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Awakening the Spirit of the NLRA: The Future of Concerted Activity Through Social Media

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AWAKENING THE SPIRIT OF THE NLRA: THE FUTURE OF CONCERTED ACTIVITY THROUGH SOCIAL MEDIA

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I. INTRODUCTION

So often we overlook the work and the significance of those who are not in professional jobs, of those who are not in the so-called big jobs. But let me say to you tonight, that whenever you are engaged in work that serves humanity and is for the building of humanity, it has dignity, and it has worth. One day our society must come to see this. One day our society will come to respect the sanitation worker if it is to survive, for the person who picks up our garbage, in the final analysis, is as significant as the physician, for if he doesn’t do his job, diseases are rampant. All labor has dignity.1

– Martin Luther King, Jr.

National labor policy emerged in response to the pervasive labor disputes and unrest during the 18th and 19th centuries.2 After numerous failed legislative efforts, Senator Robert Wagner prevailed and struck a balance between employer and employee interests with the passage of the National Labor Relations Act (“NLRA” or “the Act”), popularly known as “The Wagner Act.”3 The heart of this legislation—its central purpose—was to vindicate the rights of workers who were subjected to conditions that are practically unthinkable in today’s post-industrial American society.4 However, the decrease in pervasive, patently unconscionable working conditions in today’s workplace does not justify rendering the NLRA a toothless and irrelevant piece of legislation. Just as our society, our economy, and our culture evolves, the


2 PATRICIA SEXTON, THE WAR ON LABOR AND THE LEFT: UNDERSTANDING AMERICA’S UNIQUE CONSERVATISM 55–56 (1991) (finding that the numbers of workers killed or injured were much higher in the United States than in Western European countries); see also Pre-Wagner Act Labor Relations, NAT’L LABOR RELATIONS BD., https://www.nlrb.gov/who-we-are/our-history/pre-wagner-act-labor-relations (last visited Nov. 6, 2015).


https://researchrepository.wvu.edu/wvlr/vol118/iss2/9
NLRA, although an aged construct, must evolve to meet the needs of today's workplace and the social media presence of employees. This evolution requires the inclusion of electronic communications and social media in the doctrine of concerted activity. So long as the evils the Act was meant to eradicate persist, the NLRA must remain relevant and true to its original purpose. Although the industrial, legal, and social landscapes have changed over the years, the battle for workers' rights continues and is as alive today as it was a century ago. For the average worker to succeed, the NLRA's protection of concerted activity must evolve along with the workplace to broadly protect employees' social media activity and electronic communications.

Current administrative material and adjudication does not adequately protect the actions of individual employees on social media. Over the past several years, the National Labor Relations Board's ("NLRB" or "Board") General Counsel has issued several memoranda in an effort to stay current with developing forms of communication and how their relationship with the law and the workplace evolve. After the NLRB's articulation of its position on social media, a rule emerged: in short, an employee's social media activity is

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5 See 29 U.S.C. § 151 (2013) ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." (emphasis added)).


7 See infra Part VI.

protected only if that activity solicits a response from a coworker. However, "the question of whether an employee engaged in concerted activity is, at its heart, a factual one" that the Board must decide in the first instance. This rule requiring a response from a coworker fails to recognize a well-established aspect of concerted activity: the action of a single employee seeking to induce group action or bring truly group complaints to the attention of management is protected under the NLRA.

This Note argues that the National Labor Relations Board and the courts should awaken and reinvigorate the spirit of the NLRA and its "sleeping beauties" by applying the concerted-activity doctrine to social-media activity in the same employee-focused manner that they have applied the doctrine to other electronic communication. This intersection of law and technology provides the perfect opportunity for the interpretation of the NLRA to comport with its original purpose: to vindicate and protect the collective, concerted rights of all workers—union and nonunion alike. Specifically, technological advancements and the explosion of social media have provided the Board and the courts a unique opportunity to revisit the doctrine of protected concerted activity in the burgeoning context of social media. As discussed in further detail below, the doctrine of protected concerted activity extends statutory protection to all employees who act together—and even alone in some circumstances—to improve the terms and conditions of employment.

This Note sets the stage by first providing in Part II a broad overview of the labor movement, the NLRA, and the NLRB’s role in interpreting the Act. Part III discusses employees’ key rights under the Act and hones in on the doctrine of protected concerted activity; more specifically, it asks how that doctrine applies to and affects the nonunion workforce in the context of electronic communications and social media. Next, Part IV demonstrates the role of social media in workers’ organizational efforts and the limited instances in which the Board has applied the concerted action doctrine.

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10 Rozlyn Fulgoni-Britton, NLRB Issues Guidance on Social Media Policies and Activity, 21 No. 10 IND. EMP. L. LETTER 5.


12 See infra Parts V–VI; see also, e.g., Samuel Estreicher, Improving the Administration of the National Labor Relations Act Without Statutory Change, 5 FLA. INT'L U. L. REV. 361, 361–63 (2010) (recognizing that the unionization rate in private companies is down from 35% in the 1950s to under 8% in 2010, and arguing for "changes the NLRB can implement on its own, without statutory amendment, to improve its administration of the NLRA in its core functions of resolving questions concerning representation and enforcing the Act's prohibitions against employer and union misconduct").


14 See infra Parts III.B–C.
Part V of this Note recognizes the oscillation in the Board’s precedent in relation to the changes in the demographics of the workplace and worker organization. This wavering and often regressive precedent is a result of anti-union campaigns in both the private and public sectors and the disparate distribution of power between employer and employee. Part VI examines the Board's willingness to adopt worker-focused jurisprudence and argues, among other things, that because of demographic changes in worker organization, the future of the NLRA's relevance lies largely in a broad construction of the doctrine of protected concerted activity when applied in the context of social media and electronic communications.

Finally, this Note concludes that the Board and the courts have shown a proclivity for a worker-focused interpretation of protected concerted activity when applied to the changing way people communicate. Through a broad interpretation of the concerted-activity doctrine as it relates to social media, the Board can awaken the dormant spirit of the NLRA, crafting worker-focused precedent that recognizes the realities of both the labor movement and the workplace, bolstering workers’ right to organize, and providing a counterweight to the erosion of unionization and unions’ rights.

II. THE NATIONAL LABOR RELATIONS ACT

The NLRA is the progeny of the first federal statute that codified the rights of workers, which has been applied to define the ever-changing employment relationship, responsive to changes in labor, industry, and the economy. Framed by the history of the labor movement, Part II.A provides an overview of the NLRA. Part II.B then discusses how the expansive piece of legislation is implemented, interpreted, and enforced by the NLRB.

A. History and Purpose of the NLRA

Workers’ demands for increased and improved rights triggered the labor movement that culminated in statutory protections for all employees. In the summer of 1935, Congress wove the NLRA—now known as the Wagner Act—into the statutory fabric of national labor policy, codifying workers’

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15 See infra Part V.B (discussing the oscillation in the Board’s interpretation of protected concerted activity); see also Joseph E. Slater, Public Workers: Government Employee Unions, the Law, and the State, 1900–1962, at 199–200 (2004).
16 See generally infra Parts IV–V (examining the role of social media in employees’ efforts to organize and concerted action on social media).
rights and providing for enforcement of those rights.\textsuperscript{19} It is a legislative hallmark of the New Deal era that sought to promote industrial stability and peace\textsuperscript{20} and to redress the “inequality of bargaining power” between employer and employee.\textsuperscript{21} At the macro level, these goals were—and are—to be achieved through progressive labor policies that “diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, [by] creat[ing] a National Labor Relations Board, and for other purposes.”\textsuperscript{22} Such policies’ goals were achieved in the workplace by empowering workers and imposing limitations on employers’ more coercive, and relatively unfettered, control of the employment relationship because, among other reasons, the free market simply failed to do so.\textsuperscript{23}


\textsuperscript{20} 29 U.S.C. § 151 (“The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce . . . .”).

\textsuperscript{21} *Id.* (“The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.”).

\textsuperscript{22} National Labor Relations Act, ch. 372, 49 Stat. 449, 449 (1935).

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

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Organizations—both anti- and pro-labor—existed, in some shape or form, in the United States as early as the late-18th\(^2\) and early-19th centuries.\(^2\) After the Civil War, significant technological advancements led to birth of the American Industrial Revolution, which resulted in increased labor tensions and a growing disparity of wealth and power between employers and employees.\(^2\) These conditions set the stage for the bloodiest, “most violent labor history in the Western world.”\(^2\)\(^2\)

Despite a hostile legal environment, dramatic and often violent labor disputes ensued over dangerous and arduous conditions of employment.\(^2\)\(^8\) As such disputes became more prevalent, more violent, and increasingly within the purview of the general public,\(^2\) unions gained traction, union membership grew, and national labor organizations were formed.\(^3\)\(^0\) The first was the National Labor Union, which was formed in 1866 but lasted only six years.\(^3\)\(^1\)

failures in the contractual relationship between the employer and employee); Cass R. Sunstein, *Rights, Minimal Terms, and Solidarity: A Comment*, 51 U. Chi. L. Rev. 1041, 1059 (1984) (arguing that reliance on market forces to reflect employees’ values is misplaced because that reliance fails to consider that unconstrained market forces in labor may produce allocations of power that are undesirable for society); *see also* Maurice Dobb, *STUDIES IN THE DEVELOPMENT OF CAPITALISM* 223 (1947) (“The capitalist system presupposes the complete separation of the labourers from all property in the means by which they can realize their labour . . . The expropriation of the agricultural producer, of the peasant, from the soil is the basis of the whole process.”).

\(^2\) SETH D. HARRIS ET AL., *MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS: CASES AND MATERIALS* 5–6 (2013); *see also* ROBERT R.R. BROOKS, *UNIONS OF THEIR OWN CHOOSING: AN ACCOUNT OF THE NATIONAL LABOR RELATIONS BOARD AND ITS WORK* 37 (1939) (noting that anti-labor organizations date back to 1798, but the first national anti-union employers’ organization was founded after the Civil War, followed by large growth in the 1880s and 1890s).

\(^2\) See, e.g., HARRIS ET AL., *supra* note 24, at 5 (“The first reported labor case in the U.S. was *Commonwealth v. Pullis*, 3 Commons & Gilmore 59 (Mayor’s Ct. 1806) often called the ‘Philadelphia Cordewainers’ Case.’”).

\(^2\) BROOKS, *supra* note 24, at 37 (“This inequality resulted in the piling up of superabundant means of production in the face of inadequate mass consuming power . . . Wages had a constant tendency to lag behind increasing productivity because workers did not have the organized power to drive them up.”).

\(^2\) SLATER, *supra* note 15, at 199; *see also* MELVYN DUBOFSKY & FOSTER RHEA DULLES, *LABOR IN AMERICA: A HISTORY* 151 (8th ed. 2010) (opining that the Homestead steel strike of 1892, in Pittsburgh, was “a battle which for bloodthirstiness and boldness was not excelled in actual warfare”); HARRIS ET AL., *supra* note 24, at 6; Sexton, *supra* note 2, at 55–56 (finding that the numbers of workers killed or injured were much higher in the United States than in Western European countries).


\(^2\)\(^9\) *See* MELVYN DUBOFSKY, *THE STATE AND LABOR IN MODERN AMERICA* xvii (1994).

\(^3\)\(^0\) See, e.g., 2 JOHN R. COMMONS ET AL., *HISTORY OF LABOUR IN THE UNITED STATES* 4–6 (1918).

