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BOSTON UNIVERSITY LAW REVIEW

LABOR, LOYALTY, AND THE CORPORATE CAMPAIGN

MELINDA J. BRANSCOMB*

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*“Who can be wise, amaz’d, temp’rate, and furious,
Loyal, and neutral, in a moment?”¹*

INTRODUCTION

Since 1935, section 7 of the National Labor Relations Act (the Act or NLRA)² has protected employees who seek to safeguard or to better their working conditions by prohibiting employers from disciplining³ employees who engage in collective activity for mutual aid or protection such as strikes, boycotts, and the publicity accompanying these efforts. Recent years, however, have brought a change in both the battlefield on which workplace disputes are resolved and the allies sought in that contest. The battle has moved from the physical to the verbal terrain as the strike has been increasingly replaced by the “corporate campaign.”⁴ A lessened stigma attached to crossing a picket line, combined with the ready availability of unemployed workers willing to replace strikers, has removed the strike from employees’ arsenal of viable economic weapons. In place of the traditional battle front

¹ WILLIAM SHAKESPEARE, *THE TRAGEDY OF MACBETH* act 2, sc. 3, lines 108-109 (THE RIVERSIDE SHAKESPEARE (G. Blakemore Evans ed., (1974)). Macbeth’s answer to his own question is, no one. *Id.* at line 109.

² In 1935 Congress enacted the Wagner Act, the original piece of current, private sector federal labor legislation. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1988)) [hereinafter NLRA]. The Act was substantially amended by the Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (1988)) and by the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified in various sections of 29 U.S.C.).

³ The term “working conditions” as used herein includes wages, hours, and other aspects of the workplace relationship. “Discipline” refers to any sanctions undertaken against an employee, such as discharge, suspension, or retaliation by undesirable work assignments.

⁴ In the typical corporate campaign, the union engages in a “multidimensional” effort to reach all phases of a corporation’s economic vulnerability. The union employs numerous approaches to generate adverse publicity about the employer and its conduct towards its employees, community, or consumers. The tactics may include consumer boycotts, political lobbying, pressuring shareholders, and targeting financial institutions doing business with the employer. *Lawyers Predict Corporate Campaigns Will Remain Popular as Strike Alternative*, DAILY LAB. REP. (BNA) No. 45, at A-7 (Mar. 7, 1990) (reporting that “corporate campaigns are being viewed as an alternate economic weapon”). Corporate campaigns may attack a company’s public image, its noncompliance with governmental laws and regulations, or its individual officers who are believed to be egregious labor law offenders. The campaign consists largely of rhetoric and it lacks the physical picket line. Though the traditional strike included leaflets or words on picket signs, the mere presence of the picket was as important, or even more important, than the written message. The picket line alone was a nonverbal weapon, which persuaded pro-union employees, suppliers, and customers to stay away from the plant. Its symbolism was powerful and well-understood.

is today's corporate campaign, in which employees and their unions relentlessly advance by verbal warfare on the target employer and its agents for the purpose of enlisting the public as allies in their cause.⁵ Specifically, in a corporate campaign, employees seek consumers, rather than their fellow employees, as their primary allies.⁶

These changes in the battle's venue and its participants affect the tactical options available to the contestants and raise new legal issues.⁷ These new

⁵ Recent examples include: a union's international president passing out leaflets at a Neiman Marcus department store, urging consumers not to purchase Godiva Chocolates, because Godiva was a large corporate consumer of Diamond Walnuts, which was the primary object of a labor dispute, see Bill Wallace, *Teamster Boss Says Reform on Track; Ron Carey in S.F. for Clinton Campaign, Walnut Boycott*, S.F. CHRON., Oct. 21, 1992, at A2; and an Allied Industrial Workers local's president writing to top executives of First of America Bank Corporation urging it to use its influence to end the "union busting tactics" of a Board member who also is President of A.E. Staley Manufacturing Co., the object of a labor dispute, see *AIW Sends Warning to First of America Bank over Staley/Tate & Lyle Dispute*, BUS. WIRE, Sept. 29, 1992, available in LEXIS, Nexis Library, Wires File.

A recent, highly publicized example of the corporate campaign involved a union's allegations that Food Lion, the object of an organizing drive, violated the overtime wage laws, and the union's cooperation with ABC's "PrimeTime Live" to produce an unflattering story about Food Lion which aired on November 5, 1992. See *'PrimeTime Live' Producer Confirms Show Is Designed to 'Entertain,'* PR NEWSWIRE, Oct. 20, 1992, available in LEXIS, Nexis Library, Wires File; *Union 'Misrepresentations' Noted in Food Lion Letter to Congress*, PR NEWSWIRE, Oct. 14, 1992, available in LEXIS, Nexis Library, Wires File. The Company denied the show's allegations, which included claims that it sold outdated produce, treated products to alter their smell and appearance, and ground outdated beef with fresh beef for sale. See *The Food Lion Side of the Story in Response to PrimeTime Live's Segment November 5, 1992*, PR NEWSWIRE, Nov. 6, 1992, available in LEXIS, Nexis Library, Wires File.

⁶ "The beauty of the electronic picket line is that it allows us to involve both our employees and customers who believe that good American jobs are worth fighting for." *CWA Unleashes Intensive Campaign Against AT&T; Employment Security Concerns Hanging Up Talks*, PR NEWSWIRE, June 4, 1992, available in LEXIS, Nexis Library, Wires File (quoting CWA Union president's announcement of a plan to encourage union members and labor allies to switch to other long-distance telephone carriers from AT&T, the object of a dispute). Additional allies sought may include stockholders, board members, financiers, regulators, and government agencies.

⁷ For example, employees have been active in corporate proxy battles, such as recent efforts regarding Lockheed Corporation, and some employee groups are active in proxy reform at the national level, such as the California Public Employees' Retirement System (CalPERS). See Kellye Y. Testy, *The Capital Markets in Transition: A Response to New SEC Rule 144A*, 66 IND. L.J. 233, 268 n.190 (1990) and sources cited therein. It is not difficult to imagine, for example, a scenario in which employees fight to replace directors with a slate they perceive to be more sensitive to employee interests on such issues as plant relocation and "exportation" of jobs. Are such activities "disloyal," given that they are directly adverse to management's interests? The scenario raises interesting questions concerning the interplay between the corporate agents' possible violation of their own

issues, when combined with unclear labor law doctrine interpreting employer and employee rights and obligations under the Act, call for a reexamination of that doctrine. I predict that the continuing development of the corporate campaign will exacerbate the problems in one already confusing area of labor law: the “disloyalty” exception to section 7 protection.

That an employee may lose protection because of “disloyalty” is not a new proposition; it originated in a landmark 1953 Supreme Court decision known as *Jefferson Standard*.⁸ The disloyalty exception has never been clearly defined, uniformly understood, or consistently applied. The National Labor Relations Board (NLRB or the Board) and courts have struggled laboriously but unsuccessfully to make sense of it. Even before today’s corporate campaign tactics emerged in the labor/management relationship, it was notoriously hard to predict when certain collective activity might later be adjudged as “disloyal.” For labor law practitioners, the disloyalty exception has become a minefield that has indiscriminately claimed both employers and employees as casualties. Employers have responded to conduct that they felt was the epitome of disloyalty, only to find themselves confronting the damaging publicity of an unfair labor practice trial, liability for reinstatement and back pay, and a further antagonized workforce. Employees have attempted in good faith to exercise their statutorily protected right to engage in collective activity, only to find themselves unemployed because their actions were later adjudged disloyal. Since *Jefferson Standard*, the parameters of the narrow disloyalty exception have expanded to unrecognizable proportions from its original application in the product disparagement context. As the exception was applied to more types of activity, the minefield has claimed increasing numbers of employee casualties who wrongly estimated its boundaries.⁹

The indistinct boundaries of the disloyalty exception present employers and employees with a Hobson’s choice between the drawbacks of too much caution or the risks of too little. The overly conservative choice—for the employer not to discharge the employee or for the employee not to engage in the collective activity—has the drawback of leaving both needlessly disarmed in the struggle: the employer with an undesired employee in the workforce and the employee too afraid to exercise her statutory rights. The overly risky choice—for employers to discharge the employees or for employees to engage in the activity—may result in litigation and liability on the one hand and unemployment on the other. Even if a party guesses cor-

fiduciary obligations if they fire these employees (assuming the agents are not insulated by the business judgment rule) and NLRA § 7 protection.

⁸ NLRB v. Local Union No. 1229, IBEW (*Jefferson Standard*), 346 U.S. 464 (1953).

⁹ In the last decade, the Board and the courts have narrowed the exception a bit, reversing the 30-year trend of expansion that followed *Jefferson Standard*. This reversal has left some unexpected employers as victims in its wake. See *infra* notes 132-37 and accompanying text. Interestingly, the ensuing half century since *Jefferson Standard* has not occasioned clarification of the doctrine by the Supreme Court.

rectly about the parameters of disloyalty, the result is often a costly, protracted legal battle fostered by the confusion surrounding the exception.

The phenomenon of decades of almost consistent expansion of the disloyalty exception is now about to collide with the recently expanded phenomenon of the corporate campaign. In contrast to the time when labor's message was transmitted implicitly through the fairly standardized, physical picket line, today's corporate campaign message is verbal in form and creatively tailored *de novo* in each situation to criticize the particular employer and its agents and to involve a particular audience.¹⁰ To be successful it must have two key features: rhetoric and negative content. That is, it must articulate its message with sufficient urgency, appeal, and emotion so that an uninvolved public already numb from ubiquitous advertising stops and takes notice,¹¹ and it must publicize clearly the employer's negative attributes so that the public is persuaded to act. These emotional appeals to public audiences, with negative content on sensitive topics, embellished with rhetoric and flourish, would seem to be the essence of "disloyalty" from the employer's vantage point and therefore to invite the application or, more accurately, misapplication, of the disloyalty test.

A third development makes the inevitable collision course of the disloyalty test and the corporate campaign more imminent: a 1988 Supreme Court decision decidedly expanding the lawfulness of the secondary boycott in light of the First Amendment.¹² Because the boycott and appeals to consumers, shareholders, and others in the public are hallmarks of the corporate campaign, this case makes a careful examination of the disloyalty exception even more urgent.

¹⁰ See, e.g., *Drive Begins to Discourage Law Students from Applying to 'Union Busting' Firms*, DAILY LAB. REP. (BNA) No. 174, at A-9 (Sept. 7, 1990) (describing a campaign initiated by Harvard law students and joined by the AFL-CIO to discourage students nationally from seeking jobs with law firms designated as "union busters"). I am not implying that labor's traditional tactics lacked creativity, or that boycotts are new, but simply that the message in the typical strike was largely communicated implicitly by the picket line. In contrast, today's corporate campaign attempts to involve far-ranging audiences (shareholders, investors, college students, etc.) with written appeals for nationwide boycotts, stockholder actions, and the like.

¹¹ See generally Ronald K.L. Collins & David M. Skover, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087 (1990) (discussing how commercial television has anesthetized public discourse).

¹² *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council (DeBartolo II)*, 485 U.S. 568 (1988) (holding that peaceful handbilling urging consumer boycott of neutral employer, absent picketing, does not constitute coercion under NLRA § 8(b)(4)(ii)(B), 29 U.S.C. § 158(b)(4)(ii)(B) (1988), secondary boycott prohibitions). A secondary boycott involves economic pressure against a "neutral employer," one that is not directly involved in a labor dispute. An example would be picketing (or handbilling) with requests not to patronize a company that does business with the "primary" employer that is the target of the dispute. Section 8(b)(4) prohibits some, but not all, secondary activity.

This Article critically assesses the disloyalty test, offering badly needed guidance in this murky and risky area of labor law. Part I provides an overview of the relevant portions of the Act and the problems facing the National Labor Relations Board (NLRB or the Board) and the courts as these decision makers interpret section 7 law. It reviews the early section 7 exceptions, the creation of the disloyalty test, and the aftermath of this new exception, and it introduces a number of problems left as *Jefferson Standard's* legacy. Part II discusses the analytical inconsistency applied in disloyalty doctrine analysis and proposes a coherent framework for analyzing section 7 cases.

Moving from problems of analysis to problems of application, Part III shows that no uniform definition of disloyalty has emerged, and that Board members and judges have confused the term with other section 7 exceptions.¹³ The disloyalty test has proven unworkable because the cases do not, in fact, turn on disloyalty, and because not all disloyal employees lose protection. Part III examines the unpredictable differences among the individual decision makers¹⁴ that shape the way they apply the facts to the disloyalty test: their individual adoption of an "adversary" or a "harmony" labor relations philosophical paradigm, their disagreement over whether disloyalty is an objective or subjective term, their differing emotions and personal ethics, and their reluctance to accord deference to the NLRB. An examination of the different factors often considered by these decision makers shows that consistency in the application of the test is impossible.

Part IV discusses the important philosophical and policy problems generated by a disloyalty exception. Fundamentally, all exercise of section 7 rights is "disloyal." The disloyalty test lacks a solid foundation in labor law or common law, and it is at odds with the structure and policies of the Act. Its abandonment will have no adverse practical or legal ramifications. This Article concludes that the exception should be abandoned as unworkable, unnecessary, unjustified, and inconsistent with the Act.¹⁵

¹³ The exceptions include product disparagement, insubordination, interruption of production, illegality, and disclosure of confidences.

