

# Rearticulating Labor Rights

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*In principle, Section 7 of the National Labor Relations Act (NLRA) guarantees most private-sector employees the right to be free from employer interference when they band together in pursuit of shared interests. In practice, most workers—especially the “preorganizational” workers who have no contact with a union—cannot use their Section 7 rights because they do not know they exist. In 2011, the National Labor Relations Board (the Board), the agency which administers the NLRA, promulgated a Rule requiring employers to post notice of workers’ rights. The Rule happened to succumb to legal challenge but would, in any case, have had the substantive defects common to all isolated transmission strategies: efforts to take the current doctrine—vague, complex, and uncertain as it is—and simply relay it to unsophisticated workers.*

*Instead, this Article proposes a rearticulation strategy. It identifies three principles of designing communicable doctrine—salience, accessibility, and directiveness—and proposes that the Board apply these principles to vest preorganizational employees with two discrete rights (subject only to a handful of employer defenses that will rarely apply): (1) the right to challenge (i.e. confront managers and supervisors over terms and conditions of employment) and (2) the right to appeal (i.e. seek external support in labor disputes). The proposed rights would establish, and conveniently name, zones of near-absolute protection and permit workers to violate norms of worker deference and timidity. Because they are easy to understand, explain and vividly illustrate, knowledge of these rights would tend to propagate.*

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## INTRODUCTION

Suppose that, one sub-zero winter day in Ontario, Canada, two construction workers, having no connection with a labor union, agree jointly to walk off the job to protest the frigid working conditions. Because this action does not occur under the aegis of a union, nothing in Ontario’s labor laws will protect the workers from termination or other retaliation.<sup>1</sup> If their worksite lay just across the Niagara in Buffalo, New York, their prospects would be far brighter. There, Section 7 of the federal National Labor Relations Act (NLRA) recognizes the broad right of covered employees to engage in “concerted activities for . . . mutual aid or protection,”<sup>2</sup> (which, according to settled law, almost certainly includes the protest strike in the hypothetical)<sup>3</sup> *without regard to union affiliation*. Indeed, according to one leading Canadian labor law scholar, progressive Canada can learn greater generosity to nonunion workers from their neoliberal southern neighbors.<sup>4</sup>

The national difference is largely illusory. The nonunion workers in Buffalo are unlikely to benefit from their Section 7 rights because they will probably have no idea that they exist, or have unhelpfully vague or erroneous

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1. David Doorey, *The Ideal ‘Right to Strike’ Would Merge the Strengths of the Canadian and U.S. Labor Law Models*, ONLABOR (Oct. 26, 2022), <https://onlabor.org/the-ideal-right-to-strike-would-merge-the-strengths-of-the-canadian-and-u-s-labor-law-models> [<https://perma.cc/HAP2-3YRM>]; *see also* César Rosado Marzán, *Alt-Labour and Worker Centres*, in *THE OXFORD HANDBOOK OF THE LAW OF WORK* 481 (Guy Davidov ed., 2024) (comparing rights of nonunion workers in the United States, Canada, and Australia).

2. 29 U.S.C. § 157.

3. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14–15 (1962).

4. Doorey, *supra* note 1.

ideas about them.<sup>5</sup> This Article will explain the main reasons for this legal ignorance and propose a response: rearticulating administrative jurisprudence on Section 7 rights to promote practical awareness of Section 7 among *prepetition* workers—i.e., the subset of nonunion workers who are not represented by a union or subject to a union-election campaign.

To be sure, legal ignorance or uncertainty is not always problematic.<sup>6</sup> In this case, however, they harm important interests of nonunion workers and impede national policy in favor of unionization and collective bargaining.<sup>7</sup> Since the scarcity of unions—major disseminators of information about the NLRA—tends to increase general ignorance about Section 7, policymakers are faced with a vicious cycle.

In 2011, the National Labor Relations Board (the Board), the federal agency that administers the NLRA, officially recognized and responded to the problem. That year, the Board promulgated a Rule requiring employers to post notices at the workplace informing employees of their NLRA rights. The Board withdrew the notice-posting Rule after it was successfully challenged in two federal courts of appeal, but its shortcomings went beyond any legal vulnerabilities. Had it survived, the Rule would have been a very imperfect tool for giving nonunion workers actionable information about their rights. It required predictably resentful and uncooperative intermediaries (employers) to post a wordy and complex document that, if read at all, would give the attentive reader only the sketchiest guidance about the concrete contours of her Section 7 rights—except, perhaps, insofar as those rights relate to unions.

There were likely more effective ways of designing the Rule, but none of them could escape the basic limitations of what this Article calls “transmission” strategies for communicating Section 7 rights. A transmission strategy takes the basic “message” of Section 7 rights as expressed by the

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5. While largely anecdotal, the evidence of ignorance is abundant and compelling. Certainly, those of us who teach American labor law to highly sophisticated students can always count on the modest professorial delight of startling the room with the news that labor rights exist apart from labor unions.

6. In employment law, for instance, scholars often debate the significance of the (undisputed) fact that employees generally have no idea that they are (mostly) terminable at will. Compare, e.g., Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6 (2002), with Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment-at-Will in Light of Findings That Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307 (2002). As to law more generally, scholars have long been fascinated by the potential virtues and vices of what Meir Dan-Cohen famously called “acoustic separation”—a divergence between the “conduct rules” that guide the general public and the “decision rules” that guide those who enforce the conduct rules. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630 (1984). Adam Muchmore has argued persuasively that “pockets of uncertainty are desirable in many, and perhaps most, regulatory systems,” because uncertain rules can be more intelligible and predictable than more precise alternatives, can prevent legal gamesmanship, and can avoid creating a tangled multiplicity of “certain” rules that in the aggregate reduce the certainty of the system. Adam I. Muchmore, *Uncertainty, Complexity, and Regulatory Design*, 53 HOUS. L. REV. 1321, 1360 (2016).

7. See *infra* Part I.

statute and the Board's implementing doctrine and seeks to increase workers' exposure to that message. Even if it involves aggressive selection from and compression of the content contained in the legal sources, a transmission strategy will ultimately be defined by the effort to accurately convey whatever message is selected for transmission. But some messages are harder to select from, compress, and transmit to a given audience under given conditions than are others. Here, the existing gospel of nonunion Section 7 rights, especially as expressed in the Board's complex Section 7 doctrine, resists accurate and useful transmission to the unsophisticated, economically insecure, and rationally risk-averse prepetition workers who most need it.

The trouble is that the Board's old mental habits die hard. The ill-fated notice-mandate Rule reflected a laudable desire to move nonunion employees closer to the center of labor policy. But whenever the Board dons its quasi-legislative hat and sets about articulating Section 7 doctrine, it appears to speak to the same imagined audience as it did in the heyday of union power: sophisticated agents (mostly specialist attorneys) of unions and businesses, who are presumed to have the capacity and opportunity to translate relevant aspects of that doctrine to any less-sophisticated parties who might need to know about it. Any reader of the Board's Section 7 jurisprudence will confirm that, even when it somehow *concerns* prepetition workers, it gives no hint of being *addressed* to them. This Article is premised on the judgment that it is time to take prepetition workers seriously as an audience of Section 7. To this end, it develops a simple analytic framework to understand the task of conveying legal information to nonunion workers (or indeed, any group of unsophisticated persons) and to diagnose the shortcomings of current Section 7 doctrine. Building on this analytic framework, it develops principles for designing communicable law and proposes a sweeping doctrinal revision to implement those principles.

Any attempt to address prepetition workers effectively (that is, in a way that makes a practical difference to their behavior), faces three basic challenges. First, the content of Section 7 doctrine must come to the attention of prepetition workers—this is the challenge of reception. Next, these workers must be able to make accurate sense of the message—this is the challenge of comprehension. Finally, these workers must perceive the information they have grasped as practically useful to them, in their circumstances—this is the challenge of appreciation. The Board's current Section 7 doctrine is calculated to meet none of these challenges.

Section 7 doctrine is complex; it is characterized by vague standards and multifactor tests, and so, naturally, uncertainty about the scope of protection. And, although protection of disruptive conduct both promotes dissemination of knowledge and correlates highly with effectiveness, Section 7 doctrine gives less reliable protection to conduct the more disruptive it is. Furthermore, Section 7 doctrine must be transmitted through a social environment in which sophisticated and credible mediators are scarce. It

therefore takes rare good fortune for any particular prepetition worker to *receive* the Section 7 message at all (or in a basically accurate form), to *comprehend* it if she receives it, and if she does comprehend it, to properly *appreciate* its practical value for her. This Article argues that efforts to transmit Section 7 rights will be highly unsatisfactory unless those rights are substantively reworked to become easier to transmit, that is, unless the Section 7 message is significantly *rearticulated*. No doubt a truly adequate response would require new legislation. But, with major congressional action remaining unlikely for the foreseeable future,<sup>8</sup> the responsibility for rearticulating Section 7 falls chiefly to the Board.

This Article proposes a reformulation of the Board's Section 7 doctrine to promote actionable knowledge of Section 7 rights among the nonunion workers least likely to have it—the prepetition workers who typically lack sustained contact with unions. The proposal is based on three core design principles, each corresponding to one of the communication challenges identified above. To promote reception, there is the principle of salience: designing doctrine to attract sustained attention (and/or to facilitate mediators' efforts to attract attention). To promote comprehension, there is the principle of accessibility: designing doctrine to be confidently and accurately interpreted by persons with little background knowledge (and/or to be intelligibly summarized by mediators with little loss of relevant information). To promote appreciation, there is the principle of directiveness: designing doctrine to suggest practically valuable kinds of conduct credibly protected under that doctrine (and/or to facilitate such suggestions by mediators). Under this proposal, the Board would rearticulate the general Section 7 right of concerted activity as investing prepetition workers (and only prepetition workers) with two sub-rights: (1) the *right to challenge* (protecting the right of nonviolent confrontation with managers and supervisors over terms and conditions of employment) and (2) the *right to appeal* (protecting nonviolent attempts to get support in labor disputes from those outside the firm). Behavior within the scope of the right, no matter how offensive, unfair, or “disloyal,” would be protected from employer retaliation unless the employer could establish one of a set of enumerated defenses that will rarely apply. Knowledge of the proposed rights would tend to propagate quickly, as their crisp and suggestive names make them intriguing and easy to refer to. Simultaneously, their substance makes them easy to understand, explain, and illustrate (including in vivid and compelling ways), striking in their most obvious implications, and relevant to a large range of realistic circumstances.

The proposal would reform doctrine by selectively strengthening and codifying the Section 7 rights of prepetition workers. More specifically, it

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8. Andrew Solender, *Capitol Hill Stunner: 2023 Led to Fewest Laws in Decades*, AXIOS (Dec. 18, 2023), <https://www.axios.com/2023/12/19/118-congress-bills-least-unproductive-chart> [<https://perma.cc/V8YE-W73P>].

would change the law in two main ways. First, it would single out prepetition workers for special legal treatment. Second, as to those workers, it would displace the so-called *Atlantic Steel* test currently used to determine whether employees have forfeited Section 7 protection by misconduct in their interactions with management. It would also require the Board to double down on its traditionally narrow view of what public criticisms of employers are sufficiently “disloyal” to deprive workers of Section 7 protection. Thanks to the proposed rights, much concerted activity currently considered “misconduct” would not simply be eligible for toleration under certain conditions, but affirmatively protected. It would be protected not *despite* but partly *because* of its harshness or disruptiveness.<sup>9</sup> After all, these unpleasant qualities can make concerted activity more effective at pressuring employers to comply and spreading knowledge of the law—both perfectly legitimate objectives under the NLRA.

The proposed change would be substantial, but it (1) would violate no statutory parameters<sup>10</sup> and (2) would promote the statutory policy in favor of empowering workers in a manner suited to the present reality of union decline. Indeed, these rights could act as powerful legal *archetypes*, rules that in a manner sum up and diffuse the spirit of federal labor law, especially immanent principles that this Article calls “nondomination” and “solidarity.”<sup>11</sup>

The benefits of this proposal would not come at an excessive cost to either employers or employees. Because they relate only to communications, the proposed rights would not impair the employer’s ability to punish disobedience to work-related orders. Admittedly, the rights might have a larger impact on workplace civility and decorum, but only to the extent that those conditions depend on fear of discipline. These rights would certainly not limit recourse to non-coercive managerial methods for cultivating a respectful environment. Employers would also retain nearly complete power to protect employees against workplace discrimination, and themselves against liability.<sup>12</sup> The only significant change in the status quo is that

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9. See Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546 (2021), for an influential article embracing the virtues of disruption.

10. As the statute requires, the proposal would protect only activities reasonably categorizable as “concerted activities for . . . mutual aid and protection” and would preserve a meaningful employer right to dismiss employees for “cause.” See 29 U.S.C. §§ 157 (outlining employees’ right to engage in concerted activity), 160(c) (outlining employers’ right to terminate employees for cause).

11. See *infra* Part IV.A.2.

12. Significant scholarly literature wrestles with the possible tension between NLRA protections for free employee expression in the context of concerted activity on the one hand and antidiscrimination law and policy on the other. See, e.g., Peter E. Millspaugh, *When Self-Organization Includes Racial Harassment: Must the NLRA Yield to Title VII?*, 2 GEO. MASON U. C.R. L. J. 1 (1991); Michael Z. Green, *The Audacity of Protecting Racist Speech Under the National Labor Relations Act*, 2017 U. CHI. LEGAL F. 235 (2017); Michael H. LeRoy, *Slurred Speech: How the NLRB Tolerates Racism*, 8 COLUM. J. RACE & L. 209 (2018); Manuel Quinto-Pozos, *The Tension Between the NLRA, the EEOC, and Other Federal*

employers would have to exercise greater caution and creativity in responding to *some* discriminatory statements (those part of a challenge to some term or condition of work) by rank-and-file employees against supervisors. Far from being an unmixed evil, this kind of forced adaptation may well result in wiser management and more congenial workplaces.<sup>13</sup> Indeed, forced adaptation is a substantial secondary benefit of deliberately protecting disruptive conduct.

This Article has five parts. Part I lays out the Section 7 doctrine most relevant to prepetition workers—the Section 7 message. Part II explains why this message generally fails to get through. Part III uses the Board’s ill-fated 2011 notice-posting rule to illustrate the shortcomings of transmission strategies for improving communication of the Section 7 message. Part IV

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*and State Employment Laws: The Union Perspective*, 33 A.B.A. J. LAB. & EMP. L. 277 (2018); Marion Crain & Ken Matheny, *Sexual Harassment and Solidarity*, 87 GEO. WASH. L. REV. 56 (2019); Molly Gibbons, *License to Offend: How the NLRA Shields Perpetrators of Discrimination in the Workplace*, 95 WASH. L. REV. 1493 (2020); Christine Neylon O’Brien, *Twenty-First Century Labor Law: Striking the Right Balance Between Workplace Civility Rules That Accommodate Equal Employment Opportunity Obligations and the Loss of Protection for Concerted Activities Under the National Labor Relations Act*, 12 WM. & MARY BUS. L. REV. 167 (2020); Taylor Arluck, *How the National Labor Relations Board Is Still Failing Marginalized Employees*, 87 BROOK. L. REV. 1007, 1007 (2022). One much-examined example should suffice to illustrate the problem. In *Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d 885, 891 (8th Cir. 2017), the court upheld a Board order requiring reinstatement of Anthony Runion, terminated for speech on the picket line during an employer lockout. During the lockout, the employer hired replacement workers, including many African Americans. *Id.* at 899. After a van carrying some replacements crossed the picket line, Runion “yelled ‘Hey, did you bring enough KFC for everybody?’ and ‘Hey, anybody smell that? I smell fried chicken and watermelon.’” *Id.* The court concluded that these (obviously racist) comments did not cause Runion to lose the protection of the NLRA. *Id.* at 891. Writing in dissent, Judge Beam protested both the result and the general tendency of Board jurisprudence in connection with discriminatory expression: “Discriminatory and degrading stereotypes are not legitimate weapons in economic disputes carried out on the picket line. It is both ‘preposterous’ and insulting to ensconce into labor law the assumption that ‘employees are incapable of organizing a union or exercising their other statutory rights under the National Labor Relations Act without resort to abusive or threatening language’ targeted at a person’s gender or race. . . . Yet, the Board repeatedly broadens the protections for such repulsive, volatile, incendiary, and heinous activity time and again in cases such as these.” *Id.* at 898 (internal quotations and citations omitted).

13. See Bradley A. Areheart, *Organizational Justice and Antidiscrimination*, 104 MINN. L. REV. 1921, 1924 (2020). Areheart persuasively explains that reactionary antidiscrimination laws have failed to prevent racial disparities in the workplace, and preventative employment policies such as antibias training are “failing, and in some cases, actually *worsening* bias.” *Id.* at 1922–24. Areheart’s proposed solution to the shortcomings identified by current practices is grounded in the principles of Organizational Justice. *Id.* at 1925. He explains that the workplace “naturally foments feelings of injustice,” but these feelings can be overcome when the workplace adopts an Organizational Justice approach, which provides workers with a belief that the workplace is principally fair. *Id.* at 1953–54. Organizational Justice is achieved through three “work-related concerns: (1) what people receive (distributive justice); (2) the standards, rules, and processes under which people receive (procedural justice); and (3) how people are treated along the way (interactional justice).” *Id.* at 1953. For the third principle of interactional justice, Areheart maintains that “when employees are given a chance for their voices to be heard regarding workplace policies, they are less likely to view the employer’s systems as opaque and more likely to see them as fair.” *Id.* at 1967. An employer can facilitate this voice by adopting a “simple and costless” complaint or suggestion process. *Id.* Consistent with this understanding, this Article’s goal of promoting the right to challenge and right to appeal would further promote interactional justice in the workplace by allowing workers to freely recognize and raise their Section 7 rights.

describes and applies the principles of a rearticulation strategy. It defines the *right to appeal* and the *right to challenge* and explains how they would make Section 7 more communicable to prepetition workers. Finally, Part V considers some objections to the proposal before moving to a brief conclusion.

