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The Right to Engage in Concerted Activity After Union Recognition: A Study of Legislative History

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When a union has been recognized as a collective bargaining representative, do rank-and-file workers have the right to engage in concerted activity without the union's approval? Working people themselves do not know.¹ Section 7 of the National Labor Relations Act seems straightforwardly to protect "the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection"² However, the typical union contract prohibits strikes for the duration of the agreement. Experience teaches, moreover, that workers who leaflet, picket, or strike without union approval are likely to be discharged. The result is what in other contexts has been called a chilling of protected rights. Not knowing what is protected and what is not, most workers keep their heads down and avoid making waves.

The right to concerted activity for collective bargaining or other mutual aid or protection has been described by the United States Supreme Court as a "fundamental right."³ But it is unclear what this means. Outside the workplace, in the larger society, designation of a right as "fundamental" means that state action to abridge or deny the right must substantially justify itself. If this were what fundamental rights meant inside the workplace, when union members leafleted, picketed, or went on strike, their activity would be presumed to be protected by law, even if not approved by the union. The burden would

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¹ See the interviews collected in *RANK AND FILE: PERSONAL HISTORIES BY WORKING-CLASS ORGANIZERS* (A. Lynd & S. Lynd eds. 1973) [hereinafter cited as *RANK AND FILE*]. Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 *TEXAS L. REV.* 378 (1969), argues that an employee should not be discharged for concerted activity unless the employee knew or should have known that the activity was unprotected.

² 29 U.S.C. § 157 (1970).

³ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

be on whoever wished to stop the concerted activity to show what statute or contract language forbade it.

Until recently, the Supreme Court by and large presumed concerted activity to be protected, although often, in specific cases, finding the presumption rebutted. A company rule which prohibited leafleting on company property outside of working hours was "presumed to be an unreasonable impediment to self-organization."⁴ Peaceful picketing was presumed to be protected unless expressly prohibited. The Court declared:

The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. . . .⁵

Even strikes, despite their disruption of production, were until recently presumed to be protected. The Court found some kinds of strike action to be per se exceptions to the rule.⁶ The Court also recognized that a union could waive the right to strike during the life of a collective bargaining agreement by explicit contractual provision. But the Court held that, unless the waiver was clear and explicit, "the affirmative emphasis that is placed by the Act upon freedom of concerted action and freedom of choice of representatives"⁷ should cause ambiguity to be resolved in favor of the right to strike "against unlawful practices destructive of the foundation on which collective bargaining

⁴ Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803-04 n.10, 804 (1945).

⁵ Garner v. Teamsters Union, 346 U.S. 485, 499-500 (1953). The importance of the Garner formulation is emphasized in Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1345 (1972), and Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COLUM. L. REV. 469, 478 (1972). The Supreme Court itself reaffirmed Garner as late as NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 62-63 (1964):

Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable. . . . We have recognized this congressional practice and have not ascribed to Congress a purpose to outlaw peaceful picketing unless "there is the clearest indication in the legislative history"

⁶ Even during the period when it was most protective of concerted activities, the Supreme Court withdrew protection from sit-down strikes, NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939), and from "quickie" strikes, International Union, UAW, Local 232 v. Wisconsin Emp. Rel. Bd., 336 U.S. 245 (1949). See text accompanying note 82 *infra*.

⁷ Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 287 (1956).

must rest."⁸

Lately, however, the Court appears to have adopted the position that when a union has been recognized, concerted activity without union approval is presumed to be unprotected. Ambiguity as to the right to strike is now resolved by a presumption of arbitrability.⁹ Even workers who strike because of what they believe to be abnormally dangerous conditions, under the apparent shelter of section 502 of the Labor Management Relations Act, must be prepared to produce objective evidence of the danger or face discharge.¹⁰ The right to leaflet about the choice of a bargaining representative continues to be protected.¹¹ But the Supreme Court, in the recent *Emporium Capwell*¹² case, has held that once a representative has been chosen, peaceful picketing and leaflet distribution may be cause for discharge if the protesters demand to talk with management, thus bypassing the union.

The *Emporium Capwell* decision is a particularly disturbing one. Peaceful picketing is the most elemental form of protest available to working people. The protesters in that case picketed on their own time, without violence, and without obstructing the entrances to their workplace.¹³ *Emporium Capwell* seems to say that concerted activity which

⁸ *Id.* at 281.

⁹ *USW v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960); *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

¹⁰ *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974). Section 502 of the LMRA states: "[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter." 29 U.S.C. § 143 (1970). The Court found that section 502 did not limit the arbitration clause in the contract, and that that clause gave rise to an implied no-strike clause.

¹¹ *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974).

¹² *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975).

¹³ For the facts in the *Emporium* case, see *The Emporium & Western Addition Community Org.*, 192 N.L.R.B. 173 (1971), *rev'd sub nom. Western Addition Community Org. v. NLRB*, 485 F.2d 917 (D.C. Cir. 1973), *rev'd sub nom. Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975). The *Emporium Capwell* Company operated a department store in San Francisco. The company had a collective bargaining agreement with the Department Store Employees Union. In April 1968, a group of employees covered by the agreement (one of the two men subsequently fired was not a member of the union) met with the secretary-treasurer of the union to present a list of grievances including a claim that the company was discriminating on the basis of race in making assignments and promotions. The union pursued the claim. At a meeting in September 1968 attended by union officers, employees, and representatives of the California Fair Employment Practices Committee and the local antipoverty agency, the secretary-treasurer announced that the union had concluded that the company was discriminating, and that it would process every such grievance through to arbitration if necessary. Some of the employees present suggested that the grievance procedure was inadequate to deal with a pattern of discrimination, and advocated that the union instead begin picketing the store in protest. The union spokesmen disagreed. In October 1968, several of the dissident employees held a press conference where they denounced the store's employment policy as racist, expressed their desire to deal directly with top management, and

was protected before union recognition becomes unprotected because of the mere presence of a recognized union.

So fundamental a departure from the seeming intent of section 7 of the NLRA should be carefully scrutinized. The obvious first step is to look again at the text of the Act.

The text of the National Labor Relations Act does not mandate a clear choice between a presumption of protection or a presumption of illegitimacy for concerted activities without the union's approval.

Section 7, as previously quoted, establishes a prima facie case for protectedness. It does not distinguish between the rights of employees before union recognition and the rights of employees after union recognition.¹⁴ It affirms, as the courts have recognized, not only a right to engage in concerted activity for the purpose of collective bargaining but a second, separate right to concerted activity for the purpose of other mutual aid or protection.¹⁵

The protection extended by section 7 is arguably withdrawn by section 9(a). That section states:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment¹⁶

It has been forcefully contended that the logical implication of section 9(a), in the context of the national labor policy, is that after a union has been recognized as a collective bargaining representative, concerted

announced their intention to picket and to distribute leaflets calling for a consumer boycott. When two of them did so they were fired.

¹⁴ Sections 7 and 8 [of the National Labor Relations Act] together bespeak a strong purpose of Congress to leave workers wholly free to determine in what concerted labor activities they will engage or decline to engage. This freedom of workers to go their own way in this field, completely unhampered by pressures of employers or unions, is and always has been a basic purpose of the labor legislation now under consideration. In my judgment it ill behooves this Court to strike so diligently to defeat this unequivocally declared purpose of Congress, merely because the Court believes that too much freedom of choice for workers will impair the effective power of unions.

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 216 (1967) (Black, J., dissenting).

¹⁵ The independent right to concerted activity for mutual aid or protection has been recognized even by courts which hold that the right should not be protected after union recognition. "[S]ection 7 . . . specifically protects both the right to bargain collectively and the right to engage in other concerted activities and specifically distinguishes between the purpose of collective bargaining and the purpose of other mutual aid or protection." NLRB v. Tanner Motor Livery, Ltd., 349 F.2d 1, 3 (9th Cir. 1965).

¹⁶ 29 U.S.C. § 159(a) (1970).

activity should be channelled through the union and should be permitted only with union approval.¹⁷

However, section 9(a) contains a proviso which has been part of that section since the original passage of the National Labor Relations Act, and was strengthened when the Act was amended in 1947. The proviso reads:

Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.¹⁸

This proviso can be understood not only to give rank-and-file workers a right to settle grievances directly with their employer, but also to legitimize reasonable concerted activities in support of those grievances.¹⁹

Not surprisingly, the uncertainty inherent in these contrapuntal passages has driven decisionmakers to review the legislative history.²⁰ Where did the language about concerted activities originate, and how was it initially understood? How were concerted activities, thus under-

¹⁷ [W]ildcat strikes . . . are . . . acts of treason. . . . [W]e need not waste too much sympathy upon the worker who acts to destroy his union. He should be free to agitate for changes in union law, but when the law is made he should become the law-abiding citizen in the legal entity or go elsewhere.

Williams, *The Political Liberties of Labor Union Members*, 32 TEXAS L. REV. 826, 831 (1954). See also Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1242-48 (1967); Comment, *Exclusive Representation and the Right of Employees to Engage in Concerted Activity—Conflicting Policies of the NLRA*, 4 U.S.F.L. REV. 354 (1970).

In Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897 (1975), the author proposes the converse: that since exclusivity hems in and oppresses individual workers in a variety of ways, Congress should consider doing away with it altogether. The point of view suggested by the legislative history lies between these two extremes. Both in 1935, see text accompanying notes 25-77 *infra*, and in 1947, see text accompanying notes 78-122 *infra*, Congress envisioned a system in which the recognized union has exclusive authority to negotiate periodic collective bargaining agreements, but in which, between contract negotiations, individual workers and small groups of workers have considerable freedom to act for themselves in adjusting particular problems. For a similar view, see Cassel, *The Emporium Case: Title VII Rights and the Collective Bargaining Process*, 26 HASTINGS L.J. 1347 (1975).

¹⁸ 29 U.S.C. § 159(a) (1970) (italics in original).

¹⁹ "Section 7 of the Act is designed to guarantee to employees the fundamental right to present grievances to their employer to secure better terms and conditions of employment, even if the presentation of a grievance requires a work stoppage . . ." Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1347-48 (3d Cir. 1969). "The language of

stood, conceived to be qualified or limited by making the representatives supported by a majority of the employees the exclusive representatives for collective bargaining purposes? And in what way did Congress in turn seek to modify majority rule by the proviso to section 9(a)?