\(^3\)\(^1\) See, e.g., *id.* at 85.
However, the momentum continued: the American Federation of Labor was formed later in 1886, and by 1924 it had over 2 million members.\textsuperscript{32}

The increasingly violent and divisive labor disputes between employers and employees, coupled with the growing strength of unions, spurred the legislature to react to the readily apparent need to recognize and codify employees’ rights.\textsuperscript{33} Thus, after several legislative efforts, the National Labor Relations Act was born in 1935.\textsuperscript{34} The purpose of the Act was two-fold: (1) to promote industrial stability and peace\textsuperscript{35} and (2) to redress the “inequality of bargaining power.”\textsuperscript{36}

To achieve this broad two-fold purpose, the NLRA grants employees four essential non-exclusive rights that provide them the leverage to meaningfully influence the terms and conditions of their employment: (1) the right to form, join, or assist unions, (2) the right to self-organize, (3) the right to bargain collectively, and (4) the right to engage in concerted activities.\textsuperscript{37} In the changing construct and demographics of the workplace, it is the right of \textit{all} employees to engage in protected concerted activity that is central in their pursuit to change the terms and conditions of employment. As discussed below, Section 7 is the heart of the NLRA, granting sweeping rights to employees—union and nonunion alike.\textsuperscript{38} Section 7 is especially important for the nonunion worker because portions of Section 7 apply to \textit{all} employees, thus granting important rights to the nonunionized workforce.\textsuperscript{39} Ultimately, the NLRA codified what some contend are inherently collective and communal rights,\textsuperscript{40} creating a powerful tool for employees to push back against their historically more coercive and powerful employers.\textsuperscript{41}

\begin{itemize}
\item \textsuperscript{32} \textit{Olson}, \textit{supra} note 28, at 6–7.
\item \textsuperscript{33} \textit{See}, e.g., National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933) (codified as amended at 15 U.S.C. §§ 701–712 (1934) (repealed 1935)).
\item \textsuperscript{35} 29 U.S.C. § 151.
\item \textsuperscript{36} \textit{Id}.
\item \textsuperscript{37} 29 U.S.C. § 157.
\item \textsuperscript{38} \textit{See infra} Part II.B; \textit{see also} 29 U.S.C. § 157.
\item \textsuperscript{39} \textit{See infra} Part III; \textit{see also} 29 U.S.C. § 157.
\item \textsuperscript{40} Staughton Lynd, \textit{Communal Rights}, 62 Tex. L. Rev. 1417, 1423 (1984) (“suggest[ing] that the right of workers to engage in concerted activities . . . is an example of a communal right”).
\item \textsuperscript{41} \textit{See} Anne Marie Lofaso, \textit{Toward a Foundational Theory of Workers’ Rights: The Autonomous Dignified Worker}, 76 UMKC L. Rev. 1, 41–42 (2007) [hereinafter Lofaso, \textit{The Autonomous Dignified Worker}] (describing the coercive power of the employer over the employee); Lynd, \textit{supra} note 40, at 1422–23 (“[C]ommunal rights’ are not the opposite of ‘individual rights.’ Communal rights, whether exercised by groups or individuals, are rights characteristic of a society in which the free development of each has become the condition of the free development of all. The opposite of a communal right is any right which presupposes that what is accessible to one person is therefore unavailable to another.”).
\end{itemize}
B. Implementation, Interpretation, and Enforcement of the NLRA: The National Labor Relations Board

Like many expansive statutory acts, the NLRA provided for the creation of an administrative body, the National Labor Relations Board. The NLRB is "an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative." The Board is further charged with remedying and preventing unfair labor practices committed by employers.

Although employers’ rights and interests have crept into the interpretation and administration of the NLRA, the original language of the Act focused mainly on the imbalance of power and the underrepresented rights of employees. Section 7 of the Act provides that

[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective

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44 29 U.S.C. § 158(a); What We Do, Nat'l Labor Relations Bd., https://www.nlrb.gov/what-we-do (last visited Nov. 6, 2015).
45 See National Labor Relations (Wagner) Act, ch. 372, § 1, 49 Stat. 449, 449–50 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2013)) ("The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce. The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries. Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury . . . ." (emphasis added)). But see National Labor Relations Act, Nat'l Labor Relations Bd., https://www.nlrb.gov/resources/national-labor-relations-act (last visited Nov. 6, 2015) ("Congress enacted the National Labor Relations Act in 1935 to protect the rights of employees and employers, to encourage collective-bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, business and the U.S. economy.").
bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . . .

"Section 7 rights" are the core of employees' rights under the NLRA. Specifically, Section 7 delineates the statutory rights of private-sector employees, including some of the specific types of activities that employees may engage in under the Act's protection. These rights apply to all private sector employees, including nonunion employees. This Note focuses on the portion of Section 7 that empowers all private sector employees by protecting their right to engage in concerted action: "Employees shall have the right to . . . engage in . . . concerted activities for the purpose of . . . mutual aid or protection."

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47 See, e.g., Tradesman Int'l, 338 N.L.R.B. 460 (2002). "Section 7" refers to the public law section number of the NLRA, now codified at 29 U.S.C. § 157 ("Section 7 rights" is the colloquial language used by the courts and the National Labor Relations Board when referring to employees' rights under 29 U.S.C. §157).
50 29 U.S.C. § 152(3) ("The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.").
51 Id.; see also 29 U.S.C. § 157; Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978) (finding that all employees'—including nonunion employees—activity is protected under the doctrine of "mutual aid or protection" when "seek[ing] to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employer-employee relationship"); Fulgoni-Britton, supra note 10 ("Some employers make the mistake of assuming that the National Labor Relations Act (NLRA) and the NLRB's actions don't affect them because they aren't unionized. However, the NLRA gives both union and nonunion employees the right to engage in protected concerted activities. Generally, two or more employees acting together to address a concern about terms or conditions of employment constitutes protected concerted activity. Additionally, a single employee who (1) acts on behalf of others[;] (2) initiates, induces, or prepares for group action[;] or (3) discusses the matter with coworkers can also be engaged in protected concerted activity.").
Section 8(a) of the NLRA establishes boundaries and guidelines at the intersection of the employers’ business interests and the employees’ interests in asserting their Section 7 rights.\(^{53}\) Section 8(a) prohibits a range of employer conduct by making it “an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].”\(^{54}\) Therefore, if an employee's activity is considered to be protected concerted activity under Section 7, the employer commits an unfair labor practice if it knowingly interferes with, restrains, or coerces the employee in the engagement of those activities.\(^{55}\)

If a charge alleging an unfair labor practice is filed with the appropriate regional office, the Regional Director conducts an investigation and determines whether formal action should be taken against an employer.\(^{56}\) After the Regional Director files a complaint and notice of hearing, an NLRB Administrative Law Judge (“ALJ”) presides over an adjudication and issues a decision on behalf of the Board.\(^{57}\) If the ALJ finds that the employer committed an unfair labor practice, the Board will order a remedy, which generally includes a cease and desist order regarding the practice that was in violation of the NLRA.\(^{58}\) The employer may appeal, and the appellate courts have the authority to “enforce, set aside or remand all or part of the case.”\(^{59}\) The United States Supreme Court serves as the court of last resort.\(^{60}\)

As discussed below, the fluctuations in the makeup of the Board—often along political party lines—creates a somewhat unstable and unpredictable legal atmosphere.\(^{61}\) At the same time, the Board has the autonomy to interpret the NLRA in various—sometimes inconsistent—ways so long as its interpretation is reasonable.\(^{62}\) Because the doctrine of concerted activity is widely applicable and expansive, it is central to many cases that come before the Board.\(^{63}\) Thus, few labor law doctrines have suffered from the fluctuation in Board composition and inconsistent treatment like the doctrine of

54 Id.
55 Id.
57 Id.
58 Id.
59 Id.; see also 29 U.S.C. § 160(f).
60 Unfair Labor Practice Process Chart, supra note 56.
61 See infra Part V.B.
63 See generally Protected Concerted Activity, NAT’L LABOR RELATIONS BD., https://www.nlrb.gov/rights-we-protect/protected-concerted-activity (last visited Nov. 6, 2015) (providing a map of recent concerted activity cases around the country).
protected concerted activity.64 Before examining how the doctrine of concerted activity can be interpreted to comport with the purpose of the Act and expand employees’ rights, a discussion of the rule of protected concerted activity, its current interpretation, and its application to various circumstances provides useful guidance.

III. EMPLOYEES’ RIGHTS UNDER THE NLRA AND THE RULE OF PROTECTED CONCERTED ACTIVITY

Although the NLRA is often associated with the rights, regulations, and operations of unions, there are provisions within the Act that extend to protect the rights of all employees, including nonunion employees.65 These provisions are the sleeping beauties of the NLRA.66 As such, many employees—especially nonunion employees—do not know these provisions exist and, thus, do not know the extent of their legal rights.67 In fact, most employees harbor grave misconceptions as to their legal rights within the workplace.68 These misconceptions are due to a number of reasons, such as employer and


65 29 U.S.C. §§152(3), 157 (2013); see also Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978) (finding that all employees’ (including nonunion employees) activity is protected under the doctrine of “mutual aid or protection” when “seek[ing] to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employer-employee relationship”); Rozlyn Fulgoni-Britton, supra note 10.


67 See Pauline T. Kim, Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World, 83 CORNELL L. REV. 105, 136 (1997). Unions have representatives who educate employees about their rights and bargain on their behalf; nonunion employees are left to their own perceptions in a complex legal framework that is anything but intuitive. Moreover, at-will-employee perceptions—or misconceptions—have been recognized to be the basis of psychological contracts between employer and employee. Jill Kickul & Scott W. Lester, Broken Promises: Equity Sensitivity as a Moderator Between Psychological Contract Breach and Employee Attitudes and Behavior, 16 J. BUS. & PSYCHOL. 191, 192 (2001). These non-legal contracts create a belief that an employer is bound to act as he has in the past or in accordance with a promise. See Elizabeth Wolfe Morrison & Sandra L. Robinson, When Employees Feel Betrayed: A Model of How Psychological Contract Violation Develops, 22 ACAD. MGMT. REV. 226, 228 (1997).

68 See Richard B. Freeman & Joel Rogers, What Workers Want 119 (1999) (finding that 83% of employees thought that they could only be fired for cause); see also Kim, supra note 67 at 134 (survey data showing a misunderstanding by employee-respondents of several legal rules governing the employment relationship).
employee ignorance of the law, employers' blatant disregard of the law, or intentional misrepresentation of the law.  

For example, many employees are led to believe that they cannot discuss their wages with coworkers. Such employment policies—whether implicit or explicit—are known as "wage gag rules." However, these policies fly in the face of well-established legal precedent and the fundamental rights established by Section 7. Employers cannot prohibit or chill employees' exercise of their statutory rights, and it is undisputed that wages are one of the most fundamental terms and conditions of employment. Accordingly, employers violate the Act when they prohibit employees from discussing wages and also when they discipline employees for breaking that unlawful work policy. Employees' rights, especially in the nonunionized workplace, suffer a similar misunderstanding and dormancy. Employees have federal statutory rights under the NLRA that extend beyond the limited protections offered by other federal and state employment protections in at-will employment relationships. As fully discussed below, all private sector employees have the right to take concerted action for mutual aid or protection.

Part III.A begins by discussing the interpretation of employees' statutory right to communicate about the terms and conditions of their employment. Part


70 Id. at 171 (noting that the practice of employer pay secrecy rules is common and often illegal); see also Sacha Cohen, Shhh, They're Talking Salary, USA TODAY (Dec. 20, 2002, 5:07 PM), http://usatoday30.usatoday.com/money/jobcenter/jobhunt/salary/2002-12-20-salary-talk_x.htm.

71 Bierman & Gely, supra note 69, at 169 ("[T]he right of employees to talk to each other about pay is as fundamental as any activity intended to receive NLRA protection."); see also, e.g., NLRB v. Main St. Terrace Care Ctr., 218 F.3d 531, 534 (6th Cir. 2000); Fredericksburg Glass & Mirror, Inc., 323 N.L.R.B. 165, 173–74, 179 (1997).

72 See, e.g., Republic Aviation Corp. v. NLRB, 324 U.S. 793, 796 n.1 (1945); Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998), enforced, 203 F.3d 52 (D.C. Cir. 1999) (holding that an employer commits an unfair labor practice in violation of Section 8(a)(1) when it maintains a rule that "would reasonably tend to chill employees in the exercise of their Section 7 rights").


III.B hones in on the rule of protected concerted activity. Part III.C lays out the limitations of this doctrine. Finally, Part III.D examines how the Board and the courts have applied the doctrine of concerted activity to various forms of communication, which provides some framework for its application to social media and electronic communications.