## I. THE SECTION 7 MESSAGE

### A. *Why Section 7 Matters*

Over the past several years, unions have made headlines for ambitious organizing efforts and muscular bargaining methods, culminating in 2023's "summer of strikes"—a spate of labor actions across a range of industries.<sup>14</sup> Nonetheless, private-sector unions remain a minor, and dwindling, economic and cultural force in the United States, as they have been for over forty years.<sup>15</sup> Since union decline frustrates the explicit statutory preferences of the United States<sup>16</sup> it is appropriate to make efforts to reverse the decline, or at least to compensate for it.

Critical to any such effort is the protection of nonunion employees' efforts to band together in pursuit of shared interests. A petition for a union election is often the culmination of a series of concerted activities that nurture both a sense of collective interests and awareness of substantial collective power. The solidarity is hard to generate, and the power is hard to demonstrate, without behavior workers are unlikely to engage in absent legal protection. Even when it does not lead to collective representation and bargaining, concerted activity by nonunion employees can be a means of securing benefits or solving or preventing problems at work. Moreover, to the extent concerted activity involves the exchange of employment-related information and ideas, it can enhance purely individual decision making.<sup>17</sup>

At first blush, Section 7 of the NLRA is more than adequate to the task of protecting nonunion workers' freedom to band together. Section 7 guarantees covered workers (i.e. most workers in the private sector) "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other*

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14. Cecelia Smith-Schoenwalder, *Why Were There So Many Strikes in 2023?*, U.S. NEWS & WORLD REPORT (Dec. 28, 2023, 1:33 PM), <https://www.usnews.com/news/national-news/articles/2023-12-28/why-were-there-so-many-strikes-in-2023-and-what-does-it-mean-for-2024> [<https://perma.cc/LY5A-LWKZ>].

15. See Andrias & Sachs, *supra* note 9, at 568–69.

16. See *id.* at 576; *supra* notes 11–12 and accompanying text.

17. Perhaps the most obvious example: during a conversation about persuading workers to request raises, a worker may learn that she is paid less than an equally qualified peer. She may use this information in her individual negotiations with management, or even in an equal pay lawsuit.

*mutual aid or protection.*”<sup>18</sup> Notably, workers enjoy the general, residual right to engage in concerted activities “for mutual aid and protection” completely without regard to union affiliation.

Unsurprisingly, scholars and commentators have long called for more aggressive use of Section 7 in the nonunion workplace. When, in 2002, William Corbett advocated “a broad interpretation and application of Section 7 in the nonunion workplace” he expressed an idea that was already familiar, indeed, commonsensical.<sup>19</sup> But Corbett also flagged a stubborn obstacle to this strategy that has become equally, maddeningly, familiar: “The scope of coverage of Section 7 and its application to nonunion employees may have been one of the best-kept secrets of labor law.”<sup>20</sup> This problem, of communicating Section 7 rights to its intended beneficiaries, persists. Thanks to continued union decline, it may well have worsened over the past two decades.

To understand the problem, and so take the first step towards ameliorating it, let us consider the basic stages of communication according to classic communication theory.<sup>21</sup> First, a sender develops and encodes a particular message.<sup>22</sup> This message is then transmitted through a channel subject to noise (factors that obstruct or corrupt the message encoded).<sup>23</sup> The message is then decoded by the receiver, which interprets it.<sup>24</sup> After sending the message, the sender receives feedback, i.e. some sort of information as to whether the message has been received and how it has been interpreted.<sup>25</sup> This Part will consider the basic content and form of the Section 7 message. Part II will explain how transmission of the message is impeded by qualities of the message itself, of the *channel* through which it is transmitted, and of the subset of *receivers* of chief interest—prepetition workers.

### B. The Section 7 Message: Content

Where do we look to determine the content of the Section 7 message, specifically the aspect relevant to prepetition workers? Obviously, the text of the NLRA is fundamental. But that text simply sets the outer limits of a

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18. 29 U.S.C. § 157 (emphasis added).

19. See William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 267 (2002).

20. *Id.*

21. See generally CLAUDE E. SHANNON & WARREN WEAVER, *THE MATHEMATICAL THEORY OF COMMUNICATION* (1949). This Article makes no use of the technical-mathematical apparatus needed to fix or optimize systems of communication. But a basic theoretical model can help describe the general structure of a complex process.

22. See *id.* at 7.

23. See *id.* at 7–8.

24. See *id.* at 7.

25. See *id.* at 68. Highly informative feedback need not involve any return communication. For example, a sudden skyward tilt of the head is perfectly informative feedback to a shouted “heads up!” at a baseball game.

doctrine that is decisively elaborated by the Board, subject to judicial oversight.

### *1. Statutory Boundaries*

The NLRA generally establishes which workers are eligible for protection (coverage), what activities are protected against which employer actions (scope and force), how employees can seek redress for violations of their rights (process), and what kind of relief they can get (remedies).

#### *a. Coverage*

The subjects of Section 7 rights are “employees,” which the NLRA identifies as “any employee” not specifically excluded. Among the excluded categories are independent contractors, agricultural laborers, domestic servants, and supervisors.<sup>26</sup>

#### *b. Scope and Force*

As noted above, Section 7 guarantees covered workers “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .”

Section 8(a)(1) provides that it is an “unfair labor practice” for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].” Although subsections 8(a)(2)–(5) proscribe specific forms of employer interference, restraint and coercion, they all fall within the scope of the general prohibition of 8(a)(1). Unions, too, can commit unfair labor practices against employees, but that is not relevant to the focus of this Article on prepetition employees.

Section 10(c) of the Act appears to give employers a *de facto* right, notwithstanding Sections 7 and 8, to suspend or discharge workers “for cause.”<sup>27</sup> Section 8 itself specifically protects employers’ rights, notwithstanding any other provisions, to engage in any speech not constituting a “threat of reprisal or force or promise of benefit.”<sup>28</sup>

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26. See 29 U.S.C. § 152(3). Also excluded are employees of certain employers—most notably government employers and employers subject to the Railway Labor Act. *Id.* §§ (2)(3). The Supreme Court has interpreted the NLRA to exclude “managerial” workers from protection. *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 275 (1974). On the other hand, the Court has held that the NLRA protects *applicants* for employment from discrimination based on union status. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185, 188 (1941).

27. See 29 U.S.C. § 160(c) (specifying that the NLRA provides that the NLRB cannot order reinstatement or back pay when employees have been terminated for cause).

28. See 29 U.S.C. § 158(c).

*c. Process*

Critically, covered employees cannot enforce their rights without the involvement, indeed, the active leadership of the Board. To vindicate their rights, an aggrieved worker must file an unfair labor practice charge with the appropriate regional office of the Board.<sup>29</sup> If the Regional Director concludes that the charge lacks merit, the worker can appeal to the General Counsel (GC), whose determination is effectively final—the worker has no alternative forum.<sup>30</sup> If the GC deems the charge meritorious, a regional office attorney will litigate on the worker’s behalf before a Board administrative law judge.<sup>31</sup> Either party may appeal any part of the judge’s decision, first to the Board proper—a five-member body of commissioners—and then to a United States Court of Appeals and then finally to the Supreme Court (which has complete discretion as to whether to take the case).<sup>32</sup>

*d. Remedies*

The Act empowers the Board, subject to judicial review by an appropriate federal court of appeals, to remedy unfair labor practices by issuing orders for injunctive relief, including reinstatement, and via back pay.

*2. The Board’s Section 7 Doctrine*

Within the statutory limits just described, the Board adjudicates unfair labor practices. The statutory limits are not trivial and are meaningfully (sometimes aggressively) policed by reviewing courts. Nonetheless, it is well settled that the NLRA assigns the Board the quasi-legislative function of “develop[ing] and apply[ing] fundamental national labor policy,”<sup>33</sup> a function that implies “authority to formulate rules to fill the interstices of the broad statutory provisions.”<sup>34</sup> Notably, this authority includes the power—often exercised—to change statutory interpretations to respond to economic

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29. 29 C.F.R. § 101.2.

30. See 29 C.F.R. §§ 101.6, 101.14. Contrast this with the role of the Equal Employment Opportunity Commission (“EEOC”) in administering federal employment discrimination laws. See EQUAL EMP. OPPORTUNITY COMM’N, *Filing a Lawsuit*, <https://www.eeoc.gov/filing-lawsuit> [https://perma.cc/VM9B-5M7C] (last visited Feb. 11, 2025). Would-be plaintiffs must, in most cases, file a discrimination charge with the EEOC and give the agency an opportunity to investigate. See *id.* Failing a satisfactory resolution, however, the plaintiff can secure a Notice of Right to Sue and proceed on her claim in federal court. See *id.* By contrast, following NLRB proceedings, the worker cannot bring her claim in federal district court, but can only seek review of the NLRB’s decision by a federal court of appeals. See 29 C.F.R. § 101.14.

31. 29 C.F.R. §§ 101.8, 101.10(a).

32. 29 C.F.R. §§ 101.11(b), 101.12(a), 101.14.

33. See *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500 (1978).

34. *Id.* at 501.

developments<sup>35</sup> or to reflect changed policy preferences.<sup>36</sup> Furthermore, when one court of appeals rejects a Board interpretation, it is the Board's traditional practice—the so-called policy of (inter-circuit) non-acquiescence<sup>37</sup>—to continue enforcing its preferred interpretation in cases outside that court's jurisdiction. Therefore, barring appellate-court unanimity or a decision of the Supreme Court, the Board will, in practice, decide what the NLRA means for at least some litigants.

The NLRA gives the Board few interstices to fill or ambiguities to resolve as to the process of litigation or the menu of remedies available. The Board's role in defining coverage is more consequential, with the Supreme Court (at least so far) allowing the Board freedom to rule whole categories of workers—for example, graduate students<sup>38</sup>—in or out of the Act. Undoubtedly, however, the Board's most important contribution to the NLRA's message to nonunion workers is its specification of the scope and force of Section 7 rights.

Because the Board's Section 7 doctrine is complex, highly context-dependent, and some aspects of it are subject to frequent change (as the Board shifts back and forth between Democratic and Republican majorities), this Article can only provide a synthetic simplification that attempts to identify the most important principles and rules at the time of its writing. It will consider what, generally, the current Board considers protected concerted activity and what employer actions unlawfully interfere with it.

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35. In *Browning-Ferris Indus. of California, Inc.*, 362 N.L.R.B. 1599, 1599 (2015), for example, the Obama Board changed the test for joint-employer status in large part on the grounds that the test then in effect “[left] the Board’s joint employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships.” See also *Am. Trucking Ass’ns v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967) (“agencies . . . are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation’s needs in a volatile, changing economy.”).

36. That is to say, changed interpretations of statutory purposes and/or the best means of achieving them. See, e.g., *Wendt Corp.*, 372 N.L.R.B. No. 135 (Aug. 26, 2023). In *Wendt*, the Biden Board overruled the Trump Board’s holding in *Raytheon Network Centric Systems*, 365 N.L.R.B. 1772 (2017), permitting employers to unilaterally change terms and conditions of employment for a unionized workforce when such changes were similar in kind and degree to prior unilateral changes made by the employer. See *Wendt Corp.*, 372 NLRB No. 135, at \*1. The *Wendt* Board argued that its decision better comported with Supreme Court precedent but also judged that “the policy we announce today better sustains the collective-bargaining process that lies at the core of the NLRA.” *Id.* at \*17.

37. See BENJAMIN M. BARCZEWSKI, CONG. RSCH. SERV., R47882, AGENCY NONACQUIESCENCE: AN OVERVIEW OF CONSTITUTIONAL AND PRACTICAL CONSIDERATIONS 17–19 (Dec. 26, 2023), <https://crsreports.congress.gov/product/pdf/R/R47882> [<https://perma.cc/73K4-QXCA>].

38. Compare *Brown Univ.*, 342 N.L.R.B. 483, 500 (2004) (holding that graduate student teaching assistants, research assistants, and proctors in the petitioned-for bargaining unit are not statutory employees), with *Trs. of Columbia Univ. in the City of N.Y.*, 364 N.L.R.B. 1080, 1080 (2016) (overruling *Brown Univ.* and extending Section 2(3) of the Act to cover both externally-funded graduate research assistants and undergraduate student assistants).

*a. Protected Activity*

To be protected, or rather protectable, under Section 7, employee activity must (1) be “concerted” and (2) aim at protected ends by (3) protected means.

*i. Concertedness*

Concerted activity is that which is undertaken in cooperation with or on the authority of at least one other employee, or that grows out of, extends, prepares for, or intends to induce such action.<sup>39</sup> Classic examples include multiple workers jointly protesting work conditions by word or deed; single workers airing grievances as a representative of a group; single workers objecting to management policies in the presence of other workers at employee-management meetings; and single workers attempting to persuade fellow employees to take some concerted actions. Concertedness is determined based on all the circumstances, but the Board has long held that communications among coworkers about wages, hours, and job security are “inherently concerted” and so eligible for protection without any showing that the worker(s) contemplated group activity.<sup>40</sup> Moreover, according to the so-called *Interboro* doctrine, individual efforts to enforce the provisions of an existing collective bargaining agreement count as concerted activity.<sup>41</sup>

*ii. Protected Ends*

As the text of the NLRA makes clear, conduct is protectable only if it is for mutual aid and protection.<sup>42</sup> This has been interpreted to mean that the conduct must seek to promote or protect employees’ interests *as* employees.<sup>43</sup> Therefore, even clearly concerted worker activity intended to protect the American consumer, national security, or public morals is outside the

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39. *Meyers Indus., Inc.*, 281 N.L.R.B. 882, 887 (1986) (“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.”); *Salisbury Hotel, Inc.*, 283 N.L.R.B. 685, 687 (1987) (stating individual action is concerted when a “continuation” of concerted activity).

40. *See Trayco of S.C., Inc.* 297 N.L.R.B. 630, 634 (1990) (wages); *Aroostook Cnty. Reg’l Ophthalmology Ctr.*, 317 N.L.R.B. 218, 220 (1995) (work schedule); *SABO, Inc.*, 362 N.L.R.B. 690, 690 n.1 (2015) (job security). Under the Biden Administration, the General Counsel sought to expand the category of inherently concerted conversations to include discussions of racism. *Kaiser Permanente Bernard J. Tyson Sch. of Med.*, No. 21-CA-273372, NLRB Advice Memorandum, at 6 (Oct. 19, 2021). At least one previous advice memorandum has argued that discussions of workplace safety are inherently concerted. *N. W. Rural Elec. Coop.*, No. 18-CA-150605, NLRB Advice Memorandum, at 9–12 (Sept. 21, 2015).

41. *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 1298 (1966); *see also NLRB v. City Disposal Sys., Inc.* 465 U.S. 822, 830 (1984).

42. *See* 29 U.S.C. § 157 (referring to protection for actions taken “for the purpose of collective bargaining or other mutual aid or protection.”).

43. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 566–67 (1978) (discussing how the protectability of concerted employee activity depends in part on its tendency to “improve their lot as employees” or on the degree of the activity’s “relationship to employees’ interests as employees”).

protection of Section 7 unless it also advances the workers' interests as employees. Almost always, conduct recognized as protected will aim at influencing terms or conditions of employment at a particular firm (typically compensation, hours, or physical conditions of work). Those terms and conditions directly impact the employee asserting protection and therefore will be subject to the control of that employee's own employer. It is well settled, however, that covered employees may be protected when they simply pursue the interests of employees *as a class*, without any immediate relation to their own terms and conditions of employment. In *Eastex Inc. v. NLRB*, for instance, the Supreme Court approved the Board's protection of interests "through channels outside the immediate employee-employer relationship," there through employees opposing "right-to-work" legislation, criticizing President Nixon's veto of a bill to raise the minimum wage, and calling on workers, as voters, to "defeat our enemies and elect our friends."<sup>44</sup>

### *iii. Protected Means*

Board jurisprudence treats some kinds of conduct as so harmful or inappropriate that they always justify adverse employer action, without any context-specific inquiry. It goes without saying that there is no protection for violence against persons or property (perhaps subject to a *de minimis* threshold). Slowdowns, sit-down strikes (stopping work and refusing to leave the plant), and intermittent strikes (deliberate schemes to strike, return to work, and strike again) are unprotected.<sup>45</sup> And, as the Supreme Court has recently emphasized, workers are unprotected when they fail to take "reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent danger due to sudden cessation of work."<sup>46</sup> Yet illegality or tortiousness under state law is not necessarily dispositive. For example, although it has been settled from the infancy of the Act that illegal occupation of employer property will in no case be protected,<sup>47</sup> it is equally clear that the state law of trespass cannot proscribe protected activity. For example, if employer rules forbade union-organizing activity on their premises, workers who broke those rules would be considered to have violated the license by which they occupy employer property and may therefore have trespassed. But federal protection trumps state proscription. So, too, defamation is not necessarily unprotected. On the

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44. *Id.* at 565, 569.

45. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 252 (1939) (sit-down strikes); *Elk Lumber Co.*, 91 N.L.R.B. 333 (1950) (slowdowns); *Pac. Tel. & Tel. Co.*, 107 N.L.R.B. 1547 (1954) (intermittent strikes).