The Court's own answers to these problems in legislative history are reasonably clear. The labor laws of the 1930's, in the Court's view, were mainly intended to help working people to organize unions. But

[a]s labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes.²¹

Since the end of World War II the purpose of national labor policy has changed, the Court believes. The more recent labor statutes promote a policy of minimizing industrial strife through contract observance and arbitration, so the Court thinks.

The *Emporium Capwell* decision summarizes this reading of the legislative history, and expressly relies on it. In *Emporium Capwell*, the Court makes the following key assertions about legislative history:

1. "[Section 7 rights] are, for the most part, collective rights, rights to act in concert with one's fellow employees; they are protected

§7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made." *Id.* at 1349 n.9, quoting *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). In *Washington Aluminum* there was no recognized union. However, both Schatzki, *supra* note 1, at 378 n.3, and Getman, *supra* note 17, at 1245 n.198, call attention to *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960), wherein the Supreme Court held that it was not a refusal to bargain for a union to leaflet, picket, and engage in various forms of slowdown, at the same time that it was negotiating a new contract. It would seem to follow that, to whatever extent rank-and-file workers are protected in settling grievances with their employer after a union is recognized, they are also protected in supporting their demands with concerted activity.

For rich descriptions of the way in which rank-and-file workers expand the meaning of the collective bargaining agreement by informal pressure from below, see Atleson, *Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience*, 34 OHIO ST. L.J. 750, 790-92 (1973); Weir, *The Informal Work Group*, in *RANK AND FILE*, *supra* note 1, at 179, 196-200.

²⁰ See Cox, *The Right to Engage in Concerted Activities*, 26 INDIAN L.J. 319, 332-33 (1951): "[N]o provision of the Act supplies a standard by which the choice can be made" as to how much concerted activity independent of a recognized union should be permitted.

²¹ *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 393 U.S. 235, 251 (1970). This passage has become a staple in subsequent decisions restricting the freedom of action of individual employees. See, e.g., *Collyer Insulated Wire*, 192 N.L.R.B. 837, 843 n.15 (1971); *Gateway Coal Co. v. UMW*, 414 U.S. 368, 381 (1974).

not for their own sake but as an instrument of the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.' 29 U.S.C. § 151."²²

2. "Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule. . . . 'The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.'"²³

3. "The intendment of the proviso [to Section 9(a)] is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative, a violation of §8(a)(5)."²⁴

So far as section 7 rights are concerned, the Court's reading of the legislative history might be termed the Extinction Theory. Self-government in the workplace, like self-government in the larger society, requires the individual to give up certain rights so that other rights may be more securely protected. The great questions inside the shop just as outside it are: Is the surrender of rights voluntary? Which rights may be, or must be, given up? Are rights surrendered once and for all, or may they be reclaimed if the government to which they are surrendered—here, the union government—forfeits its trust? In *Emporium Capwell*, as in other recent cases, the Supreme Court takes the position that the selection of a bargaining representative extinguishes the rights of individuals to take direct action on their own behalf.

The Court asserts that this is what Congress intended. Even if it were, a question would remain as to whether the persons thus deprived of their rights ever consented to the surrender, and if not, what authority the resulting arrangements should have. But it is unnecessary to reach that question, for, as the following pages seek to show, the Court's reading of legislative history is wrong.

I. RIGHTS PROTECTED FOR THEIR OWN SAKE

[Section 7 rights] are, for the most part, collective rights, rights to act in concert with one's fellow employees; they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife "by encouraging the practice and procedure of collective bargaining." 29 U.S.C. § 151.²⁵

²² *Emporium Capwell Co. v. Western Addition Comm. Org.*, 420 U.S. 50, 62 (1975).

²³ *Id.* at 62-63, quoting *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

²⁴ *Id.* at 61 n.12.

²⁵ *Id.* at 62.

The heart of section 7, the phrase "concerted activities for the purpose of collective bargaining or other mutual aid or protection," did not originate as part of the National Labor Relations Act (Wagner Act) of 1935. The phrase first made its appearance as part of the statement of public policy in section 2 of the anti-injunction bill reported to the United States Senate by its Judiciary Committee on May 26, 1928.²⁶ The bill, including this phrase, was enacted substantially unchanged in 1932 as the Norris-La Guardia Act.²⁷

Amid much that has changed, these words have stood for 50 years as a definition of national labor policy. Congress has repeatedly seen fit to use the same phrase to describe the rights of employees. The language was also adopted by the National Industrial Recovery Act of 1933,²⁸ the National Labor Relations Act of 1935,²⁹ and the Labor Management Relations Act (Taft-Hartley Act).³⁰ Likewise the Labor Management Reporting and Disclosure Act (Landrum-Griffin Act) begins with the words:

The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection³¹

The natural inference is that the rights described by the phrase are indeed thought to be fundamental and to continue substantially unchanged in different phases of labor activity.

The rights protected by the Norris-La Guardia Act were intended to be protected whether exercised by a single individual or by a group. Section 2, the statement of public policy, was framed with great care by the draftsmen, Professors Frankfurter, Sayre, Oliphant, and Witte, together with labor attorney Donald Richberg.³² Section 2 was in-

²⁶ 69 CONG. REC. 10,050-51 (1928).

²⁷ 29 U.S.C. §§ 101-15 (1970).

²⁸ Act of June 16, 1933, 48 Stat. 195.

²⁹ 29 U.S.C. §§ 151-67 (1970).

³⁰ Labor Management Relations Act of 1947, 29 U.S.C. §§ 141-87 (1970).

³¹ Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401(a) (1970).

³² Donald Richberg told the House Judiciary Committee in 1932 that section 2 of the Norris-La Guardia Act embodied two principles, "both of which have been written into the opinions of the Supreme Court of the United States." The first was the principle that under modern industrial conditions the single employee is helpless to exercise freedom of contract, and can do so only through a union. As to this principle, Richberg cited the words of Chief Justice Taft in *American Steel Foundries v. Tri-City Council*, 257 U.S. 184 (1921). The second principle embodied in section 2, according to Richberg, was the principle that employees shall have the right to organize and bargain collectively through representatives of their own choosing. This principle was enunciated in the

tended by the draftsmen and by the congressional sponsors, Senator Norris and Congressman La Guardia, to avoid the judicial evisceration which had befallen the Clayton Act.⁸³ Section 2 states that "under prevailing economic conditions, . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor," and that he should have "full freedom of association, self-organization, and designation of representatives of his own choosing. . . ."⁸⁴

Moreover, section 4 of the Act lists a series of activities which no federal court may prohibit "any person or persons" from doing "whether singly or in concert."⁸⁵ The expression "concerted activities" in section 2 should be understood to include at least the activities enumerated in section 4. The courts have viewed the two sections in this way. "Section 4," one commentator wrote, "has been used as a guide to discover the activities which Congress particularly wished to shield from injunctive relief."⁸⁶

Prior to the passage of the Norris-La Guardia Act, Congress had sometimes extended rights to individuals which it had denied to employees acting in concert. Thus the Railway Labor Act of 1926 was deliberately phrased to protect the right of individual employees, but

Railway Labor Act of 1926 and endorsed by the Supreme Court (after the anti-injunction bill was drafted) in *Texas & New Orleans R.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 570 (1930). *Hearings on H.R. 5315 Before the House Comm. on the Judiciary*, 72d Cong., 1st Sess. 10-11 (1932). Neither source refers to concerted activities for mutual aid or protection, however. Section 3 of an anti-injunction bill submitted to the Massachusetts legislature in 1929 referred to "strike, lockout, or other concerted action" (see Sayre, *Labor and the Courts*, 39 YALE L.J. 682, 698 (1930)), but obviously a 1929 bill was not the source of a phrase in a bill drafted in 1928.

⁸³ 15 U.S.C. §§ 12-27, 44 (1970). See Frankfurter & Greene, *Labor Injunctions and Federal Legislation*, 42 HARV. L. REV. 766 (1929), reprinted in F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* 206 (1930); Frankfurter & Greene, *Congressional Power over the Labor Injunction*, 31 COLUM. L. REV. 385, 395 (1931); Witte, *The Federal Anti-Injunction Act*, 16 MINN. L. REV. 638, 645 (1932); S. REP. NO. 163, pt. 1, 72d Cong., 1st Sess. 14 (1932); H.R. REP. NO. 669, 72d Cong., 1st Sess. 6 (1932); 75 CONG. REC. 4503-04 (1932) (remarks of Sen. Norris).

⁸⁴ 29 U.S.C. § 102 (1970). There is a general similarity between this statement of public policy in the Norris-La Guardia Act and 29 U.S.C. § 151, the statement of public policy in the National Labor Relations Act, quoted by the Supreme Court in the passage from *Emporium Capwell* at the beginning of this section. There is also an important difference between the two statements. Whereas 29 U.S.C. § 151 begins and ends with sentences which extol "the procedure of collective bargaining," the emphasis in 29 U.S.C. § 102 is more broadly on "self-organization," including organization for collective bargaining.

⁸⁵ 29 U.S.C. § 104 (1970). The expression "any person" is also used in subsections (c), (d), and (g). Subsection (b) refers to becoming or remaining "a member" of a labor organization.

⁸⁶ Comment, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-La Guardia*, 70 YALE L.J. 70, 95 (1960).

not the right of employees en masse, to quit work³⁷ The Norris-La Guardia Act extended such rights to employees in groups without ceasing to protect their exercise by individuals.³⁸

Emporium Capwell is mistaken in asserting that the rights to concerted activity were not protected for their own sake, but only for their instrumental function in promoting collective bargaining. Picketing, in particular, was conceptualized as protected speech.