A. Employees' Right to Communicate

In any political or social movement, communication among members is essential to its success. The same is true in the workplace; communication among and between employees is critical to the success of any organizing campaign or concerted goal. Thus, employees’ right to communicate with each other about unionization, terms and conditions of employment, and topics of mutual interest have long been pitted against employers’ interests to control their property and limit employee communications. Communication in the workplace is an aspect of the employment relationship that has been at the center of countless cases, and the only consensus is that neither the employer’s right to limit communication nor the employee’s right to communicate is absolute. The Court has found that “the validity of employer rules restricting union solicitation or distribution of union literature on plant premises depends upon ‘an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments.’”

In Republic Aviation Corp. v. NLRB, the Supreme Court developed the basic and longstanding framework to achieve a balance between the employees’ Section 7 rights and employers’ property interests. The Court addressed several consolidated cases arising out of similar circumstances: employers banning union solicitation on their property. Republic Aviation expressly recognized that employees have a right to communicate about unionization and exercise their Section 7 rights. Considering these interests, the Court developed a shifting presumption test that balances the employer’s and employee’s interests: “It is therefore within the province of an employer to

77 See infra text accompanying notes 86–92.
79 324 U.S. 793.
80 See id.; see also Beth Isr. Hosp. v. NLRB, 437 U.S. 483, 491 (1978); NLRB v. Magnavox Co. of Tenn., 415 U.S. 322, 325 (1974) (“The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees. . . . [B]anning of [employee solicitations at work] might seriously dilute [Section] 7 rights.”).
81 See Republic Aviation, 324 U.S. 793.
82 Id. at 803.
promulgate and enforce a [non-discriminatory] rule prohibiting union solicitation during working hours," and such rules will be presumptively valid.\textsuperscript{83} However, that presumptive right is tempered by the recognition that "time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property."\textsuperscript{84} Therefore, any rule that unreasonably impedes employee self-organization during non-working time is presumed to be unlawful absent evidence that the rule is "necessary in order to maintain production or discipline."\textsuperscript{85}

The Board has furthered its well-established shifting presumption framework by extending it to presumptively prohibit an employer's restriction of employees' solicitations regarding Section 7 rights during non-work time and in non-work areas.\textsuperscript{86} However, that same presumption does not necessarily extend to written material.\textsuperscript{87} Rather, as long as employees have reasonable alternative means of distribution, employers can presumptively prohibit distribution of written solicitations at work, such as pamphlets, leaflets, and cards, even during non-work time.\textsuperscript{88} In short, employees' Section 7 communications are presumptively protected during non-work time but are presumptively unprotected during work time. In contrast, non-employee solicitations or attempts at communication with employees do not enjoy the same level of protection as employee speech.\textsuperscript{89}

As discussed above, Republic Aviation recognized employees' right to communicate regarding Section 7 issues on their employer's property during non-work times. However, in Lechmere, Inc. \textit{v. NLRB},\textsuperscript{90} the Court limited its holding in Republic Aviation by recognizing an employer's right to forbid non-employee union organizers from soliciting on the employer's private property when other reasonable alternatives exist.\textsuperscript{91} The synthesis of these two doctrines is that (1) an employer's property rights generally trump non-employees' right to communication in the workplace as long as there are not "unique obstacles"
to accessing employees, and (2) employee communications regarding Section 7 rights are generally afforded greater protection and deference, notwithstanding this doctrine's effect on non-employee communications. Under this framework, the distinction between employee communications and non-employee communications is significant. Thus, the Board and courts alike strive to strike a balance between employees' statutory rights under the NLRA and the employer's property interests, but when it comes to limiting employee communications, the stakes are high.

B. Protected Concerted Activity

Employee activity for the "mutual aid and protection" of coworkers must meet three elements to be protected under the NLRA: (1) it must be concerted activity, (2) it must be for a legitimate purpose, and (3) it must be achieved by legitimate means. Under Section 7, the activity must be "concerted" before it can be "protected," but not all concerted activity is protected under the purview of the NLRA. Employees acting concertedly for mutual aid or protection generally seek to further a group's—or individual employee's—interests that stem from a specific grievance pertaining to the terms or conditions of their joint employment. The terms and conditions of employment that employees may seek to improve under the Act include, but are not limited to, "wages, benefits, working hours, the physical environment, dress codes, assignments, responsibilities, and the like." As one may assume from the plain language, concerted activity includes instances where multiple

92 *Id.* at 535, 538, 540–41.
93 Republic Aviation Corp. v. NLRB, 324 U.S. 793, 796 (1945).
95 See *id.;* Metro. Dist. Council & Vicinity United Bhd. of Carpenters & Joiners v. NLRB, 68 F.3d 71, 75 (3d Cir. 1995); Leslie Homes, Inc., 316 N.L.R.B. 123, 125, 129 (1995); see also UFCW v. NLRB (Oakland Mall II and Loehmann's Plaza II), 74 F.3d 292, 298–99 (D.C. Cir. 1996).
97 29 U.S.C. § 157; New River Indus. v. NLRB, 945 F.2d 1290, 1295 (4th Cir. 1991) ("[W]hen employees collaborate to criticize matters that are not related to the mutual aid and protection of employees, this activity is not protected 'concerted activity.'").
98 *See generally* NLRB v. Wash. Aluminum Co., 370 U.S. 9 (1962) (finding that nonunion, unorganized factory workers' conduct was protected concerted activity when they walked out to protest extremely cold working conditions because they were acting for mutual aid and protection).
99 *New River*, 945 F.2d at 1294. (recognizing the importance of a worker-focused interpretation of the Act).
employees are acting together to achieve a common employment-related goal.\(^{100}\) However, as discussed below, it extends to the less obvious as well.

Although the framework of protected concerted activity is conceptually simple, misconceptions of industrial life and the relationships between employees and employers have proven to be a stumbling block for the courts. Such misconceptions result in an application of the doctrine that fails to reflect the reality of the workplace. Although Judge Learned Hand has been accused of being out of touch with reality in some instances,\(^{101}\) he hit the mark on the realities of the workplace while so many other jurists had difficulty grasping the manifest reality of concerted activity in its actual context:\(^{102}\)

When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts. So too . . . [when] the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased.\(^{103}\)

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\(^{100}\) Id.

\(^{101}\) See Nina Totenberg, Notes on a Life, in The Legacy of Ruth Bader Ginsburg 3–5 (Scott Dodson ed., 2015) (describing how Judge Learned Hand did not hire Justice Ginsburg as a law clerk because he could not swear in front of a woman, yet, "[a]s it turned out though, Ginsburg's boss, Judge Palmieri, would often give Hand a ride home from work, and Hand would sit in the front seat singing sea shanties and swearing up a storm. Ginsburg, sitting in the backseat, was transfixed. She finally asked why, if Hand said 'whatever came into his head' in the car, he had refused to consider her as a law clerk on grounds that he wouldn't feel free to speak without censoring himself? Replied Hand: 'Young lady, I am not looking at you.'").

\(^{102}\) See Stephan Thernstrom, Poverty and Progress: Social Mobility in a Nineteenth Century City 1 (9th ed. 1994) (quoting Frederick Law Olmstead (1859)) ("Men of literary taste . . . are always apt to overlook the working-classes, and to confine the records they make of their own times, in great degree, to the habits and fortunes of their own associates, and to those of people of superior rank to themselves, of whose sayings and doings their vanity, as well as their curiosity, leads them most carefully to inform themselves. The dumb masses have often been so lost in this shadow of egotism, that, in later days, it has been impossible to discern the very real influence their character and condition has had on the fortune and fate of the nation.").

\(^{103}\) NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505–06 (2d Cir. 1942).
Nevertheless, as articulated in *Interboro Contractors Inc.* the participation of two or more employees towards a common goal is not dispositive in determining whether employees' actions were protected concerted activity, as the term may suggest. The doctrine extends to the less obvious. Enforcing the Board's *Interboro* doctrine, the United States Supreme Court has held that individual employees engage in protected concerted activity when they are honestly and reasonably asserting bargained-for privileges under a collective-bargaining agreement to contradict the directions or orders of their employer. In the nonunion workplace, the question becomes when, if ever, a nonunion employee's individual actions are protected concerted activity. The Board addressed this question in *Meyers Industries, Inc. v. NLRB* and its progeny. These cases established three important standards for determining whether individual employees' activity in a nonunion workforce is concerted: (1) when "[the activity] be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself"; (2) in "circumstances where individual employees seek to initiate or induce or to prepare for group action"; and (3) when "individual employees bring[] truly group complaints to the attention of management."

Further, the Supreme Court found no statutory or public policy support for the "view that employees lose their protection under the 'mutual aid or protection' clause when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." In dicta, the Court recognized, however, that "some concerted activity bears a less immediate

104 157 N.L.R.B. 1295, 1298 (1966) (recognizing an individual employee's honest and reasonable invocation of a collectively bargained right to be concerted activity), enforced, 388 F.2d 495 (2d Cir. 1967).

105 NLRB v. City Disposal Sys. Inc., 465 U.S. 822, 840 (1984). *But see* NLRB v. City Disposal Sys. Inc., 465 U.S. 822, 842 (1984) (O'Connor, J., dissenting) ("Although the concepts of individual action for personal gain and 'concerted activity' are intuitively incompatible, the Court today defers to the Board's judgment that the *Interboro* doctrine is necessary to safeguard the exercise of rights previously won in the collective bargaining process. Since I consider the *Interboro* doctrine to be an exercise in undelegated legislative power by the Board, I respectfully dissent.").


107 *Meyers I*, 268 N.L.R.B. at 497.


109 *Id.*

110 Eastex, Inc. v. NLRB, 437 U.S. 556, 565 & n.14 (1978) (noting that the "Norris-LaGuardia Act expresses Congress' recognition of the 'right of wage earners to organize and to act jointly in questions affecting wages, conditions of labor, and the welfare of labor generally'" (quoting S. REP. NO. 72-163, at 9 (1932))).
relationship to employees’ interests as employees than other such activity. We may assume that at some point the [employee-employer] relationship becomes so attenuated that an activity cannot fairly be deemed to come within the ‘mutual aid or protection clause.’”  

In a progressive interpretation of protected concerted activity, both the Third and Fourth Circuits have recognized the Board doctrine that conversations alone may constitute concerted activity if the conversation “had some relation to group action in the interest of employees.” Although this position was not exempt from criticism by sister circuits, it has been overwhelmingly accepted despite efforts to limit its reaches.

The current standard used to determine whether an individual, nonunion employee’s action is protected concerted activity, as articulated in Meyers I and Meyers II, asks whether the employee’s activity was “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” The Board clarified in Meyers II that the “definition of concerted activity . . . encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” Further, it may be an unfair labor practice for an employer to preemptively terminate an employee because of a concern that he will engage in concerted activity in the future.

In sum, the activity must be concerted, it must not be too far removed from the employment relationship, and it must be engaged in by one or more employees on behalf of their coworkers to be protected. Concerted action is

111 Id. at 567–68.
112 Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964); see also Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969) (“[A]ctivity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much ‘concerted activity’ as is ordinary group activity.”).
113 Pelton Casteel, Inc. v. NLRB, 627 F.2d 23, 28 (7th Cir. 1980) (citing Indiana Gear Works v. NLRB, 371 F.2d 273, 276 (7th Cir. 1967)); see also Signal Oil & Gas Co. v. NLRB, 390 F.2d 338, 342–43 (9th Cir. 1968) (“[P]ublic venting of a personal grievance, even a grievance shared by others, is not a concerted activity.”).
114 See El Gran Combo de P.R. v. NLRB, 853 F.2d 996, 1004 (1st Cir. 1988) (following Mushroom Transp., 330 F.2d 683); Roadway Express v. NLRB, 700 F.2d 687, 693 (11th Cir. 1983) (same), vacated for other reasons, 446 U.S. 920 (1984); Pioneer Nat. Gas Co. v. NLRB, 662 F.2d 408, 418 (5th Cir. 1981) (same); see also Alleluia Cushion Co., 221 N.L.R.B. 999 (1975), overruled by Prill v. NLRB, 755 F.2d 941, 958 (D.C. Cir. 1986) (expanding the doctrine of concerted action by presuming that employees would have authorized another employee to speak on their behalf).
116 Meyers II, 281 N.L.R.B. at 887.
driven by communal interest in the terms and conditions of employment; it spurs improvement of the employment relationship through the power of employee solidarity. The power and influence of group solidarity creates the individual interest for the non-aggrieved employee to join his coworker in his struggle. After all, solidarity is the heart of any labor movement; an "injury to one is an injury to all."