46. *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174*, 598 U.S. 771, 781 (2023) (citing *Bethany Med. Ctr.*, 328 N.L.R.B. 1094 (1999)). In *Glacier Northwest*, the workers allegedly abandoned trucks full of wet concrete without informing their employer or otherwise taking care to avoid the risk that the concrete would harden and destroy the trucks. *Id.*

47. *Fansteel Metallurgical Corp.*, 306 U.S. at 252.

contrary, the Act preempts state law (and so precludes a defamation claim) unless the defamation is “deliberately or maliciously false.”<sup>48</sup>

Since illegality does not automatically render concerted action unprotected, still less does violation of employer rules—which raises the thorny question of discipline for “cause.” Supreme Court precedent constrains the Board to recognize that the NLRA does not protect concerted activity constituting “cause,” which includes (without limitation) “insubordination, disobedience or disloyalty.”<sup>49</sup> And yet, for the right to strike to be meaningful, clearly the NLRA must protect at least some “insubordinate” or “disobedient” work stoppages, and it is not clear where this logic should stop. Any appropriate notion of “disloyalty” must accommodate the fundamental fact that it is the policy of the NLRA to protect employees’ pursuits of interests adverse, and even deliberately harmful, to their employers’ economic interests to extract concessions in negotiations. As to “disloyal” public criticisms of the employer, it has for several decades been the Board’s position that protection cannot be lost unless (1) the employee(s) fail to disclose the connection with an existing labor dispute, or (2) the criticisms are excessively “disloyal, reckless or maliciously untrue.”<sup>50</sup> The Board has stated that public disparagement becomes excessively disloyal when it is “flagrantly disloyal, wholly incommensurate with any grievances,” but with the apparent limitation that it cannot lose protection unless it “evidence[s] a malicious motive.”<sup>51</sup> The malicious motive requirement is vague, but seems to mean that the employee intends, with some specificity, harm to the employer that is inappropriate in kind or degree.<sup>52</sup> The Eighth Circuit rejected a malice requirement for this kind of harm in 2017,<sup>53</sup> holding instead that the disloyalty inquiry should focus on the objectively likely magnitude and duration of the harm caused to the relationship.<sup>54</sup>

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48. *Walls Mfg. Co.*, 137 N.L.R.B. 1317, 1319 (1962); *see also* *Linn v. United Plant Guard Workers of Am.*, *Loc. 114*, 383 U.S. 53, 63–64 (1966).

49. *NLRB v. Loc. Union No. 1229, Int’l Bhd. of Elec. Workers*, 346 U.S. 464, 475 (1953).

50. *American Golf Corp.*, 330 N.L.R.B. 1238, 1240 (2000).

51. *MikLin Enters., Inc.*, 361 N.L.R.B. 283, 286, 293 (2014).

52. Perhaps the intended harm is so disproportionate to the workers’ demands as to suggest an element of gratuitousness. Perhaps any intent to reduce patronage or harm the employer’s reputation is illegitimate to the extent that it is separate from an intent to gain third-party support. Or perhaps, in addition to the harm intended, “malice” is meant to capture the unfairness of the means—for example, abuse of a position of particular knowledge or trust or exploitation of a moment of particular vulnerability. One can find support for all these notions and more in the Board’s jurisprudence. *See generally* discussion of disloyalty in *DirecTV, Inc. v. NLRB*, 837 F.3d 25 (D.C. Cir. 2016).

53. *See MikLin Enters., Inc. v. NLRB*, 861 F.3d 812, 825 (8th Cir. 2017).

54. *Id.* at 822 (considering the extent to which disparagement is likely to cause “harm that outlasts the labor dispute”).

*b. Employer Violations*

There may be an unfair labor practice whenever an employer somehow interferes with employees' Section 7 rights.<sup>55</sup> There is more than one legitimate way of analyzing such interference, but if we adopt the perspective of a nonunion worker, it is natural and convenient to divide modes of interference into *inhibition* and *retaliation*. Inhibition is any kind of employer conduct that tends to discourage or obstruct protected activity *ex ante*. Retaliation is any employer conduct that imposes some materially adverse consequence in response to protected activity. For nonunion workers, this adverse consequence will almost always be discharge or some obviously material discipline (suspension, reduction in pay, assignment to unfavorable duties, etc.).<sup>56</sup>

*i. Inhibition*

The most frequently discussed and litigated kind of inhibition is the maintenance of work rules that tend to chill Section 7 activity. The tendency of a rule is judged from the perspective of a reasonable but legally unsophisticated and economically dependent employee who is contemplating some course of protected conduct. If such an employee could reasonably interpret a rule to prohibit protected activity, that rule is presumptively unlawful. The rule can stand only if the employer shows that it advances a legitimate and substantial business interest that cannot be advanced with a more narrowly tailored rule.<sup>57</sup>

The Board recently overturned decades of precedent by holding that employers unlawfully interfere with Section 7 rights when they hold so-called "captive audience" meetings—i.e. mandatory meetings in which employers communicate their (usually unfavorable) views on unionization.<sup>58</sup>

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55. The word "interfere" seems to reasonably encompass all the verbs in the statutory phrase "interfere with, restrain, or coerce."

56. To be clear, the NLRA does clearly contemplate "positive" interference in the form of a promise of benefit. 29 U.S.C. § 158(c). It also prohibits "contribut[ing] financial or other support to a labor organization." *Id.* § 158(a)(2). The latter is the so-called "company union ban."

57. Stericycle, Inc., 372 N.L.R.B. No. 113, at \*8 (Aug. 2, 2023).

58. Amazon.com Servs. LLC, 373 N.L.R.B. No. 136, at \*8 (Nov. 13, 2024) (*overruling* Babcock & Wilcox Co., 77 N.L.R.B. 577 (1948)). This decision came less than a week after the Board, overturning longstanding precedent, severely curtailed employers' freedom to make statements to workers predicting that unionization would impair the relationship between individual employees and management. Siren Retail Corp., 373 N.L.R.B. No. 135, at \*2 (Nov. 8, 2024) ("[T]o be deemed lawful, employer predictions about the negative impacts of unionization on employees' ability to address issues individually with their employer 'must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.'" (*overruling* Tri-Cast, Inc., 274 N.L.R.B. 377 (1985))).

*ii. Retaliation*

Since workers' incentives are determined more by what they believe employers can do with impunity than by what they can threaten with impunity, closer attention is due to Board doctrine touching on retaliation.<sup>59</sup>

An employer is presumptively liable for an unfair labor practice if it takes materially adverse action against a covered employee because of protected activity (whether or not pursuant to a disciplinary rule), provided that, at the time it retaliates, the employer knows of the concerted nature of the activity.<sup>60</sup>

The employer who retaliates against protected activity known to be concerted commits an unfair labor practice unless its action was motivated by a legitimate and adequate business interest.<sup>61</sup> Such interests can include production, discipline, and customer or client wellbeing.<sup>62</sup> The application of these principles is highly fact-dependent, with relative certainty limited to a few factual scenarios. For example, employers generally cannot punish protected communications among workers, even on work time, absent special circumstances. They can, however, generally maintain, and therefore presumably enforce, rules against non-work use of employer materials and equipment, including communications systems.<sup>63</sup>

One important cluster of cases relates to employee "misconduct" during otherwise protected activity.<sup>64</sup> Neither the Board nor any court has defined

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59. This is of course not to deny that the power to challenge inhibitory policies and actions is useful to workers in general and prepetition workers in particular.

60. *Meyers Indus., Inc.* 268 N.L.R.B. 493, 497 (1984).

61. *See, e.g., Republic Aviation v. NLRB*, 324 U.S. 793 (1945). Language in some opinions (especially judicial opinions) enthusiastically reaffirms the default norm of employer sovereignty and so creates the impression that any interest is adequate as long as it is legitimate and sincere—in other words, that the employer has the duty not to accommodate protected activity but only to refrain from targeting it. Such a conclusion is inconsistent with both a natural reading of Section 7 and, as illustrated by *Republic Aviation*, the actual disposition of the cases.

62. *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773 (1979) (patient care); *MBI Acquisition Corp.*, 324 N.L.R.B. 1246, 1250 (1997) (production and discipline).

63. *See, e.g., Caesars Ent.*, 368 N.L.R.B. No. 143, at \*13 (Dec. 16, 2019).

64. *See generally* *Lion Elastomers LLC*, 372 N.L.R.B. No. 83 (May 1, 2023). The Fifth Circuit recently vacated and remanded the *Lion Elastomers* case on due-process grounds having no relation to the statutory permissibility of the Board's doctrinal framework. *Lion Elastomers, L.L.C. v. NLRB*, 108 F.4th 252 (5th Cir. 2024). The Board's *Lion Elastomers* decision nonetheless represents the best evidence of the framework that it is likely to apply in misconduct cases for the foreseeable future. *Lion Elastomers* restored the approach rejected by the Trump Board in *General Motors LLC*, 369 N.L.R.B. No. 127 (July 21, 2020). *See* *Lion Elastomers*, 108 F.4th at 257. Under the *General Motors* analysis, misconduct cases would be governed by the so-called *Wright Line* burden-shifting approach. *See id.* at 256. Under *Wright Line*, if the General Counsel shows that Section 7 activity (as distinct from misconduct) was a motivating factor in an adverse action, the burden shifts to the employer to show that it would have taken the same action in the absence of the protected activity. *See id.* A Board with a Republican majority is likely to return to *General Motors* or a similar approach.

In January 2025 President Trump fired Board Member Gwynne Wilcox, causing the Board to lose its quorum of three. At the time of this writing (June 2025), the President has not indicated an intention to nominate a new Member. Meanwhile, Wilcox has sought reinstatement in a pending lawsuit against President Trump. *Trump v. Wilcox*, 145 S. Ct. 1415 (2025) (per curiam order granting stay of district

misconduct, but the paradigm cases involve insulting, vulgar, or otherwise offensive or inflammatory language.<sup>65</sup> Here the Board applies one of three standards depending on the factual setting.

When misconduct occurs during workplace interactions with management, the Board applies the *Atlantic Steel* multi-factor test, which requires considering (1) the place of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee’s outburst, and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.<sup>66</sup> When misconduct occurs during interactions among employees in the workplace and on social media, the Board simply considers its severity under the “totality of the circumstances.”<sup>67</sup> Finally, when misconduct occurs during picket line activity,<sup>68</sup> the Board applies the *Clear Pine Mouldings* test, which considers whether, under all the circumstances, non-strikers would have been coerced or intimidated by the misconduct.<sup>69</sup>

There is a lack of clarity about *why* misconduct is eligible for protection. On one view (call it the “prophylactic” one) the misconduct is, properly speaking, extrinsic to any protected activity, but must sometimes be tolerated because it tends so naturally to coincide with protected activity.<sup>70</sup> On the other view (call it the “proportionalist” one) the misconduct is a mode or means of protected activity, perhaps with distinctive advantages, that may be deliberately preferred to other modes or means.<sup>71</sup> The only question is whether this particular mode of protected activity imposes unreasonable costs on the employer or third parties. These two rationales are consistent with each other in the sense that each can apply to some misconduct.<sup>72</sup> It is hard to see,

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court orders). It remains to be seen whether the jurisprudence of the second Trump Board reflects the vaguely pro-labor inclinations expressed by Trump and (even more) Vice President Vance during the 2024 presidential campaign.

65. It is apparently neither a necessary nor sufficient condition for the existence of misconduct that behavior violate an employer rule or policy.

66. *Lion Elastomers*, 372 N.L.R.B. No. 83, at \*1 (citing *Atl. Steel Co.*, 245 N.L.R.B. 814, 816 (1979)).

67. *Id.*

68. An unlikely but not impossible circumstance for prepetition workers to find themselves in.

69. *Lion Elastomers*, 372 N.L.R.B. No. 83, at \*22 (citing *Clear Pine Mouldings*, 268 N.L.R.B. 1044, 1046 (1984)).

70. *Id.* at \*4 (“[D]isputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses. . . . That is why misconduct in the course of Section 7 activity is treated differently than misconduct in the ordinary workplace setting that is unrelated to Section 7 activity.”) (quoting *Consumer Power Co.*, 282 N.L.R.B. 130, 132 (1986)).

71. *Id.* at \*5 n.21 (“Federal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point.”) (quoting *Old Dominion Branch No. 496, Nat. Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974)).

72. E.g. if an employee, in a tirade airing worker grievances about supervisory practices, calls his supervisor both a “Nazi slavedriver” and an “ugly bastard,” then, at least *prima facie*, the first epithet invites a proportionalist evaluation while the second invites a prophylactic one.

however, how they can both apply to any given instance or aspect of misconduct.

Whatever the nature of the misconduct, employers cannot use it as a pretext. For example, if they generally tolerate profanity in customer service areas but punish it when it is part of concerted activity for mutual aid and protection, or when it is engaged in by concerted action “troublemakers,” they commit an unfair labor practice.<sup>73</sup>

Finally, there are the “dual motive” cases in which an adverse employment action is motivated by both protected and unprotected conduct. These cases are generally covered by the *Wright Line* analysis,<sup>74</sup> under which an employer commits an unfair labor practice unless it can show that it would have taken the same action in the absence of the protected conduct.

### C. The Section 7 Message: Form

In addition to the content of the NLRA’s message for nonunion workers, let us note some aspects of its form, i.e., the manner and context in which this content is initially encoded prior to the variety of transformations that may occur as it is transmitted through the channel. As should be clear from the foregoing discussion, the Section 7 message is principally encoded in written judicial or quasi-judicial opinions explaining the determination of particular controversies. These opinions make ample use of specialized legal vocabulary. In keeping with the norms of the genre, the message proper (i.e., the statement of authoritative rules relevant to prepetition workers) is typically embedded in wide-ranging discussions—touching on policy, precedent, the particular facts, the merits of alternative or contrary legal arguments or characterizations of the facts, reflections on hypothetical controversies, *inter alia*. Even for sophisticated readers, getting to the “bottom line” may require substantial effort and still leave significant residual uncertainty regarding the precise meaning of the rules articulated and the range of factual scenarios to which they apply.<sup>75</sup>

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73. A legendary example is the case of Walter Weigand, described in *Edward G. Budd Mfg. Co. v. NLRB.*, 138 F.2d 86, 90 (3d Cir. 1943). Weigand was a chronic absentee, drank on the job, and—so the court demurely hints—procured a prostitute called the “Duchess” for the entertainment of his coworkers. *Id.* This amazing record (which had not prevented Weigand from receiving a series of raises) was improbably cited as the reason for Weigand’s abrupt discharge two days after he was seen speaking with a union organizer. *Id.*

74. *Wright Line*, 251 N.L.R.B. 1083, 1089 (1980).

75. *See, e.g.* Com. Solar Arizona, LLC & Jared Shortal, 373 N.L.R.B. No. 69 (June 14, 2024) (demonstrating, in a routine decision applying *Wright Line*, how wordy and fact-intensive Board opinions typically are: “[a]lthough we affirm the judge’s dismissal of this complaint allegation, we do so on a different basis. Specifically, we find that the credited evidence does not establish that Shortal was discharged. Indeed, the credited testimony does not mention any reference to a discharge during the October 18 conversation. Additionally, Ellerbe’s email to Shortal did not mention a discharge. Instead, it referenced a resignation, and Shortal neither responded to the email nor returned to work to demonstrate that he had not resigned. Further, after his application for unemployment insurance was denied, based on the Respondent’s assertion that Shortal had quit his employment, Shortal did not appeal that

In sum, Section 7, as elaborated by the Board in quasi-judicial opinions resolving particular disputes, conditionally protects workers' concerted efforts to promote their interests from employer inhibition or interference. There are important, recurrent circumstances governed by straightforward rules that determine, more or less mechanically, whether protection exists. But there is also a large twilight zone of concerted activity governed by flexible, fact-dependent standards.

## II. THE COMMUNICATION CHALLENGE

Part I summarized the “message” that Section 7 holds for nonunion workers. This Part first describes the complex of mediators (the “channel”) through which the message must pass for any part of it to reach more than a fraction of nonunion workers and sketches the epistemic circumstances and motivational profile that mark many such workers. It next shows how characteristics of the message, the channel, and the receivers combine to guarantee massive communication failure. Briefly put, Section 7 carries a voluminous and nuanced message to receivers with limited relevant processing capacity and a high relevance threshold through a low-conductive channel full of noise, obstructions, and contrary signals.

### *A. The Channel and the Receivers*

#### *1. The Channel*

If the channel of the Section 7 message is understood in a narrow, technical sense, as the physical media by which the message is officially propagated, there is little to say about it. The opinions containing the message are reproduced online and in print with virtually perfect fidelity. But if nonunion workers encounter the Section 7 message at all, they will likely not encounter it “raw” in the form of some Board adjudication, court opinion, or statutory text. Rather, they will encounter it as it has been interpreted and re-encoded by intermediaries, or indeed a series of intermediaries, any of which may substantially transform the message through selection, emphasis, (perhaps unintentional) distortion, and transposition into new physical media. Moreover, the message may be mediated by signs that are not signals (or at any rate, not signals that refer to any part of the message)—behaviors or occurrences from which nonunion workers may draw inferences about their (lack of) rights. In this context, then, the “channel” refers to the complex, heterogeneous social and institutional environment through which the

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determination. Plainly, these facts do not establish that the Respondent discharged Shortal. In the absence of evidence establishing that a discharge occurred, the General Counsel's initial burden under *Wright Line* is not sustained. For this reason, we affirm the judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(1) by discharging Shortal for his protected activity.”)

message may pass and be, in various ways, modified before a nonunion worker receives it.

Of the many potential mediators in the channel, four broad categories stand out.

First there is the Board itself. Through a variety of official messaging (principally on its website), the Board may summarize or comment on its own doctrines. Nonunion workers may encounter the message in this form, but more consequentially, Board messaging conditions the way subsequent mediators propagate the Section 7 message.<sup>76</sup>

Labor unions and other worker advocacy groups<sup>77</sup> are the actors most likely to attempt direct (though probably partial) communication of the Section 7 message to nonunion workers. In any event, whether or not directly communicated to these workers, labor organizations originate many communications ultimately directed at them.

Journalists and other public commentators are of course of critical importance in disseminating aspects of the Section 7 message. For example, news or opinion journalists, or simply influential figures on social media, may directly convey information about the law by reporting or commenting on labor disputes, litigation, legislative proposals, or other related matters. The most careful and pointed discussions tend to be provided by those engaged in commentary on policy or compliance, such as think tanks, attorneys, and human resources organizations.