Section 4(e) of the Norris-La Guardia Act³⁹ shields from injunction “[g]iving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence” Section 4(e) was an object of controversy during the four-year incubation of the Norris-La Guardia Act, and was included in the bill as enacted with particular deliberation. In an attempt to delegitimize mass picketing, the majority of the Senate Judiciary Committee at one point succeeded in striking from the bill all of section 4(e) after the words “labor dispute.”⁴⁰ The offending language was later restored. In 1932, an attempt was made on the Senate floor to substitute for the present section 4(e) the language: “Giving fair publicity to the existence of, or the facts involved in, such dispute.” The amendment was defeated, 53-16.⁴¹

Something of the passion which accrued to this struggle over the right to picket is suggested by the committee report⁴² submitted together with the final version of the Norris-La Guardia Act on February 4, 1932. The report condemned an injunction issued by the United States District Court for the Northern District of Iowa, on March 29, 1930. The injunction was directed at picketing to publicize the

³⁷ The Railway Labor Act stated in part: “[N]othing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act” 45 U.S.C. § 152(10) (1970). Explicating this clause, the Supreme Court quoted the report of the Senate committee, S. REP. NO. 222, 69th Cong., 1st Sess. 4 (1926), according to which the word “individual” had been inserted before the word “employee” throughout the proviso to make clear that the words were not intended to apply to “combinations, conspiracies, or group actions.” The Court concluded: “The purpose of this limitation was manifestly to protect the individual liberty of employees and not to affect proceedings in case of combinations or group action.” *Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 566-67, 567 n.4 (1930).

³⁸ 29 U.S.C. § 104(a) (1970).

³⁹ 29 U.S.C. § 104(e) (1970).

⁴⁰ S. REP. NO. 1060, 71st Cong., 2d Sess. 2 (1930). See also S. Doc. No. 327, 71st Cong., 3d Sess. 8 (1931).

⁴¹ 75 CONG. REC. 4767-71 (1932).

⁴² S. REP. NO. 163, pt. 1, 72d Cong., 1st Sess. (1932).

existence of a strike. The injunction forbade

printing, publishing, issuing, circulating, and distributing, or otherwise communicating, directly or indirectly, in writing or verbally to any person, association of persons, or corporation, any statement or notice of any kind or character whatsoever, stating or representing . . . [that] there is a strike⁴³

The committee report summarized: "In other words, their mouths were absolutely closed and 'free speech' was forbidden."⁴⁴ Referring to the same injunction on the Senate floor, Senator Norris stated that it absolutely and completely denied "the fundamental right of human liberty and freedom," and that a worker who disobeyed it "would be doing only what every human being has a right to do!"⁴⁵

The Supreme Court stated correctly in 1938 that Congress, in protecting peaceful picketing by the Norris-La Guardia Act, intended to protect the "peaceful and orderly dissemination of information" and the opportunity "peacefully to persuade others to concur" in one's views.⁴⁶

The National Labor Relations Act intended no change in the understanding of concerted activities. Throughout the legislative history of the Act, it was assumed that the concerted activities protected by the new law were the same that were protected by the Norris-La Guardia Act. The committee report submitted together with the first draft of the bill expressly declared that section 4 (which in later drafts became section 7)

restates the familiar law already enacted by Congress in section 2 of the Norris-La Guardia Act [and other statutes] The language restrains employers from attempting by interference or coercion to impair the exercise by employees of rights which are admitted everywhere to be the basis of industrial no less than political democracy. A worker in the field of industry, like a citizen in the field of government, ought to be free to form or join organizations, to designate representatives, and to engage in concerted activities.⁴⁷

⁴³ *Id.* at 17.

⁴⁴ *Id.*

⁴⁵ 75 CONG. REC. 4507 (1932).

⁴⁶ *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 562-63 (1938).

⁴⁷ S. REP. NO. 1184, 73d Cong., 2d Sess. 4 (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1099, 1103 (1949) [hereinafter cited as LEGISLATIVE HISTORY 1935]. *See also* 79 CONG. REC. 2371, 7569 (1935) (remarks of Sen. Wagner), *reprinted in* 1 LEGISLATIVE HISTORY 1935, at 1312, 2 *id.* 2332; *Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess., pt. 1, at 38 (1935) (remarks of Sen. Wagner), *reprinted in* 1 LEGISLATIVE HISTORY 1935, at 1414.

This authoritative exposition of the National Labor Relations Act, even more clearly than the report which accompanied the Norris-La Guardia Act, thus analogized section 7 rights to the rights outside the workplace protected—and surely for their own sake—by the first amendment.

The legislative history of the National Labor Relations Act, in fact, displays a persistent concern that section 7 rights not be diminished by other features of the Act which promote collective bargaining. Section 4 of the first draft stated: “Employees shall have the right to organize and join labor organizations, and to engage in concerted activities, *either in labor organizations or otherwise . . .*”⁴⁸ Section 13⁴⁹ of the Act was anticipated by a portion of Public Resolution 44, enacted in June 1934 as a temporary substitute for a new labor law: “Nothing in this resolution shall prevent or impede or diminish in any way the right of employees to strike or engage in other concerted activities.”⁵⁰

The framers of the National Labor Relations Act not only explicitly protected the right to strike but also explicitly rejected the necessity of arbitration. Initially this was not at all clear. On March 1, 1934, Senator Wagner told the Senate that his new bill was modelled on the Railway Labor Act,⁵¹ which heavily stressed arbitration and correspondingly restricted the right to strike. “The National Labor Board . . .,” the Senator continued, “is not designed to act chiefly as a policeman or a judge. Its chief function will be to mediate and conciliate industrial disputes, and to offer its services as an arbitrator whenever the parties so desire.”⁵² Accordingly, the 1934 version of what became the Wagner Act contained a lengthy section 206, beginning:

The Board shall have power to act as arbitrator in labor disputes. When any of the parties to a labor dispute agree to submit the whole or any part thereof to the arbitration of the Board,

⁴⁸ S. 2926, 73d Cong., 2d Sess. § 4 (1934), *reprinted in* 1 LEGISLATIVE HISTORY 1935, at 1, 3 (emphasis added).

⁴⁹ Section 13 of the Act as originally enacted stated: “Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.” Act of July 5, 1935, 49 Stat. 449, 457, now incorporated in substance in the LMRA of 1947, 29 U.S.C. § 163 (1970).

⁵⁰ H.R.J. Res. 375, ch. 67, § 6, 48 Stat. 1183 (June 19, 1934), *reprinted in* 1 LEGISLATIVE HISTORY 1935, at 1256. Section 6 was added to the resolution at the motion of Senator Robert LaFollette of Wisconsin. See I. BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 80-81 (1950).

⁵¹ 78 CONG. REC. 3443 (1934), *reprinted in* 1 LEGISLATIVE HISTORY 1935, at 17.

⁵² *Id.* at 3443-44, *reprinted in* 1 LEGISLATIVE HISTORY 1935, at 17.

and the Board accepts such submission, the agreement shall be valid, irrevocable, and enforceable as to the submitting parties save upon such grounds as exist at law or in equity for the revocation of any contract. In any case accepted by it for arbitration the Board shall have power to issue an award applicable to the submitting parties.⁵³

Workers were the first to protect section 206. Thus George Powers, a steelworker at the Bethlehem mill in Sparrows Point, Maryland, told the Senate Committee that "our position is that establishment of compulsory arbitration, which would be established if the Wagner bill is passed, would be against the interests of the workers."⁵⁴

Eventually the sponsors of the Act agreed. Reporting a revised version of the bill in 1935, the Senate Committee on Education and Labor observed that "compulsory arbitration has not received the sanction of the American people,"⁵⁵ adding:

[T]he duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.⁵⁶

In signing the National Labor Relations Act into law, President Franklin Roosevelt said exactly the reverse of what Senator Wagner had said when first introducing it: "The National Labor Relations Board will be an independent quasi-judicial body. It should be clearly understood that it will not act as mediator or conciliator in labor disputes."⁵⁷ And in upholding the constitutionality of the Act, the Supreme Court repeated in *Jones & Laughlin*:

The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. . . . The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel.⁵⁸

⁵³ S. 2926, 73d Cong., 2d Sess. § 206 (1934), *reprinted in* 1 LEGISLATIVE HISTORY 1935, at 10.

⁵⁴ *Hearings on S. 2926 Before the Senate Comm. on Education and Labor, 73d Cong., 2d Sess., pt. 1, at 488 (1934), reprinted in* 1 LEGISLATIVE HISTORY 1935, at 522.

⁵⁵ S. REP. NO. 573, 74th Cong., 1st Sess. 8 (1935), *reprinted in* 2 LEGISLATIVE HISTORY 1935, at 2307.

⁵⁶ *Id.* at 12, *reprinted in* 2 LEGISLATIVE HISTORY 1935, at 2312.

⁵⁷ 79 CONG. REC. 10,720 (1935), *reprinted in* 2 LEGISLATIVE HISTORY 1935, at 3269.

⁵⁸ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937). One should hasten to add that the rejection of arbitration did not signify any weakening of the Congressional desire to prevent strikes. On the contrary, it is clear that the impetus to pass the National Labor Relations Act waxed and waned in intensity in direct correlation with

In addition to section 7, section 13, and this rejection of arbitration, the National Labor Relations Act protected the right to strike by defining the "employees" protected by the Act so as to include workers on strike.⁵⁹ Responding in 1939 to the first wave of proposals for restrictive amendments of the National Labor Relations Act, Senator Wagner had this to say about the right to strike:

[T]he amendments proposed by Senator Burke would have the effect, among other things, of placing restraints upon the right to strike. No such proposal can strengthen or improve the Labor Act because it is antagonistic to the whole spirit and purpose of the law. The spirit and purpose of the law is to create a free and dignified workingman who had the economic strength to bargain collectively with a free and dignified employer in accordance with the methods of democracy. The abolition or curtailment of the right to strike is a denial of the principles of democracy and a substitution of the methods of the authoritarian state. The design of the National Labor Relations Act is to reduce the number of strikes by eliminating the main wrongs and injustices that cause strikes. The imposition of legal restrictions upon the right to strike, instead of removing these wrongs, would merely deprive the worker of his inalienable right to protest against them.⁶⁰

Peaceful picketing, it is clear, was also expressly designated for protection by section 7. Congressman Connery, sponsor of the National Labor Relations Act in the House, and Senator Wagner, each had something personal to say about peaceful picketing. On May 29, 1934, Congressman Connery told his colleagues how he himself "was arrested for picketing on the East Side when we of the actors' union were picketing the Avenue B Theater."⁶¹ Senator Wagner's experience with picketing was from the other side of the bench. On May 16, 1935, he rose to oppose an amendment to section 7 which would have added

the waxing and waning of the strike wave of 1934-35. See J. HUTHMACHER, SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM 166, 190 (1968); I. BERNSTEIN, *supra* note 50, at 71, 76-77. The point, rather, is that Congress became convinced that many strikes were caused by the refusal of management to recognize unions and to bargain collectively, that collective bargaining requires the freedom to strike in the event of an impasse, and hence, that the right to strike must be preserved in order to prevent strikes. See, e.g., S. REP. NO. 573, *supra* note 55, at 2, reprinted in 2 LEGISLATIVE HISTORY 1935, at 2301: "[O]f the 6,355 new cases received by the regional agencies of the present National Labor Relations Board during the second half of 1934, the issue of collective bargaining was paramount in 2,330"

⁵⁹ See S. REP. NO. 573, *supra* note 55, at 6-7, reprinted in 2 LEGISLATIVE HISTORY 1935, at 2306: "[T]o hold that a worker who because of an unfair labor practice has been discharged or locked out or gone on strike is no longer an employee, would be to give legal sanction to an illegal act and to deny redress to the individual injured thereby."