¹⁴ "Decision makers" refers here to all those who issue written decisions or opinions evaluating unfair labor practice allegations. The first level decision maker in an unfair labor practice proceeding is the Administrative Law Judge (A.L.J., formerly Trial Examiner). See 29 C.F.R. §§ 102.15, 102.34-.35 (1992). Once the Administrative Law Judge has issued a decision and a recommended disposition, the Members of the NLRB may or may not adopt the recommendation. See 29 U.S.C. § 160(b)-(c) (1988); 29 C.F.R. § 102.48 (1992). The Board's decision is directly appealable to the federal circuit courts of appeals, and then to the Supreme Court, though judicial review is limited. See 29 U.S.C. § 160(e)-(f) (1988); *infra* part III.C.4.

¹⁵ The disloyalty test has not been thoroughly explored before this writing, but others have come to similar conclusions, at least tentatively, when examining other aspects of the Act. See Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 988-94 (1992); Julius G. Getman, *The Protection of Economic Pressure by*

I. EVOLUTION OF THE DISLOYALTY TEST: AN OVERVIEW

A. *The Early Section 7 Exceptions*

Congress established the foundations of contemporary American labor policy in the 1935 National Labor Relations Act,¹⁶ conferring in section 7 statutory protection for the right of employees to organize, join unions, bargain collectively, and “engage in other concerted activities for the purpose of . . . mutual aid or protection.”¹⁷ An employer commits an unfair labor practice if she disciplines an employee for exercising his section 7 rights.¹⁸ Although section 7 contains no exceptions on its face, the Board and courts have used legislative history, national labor policy, and common sense to craft a group of exceptions, under which some concerted activity for mutual aid or protection is deemed not to be “protected.”¹⁹ The NLRB, as the

Section 7 of the National Labor Relations Act, 115 U. PA. L. REV. 1195, 1238-39 (1967). *But see* Getman, *supra*, at 1240 n.177. Professor Estlund’s recent article focuses on the comparison of the speech rights of employees in the public and private sectors. Significantly, we reach several of the same conclusions concerning disloyalty, while beginning our scholarly journeys from entirely different points of origin, and while traversing different terrain.

¹⁶ 29 U.S.C. §§ 151-169 (1988). Much of the Act was grounded in the policies and practices of the Railway Labor Act of 1926, 45 U.S.C. §§ 151-188 (1988).

¹⁷ 29 U.S.C. § 157 (1988).

¹⁸ NLRA, § 8(a)(1), 29 U.S.C. § 158(a)(1) (1988). An employer generally violates § 8(a)(1) by discharging employees who voted for or against a union, concertedly requested a raise, decided to strike, or distributed in the parking lot leaflets concerning working conditions. When an employer discriminates in hiring or conditions of employment to discourage membership in labor organizations, the employer also violates § 8(a)(3), 29 U.S.C. § 158(a)(3) (1988). *See* CHARLES J. MORRIS, *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* 93 n.25 (2d ed. 1983 & Supp. 1989). For a general discussion of § 8(a)(3), *see id.* at 182-256 (2d ed. 1983), 90-124 (Supp. 1989). For our purposes, the remedies are the same, and unless relevant, no distinction will be made herein between conduct violative of § 8(a)(1) and conduct that also involves the animus that violates § 8(a)(3).

¹⁹ Few would argue, for example, that an employer cannot discharge employees who bomb their work site as part of a plan to “persuade” the employer to grant a requested wage increase. Though such employees may be acting “concertedly” for perceived “mutual aid or protection,” one cannot reasonably construe the Act to forbid their discharge. In creating exceptions, the Board and courts have acknowledged legitimate employer interests and have construed the law to preserve these interests when possible. *See NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (upholding an employer’s right to discharge employees who forcibly seize and occupy an employer’s factory building); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937) (recognizing an employer’s right to select its employees or discharge them, when it exercises that right for reasons other than labor intimidation or coercion); *NLRB v. Knuth Bros.*, 537 F.2d 950, 956 (7th Cir. 1976) (upholding an employer’s right to discharge employees who reveal information that the employer regards as confidential and that could jeopardize the employer’s business relationships); *NLRB v. Prescott Indus. Prods. Co.*, 500 F.2d 6, 9 (8th Cir. 1974) (preserving an employer’s right freely to express opinions about

agency charged with interpreting the Act, bears the responsibility for determining the nature and scope of the activities not protected by section 7.²⁰ An interpretive obligation also falls on the federal courts of appeals, who deferentially review Board orders.²¹

Before *Jefferson Standard*, the Board had enunciated a less than concrete "totality of the circumstances" test for loss of section 7 protection even though activities may have been concerted and for mutual aid or protection: "The question . . . is . . . whether this particular activity was so indefensible, under the circumstances, as to warrant [discipline or discharge]"²² In 1942, Judge Learned Hand, writing for the United States Court of Appeals for the Second Circuit, narrowed the activity excepted from section 7 through a "lawfulness" inquiry that later became frequently quoted as the test for loss of protection:

*[S]o long as the "activity" is not unlawful, we can see no justification for making it the occasion for a discharge; a union may subsidize propaganda, distribute broadsides, support political movements, and in any other way further its cause or that of others whom it wishes to win to its side. Such activities may be highly prejudicial to its employer; his customers may refuse to deal with him, he may incur the enmity of many in the community whose disfavor will bear hard upon him; but the statute forbids him by a discharge to rid himself of those who lay such burdens upon him.*²³

issues, including labor matters). Other sections of the Act accommodate employer interests. See NLRA, § 8(c), 29 U.S.C. § 158(c) (1988) (protecting an employer's right to express views, provided they contain no threats of force, reprisal or promises of benefit); 29 U.S.C. § 158(b)(4)(ii)(b) (prohibiting certain secondary boycotts against neutral employers); *id.* § 158(b)(7)(c) (prohibiting picketing for recognition beyond 30 days without having filed a petition for election). Because § 7, unlike these sections, does not make allowances for employer interests, the Board and courts should exercise restraint in crafting exceptions to it. A number of other labor and employment statutes similarly require that managerial "rights" yield to countervailing public interests. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12117 (Supp. III 1991).

²⁰ E.g., *Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 215 (9th Cir. 1989). See generally NLRA, § 10, 29 U.S.C. § 160 (1988) (discussing generally the power of the Board).

²¹ See *infra* part III.C.4. The obligation to anticipate accurate statutory interpretations also falls on counsel of employers, employees, and unions.

²² *Harnischfeger Corp.*, 9 N.L.R.B. 676, 686 (1938) (finding a partial strike to protest employer's labor policies protected). The use of "indefensibility" as a test of loss of protection has a checkered history and has been criticized. See Getman, *supra* note 15, at 1233-38; *infra* notes 53-54 and accompanying text; *infra* text accompanying notes 177-81. Judge Hand's oft-quoted decision, *infra* note 23 and accompanying text, clearly rejected such a broad test, and the Supreme Court's treatment of the term "indefensible" in *Jefferson Standard* certainly fell short of an endorsement. See *infra* note 63; *infra* text accompanying notes 39, 46.

²³ *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 506 (2d Cir.

With a few limited exceptions for conduct such as insubordination and interruption of production, then, employees did not lose section 7 protection if the activity was carried out (1) for lawful ends, and (2) by lawful means, such as peacefully and non-violently.²⁴

B. *Creating the Disloyalty Test*

The landmark *Jefferson Standard* decision in 1953 introduced into section 7 discourse the new concept that employees criticizing their employer's product in a labor dispute could be disloyal.²⁵ *Jefferson Standard* engaged in radio and television broadcasting in Charlotte, North Carolina. When it and its technicians' union reached an impasse in contract negotiations, the employees picketed and distributed the handbill that became an issue in the case.²⁶ The handbill alleged that *Jefferson Standard* had outmoded equip-

1942) (emphasis added); see also *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 258 (1939) (stating that although the Act redresses violations of employee rights, it does not "license . . . [employees] to commit tortious acts or to protect them from the appropriate consequences of unlawful conduct").

²⁴ See *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 43 (1942) (holding strikes constituting mutiny unprotected); *Fansteel Metallurgical Corp.*, 306 U.S. at 253-58 (holding that § 7 protection for concerted activity does not extend to violent, disruptive, and illegal strikes); *Hoover Co.*, 90 N.L.R.B. 1614, 1621-22 (1950) (stating that the NLRA protects employees if they employ peaceful means and if their objectives are not improper for reasons of clear public policy), *enforcement denied on other grounds*, 191 F.2d 380 (6th Cir. 1951). Concerning insubordination and interruption of production, see *International Union, UAW, Local 232 v. Wisconsin Employment Relations Bd. (Briggs & Stratton)*, 336 U.S. 245, 255-63 (1949) (holding that states may forbid recurrent or intermittent unannounced stoppages of work by employees when unaccompanied by specific demands), *overruled on other grounds*, *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 152 (1976); *NLRB v. Condenser Corp. of Am.*, 128 F.2d 67, 77 (3d Cir. 1942) (holding that an employer may discharge employees who stop work repeatedly during the working day when the employer promises to confer with the employees later in the day and there is no reason to mistrust the promise); *C.G. Conn., Ltd. v. NLRB*, 108 F.2d 390, 396-98 (7th Cir. 1939) (holding that employees who walk off the job each day before their scheduled overtime do not merit strike protection under the NLRA because employees do not have the right to work solely upon terms of their own); *Elk Lumber Co.*, 91 N.L.R.B. 333, 336-39 (1950) (upholding an employer's right to discharge employees who engage in a collective slowdown and thus work solely upon terms of their own).

²⁵ *NLRB v. Local Union No. 1229, IBEW (Jefferson Standard)*, 346 U.S. 464, 472 (1953).

²⁶ Ironically, the parties were deadlocked over the Company's demand that the prior contract's "just cause" for discharge requirement and its arbitration procedures be deleted, allowing discharge for any (or no) reason, and the Union's insistence that the clauses remain. *Jefferson Standard Broadcasting Co.*, 94 N.L.R.B. 1507, 1530 (1951) (Trial Examiner's report), *rev'd sub nom. Local Union No. 1229, IBEW v. NLRB (Jefferson Standard)*, 202 F.2d 186 (D.C. Cir. 1952), *set aside*, 346 U.S. 464 (1953). The picketing, not at issue in the case, was classically protected activity, with placards and handbills

ment and that its television programming was outdated and devoid of local programs.²⁷ It questioned whether the company considered Charlotte a second-class city. After 5,000 copies were distributed during nine days, Jefferson Standard discharged ten employees who sponsored or distributed the handbill.²⁸

When the discharged employees challenged Jefferson Standard's actions, the Trial Examiner ruled that distribution of the leaflets was protected activity, such that the employees could not lawfully be discharged.²⁹ The Examiner reasoned that Jefferson Standard made no attempt to counter the propaganda nor to request a retraction.³⁰ Further, the handbill was, in some measure, true.³¹ Those who wrote it and authorized its distribution honestly believed it to be completely truthful³² and had no "intent to falsify or maliciously injure"³³ the Company. The Examiner noted that the Act protects "honestly believed statements of fact or opinion, which, in some cases, may actually be unfounded in fact."³⁴ He relied on precedent holding that as

identifying the Union, indicating that there was a labor dispute, and appealing for support. *Id.* at 1531 (Trial Examiner's report).

²⁷ The handbill stated:

Is Charlotte a Second-Class City?

You might think so from the kind of Television programs being presented by the Jefferson Standard Broadcasting Co. over WBTV. Have you seen one of their television programs lately? Did you know that all the programs presented over WBTV are on film and may be from one day to five years old. There are no local programs presented by WBTV. You cannot receive the local baseball games, football games or other local events because WBTV does not have the proper equipment to make these pickups. Cities like New York, Boston, Philadelphia, Washington receive such programs nightly. Why doesn't the Jefferson Standard Broadcasting Company purchase the needed equipment to bring you the same type of programs enjoyed by other leading American cities? Could it be that they consider Charlotte a second-class community and only entitled to the pictures now being presented to them?

WBT TECHNICIANS

Id. at 1532.

²⁸ *Id.* at 1533.

²⁹ *Id.* at 1537.

³⁰ *Id.* at 1533-34 (Trial Examiner's report).

³¹ The partially or wholly inaccurate statements or inferences were as follows: that if the Company purchased certain equipment, it could bring certain programs to Charlotte as other major cities received, when the necessary telephone equipment was not actually available in Charlotte; that there were no local programs produced by WBTV, when actually two to two and one half hours of daily programming was local; that all programs were on film, when one was not; and that the films were "one day to five years" old, when some were only minutes or hours old. *Id.* at 1535-36 n.7 (Trial Examiner's report).

³² *Id.* at 1520-21 (Murdock, Member, dissenting).

³³ *Id.* at 1536 (Trial Examiner's report); *see also id.* n.8 (Trial Examiner's report) (distinguishing threat from legal malice).

³⁴ *Id.* at 1537 (Trial Examiner's report) (quoting *Atlantic Towing Co.*, 75 N.L.R.B. 1169, 1172 (1948)). Further, the Trial Examiner relied on *NLRB v. Illinois Tool Works*,

long as conduct is not unlawful, it does not lose protection simply because it may be "highly prejudicial,"³⁵ and he concluded that the policy of protecting free, robust employee speech outweighed the employer's interest in truthfulness of the handbill.³⁶

Upon review, the Board disagreed. The Board conceded that section 7 normally protects picketing and other activity publicly denouncing an employer's practices, even if coupled with a boycott asking the public to exert pressure to that end.³⁷ The Board said, however, that such activity can lose protection if carried out for unlawful objectives³⁸ or by "indefensible" means.³⁹ Here, the objectives of enlisting public support in a labor dispute to obtain bargaining concessions were lawful, but the employees failed to disclose that purpose.⁴⁰ Although the leaflets contained no willful misrepresentations,⁴¹ they made no reference to the dispute or even to a union.⁴² The employees "deliberately undertook to alienate their employer's customers by impugning the technical quality of his product"⁴³ and succeeded in causing loss of business.⁴⁴ The employees appeared to be appealing to the consuming

153 F.2d 811 (7th Cir. 1946), enforcing 61 N.L.R.B. 1129 (1945), to distinguish between "inaccuracies" because of momentary "animal exuberance" and flagrant, violent, and serious misconduct in which an employee is unfit to continue working. *Jefferson Standard*, 94 N.L.R.B. at 1537 (Trial Examiner's report).