Yet, there are limits to the protection of concerted activity.

C. The Bounds of Protection

Consistent with the adage, "[y]our right to swing your arms ends just where the other man's nose begins," employees' right to engage in protected concerted activity is not without limits. An employee's right to engage in protected concerted activity ends—or extends to—where federal law, state law, or the terms of a collective-bargaining agreement begin. Employees' activity will lose protection of the Act if it is considered to be "opprobrious conduct," or if it is openly disloyal and disparaging of the business itself. As a general matter, unprovoked profane, defamatory, threatening, or malicious language is likely to fall outside of the protection of the Section 7.

To determine whether an employee's conduct loses protection under the opprobrious prong, the Board established a four-factor test in Atlantic Steel

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119 *Kim Moody, An Injury to All: The Decline of American Unionism* 346 (1988) (recognizing the prevalence of this saying across labor movements, and arguing that it represents a labor ethic that "takes social responsibility for all working people").

120 See infra Part III.C.

121 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2791 (2014) (Ginsburg, J., dissenting) (finding use for an adage that entered scholarly legal discourse in the context of free speech in Zaechariah Chafee, Jr.'s article *Freedom of Speech in War Time*, 32 Harv. L. Rev. 932, 957 (1919)).


125 See id.; see also Honda of Am. Mfg., Inc., 334 N.L.R.B. 746, 748–49 (2001) (distinguishing cases where opprobrious language was impulsive or provoked, finding them not to lose protection).
Co. 126 to guide the judiciary and the public in the analysis. 127 This test is “generally applied to an employee who has made public outbursts against a supervisor.” 128 To determine whether the speech is protected, the Board has considered the following four factors: “(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.” 129

Courts use the test established in NLRB v. Local Union No. 1229, IBEW (Jefferson Standard) 130 to determine whether employees’ communications constitute a “sharp, public, disparaging attack upon the quality of [a] company’s product and its business policies, in a manner reasonably calculated to harm the company’s reputation and reduce its income.” To determine whether concerted activity remains protected under the principles of Jefferson Standard, the Board set forth a two-part test: (1) the communication must be related to an ongoing labor dispute between employer and employee; and (2) “the communication [must] not [be] so disloyal, reckless or maliciously untrue as to lose the Act’s protection.” 131 Because these standards apply to all employee communications in the context of concerted action, they also apply to similar circumstances, analogous electronic communications, and in the context social media.

D. The NLRB’s Position on Analogous Modalities of Communication

Before exploring how the existing precedent of the rule of protected concerted activity applies to social media and postulating on its future, it is valuable to look at how the Board has treated other forms of communication in the workplace. Generally, state laws grant employers a “basic property right” to “regulate and restrict employee use of company property.” 132 However, in a

126 245 N.L.R.B. 814, 816 (1979). In Atlantic Steel, the Board disagreed with the ALJ and found that although an employee called his supervisor a “lying s.o.b.,” as he was discussing a grievance, the employee’s “offhand complaint” was not protected activity. Id. at 817. Therefore, after considering the four-factor test, the Board concluded, that the employee was engaged in protected concerted activity. Id. at 814, 816.
127 Id. at 816.
128 See AGC Memorandum I, supra note 9.
129 Atl. Steel Co., 245 N.L.R.B. at 816.
130 346 U.S. 464, 471 (1953) (introducing what is now the well-settled Jefferson Standard test). In this case, employee-technicians disparaged the quality of the employer’s product by disseminating handbills that failed to mention the ongoing labor dispute. Id. at 466–68. The Board found that the employees were fired for cause, and the Court affirmed the Board’s original holding. Id. at 475–78.
132 See, e.g., Union Carbide Corp. v. NLRB, 714 F.2d 657, 663–64 (6th Cir. 1983).
line of recent decisions, the Board has struggled with the application of this property right analysis when applied to electronic communications.\textsuperscript{133} As discussed further below,\textsuperscript{134} in Purple Communications, Inc.,\textsuperscript{135} the Board recently overturned its prior holding on a question of first impression—whether employees have a right to use the employer’s email system for Section 7 purposes—and held that employees have a presumptive right to use their employer’s email system to exercise their Section 7 rights if they had previously been granted access to the email system for work purposes.\textsuperscript{136} These recent decisions regarding electronic communications may seem more analogous in the context of social media, but looking at the Board’s prior precedent as to other forms of communication also provides useful guidance.

As discussed above, it is well-established that employees’ “time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee’s time to use as he wishes without unreasonable restraint, although the employee is on company property.”\textsuperscript{137} Yet, as discussed above, some restrictions do exist as to employees’ use of company property during that time, even for purposes generally protected under Section 7.\textsuperscript{138}

Considering various forms of communication under the framework established in the seminal case Republic Aviation,\textsuperscript{139} the Board has recognized that an employer’s property interests outweigh employees’ exercise of their statutory right to communicate for purposes of organizing under the following circumstances: employees’ use of their employer’s television to show union videos in the break room,\textsuperscript{140} employees’ use of their employer’s bulletin

\textsuperscript{133} Compare Register-Guard, 351 N.L.R.B. 1110, 1110 (2007) (holding that “employees have no statutory right to use [their employer’s] e-mail system for Section 7 purposes”), enforced in relevant part and remanded sub. nom. Guard Publ’g Co. v. NLRB, 571 F.3d 53 (D.C. Cir 2009), with Purple Comm’ns, Inc., 361 N.L.R.B. No. 126, 2014 WL 6989135, at *1 (2014) (overruling the holding of Register-Guard).

\textsuperscript{134} See infra Part V.B.3.

\textsuperscript{135} 361 N.L.R.B. No. 126, 2014 WL 6989135 (2014).

\textsuperscript{136} Id. at *1 (overturning Register-Guard and the contention that the “Board has consistently held that there is ‘no statutory right . . . to use an employer’s equipment or media,’ as long as the restrictions are nondiscriminatory” (quoting Register-Guard, 351 N.L.R.B. at 1114)).

\textsuperscript{137} Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945) (quoting Peyton Packing Co., 49 N.L.R.B. 828, 843 (1943)).

\textsuperscript{138} See id. at 803 (recognizing the employer’s property rights sometime trump an employee’s Section 7 activity).

\textsuperscript{139} 324 U.S. 793; see supra Part III.A.

\textsuperscript{140} Mid-Mountain Foods, Inc., 332 N.L.R.B. 229, 230 (2000) (holding that employees had no statutory right to use the television in the break room to show a pro-union video during non-work time), enforced, 269 F.3d 1075 (D.C. Cir. 2001).
boards,\(^1\) employees’ use of their employer’s copy machine,\(^2\) employees’ use of company phones,\(^3\) and employees’ use of the company public address system.\(^4\) However, as mentioned above, the Board has recognized a statutory right for employees to use the employer’s email system, so long as they have already been granted access to email for work purposes.\(^5\)

IV. THE ROLE OF SOCIAL MEDIA IN EMPLOYEES’ EFFORTS TO ORGANIZE

A number of cases where employees have used social media to engage in concerted activity have been before the Board. \textit{Knauz BMW}\(^6\) was the Board’s first decision regarding terminations for conduct on social media. In that case, the Board relied upon the standards recognized in \textit{Mushroom Transportation Co. v. NLRB}\(^7\) and the \textit{Meyers} cases to determine whether the employee’s Facebook post was a conversation that sought to induce group action. In \textit{Knauz}, the specific question was whether a BMW salesman’s Facebook posts qualified as protected concerted activity.\(^8\) Two posts were at issue: one post was about the quality of food provided at a work event and the other involved photos of the company’s Land Rover that a 13-year-old drove into a pond while under the supervision of a coworker.\(^9\) The ALJ found that the employee’s Land Rover photos were not protected because they had nothing to do with the terms and conditions of employment.\(^10\) However, the

\(^{11}\) NLRB v. Southwire Co., 801 F.2d 1252, 1256 (11th Cir. 1986) (“There is no statutory right for an employee or a union to use an employer’s bulletin board.”); Eaton Techs., Inc., 322 N.L.R.B. 848, 853 (1997) (same).

\(^{12}\) Champion Int’l Corp., 303 N.L.R.B. 102, 109 (1991) (stating employer has “a basic right to regulate and restrict employee use of company property,” in this case, a copy machine).


\(^{14}\) Health Co., 196 N.L.R.B. 134, 135 (1972) (noting that an employer could refuse pro-union employees to use the public address system to respond to anti-union broadcasts).


\(^{16}\) 358 N.L.R.B No. 164 (Sept. 28, 2012).

\(^{17}\) 330 F.2d 683 (3d Cir. 1964) (holding that conversations alone, without action, may be protected concerted activity); see infra Part V.B.1 (discussing \textit{Mushroom Transportation} in detail).


\(^{19}\) \textit{Knauz BMW}, 358 N.L.R.B. No. 16 at *16.

\(^{20}\) Id. at *1.

\(^{21}\) Id. at *18.
ALJ found the Facebook postings about the food to be protected because he had voiced the same concerns in the past and because the food choices could affect the employee’s commission from the sale of luxury vehicles at the event.\textsuperscript{152} Therefore, the ALJ considered it to be a legitimate gripe that could affect the terms and conditions of employment of all employees. However, the Board punctured on review and decided the case on narrow grounds, finding no reason to address the posts about the food because the post with the Land Rover photos was sufficient to terminate his employment.\textsuperscript{153}

In another case, \textit{Three D, LLC},\textsuperscript{154} one employee expressed her discontent with her employer via Facebook because she owed money in taxes and blamed it on incorrect tax withholding calculations by one of the owners of Triple Play Sports Bar and Grille.\textsuperscript{155} Other employees joined in the exchange, which became rather colorful.\textsuperscript{156} At one point, an employee referred to the owner as “[s]uch an asshole.”\textsuperscript{157} The Board reviewed the case under \textit{Jefferson Standard} and \textit{Linn v. United Plant Guard Workers},\textsuperscript{158} and found that the discharges were unlawful because the employees were discussing workplace complaints.\textsuperscript{159} Although the comments were colorfully critical, they did not disparage the employer’s product.\textsuperscript{160}

Further, many employers create social media policies that employees are required to follow.\textsuperscript{161} In several cases, the Board has addressed these and similar policies that act to chill employees’ exercise of their Section 7 rights.\textsuperscript{162} Generally, the policies must be pointedly crafted and not overly broad or ambiguous for two reasons: (1) so that a reasonable employee would not believe that the policy prohibited him from discussing statutorily protected communications such as wages, benefits, or other terms and conditions of

\textsuperscript{152} \textit{Id.} at *16.
\textsuperscript{153} \textit{Id.} at *1.
\textsuperscript{154} 361 N.L.R.B. No. 31 (Aug. 22, 2014).
\textsuperscript{155} \textit{Id.} at *1–2.
\textsuperscript{156} \textit{Id.} at *2. The initiating employee posted on Facebook: “Maybe someone should do the owners of Triple Play a favor and buy it from them. They can’t even do the tax paperwork correctly!!! Now I OWE money... Wtf!!!” \textit{Id.} Other employees, and even customers, chimed in, saying things like “I FUCKING OWE MONEY TOO!” and “You owe them money... that’s fucked up.” \textit{Id.}
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} 383 U.S. 53 (1966).
\textsuperscript{159} \textit{Three D}, 361 N.L.R.B. No. 31 at *7.
\textsuperscript{160} \textit{Id.}
employment, even with nonemployees and (2) so that failure to limit the scope of such policies by expressly exempting privileges granted by Section 7 does not mislead employees.\(^\text{163}\) In light of these requirements, the Board and the courts have shown a proclivity to strike down employer social media policies that are ambiguous and could be reasonably read by an employee to be coercive or have a chilling effect on the employees’ exercise of their Section 7 rights.\(^\text{164}\)

For example, in \emph{Knauz BMW}, the social media policy in the employee handbook read as follows:

(b) Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.\(^\text{165}\)

The Board agreed with the ALJ’s finding that the policy in the employee handbook violated Section 8(a)(1). Although it does not explicitly prohibit Section 7 activity, a reasonable employee could read the “courtesy” rule to restrict the exercise of their Section 7 rights: “object to their working conditions and seek the support of others in improving them.”\(^\text{166}\)

The guidance of prior precedent in the context of social media and electronic communications poses the Board with the challenge of applying a general doctrine to another specific form of communication. However, social media is different. Employer property concerns in this form are practically moot in light of the decision in \emph{Purple Communications}, and there is a colorable argument that social media communication should be treated as electronic communication with even greater protections. The same tests that determine the extent of protection based upon the content of the communication apply to concerted action in social media.