Most nonunion workers are not likely to get any direct information about the NLRA, except through interaction with persons or entities with which they have frequent contact. This of course includes friends and family, but also coworkers and employers. The most powerful direct influences come from those informed and militant coworkers (paradigmatically, union “salts”<sup>78</sup>) who seek to actively inform their colleagues about the Act with a view to concerted action. Some employers may explicitly convey some of the Section 7 message, but information is more likely to be inferred from actions,

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76. See, e.g., *General Counsel Memos*, NLRB, <https://www.nlr.gov/guidance/memos-research/general-counsel-memos> [<https://perma.cc/4S8S-48ZH>] (last visited Jan. 31, 2025); *Advice Memos*, NLRB, <https://www.nlr.gov/guidance/memos-research/advice-memos> [<https://perma.cc/7C7G-FUYG>] (last visited Feb. 28, 2025); *What's the Law?*, NLRB, <https://www.nlr.gov/about-nlr/rights-we-protect/whats-law> [<https://perma.cc/R3VG-FP73>] (last visited Jan. 27, 2025) (general summaries of the law); *Brochures*, NLRB, <https://www.nlr.gov/news-publications/publications/brochures> [<https://perma.cc/5NAU-Z53L>] (last visited Feb. 2, 2025) (informational brochures on particular topics); *News Releases*, NLRB, <https://www.nlr.gov/news-publications/news/news-releases> [<https://perma.cc/H7K8-L3ZP>] (last visited Feb. 1, 2025); *Manuals*, NLRB, <https://www.nlr.gov/guidance/key-reference-materials/manuals-and-guides> [<https://perma.cc/T75A-9V6N>] (last visited Mar. 1, 2025).

77. Besides unions, the most important groups are the family of organizations called worker centers. See JANICE FINE, ECON. POL'Y. INST., BRIEFING PAPER NO. 159, WORKER CENTERS—ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM (2005), <https://www.epi.org/publication/bp159/> [<https://perma.cc/THW3-7ZEP>].

78. These are employees or close affiliates of a union who accept or continue employment at a firm with the definite intention of organizing workers.

especially disciplinary actions taken or not taken in response to employee actions.

## 2. *The Receivers*

The epistemic and motivational profile of nonunion workers is of course essential for understanding how they decode, interpret, and react to the message.

Nonunion workers are a very large group, highly heterogenous in the information they possess and the motives that actuate them. We may nonetheless make some reasonable generalizations about the low-income, low-prestige workers who (let us stipulate) stand to receive the greatest marginal benefits from increased concerted activity for mutual aid and protection.

Although most nonunion workers are literate anglophones,<sup>79</sup> levels of competence in English—especially written English—vary substantially, and legal sophistication is low. These workers are mostly employed in industries with weak-to-nonexistent traditions of unionization or other concerted activity, like sales and food service. More generally, unless they deviate from the contemporary American norm, they will have limited engagement with any extra-familial associations.<sup>80</sup> Target workers will typically work in industries marked by strong norms of management prerogative and, in some firms, frequent and even flagrant violation of workers' legal rights, including their rights under the NLRA.

As to their motivational profile, easily the most important facts are that these workers generally depend on their jobs for their livelihood and that of their dependents and enjoy low perceived job-security. A less important (but by no means trivial) factor is the natural desire to appear and be prosocial and

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79. It is worth noting, however, that a substantial portion of the working population may have limited English proficiency. One study estimates that roughly 10% of working-age U.S. adults have limited English proficiency (that is, speak English less than "very well"). JILL H. WILSON, METRO. POL'Y PROGRAM, BROOKINGS, INVESTING IN ENGLISH SKILLS: THE LIMITED ENGLISH PROFICIENT WORKFORCE IN U.S. METROPOLITAN AREAS (2014) [https://www.brookings.edu/wp-content/uploads/2014/09/metro\\_20140924\\_investing\\_in\\_english\\_skills\\_report.pdf](https://www.brookings.edu/wp-content/uploads/2014/09/metro_20140924_investing_in_english_skills_report.pdf) [<https://perma.cc/Y768-SKUR>].

80. The trends Robert Putnam identified a quarter of a century ago have shown no signs of abating. See ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 61–66 (2000); see also Lulu Garcia-Navarro, *The Interview: Robert Putnam Knows Why You're Lonely*, N.Y. TIMES (July 13, 2024), <https://www.nytimes.com/2024/07/13/magazine/robert-putnam-interview.html> [<https://perma.cc WR6J-QTRE>]. To be sure, some substantial portion of the low-income, low-prestige workers under consideration may indeed have unusually rich associational lives—e.g. through membership in religious and ethnic organizations. With respect to religion, however, it is worth noting consistent findings that the working poor are less religiously-observant (and in that respect have poorer associational lives) than wealthier Americans. See Mya Jaradat, *Working class: Religious but not attending church*, DESERET NEWS (Jun. 12, 2023) <https://www.deseret.com/2023/6/12/23737197/working-class-religious-but-not-attending-church> [<https://perma.cc/8SAN-PRF6>].

decent. Employers can, deliberately or not, play an important role in influencing employees' sense of what norms deserve adherence.<sup>81</sup>

### B. Accounting for the Disconnect

At the time of this writing, there appear to be no twenty-first century studies indicating how well employees know their NLRA rights.<sup>82</sup> Among those familiar with the NLRA, however, there is widespread and firm conviction, supported in many cases by personal experience, that even rudimentary knowledge of the law is rare. The Board cited a large number of comments expressing this conviction in support of its 2011 Rule requiring employers to post notice of NLRA rights.<sup>83</sup> For example, one commenter said, "I had no idea that I had the right to join a union, and was often told by my employer that I could not do so,"<sup>84</sup> while another, claiming to have "participated in hundreds of organizing campaigns involving thousands of employees," said that "most people had no idea what their rights were to organize or join unions."<sup>85</sup> There are certainly reasonable grounds for skepticism about such comments, which were all made by unions or union-affiliated persons. On the other hand, contrary comments were also made primarily by interested parties (employers and management-side firms) and rarely appealed to personal experience. Solid, recent statistical evidence is no doubt desirable. For the time being, however, it is reasonable to believe that a large proportion of workers are not getting the message of Section 7.<sup>86</sup>

Assuming that ignorance exists, what could be going wrong? There seem to be three basic possibilities: (1) nonunion workers have simply not

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81. See Michael M. Oswald et. al., *Power and Pay Secrecy*, 99 IND. L.J. 43, 97–98 (2023), for a discussion, in the context of pay secrecy policies, of the employer's power to legitimate workplace norms in the minds of employees:

"Legitimacy is achieved through 'normative frameworks, values and systems of belief' held in common that validate existing organizational rules and procedures. For example, the legitimacy of a pay secrecy rule rests upon whether those subject to it believe the restriction 'makes sense' to achieve commonly held organizational goals and conforms to the broader corporate culture. In general, legitimacy does the quiet work of upholding power differentials, obviating any need for coercion in the first place. . . . [W]orkers express supermajority support for whatever approach to pay secrecy or transparency that managers mandate. Nearly eight in ten workers in organizations that publicize pay support such a policy; an even higher fraction of workers who are allowed to discuss wages and salaries support this particular pay discussion norm. Workers' beliefs in the salary taboo don't appear fixed but vary according to their employers' stance on the issue."

82. See generally Peter D. DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under the National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431, 471, n.28 (1995) (citing four studies from the 1980s showing knowledge of the NLRA among college students).

83. See *infra* Part III.A.

84. Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54006, 54015 (Aug. 30, 2011) (to be codified at 29 C.F.R. § 104).

85. *Id.* at 54106.

86. This is not to ignore outbreaks of nonunion concerted activity (including strikes) that suggest awareness of Section 7. See, e.g., Michael Oswald, *Short Strikes*, 95 CHI. KENT L. REV. 67, 74–77 (2020) (discussing non-unionized strike at Google). There do seem to be significant pockets of informed nonunion workers. This Article develops one strategy for increasing the number and size of these pockets.

received the message (or some critical component of it) at all (the reception problem); (2) these workers have failed to understand it or misunderstood it (the comprehension problem); or (3) they have not recognized its practical value for themselves (the appreciation problem).<sup>87</sup> Characteristics of the message and channel, and of target receivers, all contribute to these problems.<sup>88</sup>

### 1. Reception

Reception of the message, or any aspect of it, requires both exposure and salience. Exposure is the simple presence of substantially accurate information in the worker's environment. Salience requires that such information attract non-trivial attention from the worker.

One critical limit on workers' exposure to the message is the scarcity of voluntary mediators in the channel. Such mediators will be particularly scarce from the point of view of the target, prepetition workers, because they tend to work in industries with particularly low union density. But the scarcity is not only a function of union density, but also of the complexity of the message. The vague standards, multifactor tests, multistage analyses and an imposing prolixity make the message challenging for union lawyers to understand, let alone accurately to relay to the less sophisticated. Because of the difficulties involved in mediation, many potential mediators will not attempt to relay the doctrine, and many attempts will involve substantial error and omission.<sup>89</sup>

The most competent and motivated mediators are generally unions, which have only limited opportunities to engage with nonunion workers directly.<sup>90</sup> When they do interact, they will naturally tend to emphasize doctrine relevant to unionization, perhaps leaving these workers comparatively ignorant of the Section 7 rights that they possess outside the union context.

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87. There is, admittedly, something artificial about these distinctions. For example, one could argue that any given failure of *appreciation*, even if it does not, strictly speaking, involve error or confusion, is really just a failure to *comprehend* with a certain depth or specificity or even just a failure to *receive* a certain aspect of the Section 7 message.

88. Features of the message and the channel can interact or combine to create this result. Obviously, the content and form of a message critically condition how it is mediated in the channel. Conversely, characteristics of the channel can amplify deficiencies in the message.

89. It may be that even some dedicated pro-worker organizations lack an adequate appreciation of the NLRA and so are unlikely to act as effective mediators. See, e.g., Kati L. Griffith, *Worker Centers and Labor Law Protections: Why Aren't They Having Their Cake?*, 36 BERKELEY J. EMP. & LAB. L. 331, 346 (2015) (“[S]ome worker centers may not turn to the NLRB because they simply do not know enough about what this legal route has to offer or how to navigate it effectively. Indeed, one scholar has referred to the NLRA’s protection of non-union concerted activity among employees as ‘one of the best-kept secrets of labor law.’”).

90. The courts have made the situation harder by limiting legislative power to guarantee them access to workers. See, e.g., *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 155–57 (2021).

Arguably the *best-placed* mediators are employers, almost all of whom will have incentives to play the part of insulators—i.e., to actively block<sup>91</sup> or distort Section 7 information they find it inconvenient for workers to know.

Even if the Section 7 message gets into the worker's environment, it may very well do so in a way that is not salient for the worker. This is truer the more the form of the message as received resembles the form in which it was originally encoded—written, technical English. By comparison with the highly visual, dynamic messages that bombard most of us from a variety of screens, the Section 7 message is initially transmitted through a very “cool” medium—i.e., it conveys very little information without active participation by the receiver.<sup>92</sup> This makes it comparatively unlikely to attract and retain the attention of anyone—it is still more unlikely for workers without the related knowledge that primes them to notice and engage with it. The Section 7 message must of course compete with the demands of work, which is often conducted at an intense pace with few, brief breaks. More importantly, the message must compete with highly vivid, persuasive and ostensibly contrary signs<sup>93</sup> of employer power and prerogative—ranging from unanswered verbal abuse, to open wage theft, to summary termination for mild protests against work conditions. Workers may easily conclude that such displays of raw force tell them all they need to know about the relative power between workers and employers.

Some mediators might of course try to “heat up” the message, say, by engaging in the highly disruptive kind of protected behavior that tends to both attract attention and efficiently convey the reality of worker power. But those tactics require not just creativity, but also courage, as they are more likely to fall into the gray zone of potentially unprotected “misconduct.”

## 2. *Comprehension*

To the extent workers—who are mostly unsophisticated—encounter and engage with the message in a form resembling the technical, abstract, and prolix English in which it was originally encoded, it will be easy to misunderstand it or fail to understand it at all.<sup>94</sup> Moreover, even the most determined mediator cannot increase the intelligibility of the message past a

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91. For example, by excluding unions from their property.

92. See MARSHALL McLuhan & Lewis H. Lapham, *Understanding Media: The Extensions of Man* (1994), for the distinction between “hot” and “cool” media. The “heat” of a medium is on a continuum and depends on social conditions that are always in flux.

93. Which may or may not be intentional signals.

94. This Article does not suppose that Section 7 is, like some portions of the tax code, not realistically within the ken of ordinary people. A basic understanding of Section 7, sufficient to rely on in engaging in meaningful concerted activity, is possible for the average worker. Without sustained attention and a credible interpreter, however, even this basic understanding is unlikely. See *supra* note 76 and accompanying text; see also Estlund, *supra* note 6, at 10 (describing a “fairness heuristic” common among workers who overestimate their legal rights that inhibits the ability to correct false beliefs because they believe the law “prohibits what fairness forbids”).

certain point without outright distortion. To borrow useful terms from John Gardner, while it may be possible to increase the *textual clarity* of Section 7 doctrine, it will remain seriously deficient in *moral clarity*.<sup>95</sup> That is to say, even if the words and syntax expressing Section 7 doctrine were made easier to understand (textual clarity), it would still lack harmony with any intuitive or customary rules with which most nonunion workers are familiar (moral clarity); it will therefore remain a poor guide to action for those workers.<sup>96</sup> However reasonable one may judge the balance current doctrine strikes between the interests of workers and employers in particular scenarios, it is not predictable based either on untutored intuition or reflection on common workplace experiences.

In addition, even when the fundamentally complex message is transmitted without error, it will often be problematically fragmentary or elliptical because it is not central to what the mediator is trying to communicate—this is often the case in journalism somehow touching on the NLRA.<sup>97</sup> Or again, it may be that the mediator is assuming a more sophisticated audience—this is virtually always the case with commentaries by attorneys, scholars, or policy experts.

### 3. *Appreciation*

Even if workers receive and understand the Section 7 message, it will make no difference to their practical deliberations unless they appreciate it. They must trust that it is accurate, see that it is relevant to people situated as they are, and believe that the rights proclaimed by the message will be enforced reliably enough to justify the risks—often including loss of livelihood—of meaningful concerted activity.

Nonunion workers will often mistrust mediators because talk is cheap. Many mediators (random, opinionated coworkers, for instance) will not obviously have any special authority, and even those who do might be suspected of having incentives to materially distort the doctrine to serve their own purposes—for example, union organizers eager to increase

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95. John Gardner, *Rationality and the Rule of Law in Offences Against the Person*, 53 CAMBRIDGE L.J. 502, 512–13 (1994).

96. *Id.* at 513–14 (arguing that the converse can be true; law as stated in official sources can be complex, obscure, even ostensibly illogical and yet possess sufficient moral clarity to guide action (and justify enforcement)). See *infra* Part IV for more on Gardner’s distinction.

97. See, e.g., Alonzo Martinez, *What Employers Should Consider When Drafting a Social Media Policy*, FORBES (Feb. 6, 2020), <https://www.forbes.com/sites/alonzomartinez/2020/02/06/what-employers-should-consider-when-drafting-a-social-media-policy> [<https://perma.cc/3BE4-T5UN>] (noting that employers must be careful not to run afoul of Section 7, which protects the freedom of employees (whether unionized or not) “to share information—even negative information—about their work conditions, pay, management, or benefits.”). Given its focus on a specific issue of interest to employers keen to avoid liability, this piece understandably provides no information on the *limits* of Section 7 protection for employee information-sharing and does little more than acknowledge the existence of modes of concerted activity other than information-sharing.

membership.<sup>98</sup> And then, of course, some workers will often be exposed to employer actions that, deliberately or not, so flagrantly violate Section 7 rights that they reasonably call into question those rights' existence.<sup>99</sup> It is hard for mediators to match the visceral persuasiveness of such employer demonstrations.<sup>100</sup>

For the message to have practical relevance to most nonunion workers, it must more-or-less immediately (that is, without need for extensive reflection or additional information-gathering) indicate that the law meaningfully protects conduct workers regard as potentially useful and realistic for them. Workers without associational experience may well need any concerted activity to be actively suggested to them, because the very possibility of banding together to solve a problem or promote joint interests may be slow to present itself to their moral imaginations.<sup>101</sup> One obstacle to providing this nudge is the complexity of the Section 7 message. There is a risk that it will, to avoid inaccuracy, be explained in unhelpfully general terms—at the extreme, basically tracking the abstract statutory language of “concerted activity for mutual aid and protection.” Another risk is that mediators (and not just unions) will give excessive, even exclusive, attention to union-related applications of Section 7 rights.<sup>102</sup> The bias toward the union context is understandable because there is a pervasive priority of union-related activity in Section 7 jurisprudence. Even the most broadly applicable rights are often articulated in union-related factual contexts. Claims of rights unrelated to union activity are thus easy to interpret as peripheral and therefore, perhaps, tenuous.

Finally, even if nonunion workers get the message that the NLRA protects potentially advantageous behavior, they must be persuaded that this protection and its benefits are sufficiently certain and swift to outweigh the

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98. Unions are of course quite sensitive to the stark reality of declining union membership. *See, e.g.* AFL-CIO COMMISSION ON THE FUTURE OF WORK AND UNIONS, REPORT TO THE AFL-CIO GENERAL BOARD 31 (Sept. 13, 2019) (“Yet, despite working people’s overwhelming desire for a voice on the job, the percentage of workers represented by a union has been declining steadily since the mid-1950s.”).

99. And to be fair to employers, ignorance of Section 7 rights is surely very common among them as well.

100. *See supra* note 85 and accompanying text (“I . . . was often told by my employer that I could not [join a union].”); *see also* NLRB v. Haven Salon + Spa, Inc., 60 F.4th 1058, 1059 (7th Cir. 2023) (holding spa owners in contempt for ignoring a court-enforced Board order to remedy termination of an employee in violation of the NLRA).

101. *See Moral Imagination*, ETHICS UNWRAPPED: UNIV. OF TEX. AT AUSTIN MCCOMBS SCH. OF BUS., <https://ethicsunwrapped.utexas.edu/glossary/moral-imagination> [<https://perma.cc/ZB4V-CHW7>] (last visited Mar. 13, 2025).