³⁵ *Jefferson Standard*, 94 N.L.R.B. at 1536 (Trial Examiner's report) (quoting NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 506 (2d Cir. 1942)); see also *supra* note 24 and accompanying text.

³⁶ *Jefferson Standard*, 94 N.L.R.B. at 1537 (Trial Examiner's report).

³⁷ *Id.* at 1510 n.7, 1512.

³⁸ See *infra* notes 157-58 and accompanying text.

³⁹ *Jefferson Standard*, 94 N.L.R.B. at 1509-10 (noting "sit-down strikes, sabotage, [or] 'violence, or similar conduct'" (quoting Hoover Co., 90 N.L.R.B. 1614, 1621 (1950))). Given that the objectives were lawful, the Board in *Jefferson Standard* focused on the issue of "means." See *supra* notes 22-23; *infra* notes 63, 177-78.

⁴⁰ The employees "did not indicate that they sought to secure any benefit for themselves, as employees, by casting discredit upon their employer." *Jefferson Standard*, 94 N.L.R.B. at 1511.

⁴¹ *Id.* In any event, the Board stated in dictum that truthfulness is not dispositive. It rejected a test that "the truth of employee speech, irrespective of the context or the motives of the speaker, is the test of its protected character." *Id.* at 1512 n.14. The Board declined to rule on whether the speech constituted defamation. *Id.* at 1512 n.18.

⁴² *Id.* at 1510-12. The activity did not relate to labor policies of the employer or concern wages, hours, or working conditions, and the employees' conduct was a concerted separate attack made in the interest of the public, not the employees. *Id.*

⁴³ *Id.* at 1511. The Board also was undoubtedly influenced by the union's admitted intent to distribute even more extreme leaflets. The union had informed management that there were additional "stronger" handbills to be distributed. See *id.* at 1533 (Trial Examiner's report).

⁴⁴ The issue of whether the Company was actually harmed was the source of some confusion. The Trial Examiner found that the handbills caused "considerable discussion" among business persons and "some alarm among Respondent's [Jefferson Stan-

public's interests by attacking the employer's products as of inferior quality, but they did not reveal that they were actually seeking to further their own interests in a labor dispute.⁴⁵ As such, the leaflets were "hardly less 'indefensible' than acts of physical sabotage."⁴⁶

Dissenting Member Murdock argued that activity loses section 7 protection only if the objectives or means are unlawful.⁴⁷ According to Member Murdock, the statements in the leaflet were substantially accurate and those who distributed it believed it to be true.⁴⁸ Whether the concerted activity resulted in economic harm to the employer would be an inappropriate test of protection,⁴⁹ and in any event the leaflet caused no "present financial loss"⁵⁰ or "substantial damage."⁵¹ He found the decision "startling" because it

dard's] management and television equipment distributors and dealers as to its possible economic effects upon their business," but that there was "no evidence that any distributor or dealer communicated his concern to Respondent prior to the discharge of the employees, although several of them did afterwards." *Id.* at 1533 (Trial Examiner's report) (emphasis added). He found that the Company was already losing money when the flyers appeared and that this continued, *id.*, but he also said there was a drop in sales of televisions the month after the leaflets' distribution. *Id.* at 1536 n.10 (Trial Examiner's report). The Board "corrected" the Trial Examiner's summation of the evidence in that "[t]he record does contain evidence that dealers immediately communicated to the Respondent their concern over the effect of the handbill." However, the Board stated that this difference was "without significance to our finding." *Id.* at 1511 n.12. The dissenting Member queried, "how relatively inconsequential was any actual damage to the employer . . . ? These employees did no more than to point out to the public what in large measure it already knew [T]his handbill did not and could not result in any present financial loss to the Respondent." *Id.* at 1524-25 (Murdock, Member, dissenting).

⁴⁵ *Id.* at 1511-12. The Board declined to rule on whether the handbills would have been protected if they had appealed to the public for support of the union in the labor dispute. *Id.* at 1512 n.18. The Board stated that the leaflets "called for a boycott," which is not literally true. Although some viewers might not purchase televisions because of the leaflets, and that undoubtedly was a hoped-for result in their distribution, the flyers on their face could just as easily be read as an appeal to consumers to demand the station to purchase the "needed equipment" to improve the programming they were receiving. Either result would put pressure on the employer to alter its bargaining position.

⁴⁶ *Id.* at 1511 (footnote omitted); see also *supra* note 22.

⁴⁷ *Jefferson Standard*, 94 N.L.R.B. at 1521-23 (Murdock, Member, dissenting).

⁴⁸ *Id.* at 1520-21.

⁴⁹ *Id.* at 1525 n.38 (Murdock, Member, dissenting) (citing Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503 (2d Cir. 1942)); cf. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council (DeBartolo II)*, 485 U.S. 568, 599 (1988) (noting that lawfulness of activity within the meaning of NLRA § 8(b)(4)(ii)(B), 29 U.S.C. § 158(b)(4)(ii)(B) (1988), does not turn on harm caused to employer).

⁵⁰ *Jefferson Standard*, 94 N.L.R.B. at 1525 (Murdock, Member, dissenting).

⁵¹ *Id.* at 1525 n.38.

As the majority opinion indicates, the Respondent only 'apprehended' the remote contingency of an inability to increase its revenues by charging higher advertising rates in the future based upon the presence of a larger number of TV sets in the area,

sets aside principles which this Board with court sanction has heretofore recognized as the proper test of protected concerted activity; startling because it has shriveled the previously recognized area of statutory protection for concerted activities and left employers, employees, and the Board itself without any certain standards to mark the remaining greatly circumscribed area.⁵²

On appeal, the United States Court of Appeals for the District of Columbia Circuit chastised the Board for not applying the Board's own test that the courts had previously endorsed: protection is lost only with illegal purpose (ends) or illegal means.⁵³ Remanding, the Court criticized the Board for using an "indefensible" means standard and requested an explanation for its departure from precedent.⁵⁴

The Supreme Court reversed, vacated the remand order, and addressed the merits in a 6-3 decision.⁵⁵ Much of the majority's reasoning was similar to the Board's: product quality and business policies were impugned with a "sharp, public, disparaging attack" made "in a manner reasonably calculated to harm the company's reputation and reduce its income;"⁵⁶ the relationship to a labor dispute was undisclosed;⁵⁷ and the public distribution was widespread,⁵⁸ resulting in concern in the community and "apprehen[sion]" of loss of advertising income.⁵⁹

As an additional rationale for affirming the Board, and in what arguably was dictum,⁶⁰ the Court stated that the employer justifiably labeled employ-

if the handbill should discourage people who did not then own TV sets from buying them.

Id.

⁵² *Id.* at 1520.

⁵³ Local Union No. 1229, *IBEW v. NLRB* (Jefferson Standard), 202 F.2d 186, 188-89 & n.17 (D.C. Cir. 1952), *set aside*, 346 U.S. 464 (1953).

⁵⁴ *Id.* at 188-89. The court ruled that § 7 protected all means except "unlawful" ones. *Id.* at 187 n.4 (citing *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 344 (1939) (action breaching labor agreement), and *Scullin Steel Co.*, 65 N.L.R.B. 1294 (1946) (mid-contract strike for wage increase), *enforced as modified*, 161 F.2d 143 (8th Cir. 1947)); *see also supra* note 23.

⁵⁵ *NLRB v. Local Union No. 1229, IBEW* (Jefferson Standard), 346 U.S. 464 (1953).

⁵⁶ *Id.* at 471.

⁵⁷ *Id.* at 472 (quoting *Jefferson Standard Broadcasting Co.*, 94 N.L.R.B. 1507, 1511 (1951)). The Court pointed out that disclosure might have decreased public support for the employees' cause. *Id.* at 477.

⁵⁸ *Id.* at 468, 469 n.4.

⁵⁹ *Id.* at 471 (quoting *Jefferson Standard Broadcasting Co.*, 94 N.L.R.B. 1507, 1511 (1951)); *see also supra* note 51.

⁶⁰ A careful reading of the case reflects that despite the lofty language concerning "elemental" disloyalty, it was primarily the other bases for loss of protection—the arguments it adopted from the Board concerning the disparagement of the product—on which the outcome was grounded. The actual holding concerned product disparagement, and on this subject the Court affirmed the Board. The court added the disloyalty rheto-

ees “disloyal” who attacked the product (television programming) while drawing wages.⁶¹ Disloyalty, the Court said, constitutes cause for discharge.⁶² Even if the “attack” did come partly or fully within the ambit of section 7 activities, the “means” used here provided grounds for loss of protection.⁶³

By contrast, dissenting Justices Frankfurter, Black, and Douglas believed that the court of appeals had justifiably requested that the Board explain its departure from precedent.⁶⁴ Writing for the dissent, Justice Frankfurter

ric, on its own initiative, as additional support for the Board’s holding that the product disparagement was unprotected.

⁶¹ 346 U.S. at 476. The Court stated that the employer should not be required to “finance” attacks on “the very interests which the attackers were being paid to conserve and develop” when there was no appeal for public sympathy. *Id.* Of course, the employees were not actually drawing wages at the time, for they picketed during non-work hours. The Court ruled that the criticism of the quality of the product was separable from the protected aspects of the employee’s collective activity. *Id.* at 477. The Court also invoked one of the Act’s remedy provisions to rule that distribution of the leaflets constituted “cause” for discharge. NLRA, § 10(c), 29 U.S.C. § 160 (1988); *see also* discussion *infra* part II.B.2.

⁶² 346 U.S. at 475.

⁶³ *Id.* at 477. Regarding the “indefensible” term that the Board had used, the Supreme Court noted in passing that the Board had described the conduct this way, but the Court appeared to go out of its way to avoid using the term itself. *Id.*; *see also supra* note 22. As authority for its use of the term in *Jefferson Standard*, the Board cited one case that did not contain the term, *Brown Radio Service & Laboratory*, 70 N.L.R.B. 476, 478 (1946), and another in which employees who had engaged in a partial strike and had damaged machinery were adjudged *protected*, *Harnischfeger Corp.*, 9 N.L.R.B. 676, 686 (1938). The “indefensible” language later was used by the Supreme Court in a different context, in passing and in dictum, in *International Union, UAW, Local 232 v. Wisconsin Employment Relations Board (Briggs & Stratton)*, 336 U.S. 245, 256 (1949), *overruled on other grounds*, *Lodge 76, Int’l Ass’n of Machinists v. Wisconsin Employment Relations Comm’n*, 427 U.S. 132, 152 (1976). *Briggs & Stratton* involved *illegal* work stoppages, but the Board subsequently has misinterpreted the case as endorsing the “indefensible” term generally. *Elk Lumber Co.*, 91 N.L.R.B. 333, 337 (1950) (equating indefensible activity with any conduct involving “unlawful objective[s]” or “*improper* means”).

The *Jefferson Standard* Court also noted that the handbills were distributed “[w]ithout warning.” 346 U.S. at 467. Surely this reference to the element of surprise is not legally significant. The discussion of surprise does relate to the Board’s “sabotage” analogy, *see Jefferson Standard Broadcasting Co.*, 94 N.L.R.B. 1507, 1511 (1951), *rev’d sub nom. Local Union No. 1229, IBEW v. NLRB (Jefferson Standard)*, 202 F.2d 186 (D.C. Cir. 1952), *set aside*, 346 U.S. 464 (1953), but surprise should not be a relevant criterion in evaluating loss of protection because many classically protected activities do not involve advance notice to the employer and would lose their effectiveness if notice were given. *Jefferson Standard* does not indicate that advance notice would have changed the result. Surprise may, however, affect whether the employer has time to issue counterpropaganda in rebuttal of any union allegations, to minimize its harm.

⁶⁴ 346 U.S. at 478-81 (Frankfurter, J., dissenting). The dissent was sensitive to the limited judicial review of administrative decisions, which dictates that the Board is the

explained that imprecise notions of loyalty not found in the Act did not justify the Court's reaching the merits. In any event, the employees should not be treated as "interloping outsiders,"⁶⁵ but rather as at least arguably exercising legitimate section 7 rights under a statute that was "designed to put labor on a fair footing with management."⁶⁶ The dissent predicted that the disloyalty exception left no guidance for future cases and that,

More than that, to float such imprecise notions as "discipline" and "loyalty" in the context of labor controversies, as the basis of the right to discharge, is to open the door wide to individual judgment by Board members and judges. One may anticipate that the Court's opinion will needlessly stimulate litigation.⁶⁷

C. *The Aftermath*

Though the Court specified a number of objectionable aspects of the technicians' conduct, it articulated the weight and relevance of none. Like the Board,⁶⁸ it declined to formulate a test for loss of protection, but it went beyond the Board's analysis in its imposition of a disloyalty test. *Jefferson Standard* is fraught with problems of analysis, of statutory construction, and of general ambiguity. The legal significance of *Jefferson Standard* lies in the Court's creation, *sua sponte*, of a disloyalty exception that (1) is not provided for expressly in any section of the Act, (2) has no stated definition and no clear limits, (3) is grounds for forfeiture of rights, expressly protected, to engage in concerted activities for mutual aid or protection, and (4) subsequently has been misconstrued to have a meaning independent of product disparagement and other traditional section 7 exceptions.⁶⁹ Moreover, since *Jefferson Standard*, the disloyalty exception has become so expansive and vague that it threatens to eviscerate section 7's protection for activity that happens to include negative words about the employer or its product.⁷⁰

appropriate body to make the initial assessment of whether these employees' conduct was more egregious than that previously adjudged to be lawful.