V. \textsc{Analysis: May the Odds Be Ever in the Employer’s Favor?}

The success of the labor movement can be attributed to one general principle: solidarity. Unlike most institutions in a predominantly capitalist society, communal values are central to the philosophy and success of the labor movement.\(^\text{167}\) The manifestation of solidarity in the workplace is the action of


\(^{165}\) \textit{Id.} at *1.

\(^{166}\) \textit{Id.}

\(^{167}\) \textit{See Lynd, supra} note 40, at 1423.
one employee spurred by the grievance of another. This is the base for any movement to improve the terms and conditions of employment. Diametrically opposed to the interests of the worker, an employer is generally focused on individual gains, profits, efficiency, and managerial freedom, not necessarily the well-being of his employees. Thus, a schism of interests, power, and coercion exists between the employers and employees. As a result of this tension, the labor movement arose from the depths of inhumane conditions, mutual strife, and experiences of workers. In turn, the labor movement spurred the promulgation of legislation protecting the rights of workers.

Considering the tumultuous history of the labor movement, it comes as no surprise that employers are pushing back against employees’ use of electronic communications to organize. In fact, there is a long history of contentious litigation focused on the precise issue of employee communications. The distribution of power and influence in the employment relationship makes one voice much louder than the other. However, as the Board has demonstrated, the loudest argument is not always the correct argument. Yet, in this context, the loud argument has been successful enough to slowly erode much of workers’ rights—or their understanding and knowledge of those rights—rendering the NLRA a toothless and dormant piece of legislation in the context of nonunionized, private sector employment. Thus, the Board and the courts should awaken and reinvigorate the spirit of the NLRA and its sleeping beauty—the doctrine of concerted activity—through an employee-focused approach in the context of social media activity, just as the Board has applied this doctrine to electronic communications in Purple Communications.

169 See Julina Guo, A Backgrounder: The Market Basket Strike, ONLABOR (Oct. 28, 2014), http://onlabor.org/2014/10/28/a-backgrounder-the-market-basket-strike/ (explaining nonunion employees organized and informed over 25,000 employees via Facebook and Twitter about the ouster of a widely admired CEO of Market Basket groceries, which led to widespread protests and strikes, and eventually the reinstatement of the admired CEO, who eventually bought the company).
170 See Gottesman, supra note 23, at 76–77 (recognizing an information imbalance between employers and employees).
171 See supra Part II.A.
172 See supra Part II.B.
173 See Appleby & Gordon, supra note 161.
175 See supra note 23, at 76–77 (recognizing an information imbalance between employers and employees).
A. The Shift in Worker Organization and the Disparate Distribution of Power

[Instead of clamping down on the labor movement, Americans “should be extremely grateful to unions,” which had given workers a sense of decency by reducing poor working conditions “and by doing so have helped the country and all the workers.”177

Employers are inherently a much more coercive and powerful force than employees.178 Further, employers generally share one simple common goal: to be as profitable as possible. On the other hand, employees’ interests are much more diverse and are subject to the industry in which they work. Therefore, the collective power and influence possessed by employer organizations is inherently much greater.179 The number of amici briefs filed in Purple Communications,180 which is discussed in detail below, is a fitting example of the disparity in power between employer and employee, the very thing the NLRA is meant to alleviate. In Purple Communications, there were 12 amici briefs filed in favor of upholding Register-Guard and only 3 that argued for it to be overturned; yet, the Board rejected the loud argument and overturned Register-Guard.181

As often seems to be the case, decisions—both legislative and adjudicative—that restrict employees’ exercise of Section 7 rights are promulgated largely by Republican majority182 compositions of the NLRB and anti-union, pro-business legislators who are often out of touch with the reality and the changing patterns of industrial life.183 Further, the focus of conservative


182 See, e.g., Judson MacLaury, A Brief History: The U.S. Department of Labor, U.S. DEPT. OF LAB., http://www.dol.gov/dol/aboutdol/history/dolhistoxford.htm (last visited Nov. 6, 2015) (“After the activism of President Wilson there was a sharp reversal in policy by the Republican Administrations from 1921 to 1933 . . . .”)

Boards on the rights of the employer misses the mark—the Act protects employee, not employer, rights, although it may accommodate employer rights in some instances. Unfortunately, as discussed in the following section, such Boards and legislators choose an unworthy scapegoat in the union or the worker.

B. Political Influences and Oscillation in Board Precedent

Despite what is a facially simple framework, the Board and, in turn, the courts have had difficulty consistently applying this framework to emerging modalities of communications and the resulting unique factual circumstances. Due to the nature of independent regulatory agencies and the influence of political winds and whims, the Board’s interpretation and application of the Act reflect an obvious and politically associated oscillation. Thus, at times, litigants and lawyers alike may feel as if they have entered a fictional, nightmarish jurisdiction replete with moving targets and holographic safe havens, rather than that of the NLRA and the NLRB. Nonetheless, federal courts grant deference to the Board’s expertise in construing the Act and determining the reach and bounds of employees’ rights under Section 7, so long as that interpretation is reasonable and permissible, even if it departs from a long line of Board precedent in earlier cases. Therefore, as demonstrated, the Board has the opportunity to provide a reasonable, employee-focused interpretation of protected concerted activity that aligns with the purpose of the Act and protects the most workers.

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185 See Estreicher, supra note 12, at 361–63; supra Parts III.A, III.D (discussing an employer’s right to restrict employees’ use of property).
187 See generally Chevron, U.S.A., Inc., 467 U.S. at 844 (granting deference to administrative agencies’ reasonable interpretation of the statute they are charged with enforcing).
1. Conversation and Individual Speech as Concerted Action

In *Mushroom Transportation*,\(^{188}\) the Third Circuit confronted the question of whether conversations alone may constitute concerted activities under the Act. Although the court did not find the specific conversations at issue constituted concerted activity, it recognized that conversations alone, without action, may be protected concerted activity.\(^{189}\) In addition to recognizing that "almost any concerted activity for mutual aid and protection has to start with some kind of communication,"\(^{190}\) the court provided further guidance in making the determination whether and when a conversation falls under the protection of the NLRA:

It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere "griping."\(^{191}\)

The notion that conversations alone may constitute concerted activity was reaffirmed by the Board and approved by the Fourth Circuit in *Owens-Corning Fiberglas Corp. v. NLRB*\(^{192}\): the "activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much ‘concerted activity’ as is ordinary group activity."\(^{193}\)

The trend of increasingly broad interpretations of employees’ rights under Section 7—specifically, what constitutes concerted activity—culminated with the decision in *Alleluia Cushion Co.*,\(^{194}\) where the Board expanded its interpretation of concerted activity by presuming that coworkers consented to


\(^{189}\) Id.

\(^{190}\) Id.

\(^{191}\) Id.

\(^{192}\) Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1365–66 (4th Cir. 1969).

\(^{193}\) Id. at 1365.

\(^{194}\) Alleluia Cushion Co., 221 NLRB 999, 1001 (1975), overruled by Prill v. NLRB, 755 F.2d 941, 958 (D.C. Cir. 1985).
the petitioner’s activities when he spoke out about lack of safety precautions in the workplace.\textsuperscript{195} The Board found that “in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.”\textsuperscript{196} In \textit{Alleluia}, an employee complained of “safety conditions, including the lack of instruction regarding chemicals used in production, the absence of protective guards on machines, his inability to communicate safety instructions to the majority of employees who were Spanish-speaking, and the absence of first aid stations, eyewash stations, and an overall safety program,” and, eventually, he filed a complaint with the state Occupational Safety & Heath Administration (“OSHA”) office.\textsuperscript{197} The Board found the employee’s actions to constitute protected concerted activity by inferring the consent of his coworkers.\textsuperscript{198} Years later, the Reagan Board narrowed this broadly inclusive framework in \textit{Meyers} and its progeny.\textsuperscript{199}

Later, the Board departed from \textit{Alleluia} in its decision in \textit{Meyers I}, reasoning that the approach to concerted activity in \textit{Alleluia} did “not comport with the principles inherent in Section 7."\textsuperscript{200} Rather, the \textit{Meyers I} Board drew from earlier cases in which the court interpreted the meaning of concerted activity to require “interaction among employees”\textsuperscript{201} in an effort to establish a comprehensive definition.\textsuperscript{202} However, even the \textit{Meyers I} Board had the foresight to caution, that its “comprehensive definition” was “by no means exhaustive,”\textsuperscript{203} and that “the question of whether an employee engaged in concerted activity is, at its heart, a factual one.

\textsuperscript{195} Id. at 1000.
\textsuperscript{196} Id.
\textsuperscript{197} Id. at 999.
\textsuperscript{198} Id. at 1000.
\textsuperscript{200} \textit{Meyers I}, 268 N.L.R.B. at 496.
\textsuperscript{201} Id. at 494 (citing Traylor-Pamco, 154 N.L.R.B. 380 (1965)) (“There is not even the proverbial iota of evidence that there was any consultation between the two in the matter, that either relied in any measure on the other in making his refusal, or that their association in refusing [to submit to the condition of employment they were opposing] was anything but accidental.”); Cont’l Mfg. Corp., 155 N.L.R.B. 255, 257 (1965) (finding that a letter purporting to convey the grievances of a majority of employees did not constitute concerted action because there was “no evidence that the criticisms in the letter reflected the views of other employees, nor is there evidence that the letter was intended to enlist the support of other employees”).
\textsuperscript{202} \textit{Meyers I}, 268 N.L.R.B. at 496–97.
\textsuperscript{203} Id.
\textsuperscript{204} Id. at 497.
Although Meyers I and Meyers II propounded a more narrow definition of concerted activity than Alleluia, the Board, and later the court, did recognize two important, related rules that are central to employees' right to engage in concerted activity: (1) "Manifestly, the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization", and (2) "actions an individual takes in attempting to enforce a provision of an existing collective-bargaining agreement are, in effect, grievances within the framework of that agreement," and are protected as concerted activity. Although the Interboro doctrine was confirmed in NLRB v. City Disposal Systems Inc., the Board distinguished Interboro from Alleluia noting that the assertion of a statutory right on behalf of fellow employees is not granted the same protection as when an employee asserts a contract right under the collective-bargaining agreement. This distinction of the superiority of a contract right over a statutory right is a difficult one to reconcile in the post-Lochner era.

In further distancing itself from the Alleluia Board, the Reagan Board in Meyers contended that the previous standard would essentially allow the adjudicative body to employ a highly subjective inquiry in an effort to determine the theoretical actions of other employees when a single employee asserts a statutory right individually—perhaps a right known only to him among his peers. So, the Board reasoned, that even in the face of relevant legislation, for an individual to engage in concerted activity alone on the behalf of his coworkers, the inquiry must be based on the "observable evidence of group action to see what men and women in the workplace in fact chose as an issue about which to take some action." The inquiry should not "question[] whether the purpose of the activity was one it wished to protect and, if so, if

205 Id. at 494 (quoting Root-Carlin, Inc., 92 N.L.R.B. 1313, 1314 (1951)).
206 Id. at 496.
208 City Disposal Sys., 465 U.S. at 840.
209 Meyers I, 268 N.L.R.B. at 496–98.
210 See generally Lochner v. New York, 198 U.S. 45 (1905) (striking down rules limiting bakers to 10 hour days and 60 hour work weeks and laying the foundation for an era of unfettered economic freedom in which contract and property rights were paramount).
211 Meyers I, 268 N.L.R.B. at 495–96. But see Mushroom Transportation Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964).
212 Meyers I, 268 N.L.R.B. at 495.
[sic] then deemed the activity ‘concerted,’ without regard to its form."\(^{213}\) The Board found such an inquiry to be an insufficient basis to consider an activity "concerted."\(^{214}\) In addition to these limits placed on *Alleluia*, the Board continued to narrow employee rights to communicate. As shown below, employee-focused precedent fell victim to what has come to be known as the "September Massacre," a collection of 2007 amendments and decisions that eroded workers’ rights.\(^{215}\) For example, as discussed further below, the interpretations in *Register-Guard*\(^ {216}\) seemed to capsize established precedent, but in a recent Board decision, the ship seems to have righted itself.\(^ {217}\)

2. Narrowing Employees’ Rights to Communicate: *Register-Guard*\(^ {218}\)

In a restrictive decision, the Seventh Circuit reversed the part of the Board’s holding in *Flemming Cos.*\(^ {219}\) that granted employees the right to use their employer’s communication equipment—bulletin boards in this case—for Section 7 purposes if the employer had already granted them the right to use it for other non-work related purposes.\(^ {220}\) The Seventh Circuit denied enforcement of the Board’s decision and proffered the opinion that union solicitations are different than personal emails or other personal non-work use of the employer’s email.\(^ {221}\) Therefore, under this interpretation, an employer could distinguish between employees’ various types of non-work activity conducted through its email, or on other equipment, and choose part and parcel

\(^{213}\) Id. "[W]e are not empowered to correct all immorality or even illegality arising under the total fabric of Federal and state laws." Id. at 499.