102. Union-related activity tends to loom large in the imaginations of employers, politicians, and journalists thanks to the perceived economic consequences of unionization. Chris Isodore, *Unions are the strongest in decades. Nearly a million Americans got double-digit raises as a result*, CNN (Nov. 21, 2023, 3:01 PM), <https://www.cnn.com/2023/11/21/business/big-paydays-union-members/index.html> [<https://perma.cc/6MCL-4W9P>].

likely costs.<sup>103</sup> But they might learn, either from candid mediators or through their own research, that Section 7 doctrine is often uncertain—especially with respect to disruptive or offensive behaviors; that Section 7 doctrine, being prone to material changes, is unstable; and that the process of adjudicating unfair labor practices, especially those involving close legal questions, can involve considerable delay, which reduces the present value of protection.

### III. THE LIMITATIONS OF TRANSMISSION STRATEGIES

As Part II showed, current institutional conditions make it highly unlikely that nonunion workers will receive actionable information about Section 7. A natural response is to adopt a transmission strategy, that is, to try to increase nonunion workers' exposure to the Section 7 message by increasing the volume and directness of transmission. Transmission strategies can take many forms, from public relations campaigns to efforts to insert knowledge of labor rights into school curricula. In one event, the Board chose to compel employers to relay the Section 7 message to employees through a written notice. As this Part shows, the Board's approach, combined with existing legal vulnerabilities, illustrated the shortcomings likely to affect any transmission strategy (or at least any *isolated* transmission strategy) in this area—a failure to adequately accommodate the limitations and priorities of the receivers or properly account for countervailing forces. This Part recognizes and discusses how a notice-posting mandate, or other transmission strategies, could be better designed to reach workers where they are. It concludes by urging an intervention upstream of transmission; by rearticulating Section 7 doctrine itself to make the Section 7 message inherently more communicable.

#### *A. The Ill-Fated 2011 Notice-Posting Rule*

At least as early as 1989, commentators on the NLRA have suggested that workers—especially nonunion workers—need to be better informed about their Section 7 rights.<sup>104</sup> It was not until 2011, however, that the Board attempted decisive action to disseminate information among employees.

Uncharacteristically, the Board chose to act by rulemaking.<sup>105</sup> On August 30, 2011, after notice and comment, the Board promulgated a Rule titled “Notification of Employee Rights Under the National Labor Relations

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103. The nonunion worker's estimate of costs and benefits will often differ, quite reasonably, from those suggested by enthusiastic mediators (even coworkers like union “salts”) who may well have more to gain and/or less to lose.

104. Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1675–76 (1989).

105. See generally Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1469 (2015), for a discussion on the Board's tradition of preferring adjudication to rulemaking. Of course, there was probably no alternative to rulemaking once the Board decided to impose highly detailed prospective requirements on huge numbers of parties not before them.

Act” that would have required employers to post the following notice to employees:

EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS  
ACT

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA\* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees’ own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.

- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

“Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten or coerce you in order to gain your support for the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take adverse action against you because you have not joined or do not support the union.

If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency’s Web site: <http://www.nlr.gov>.

You can also contact the NLRB by calling toll-free: 1-866-667-NLRB (6572) or (TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB’s Web site or by calling the toll-free numbers listed above.

\*The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

This is an official Government Notice and must not be defaced by anyone.<sup>106</sup>

Explaining its action, the Board cited its belief that “most [workers]” were ignorant that “[their NLRA] rights exist and that the Board protects these rights.”<sup>107</sup> In response to this situation, the Board judged it appropriate to require employers to relay the critical information to employees.<sup>108</sup> Accordingly, the Rule provided that employers, on pain of liability for an unfair labor practice, must “post notices to employees, in conspicuous places, informing [employees] of their NLRA rights, together with information on how to contact the Board and on basic enforcement procedures.”<sup>109</sup> The Rule rigidly prescribed the wording and physical dimensions required for valid notice, including directives regarding posting electronically and in languages other than English.

Business plaintiffs promptly sued to invalidate the Rule and won. Challenges to the invalidation succeeded in the district courts of Washington, D.C., and in South Carolina,<sup>110</sup> with both decisions upheld on appeal.

The D.C. Circuit held that the Board had no legal right to make a failure to post the notice an unfair labor practice or even (here it went beyond the reasoning of the District Court<sup>111</sup>) to treat it as *evidence* of an unfair labor practice. The court’s conclusion was based on the principle that the NLRA

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106. 29 C.F.R. Pt. 471, Subpt. A, App. A (2023).

107. Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54006 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).

108. *Id.* As possible contributing causes, the Board cited “the low percentage of employees who are represented by unions and thus lack an important source of information about NLRA rights; the increasing proportion of immigrants in the work force, who are unlikely to be familiar with their workplace rights; and lack of information about labor law and labor relations on the part of high school students who are about to enter the labor force.” *Id.*

109. 29 C.F.R. § 104.202(a) (2015). In its Notice of Proposed Rulemaking, the Board acknowledged that an intervention was a long time coming: “In 1993, Charles J. Morris petitioned the Board to issue a broad rule requiring employers and unions to post notices advising employees of their rights and duties under the NLRA and of addresses and telephone numbers where employees can contact the Board for information and assistance. In 1998, then-California Governor Pete Wilson petitioned the Board to require employers to inform employees, by either mailed or posted notices, of the rights of nonmembers under *Communications Workers v. Beck*. Most recently, on January 30, 2009, President Obama issued Executive Order 13496, requiring Federal contractors and subcontractors to include in their Government contracts specific provisions requiring them to post notices of employees’ NLRA rights. On May 20, 2010, the Department of Labor issued a Final Rule implementing the order effective June 21, 2010. 75 FR 28368, 29 CFR part 471. Both of the petitions and President Obama’s order stressed the need for employees to be informed of their NLRA rights.” Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80410, 80411 (Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104).

110. *Nat’l Ass’n of Mfrs. v. NLRB*, 846 F. Supp. 2d 34 (D.D.C. 2012), *aff’d in part, rev’d in part*, 717 F.3d 947 (D.C. Cir. 2013); *U.S. Chamber of Com. v. NLRB*, 856 F. Supp. 2d 778 (D.S.C. 2012), *aff’d*, 721 F.3d 152 (4th Cir. 2013).

111. *Nat’l Ass’n of Mfrs.*, 846 F. Supp. 2d at 55 (stating merely that the NLRA does not permit the Board to make a failure to post the notice an unfair labor practice on its own).

protects employee free speech, including the right to be free from coerced speech.<sup>112</sup>

For the Fourth Circuit, the decisive issue was not employer free speech but the fundamental nature of the Board. The Fourth Circuit agreed with the District Court that the language and structure of the Act showed the Board to be a purely “reactive” agency. That is to say, the Board was empowered only to respond to some action by an outside party, principally via claims of unfair labor practices or requests to administer representation elections. Although the Act expressly empowered the Board to make rules, the court reasoned, such rules were only valid in service of its reactive statutory functions. Since the Act did not expressly impose a notice-posting duty on employers nor empower the Board to do so, the Rule was *ultra vires*.<sup>113</sup>

On April 26, 2012, the effective date of the rule was delayed indefinitely.<sup>114</sup> As of the time of this writing, there has been no further administrative or judicial action. The Rule, though part of the Code of Federal Regulations, remains a dead letter (except for government contractors).

### B. The Substantive Deficiencies of the Rule

Since the Supreme Court has not passed on the Rule, it has not definitively failed judicial muster—some provision substantially identical to it may someday go into effect.<sup>115</sup> There is, therefore, a real question about how effective such a rule could be. To what extent could it overcome the problems of reception, comprehension, and appreciation?

#### 1. Reception Issues

At first blush, the Rule appears to be an effective means of ensuring that workers receive information about their Section 7 rights. Those rights would be proclaimed (physically, and in many cases, electronically) in every covered workplace and in every tongue spoken by at least twenty percent of workers. The proclamation would be visually salient. It would be required

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112. *Nat'l Ass'n of Mfrs.*, 717 F.3d at 959; *but see* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (overruling in part—correcting deception is not the only thing that can justify compelled speech); *Nat'l Ass'n of Mfrs. v. Perez*, 103 F. Supp. 3d 7, 7 (D.D.C. 2015) (upholding rule as to federal contractors).

113. *See Chamber of Com.*, 721 F.3d at 162 (“The NLRB serves expressly reactive roles: conducting representation elections and resolving ULP charges. As an examination of the Act as a whole makes evident, none of its sections imply that Congress intended to grant the Board authority to issue the notice-posting rule sua sponte.”).

114. Notice of Delay of Effective Date, 77 Fed. Reg. 25868 (May 2, 2012) (to be codified at 29 C.F.R. pt. 104).

115. For criticisms of the arguments used to strike down the rule, see Amanda L. Ireland, *Notification of Employee Rights Under the National Labor Relations Act: A Turning Point for the National Labor Relations Board*, 13 NEV. L.J. 937 (2013); Daniel B. Amodeo, *Fair Notice: Reassessing NLRB Authority to Inform Employees of Their Rights to Unionize*, 63 AM. U. L. REV. 789 (2014); Kimberly S. Webster, *Fissured Employment Relationships and Employee Rights Disclosures: Is the Writing on the Wall for Workers' Right to Know Their Rights?*, 6 NE. U. L.J. 435 (2014).

“in conspicuous places . . . including all places where notices to employees concerning personnel rules or policies are customarily posted.”<sup>116</sup> It could be no smaller than eleven by seventeen inches and the employer would have an affirmative duty to “take reasonable steps” to see that it is not “altered, defaced, covered by any other material, or otherwise rendered unreadable.”<sup>117</sup>

On closer inspection, however, the Rule seems rather feeble. First of all, the notice contains more of a general survey of the statutory framework than of the doctrine that decisively interprets and elaborates those parts of the law of greatest relevance to nonunion workers.<sup>118</sup> Notably, the information that is likely to embolden nonunion workers to engage in concerted action is not particularly salient, mixing on terms of equality with information that has no such tendency—most obviously, the laundry list of potential union unfair labor practices.

Second, there is substantial risk of noncompliance, especially by the defiant (or at least legally ignorant) employers who are most likely to commit unfair labor practices. After all, someone must first bring the notice-posting unfair labor practice to the attention of the Board, which must then establish that a violation has occurred (an inquiry often requiring close judgments of fact)<sup>119</sup> and, in the likely event of an employer appeal, persuade a court to agree. Then, assuming a favorable court order, and further assuming the penalties are in principle enough to deter a willful employer, will the Board be practically able to monitor compliance?

Finally, there is the fact that, even if conspicuous and legible, the contents of the poster at best guarantee modest results in gaining and holding the attention of busy people. It is of course presented in a relatively “cool” medium (the written word) stated in a bland, impersonal style, and is offputtingly wordy.<sup>120</sup> Yes, workers would have plenty of exposure to the notice, which many of them would see every day at work, and at multiple

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116. Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54006, 54046–47 (Aug. 30, 2011) (to be codified at 29 CFR pt. 104).

117. At present, the Board provides sample posters to be voluntarily posted by employers. The typographical style of these samples, while hardly captivating, is lively enough, with strong contrasting colors and appropriate use of bold text to facilitate understanding of the document. See *Employee Rights Under the National Labor Relations Act*, NLRB, <https://www.nlr.gov/sites/default/files/attachments/pages/node-251/employee-rights-under-the-nlra-poster-11-x-17-version-pdf-2022.pdf> [<https://perma.cc/LU4B-ANED>] (last visited Mar. 13, 2025).

118. *E.g., id.* (“Under the NLRA, it is illegal for your employer to: . . . Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.”).

119. For instance, how conspicuous is “conspicuous”? What are “reasonable steps” to guarantee legibility? Employers may also engage in deliberate misprioritization—some strategic deemphasis of the notice—that does not run afoul of the letter of the Rule. For example, the notice could be surrounded by a multitude of (perfectly truthful) reminders that they are at-will employees. For an analysis of misprioritization in consumer markets, see generally Oren Bar-Gill & Omri Ben-Shahar, *Misprioritized Information: A Theory of Manipulation*, 52 J. LEGAL STUD. 305 (2023).

120. Over 870 words.

workplaces over time. On the other hand, like any other familiar object, the notice is likely to be rather less engaging on the fiftieth viewing than on the first.

## 2. *Comprehension Issues*

To many college-educated readers, especially those with some prior specialized knowledge to provide context, the text of the notice may appear to be an accessible, even admirably clear, digest of the essentials of the law. To the general public, however, and especially the less-educated workers who stand to gain the most from learning about the law, it is probably of intimidating difficulty, especially considering its significant length. According to the Flesch-Kincaid grade level reading formula, the text is written at a college level and is coded “very difficult.”<sup>121</sup>

To be sure, the poster partly compensates for the difficulty of the language by referring the reader to sources of better (clearer or more detailed) information.<sup>122</sup> But these references are not, at least early versions of the poster, very prominent.<sup>123</sup> Nor are they particularly easy to understand.<sup>124</sup>

## 3. *Appreciation Issues*

Perhaps the strongest point of the notice is its credibility. The very “official” appearance and tone would probably lead most readers to believe in the basic accuracy of its contents.<sup>125</sup> Anyone hostile to the rights declared would face an uphill battle in persuading workers to mistrust it. Matters are different as to relevance and reliability.

The notice does contain language making clear that the NLRA is relevant to nonunion workers. It proclaims their rights to “[d]iscuss . . . wages

121. See Readability Scoring System Plus <https://readabilityformulas.com/readability-scoring-system.php#formulaResults> (copy the text of 29 C.F.R. Pt. 471, Subpt. A, App. A (2023); then paste into the text box; then select “Flesch-Kincaid Grade Level”; then click “Calculate Text Readability”). Some portions of the text are assigned a *higher* reading difficulty. The first paragraph (prior to bullet points) is judged “extremely difficult”; “College graduate.” Workers’ extended exposure to the notice (mentioned above) would in principle give them the opportunity to digest its content, but only on the assumption that they initially notice it and judge it worth the effort of understanding.

122. NLRB, *supra* note 117.

123. See Jon Towne, *Requirement for labor poster riles businesses*, TELEGRAM, (Oct. 30, 2011) <https://www.telegram.com/story/news/local/north/2011/10/30/requirement-for-labor-poster-riles/49852862007/> [<https://perma.cc/F4PF-NKRZ>].

124. The sentences in the first paragraph inviting workers to reach out are rated 16.92; “College Graduate”; “extremely difficult.” The original language directing readers who “do not . . . understand English well” to a translation of the poster has been replaced with a more general statement that “Language assistance is available.” Both passages are probably too brief to be meaningfully evaluated by an electronic algorithm. For whatever it may be worth, however, the original language is rated 12.11; “difficult”; “12th Grade” while the current language is rated 15.05; “College Graduate”; “Extremely Difficult.” See *supra* note 121 (explaining tool for measuring reading difficulty).

125. Cf. B.R. Myers, *A Reader’s Manifesto: An Attack on the Growing Pretentiousness of American Literary Prose*, ATLANTIC (July/August 2001), <http://www.theatlantic.com/magazine/archive/2001/07/a-readers-manifesto/302270> [<https://perma.cc/Q57J-7Z2Z>].

and benefits and other terms and conditions of employment” and to “[t]ake action with . . . coworkers to improve . . . working conditions by . . . raising work-related complaints directly with [the] employer or with government agency.”<sup>126</sup> Beyond that, the text of the notice conveys relatively little information that seems material and actionable for nonunion employees. Instead, most of the information assumes that a union is in the picture or that workers are contemplating forming one. Of the twenty bullet-pointed items outlining employee rights and prohibited employer or union activities, only five contain any information that does not somehow relate to an existing or potential union. Moreover, two of these specifically identify only union-related rights or illustrate general rights only with union-specific examples, reinforcing the priority of the union context.<sup>127</sup>

As to reliability, there is relatively little information that would give a moderately cautious worker confidence that any specific mode of “concerted activity for mutual aid and protection” would be protected. Perhaps such confidence could attach to “discuss[ion of] wages and benefits,” and, just maybe, to ostentatiously calm and elaborately polite “work-related complaints.” But the notice itself seems to discourage readers from confident reliance. For example, the discussion of the right to strike, the most classic and characteristic form of protected activity, flags completely unspecified qualifications: Employees are told that they have the right to “[s]trike and picket,” but only “depending on the purpose or means of the strike or the picketing.”

### C. Towards a Rearticulation Strategy

To summarize, the notice required by the Rule appears apt to create basic trust in the accuracy of the information conveyed but is otherwise moderately effective at best in addressing the major challenges of effective communication identified in Part II.

Some of the Rule’s shortcomings cannot be satisfactorily addressed. For example, there is a tradeoff between brevity, which promotes reception and comprehension, and the provision of illustrations or important details, which also promotes comprehension and appreciation. Who can say what is more communicative: to state the “right to strike” with unspecified, possibly

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126. It is worth noting that the bullet points in which these phrases appear are both coded “College”; “Difficult to read” by the Flesch-Kincaid calculator. (This is the result obtained if the phrase “You have the right to” is inserted at the beginning of the selection to form a complete sentence. The difficulty level increases without this adjustment.) See *supra* note 121 (explaining tool for measuring reading difficulty).

127. The two relevant provisions are: (1) “Under the NLRA, you have the right to: . . . Choose not to do any of these activities, *including joining or remaining a member of a union*”; and (2) “Under the NLRA, it is illegal for your employer to: . . . Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, *because you join or support a union*, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.” (emphasis added). See *supra* note 106 and accompanying text.

chilling, qualifications (as the notice does); to state it without qualifications, perhaps inviting over-confident reliance; or to illustrate limitations on the right to strike at the risk of confusing or losing the audience?

Of course, one can imagine different and more effective versions of the notice-posting rule, as well as supplementary or alternative initiatives also aimed at improving the transmission of the message to nonunion workers. Most superficially, the notice could be made more salient while retaining the same text through recourse to what might crassly be called advertising tricks. The skillful use of elements such as color, font, layout, and illustrative pictures could make the notice more visually appealing. Substantively, the salience of the most important information, as well as the perception of relevance, could be increased by the excision or dramatic subordination (say, through relative textual quantity or font size) of information less relevant to nonunion workers.