⁶⁵ *Id.* at 481 (Frankfurter, J., dissenting).

⁶⁶ *Id.* at 480.

⁶⁷ *Id.* at 481. The dissent also disagreed that § 10(c) provided grounds for loss of protection. *Id.* at 479-80.

⁶⁸ The Board had concluded, "[f]or these reasons, without attempting to formulate a test which will decide every imaginable case involving similar questions as to the scope of Section 7, we hold that the employees in this case went beyond the pale when they published the 'second-class' handbill." *Jefferson Standard Broadcasting Co.*, 94 N.L.R.B. 1507, 1512 (1951) (footnote omitted), *rev'd sub nom.* *Local Union No. 1229, IBEW v. NLRB* (*Jefferson Standard*), 202 F.2d 186 (D.C. Cir. 1952), *set aside*, 346 U.S. 464 (1953).

⁶⁹ See *infra* part III.A.2 (discussing the confusion of the disloyalty exception with other recognized § 7 exceptions).

⁷⁰ Disloyalty usually focuses on written or oral language, though often the speech is intertwined with other facts concerning conduct.

The dissent's fears ultimately have been realized, as Board members and judges have been unable to agree on a consistent application of the disloyalty and product disparagement exceptions. In recent months alone, two decisions of the United States Court of Appeals for the District of Columbia Circuit specifically addressed and endorsed the disloyalty rubric, but failed to articulate clearly what the term encompasses.⁷¹ Conversely, the United States Court of Appeals for the Fourth Circuit refused to judge employee conduct against "some type of transcendent loyalty" employees supposedly owe their employers.⁷² In the most comprehensive attempt to date, the United States Court of Appeals for the Ninth Circuit valiantly struggled to make sense of the exception. The Ninth Circuit noted that "shifting boundaries of protection" have evolved because of the lack of consensus about what factors decision makers should look to in defining loyalty, and the "changing norms" regarding whether loyalty should be required in the workplace at all.⁷³

What is at stake while the legal confusion abounds? The well-being of real people, both labor and management, in serious conflict. An active union officer in an isolated company town on an island in Alaska desperately appeals to the community for help, and even manages to fly to Washington, D.C. to testify before Congress. By protesting his employer's "dishonorable" anti-union labor policies, strikebreaking activity, and unwarranted demands for repeated wage concessions, he risks being discharged and branded as disloyal for "activities destructive to the Company," and faces a legal battle over his job that promises to last ten years.⁷⁴ An employee some-

⁷¹ *Willmar Elec. Serv., Inc. v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1252 (1993); *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061 (D.C. Cir. 1992). In *Willmar Electric Service*, the court assumed, *arguendo*, that disloyalty constituted grounds for discharge, but there was no proof that the union organizer in question was disloyal.

⁷² *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 73 (4th Cir. 1989) (dictum; holding that union-sponsored individual was not bona fide applicant for an "employee" position on particular facts presented, *but see* *Town & Country Elec., Inc.*, 309 N.L.R.B. No. 181, 1992-1993 NLRB Dec. (CCH) ¶ 17642 (Dec. 16, 1992)).

⁷³ *Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 216 n.6 (9th Cir. 1989); *cf.* *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (noting that the Board, not the courts, is generally responsible for adapting the Act to "changing patterns of industrial life").

⁷⁴ *See* *Alaska Pulp Corp.*, 296 N.L.R.B. 1260, 1261-62 & n.8 (1989) (holding conduct protected), *enforced*, 944 F.2d 909 (9th Cir. 1991), *reported at* 1991 U.S. App. LEXIS 22273 (9th Cir. Sept. 18, 1991). I served as counsel to some charging parties in the case, though not to Florian Sever, the individual mentioned here. On December 7, 1988 the Administrative Law Judge originally decided that Alaska Pulp Corporation (APC) wrongfully denied charging parties their recall rights after a 1986 strike, and ordered APC to reinstate them with back pay. *Id.* Despite the NLRB's affirmation of the order and the Ninth Circuit's enforcement order, charging parties have as of this writing not been paid their back pay or been made whole. As to Mr. Sever's fate, he is a highly skilled mechanic and he worked at Mountain Aviation Company in Sitka, Alaska after he

where in the country reads about a court's ruling that employees may be fired for disloyalty for showing up at rallies or parades or participating in boycotts.⁷⁵ Consequently, he decides not to attend an organizing rally to find out about unionization. A paint company owner is chagrined when a group of passionate strikers publicly question the ability of newly hired, inexperienced strike replacements to make quality paint.⁷⁶ When he seeks counsel, his lawyer informs him that if he discharges the strikers, he may face years of costly litigation, uncertainty on the merits, attorneys fees, and potential liability for reinstatement and back pay for the entire group.⁷⁷

Regrettably, the half century of uncertainty caused by the disloyalty exception has been unnecessary. *Jefferson Standard* should never have been interpreted, despite its dicta and ambiguity, as a case creating a "disloyalty" exception. It was merely a product disparagement case. It turned on the fact that employees, while concealing their union status and the existence of a labor dispute, publicly and relentlessly criticized their employer's product, a subject unrelated to that dispute.⁷⁸

was illegally replaced by APC. *Id.* at 1265, 1267-68 (A.L.J. decision). According to Sever, APC retaliated for his union activity and his testimony in Congress by pressuring Mountain Aviation to fire him and by persuading the City of Sitka to blacklist him from employment. *See Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1532-33 (9th Cir. 1992). Mountain Aviation did fire Sever. Sitka subsequently denied him a job as a dog catcher, which, according to Sever, the City filled by hiring an individual from the "Lower 48." *See id.*; Various Conversations with Florian Sever (1986-1989). Sever's RICO claim arising from these incidents was dismissed because in relevant part, APC's conduct was merely "a single episode having the singular purpose of impoverishing Sever . . . [and] there is no suggestion defendants would have continued to tamper with witnesses, or that they ever intended anyone but Sever any harm." *Sever*, 978 F.2d at 1535. His civil rights claim was dismissed because individuals who petition the government are not a suspect class and any harassment was motivated by the company's financial goals, not concerns about congressional testimony generally. *Id.* at 1536-37. His related state law claims are pending.

⁷⁵ *See George A. Hormel & Co. v. NLRB*, 962 F.2d 1061, 1065-66 (D.C. Cir. 1992) (holding conduct unprotected); *infra* notes 191-94 and accompanying text (discussing *Hormel*).

⁷⁶ *See Patterson-Sargent Co.*, 115 N.L.R.B. 1627, 1627-29 (1956) (holding conduct unprotected on both disloyalty and product disparagement grounds).

⁷⁷ Normally, after an economic strike, as vacancies arise the employer is required to reinstate former strikers to their pre-strike jobs or equivalent positions. However, after a strike caused by unfair labor practices, the employer must reinstate the strikers to their pre-strike jobs.

⁷⁸ Thus, this Article does not depend on proving that *Jefferson Standard's* holding, concerning product disparagement, was wrongly decided; the result may have been correct. Rather, it critically assesses disloyalty as an independent basis for denial of § 7 protection, takes issue with the Court's disloyalty discussion, and, most importantly, with the misapplication of that discussion in subsequent decisions of the Board and courts.

This Article analyzes disloyalty in the context of union activity and other collective activity that is expressly protected by § 7. It is important to distinguish that context from

Laboriously, after forty years the Board and courts still grapple with the disloyalty exception,⁷⁹ having reached no consensus on the meaning of disloyalty, having failed to distinguish it from disparagement, having ruled much conduct protected even though disloyal (at least, as that term is commonly used), and finally having split disloyalty into allowable and unallowable categories. These decision makers have disagreed over whether the term is objective or subjective and have been forced to apply the exception in essentially a standardless, ad hoc manner determined by emotions, personal ethics, and individual constructs of labor law. They have collapsed disloyalty with other traditional exceptions to section 7 on the basis of which many putative disloyalty cases could have, and should have, been resolved. They have looked to varying and problematic factors to determine if an employee is disloyal. Before addressing these problems of application, I propose an analytical framework within which to tackle them.

II. PROBLEMS OF ANALYSIS: LACK OF A COHERENT APPROACH TO THE DISLOYALTY EXCEPTION

A. *A Proposed Analytical Framework*

The first problem encountered by those seeking to make sense of the disloyalty exception is not a substantive one concerning the merits of disloyalty, but rather the absence of an analytical framework within which to evaluate section 7 cases generally. The lack of a framework is especially conspicuous and troublesome in cases concerning disloyalty and disparagement, and its absence has led to confusing decisions with questionable results. Accordingly, I propose a three-part analytical framework,⁸⁰ which is implicitly, but obviously, called for when section 7 is read in light of the policies of the Act

the general day-to-day conduct of employees in all other situations, which does not implicate § 7 and is not addressed in my Article. Furthermore, in analyzing disloyalty, I have needed to discuss decisions using the term "product disparagement," when the cases use disparagement and disloyalty interchangeably.

⁷⁹ See, e.g., *Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 216 n.6 (9th Cir. 1989).

⁸⁰ The Board has implicitly supported such a distinct framework:

[N]ot every form of concerted activity which falls within the literal language of section 7 is given protection, so as to immunize those who participate in it against discharge or other discipline. [Limited exceptions to the broad language of section 7 are recognized when] the means involved violence or similar conduct, or where the objectives sought were inconsistent with the terms or the clearly enunciated policy of this Act or other Federal statutes.

Jefferson Standard Broadcasting Co., 94 N.L.R.B. 1507, 1510 n.6 (1951) (quoting *Hoover Co.*, 90 N.L.R.B. 1614, 1621 (1950), *enforcement denied*, 191 F.2d 380 (6th Cir. 1951)), *rev'd sub nom.* *Local Union No. 1229, IBEW v. NLRB* (*Jefferson Standard*), 202 F.2d 186 (D.C. Cir. 1952), *set aside*, 346 U.S. 464 (1953); see also *NLRB v. Red Top, Inc.*, 455 F.2d 721, 726 (8th Cir. 1972) (recognizing that even when employees arguably are "engaged in protected activity, there is a point where their methods . . . would take them outside the protection of the Act" (footnote omitted)); *Emarco, Inc.*, 284 N.L.R.B. 832, 837 (1987) (Dotson, Chairman, dissenting) (noting that *Jefferson Standard* is the bench-

and the principles of statutory construction.⁸¹ The framework is straightforward and easy to apply. Although it may appear simplistic, it is apparently not self-evident to all Board members and judges, as the decisions attest.

To be protected under section 7, conduct must pass three distinct tests. *First*, it must be “concerted.”⁸² The Act’s protections hinge on collective action. The Act protects employees who combine to better their wages, hours, or working conditions, not individuals who act alone and solely for their own concerns.⁸³

Second, the conduct must have the purpose of “self-organization . . . collective bargaining or other mutual aid or protection.”⁸⁴ Thus, the second step in any section 7 analysis is to evaluate the purposes for which the employees are acting.⁸⁵ The “mutual aid or protection” clause has been broadly construed to encompass not only activity of immediate assistance to employees, such as protesting a pay cut, but also more remote goals such as forming, joining, or assisting unions, helping a union that may reciprocate in the future, or improving the lot of workers generally through legislative, administrative, and judicial channels.⁸⁶ The clause has been interpreted to

mark for determining if “employee activity which generally might be protected under Section 7” has lost its protection) (§ 10(c) reinstatement case).

⁸¹ For a discussion of statutory construction, see *infra* note 89 and accompanying text.

⁸² 29 U.S.C. § 157 (1988).

⁸³ Protection does not require, however, that a union or unionized employees be involved. For a discussion of the collective model concerning feminist theory, see Marion Crain, *Images of Power in Labor Law: A Feminist Deconstruction*, 33 B.C. L. REV. 481 (1992). “Concert” generally turns on whether the employee is acting with or on behalf of others or is seeking to initiate group action. *Meyers Indus. (Meyers II)*, 281 N.L.R.B. 882, 885 (1986), *aff’d sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied sub nom. Meyers Indus. v. NLRB*, 487 U.S. 1205 (1988); see also *NLRB v. City Disposal Sys.*, 465 U.S. 822 (1984); *Brownsville Garment Co.*, 298 N.L.R.B. 507 (1990), *enforced without opinion*, 937 F.2d 609 (6th Cir. 1991) (*per curiam*). See generally MORRIS, *supra* note 18, at 73-78; Archibald Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319 (1951).

⁸⁴ 29 U.S.C. § 157 (1988).

⁸⁵ Because organizing and collective bargaining are subsets of “mutual aid or protection,” the analysis focuses on the latter phrase. The mutual aid or protection inquiry is distinct from the concertedness inquiry. *Meyers II*, 281 N.L.R.B. at 884-85. It includes the activities specifically listed in § 7 and generally any collective activity that assists employees in the workplace. See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 570 (1978) (holding that a leaflet distribution concerning politicians’ positions on minimum wage and “right to work” laws are protected). See generally Getman, *supra* note 15 (discussing the use of economic pressure by employees under the “mutual aid or protection” clause).