\(^{214}\) Id. at 496.


\(^{216}\) *Register-Guard*, 351 N.L.R.B. 1110 (2007), enforced in part, remanded in part sub nom. Guard Publ’g Co. v. NLRB, 571 F.3d 53 (D.C. Cir. 2009); see also infra Part V.B.2.


\(^{218}\) *Register-Guard*, 351 N.L.R.B. at 1110, enforced in relevant part, remanded in part sub nom. Guard Publ’g Co., 571 F.3d at 57 (holding that “employees [have] no statutory right to use the[ir] [employer]’s e-mail system for Section 7 matters”).


\(^{220}\) See id. at 975; see also Guardian Indus. Corp., 313 N.L.R.B. 1275, 1275 (1994), enforced, Guardian Indus. Corp. v. NLRB, 49 F.3d 317 (7th Cir. 1995). “If an employer allows employees to use its communications equipment for non-work related purposes, it cannot validly prohibit employee use of communications equipment for Section 7 purposes.” D. Michael Reilly & Kirsten G. Daniels, *Employees’ Use of E-mail for Union Support Purposes*, 2008 HUMAN RESOURCES 159.

\(^{221}\) *Guardian Indus. Corp.*, 49 F.3d 317.
which activities it will allow.\textsuperscript{222} It is certainly conceivable that such discretionary employer power will have a chilling effect on employees’ freedom and willingness to engage in protected activity guaranteed by the rights granted in Section 7.

In \textit{Register-Guard}, the three-to-two Board majority ruled that employers had the privilege to limit employees’ use of company e-mail systems for non-work related purposes, including union solicitations and calls to organize, so long as such limitations do not discriminate against activity protected under the NLRA.\textsuperscript{223} In reaching this decision, the Board—seemingly arbitrarily—applied a new standard to determine whether an employer has violated section 8(a)(1) of the NLRA by discriminatorily enforcing its policies.\textsuperscript{224} The new standard seems to be a misguided interpretation of the NLRA, leading to a standard that could be considered labor law’s separate but equal doctrine: discrimination is the “unequal treatment of equals.”\textsuperscript{226}

\textit{Register-Guard} involved employees’ use of the employer’s personal property (e-mail) rather than use of the employer’s real property as in \textit{Republic Aviation} (union solicitation on employer’s property).\textsuperscript{227} However, despite the guidance of the basic principles of property law and the Supreme Court’s holding and reasoning in \textit{Republic Aviation}, the \textit{Register-Guard} Board conflated the perceived need for greater protection of an employer’s real property interest with the lesser protection of personal property interests and extended dicey precedent to allow an employer’s personal property interest to usurp employees’ Section 7 rights to communication and collective action in the workplace.\textsuperscript{228} Further, the decision to restrict employees’ use of electronic communication frustrates the central purpose of the NLRA and the policies of

\textsuperscript{222} Id.

\textsuperscript{223} \textit{Register-Guard}, 351 N.L.R.B. at 1110, enforced in part, remanded in part sub nom. \textit{Guard Publ’g Co.}, 571 F.3d at 57 (holding that “employees have no statutory right to use the[ir] [employer]’s e-mail system for Section 7 matters”).

\textsuperscript{224} \textit{Register-Guard}, 351 N.L.R.B. at 1110 (“We have decided to modify the Board’s approach in discriminatory enforcement cases to clarify that discrimination under the Act means drawing a distinction along Section 7 lines.”).

\textsuperscript{225} \textit{See} \textit{Plessy v. Ferguson}, 163 U.S. 537, 552 (1896).

\textsuperscript{226} \textit{See} \textit{Fleming Cos. v. NLRB}, 349 F.3d 968, 975 (7th Cir. 2003), granting enforcement in part, denying in part to Fleming Cos., 336 N.L.R.B. 192 (2001) (distinguishing between personal non-work-related posts and organizational posts, such as union related posts); \textit{see also} \textit{Guardian Indus. Corp.}, 49 F.3d at 319–20, \textit{denying enforcement to} 313 N.L.R.B. 1275 (1994) (same). The \textit{Register-Guard} Board adopted the Seventh Circuit’s “unequal treatment of equals” definition of discrimination. \textit{Register-Guard}, 351 N.L.R.B. at 1117.

\textsuperscript{227} \textit{Register-Guard}, 351 N.L.R.B. at 1115.

\textsuperscript{228} \textit{See Guard Publ’g Co.}, 571 F.3d at 59–60.
the NLRB: to protect the statutory rights of all employees to engage in collective action, not to protect employer’s property rights.\textsuperscript{229}

3. A Change of the (Register) Guard: Purple Communications\textsuperscript{230}

Purple Communications provided communication services for individuals who are deaf or hard of hearing through sign language interpretation during video calls.\textsuperscript{231} To provide this service, employees used “company-provided computers located at their workstations.”\textsuperscript{232} Union elections were taking place at a number of the employer’s locations. The NLRB issued a complaint alleging that the employer had committed unfair labor practices by maintaining two rules that interfered with employees’ section 7 rights: (1) a rule prohibiting employees from “[c]ausing, creating, or participating in a disruption of any kind during working hours on Company property” and (2) a policy that prohibiting employees’ use of their employer’s email system for “any nonbusiness reason.”

An ALJ found in favor of the General Counsel as to the first rule prohibiting disruptions.\textsuperscript{233} However, the ALJ found the electronic communications policy lawful based on Register-Guard.\textsuperscript{234} When the case reached the Board, it deferred its review of the ALJ’s decision as to Purple Communications’ electronic communications policy on its merits pending the Board’s review of solicited party and amici briefs addressing that issue.\textsuperscript{235} In its

\textsuperscript{229} Hirsch, supra note 178, at 1151 (“[T]he regulation of workplace discourse has become so far adrift that the NLRB now views e-mail as an affront to employer interests, rather than a low-cost, effective means for employees to exercise their right to collective action.”); see also William R. Corbett, Awakening Rip Van Winkle: Has the National Labor Relations Act Reached a Turning Point?, 9 Nev. L.J. 247, 252 (2009) (stating that Register-Guard “elevated employers’ property interests over employees’ rights, and interpreted the NLRA in a restrictive way that threatens to make it irrelevant and obsolescent”).


\textsuperscript{231} Id. at *2.

\textsuperscript{232} Id. at *17.

\textsuperscript{233} Board Decision at 19, Purple Commc’ns, Inc., 361 N.L.R.B. No. 126 (2014) (No. 21-CA-095151) (“The Employer has violated Section 8(a)(1) of the Act since June 19, 2012, by maintaining a rule prohibiting employees from ‘[c]ausing, creating, or participating in a disruption of any kind during working hours on Company property’ because that rule creates an overly broad restriction that interferes with the Section 7 rights of employees to engage in union and/or protected concerted activity.”).

\textsuperscript{234} Purple Commc’ns, Inc., 2014 WL 6989135, at *3.

\textsuperscript{235} See Board Decision at 1 n.3, Purple Commc’ns, Inc., 361 N.L.R.B. No. 126 (2014) (No. 21-CA-095151) (“Accordingly, today’s [September 24, 2014] decision does not address Register-Guard or Purple’s electronic communications policy on the merits.”); see also Board’s Formal Notice to Parties/Public at 1–2, Purple Commc’ns, Inc., 361 N.L.R.B. No. 126 (2014) (No. 21-CA-095151) NLRB Notice and Invitation to File Briefs, Apr. 30, 2014,
invitation to file briefs, the Board provided five questions to guide the amici’s analysis of the issue.\textsuperscript{236}

After reviewing the amici briefs,\textsuperscript{237} the Board held that “employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems.”\textsuperscript{238} Importantly, the Board stated that “[i]n overruling Register-Guard, we seek to make ‘[n]ational labor policy... responsive to the enormous technological changes that are taking place in our society.’”\textsuperscript{239} However, in his dissent, Board Member Johnson contended that employees should not have a right to use employer email to communicate because “most employees already have access to technology which they can use to communicate with one another about protected concerted activity without needing to use their employer’s business email system.”\textsuperscript{240} Board

\textsuperscript{236} The five questions presented were as follows:

[1] Should the Board reconsider this conclusion in Register Guard that employees do not have a statutory right to use their employer’s email system (or other electronic communications system) for Section 7 purposes? [2] If the Board overrules Register Guard, what standard(s) of employee access to the employer’s electronic communications systems should be established? What restrictions, if any, may an employer place on such access, and what factors are relevant to such restrictions? [3] In deciding the above questions, to what extent and how should the impact on the employer of employees’ use of an employer’s electronic communications technology affect the issue? [4] Do employee personal electronic devices (e.g., phones, tablets), social media accounts, and/or personal email accounts affect the proper balance to be struck between employer’s rights and employees’ Section 7 rights to communicate about work-related matters? If so, how? [5] Identify any other technological issues concerning email or other electronic communications systems that the Board should consider in answering the foregoing questions, including any relevant changes that may have occurred in electronic communications technology since Register Guard was decided. How should these affect the Board’s decision?

\textsuperscript{237} The amici briefs were overwhelmingly arguing for adherence to the Register-Guard holding; in fact, only 3 of 15 argued for Register-Guard to be overturned. See supra note 181 and accompanying text.

\textsuperscript{238} Purple Commc’ns, 2014 WL 6989135, at *1.

\textsuperscript{239} Id. at *17 (quoting Register-Guard, 351 N.L.R.B. 1110, 1121 (2007), enforced in relevant part, remanded in part sub nom. Guard Publ’g Co. v. NLRB, 571 F.3d 53 (D.C. Cir. 2009)).