Whatever text remained could probably, with the assistance of plain-language experts, be redrafted for greater intelligibility. Admittedly, the underlying doctrine is probably difficult to make simple within reasonable space restrictions. For that reason, a more reliable means of ensuring ultimate comprehension might be to abandon any attempt to convey more information about the law than needed to grab the viewer's attention. Instead of conveying information directly, the central function of the notice would be to direct viewers to better sources of information. For example, a poster might consist only of the words "Getting a raw deal at work?" (or perhaps no words at all!)<sup>128</sup> paired with a large Quick Response (QR) code directing the viewer to engaging multimedia materials explaining their NLRA rights, how to vindicate them, and how to get more information.<sup>129</sup>

Workers could be led to see the relevance and reliability of Section 7 if the Board designed materials—either directly in the notice, or by referring viewers to them—that illustrated, through skits or real-life scenarios, how Section 7 rights can be used, violated, or vindicated in the nonunion setting. The reliability would be particularly enhanced by descriptions of successful unfair labor practice charges against employers, much in the manner of litigation from Securities and Exchange Commission releases.<sup>130</sup> And of course, there is no evident legal obstacle preventing the Board from preparing and disseminating such materials quite independent of any mandatory notice Rule. Nor would the Board necessarily have to act alone, as it has the

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128. This would be a similar strategy to signs commonly seen in New York (and perhaps elsewhere) consisting principally of telephone numbers for reporting problems. Such an approach might avoid the compelled-speech argument found persuasive by the D.C. Circuit. *See Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 957 (D.C. Cir. 2013).

129. Debayan Paul, *QR Code History—From 1994 to 2024—in Under 10 Mins*, UNIQODE (Dec. 25, 2024), <https://www.uniqode.com/blog/qr-code-basics/qr-code-history> [https://perma.cc/SFR7-SPGH].

130. *See, e.g.*, Litigation Release No. 25986, SEC Obtains Final Judgment Against Former Broker Engaged in Fraud, SEC, (Apr. 29, 2024), <https://www.sec.gov/litigation/litreleases/lr-25986> [https://perma.cc/6TFY-J7Y5].

prominence and authority to play the leading role in a loosely coordinated public education campaign that would likely be supported by many labor organizations, think tanks, politicians, and other actors.

All the same, whatever the merits of any particular transmission strategy—setting aside resource constraints that would make it difficult for the Board to execute some of them—all such approaches are limited by the underlying doctrinal complexity and uncertainty. Such limits will always tend to impede effective communication, especially comprehension and appreciation. This Article therefore argues that the Board should develop a *rearticulation* strategy. That is, the Board should restructure underlying Section 7 doctrine to increase the effectiveness of communication—i.e., the receipt, comprehension, or appreciation of the Section 7 message. This could be beneficial and, in some ways, more impactful than a transmission strategy.

To put it very simply, some messages are easier to transmit to particular audiences than others—easier to summarize, understand, explain, or illustrate. They can be more striking in themselves or of more obvious, practical relevance in their implications. In exercising its considerable discretion to determine what “message” Section 7 sends, why shouldn’t the Board consider its communicability? Indeed, why shouldn’t it develop a specialized doctrine, applicable only to a subset of workers who are particularly difficult to reach, that takes into account their knowledge and motives? The next Part sketches the basic principles of designing doctrine for communicability and proposes applying them through a suite of specific doctrinal reforms.

#### IV. SECTION 7 REARTICULATED

Part III demonstrated the shortcomings of transmission strategies in meeting the communication challenge described in Part II and suggested that the Board explore a rearticulation strategy centered on doctrinal reform. This Part lays out the principles that should guide a rearticulation strategy and applies them to create and explain a concrete proposal for revising Section 7 doctrine.

##### *A. Designing for Communication*

###### *1. Three Design Principles*

To make doctrine on Section 7 rights more communicable, we must try to give it characteristics that reduce the barriers identified in Part II as far as possible. Doctrine should be salient to promote reception, accessible to promote comprehension, and directive to promote appreciation.<sup>131</sup> Doctrine

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131. It is not certain, a priori, that all these qualities can be maximized at once. It is possible that there will have to be tradeoffs.

can have these desirable qualities either on its face or as predictably mediated—whether through interpretation, illustration, or any behavior tending to convey information about the law.

*a. Salience*

Section 7 rules will be salient to the extent that they are likely to grab and retain the attention of workers. Legal rules are most often salient to individuals because of some combination of the perceived magnitude of their assumed consequences and the relevance of those consequences to those individuals (or those with whom they associate). For instance, general awareness of prohibitions on acts like murder, rape, burglary, and possession of controlled substances is probably substantially driven by the severity of the penalties attached to them, leaving aside any concern for personal repercussions. Personal interests probably play a bigger role in explaining the salience of other legal rules, such as whistleblower laws among persons in regulated firms, graduated tax rates among high earners, the Fourth Amendment among drug traffickers, and selective service requirements among men. However, distinct from the magnitude and relevance of the consequences of law, salience may be created by novelty or surprise, such as when there is some substantial change in the legal status quo, or the law is implicated in a significant departure from expectations. An example of the first is the public attention garnered when states legalize use and possession of marijuana.<sup>132</sup> An example of the second is the massive spike in awareness of the electoral college in 2016, after Donald Trump won the presidency despite losing the popular vote by over three million votes.<sup>133</sup>

In the context of Section 7, perhaps the most powerful way of creating salience is protecting disruptive behavior by employees—that is, employee conduct that departs from entrenched workplace norms, especially those of deference and decorum. Disruptive behavior could take any number of forms: defiance of orders, blunt objections to terms and conditions of work, personal insults, and more. Since there are tight statutory limits on the available remedies, protecting disruption is the best way of increasing the magnitude

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132. See Adam Gabbatt, *Colorado and Washington legalise marijuana: what it really means*, GUARDIAN (Nov. 9, 2012), <https://www.theguardian.com/world/2012/nov/09/colorado-washington-legalise-marijuana> [<https://perma.cc/799K-3SD2>]; Ryan Bort, *New York Legalized Weed – Now What?: Governor Andrew Cuomo signed the Marijuana Legislation and Taxation Act into law on Wednesday*, ROLLING STONE (Mar. 31, 2021), <https://www.rollingstone.com/culture/culture-news/new-york-weed-marijuana-legalization-1148949> [<https://perma.cc/E8RC-A7M5>]; German Lopez, *Marijuana legalization is about to have a huge year: At least 18 states stand to loosen their marijuana laws this year*, VOX (Jan. 23, 2020), <https://www.vox.com/policy-and-politics/2020/1/23/21076978/marijuana-legalization-2020-ballot-initiatives> [<https://perma.cc/AN6T-6VSY>].

133. Peter Beinart, *The Electoral College Was Meant to Stop Men Like Trump From Being President: The founders envisioned electors as people who could prevent an irresponsible demagogue from taking office*, ATLANTIC (Nov. 21, 2016), <https://time.com/4558510/electoral-college-history-slavery/>; <https://www.theatlantic.com/politics/archive/2016/11/the-electoral-college-was-meant-to-stop-men-like-trump-from-being-president/508310> [<https://perma.cc/ZQ3H-9PY3>].

of the consequences. Protecting disruption also tends to increase relevance (which should be, in principle, already high for covered workers) by increasing the range of conduct to which Section 7 may meaningfully apply. However, perhaps most significantly, the authorization of disruptive conduct would create opportunities for workers to experience a significant departure from their expectations of respectful compliance, creating surprise and curiosity that naturally leads to greater awareness of Section 7.

Knowledge of salient Section 7 rules will tend to propagate, notwithstanding insulators. Salient rules empower intentional mediators to announce their startling implications and, even more powerfully, concretely demonstrate them with dramatic gestures in the workplace. In the latter case, employers will typically be put to the painful choice between tolerating unwelcome behavior, thus confirming that it is legally protected, or punishing that behavior in flagrant violation of law. To be sure, some employers flagrantly violate labor law and would act no differently if protection was clearer or broader.<sup>134</sup> Nonetheless, it seems reasonable to suppose that, all else being equal, employers would be more reluctant to engage in obvious violations of law than in subtle or debatable ones. In any case, knowledge of salient rules will tend to spread by word of mouth and the media (with friendly, neutral, and hostile media alike all contributing to the spread).

#### *b. Accessibility*

Law is more accessible the cheaper it is (especially in terms of cognitive effort and information-gathering costs) for unsophisticated persons to interpret it confidently and accurately. The most obvious way of increasing the accessibility of law is via linguistic and conceptual simplification. That is, striving to craft rules that either involve a minimum of propositions, are dependent on a minimum of distinctions, are all readily intelligible to a large swath of the population, or are capable of approximate paraphrase in such a simple form. Much of property law, for instance, is highly accessible because, whatever the refinements in statute books or caselaw, the rule of thumb, i.e., “don’t touch other people’s things without permission,” can do most of the work in identifying and avoiding violations of law. Law may also

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134. Some employers are bold enough to engage in egregious violations even after sanctions or, occasionally, to simply ignore court-enforced Board orders. *See* Noah’s Ark Processors, LLC, 372 N.L.R.B. No. 80, at \*4 (Apr. 20, 2023) (“[T]he record shows that the Respondent violated the Section 10(j) injunction related to the 2018-2019 negotiations, but despite facing sanctions and a “purge plan” from the court, simply chose to again refuse to bargain in good faith. It offered regressive proposals, refused to consider even minor changes or the Union’s proposals, adhered largely to its initial positions, and implemented its final offer without a lawful impasse. These violations seriously affected the entire unit by undermining their chosen bargaining representative, violating their right to have the Union negotiate on their behalf, and demonstrating to them in no uncertain terms that the Respondent was willing to ignore a court order in order to violate their rights.”); *NLRB v. Haven Salon + Spa, Inc.*, 60 F.4th 1058, 1059 (7th Cir. 2023) (holding spa owners in contempt for ignoring a court-enforced Board order to remedy termination of an employee in violation of the NLRA).

be accessible not because it is particularly simple or tracks simple customary norms, but because, to return to John Gardner's phrase, it has moral clarity—i.e. it tracks widely-distributed understandings or intuitions. For example, as Gardner argued in 1994, the notoriously confusing (as it then stood) Offenses Against the Person Act did not, contrary to appearances, jeopardize the rule of law, because it “adequately replicat[ed] [. . .] clear distinctions and significances which apply outside the law, together with reasonably clear indication . . . of which cluster of distinctions and significances” it relied on.<sup>135</sup>

In the Section 7 context there is, unfortunately, no general norm or custom (whether straightforward or nuanced) that would be desirable to replicate or approximate. On the contrary, it is critical to decisively displace the deferential norms that currently predominate and, if possible, to replace them with new norms capable of assuming the force of custom—i.e. of being recognized even by those who are ignorant of the law and tending to guide behavior even if the law changes. While it may be possible for some mediators to simplify facially complex Section 7 doctrine without material distortion, the simpler the rules are on their face, the easier and therefore more likely they are to be simple as mediated.

To be sure, it would be difficult, and probably unwise, to rid Section 7 doctrine of any degree of nuance, complexity, technicality, or uncertainty that might significantly impede understanding by less sophisticated workers. To take only one example, it would be unreasonably prejudicial to the significant interests of employers, customers, and other employees to protect any and all racist epithets for mutual aid and protection, with no regard for the overall context of the speech. It may be possible, however, to reduce the cognitive burden on workers by making legal nuances irrelevant for a broad range of recurrent circumstances. Concretely, that can be achieved by a few simple rules creating predictable outcomes in a core set of situations, paired with standards applicable to the peripheral situations.<sup>136</sup> For most intents and purposes, then, the simple rules would be an adequate statement of law. Ideally, even total ignorance of the standards would leave most workers no worse off, such that only the most scrupulous mediators would feel obligated to mention them.

Note, also, that a doctrine including highly predictable paradigm situations is also more accessible because it is more demonstrable. It makes it easy for mediators (following the adage “show don't tell”) to vividly convey critical implications of law using hypotheticals or demonstrations requiring a minimum of verbal commentary. For example, a legally sophisticated worker responding to his peers' disquiet about a time off policy

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135. Gardner, *supra* note 95, at 513; *see also supra* notes 95–96 and accompanying text (explaining Gardner's concept of moral clarity).

136. *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (providing the seminal analysis of the choice between rules and standards).

might not judge it most effective to recite or paraphrase statutory or doctrinal formulas about their rights. Instead, he might prefer to say, “We have the right to stand up for ourselves!” and then publicly accost his manager with a forceful protest brought in the name of the group.

*c. Directiveness*

The “direction” contemplated here is meant primarily to convey passive indication (like a signpost) of kinds of conduct that may be engaged in, but also, secondarily, to be an active invitation to that conduct (like an advertising billboard). The directiveness of law is largely a function of its content, namely the ease and certainty with which it can be applied to a realistic situation. But directiveness can also be affected by more superficial aspects, like choice of words. For example, the substance of “stand your ground” laws is highly directive—by recognizing no duty to retreat and authorizing deadly force in response to a large swath of violent attacks, they make very clear where the law stands on a course of conduct that many people will entertain if threatened or assaulted. The directiveness of the law is further enhanced by the use—often in the statutory text—of the phrase “stand your ground.”<sup>137</sup> The concrete image and the ethical connotations associated with someone “standing his ground” both vividly convey what sort of conduct is being immunized and tend to subtly valorize and encourage it.

Section 7 doctrine will be directive to the extent that it allows workers to swiftly identify specific modes of concerted activity they are likely to find rationally appealing (going to the relevance of Section 7) and encourages them to engage in those activities by inspiring confidence that they will be protected (going to the reliability of Section 7 rights). Doctrine should, ideally, select for protection easily identifiable, valuable (and affirmatively valorized) forms of concerted activity and tightly limit any derogations from protection. More specifically, directive Section 7 doctrine should permit behavior that few employers would tolerate unless legally required to do so—i.e., disruptive conduct. This would allow mediators to credibly demonstrate that legal protection is real and reliable.

*2. Two Priorities*

If Section 7 doctrine clearly protected all concerted activity indiscriminately it would probably be highly salient, accessible and directive. But as mentioned above in the discussion of accessibility, an excessively categorical approach would unreasonably jeopardize legitimate interests of employers and third parties. On the other hand, multiplying the number of

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137. See, e.g., FLA. STAT. § 776.012(2) (“A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.”).

distinct forms of highly protected behavior would increase the complexity of Section doctrine and thus reduce its accessibility. It follows that Section 7 doctrine must aim for efficiency. It must create the greatest possible marginal contribution to legitimate policy goals with the fewest number of distinct protections.

What kinds of concerted activity is it efficient to prioritize? Speaking abstractly, priority concerted activity should have some special tendency to increase workers' economic power, perhaps by way of increasing their social or political power. But, to obtain maximum policy benefits, it is highly desirable for this priority activity to be suitable objects of what Jeremy Waldron calls legal archetypes.<sup>138</sup> An archetype is "a particular provision in a system of norms which has a significance going beyond its immediate normative content, a significance stemming from the fact that it sums up or makes vivid to us the point, purpose, principle, or policy of a whole area of law."<sup>139</sup> Among the examples Waldron cites are the writ of habeas corpus (archetypal of Anglo-American culture's love of liberty and freedom from physical confinement); the Second Amendment (archetypal of the American permissiveness with respect to weapons); and the doctrine of adverse possession (archetypal of the law's interest in settlement and predictability.)<sup>140</sup> Within work law, archetypes include the at-will rule (expressing principles of both free labor and freedom of contract) and the right to strike (expressing both free labor principles and the labor policy permitting limited economic conflict). With respect to nonunion workers, enhanced Section 7 protections can be chosen to express some relevant policy principles underlying the NLRA. In the first place, archetypal rights serve to inform, remind or inspire workers, but may also influence the dispositions of employers, administrators, judges, and the general public.<sup>141</sup> The recognition of archetypal rights could help renew the moribund culture of labor militancy out of which the Act grew—a culture marked by, among other things, strong class consciousness, solidarity, and a certain appetite for confrontation.<sup>142</sup>

This Article proposes two strategically important kinds of conduct to give priority protection, each of which also corresponds to an important principle of labor law<sup>143</sup> that would be well served by archetypal expression.

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138. Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1723 (2005).

139. *Id.*

140. *See id.* at 1718.

141. Compare with habeas corpus, which Louis Pollak credits with the power of "slowly educating the bench, the bar, police, prosecutors and the mass of citizens to the highest traditions of Anglo-American law." *Id.* at 1724 (citing Louis H. Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 66 (1956)).

142. *See generally* JULIUS GETMAN, *STRIKE!* (1996).

143. *See, e.g.*, Larry Alexander, *What Are Principles, and Do They Exist?* San Diego Legal Stud. Rsch. Paper Series, Paper No. 13-119 (2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2277787](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2277787).

The first kind of priority conduct is *confronting management with objections to terms and conditions of employment*. This kind of behavior is critical in determining the basic character of the employment relationship. The simple fact of speaking up can transform the relationship, in the eyes of both parties, from a fundamentally adhesive, fearful, and deferential submission of employer to employee, to an essentially negotiated and more equal one. This shift can occur even if the employee does not gain anything from a particular confrontation or negotiation. Protecting this conduct would embody the chief labor-law principle of nondomination,<sup>144</sup> borrowing a term from republican theory. Nondomination is a condition in which an actor's freedom of action is not subject, even in principle, to constraint by another. Absolute nondomination in any straightforward sense is obviously impossible<sup>145</sup> and the NLRA leaves traditional employer prerogatives to define and direct the work of the firm substantially unaffected.<sup>146</sup> But from the beginning, reducing the employer's de facto power to control employees was understood as an objective of the Act.<sup>147</sup> The more latitude the employee enjoys to manifest independence, disagreement, dislike, or even disrespect, the more clearly nondomination will be expressed.