⁸⁶ See, e.g., *Eastex, Inc.*, 437 U.S. at 556; *NLRB v. Circle Bindery, Inc.*, 536 F.2d 447, 452 (1st Cir. 1976); *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 506 (2d Cir. 1942). Some commentators have persuasively argued that the clause still is too narrowly construed. See Estlund, *supra* note 15. While I agree with that criticism, a full discussion of steps one and two is beyond the scope of this Article, which will proceed from current interpretations of step two.

protect such diverse purposes as policing the use of the union label, promoting the hiring of union members, resisting the undercutting of union standards, and assisting others in the long-term interest of garnering reciprocal support if needed in the future.⁸⁷ The first two steps in section 7 cases, then, should be to assess whether the activity meets the two literal requirements of the statute.

Third, assuming an employee's conduct passes steps one and two, the decision maker must determine if the conduct is so inimical to legitimate countervailing interests that section 7 "protection" should be considered "lost" under one of the administratively and judicially created exceptions.⁸⁸ Under the proposed analytical framework, then, an employee may be disciplined if he fails to act in concert (step one) or with the requisite purpose (step two), or if he falls within an exception (step three).

B. *The Board's and Courts' Analytical Errors*

1. The Collapse of the Analytical Framework

In practice, the Board and courts have not rigorously observed the above analytical distinctions in their section 7 analyses. They have often collapsed what should be distinct inquiries into one.⁸⁹ The Board and Courts occasionally skip step two (and sometimes both one and two) and proceed

⁸⁷ *Circle Bindery*, 536 F.2d at 452 (policing union label); *Peter Cailler Kohler*, 130 F.2d at 505 (garnering future support).

⁸⁸ See, e.g., *Cordura Publications, Inc.*, 280 N.L.R.B. 230 (1986) (analyzing § 7 protection under this framework). In creating and applying the exceptions, the Board and reviewing court should proceed cautiously, exercising restraint under well-established principles of statutory construction. For example, statutory exceptions should be narrowly construed. HENRY C. BLACK, *HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS* 434-38 (2d ed. 1911); EARL T. CRAWFORD, *THE CONSTRUCTION OF STATUTES* 610 (1940). When a statute contains no exceptions on its face, exceptions should not be lightly inferred and cannot be inferred in a manner inconsistent with the meaning of the statute itself. CRAWFORD, *supra*, at 612.

⁸⁹ The confusion between these steps is not a new phenomenon. For example in *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749 (4th Cir. 1949), the court collapsed all three steps. An employee was angry at a foreman who had warned him about unacceptable workplace conduct. The employee was fired for enlisting other employees in signing a petition calling for the foreman's discharge and for speaking rudely to the foreman. Concluding that the discharge did not violate the Act, the court ruled that the petition was not "concerted" (step one), *id.* at 752; at least not within the meaning of the Act (step two, perhaps?), *id.*; that the petition, in light of the circumstances, was not "[t]he sort of activity that the statute protects" (step two or three, perhaps?), *id.* at 751, 753; and that it lacked the § 7 "purpose" of mutual aid or protection (step two), *id.* at 753. The court used these concepts interchangeably, rather than clarifying the source of each inquiry.

Although the Board has gone to great lengths to distinguish step one from step two and to clarify confusion surrounding them, see, e.g., *Meyers II*, 281 N.L.R.B. at 884, both Board members and judges have done a poor job of distinguishing the analytical steps.

directly to analyze whether the employee lost protection under an exception, such as disloyalty. This approach may result in a failure to determine if the activity is concerted or has a section 7 purpose.

In *Jefferson Standard*, the Supreme Court set a poor example in its section 7 analysis. It mistakenly treated the distribution of the "second-class city" handbills as neither concerted nor for a section 7 purpose.⁹⁰ The handbill's distribution obviously was concerted activity under step one. Just as obvious was that the employees had a classic section 7 purpose: they sought in bargaining to retain certain contract clauses (step two). The real issue was whether the activity fell under an exception (step three), and the Court should have approached the analysis accordingly. In fact, almost as an aside, toward the end of the decision the Court did state an alternative analysis for its holding:

Even if the attack were to be treated . . . as a *concerted* [step one] activity wholly or partly within the *scope of those mentioned* in § 7 [step two], the *means* used by the technicians in conducting the attack have *deprived the attackers of the protection* [step three] of that section, when read in the light and context of the purpose of the Act.⁹¹

This is the proper analytical framework. Unfortunately, this single sentence has proved too faint a beacon to be detected by subsequent decision makers seeking guidance in the disloyalty analysis.

A recent Fourth Circuit case illustrates the confusion surrounding the analysis. An employee had posted a sarcastic letter in response to an announcement by the employer that it was giving employees a free ice cream.⁹² The court ruled that the criticism lacked a section 7 purpose because the ice cream was a one-time gift by management, not a condition of employment.⁹³ Although this part of its analytical framework was appropri-

⁹⁰ The Court also stated erroneously that the *Board* had not viewed the activities as concerted or for a § 7 purpose. *Jefferson Standard*, 346 U.S. at 477. On the contrary, the Board assumed the conduct to be concerted, *Jefferson Standard Broadcasting Co.*, 94 N.L.R.B. 1507, 1509 (1951), *rev'd sub nom.* *Local Union No. 1229, IBEW v. NLRB (Jefferson Standard)*, 202 F.2d 186 (D.C. Cir. 1952), *set aside*, 346 U.S. 464 (1953), and implicitly acknowledged that it was for a collective bargaining objective, *see id.* at 1511. The Board properly handled the analysis as one of step three forfeiture because of the means used. *Id.* at 1509-10, 1510 n.6. The Supreme Court's misstatement may have originated with a misunderstanding of dissenting Board Member Murdock's statement that "the holding of the majority that the distribution of the 'second-class city' handbill *is not concerted or union activity protected* by the Act is one of the most important decisions dealing with that subject which the Board has ever issued." *Id.* at 1520 (Murdock, Member, dissenting) (emphasis added). Perhaps the Supreme Court majority did not realize that the italicized words mean that the distribution was not concerted activity that was protected, not that the distribution was not concerted.

⁹¹ 346 U.S. at 477-78 (emphasis added) (footnote omitted).

⁹² *New River Indus. v. NLRB*, 945 F.2d 1290 (4th Cir. 1991).

⁹³ One might have expected that the presence or absence of ice cream at work would

ate, the court supported it with facts that are relevant only to disloyalty, illegality, or one of the other step three exceptions, not to the issue of mutual aid or protection.⁹⁴ Moreover, the court cited two disloyalty cases as authority for its no-section-7-purpose conclusion.⁹⁵ In both of those cases the employees had section 7 purposes, and the decisions turned on whether the employees lost protection under disloyalty and disparagement at step three.

There are at least four reasons why it is important to complete the concertedness (step one) and purpose (step two) inquiries before starting the disparagement/disloyalty inquiry. First, by adhering to the proper analysis, subsequent decision makers will shorten the inquiry in those cases in which employees' conduct lacks the required concert or purpose. When the statutory requirements of concert or purpose are not met, conduct is not even arguably within section 7 protection, and the inquiry into the lawfulness of the discipline need go no farther.⁹⁶ Second, decision makers who dispose of cases at the first two steps have the additional benefit of avoiding the more nebulous, non-statutory issues of disloyalty and disparagement.⁹⁷ Third, the

be a matter pertaining to working conditions. According to the Court, however, the letter was not intended to enlist support of other employees, and it was not related to calling attention to or resolving what the Court believed to be working conditions. *Id.* at 1294-95. This conclusion overlooks the fact that § 7 encompasses attempts to call employees' attention to conditions of employment and to create solidarity regarding those matters. Several employees did collectively generate the idea of pointing out the employer's lack of generosity to the employees, which they felt was demonstrated by the insignificance of the ice cream reward compared to the size of the new contract it celebrated. *Id.* at 1292. The letter did discuss morale, working conditions, and management's lack of appreciation for employees. *Id.*

⁹⁴ The court emphasized that the company's suppliers were in the plant, where they were likely to see the letter, and that the employees had apparently broken into a locked bulletin board to post it.

Additional instances of collapsed analysis occur in some cases phrasing the *Jefferson* holding as a rule that collective activity is protected unless it is a personal attack unrelated to a labor dispute. See *infra* notes 323-25.

⁹⁵ *New River Indus.*, 945 F.2d at 1295 (relying on *NLRB v. Local Union No. 1229, IBEW (Jefferson Standard)*, 346 U.S. 464 (1953), and comparing *Community Hosp. of Roanoke Valley, Inc. v. NLRB*, 538 F.2d 607 (4th Cir. 1976)). The court's disposition of the case at step two means that it did not reach the issue of step three.

⁹⁶ The absence of coverage at steps one or two could be compared to a "jurisdictional" defect, the absence of which renders further analysis moot.

⁹⁷ See *infra* part III.C.5. I do not suggest that the first two steps are always easy to resolve, nor that there are not "borderline" issues involving concert and purpose. The application of few legal standards to facts is entirely self-evident, and a given set of facts may fall within the "grey areas" of steps one or two. See, e.g., *Cordura Publications, Inc.*, 280 N.L.R.B. 230, 234 (1986). In *Cordura Publications*, three Board members treated a critical letter written by employees as pertaining to terms and conditions of employment (professionalism, wages, education, training, and employee treatment), while one viewed it as an effort to change "managerial policies and organizational structure." Such cases notwithstanding, on a comparative basis steps one and two generally involve a

recommended framework accords with well-tested principles of statutory construction.⁹⁸ Finally, on a practical level, when the Board and courts fail to follow a coherent analytical approach, their decisions create precedent that is perplexing to subsequent Board members or judges attempting to apply cases such as *Jefferson Standard*. Lack of clear distinctions among the three analytical steps causes confusion in the substantive law concerning each of the three issues.⁹⁹

2. Improper Interjection of Section 10(c) into the Analysis

A different analytical problem stems from the misapplication of section 10(c) of the Act. As part of the 1947 Taft-Hartley amendments,¹⁰⁰ a clause was added to section 10(c) prohibiting the reinstatement of or back pay for any employee who was "suspended or disciplined for cause."¹⁰¹ Board members and reviewing judges sometimes yield to the temptation to begin the section 7 analysis not with section 7 itself, but by determining if the employee was discharged for "cause" under section 10(c).¹⁰² The temptation

more straightforward application of facts to law than the vague parameters of disloyalty, and possibly of product disparagement.

⁹⁸ Sound statutory analysis requires examining a rule before its exceptions. Section 7 mandates the presence of concertedness and purpose in all cases, while disloyalty and disparagement constitute exceptions in some. *See supra* note 88.

⁹⁹ Much of the substantive confusion in the case law appears to result from the failure to understand that the three analytical steps are distinct inquiries, often because the Board and courts begin with step three and fail to assess steps one and two. *See, e.g.*, *Patterson-Sargent Co.*, 115 N.L.R.B. 1627 (1956). Theoretically, the outcome of a case would not be affected by the *order* of the three-step inquiry. Putting step three first, however, may well be causing some of the substantive confusion between the "not related to a labor dispute" step three disparagement issue in *Jefferson Standard*, *see supra* text accompanying note 57, and the purpose requirement of step two, *see infra* notes 324-25 and accompanying text.

¹⁰⁰ Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (1988)).

¹⁰¹ The Taft-Hartley Act added the italicized language to § 10(c):

If upon *the preponderance of the testimony* taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. *No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.*

Labor Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 10(c), 61 Stat. 136, 147 (1947) (codified as amended at 29 U.S.C. § 160(c) (1988)).

¹⁰² *See, e.g.*, *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061, 1064 (D.C. Cir. 1992) (beginning its analysis, after mentioning §§ 7 and 8(a)(1) in passing, by citing § 10(c) for the proposition that "[n]othing in the Act prevents an employer from disciplining or discharging an employee for disloyalty," and citing § (10)(c), as if that section conferred substantive "rights" on employers); *see also* *Sahara Datsun, Inc.*, 278 N.L.R.B. 1044,

stems from the fact that if the behavior was outrageous or obviously unacceptable, the conclusion seems self-evident: "an employer just ought to be able to discipline for this!"¹⁰³ Though in extreme cases, this initial instinct to shortcut the analysis by labeling such conduct "cause" and skirting the section 7 issue is understandable, this approach is inconsistent with the structure of the Act and creates confusion in section 7 case analyses, especially in the disloyalty and disparagement cases. This method of analysis incorrectly eliminates any investigation into the section 7 protection that the employee conduct, considered as providing "cause" for discharge, might deserve.

When viewed in context, neither the Taft-Hartley Act generally nor its amendments to section 10(c) provides grounds to begin section 7 analysis with the issue of "cause." The legislative history of the Taft-Hartley Act does reflect Congress' perception that Board decisions had been overly generous in extending section 7 protection. First, Congress believed that the Board had read section 7 incorrectly as licensing employees to engage in certain collective activity.¹⁰⁴ Accordingly, Congress enacted several amendments (not the "cause" amendment) that now expressly outlaw certain concerted activities, such as prohibitions against union coercion of employees,¹⁰⁵ certain secondary boycotts,¹⁰⁶ and attempts to force employers to assign work in union jurisdictional disputes.¹⁰⁷

Second, Congress expressed dissatisfaction with the Board for finding some employers in violation of the Act simply because they expressed their

1045 (1986) (stating that the Jefferson Standard Court held that "even if employees are arguably engaged in concerted activity, if the nature of their actions involves a malicious attack on the product or reputation of their employer, their activity loses the protection of Section 7 of the Act and their subsequent discharge is for 'cause' within the meaning of Section 10(c)" (footnote omitted)), *enforced*, 811 F.2d 1317 (9th Cir. 1987).