⁶⁰ THE WAGNER ACT: AFTER TEN YEARS 31 (L. Silverberg ed. 1945).

⁶¹ 78 CONG. REC. 9888 (1934), reprinted in 1 LEGISLATIVE HISTORY 1935, at 1152.

the words "free from coercion or intimidation from any source."⁶² The Senator stated that the word "coercion" had in the past been made use of by judges to enjoin peaceful picketing.

When I was a judge [the Senator continued] I issued such injunctions myself. But how has the word "coercion" as among employees been interpreted by the courts? The use of pickets, mere persuasion without any force, threats, or intimidation, has been deemed coercion⁶³ Even peaceful persuasion by picketing was regarded in some jurisdictions as a coercive method employed by labor against the employer.⁶⁴

The amendment was defeated, 50-21.⁶⁵

In sum, then, the words "concerted activities for . . . mutual aid or protection" were used in the Norris-La Guardia and National Labor Relations Acts with the intent of shielding activities like strikes and peaceful picketing from court orders and employer retaliation; these activities were to be protected whether undertaken by one person or by many; and the rights thus recognized were felt to be fundamental rights, akin to the rights protected by the first amendment, and so deserving of protection for their own sake.

II. THE MEANING OF MAJORITY RULE

Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule. . . . "The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees."⁶⁶

This, then, brings us to the question of how section 9 of the National Labor Relations Act was conceived to qualify or limit section 7. Section 9 of the National Labor Relations Act declares that representatives selected for purposes of collective bargaining by the majority of the employees in an appropriate bargaining unit shall be the exclusive representative of all the employees in such unit "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment"⁶⁷ In the Act as en-

⁶² 79 CONG. REC. 7653 (1935), reprinted in 2 LEGISLATIVE HISTORY 1935, at 2357.

⁶³ *Id.* at 7654, reprinted in 2 LEGISLATIVE HISTORY 1935, at 2358.

⁶⁴ *Id.* at 7670, reprinted in 2 LEGISLATIVE HISTORY 1935, at 2386.

⁶⁵ *Id.* at 7675, reprinted in 2 LEGISLATIVE HISTORY 1935, at 2399-2400.

⁶⁶ *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 62-63 (1975), quoting *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

⁶⁷ 29 U.S.C. § 159(a) (1970).

acted in 1935 there followed a proviso, stating: "That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."⁶⁸

The legislative history makes clear that what was feared in 1935 was *not* the adjustment of grievances by individuals and small groups *after* the adoption of a collective bargaining agreement covering all employees in an appropriate unit. Such adjustment was expressly anticipated and welcomed by the proviso to section 9(a). Instead, what was feared was that minorities, organized in company unions, would be permitted to negotiate their own basic agreements side-by-side with the agreement negotiated by the representative of the majority.⁶⁹

The difference can be illustrated by an analogy often used at the time and later. In section 9 of the National Labor Relations Act, Congress saw fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body. The intent of section 9, then, was to ensure that there would be only one legislature for a given unit. The employer could not be expected to negotiate with more than one set of representatives as to the "basic subjects of collective bargaining." There must not be "two or more basic agreements." "[T]here must be one basic scale, and it must apply to all."⁷⁰

But this in no way signified opposition to a less exclusive "judicial" process for adjusting grievances. On the contrary, not only might any individual or group of employees at any time present grievances to the employer, but also, said the House Committee, "the majority rule does not preclude adjustment in individual cases of matters outside the scope of the basic agreement."⁷¹

Senator Wagner and his colleagues affirmed the foregoing interpretation of section 9 again and again. In 1934, Senator Wagner approvingly quoted a letter to the *New York Times* which stated that the role played by majority representatives "shall in no case prevent the minority from having the right to discuss any grievance it may have with the management."⁷² Similarly Senator Walsh, Chairman of the Senate Committee on Education and Labor, stated in 1934:

There is nothing in this provision, or any other provision of

⁶⁸ Act of July 5, 1935, 49 Stat. 449, 453. *But cf.* 29 U.S.C. § 159(a) (1970).

⁶⁹ *See, e.g.*, H.R. REP. NO. 972, 74th Cong., 1st Sess. 18-20 (1935), *reprinted in* 2 LEGISLATIVE HISTORY 1935, at 2974-76.

⁷⁰ *Id.* at 18, *reprinted in* 2 LEGISLATIVE HISTORY 1935, at 2974.

⁷¹ *Id.* at 19, *reprinted in* 2 LEGISLATIVE HISTORY 1935, at 2975. For subsequent citation of this passage by the National Labor Relations Board as a guide to the interpretation of the proviso to section 9(a), see note 88 *infra* & text accompanying.

⁷² 1 LEGISLATIVE HISTORY 1935, at 1185.

the act, which prohibits an employer from discussing grievances with any employee or groups of employees at any time, irrespective of the duly chosen representatives of the majority. Thus an employer before agreeing or in agreeing to any settlement of grievances presented by the duly chosen representatives of a majority of his employees may receive the views of these representatives of the minority.⁷³

In the hearings on the revised 1935 bill, Senator Wagner continued to explain that majority rule still "preserves at all times the right of any individual or minority group to present grievances to their employer through representatives of their own choosing."⁷⁴ He and other sponsors of the bill cited President Franklin Roosevelt's Executive Order of June 28, 1934, creating a National Steel Labor Relations Board, which stated that majority rule was to be applied "without denying to any employee or groups of employees the right to present grievances, to confer with their employers, or to associate themselves and act for mutual aid or protection."⁷⁵

As in the Executive Order, the right to present grievances was linked to the right to engage in concerted activity. On the eve of the Senate's final vote on the bill, Senator Walsh asserted that the minority's right to present grievances by implication required the minority's right to strike:

MR. WALSH. Mr. President, under this bill representatives chosen by a majority of the workers in a particular unit are recognized as entitled to represent the workers in that unit for the purpose of collective bargaining with the employer, following a similar provision in the Railway Labor Act. It would be obviously impracticable to have two collective agreements, with differing terms as to wages and conditions of employment, covering the same categories of workers in an appropriate unit. Who, then, should represent the employees *in negotiating the agreement*? Obviously, the representatives chosen by the majority of the workers in the unit affected, in accordance with democratic principles; otherwise the employer will be enable [*sic*] to profit by

⁷³ *Id.* at 1126. Note the phrase, "representatives of the minority." Early drafts of the Act embodied this concept, *e.g.*, S. 1958, 74th Cong., 1st Sess., introduced in February 1935, in which the proviso to section 9(a) read: "Provided, That any individual employee or group of employees shall have the right at any time to present grievances to their employer through representatives of their own choosing," 1 LEGISLATIVE HISTORY 1935, at 1300. See also S. REP. No. 1184, 79th Cong., 2d Sess. (1934), reprinted in 1 LEGISLATIVE HISTORY 1935, at 1108: "[T]he minority have a right through representatives or otherwise to present grievances to their employer." This was in accord with the practice of the railroad industry. See note 94 *infra*.

⁷⁴ 1 LEGISLATIVE HISTORY 1935, at 1420.

⁷⁵ *Id.* at 1525-26.

exploiting a division in the ranks of the workers, by playing off one group against another in the negotiations, and thus defeating true collective bargaining. Minority groups and individuals are permitted by the bill to present grievances to the employer. But any agreement arrived at with the majority representatives necessarily is applicable to all the workers in the unit. *If a dissenting minority do not like the terms of the agreement, there is nothing in the bill which prevents the minority from quitting or striking.*

MR. HASTINGS. Will the senator be good enough to tell me what section that is?

MR. WALSH. It is the theory of the whole bill.⁷⁶

In general, supporters of the National Labor Relations Act shared the belief that the Act would permit individuals and groups to adjust grievances with the employer so long as the adjustment was consistent with the collective bargaining agreement. President William Green of the American Federation of Labor summed up the consensus at the House committee hearings. "Any worker has a right to present a grievance . . . [A] minority group may present grievances to the management for adjustment. But . . . there must be established one bargaining agency . . ."⁷⁷

III. THE INTENDMENT OF THE PROVISIO

The intendment of the proviso [to section 9(a)] is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative, a violation of § 8(a)(5).⁷⁸

It is, then, a considerable overstatement to say that when the National Labor Relations Act was first enacted in 1935, the Act "was not concerned, except incidentally, with what took place after the proper union had been recognized by the employer . . ."⁷⁹ On the contrary, there was intense concern with what would happen to individuals and minorities after union recognition, and the proviso to section 9(a) was enacted in response.

What is true is that the problems which first presented themselves under the Act were problems connected with organizing for recogni-

⁷⁶ 2 *Id.* at 2390 (emphasis added).

⁷⁷ *Id.* at 2680. See, to the same effect, the testimony of Dr. William M. Leiserson, Chairman of the National Mediation Board, in *id.* at 2262.

⁷⁸ *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 61 n.12 (1975).