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144. The concept of nondomination, famously developed in Philip Pettit's republican political theory, see, e.g., PHILIP PETTIT, *ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY* (2012), has been applied to work law by Alan Bogg and Cynthia Estlund. See, e.g., Alan Bogg & Cynthia Estlund, *Between Authority and Domination: Taming the Managerial Prerogative*, 44 COMP. LAB. L. & POL'Y J. 237 (2024) [hereinafter Bogg & Estlund, *Between Authority*]; Allan Bogg & Cynthia Estlund, *The Right to Strike and Contestatory Citizenship*, in PHILOSOPHICAL FOUNDATIONS OF LABOR LAW 229 (Hugh Collins, Gillian Lester, & Virginia Mantouvalou, eds. 2018); Alan Bogg & Cynthia Estlund, *Freedom of Association and the Right to Contest: Getting Back to Basics*, in VOICES AT WORK: CONTINUITY AND CHANGE IN THE COMMON LAW WORLD 141 (Alan Bogg & Tonia Novitz, eds. 2014).

145. Unsurprisingly, it is a major task of republican theorists to explain how clearly necessary interference with individual or group freedom can be reconciled with a more general or fundamental condition of nondomination. Pettit, for instance, emphasizes that government should interfere only on terms established by the people and subject to their ultimate control. See generally PETTIT, *supra* note 144.

146. Theorists are divided about what the principle of nondomination requires of workplace relations. For some, the employee's freedom to quit is sufficient, for others true nondomination is not possible at capitalist firms, while others believe that managerial prerogative and nondomination can be reconciled. See Bogg & Estlund, *Between Authority*, *supra* note 144, at 240-41 (contrasting their reconciliationist views with those of "libertarian republicans" like Robert Taylor and "radical neo-republicans" like Alex Gourevitch).

147. See, e.g., the comments of U.S. Senator Robert Wagner a few weeks after the Supreme Court affirmed the constitutionality of the NLRA in *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937): "[T]he struggle for a voice in industry through the processes of collective bargaining is at the heart of the struggle for the preservation of political as well as economic democracy in America. Let men become the servile pawns of their masters in the factories of the land and there will be destroyed the bone and sinew of resistance to political dictatorship . . . . But let men know the dignity of freedom and self-expression in their daily lives and they will never bow to tyranny in any quarter of their national life. That is why I earnestly believe that the victory for the principles of economic democracy in the recent Supreme Court decisions on the National Labor Relations Act ranks among the notable achievements of our entire history." Robert F. Wagner, *The Ideal Industrial State—As Wagner Sees It*, N. Y. TIMES MAG., May 9, 1937, at 23, available at <https://www.nytimes.com/1937/05/09/archives/the-ideal-industrial-startas-wagner-sees-it-the-senator-would.html> [<https://perma.cc/SV4P-QJ3V>].

The second kind of conduct is *soliciting assistance in labor disputes from agents outside the firm*. This behavior can give the specific workers involved greater (perhaps vastly greater) bargaining power through economic or reputational mechanisms. It is also a critical means of developing or strengthening the networks that can give workers as a class economic, social, and political clout. The NLRA's protection of concerted activity specifically suggests that solidarity is a statutory value, but the full meaning of and scope of this solidarity is more clearly expressed in the Court's *Eastex* opinion. In *Eastex*, the Court interpreted Section 7 to protect concerted activity (in that case, broadly worker-friendly political advocacy) having no direct connection to the economic interests of the workers involved.<sup>148</sup> This indicates a statutory principle of nurturing unity among workers as a class and, perhaps, with workers as a class. The same principle is more clearly manifested the more obviously there is protection for workers' efforts to seek advocates outside the firm.

### *B. Two Bespoke Rights: A Proposed Revision of Section 7 Doctrine*

This Part proposes that the Board apply the foregoing principles by endowing a critical subset of nonunion workers, namely prepetition employees, with two discrete sub-rights that specify the general Section 7 right to concerted action: the *right to challenge* and the *right to appeal*. While not absolute, these rights would be subject only to a limited set of employer defenses. I will define each of the rights and defenses, illustrate their operation in practice, and then explain how the proposal would make Section 7 more communicable.

#### *1. Coverage*

As explained in the Introduction, “prepetition employees” are employees covered by the Act who do not belong to an existing or proposed bargaining unit. A bargaining unit begins to exist when voluntarily recognized by an employer or certified by the Board. A bargaining unit is “proposed” when a union is identified in a petition to the Board for an election, or when a union requests recognition by an employer.<sup>149</sup>

This definition may seem overinclusive in that it embraces workers personally affiliated with, or even belonging to, unions who happen not to belong to a current or proposed bargaining unit. Why should these workers, who arguably aren't even “nonunion” workers at all, enjoy heightened protection when they are not likely to suffer from the ignorance that justifies the protection? Relatedly, unions sometimes have opportunities to teach workers about Section 7 well before a petition is filed; in that case, why shouldn't special contact end when employee ignorance presumably does—

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148. See *supra* Part I.B.2(a)(ii).

149. See 29 U.S.C. § 159(c).

i.e., at or slightly after first contacts with a union? There are two reasons for the breadth of coverage.

First, it is administratively convenient. As to identifying covered workers, it is easier to apply criteria that do not require individualized inquiries into the external connections of particular employees. As to the temporal cutoff, the point of petition or request is the earliest ascertainable moment at which we can say with fair confidence that any given worker belongs to a group subject to meaningful union influence.

Second, as a matter of substantive policy, it is desirable (1) to protect some more-knowledgeable employees to make them more effective mediators to their less-knowledgeable colleagues, and (2) to give unions an initial window of time to organize under more-favorable rules. Yes, the proposed definition allows organized and knowledgeable unions, who can presumably fend for themselves, to exploit rules meant for unorganized and ignorant workers. For example, a bloc of union-affiliated workers may infiltrate a firm and, under the direction of the union, carry out an outrageously disruptive campaign intended to extract concessions from the employer outside the relatively orderly framework of collective bargaining. Yet, even assuming this strategy became common, how long would the wild interlude be likely to last? It is possible that unions with a foothold at a firm would rather maintain the benefits of prepetition jurisprudence proposed here than attempt to become exclusive bargaining representatives. But it seems even more realistic that they would exploit the prepetition jurisprudence to move faster towards a petition or request, at which point the law would revert to normal. The principal effect on employers, then, would not be to compromise legitimate managerial control, but rather to weaken their power to forestall union elections—a power to which no recognized policy or principle entitles them.

## 2. *Rights*

### *a. The Right to Challenge*

The *right to challenge* is the right to make nonviolent communications with or on behalf of one or more other prepetition employees; directed at a superior; objecting to or proposing changes to some term or condition of employment or to some managerial act or practice.

“Violent” conduct would exclude only criminal incitement to, or commission of, a crime against persons or property as defined by applicable state law.<sup>150</sup> Note that this does not include all behavior that might constitute a breach of the peace. Still less does it include all behavior that common sense or even existing Board precedents would describe as misconduct. Nonviolent

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150. E.g. (incitement to) assault, battery, or mischief.

communication, then, may well be exceptionally harsh, insulting, or manifestly intended to embarrass, wound, or provoke.

*b. The Right to Appeal*

The *right to appeal* is the right to engage in off-duty nonviolent communications with or on behalf of at least one other prepetition employee; directed at any person outside the firm; seeking lawful assistance in an employment dispute with an employer.

*3. Defenses*

An employer who takes adverse action against an employee because they have exercised either of these rights has prima facie committed an unfair labor practice. Causation here is determined by the undemanding “motivating factor” standard—i.e., causation is established if the worker’s exercise of the right played a role in the decision to take adverse action. Note that although only “concerted” activity is protected, (1) employer knowledge of concertedness is not an element of the prima facie case for an unfair labor practice,<sup>151</sup> and (2) employer ignorance is not a defense. The employer will only escape liability if it can establish one of two general affirmative defenses, the first of which has four subdivisions.

The first defense is *cause*, which is limited to three torts and a residual wrong, with the residual wrong being available only as a defense to the right to appeal. The three torts are: (1) knowing or reckless defamation, (2) trade libel, and (3) misappropriation of intellectual property. The residual wrong, which can be called “pretextual appeal,” is limited to the right to appeal because it is meant to pick out a subset of “disloyal” public criticisms of the employer.<sup>152</sup> To prove pretextual appeal, the employer must show that a purported appeal for outside support is in fact a pretext for inflicting reputational or economic harm.<sup>153</sup> At a minimum, this means that (1) the desire to cause harm was a necessary or but-for factor and (2) the desire to gain outside support was *not a substantial* motivating factor.<sup>154</sup>

The second defense is *compliance*. This is the reasonable belief that discipline is no more burdensome to the prepetition employee than necessary to comply with applicable antidiscrimination law.

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151. *Contra* Meyers Indus., 268 N.L.R.B. 493, 497 (1984) (holding that a violation occurred only if the “employer knew of the concerted nature of the employee’s activity”).

152. *See supra* notes 50–54 and accompanying text.

153. Pretextual appeal is meant to combat a certain kind of gamesmanship: the abuse of a recognized liberty to inflict harm. This concern is shared in similar contexts where the parties appeal to outside support. *See, e.g.,* Curiano v. Suozzi, 469 N.E.2d 1324, 1327 (N.Y. 1984) (recognizing that New York state’s prima facie tort cause of action, which is functionally similar to pretextual appeal, allows parties to defend against “intentional and malicious actions that cause harm . . . without probable cause for doing so . . .”).

154. The employer does not have to show that the desire to gain support was completely absent.

#### 4. *The Rights Illustrated*

To show how the proposal might work concretely (materially changing doctrine and, in some cases, outcomes), consider *Trus Joist Macmillan & United Mineworkers of America & Dane Wood Moore, III*, 341 N.L.R.B. 369 (2004), and *MikLin Enterprises, Inc. v. NLRB*, 861 F.3d 812 (8th Cir. 2017).

In *Trus Joist*, Roger Harris, a prominent union advocate at a West Virginia manufacturer factory, was fired for verbally savaging the assistant plant manager, Thomas Booker, during a meeting.<sup>155</sup> Harris requested the meeting to get information about the abrupt termination of a supervisor who had refused to pretextually and illegally terminate Harris.<sup>156</sup> The Board determined that Harris's termination was legitimate because while his conduct constituted concerted activity, it had lost protection under the four-factor *Atlantic Steel* test applicable to interactions between employees and management.<sup>157</sup>

According to the Board, Factor 1 of *Atlantic Steel* (the place of the discussion) was neutral: the attack did not occur on the shop floor in front of the whole plant but it did occur in the presence of other managers, which was probably intended to humiliate Booker.<sup>158</sup> Factor 2 (the subject matter of the discussion) weighed slightly in favor of protection. Harris did intend to embarrass Booker, but undeniably his actions “involved the matter of the right of employees to engage in protected union activity and the unlawful removal of a supervisor who refused to violate this right”—matters of core “mutual aid and protection.”<sup>159</sup> Factor 3 (the nature of the “outburst”) weighed heavily against protection because “Harris’ remarks were personal, highly offensive and [led to foreseeable escalation.]”<sup>160</sup> The Board’s characterization is quite apt. The record showed that Harris called Booker “a liar, a lying bastard, and a prostitute [for the plant manager, Booker’s boss]” and grabbed his crotch, telling Booker that he had Booker’s manhood “hanging right here.”<sup>161</sup> Finally, Factor 4 (the extent to which the outburst was a response to an unfair labor practice) was neutral.<sup>162</sup> While Harris was undoubtedly reacting to one unfair labor practice (and acting in anticipation of another), his response was excessive and calculated rather than

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155. *Trus Joist*, 341 N.L.R.B. at 370.

156. *Id.*

157. *Id.* at 370–71.

158. *Id.* at 370.

159. *Id.*

160. *Id.* at 371.

161. *Id.*

162. *Id.*

spontaneous.<sup>163</sup> Applying some occult arithmetic, the Board concluded that the balance of factors ultimately weighed against protection.<sup>164</sup>

Under this Article's proposal, the analysis would be far simpler and more transparent for a prepetition employee in Harris's position. That employee would invoke the *right to challenge* and would almost certainly, with a minimum of analysis, succeed. However obscene, disrespectful and—to be quite clear—reprehensible they undoubtedly were, the words were integral to a protected challenge. The accusation of lying might be considered defamatory, but in context appears to be a statement of opinion implying no factual basis. Similarly non-factual, as well as vague and manifestly hyperbolic, is the accusation of being a “prostitute.” Conceivably, the crass sexual taunting might implicate Title VII's prohibition on sex discrimination, but it is doubtful that they would create a hostile workplace for Booker or the other two managers. Even supposing it did, the company would be hard pressed to demonstrate a reasonable belief that compliance required nothing less severe than firing Harris. Completely irrelevant are several factors that appear to play an important role in the *Trus Joist* Board's analysis: Harris's obvious desire to embarrass Booker, the premeditation with which he orchestrated the confrontation, the personal nature of the attack, and the use of profane words and gestures.

In *MikLin*, the Eighth Circuit reversed the Board, holding that Section 7 did not protect Jimmy John's workers who, in a public campaign for sick leave, insinuated that sick workers might be contaminating Jimmy John's sandwiches.<sup>165</sup> Although the statements were clearly part of a concerted activity—i.e., an appeal for public support in a labor dispute—the court nonetheless deemed them unprotected on the grounds that they “disloyally” risked causing economic harm to the employer that would outlive the dispute, and were materially false and misleading into the bargain.<sup>166</sup> Critically, the

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163. *See id.* (“Harris’ offensive outburst was not a spontaneous or reflexive reaction to the news about Moore’s termination. . . . Afterwards, however, while he had time to reflect, Harris engaged in considerable planning as to how, when, and where he would respond to the news.”).

164. *See id.* at 371–72.

165. *MikLin*, 861 F.3d at 815–16 (“Organizers of the IWW sick leave campaign began their attack in late January and early February 2011 by designing and posting on community bulletin boards in MikLin stores posters that prominently featured two identical images of a Jimmy John’s sandwich. Above the first image were the words, ‘YOUR SANDWICH MADE BY A HEALTHY JIMMY JOHN’S WORKER.’ The text above the second image said, ‘YOUR SANDWICH MADE BY A SICK JIMMY JOHN’S WORKER.’ ‘HEALTHY’ and ‘SICK’ were in red letters, larger than the surrounding text in white. Below the pictures, white text asked: ‘CAN’T TELL THE DIFFERENCE?’ The response, in red and slightly smaller: ‘THAT’S TOO BAD BECAUSE JIMMY JOHN’S WORKERS DON’T GET PAID SICK DAYS. SHOOT, WE CAN’T EVEN CALL IN SICK.’ Below, in slightly smaller white text, was the warning, ‘WE HOPE YOUR IMMUNE SYSTEM IS READY BECAUSE YOU’RE ABOUT TO TAKE THE SANDWICH TEST.’ Text at the bottom of the poster asked readers to help the workers win paid sick days by going to their website.”).

166. *See id.* at 825–26 (“By targeting the food product itself, employees disparaged MikLin in a manner likely to outlive, and also unnecessary to aid, the labor dispute. Even if MikLin granted paid sick

court rejected the Board's interpretation of disloyalty as being defined by a malicious intent to cause harm, for example, by deliberately timing conduct to maximize economic costs on the employer.<sup>167</sup>

Under the present proposal, workers who adopted similar tactics to those of the Jimmy John's workers could shelter under the right of appeal, with success being fairly likely (at least outside the Eighth Circuit). Jimmy John's' only colorable defenses would be pretextual appeal and trade libel. The first would probably fail because of the evidently sincere and arguably predominant motive to gain outside support. The second would almost certainly fail for lack of an actionable false statement. For the most part, the statements simply identified, in a rhetorical and admittedly unpleasant manner, health risks that in their opinion resulted from the undisputed absence of paid sick leave.<sup>168</sup> They nowhere suggested that Jimmy John's had, for example, failed health inspection or lacked appropriate health protocols in preparing food. The one weakness in the employees' case on this score is the assertion that they "can't even call in sick," which was apparently false.<sup>169</sup> The right to appeal proposal preserves what is most compelling in the existing notions of "disloyalty"—elementary fairness, good faith, and honesty—but disciplines it by tying it closely to recognized torts. In general, the right to appeal would make it rational for workers to be as creative, vigorous—and displeasing—as they wish in making external appeals. Workers must simply maintain a thematic focus on the dispute with their employer (not free-floating reputational attacks or other kinds of sabotage) and avoid lies or reckless falsehoods.

### C. Why the Proposed Rights Are Communicable

Current Section 7 jurisprudence does not recognize varied levels or kinds of protection for different groups of covered employees. The foregoing proposal would change that, reflecting the insight that workers at a particular epistemic disadvantage—prepetition workers—may need the benefit of particularly communicable rules. Current Section 7 jurisprudence applies the formless *Atlantic Steel* test to abrasive worker interactions with management ("misconduct") and applies a hazy "defamatory, reckless, or disloyal" test to public criticism of employers in the context of third-party appeals. The proposal would replace those doctrines with rules that reflect Part IV's aforementioned design principles. It specifies and privileges as distinct

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leave, the image of contaminated sandwiches made by employees who chose to work while sick was not one that would easily dissipate.").

167. See *id.* at 822.

168. See *id.* at 825. However, the close connection workers drew between current policy and these health risks weakens the Eighth Circuit's argument that the reputational damage would outlive the dispute.

169. See *id.* Even there, however, there is an argument to be made in the workers' favor. One could interpret the phrase as meaning "We can't call in sick without fearing for our jobs." This would take the statement into the realm of opinion.