\textsuperscript{240} Id. (Johnson, B.M., dissenting).
Member Johnson's contention is a perfect example of a lofty jurist being out of touch with the reality and demographics of the workplace.\footnote{See The Web at 25 in the U.S., PEW RES. CTR. 19, 31–32 (Feb. 27, 2014), http://www.pewinternet.org/files/2014/02/PIP_25th-anniversary-of-the-Web_0227141.pdf (describing survey results showing that, among 82% of respondents who used the Internet or e-mail on a given day, 44% of them went online from work); Table 8: Locations Outside the Home Where the Internet Is Accessed, by Selected Characteristics: Total, Urban, Rural, Principal City, 2010, NAT'L TELECOMMS. & INFO. ADMIN. (Jan. 28, 2011, 3:47 PM), http://www.ntia.doc.gov/files/ntia/data/CPS2010Tables/t11_8.txt (showing results of large survey in which 40% of all respondents—including those who do not use Internet at all—access the Internet at their workplace); Table 1: Persons Using the Internet in and Outside the Home, by Selected Characteristics: Total, Urban, Rural, Principal City, 2010, NAT'L TELECOMMS. & INFO. ADMIN. (Jan. 28, 2011, 3:39 PM), http://www.ntia.doc.gov/files/ntia/data/CPS2010Tables/t11_1.txt (showing that among respondents who report using the Internet anywhere (in Table 1), 56% report doing so at their workplace); see also Richard B. Freeman, From the Webbs to the Web: The Contribution of the Internet to Reviving Union Fortunes, NAT'L BUREAU OF ECON. RES. 2–5, 10–11 (2005), http://www.nber.org/papers/w11298.pdf (discussing unions' increased use of Internet); cf. supra text accompanying notes 95–99.}

\section{The Lost Purpose}

Section 7 rights\footnote{See, e.g., Tradesmen Int'l, 338 N.L.R.B. 460 (2002). "Section 7" refers to the public law section number of the NLRA, now codified at 29 U.S.C. § 157 (2013) ("Section 7 rights" is the colloquial language used by the courts, the National Labor Relations Board, and labor attorneys when referring to employees' rights under 29 U.S.C. § 157).} are the core of employees' rights under the NLRA and the heart of the Act.\footnote{Lee Modjeska, The Reagan NLRB, Phase 1, 46 OHIO ST. L.J. 95, 108 (1985).} Fighting to stymie employees' ability to communicate—including communication through social media—about the terms and conditions of employment is a continuation of the battle against the workman, the laborer. Some have even predicted that the protection of concerted activity in Section 7 of the NLRA would "[i]mpair labor's rights in the long run, however much its authors may intend precisely the contrary."\footnote{CLETUS E. DANIEL, THE ACLU AND THE WAGNER ACT 34 (Cornell Univ. ed. 1989) (expressing similar concerns to Secretary of Labor Frances Perkins and Chairman of the Labor Advisory Board Leo Wolman); id. at 71 (quoting Chairman of the ACLU's subcommittee on labor and policy, Mary Van Kleeck's letter to Senator Robert Wagner: "I have doubts about the inevitable trends of [the Act's] administration."); id. at 75 (quoting a letter from ACLU Director Roger Baldwin to Senator David Walsh on Mar. 20, 1934).} Perhaps this has been shown to be true, as illustrated above, when employer interests usurp the rights of employees.\footnote{See supra Part V.B. See generally Lofaso, Persistence of Union Repression, supra note 215, at 201–02 (demonstrating, through the "September Massacre" of 2007, that in spite of the progressive nature of Section 7, workers' rights have been eroded by congressional amendments, interpretations by the courts and the Board—the very agency tasked with protecting workers).} The oscillation of the Board's precedent through the years often correlates with changing political tides.\footnote{See supra Part V.B.
Thus, at times, one cannot help but think that the Board has misapprehended the root purpose of the NLRA and allowed the weeds of politics to take hold.\textsuperscript{247}

Indeed, numerous Board and Court decisions contravene the purpose and spirit of the NLRA, granting credence to the early prophecies of ACLU critics who expressed concerns about the administration and practical implications of the Act.\textsuperscript{248} Specifically, provisions regarding concerted activity have been construed in a way that would lead a layman, ignorant of labor law and legislative history, to think that the NLRA's purpose is to protect employers from the trouble-causing and anti-capitalist unions and employees who, in reality, are simply fighting an uphill battle for a living wage.\textsuperscript{249} Some scholars have portrayed an even more dismal outlook for the nonunionized employee, positing that "[t]here exists today a haphazard labor law for workers who do not have an exclusive bargaining representative."\textsuperscript{250}

VI. THE SOLUTION—DENTURES FOR AN OLD ACT: A LIBERAL APPLICATION OF THE PROTECTED CONCERTED ACTIVITY DOCTRINE WILL RESTORE THE LOST BITE AND SPIRIT OF THE NLRA\textsuperscript{251}

Technology has forced past changes in labor law,\textsuperscript{252} and the jurisprudence—like labor, like society—must also evolve along with the entity it regulates to achieve its purpose.\textsuperscript{253} Simply because workers die on the job less often, and no longer live in tenement housing, does not mean that labor disputes are any less relevant.\textsuperscript{254} Industry will often seek to stay ahead of or

\textsuperscript{247} See supra Part V.B.2 (discussing cases where the Board narrowly applied the rule of concerted activity and/or diminished workers' rights under the NLRA).

\textsuperscript{248} See Daniel, supra note 244, at 34, 71, 74.

\textsuperscript{249} See Drew Desilver, U.S. Income Inequality, on Rise for Decades, Is Now Highest Since 1928, PEW RES. CTR. (Dec. 5, 2013), http://www.pewresearch.org/fact-tank/2013/12/05/u-s-income-inequality-on-rise-for-decades-is-now-highest-since-1928/ (noting that the last time income inequality has been so high was before the Act was passed); see also Ross Eisenbrey, Middle Class Incomes Suffer Without Collective Bargaining, ECON. POL'Y INST. (Mar. 4, 2015), http://www.epi.org/publication/middle-class-incomes-suffer-without-collective-bargaining/; Sean McElwee, One Big Reason for Voter Turnout Decline and Income Inequality: Smaller Unions, AMERICAN PROSPECT (Jan. 30, 2015), http://prospect.org/article/one-big-reason-voter-turnout-decline-and-income-inequality-smaller-unions.

\textsuperscript{250} See Gottesman, supra note 23, at 68.

\textsuperscript{251} Mary Anderson, Woman at Work: The Autobiography of Mary Anderson as Told to Mary N. Winslow 41 (Univ. of Minn. Press ed., Oxford Univ. Press 1951) ("This is the spirit that is back of all the great struggles of the workers to improve their working conditions. Liberty and freedom for collective bargaining is what they want and it is what they must have.").

\textsuperscript{252} See supra Part III.A.

\textsuperscript{253} See supra Parts II.A., V.C.

manifest regulations with one goal in mind: profits.\textsuperscript{255} This, is a constant tension between the employee and the employer.\textsuperscript{256} Therefore, the NLRA is as relevant as ever in the campaign for workers’ rights. Even in the face of declining union membership, the “Rip Van Winkle”\textsuperscript{257} of administrative law has the possibility to awaken with its spirit reinvigorated by the sleeping beauties of the NLRA.\textsuperscript{258} To achieve these goals—protection of workers’ rights and relevance of the NLRA in today’s workplace—the Board and the courts should construe the protections of concerted action doctrine through a lens consistent with the goal and purpose of the act: a lens focused on workers’ rights. Just as our society, our economy, and our culture evolves, the NLRA, although an aged and largely dormant statute, must evolve to meet the needs of today’s workplace and acknowledge the social media presence of employees. This evolution requires an employee-focused interpretation and the inclusion of appropriate electronic communications and social media under the doctrine of concerted activity.\textsuperscript{259}

Part VI.A demonstrates the Board’s proclivity to interpret NLRA jurisprudence consistent with this argument for expanded workers-rights in the context of social media. Further, Part VI.B argues that the changes in the demographics of the workplace and in how workers organize lend support for this interpretation of concerted activity. Then, it goes beyond that recognition of applicability and takes the analysis one step further to suggest that as

\textsuperscript{255} See, e.g., Chris Hamby, Black Lung Surges Back in Coal Country, CTR. FOR PUB. INTEGRITY (July 8, 2012), http://www.publicintegrity.org/2012/07/08/9293/black-lung-surges-back-coal-country (discussing the resurgence of black lung in spite of tighter regulations on respirable dust—to be clear, industry-reported data of miners’ exposure to dust is generally below the standards required by the regulation, which have been scientifically proven to be the threshold to eliminate black lung, leaving no doubt that miners are exposed to much higher dust levels as evinced by the resurgence of black lung).

\textsuperscript{256} See supra Parts II, IV.

\textsuperscript{257} Register-Guard, 351 N.L.R.B. 1110, 1121 (2007) (Liebman & Walsh, B.M., dissenting in part) (“[T]he NLRB has become the ‘Rip Van Winkle of administrative agencies.’ Only a Board that has been asleep for the past 20 years could . . . contend, as the majority does, that an e-mail system is a piece of communications equipment to be treated just as the law treats bulletin boards, telephones, and pieces of scrap paper.” (quoting NLRB v. Thill, Inc., 980 F.2d 1137, 1142 (7th Cir. 1992))).

\textsuperscript{258} See supra Part III (discussing how largely dormant provisions of the NLRA apply to nonunion employees).

\textsuperscript{259} See 29 U.S.C. § 151 (2013) (“It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” (emphasis added)).
workers’ rights hang in the balance, a broad interpretation of concerted activity is the key to the future of employees’ rights under the NLRA.

A. The Board Has Shown a Willingness to Take the Jurisprudence in this Direction

The explosion of technology, particularly the growth of electronic communication and social media, over the past several decades has forced once unthinkable forms of communication to squeeze into what is already a convoluted framework that, under the varying dispositions of the NLRB, often results in inconsistent interpretations of the NLRA.\(^{260}\) Such oscillation and uncertainty does not make clear—for employees, employers, and unions alike—where the proverbial line is at any given time or where it will be drawn in the future, even in regards to traditional forms of communication.\(^{261}\) Therefore, the present analysis for applying the traditional framework for concerted and protected activity under NLRA is lacking when applied to the dynamic and relatively unfamiliar legal nature of social media.

Opportunity knocks; labor jurisprudence regarding electronic communications and social media is in its infancy, and now is the time to set the employee-focused precedent that will protect employees’ rights to organize outside of the aging unions and union construct. Evidence exists that the Board is willing to refocus its efforts on employees’ rights in regard to electronic communication.\(^{262}\) For example, in the face of an overwhelming number of amici briefs arguing for employers’ interests, the Board decided *Purple Communications* in congruence with the lone wolf, the brief in support of an inclusive, employee-focused interpretation of protected concerted activity.\(^{263}\)

Social media provides an opportunity for the Board to establish precedent that awakens the “Rip Van Winkle”\(^{264}\) spirit of the NLRA and develop one of its best kept secrets and most underutilized aspect: the

\(^{260}\) *See The Web at 25 in the U.S.*, supra note 241, at 19, 31–32 (describing survey results showing that, among 82% of respondents who used the Internet or e-mail on a given day, 44% of them went online from work); *Table 8: Locations Outside the Home Where the Internet is Accessed, by Selected Characteristics: Total, Urban, Rural, Principal City, 2010*, supra note 241 (showing results of large survey in which 40% of all respondents—including those who do not use Internet at all—access the Internet at their workplace); *Table 1: Persons Using the Internet in and Outside the Home, by Selected Characteristics: Total, Urban, Rural, Principal City, 2010*, supra note 241 (showing that among respondents who report using the Internet anywhere (in Table 1), 56% report doing so at their workplace); *see also* Freeman, supra note 241 (discussing unions’ increased use of Internet); *see also supra* Parts III.B–C, IV.


\(^{263}\) *Id.* at *17.

protection of the nonunion employee. The Board must not succumb to a similar slumber from reality and embrace various types of social media communications and activity as protected concerted action. The Board showed promise of reaching for such an ideal in its Purple Communications decision and adopted the logic of Board Members Liebman and Walsh’s Register-Guard dissent. Now, “employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems.”

The traditional rights analysis—pitting property rights against First Amendment rights—misses the mark when applied to concerted action in the realm of social media. It is worth noting, again, the distinction between an employer’s real and personal property, the latter of which employers have a lower expectation of control. Further, if an employer grants an employee use of real property for work purposes, the employer then has diminished property right expectations. However, as is increasingly the case, this is a moot concern because individuals can post on social media instantly from a phone or handheld device. Further, social media platforms do not impose any burden on the employer’s data systems because they merely require an internet connection to a third-party server. In fact, the use of an employer’s computer during nonworking time is so de minimis, that the employer’s strongest arguments in Purple Communications for invoking a property right fall short.

265 See Philip L. Gordon & Lauren K. Woon, United States: Five Recent NLRB Cases Provide Further Insight on Structuring Employers’ Social Media Policies, LITTLER (July 24, 2014), http://www.mondaq.com/unitedstates/x/329926/employment/litigation/tribunals/Five-Recent-NLRB-Cases-Provide-Further-Insight-on-Structuring-Employers-Social-Media-Policies (last visited Nov. 6, 2015) (“The six cases, decided in the past two months, which resulted in five losses and only one victory for employers, demonstrate that the NLRB continues to use social media and other common communications policies as a vehicle to aggressively inject itself into the non-union workplace as the number of unionized workers continues to diminish.”).