⁷⁹ *Cox & Dunlop, Regulation of Collective Bargaining by the NLRB*, 63 HARV. L. REV. 389 (1950).

tion. An authoritative National Labor Relations Board publication stated in 1940: "No occasions have as yet been presented to the board affirmatively to sketch out the rights of minorities under the act where a majority representation exists."⁸⁰

By 1947, when Congress amended the Act, two traditions of interpretation had begun to take shape. One stressed contract observance and arbitration. During World War II, union-authorized strikes largely ceased, and "the system of grievance arbitration as we now know it was created."⁸¹ In that atmosphere the assumption grew that the principal objective of the Act was labor peace. A body of Board and court precedent developed accordingly. The sponsors of H.R. 3020, the kernel of what became the Taft-Hartley Act, drew on decisions upholding the discharge of sit-down strikers, mutineers, "wildcat" strikers, strikers in violation of collective bargaining agreements, and mass picketers, among others.⁸²

A second theme of the 1947 amendments to the National Labor Relations Act, however, was the concern to protect the rights of individual employees. To begin with, this concern was expressed by the Congressmen opposed to restrictions on concerted activity. Congressman John F. Kennedy, for instance, signed a minority report of the House Committee on Education and Labor which, echoing the Supreme Court in *Jones & Laughlin*, twice characterized the right to engage in concerted activity as a "natural right."⁸³

⁸⁰ J. ROSENFARB, *THE NATIONAL LABOR POLICY AND HOW IT WORKS* 228-29 (1940).

⁸¹ Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 747 (1973).

⁸² H.R. 3020 included a new section 12, later deleted, which withdrew protection from a long list of concerted activities. 1 NLRB, *LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947*, at 204-07 (1947) [hereinafter cited as *LEGISLATIVE HISTORY 1947*]. See H.R. REP. No. 245, 80th Cong., 1st Sess. 318-19 (1947); H.R. REP. No. 510, 80th Cong., 1st Sess. (1947) (Conference Committee), *id.* at 542-43, citing decisions such as *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), and *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944), from which the list of proscribed activities was purportedly derived.

⁸³ H. REP. No. 245, 80th Cong., 1st Sess. (1947) (minority report), 1 *LEGISLATIVE HISTORY 1947*, at 355-403 (signed by Congressmen Lesinski, Kelley, Powell, Madden, Klein, and Kennedy) stated:

In section 7 the [proposed] bill purports to guarantee to employees the right of self-organization to form, join, or assist labor organizations, and to bargain collectively with representatives of their own choosing or "to refrain from any and all such activity." This fundamental right is not dependent upon legislative enactment. It is a natural right that exists and existed prior to passage and independent of the National Labor Relations Act. . . . Governmental protection of the natural right of working people to associate to protect their interests was . . . necessary to convert that natural right into an effective one There is no demonstrable need that this fundamental guarantee needs compromise in the manner proposed by the bill. Especially is this true when the nega-

But in addition, there was majority support for amendments to enhance the rights of the individual, both as an employee on the shop floor and as a union member. Congressman Hartley called his proposals along these lines a "Bill of Rights."⁸⁴ Some of these proposals were deferred until the passage of the Landrum-Griffin Act in 1959, but others were adopted. One of the two most important amendments adopted protected an employee from discharge if union membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. The other strengthened what Congressman Hartley termed the employee's "right to present his own grievance to the employer should the union refuse to do so."⁸⁵ This last was the amendment which strengthened the proviso to section 9(a) by adding to the language enacted in 1935, which protected the right to present grievances, the words: "and to have such grievances adjusted."⁸⁶

To this documentary one should contrast the Supreme Court's version of the legislative history of the 1947 amendment of section 9(a), in *Emporium Capwell*, which reads in full:

tive provisions are considered in conjunction with section 2(11), 7(b), and 8(b) which in their totality render organizational activities a hazardous pursuit and collective bargaining a sham.

Id. at 366-67.

⁸⁴1 LEGISLATIVE HISTORY 1947, at 616. H.R. 3020 contained numerous proposals which became part of the Landrum-Griffin Act, such as a requirement that union officers stand for election at least once every four years, and a requirement that unions keep adequate financial records and report thereon annually to each member. 1 LEGISLATIVE HISTORY 1947, at 182-83. Congressman Hartley itemized the bill of rights contained in H.R. 3020 in a speech on April 15, 1947, reprinted in 1 LEGISLATIVE HISTORY 1947, at 616. He also itemized, in a subsequent book, the bill of rights contained in the Taft-Hartley Act as finally enacted. F. HARTLEY, JR., OUR NEW NATIONAL LABOR POLICY: THE TAFT-HARTLEY ACT AND THE NEXT STEPS 113-14 (1948).

⁸⁵F. HARTLEY, *supra* note 84, at 114. See also Congressman Hartley's discussion of the amended proviso to section 9(a) in *id.* at 83:

Permission for individual employees to discuss their grievances directly with the employer and to adjust their grievances without the sanction of union representatives had long been thought a means of eliminating one of the greatest sources of internal discord, viz., the "playing of favorites" by union leaders . . .

⁸⁶Section 9(a) as originally enacted in 1935 ended with the words ". . . present grievances to their employer." Act of July 5, 1935, 49 Stat. 449, 453. The 1947 amendments made no changes in what had already been enacted and added the following words:

and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 159(a) (1970).

The intendment of the proviso is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative, a violation of § 8(a)(5). H.R. Rep. No. 245, 80th Cong., 1st Sess., 7 (1947); H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 46 (1947). The Act nowhere protects this "right" by making it an unfair labor practice for an employer to refuse to entertain such a presentation, nor can it be read to authorize resort to economic coercion. This matter is fully explicated in *Black-Clawson Co. v. Machinists*, 313 F.2d 179 (CA 2 1962).⁸⁷

This mini-history fails to consider decisions of the Supreme Court itself which created the context for the 1947 amendment; wrongly summarizes the congressional sources it cites; omits other, equally important sources; and relies on a circuit court decision in which the treatment of the legislative history is, if anything, worse.

In 1940, when the National Labor Relations Board stated that it had not yet determined the rights of minorities under the Act after union recognition, the author added: "Perhaps some inkling as to these rights is given by the House Report on the bill . . . : ' . . . the majority rule does not preclude adjustment in individual cases of matters outside the scope of the basic agreement.'"⁸⁸

The suggestion that the Act left individuals free to adjust for themselves matters outside the scope of the collective bargaining agreement reflected the thinking of the Supreme Court. On at least six occasions between the adoption of the National Labor Relations Act and its amendment by the Taft-Hartley Act, the Court directly or indirectly interpreted the intent of section 9(a). These decisions emphasized that in negotiating the collective bargaining agreement the representative chosen by a majority of the workers affected must be the exclusive representative.⁸⁹ But the Court also left room for individual workers to act on their own behalf during the period between contract negotiations. Interpreting analogous provisions of the Railway Labor Act in *Virginian Railway Co. v. System Federation No. 40*, the Court held that they

must be taken to prohibit the negotiation of labor contracts, generally applicable to employees in the mechanical department, with

⁸⁷ 420 U.S. at 61 n.12.

⁸⁸ J. ROSENFARB, *supra* note 80, at 229. The quotation is from H.R. REP. NO. 972, *supra* note 69, at 19.

⁸⁹ NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944).

any representative other than respondent [union], but not as precluding such individual contracts as petitioner [employer] may elect to make directly with individual employees.⁹⁰

Again, in *J. I. Case Co. v. National Labor Relations Board*,⁹¹ the Court offered the intriguing model of the collective bargaining contract as the creation of minimums. Individual contracts could not fall below the minimums, but could exceed them.

Individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the laws of contracts applicable, and to the Labor Board if they constitute unfair labor practices.

It also is urged that such individual contracts may embody matters that are not necessarily included within the statutory scope of collective bargaining, such as stock purchase, group insurance, hospitalization, or medical attention. We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practice. But in so doing the employer may not incidentally exact or obtain any diminution of his own obligation or any increase of those of employees in the matters covered by collective agreement.⁹²

Finally, in *Elgin, Joliet & Eastern Railway Co. v. Burley*,⁹³ the Court described "collective bargaining" as "the formation of collective agreements or efforts to secure them," as distinguished from a "grievance," which "contemplates the existence of a collective agreement already concluded" and "relates either to the meaning or proper application of a particular provision"⁹⁴

The *Elgin* case is particularly important. Congress referred to it in debating the amendment of the proviso to section 9(a) in 1947.⁹⁵

⁹⁰ *Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515, 549 (1937). In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44-45 (1937), the Supreme Court held that the doctrine of *Virginian Railway* was also the proper interpretation of section 9(a) of the National Labor Relations Act.

⁹¹ 321 U.S. 332 (1944).

⁹² *J.I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944).

⁹³ 325 U.S. 711 (1945).

⁹⁴ *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 723 (1945). The development of the practice whereby individual railroad workers, or representatives chosen by them for the occasion, process grievances, is described in Schreiber, *The Origin of the Majority Rule and the Simultaneous Development of Institutions to Protect the Minority: A Chapter in Early American Labor Law*, 25 RUTGERS L. REV. 237, 244-45, 287-96 (1971).

⁹⁵ See text accompanying note 116 *infra*; Comment, *Individual Employee Grievances Under the Wagner and Taft-Hartley Acts*, 1949 WIS. L. REV. 154, 166 (1949); Dunau,

In *Elgin*, moreover, the Court appears to have discussed more thoroughly than at any time before or since the difference between the union's role in collective bargaining and the union's role in grievance adjustment. The Court's citation in *Elgin* to cases under the National Labor Relations Act makes it quite clear that the discussion was not intended to be confined to the Railway Labor Act.