In *NLRB v. Knuth Bros.*, 537 F.2d 950 (7th Cir. 1976), the Court ended its analysis of an employee's activity with the comment that § 10(c) "protects the employer's right to protect its business interests and if necessary, to discharge an employee for cause," *id.* at 956, followed by the remarkable statement that "[t]he power of the Act cannot be used as a pretext for infringing the employer's rights," *id.* at 957.

¹⁰³ For example, if a group of employees blow up an employer's equipment, it scarcely seems necessary to assess if they were acting concertedly and perceived themselves to be doing so for mutual aid or protection; under any approach, the employer ought to be allowed to discipline them.

¹⁰⁴ Specifically, the Board had been refusing to allow the discharge of employees who had destroyed property, assaulted other employees, and obstructed plant entrances by "violence, mass picketing, and general rowdiness." H.R. REP. NO. 245, 80th Cong., 1st Sess. 4-5 (1947) (remarks of bill's sponsor, Congressman Hartley), *reprinted in* 1 *NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947*, at 292, 295-96 (1948) [hereinafter *LEGISLATIVE HISTORY OF LMRA*].

¹⁰⁵ Labor Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 8(b)(1), 61 Stat. 136, 141 (1947).

¹⁰⁶ *Id.* § 8(b)(4)(A).

¹⁰⁷ *Id.* § 8(b)(4)(D).

opinions, typically negative, about unionization. To remedy this, Congress amended the Act to provide that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . , if such expression contains no threat of reprisal or force or promise of benefit."¹⁰⁸ This addition allows freedom of speech in labor matters, most notably, freedom for employers to communicate noncoercive opinions to employees or to respond when criticized by employees and unions.¹⁰⁹

Last, in debating several versions of the "cause" amendment in particular, Congress focused on the Board's mishandling of issues in three areas: (1) it had been improperly attributing unlawful motives to employers without actual proof of such motives; (2) it had been mishandling mixed motive cases, those cases in which employers had several motives, lawful and unlawful; and (3) it had been improperly allocating the burden of proof in some cases.¹¹⁰ The "cause" clause was added to address these problems and to

¹⁰⁸ *Id.* § 8(c). Congressman Hartley remarked that the employer "has had to stand mute while irresponsible detractors slandered, abused, and vilified him." H.R. REP. NO. 245, *supra* note 104, at 5, *reprinted in* 1 LEGISLATIVE HISTORY OF LMRA, *supra* note 104, at 292, 296.

¹⁰⁹ *See* MORRIS, *supra* note 18, at 80-85. A few years earlier, the Supreme Court had acknowledged possible First Amendment problems if the Board used its unfair labor practices sanctions to punish employers for noncoercive speech. *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 476-77 (1941).

¹¹⁰ *See generally* *NLRB v. New York Univ. Medical Ctr.*, 702 F.2d 284, 295-98 (2d Cir.) (examining the legislative history of § 10(c)), *vacated*, 464 U.S. 805 (1983). The House Report indicated that Congress believed that the NLRB had been cursory in ascertaining whether the cause of a challenged discharge was the § 7 activity or another (unprotected) cause, such as "gross misconduct." *See* H.R. REP. NO. 245, *supra* note 104, at 42, *reprinted in* 1 LEGISLATIVE HISTORY OF LMRA, *supra* note 104, at 292, 333. The Board had been loosely inferring from an employee's union involvement that the employer's motivation was that involvement, and not some other non-§ 7 activity. It essentially had been ruling that merely engaging in protected activities insulated employees from discipline while carrying out those activities. *See id.* The Committee wanted the Board to make clear findings on causation and to articulate them to enable meaningful judicial review. *New York Univ. Medical Ctr.*, 702 F.2d at 295. Congress did not want employees to feel that when they were engaging in union activities, they had license to "loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct." H.R. REP. NO. 245, *supra* note 104, at 42, *reprinted in* 1 LEGISLATIVE HISTORY OF LMRA, *supra* note 104, at 292, 333. Similarly, a House Conference Report stated that the "cause" amendment allows discharge for interfering with other employees at work and violating shop rules, even if the employee was simultaneously carrying out union activities. It also affirmed that the Board must not infer improper employer motives when the evidence shows there was a legitimate cause. H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 55 (1947), *reprinted in* 1 LEGISLATIVE HISTORY OF LMRA, *supra* note 104, at 505, 559. By contrast, opponents of the "cause" amendment feared that the language would encourage employers to fabricate a reason as the supposed motivation for a discharge, when the real reason was

safeguard appellate review,¹¹¹ not to constrict the universe of section 7 protected activities.¹¹² The latter was accomplished by adding the amendments mentioned above, which expressly outlawed certain secondary boycotts and other conduct. Congress enacted the "cause" amendment, by contrast, to reaffirm pre-existing employer rights under section 7 law as Congress thought the Board should have been interpreting it (and as some recent decisions had correctly interpreted it).¹¹³ It did not purport to alter the landscape of protected section 7 activities. Thus, section 10(c) "cause" is not a synonym for the group of substantive section 7 exceptions.¹¹⁴

Having "cause" also cannot itself be viewed as an independent, substantive "exception" to the rule that discharges for the exercise of section 7 rights are unlawful. Discipline by an employer that today would constitute an unfair labor practice (such as firing an employee for encouraging a strike) certainly would have been considered by many employers as "cause" for discipline were the Act's unfair labor practice prohibitions not in effect. The "cause" clause is a limitation on Board remedies in certain circumstances, not an "exception" to section 7; its placement in section 10, the remedies section of the Act, rather than in the substantive "Unfair Labor Practices" section, reflects this difference.¹¹⁵

the employee's § 7 activity. H.R. MINORITY REP. NO. 245, 80th Cong., 1st Sess. 92-93, *reprinted in* 1 LEGISLATIVE HISTORY OF LMRA, *supra* note 104, at 383-84; 93 CONG. REC. 6658, 6677 (daily ed. June 6, 1947), *reprinted in* 2 LEGISLATIVE HISTORY OF LMRA, *supra* note 104, at 1572, 1593.

¹¹¹ *New York Univ. Medical Ctr.*, 702 F.2d at 295.

¹¹² See H.R. REP. NO. 245, *supra* note 104, at 27, *reprinted in* 1 LEGISLATIVE HISTORY OF LMRA, *supra* note 104, at 292, 318. Congress also considered expressly exempting unfair labor practices, unlawful concerted activities, and labor contract violations from § 7 protection. Its reasons for rejecting this option do not indicate that § 10(c)'s cause requirement altered the way § 7 was to be approached.

¹¹³ H.R. CONF. REP. NO. 510, *supra* note 110, at 55, *reprinted in* 1 LEGISLATIVE HISTORY OF LMRA, *supra* note 104, at 559 (citing *Wyman-Gordon v. NLRB*, 153 F.2d 480 (1946)); see also *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); H.R. REP. NO. 245, *supra* note 104, at 27, *reprinted in* 1 LEGISLATIVE HISTORY OF LMRA, *supra* note 104, at 292, 318 (discussing the possibility of amending § 7 to provide specific exclusions).

¹¹⁴ See, e.g., *Jones & Laughlin Steel Corp.*, 301 U.S. at 45-46 (explaining that the Board may not reinstate employees discharged for reasons other than protected concerted activity).

¹¹⁵ Generally, under current Board doctrine, the Agency should invoke § 10(c) to buttress its denial of reinstatement or back pay in four circumstances: (1) An employee is not reinstated because the § 7 activity was not in fact a reason for the discipline, see, e.g., *Taracorp Indus.*, 273 N.L.R.B. 221, 223 (1984) (denying reinstatement or back pay when employer disciplines an employee for a lawful reason, even if the employer violates the employee's § 7 *Weingarten* rights); (2) There were mixed motives and the employee would have been disciplined irrespective of her protected activity. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 404-05 (1983) (setting standards in mixed motive cases); (3) There was serious misconduct during a strike or *after* an unlawful

Additionally, it is analytically unsound to begin the unfair labor practice analysis with an inquiry into whether there was "cause" for discipline because the Act does not require employers to have "cause"¹¹⁶ (much less "good cause" or "just cause").¹¹⁷ Though the historical underpinnings of the twentieth century American notion of employment-at-will have been widely questioned and that doctrine sharply criticized, this century's labor and employment laws have been interpreted as imposing no sanctions on employers who discipline for good cause, bad cause, or no cause at all.¹¹⁸ The employer is limited only by specific federal or state statutes such as those forbidding discipline or discrimination based on such factors as collec-

discharge that, if not excusable because of unlawful employer provocation or other reasons, causes forfeiture of the employee's right to post-strike reinstatement or make-whole remedy for the discharge. See, e.g., *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044 (1984) (denying reinstatement and backpay to strikers who had engaged in misconduct that reasonably tended to coerce or intimidate employees), *enforced without opinion*, 765 F.2d 148 (9th Cir. 1985), *cert. denied*, 474 U.S. 1105 (1986); *Sahara Datsun, Inc.*, 278 N.L.R.B. 1044, 1046 (1986) (denying reinstatement to unlawfully discharged employee who had unjustifiably accused employer of being involved in prostitution and drugs and of falsifying documents), *enforced*, 811 F.2d 1317 (9th Cir. 1987); or (4) Post-discharge events would have led to the employee's discharge for other reasons, for example, a subsequent plant closure moots back pay or reinstatement beyond the date the plant closed.

¹¹⁶ *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937) (noting that the Act allows discharge for any reason other than union and collective bargaining activities); *Jones & Laughlin Steel Corp.*, 301 U.S. at 45-46 (stating that the Act permits discharge for reasons other than intimidation and coercion); *NLRB v. Condenser Corp. of Am.*, 128 F.2d 67, 75 (3d Cir. 1942) (conceding the Act's allowance of discharge for any or no reason providing it is not illegal). The statement in the text above assumes, of course, no union animus on the part of the employer.

¹¹⁷ The two latter terms are often negotiated in labor agreements as limitations on an employer's ability to discipline.

¹¹⁸ Many commentators have criticized the employment-at-will doctrine as lacking common law or doctrinal precedent and as having been an inaccurate statement of American law when first articulated. Nonetheless, in this century it has been widely applied by courts until the recent erosions through contract and tort theories such as wrongful discharge or discharges in violation of public policy, and by various "whistleblower" statutes. See generally MATTHEW W. FINKIN ET AL., *LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE* 284-86 (1989) (discussing specific anti-retaliation laws and general "whistleblower laws"); David Dominguez, *Just Cause Protection: Will the Demise of Employment at Will Breathe New Life into Collective Job Security?*, 28 IDAHO L. REV. 283 (1992) (supporting the adoption of a statutory just cause standard instead of employment-at-will); Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L. 85 (1982) (comparing the divergent developments of the indefinite employment contract in England and the United States at the turn of the century); Arthur Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631 (1988) (suggesting that state courts develop a new presumption to replace "at will," which would require employers to give a justification for dismissing employees who have passed a reasonable probationary period).

tive activity (under the Act), race, age, or physical or mental disability.¹¹⁹ To begin a section 7 case by inquiring if the employer had “cause” does not simply put the cart before the horse; it hitches the employer to a cart that the law has said she is not required to pull.

If “cause” is defined as the right to discharge for “any reason other than on account of one’s section 7 activities,” then employers have always had this right under the Act, including the years before Congress added section 10(c).¹²⁰ Section 10(c) simply does not grant to employers a substantive section 7 “exception” for which they may discharge employees. Employers have that power independent of section 10(c).

More importantly, as the *Jefferson Standard* dissenters aptly perceived,¹²¹ any analysis beginning with an inquiry about “cause” risks misconstruing the statute precisely because, under the Act, an activity protected by section 7 *cannot* lawfully constitute “cause” for discipline. Assessing section 7 by starting with section 10(c) is not merely “backwards,” it is circular. Unfortunately, the Supreme Court in *Jefferson Standard* did just that.¹²² The Court determined that because the broadcasting company had “cause” to discharge, the technicians’ activity fell outside the ambit of section 7.

As a matter of analysis, all of the facts and circumstances discussed by the *Jefferson Standard* Court in its “cause” inquiry¹²³ should simply have been

¹¹⁹ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991) (race, color, sex, religion, or national origin); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12117 (Supp. III 1991) (physical or mental disability).

¹²⁰ See, e.g., *Jones & Laughlin Steel Corp.*, 301 U.S. at 45-46.

¹²¹ *NLRB v. Local Union No. 1229, IBEW (Jefferson Standard)*, 346 U.S. 464, 480 (1953) (Frankfurter, J., dissenting) (“To suggest that actions which in the absence of a labor controversy might be ‘cause’ . . . for discharge should be unprotected, even when . . . undertaken as ‘concerted activities, for the purpose of collective bargaining,’ is to misconstrue legislation designed to put labor on a fair footing with management.”).

¹²² Confusion about the relationship between § 10(c) and § 7 is not limited to the *Jefferson* line of cases. In *Hoover Co. v. NLRB*, 191 F.2d 380, 385 (6th Cir. 1951), the court stated that it would decide, first, if a certain boycott was a “concerted activity for the purpose of . . . mutual aid and protection, which was protected,” and, second, if the boycott *was not protected*, could the employees maintaining it be suspended or discharged because the boycott constituted cause. If the court answered the first question negatively, there should be no inquiry into the second, unless the first question means to ask if the activity was concerted (step one), and for a § 7 purpose (step two) and therefore *arguably* protected. If this is the meaning, then the second question asked in this case should simply have been whether the boycott was illegal (step three exception). For a discussion about a case confusing § 10(c) with the issue of concertedness, see *Cox*, *supra* note 83, at 324 n.24 (citing *National Elec. Prods. Corp.*, 80 N.L.R.B. 995, 1001-02 (1948) (Herzog, Member, concurring), and noting that although the result in the case might be sound, “the opinion errs in basing the conclusion on the ground that the strike in breach of contract” was not concerted).