266 See generally Register-Guard, 351 N.L.R.B. at 1121 (Liebman & Walsh, B.M., dissenting in part) (stating that “the NLRB has become the ‘Rip Van Winkle of administrative agencies.’ Only a Board that has been asleep for the past 20 years could . . . contend, as the majority does, that an e-mail system is a piece of communications equipment to be treated just as the law treats bulletin boards, telephones, and pieces of scrap paper.”) (quoting NLRB v. Thill, Inc., 980 F.2d 1137, 1142 (7th Cir. 1992)).

267 See Purple Commc’ns, Inc., 2014 WL 6989135, at *5; Register-Guard, 351 N.L.R.B. at 1121 (Liebman & Walsh, B.M., dissenting in part).


270 Id.

271 Purple Commc’ns, Inc., 361 NLRB at *17. The briefs in support of employer argued that use of the employer’s email creates an undue burden on the property—the server and data storage
Thus, in the context of social media, any property rights argument by the employer is attenuated at best. Yet, the question of whether an employee has a right to use an employer’s equipment to post on social media remains undecided. However, for the reasons mentioned above, the purpose and spirit of the NLRA will be realized if the Board and the courts adopt analogous reasoning to the decision in Purple Communications: If an employer has granted an employee access to a personal computer, or similar device, for work purposes, the employee should be able to use that device during non-working times to engage in Section 7 activity via social media.

B. Considering the Demographical Changes in Worker Organization, Concerted Action Is the Future of the NLRA

Much to the chagrin of pro-labor advocates, union membership is at historic lows, the demographics of the workforce are changing, the demographics of labor organization are changing, and the workplace is changing. However, many employers see the decline in union membership as a victory of decades-long pushback and lobbying efforts. Compared with functions—of the employer. The Board rejected this argument noting that employee use of their employer’s email system is de minimis use. Id. at n.22.

272 Id. at 20. See generally Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (granting deference to administrative agencies’ reasonable interpretation of the statute they are charged with enforcing); see also MAURICE DOBB, STUDIES IN THE DEVELOPMENT OF CAPITALISM 223 (International Publishers ed. 1947) (“The capitalist system presupposes the complete separation of the labourers from all property in the means by which they can realize their labour. . . . The expropriation of the agriculture producer, of the peasant, from the soil is the basis of the whole process.”).

273 Id.


275 Id.


277 See, e.g., supra Parts IV–V.A. (describing how technology has changed the workplace).

278 SLATER, supra note 15, at 199. ("[W]hat is unique about private sector labor relations in the United States is the extreme hostility of employers. From the use of spies and private armies from the nineteenth century through the New Deal (and sometimes beyond), which produced the most violent labor history in the Western World, to the routine expenditure of millions of dollars today on ‘consultants’ to defeat organizing drives or destroy existing unions, the tactics that
other industrialized nations, we have fallen behind when it comes to workers’ rights.279 Surely, that is one of many considerations that support an argument for change and expanded workers’ rights.

The workplace is also changing: The office is becoming bigger and more spread out. Technology has spurred a workforce diaspora. The methods of worker organization are also changing. The old methods, while still effective in some work environments, will eventually become ineffective and obsolete. Social media posts and electronic communications will take the place of door-to-door union solicitation and hand billing.

The labor movement is transforming and lying in wait for meaningful avenues to change. Employees have organized and prevailed without the expertise and influence of unions.280 Also, labor organizers are using new tactics and creative approaches to effectively bargain collectively.281 Movements and organizing campaigns to raise minimum wage are taking place across the country.282 Interestingly, these movements of organized workers are taking place at the same time as more states introduce and pass “right-to-work”

American employers have used to fight unions—extremely aggressive and often marginally legal at best—have been truly exceptional among industrialized democracies.”)

279 Id.
280 See, e.g., Guo, supra note 169.
legislation, legislation that erodes support for unions, and legislation that is favorable to industry and employers—if not blatantly hostile to workers.

However, these attacks, public relations campaigns, and political stunts are clear misrepresentations of the law and misrepresentations of the reality of unions’ role in the workplace. For example, public sector unions—which are statutorily precluded from bargaining over wages and benefits—are vilified by politicians who conflate the facts and the law into a blatant untruth. Specifically, under this misrepresentation, public sector unions are blamed for states’ debt and increased taxes. Surely, this rhetoric sways public opinion as to public-sector unions and to unions in general. After all, what red-blooded American is going to stand for his tax money to be appropriated to “lazy government union workers” who do not work as hard as he does in the private sector? Further, why should public-sector employees get better benefit packages when the private sector is reeling from the Great Recession? This false and toxic rhetoric bleeds into the public perception of private-sector unions, portraying expertly trained workers as lazy, hand-out-taking leeches who are taking jobs from hardworking Americans. This view is toxic to workers’ rights and is perpetuated by venomous interests.

Enough barriers exist; employers often oppose, with an ignorant fervor, employees’ attempts to organize. A typical strategy of employers during a union organizing campaign is to attempt to increase the size of the bargaining

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285 MacLaury, supra note 182; see, e.g., A Brief History: The Department of Labor, U.S. DEPT. OF LABOR (1988), http://www.dol.gov/dol/aboutdol/history/dolhistoxford.htm (“After the activism of President Wilson there was a sharp reversal in policy by the Republican Administrations from 1921 to 1933 . . . .”).

286 Lofaso, Public-Sector Unions, supra note 283, at 302–03.

287 Id.

288 Id.

289 Id.

290 Cynthia L. Estlund, Working Together: The Workplace, Civil Society, and the Law, 89 GEO. L.J. 1, 9–10, 71 (2000) (describing the methods employers use as a bulwark to worker collective action, including, but not limited to, retaliation and limiting workplace communications).
unit, knowing that the unit loses its cohesive nature to act concertedly as it increases in size.\(^{291}\)

Just as electronic communications have eased communications for the general population, effective use of electronic communications and social media lower the barriers to employee collective action. Social media and electronic communications are not the panacea for the strife of the workers or their struggles to organize, but a broad interpretation of the Act comports with its larger goal: to protect workers’ rights.\(^{292}\) Solidarity is key, and without effective communication channels, employees are unaware of the pervasiveness of their collective concerns.\(^{293}\) Further, barriers to communication impede the right of all employees to organize for mutual aid and protection.\(^{294}\) However, erecting another barrier to collective action is not the answer.

VII. THE ARGUMENTS AGAINST WORKERS’ RIGHTS

In addition to the short counter-arguments mentioned throughout this Note, two arguments are common among employers and deserve some treatment: (1) worker-focused legislation is bad for business, and (2) social media has the potential for bad actors and harm to the business. As discussed throughout this Note, efforts to expand workers’ rights are always met with fervent opposition.\(^{295}\) Often, employers cite property rights and increased costs. However, evidence to the contrary is abundant.\(^{296}\)

Worker-focused legislation is not bad for business. Rather, protecting employees’ concerted activity is beneficial to the overall employment relationship. It gives employees a say in the terms and conditions of their employment, and it results in a better and more productive work environment, creating a symbiotic relationship that many forward thinking and progressive CEOs have learned to harness and foster\(^{297}:\) “Embracing social media isn’t just

\(^{291}\) OLSON, supra note 276, at 2, 11–12.


\(^{293}\) Hirsch, supra note 178, at 1108–11 (discussing informational disparities and asymmetry).

\(^{294}\) See Eastex, Inc. v. NLRB, 437 U.S. 556, 556 (1978) (discussing the scope of rights protected by the “mutual aid or protection” clause of Section 7).

\(^{295}\) See supra Part VI.A.

\(^{296}\) Steve Denning, Is the Goal of a Corporation to Make Money?, FORBES (Sept. 26, 2011), http://www.forbes.com/sites/stevedenning/2011/09/26/is-the-goal-of-a-corporation-to-make-money/ (comparing the performance of companies that use traditional management compared with the profits of companies using radical management—to no surprise, the companies open to new ideas and radical management performed much better).

a bit of fun, it’s a vital way to communicate, keep your ear to the ground and improve your business."

The argument that social media has the potential for bad actors is certainly grounded in sound possibility and fact, but when dealing with people, is this risk not ever-present? As discussed above, people often get fired for Facebook posts. But, if the activity they are engaging in is not covered under concerted activity or another Section 7 right, the employer is well within his rights to fire the employee. The doctrine of concerted activity cuts both ways, and each case must be tried on its individual facts. Ultimately, employers retain the upper hand through the doctrine of entrepreneurial control, where the employer bears the mere burden of showing the necessity of a business decision when justifying an employment policy or an employment decision. Thus, immediate employer-defensiveness is unwarranted because employers’ rights remain protected.

**VIII. CONCLUSION**

The Board, courts, and employers alike appear to let fear and selfish short-term goals—whether economic or political—eclipse the rights of the people the Act is meant to empower: the middle class worker, the backbone of our economy and our society.

Now, with the burgeoning communication platform that social media provides, the courts have the opportunity “to restore to its intended vigor the right to engage in concerted activity for mutual aid or protection,” and

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298 Arruda, *supra* note 297.


provide the "day of reckoning for those who defraud the laborer of his hire." Any interpretation of the NLRA that chills employees' Section 7 rights ought to be avoided because that notion alone violates the spirit of the act. Further, any decision that inhibits individual employees' right to engage in concerted activity flies in the face of legislative history:

There are not two abstract and distinguishable categories of action—individual action for self-interest and collective action for mutual interest—one which Congress chose not to protect and the other which Congress chose to protect, but rather a continuum of individual activity—of individuals choosing to speak and act on their own behalf, singly and in small and large groups. Thus, the narrow reading of the Act proceeds upon a false dichotomy, for at the core of the freedom of the individual to protest in a group necessarily lies the freedom of the individual to protest at all.

Because many employees are handicapped by information asymmetries, protected use of social media can help to level the playing field for nonunion members who lack the expertise of union organizers. Generally, the nonunion sector stands to benefit the most from the extension of the doctrine of protected concerted activity to colloquial organizing efforts through social media. Social media's ability to reach a large audience allows for the collaboration of ideas and, in many cases, input from non-coworkers who may bring a different perspective, potentially improving employees' understanding of their rights under the law. Recognition that social media posts and discussions on people's Facebook walls or Twitter feeds are more akin to oral communications than written communications provides for an additional layer of protection from employer prohibition.

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306 Id. at 344–45.

307 See supra Part III.A (discussing the distinction between oral and written communications and solicitations). There is even a solid argument that email is more akin to oral communications rather than written because of its nature. See also Register-Guard, 351 N.L.R.B. 1110, 1121 (2007) (Liebman & Walsh, B.M., dissenting in part) (stating that the NLRB has become the 'Rip Van Winkle of administrative agencies.' Only a Board that has been asleep for the past 20 years could . . . contend, as the majority does, that an e-mail system is a piece of communications equipment to be treated just as the law treats bulletin boards, telephones, and pieces of scrap paper." (quoting NLRB v. Thill, Inc., 980 F.2d 1137, 1142 (7th Cir. 1992))).
Further, the subjective prong in *Mushroom Transportation* should not be discounted as it was in *Meyers*\(^{308}\) when applied in the context of social media. Social media is a forum where colloquial language prevails, and failing to consider the intent of the person making a post in which he is looking toward group action is a failure to appropriately consider the policy and purpose of the NLRA. Perhaps most importantly, the Board and the courts must not overlook the stated mission in *Purple Communications*: "We seek to make '[n]ational labor policy . . . responsive to the enormous technological changes that are taking place in our society."\(^{309}\)

Let today be the "day of reckoning for those who defraud the laborer of his hire" by recognizing the rights of employees to engage in concerted activity in ways that comport with this technological world.\(^{310}\) Progress will be met with opposition, but perhaps that opposition is akin to a toddler who refuses to take an antibiotic. To make the transition less painful for stagnating employers, the conversation needs to change. The tension between employer and employee does not have to exist. As discussed above, there is abundant evidence that investing in your employees is good for business, and the most successful CEOs have recognized this. To look at the bigger picture, the erosion of workers' rights is directly correlated to income inequality and the disappearing middle class. A worker-focused interpretation of the doctrine of concerted activity in the social media context is not only imperative to the future of the NLRA’s relevance, but it is also a step toward a better, more equal, and empowered society.

*Benjamin J. Hogan*

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\(^{308}\) See *supra* note 211 and accompanying text.


\(^{310}\) *Kelley, supra* note 304, at 204.

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