Under the Railway Labor Act, the Court began, "[t]he statute itself vests exclusive authority to negotiate and to conclude agreements concerning major disputes in the duly selected collective agent." But "[w]hether or not the agent's exclusive power extends also to the settlement of grievances . . . presents more difficult questions. The statute does not expressly so declare. Nor does it explicitly exclude these functions."⁹⁶

The union in *Elgin* took the position that the statute confers upon the collective agent "the same exclusive power to deal with grievances" as to negotiate the collective bargaining agreement.⁹⁷

The Court rejected this position. An individual employee's right to confer with management about his own grievance is a "fundamental" right.⁹⁸ Therefore, the presumption should be that this right was intended to continue after union recognition. The burden is on whoever would contend that Congress intended

to submerge wholly the individual and minority interests, with all power to act concerning them, in the collective interest and agency, not only in forming the contracts which govern their employment relation, but also in giving effect to them and to all other incidents of that relation. Acceptance of such a view would require the clearest expression of purpose. For this would mean that Congress had nullified all preexisting rights of workers to act in relation to their employment, including perhaps even the fundamental right to consult with one's employer, except as the collective agent might permit. Apart from questions of validity, the conclusion that Congress intended such consequences could be accepted only if it were clear that no other construction would achieve the statutory aims.⁹⁹

Thus the Court rejected what I have termed the Extinction Theory.

Employee Participation in the Grievance Aspect of Collective Bargaining, 50 COLUM. L. REV. 731, 745 (1950).

⁹⁶ 325 U.S. at 728-29.

⁹⁷ *Id.* at 733.

⁹⁸ *Id.* at 734 ("the fundamental right to consult with one's employer"). See also *id.* at 735 ("the individual employee's right to confer with the management about his own grievance . . . is . . . fundamental . . .").

⁹⁹ *Id.* at 733-34 (footnotes omitted).

In contrast to its later view that union recognition extinguishes the individual employee's power to order his own relations with his employer, the Court held in *Elgin* that Congress should not be presumed to have intended that union recognition nullifies all pre-existing rights of workers to act in relation to their employment.

Further, the *Elgin* decision specified two situations in which the individual employee would be particularly damaged if the union could settle his grievance without his consent.

[T]he drastic effects in curtailment of his preexisting rights to act in such matters for his own protection would be most obvious in two types of cases: one, where the grievance arises from incidents of the employment not covered by a collective agreement, in which presumably the collective interest would be affected only remotely, if at all; the other, where the interest of an employee not a member of the union and the collective interest, or that of the union itself, are opposed or hostile.¹⁰⁰

Finally, *Elgin* expressly left open the question "whether Congress intended to leave the settlement of grievances altogether to the individual workers, excluding the collective agent entirely except as they may specifically authorize it to act for them, or intended it also to have voice in the settlement as representative of the collective interest."¹⁰¹

It will be evident how closely the 1947 additions to section 9(a) followed the analysis of the Supreme Court decisions.

The amendment gives the employee the right not only to present but to settle grievances, following *Virginian Railway, J. I. Case*, and *Elgin*.

The amendment requires that any such adjustment be "not inconsistent" with the terms of a collective bargaining contract or agreement then in effect, the very words used in *J. I. Case*.

The amendment permits the union to be present at the adjustment but not to prevent it, along lines envisioned in *Elgin*.

The argument most strongly urged against a literal interpretation of the proviso is that (in the words of the Court) the Act nowhere protects the employee's right to present and adjust grievances by making it an unfair labor practice for the employer to refuse to entertain such a presentation.¹⁰² The absence of a remedy, it is suggested, vitiates the alleged right.

¹⁰⁰ *Id.* at 736.

¹⁰¹ *Id.* at 737.

¹⁰² The Court's current view is also that of the author in Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 624 & n.49 (1956).

This problem tends to arise with any right which is a "fundamental right . . . not dependent upon legislative enactment."¹⁰³ Because the statute merely recognizes, or perhaps only implies the fundamental right, the statute is unlikely to provide specific means for the right's enforcement. In consequence, it can somewhat perversely be argued that a fundamental right is not more of a right than a right created by statute, but less of a right, because the fundamental right lacks any method of enforcement. Unless the courts are prepared to fill the enforcement gap, the right, no matter how fundamental, may become just a "right," abstract and unenforceable.

A year before *Elgin*, the Court confronted the enforcement problem in *Steele v. Louisville & Nashville Railroad Co.*,¹⁰⁴ and further provided context for the 1947 amendment of section 9(a). In *Steele*, the Court held that individuals and minorities have a right to be fairly represented by any union on whom Congress confers the authority of exclusive representation. But how was the right to be enforced? The right was not clearly stated by a statute. Still less did the statute prescribe remedies. What then was to be done? Precedents were divided. In *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*,¹⁰⁵ the Court, speaking through Chief Justice Hughes, held that the fundamental right to organize and bargain collectively should be enforced by the courts even though the statute provided no penalty for its violation. But in *Amalgamated Utility Workers (C.I.O.) v. Consolidated Edison Co.*,¹⁰⁶ Hughes declared for the Court that individual workers might not initiate contempt actions for the enforcement of Board orders protecting their fundamental rights.

The Court in *Steele* followed *Texas & New Orleans* rather than *Amalgamated Utility Workers*, and held that individual workers might enforce their fundamental right to fair representation in the courts.

In the absence of any available administrative remedy, the right here asserted . . . is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdic-

¹⁰³ H. REP. NO. 245, *supra* note 83.

¹⁰⁴ 323 U.S. 192 (1944).

¹⁰⁵ 281 U.S. 548, 569 (1930):

The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided.

¹⁰⁶ 309 U.S. 261 (1940).

tion. . . . The right is analogous to the . . . right which this Court has enforced and protected by its injunction in *Texas & New Orleans R. Co. v. Brotherhood of Clerks*¹⁰⁷

In the context of Supreme Court decisions between 1935 and 1947, then, there is every reason to believe that the 1947 amendment of the proviso to section 9(a) was intended to confer additional, real rights on individual employees. Certainly the National Labor Relations Board so believed. Opposing the proposed amendment of the proviso, Chairman Herzog of the Board testified:

The proviso to section 9(a) is changed by S. 360 so that any individual or group may not only present grievances to his employer (which is entirely proper) but also "adjust such grievances, without the intervention of the bargaining representative, so long as the adjustment does not violate the terms of a collective-bargaining contract or agreement then in effect."

This proposed amendment to the proviso is a serious impingement on the authority of the exclusive bargaining agent to act for the whole unit. . . . It should be noted . . . that an individual bargain on a grievance may affect all other employees, even though it does not necessarily violate the terms of the collective bargaining contract. . . . The amendment would seriously weaken the position of a duly selected bargaining agent.¹⁰⁸

The committee reports and debates which accompanied the amendment of section 9(a) overwhelmingly confirm Chairman Herzog's interpretation, and rebut the interpretation of the proviso by the Supreme Court in *Emporium Capwell*.¹⁰⁹

The first report cited by the Court in *Emporium Capwell* discusses the proviso to section 9(a) under the heading "Rights of Workers," appropriately calling the rights "rights" and not "privileges." This section of the report begins: "Important among the provisions of the bill are those that really assure to workers freedom in their organizing and bargaining activities. The old act purported to do this, but in the Board's hands it often had the opposite effect."¹¹⁰

After discussing unit determination and the rights of union

¹⁰⁷ 323 U.S. at 207.

¹⁰⁸ *Hearings on S. 55 and S.J. Res. 22 Before the Senate Comm. on Labor and Public Welfare*, 80th Cong., 1st Sess., pt. 4, at 1914-15 (1947) (statement of Paul M. Herzog).

¹⁰⁹ The material which follows is for the most part not new. It is summarized in the articles cited in note 95 *supra*; in *Donnelly v. United Fruit Co.*, 40 N.J. 61, 190 A.2d 825 (1963); and in Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362 (1962). Because the material continues to be ignored, I have quoted rather fully.

¹¹⁰ H.R. REP. No. 245, *supra* note 82, at 298.

members to control the union's affairs, the report turns to the amended proviso to section 9(a). About this the report states:

The bill further adds to the freedom of workers by permitting them not only to present grievances to their employers, as the old Board heretofore has permitted them to do, but also to settle the grievances when doing so does not violate the terms of a collective-bargaining agreement, which the Board has not allowed.¹¹¹

The report also returns to the proviso to section 9(a) at a later point:

Like the present act, this clause of the amended act would make representatives chosen by the majority of the employees in a bargaining unit the exclusive representative of all the employees for the purpose of collective bargaining. The present act provides that any individual employee or group of employees may "present grievances to their employer." Putting a strange construction upon this language, the Labor Board says that while employees may "present" grievances in person, the representative has the right to take over the grievances. The present bill permits the employees and their employer to settle the grievances, but only if the settlement is not inconsistent with the terms of any collective-bargaining agreement than [*sic*] in effect. The proviso is thus given its obvious and proper meaning.¹¹²

Noteworthy here is that to the House Committee it was "obvious and proper" that section 9(a) conferred a *right*, and that the right included authority to *settle* grievances.

The other primary source cited by the Court in *Emporium Capwell*¹¹³ contains the same emphasis on a right to settle. By using "settlement" and "adjustment" interchangeably, this report makes clear that these terms have the same meaning.¹¹⁴

The obvious third primary source, not cited by the Court in *Emporium Capwell*, is the report of the Senate Committee on the counterpart bill in the Senate, S. 1126. This report would appear to resolve all ambiguities as to legislative intent.

Section 9(a): The revisions of section 9 relating to representation cases make a number of important changes in existing law. An amendment contained in the revised proviso for section 9(a) clarifies the right of individual employees or groups of employees to present grievances. The Board has not given full effect

¹¹¹ *Id.*

¹¹² *Id.* at 325.

¹¹³ 420 U.S. 50 (1975).

¹¹⁴ H.R. REP. No. 510, *supra* note 82, at 550.

to this right as defined in the present statute since it has adopted a doctrine that if there is a bargaining representative he must be consulted at every stage of the grievance procedure, even though the individual employee might prefer to exercise his right to confer with his employer alone. The current Board practice received some support from the courts in the Hughes Tool case . . . , a decision which seems inconsistent with another circuit court's reversal of the Board in *NLRB v. North American Aviation Company* The revised language would make it clear that the employee's right to present grievances exists independently of the rights of the bargaining representative, if the bargaining representative has been given an opportunity to be present at the adjustment, unless the adjustment is contrary to the terms of the collective-bargaining agreement then in effect.¹¹⁵

It need hardly be underscored that an individual right to present and adjust grievances, existing "independently of the rights of the bargaining representative," cannot be decided out of existence in the manner of the Court in *Emporium Capwell*.