¹²³ *Jefferson Standard*, 346 U.S. at 472 (citing such things as disparagement of prod-

included in the loss of protection step three inquiry.¹²⁴ The Court could have followed the proper analytical framework, discussed all of the same facts, and reached the same result, without predicating its analysis on section 10(c).¹²⁵ Subsequent to *Jefferson Standard*, the Supreme Court has implicitly acknowledged that section 10(c) does not create or justify any exception to section 7.¹²⁶

Turning now from *Jefferson Standard*'s analytical structure to its substance, the Court did not define the word "means" when it stated that the "means used" deprived the technicians of protection.¹²⁷ The dilemma facing the *Jefferson Standard* progeny has been in determining what it was about the conduct in that case that made the technicians' "means" unprotected. How has the disloyalty exception been applied in the ensuing four decades? How have subsequent Board members and judges defined the term? What basis did the *Jefferson Standard* Court have to read an independent disloyalty exception into section 7, if that is what it intended? The sections that follow answer these questions.

III. PROBLEMS IN APPLICATION: THE TORTUOUS ROUTE OF THE DISLOYALTY TEST

I posit that the salient "means" in *Jefferson Standard* involved both the disparagement of a product and the particular way in which that product was disparaged.¹²⁸ However, the confusion about the pertinent "means" has proven to have equal or greater potential for abuse in cases involving alleged disloyalty.

A. Confusion with Existing Section 7 Exceptions

1. Confusion with Product Disparagement

Unfortunately, disloyalty has not been clearly distinguished from disparagement. A dictionary definition of "disparage" is "to lower in the esteem or reputation; to speak slightingly of; to run down; to depreciate."¹²⁹ The

uct quality, concealment of relationship to labor dispute, apprehension of loss of income, and disloyalty).

¹²⁴ The issue of the technicians' purposes should have been discussed in the step two inquiry.

¹²⁵ I do not concede that all of the considerations the Court listed were appropriate, but merely that these factors should be considered at step three, if at all.

¹²⁶ *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962) (explaining that although § 10(c) allows for "cause" discharges, "this, of course cannot mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which § 7 of the Act protects").

¹²⁷ See *supra* text accompanying note 91.

¹²⁸ Specifically, that the employees made highly critical public comments, criticizing product quality, which was not an issue in the labor dispute, and concealed both their union status and the existence of a labor dispute.

¹²⁹ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 653 (3d ed. 1976).

term may also mean to "cheapen," "criticize," "degrade," "insult," "malign," "ridicule," or "vilify."¹³⁰ A person, goods, property, or title may be disparaged.¹³¹ Given these variations, disparagement could be construed to mean virtually any negative words spoken by an employee about an employer or its agents, product, or service. However, not all criticism may be legitimately labeled disparagement because the Act clearly would protect statements such as "Unconscionable employer is cruel to employees," or "Scabrous employer hires scab labor." The Board and courts have occasionally, and properly, stressed that a construction equating "disparaging" with "highly critical" would misinterpret *Jefferson Standard*.¹³² "[G]reat care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues,"¹³³ because the employer will always be sensitive to employee criticism to some degree. Indeed, if the comment or publicity is not critical or does not persuade the public or others, the employees would not be making it.

Despite all of the above admonitions, however, disparagement has been used loosely to cover almost any kind of critical comments. One employee "disparaged" a manager's "performance as a manager and . . . his naval service, [the manager] having recently retired from the Navy with the rank of lieutenant commander after 32 years of service."¹³⁴ Another employee "disparaged" his employer by calling him "Castro."¹³⁵ In another case an employee "disparaged" an "employer's judgment and capacity to effectively perform."¹³⁶ The term has also encompassed defamation concerning the character and reputation of individual managers or supervisors.¹³⁷

¹³⁰ WILLIAM C. BURTON, *LEGAL THESAURUS* 177 (2d ed. 1992).

¹³¹ BLACK'S LAW DICTIONARY 470 (6th ed. 1990). Historically, disparagement had a particular meaning within the confines of legal analysis. Old English law provided that a person could be disparaged by marrying below one's class. Disparagement was actionable at common law when a person's falsehood tended to denigrate another's goods or services. Under modern law, the same conduct may form the basis of a Federal Trade Commission complaint or may be actionable under state law. *Id.*

¹³² See, e.g., *Misericordia Hosp. Medical Ctr. v. NLRB*, 623 F.2d 808, 814 (2d Cir. 1980) (noting that *Jefferson Standard* "is not authority for the proposition that a statement critical of an employer automatically provides grounds for discharg[e]"); see also *Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 216-17 (9th Cir. 1989) (noting that *Jefferson* may not be read as equating criticism with "disloyal product disparagement," nor as equating every critical comment with "unprotected disloyalty").

¹³³ *Allied Aviation Serv. Co.*, 248 N.L.R.B. 229, 231, *enforced without opinion*, 636 F.2d 1210 (3d Cir. 1980).

¹³⁴ *NLRB v. Red Top, Inc.*, 455 F.2d 721, 725 (8th Cir. 1972).

¹³⁵ *Boaz Spinning Co. v. NLRB*, 395 F.2d 512, 514 (5th Cir. 1968); see also *infra* notes 149-51 and accompanying text (discussing the *Boaz* case).

¹³⁶ *American Arbitration Ass'n*, 233 N.L.R.B. 71, 71 & n.1 (1977).

¹³⁷ See, e.g., *Sahara Datsun, Inc.* 278 N.L.R.B. 1044, 1045-46 (1986) (referring to disparagement of manager's and owner's "reputation . . . in the eyes of the financial institution . . . and in the eyes of the employees," by an unsubstantiated claim that the

“Disloyalty” is even less clearly understood. Dictionary definitions of “loyalty” range from “feelings of devoted attachment and affection,”¹³⁸ to “faithful adherence to one’s promise,”¹³⁹ to “conformity to law.”¹⁴⁰ Loyal can also mean “faithful in one’s political relations; giving faithful support and allegiance to one’s prince or sovereign or to the existing government [or] [f]aithful support to cause, ideal, office, or person.”¹⁴¹ Some decision makers treat disparaging and disloyal as interchangeable.¹⁴² Others view disparagement as a subset of disloyalty, such that an employee who has made disparaging comments is then, derivatively and automatically, labeled as disloyal.¹⁴³ The Court, in *Jefferson Standard*, created this imprecision when it first found the leaflets disparaging, next described their shortcomings, and then concluded that the employees were disloyal. It used product disparagement and disloyalty almost interchangeably, giving no guidance on the factors relevant to each.¹⁴⁴ The lack of a clear distinction between the two terms makes analysis difficult for decision makers attempting to apply these exceptions.

employer was falsifying credit applications and was linked to prostitution, drugs, and crime), *enforced*, 811 F.2d 1317 (9th Cir. 1987); *cf.* *Brownsville Garment Co.*, 298 N.L.R.B. 507, 508 (1990) (finding no disparagement by employee’s comments about manager’s “personal integrity with respect to . . . production of garments”), *enforced without opinion*, 937 F.2d 609 (6th Cir. 1991).

¹³⁸ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 773 (1973).

¹³⁹ 9 THE OXFORD ENGLISH DICTIONARY 74 (2d ed. 1989).

¹⁴⁰ BLACK’S LAW DICTIONARY 947 (6th ed. 1992).

¹⁴¹ *Id.* Other meanings include “faithful to plighted troth.” 9 THE OXFORD ENGLISH DICTIONARY 74 (2d ed. 1989).

¹⁴² *See, e.g.*, *Boaz Spinning Co. v. NLRB*, 395 F.2d 512, 514 (5th Cir. 1968) (finding a comparison to Fidel Castro a “blunt disparagement” and a “form of flagrant insubordination and disloyalty”); *American Arbitration Ass’n*, 233 N.L.R.B. 71, 71 & n.1 (1977) (finding “tone and comment” of a questionnaire and letter “constituted disloyalty to, and disparagement of, Respondent’s judgment”).

¹⁴³ *See, e.g.*, *American Arbitration Ass’n*, 233 N.L.R.B. at 74 (finding use of confidential list and sending questionnaire, “because it was childish and disparaged the Respondent, constituted acts of disloyalty”).

¹⁴⁴ *NLRB v. Local Union No. 1229, IBEW (Jefferson Standard)*, 346 U.S. 464, 472 (1953). Conduct deemed disloyal is not always disparaging, and vice versa. Disparagement as used colloquially normally would be considered an objective term relating to the negativity of one’s words, not a subjective frame of mind. Very negative comments could be made with no desire to harm, no negative state of mind, and no disloyalty. If disloyalty were a distinct or valid exception, it probably would focus on one’s subjective state of mind. An example of the difference would be a group of hospital nurses that issued statements criticizing serious understaffing. The statements clearly disparage the service provided by the hospital, but they are not necessarily disloyal. The statements might be a genuine effort to improve the care provided, and thus benefit the hospital’s reputation. Some reviewers have found it “immaterial” whether an employee means to disparage the employer. *American Arbitration Ass’n*, 233 N.L.R.B. at 75 (A.L.J. decision).

The United States Court of Appeals for the Second Circuit approached the relationship between the two exceptions by returning to the essential elements of *Jefferson Standard*. It ruled that there can be no finding of disloyalty unless the statements publicly disparage the quality of an employer's product (or service) in a manner similar to that in *Jefferson Standard*.¹⁴⁵ This approach has treated the disloyalty test as I have argued that *Jefferson Standard* treated it: as supplemental rhetoric when there is product disparagement.

2. Confusion with Other Exceptions

Reviewing Board members and judges frequently use the disloyalty rubric when conduct is unprotected for other reasons. Some allegedly disparaging or disloyal conduct may be correctly labeled as insubordination or interruption of production. Insubordination is the refusal to do one's assigned tasks or to follow other instructions, and it has long been ruled unprotected.¹⁴⁶ Refusals to do the job or to comply with instructions on the job are straightforward cases of insubordination. In contrast, interruption of production usually involves interfering with other employees' ability to get the job done, or otherwise keeping the facility from operating.¹⁴⁷ It, like insubordination, need not be labeled as disloyalty or disparagement, even when the offending employee makes insulting or ridiculing comments.¹⁴⁸

¹⁴⁵ *NLRB v. New York Univ. Medical Ctr.*, 702 F.2d 284, 292 (2d Cir.) (holding conduct disloyal only when it publicly disparages product), *vacated on other grounds*, 464 U.S. 805 (1983).

¹⁴⁶ *See* *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937) ("The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees."); *Elk Lumber Co.*, 91 N.L.R.B. 333, 338 (1950) (allowing discharge of employees who participate in work slow-down in protest of wage arrangement); *Audubon Health Care Ctr.*, 268 N.L.R.B. 135, 137 (1983) (allowing discharge for refusing to cover duties of sick co-worker). According to popular maxim, it's "a fair day's work for a fair day's wage," not "a fair day's loyalty for a fair day's wage."

¹⁴⁷ *See, e.g., NLRB v. Aintree Corp.*, 135 F.2d 395, 397 (7th Cir. 1943) (perceiving leaflet as having the potential to create hostility and provoke militant dissension); *NLRB v. Condenser Corp. of Am.*, 128 F.2d 67 (3d Cir. 1942) (holding employees who stand idle at work stations in morning and again at noon to protest wages, when Company had agreed to meet with them at end of day, unprotected). There are a few instances, in addition to strikes, in which refusing to work is protected under § 7 because it is transitory or in furtherance of a § 7 purpose, such as sympathy strikes and brief "quickie strikes" (walkouts) over working conditions. However, the courts have been less willing than the Board to rule that activities interrupting production are protected. *See, e.g., NLRB v. Montgomery Ward & Co.*, 157 F.2d 486, 496 (8th Cir. 1946) (holding the selective refusal to perform certain assigned tasks unprotected); *C.G. Conn., Ltd. v. NLRB*, 108 F.2d 390, 397 (7th Cir. 1939) (holding the repeated refusal to work scheduled overtime not a strike and thus not protected).

¹⁴⁸ *See supra* note 147. The technicians in *Jefferson Standard* neither refused tasks nor interrupted production. Not all activity that adversely affects production falls within

Jefferson Standard's imprecision has left decision makers with a seductive opportunity, especially in egregious cases, to add "disloyalty" to buttress a conclusion that an employee was insubordinate or interfered with production, and to add "disparagement" to describe any rude, insulting, or embarrassing comments the employee made in the process. These labels add nothing and merely complicate an already unwieldy doctrine. For example, in one case an employee would not be silent at an anti-union meeting and demanded the right to speak.¹⁴⁹ The court found this conduct so disruptive that *not* disciplining the employee risked "the complete breakdown of plant discipline."¹⁵⁰ If the court was correct in this factual conclusion,¹⁵¹ then the employee actually jeopardized production, and he was also insubordinate for refusing to be quiet in a meeting on company time not designated for employee speeches. Either rationale justified the discharge; disloyalty and disparagement were not needed.