“rights” two modes of protected concerted activity. The proposed rights supplement the modes already specified by the statute (i.e., the rights to self-organization, involvement in labor organizations, and collective bargaining) and previous Section 7 jurisprudence (most notably the right to strike). These rights protect high-impact concerted activity in a manner calculated to overcome communication barriers facing prepetition workers.<sup>170</sup>

The proposal creates salience—the tendency to gain and retain the attention of an audience. To begin with terminology, the simple existence of “rights” held against employers will be surprising, intriguing, and attractive.<sup>171</sup> The same is true of the combative connotations of the words “challenge” and “appeal.” More substantively, the doctrinal lines are drawn to clearly protect (not just prophylactically tolerate) disruptive, even shocking, conduct that tends to attract the attention of workers. This facilitates the work of relatively sophisticated mediators, enriching their menu of options for engaging the attention of workers and downstream mediators (such as news media). Importantly, the proposal also harnesses the self-interest of some *employers* to promote transmission of Section 7 knowledge. Once employers learn that the law clearly protects behavior that can threaten productivity or discipline, or result in some kind of legal liability, they might alter their policies and practices to account for this fact. Some of these, such as revised human resources manuals and patterns of hiring, firing and discipline, may have the effect of disseminating more or less fine-grained knowledge of the NLRA.<sup>172</sup>

The proposal is accessible, requiring comparatively little effort and no specialized knowledge to confidently and accurately interpret it. This is not to ignore or downplay an obvious fact: the foregoing explanation of the proposed rights and defenses—especially the defenses—is not particularly easy to understand. Nonetheless, the basic nature of these rights and defenses, especially the rights, are easy enough for a mediator to paraphrase and illustrate with very little distortion or loss of useful information. For example, it should generally be adequate for a mediator to say, “The right to challenge means that you can get together with other workers and say almost anything you want to a supervisor as long as you’re talking about how management

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170. The proposed rights also have the potential to become legal archetypes, conveying the spirit of labor law to all those affected by it. For the concept of the legal archetype, see Part IV.A.2.

171. To be sure, the term “right to appeal” is ambiguous, as it may suggest some kind of procedural right to seek review of a decision. But disambiguation does not seem difficult as non-legal uses of the word “appeal” may well be more familiar to a lay audience. Moreover, obvious alternatives—say, “entreaty,” “adjuration,” “invocation,” “supplication,” “petition”—may seem pretentious (or at any rate unfamiliar), connote servility, or appear as ambiguous as “appeal.”

172. For comparison, consider something familiar to many of us: the sudden change in demeanor, followed by an avalanche of carefully stated information, triggered by any employee statement that even appears to implicate the Family and Medical Leave Act. Such reactions make quite clear to the average employee that this law really counts for something and could be worth learning about. There will not be such telling reactions to invocations of the NLRA if the Act’s remedies remain as weak as they are, but the situation can be improved.

treats you.” Indeed, the formulations used above have been derived by working backwards from such plain statements, attempting to express their substance in the careful language suitable for adjudicating cases. Ultimately, the proposal is simple enough. It encompasses only two discrete rights. These rights are general enough to apply to many realistic circumstances, but less elusive than the sprawling catchall right to “concerted activity for mutual aid and protection” set forth in Section 7. To be sure, the proposed rights are defined with imprecise language such as “terms and conditions of employment,” but this is hardly perilous to workers, whose commonsense understandings will tend to prevent either a chilling effect or misplaced reliance. For example, any employee who thinks that parental leave policies certainly relate “terms and conditions of employment” while product design decisions almost certainly don’t probably has a practically adequate grasp of that aspect of the right. Meanwhile, although the defenses that qualify the rights are complex and fuzzy at the edges, they clearly apply only to extreme or unusual behaviors. The consequence is that workers need not understand the defenses clearly to be confident that they can avoid running afoul of them; in fact, in the ordinary case, workers would be safe if they knew nothing about the defenses at all.

Finally, the proposal is directive, allowing workers to easily and confidently identify concrete, valuable forms of concerted conduct and inviting them to do so. Starting again with terminology, the words “challenge” and “appeal” are not only striking, but suggest, and subtly foster, bold action. The substantially rule-like nature of the rights makes clear that this boldness will be protected in a large number of easily identifiable contexts. The law’s implicit approval may help overcome ethical scruples. Finally, by allowing voluntary mediators to engage in conduct that strongly suggests the existence of powerful legal backing, the proposal would allow them to gain credibility.

## V. OBJECTIONS AND CONCLUSION

### *A. Objections*

There is an obvious threshold challenge to the foregoing proposal: hasn’t the Supreme Court’s recent abandonment of *Chevron* deference in *Loper Bright*<sup>173</sup> stripped the Board of the flexibility to enact such an ambitious change? No, it has not.

Although reviewing courts have sometimes purported to apply *Chevron* to Board decisions, its interpretive deference is just a first line of defense for the Board, if not largely beside the point. *Chevron* required courts to defer to agency interpretations in the case of ambiguous statutes.<sup>174</sup> Very little of the

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173. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

174. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

Board's Section 7 jurisprudence involves the resolution of ambiguity. Rather, the Board has consistently claimed,<sup>175</sup> with the full support of the Supreme Court, discretionary power to specify the generalities of the NLRA, consulting its own judgment about the best means of pursuing statutory policy.<sup>176</sup> The NLRA has always been understood to be one of those statutes that, as the *Loper Bright* Court put it, “empower an agency to prescribe rules to ‘fill up the details’ of a statutory scheme<sup>177</sup> . . . or” to regulate subject to the limits imposed by a term or phrase.”<sup>178</sup> In such cases, the courts’ function under the Administrative Procedure Act involves “‘fix[ing] the boundaries of [the] delegated authority,’ . . . and ensuring the agency has engaged in ‘reasoned decision-making’ within those boundaries.”<sup>179</sup>

Of course, this framing gives hostile courts plenty of room to interfere with the Board's policies. Moreover, the anti-administrative posture of the current Court undoubtedly makes it reasonable to anticipate a decisive tightening of the leash. For instance, it is just as possible that the Court will, in the face of decades of precedent and practice dating back to the early years of the NLRA, determine that the Board has little to no discretion to fix or change the boundaries of protected activity because Congress failed to make a sufficiently explicit delegation. Nonetheless, nothing on the face of *Loper Bright* spells disaster for the Board's traditional regulatory practices.

Another threshold objection is that rulemaking is a more appropriate means than adjudication for implementing the proposal. Whatever advantages a rule might have,<sup>180</sup> it is not clear that it would be worth the cost in time and resources of the notice and comment process. Certainly, notice and comment itself would not be very helpful. The most noteworthy comments will almost certainly be predictions, based on no evidence, of chaotic, hostile, and substantially less productive work environments for employees, and impossible legal predicaments for employers. To be clear, there is nothing inherently unserious or bad faith about such objections. The

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175. See, e.g., *Lion Elastomers LLC*, 372 N.L.R.B. No. 83, at \*4 (May 1, 2023) (“[W]e need not and do not hold that the Board’s setting-specific standards are themselves mandated by the [NLRA], only that they are statutorily permitted and that . . . they reflect a better policy choice than adopting [the standards being supplanted].”).

176. See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) (“The [NLRA] did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary that Act left to the Board the work of applying the Act’s general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. Thus a ‘rigid scheme of remedies’ is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation.”).

177. *Loper Bright*, 603 U.S. at 395 (quoting *Wayman v. Southard*, 23 U.S. 1, 43 (1825)).

178. *Id.* at 394.

179. *Id.*

180. See Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1469, 1480–85 (2015) for a critical survey of the arguments for Board rulemaking. As Garden observes, rulemaking is often said to be better informed, prospective (and so fairer to actual or possible litigants), and more stable and consistent.

point is that the notice and comment process will not likely give the Board access to new arguments or new information. Instead, if the Board is, upon mature reflection, persuaded of the merits of this bold experiment, it should simply choose the path of least resistance to implement it and then evaluate its effects over time. This evaluation could certainly include formal solicitation of feedback as part of a future rulemaking process.

This brings us to the weightiest substantive objections themselves: the risk that outrageous workplace behavior engaged in under the mantle of the rights to challenge and to appeal might destroy decorum and discipline, to the harm of businesses, customers, and workers themselves. It must be frankly admitted that this proposal would materially increase the risk of gratuitously disagreeable, and even abusive, behavior by workers. It is right to care about workplace civility, which is potentially valuable to everyone, and which arguably plays an important role in increasing the democratic competences of the citizenry. But it is easy to overstate both the extent to which civility must depend on the threat of discipline and the extent to which the current proposal restricts employers' ability to impose discipline.

Norms of politeness naturally emerge in the context of sustained cooperation. Most people have substantial psychological inhibitions against being disagreeable and wish to avoid the social sanctions that disagreeableness tends to attract. To the extent employees are invested in the success of the enterprise, they will avoid behavior that clearly tends to impair the work of the firm or repel customers. If these natural forces are not sufficient to keep most employees from being obnoxious, that may well be a reflection of and fitting judgment on the oppressive or inhumane conditions of the workplace—or, put differently, perhaps the employers are just being made to internalize the harms of their policies.<sup>181</sup> It is all to the good that employers should be prompted to take a “high road” strategy, that is, to find sustainable ways of reducing discontent rather than repressing certain expressions of it.<sup>182</sup>

The rights to challenge and appeal apply only to concerted activity, not to purely individual outbursts, and do not affect the employer's power to regulate interactions exclusively among rank-and-file employees. This leaves employers with significant power to control workplace tone and, even more significantly, to avoid liability with workplace discrimination. After all, how

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181. Besides, in the case of intentional mediators, civility is likely to be tactical and controlled, intended to assist in communicating information rather than a generalized casting-off of restraints. One of the most interesting and entertaining reflections on workplace civility was written about a decade ago by Michael C. Duff. See Michael C. Duff, *The Cowboy Code Meets the Smash Mouth Truth: Meditations on Worker Incivility*, 117 W. VA. L. REV. 961 (2015).

182. ZEYNEP TON, *THE GOOD JOBS STRATEGY: HOW THE SMARTEST COMPANIES INVEST IN EMPLOYEES TO LOWER COSTS AND BOOST PROFITS* (2014). This shows how a strategy of high wages and humane management styles can be profitable. Similarly, it should be generally possible to nurture a respectful, cooperative, and appropriately hierarchical workplace through management strategies that maximize the workers' personal stake in creating such an environment.

much actionable workplace discrimination also happens to be concerted activity, engaged in by workers covered by the NLRA, and to constitute challenges to supervisors or managers, or appeals to outside parties? Supervisors, of course, deserve protection against racism, sexism, and the like, but the harms of being discriminated against by an inferior rarely equal those of being discriminated against by an equal or superior. Besides, it is *good* for employers to experience a certain anxiety around complying with both discrimination laws and the NLRA. If they are not being forced into diligence and creativity to accommodate both individual rights and robust practices of solidarity, then one or the other is probably being given short shrift.<sup>183</sup>

The proposed rights also have a very indirect impact on the employer's power to control the customer experience. They will apply to customer interactions only to the extent that customers are objects of an appeal or happen to be present for a challenge. Notably, the employer is not helpless against pretextual uses of the right in these circumstances. For example, if ostensible "appeals" to customers have all the marks of sabotage, intended to drive customers away rather than to enlist them on the workers' side, employers can discipline the guilty employees for "cause," namely, pretextual appeal.<sup>184</sup>

If the proposal leaves employers well-equipped to maintain a non-discriminatory and relatively civil workplace, it keeps their position virtually unchanged as to maintaining effective control over daily operations and guaranteeing basic standards of customer service. Nothing prevents employers from enforcing work-related instructions that may happen to be inconsistent or in tension with certain expressions of the *right to challenge* or the *right to appeal*. For example, if a grocery store supervisor fires an off-duty cashier for haranguing entering customers about the workers' campaign for paid parental leave, he violates the right to appeal. But there is no violation if he fires the cashier for refusing orders to relocate to allow free circulation of foot traffic.

Besides all this, it is critical to remember that these rights apply only to *prepetition workers*. Once it is clear that there is a union positioned to meaningfully advise and advocate, the special protections disappear and are replaced by the more byzantine apparatus of existing Section 7 doctrine. This may seem like small comfort to most employers, who consider it monstrous to have to purchase a decorous workplace at the price of a union or a union

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183. Consider the Court's decision in *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), which announced that Title VII barred employers from excluding female workers from lead-contaminated environments but pointedly refused to guarantee that they would be absolved from tort liability for fetal harm. This is an appropriate ruling, if we assume that employers ordinarily can and should find ways to minimize bodily harm to employees or their children without discriminating based on sex.

184. See *supra* Part IV.B.3.

campaign. But this sense of horrible disproportion is evidence of one of the main problems driving the proposal: unions are now so scarce and unfamiliar that they have become boogeymen that employers can't imagine dealing with, only defeating or succumbing to. But there is no reason, in principle, that a union could not agree to mutually agreeable terms. Indeed, in a sufficiently happy and genteel workplace, a union could be formed for the sole purpose of restoring, by contract, the employer's full freedom to discipline mouthy and obnoxious employees.

Some may wonder why the proposal neglects to protect interactions exclusively among coworkers. There can be no doubt that such activity is crucial to worker empowerment and will ordinarily precede any challenges to management or external appeals. It does not follow that boosting worker awareness of the right to engage in such activities, specifically, should be a strategic priority. For one thing, although it is good and even necessary to protect coworker communications, experience suggests that quite a lot of them would occur without protection. It is a challenge for even the most diligently repressive employer to keep workers from sharing impressions, complaints, and information about work, or even from forming informal pacts and alliances. Relatedly, a worker who knows that the law shields sharp confrontations with supervisors may readily suppose that the law, a fortiori, also protects conversations with coworkers. Finally, current doctrine already picks out modes of coworker interaction for protection in a highly communicable way—for instance, there is something like what this Article calls “sub-rights” to discuss compensation or unionization with coworkers.<sup>185</sup> Perhaps what is needed are more aggressive efforts to spread the word about these sub-rights (assuming they have particular systematic value).

One criticism is applicable to most approaches that do not include statutory reform.<sup>186</sup> So long as NLRA remedies remain weak and Board adjudications slow, many workers, much of the time, will get no benefit from their rights whether they know about them or not. To put it in the terms of this Article, weak remedies and delay make the problem of appreciation essentially insoluble. This argument is powerful but does not show that the proposal would be insignificant. The expected value of rights is indeed diminished by delay and meager remedies, but the certainty of protection increases expected value by increasing the probability of prevailing and reducing delay (because adjudication is easier). The proposal creates

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185. See *supra* Part I.B.2.a.i.

186. See, e.g., Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1162 (2011) (“The NLRB’s election machinery is dramatically too slow, enabling employers to defeat organizing drives through delay and attrition. The NLRB’s remedial regime is also too weak to protect employees against employer retaliation.”) (citation omitted); LYNN RHINEHEART & CELINE MCNICHOLAS, ECON. POL’Y INST., SHORTCHANGED—WEAK ANTI-RETALIATION PROVISIONS IN THE NATIONAL LABOR RELATIONS ACT COST WORKERS BILLIONS 2–3 (2015) (describing the three “structural shortcomings” of the NLRA where penalties are not available for retaliation, workers cannot pursue individual claims, and there is no job protection for pending cases).

certainty with respect to a large range of potentially powerful concerted activities.

Another objection can be made from the point of view of cold political realism. Only a Democratic Board (and a bold one at that) would implement anything like my proposal, which would then be promptly reversed as soon as power returns to the Republicans. This is quite true. The proposal would push administrative discretion to the limit to reject apparently “common sense” limitations on worker prerogatives; it would be met with indignation by employers and their allies, as well as some level of judicial resistance. It would certainly be on the chopping block if Republicans regained control. Even so, there are two things to keep in mind. First, the new doctrine would matter while it remained in force and have effects that outlasted its (probably temporary) repeal—notably irreversibly familiarizing large numbers of workers with Section 7 and the possibility of concerted activity. Second, if the proposal proved workable and effective, it could inspire legislative reforms more resistant to changes in the political tides.

Finally, some may say—bracketing questions about the wisdom, efficacy, or durability of the proposal—that this Article hides the ball. Isn’t this really an argument for substantive strengthening of workers’ rights dressed up as an argument for better communication of those rights? No, it is not. Undeniably, the proposal recognizes that, as a general rule, the stronger substantive rights are, the more likely workers are to learn about them. But the goal of the proposal is not to make Section 7 rights as strong as possible, but rather to get Section 7 to register on the consciousnesses of more nonunion workers by any available doctrinal means. If, by magic, every worker had standing access to credible advisors competent to explain current Section 7 doctrine, substantive reforms might still be necessary—but the current proposal would be hard to explain. For example, it would be hard to understand why disruptive conduct should get such strong protection in an environment where Section 7 is already salient.

### *B. Conclusion*

This Article has proposed rearticulating the Board’s Section 7 jurisprudence to increase useful knowledge of Section 7 rights among those who need it most. The Board, I have argued, should invest prepetition workers with two powerful and reliable rights to concerted activity—the *right to challenge* and the *right to appeal*—that they are particularly likely to hear about, understand, and find both practically useful to themselves and easy to communicate to others. This targeted rearticulation of Section 7 can avoid the legal and practical obstacles attending transmission strategies while making such strategies, if adopted, easier and more effective.

This proposal can only do so much. It provides no cure for weak statutory remedies, procedural delay, general resource scarcity at the Board, or ambient judicial hostility to broad labor rights. If the proposal were

adopted, therefore, there would still be many employers who conclude that Section 7 rights are not worth respecting, and wronged employees who conclude that they are not worth vindicating. What the proposal could do, however, is stir up and nurture enough grassroots experiments in worker solidarity to increase momentum created by the “summer of strikes” and the pro-labor policy of the Biden administration,<sup>187</sup> culminating, it may be hoped, in a comprehensive, worker-friendly reform of federal labor law.

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187. Eric Loomis, *Biden's Labor Report Card: Historian Gives 'Union Joe' a Higher Grade than Any President Since FDR*, GOVERNMENT EXECUTIVE (May 30, 2024), <https://www.govexec.com/management/2024/05/bidens-labor-report-card-historian-gives-union-joe-higher-grade-any-president-fdr/397002> [<https://perma.cc/DF59-Y9PG>].