The Congressional debates supplement the three committee reports. The most important statements in the congressional debates as to the intention of the amended proviso to section 9(a) were by Congressmen Owens, of Illinois, and Hartley.

MR. OWENS. Is it not a fact that under this provision we have gone in accord with the decisions of the Supreme Court of the United States, which hold that where employees have a grievance, for instance in connection with the recovery of a certain amount of money claimed due from an employer, they can go to him and complain about it and settle it without having a bargaining agent? We have not in this section 9(a) of the bill said anything about wages, terms, conditions of employment, . . . but we have specifically said it does not include the making of any settlement inconsistent with the terms of the collective-bargaining agreement then in effect, that is, at the time of the discussion and settlement.

MR. HARTLEY. The gentleman from Illinois is absolutely correct in that statement.¹¹⁶

The mini-legislative history in *Emporium Capwell* makes no reference to the congressional debates. The Second Circuit Court of Appeals decision in *Black-Clawson*,¹¹⁷ relied on by the Supreme Court in

¹¹⁵ S. REP. No. 105, 80th Cong., 1st Sess. (1947), reprinted in 1 LEGISLATIVE HISTORY 1947, at 430.

¹¹⁶ 93 CONG. REC. 3703 (1947), reprinted in 1 LEGISLATIVE HISTORY 1947, at 781.

¹¹⁷ *Black-Clawson Co. v. International Ass'n of Machinists, Lodge 355*, 313 F.2d 179 (2d Cir. 1962).

Emporium Capwell, quotes one sentence from the debates: a sentence taken from a speech by Senator Murray in support of a *substitute* bill!¹¹⁸

Virtually the entire legislative history of the amendment of the proviso to section 9(a) of the National Labor Relations Act in 1947 has now been quoted. If legislative history is history as historians understand it, the Supreme Court's account of the purpose behind the amended proviso is misleading on all points. It is clear that Congress intended to confer a right, not a "right." The intent of the amended proviso was not to give employers the right to "entertain" grievances, but to give individual employees and groups of employees the right to present and settle them. Congress in enacting the amended proviso adopted the distinction between a collective bargaining agreement and a grievance, and the union's appropriate roles therein, articulated by the Supreme Court in *Elgin* and kindred cases.

There remain the Court's contentions in *Emporium Capwell* that the proviso to section 9(a) contains no remedy, and that, in any case, the right to present and adjust grievances does not "authorize resort to economic coercion."

With regard to remedies: Congress intended at least that employer and employee should be free to settle grievances when the settlement is consistent with the collective bargaining agreement, and the union has been given an opportunity to be present. Surely, then, an employer ought not to be able to discharge an employee who requests to do just that.¹¹⁹

With regard to coercion: The case for reasonable concerted activ-

¹¹⁸ 93 CONG. REC. 4904 (1947), reprinted in 2 LEGISLATIVE HISTORY 1947, at 1453, quoted in *Black-Clawson Co. v. International Ass'n of Machinists*, Lodge 355, 313 F.2d 179, 185 n.5 (2d Cir. 1962).

¹¹⁹ Compare the following formulations along similar lines:

An individual employee has the right, under Section 9(a) of the Act, to present his grievance individually . . . without the intervention of the union. Consequently, he has the right to present to this Board, apart from and without being limited by any grievance-arbitration process, alleged violations of the Act which have impaired those rights of his which the Act protects.

Collyer Insulated Wire, 192 N.L.R.B. 837, 852 (1971) (Jenkins, M., dissenting) (footnote omitted).

The reasoning behind the *Miranda* doctrine could be extended so as to make the "right" of individual presentation pursuant to section 9(a) enforceable by the NLRB and immune from elimination by the collective agreement or by the employer's policies.*

**Miranda* read the duty of fair representation, inferred from section 9 of the NLRA, into the rights conferred by section 7 and enforced by section 8. . . . Similar reasoning could be applied to the right of individual presentation of grievances expressly recognized in section 9(a).

Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies, the Better?*, 42 U. CHI. L. REV. 1, 40 & n.187 (1974).

ity in support of section 9(a) grievance settlement has already been sketched.¹²⁰ The venerable epithet "coercion" does not weaken it. The Court itself recently said of peaceful picketing:

The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. . . . Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.¹²¹

No obvious reason appears why peaceful concerted activity about workplace conditions should be held to a higher standard than similar activity about real estate practices.¹²² If the request to present and settle grievances is protected—as the legislative history mandates—then reasonable concerted activity in support thereof should be protected, also.

IV. CONCLUSION: FUNDAMENTAL RIGHTS IN THE WORKPLACE

Here, it is like, the common question will be made: "Who shall be judge whether the prince or legislative act contrary to their trust?" . . . To this I reply: The people shall be judge; for

¹²⁰ See note 19 *supra*.

¹²¹ *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

¹²² If the objection to the picketing in *Emporium Capwell* on section 9 grounds is set aside, the activity itself was clearly protected as solicitation in nonworking hours and off the company property under *Republic Aviation*, see note 4 *supra* & text accompanying, not to speak of the fact that the Emporium is a department store open to the public, cf. *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); cf. also *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1974). Further, if the distribution of literature as to the adequacy of the bargaining representative requires particular protection, that protection might well extend to distribution of literature which would not occur but for a belief in the representative's inadequacy. Perhaps the Court felt justified in ignoring the first amendment dimension of *Emporium Capwell* because the picketers distributed abusive leaflets which called the employer, among other things, a "racist pig." However, even assuming arguendo that some literature can be so "disloyal" and "indefensible" as to justify discharge, *NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953), that doctrine is not triggered when the "attempt to solicit through publicity . . . customers' support—moral or economic—for the labor dispute objectives" is conducted in such a way that (1) the labor dispute basis of the appeal is apparent, (2) there is no disparagement of the employer's product, and (3) the content of the literature does not materially depart from minimal standards of truthfulness. *NLRB v. National Furniture Mfg. Co.*, 315 F.2d 280, 284, 286 (7th Cir. 1963). *Accord*, *Red Top Cab & Baggage Co.*, 145 N.L.R.B. 1433, 1450 (1964). The literature distributed in *Emporium Capwell* met at least the first two tests.

who shall be judge whether his trustee or deputy acts well and according to the trust reposed in him but he who deposes him and must, by having deposed him, have still a power to discard him when he fails in his trust?¹²³

Contrary to the legislative history of the Supreme Court, the more recent labor statutes promote not one national labor policy, but two: minimizing industrial strife through contract observance and arbitration, and protecting individual rights.

These policies have not been satisfactorily accommodated. One indication of this is that Justice Douglas, spokesman for the arbitration policy in *Lincoln Mills*¹²⁴ and in the *Steelworkers Trilogy*,¹²⁵ has been calling for that policy's restriction in cases which involve conflict between the union and its individual members.

Justice Douglas early noted the Landrum-Griffin Act and its concern for individual rights in the *Borden* case.¹²⁶ Borden, a plumber, sued for damages in state court charging that his union had wrongfully failed to refer him to a job. The defendant union challenged the state court's jurisdiction on preemption grounds, and the Supreme Court, with the exception of Justices Douglas and Clark, agreed. Douglas stated for the dissenters:

As a matter of policy, there is much to be said for allowing the individual employee recourse to conventional litigation in his home-town tribunal for redress of grievances. . . . When the basic dispute is between a union and an employer, any *hiatus* that might exist in the jurisdictional balance that has been struck can be filled by resort to economic power. But when the union member has a dispute with his union, he has no power on which to rely.¹²⁷

Justice Douglas challenged the arbitration policy itself, on similar grounds, in 1971. *United States Bulk Carriers, Inc. v. Arguelles*¹²⁸ involved a seaman who sued for lost wages. The district court gave summary judgment for the employer, holding under *Lincoln Mills* that the employee must use the grievance-arbitration machinery provided

¹²³ J. LOCKE, SECOND TREATISE OF GOVERNMENT § 240 (1966).

¹²⁴ *Textile Workers' Union v. Lincoln Mills*, 353 U.S. 448 (1957).

¹²⁵ *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

¹²⁶ *Local 100, United Ass'n of Journeymen & Apprentices v. Borden*, 373 U.S. 690, 698 (1963) (Douglas, J., dissenting).

¹²⁷ *Id.* at 699-700. Justice Douglas quoted the last two sentences in his dissent in the similar case of *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Emp. v. Lockridge*, 403 U.S. 274, 305 (1971).

¹²⁸ 400 U.S. 351 (1971).

in the collective bargaining agreement before going to court. A 5-4 decision by the Supreme Court affirmed a reversal by the court of appeals. Douglas wrote for the Court: "The question here is not the continuing validity of *Lincoln Mills* and its progeny,"¹²⁹ but in fact, as the minority insisted, the Douglas opinion partially repudiated the pro-arbitration policy. The Court professed to affirm because seamen, unlike other workers, have a separate statutory remedy which predates section 301 of the Labor Management Relations Act. Douglas, however, added these words about legislative history:

Enforcement by or against labor unions was the main burden of § 301, though standing by individual employees to secure declarations of their legal rights under the collective agreement was recognized. . . . Since the emphasis was on suits by unions and against unions, little attention was given to the assertion of claims by individual employees¹³⁰

Once having distinguished the situation of the individual employee as a situation calling for systematic special treatment, Justice Douglas began to find constitutional overtones in the individual employee's plight. In *Andrews v. Louisville & Nashville Railroad Co.*,¹³¹ the plaintiff was a railroad worker who, having been discharged, sought not to be reinstated but to collect certain monies due. Dissenting alone, Justice Douglas contended that while the claim, as in *Arguelles*, arguably fell under the collective bargaining agreement, the employee should be free, as in *Arguelles*, to seek a remedy in court if he chose. Justice Douglas reached the constitutional issue with these words:

Everyone who joins a union does not give up his civil rights. If he wants to leave the commune and assert his common-law rights, I had supposed that no one could stop him. I think it important under our constitutional regime to leave as much initiative as possible to the individual. What the Court does today is ruthlessly to regiment a worker and force him to sacrifice his constitutional rights in favor of a union¹³²

¹²⁹ *Id.* at 352.

¹³⁰ *Id.* at 355-56.

¹³¹ 406 U.S. 320 (1972).

¹³² *Id.* at 330-31. The argument that the pro-arbitration policy deprives workers of a constitutionally protected right to sue was first made by Justice Black's dissent in *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 663 (1965). In *Andrews* Justice Douglas disavowed the decision in *Maddox*. It is noteworthy that *Maddox*, like *Lockridge*, *Arguelles*, and *Andrews*, was a former employee, hence arguably less precluded by the collective bargaining agreement than one presently working under it. A majority of the Court found this reasoning persuasive in *Allied Chemical & Alkali Workers of America, Local 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157 (1971), which held that an employer might unilaterally modify retirees' benefits without violating its duty to bar-

Justice Douglas was again the solitary dissenter in the critical *Gateway* and *Emporium Capwell* cases. In *Gateway*, the Justice not only argued the existence of another exception to the presumption of arbitrability, the safety-and-health exception, but rested his dissent on natural right grounds. The words of section 502 of the Labor Management Relations Act, stated Justice Douglas, "recognize in the law what is in any case an unavoidable principle of human behavior: self preservation. As Judge Hastie said for the majority in the Court of Appeals: 'Men are not wont to submit matters of life or death to arbitration'"¹³³ And in *Emporium Capwell*, gathering the fruits of repentance embodied in all these opinions, Justice Douglas twice in a brief dissent declared that the Court had made the individual worker a "prisoner of the union."¹³⁴

Justice Douglas' dissents in *Gateway* and *Emporium Capwell* bring him full circle from the position he espoused as the Court's spokesman for arbitration. In these dissents, he goes beyond the assertion that an individual employee must have access to a court, rather than to an arbitrator, should the individual choose that forum. Here he asserts that individual employees must be free to strike if they believe their lives to be in danger, or to picket if they see no other way of ending their employer's alleged racial discrimination. In effect, Justice Douglas in his *Gateway* and *Emporium Capwell* dissents puts forward the position that a worker should be able to choose, not merely between an arbitrator and a court, but between any third party decisionmaker and direct action. Thereby Douglas calls into question the inarticulate major premise of the Supreme Court's recent labor decisions: that the highest of all goods is to get the workers off the streets, or the shop floor, and into the chambers of some purportedly neutral umpire. Justice Douglas' voice serves to keep alive for the Court the choice which Congress left open between labor peace at the expense of individual liberty, and individual liberty at the risk of labor peace.

The Court has attempted to accommodate the competing congressional policies of arbitration on the one hand, and individual liberty on the other, by a doctrine of collective rights.

There are, the Court appears to be saying, two kinds of rights in

gain. The Court observed that it could not be assumed "that collective bargaining over the benefits of already retired employees would be a one-way street in their favor," cryptically citing the *Elgin* case and section 9(a). *Id.* at 173 n.12.

¹³³ *Gateway Coal Co. v. UMW*, 414 U.S. 368, 391-92 (1974) (Douglas, J., dissenting).

¹³⁴ *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 73, 76 (1975) (Douglas, J., dissenting).

the workplace.¹³⁵ First there are individual rights, like an individual's right to equal employment opportunities under Title VII of the Civil Rights Act of 1964.¹³⁶ Rights of this kind cannot be bargained away by the union. Presumably an employee might waive his or her opportunity to pursue these individual rights in court as part of a voluntary settlement. The effectiveness of any such waiver would depend on whether the employee's consent to the settlement was voluntary and knowing. To use an old-fashioned word, these rights are "inalienable."¹³⁷

Then, as the Court visualizes the statutory scheme, there are collective rights protected by section 7 of the National Labor Relations Act. They are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union. They are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife. Waiver of these collective rights is liberally construed. The principle of majority rule prevails. It is inevitable that some individuals and groups will be subordinated to the interest of the majority. The complete satisfaction of all who are represented is hardly to be expected. Thus in the eyes of the Court, section 7 rights are not really rights belonging to an individual, like other rights. They are quasi-rights, almost privileges.

The doctrine that the rights to concerted activity are collective rights corresponds neither to legislative history nor to much case law. The Supreme Court itself recently decided that an individual's right to have a union representative present at an interview which might reasonably be expected to lead to discipline was an aspect of the right to concerted activity.¹³⁸ It is settled law that an individual's action is often protected concerted activity.¹³⁹ The rights to leaflet, to picket,

¹³⁵ The following two paragraphs follow almost verbatim the language of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Emporium Capwell*.

¹³⁶ 42 U.S.C. § 2000(e) (1970).

¹³⁷ In the eighteenth century, an "inalienable right" was either (a) a right which could be given up only by consent of its possessor or (b) a right so inextricably a part of human nature that it could not be given up at all. See S. LYND, *INTELLECTUAL ORIGINS OF AMERICAN RADICALISM* ch. 2 (1968).

¹³⁸ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

¹³⁹ A single employee, attempting in good faith to enforce a right claimed under a collective bargaining agreement, is engaging in protected concerted activity and may not be discharged. *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967). Alternatively, a single employee is engaged in protected concerted activity if the employee's activity has the object of initiating or inducing or preparing for group action or has some relation to group action in the interests of the employees. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964).

and to strike are rights which individuals possess like any other rights. One may compare such individually-possessed rights to concerted activity to the rights peaceably to assemble, and to petition for the redress of grievances, protected by the first amendment. Justice Douglas had something like this in mind when he stated in *Andrews* that the plaintiff was petitioning the government under the first amendment "for a redress of grievances' in the traditional manner of suitors at common law."¹⁴⁰ From the standpoint of their respective legislative histories, moreover, section 7 rights are every bit as real, as fundamental, as statutorily-blessed, as individually-owned, and as unsusceptible to vicarious waiver, as Title VII rights.

Equally unpersuasive is the companion doctrine which protects the right to engage in concerted activities without the union's approval only when that activity supports union objectives.¹⁴¹ Surely the need for unauthorized activity is greatest precisely when the union and its dissidents are *not* in harmony.

When a union rejects a claim . . . it can scarcely be expected to use the most efficacious means of remedying it. Self-help in those circumstances would appear to be more deserving of statutory protection than in the case where the union is taking reasonable curative action.¹⁴²

Citizens of the larger society would presumably find intolerable a law permitting only public speeches certified as patriotic, or picketing only when the picket signs express confidence in the government. Yet what seems bizarre in the context of the world outside the workplace has come to seem to the majority of the Court quite proper after punching in.

Strikingly in contrast is the approach of the National Labor Relations Board when considering whether to defer to arbitration a matter which is arguably both a contract violation and an unfair labor practice. Unfair labor practice charges filed by individual employees will

¹⁴⁰ *Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 331 (1972).

¹⁴¹ This doctrine was developed by the National Labor Relations Board and by some of the circuit courts of appeal to soften the harshness of the view that, after union recognition, any section 7 activity unauthorized by the union is presumptively unprotected. It is summarized as follows by the District of Columbia Circuit Court of Appeals:

One approach has been to protect minority concerted activity, such as walkouts or picketing, whenever it is not in derogation of the union's position on the matter in question, *i. e.*, when the concerted activity supports the position taken by the union. *See, e. g.*, *N. L. R. B. v. R. C. Can Co.*, 328 F.2d 974 (5th Cir. 1964); *Western Contracting Corp. v. N. L. R. B.*, 322 F.2d 893 (10th Cir. 1963).

Western Addition Community Org. v. NLRB, 485 F.2d 917, 926 (D.C. Cir. 1973) (footnote omitted).

¹⁴² Meltzer, *supra* note 119, at 36 n.172.

be deferred to arbitration, according to the General Counsel, only if the individuals' interests are in substantial harmony with the interests of the union. Even where substantial harmony is found, the Board will not defer if the individual expressly objects to or expressly refuses to be bound by the arbitration of the dispute underlying the charge.¹⁴³

The Board's approach presumes that section 7 rights are indeed rights, belonging to individual employees, and so, like any other rights, subject to the wishes of those employees as to the preferred manner of their enforcement.

The case for presumptive protection of concerted activity, before and after union recognition, can be summarized as follows:

1. The rights to engage in concerted activity for mutual aid and protection were intended by the Congress to be fundamental rights, akin to the rights protected by the first amendment. They are rights which belong to each individual employee, and they protect activity such as picketing and strikes whether undertaken singly or in concert. These rights are protected for their own sake as well as for their instrumental function.

2. In establishing the principle that a representative chosen by a majority of employees should be their collective bargaining representative, Congress expressly reserved the right of individuals and groups to adjust grievances directly with the employer. It was understood that this right in turn required the freedom to take reasonable concerted action.

3. The 1947 amendments to the National Labor Relations Act strengthened, rather than weakened, this right of employees to deal directly with their employer independently of the union.

4. Post-World War II labor statutes affirm the desirability of contract observance and arbitration, but affirm no less strongly the freedom of action of the individual employee. Thus there are two recent labor policies, not one.

5. The Supreme Court should abandon its position that the selection of a bargaining representative extinguishes the individual employee's power to order his own relations with the employer. The Court's present position squarely contradicts both the language of the proviso

¹⁴³ Office of the General Counsel, National Labor Relations Board, Arbitration Deferential Policy Under *Collyer*—Revised Guidelines, May 10, 1973, at 32-36. *Accord*, T.I.M.E.—DC, Inc. v. NLRB, 504 F.2d 294, 302 (5th Cir. 1974). See also Atleson, *Disciplinary Discharges, Arbitration and NLRB Deference*, 20 *BUFF. L. REV.* 355 (1971); Getman, *Collyer Insulated Wire: A Case of Misplaced Modesty*, 49 *IND. L.J.* 57 (1973); Schatzki, *A Response to Professor Getman*, 49 *IND. L.J.* 76 (1973). Whether the Board in fact adheres to these guidelines is another question, for another article.

to section 9(a), and the legislative history.

6. Section 7 rights should be presumptively protected before and after union recognition. Harmony between the individual member and the union should not be a condition precedent for the exercise of section 7 rights. On the contrary, precisely to the degree that harmony does not exist, it may be the more necessary for rank-and-file workers to take back into their own hands the rights which they have delegated.