Conversely, and admirably, the United States Court of Appeals for the Second Circuit perceived some of these distinctions in one case and refused

the interruption of production exception. For example, strikes or walkouts in protest of working conditions are classically protected activity. *See, e.g.,* NLRB v. Washington Aluminum Co., 370 U.S. 9, 17 (1962) (leaving work to protest poorly heated plant protected). Three instances of interruption of production about which there is disagreement are partial strikes (only some employees strike), intermittent strikes (short, recurring strikes), and slowdowns (employees remain at work but do their tasks deliberately slowly). *See, e.g.,* International Union, UAW, Local 232 v. Wisconsin Employment Relations Bd. (Briggs & Stratton), 336 U.S. 245, 255-63 (1949) (holding 27 sporadic work stoppages in five months, unaccompanied by specific demands, unprotected), *overruled on other grounds*, Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976). These concerted activities resemble those that warrant protection, yet they are generally treated as unprotected. This is based largely on the impact on production, though another rationale may be that they are too effective and would render management helpless. *See Briggs & Stratton*, 336 U.S. at 264; *Cox, supra* note 83, at 331-32. The Board has ruled, however, that these activities are unprotected even when the employer can defend itself. *See Pacific Tel. & Tel. Co.*, 107 N.L.R.B. 1547, 1549 (1954). The law on partial and intermittent strikes has been criticized. *See Lodge 76*, 427 U.S. at 152 n.14 (speculating that some partial strikes may be protected); Julius G. Getman, *The Protected Status of Partial Strikes After Lodge 76: A Comment*, 29 STAN. L. REV. 205 (1977) (arguing that the law is unclear as to partial strikes). *But see* Kenneth T. Lopatka, *The Unprotected Status of Partial Strikes After Lodge 76: A Reply to Professor Getman*, 29 STAN. L. REV. 1181, 1188-89 (1977) (arguing that sporadic work stoppages should not be protected). The precise contours of the insubordination and interruption of protection exceptions is an issue beyond the scope of this Article, although it has been noted that the legal status of partial strikes and slowdowns may be changing in light of several decisions. *See Estlund, supra* note 15, at 975 n.217; Getman, *supra*, at 205-11.

¹⁴⁹ *Boaz Spinning Co. v. NLRB*, 395 F.2d 512, 516 (5th Cir. 1968).

¹⁵⁰ *Id.*

¹⁵¹ The Court reversed the Board in this case and, in my opinion, failed to accord adequate weight to the Agency's factual conclusions. *See infra* part III.C.4.

to heap the “disloyal” label on top of insubordination or interruption of production.¹⁵² The case involved sharply dissident employees of a medical center who distributed leaflets using extreme language to garner support for their slate of candidates in a union election. They accused the employer of racism and of using race to divide employees. Among their inflammatory comments was the statement, “If the NYU management feels threatened, it has reason to be because we mean business!”¹⁵³ The court did not become embroiled in assessing the University’s claim that the leaflets were disloyal and disparaged “the good name and reputation of the medical center.”¹⁵⁴ Instead, it reframed the issue in insubordination and interruption of production terms and evaluated the conduct for its “likely impact on the workplace.”¹⁵⁵ The court agreed with the Board that “the objectionable language in the leaflets posed no danger of breach of employee discipline.”¹⁵⁶

Another exception to section 7 that has been needlessly confused with disloyalty is illegal conduct.¹⁵⁷ On occasion, the Board or courts have found

¹⁵² *NLRB v. New York Univ. Medical Ctr.*, 702 F.2d 284, 292 (2d Cir.), *vacated on other grounds*, 464 U.S. 805 (1983).

¹⁵³ *Id.* at 287.

¹⁵⁴ *Id.* at 288. The Board and court even took the unusual step of refusing to defer to an arbitrator’s decision upholding the discharges, on the ground that it was repugnant to the Act. *See id.* at 289.

¹⁵⁵ *Id.* at 290.

¹⁵⁶ *Id.* at 291.

¹⁵⁷ *See supra* note 23 and accompanying text. The conduct may involve unlawful means, such as trespassing on a company president’s private property during a demonstration, or unlawful objectives (ends), such as boycotting to force an employer to breach a contract. There are several relevant sources of unlawfulness. First, some conduct may be unlawful because its ends or means are inconsistent with specific labor laws. Such conduct is usually outlawed expressly in the Act. *See, e.g.*, § 8(b)(4), 29 U.S.C. § 158(b)(4) (1988) (certain secondary boycotts); § 8(e), 29 U.S.C. § 158(e) (1988) (hot cargo agreements); § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1988) (forcing employers to bargain with uncertified organization); § 8(b)(7), 29 U.S.C. § 158(b)(7) (1988) (picketing for recognition if another union is certified, when election has been held within 12 months, or if petition for election is not filed within reasonable time); *see also* *Hoover Co. v. NLRB*, 191 F.2d 380, 385 (6th Cir. 1951) (seeking to persuade employer to recognize one union when another is certified). Illegal ends include persuading an employer to breach a labor contract, because conduct that repudiates a contract’s terms involving mandatory bargaining subjects constitutes an unfair labor practice under § 8(a)(5), 29 U.S.C. § 158(a)(5) (1988); *Scullin Steel Co.*, 65 N.L.R.B. 1294, 1317-18 (1946) (holding walkouts that breach a labor contract unprotected), *enforced as modified*, 161 F.2d 143 (8th Cir. 1947). Second, some conduct may not be directly unlawful under the Act, yet be contrary to the labor law scheme because it impedes the performance of specific obligations required by, or the exercise of specific rights granted by, the Act. An example is a minority group of employees demanding that the employer bargain directly and separately with them when the Act’s premise is that elected union officials be the exclusive representatives with whom the employer is required to bargain. *See* § 8(a)(5); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 67 (1975); *NLRB v.*

employees disloyal because they engaged in conduct that was for illegal purposes or carried out by illegal means. In one recent case, an appellate court determined that an employee supported an illegal boycott and then it engaged in a lengthy and unnecessary disloyalty analysis, even creating new law on disloyalty.¹⁵⁸ Given that illegal ends and means are unprotected, decision makers need not resort to the disloyalty rationale in such cases.

Cases in which employees disclosed confidences also have been infused with disloyalty rhetoric. Under common law, employees had an obligation not to reveal confidential information or communications, and the NLRB has read a similar exception into section 7.¹⁵⁹ The section 7 exception is somewhat narrow because the purpose of public collective activity is to create pressure on the employer, and the information employees seek to publicize in labor disputes is likely to be that which the employer *least* wishes to have openly discussed.¹⁶⁰ Therefore, although the Board has declined to equate the publication of "highly sensitive" or "delicate" issues with unprotected breaches of confidentiality,¹⁶¹ disclosure of truly confidential matter is

Draper, 145 F.2d 199, 202 (4th Cir. 1944) (concluding that wildcat strike by minority circumvented the Act's bargaining process). Third, conduct may have goals that, if achieved, would violate other laws independent of the labor laws. *See, e.g.*, American News Co., 55 N.L.R.B. 1302, 1307 (1944) (violation of wage stabilization laws). Fourth, the conduct may be illegal in and of itself under these other laws. Southern S.S. Co. v. NLRB, 316 U.S. 31, 46 (1942) (holding that a strike aboard a vessel in harbor constituted mutiny).

¹⁵⁸ *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061, 1064-66 (D.C. Cir. 1992); *see also infra* notes 191-94.

¹⁵⁹ At common law, an agent had a duty not to use information he acquired as agent for purposes likely to harm his principal or interfere with his principal's business. RESTATEMENT (SECOND) OF AGENCY § 395 cmt. a (1958). *See generally* W. EDWARD SELL, SELL ON AGENCY 123-24 (1975). Under the common law, confidentiality obligations extended to items such as lists of names, trade secrets, and other matters peculiarly known to those in the employer's business. RESTATEMENT (SECOND) OF AGENCY, § 395 cmt. b. In today's situations involving more technical disclosures of confidences, such as patents or trade secrets, the NLRB can tailor an exclusion in a way that is sensitive to both employers and employees' § 7 rights.

¹⁶⁰ *See, e.g.*, *Allied Aviation Serv. Co.*, 248 N.L.R.B. 229, 231 (1089) (acknowledging that employer "would understandably prefer to keep out of the public eye" such delicate matters), *enforced without opinion*, 636 F.2d 1210 (3d Cir. 1980). Examples include a union's publicity that an employer illegally employs children or pollutes the environment.

¹⁶¹ *See, e.g., id.* (finding an airplane mechanic's letter to a third party, discussing safety problems at his employer's company, a protected activity); *Misericordia Hosp. Medical Ctr.*, 246 N.L.R.B. 351, 354-56 (1979) (finding a nurse's participation in the creation of a report presented to the accreditation committee that criticized hospital sanitary conditions protected activity, rejecting the hospital's disloyalty, disparagement, and breach of confidence claims), *enforced*, 623 F.2d 808 (2d Cir. 1980); *cf. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 115, at 828 (5th ed. 1984) (explaining that defamation may be conditionally privileged when reasonably calculated to protect or further common interest between publisher and recipient).

not, and should not be, protected.¹⁶² Clothing breaches of confidence in notions of disloyalty collapses the two concepts and creates confusion.¹⁶³ An example is *Knuth Brothers*,¹⁶⁴ where a print shop employee telephoned Schlitz Brewing Company, an indirect customer of the print shop, and asked some general questions about Schlitz management's opinions about unionization.¹⁶⁵ Although the Board found the activity protected, the United States Court of Appeals for the Seventh Circuit found that the call revealed the existence of a sensitive, confidential subcontracting relationship.¹⁶⁶ It ruled that the employee violated confidences, but it couched its holding in terms of disloyalty.¹⁶⁷

When decision makers gratuitously apply the disloyalty rubric in such

¹⁶² There may be lesser protection when the breach of confidence involves the maligning of a physical product sold, as opposed to a service provided. The quality of a finished product is often not as integrally related to working conditions as is the service that it is the job of employees (in a service industry) to provide. This general distinction between workplace *products* and working *conditions* would collapse, however, if the employees were instructed to make a product unsafe or unsafely (e.g., instructed secretly to remove safety devices on a kitchen appliance or to disregard hazardous substance labeling requirements on a chemical being sold), which would involve working conditions.

¹⁶³ The United States Court of Appeals for the Ninth Circuit recently defined what is confidential in a case discussing disloyalty and disparagement. See *Sierra Publishing Co. v. NLRB*, 889 F.2d 210 (9th Cir. 1989), *enforcing* 291 N.L.R.B. 540 (1988). Employees who worked for a newspaper publisher wrote letters to the newspaper's advertisers discussing the newspaper's financial difficulties and its decline in advertising. *Id.* at 214. They claimed the paper faced an "imminent collapse." The employer had argued that the "advertising lineage" used by the employees was not a matter of public record, and that by publicizing confidential information, the employees had acted in reckless disregard of the newspaper's business interests. *Sierra Publishing Co.*, 291 N.L.R.B. 540, 540 n.1 (1988), *enforced*, 889 F.2d 210 (9th Cir. 1989). In rejecting the argument, the Board stated that the letter did not "reveal any specific financial figures relating to the newspaper," and the information in the letter was readily available to the employer's advertisers. *Id.* at 540.

¹⁶⁴ 218 N.L.R.B. 869 (1975), *enforcement denied*, 537 F.2d 950 (7th Cir. 1976).

¹⁶⁵ *Id.* at 872 (A.L.J. decision). The employee sought the information to help unionize Knuth Brothers' production workers, because if Schlitz preferred that its printing jobs be done by union workers, then unionizing could help bring in business and secure the employees' jobs. *Id.*

¹⁶⁶ *NLRB v. Knuth Bros.*, 537 F.2d 950, 956 (7th Cir. 1976); see also *Knuth Bros.*, 218 N.L.R.B. at 870 (Kennedy, Member, dissenting) (explaining that because the practice of subcontracting makes the ultimate product more expensive to customers, the dealers required the shop to keep the information confidential).

¹⁶⁷ 537 F.2d at 956 (explaining that the employee could have accomplished his objective of obtaining information in other ways); see also *American Arbitration Ass'n*, 233 N.L.R.B. 71, 72-73 (1977) (finding that an employee who sent a sarcastic questionnaire to individuals identified from a private caseload breached confidentiality and also noting in dictum that the "tone and context" of the questionnaire "constituted disloyalty to . . . and disparagement of the employer's judgment").

contexts as insubordination, interruption of production, illegality, and disclosure of confidences, they unnecessarily compound the confusion in section 7 law, because these employees may be disciplined irrespective of any "disloyalty." The following subpart addresses a situation on the opposite end of the spectrum; that is, circumstances under which employees evidently *are* disloyal but are *not* subject to discipline under the disloyalty test.

B. *An Unworkable Standard*

At least part of the reason why disloyalty is often confused with, or unnecessarily added to, existing section 7 exceptions is that "disloyalty" is an unworkable standard. It is unworkable in large part because, rhetoric notwithstanding, the so-called disloyalty cases do not consistently turn on loyalty or its absence. This problem is highlighted by comparing *Jefferson Standard* with a factually similar case, *National Furniture Manufacturing Co.*¹⁶⁸ In *National Furniture*, six employees (one in company uniform), as part of attempts to obtain recognition and bargaining, showed up at an annual furniture exposition attended by over 15,000 buyers from over 7500 stores.¹⁶⁹ For three days they distributed leaflets describing National Furniture as a "chiseling," "unfair," and "hard-nosed" labor law violator, who treated employees "badly," "under-min[ed]" the wages paid by "fair-minded" employers, and refused to comply with an NLRB order.¹⁷⁰ The Board found the activity protected.¹⁷¹

One is hard-pressed to find distinctions between the loyalties of the radio/television technicians and the furniture store employees. In its discharge letter to its employees, National Furniture insisted that they had been disloyal: "[t]hey have attempted to degrade, humiliate, hurt, injure, and otherwise damage the reputation, ability to sell and/or the productive capacity of this company."¹⁷² Recall that *Jefferson Standard* also involved distribution, during bargaining, of handbills criticizing the employer's business policies.¹⁷³ Both the furniture employees and the radio/television technicians endeavored to harm their employers economically, chose passionate appeals to customers as their means, severely criticized their employer, hoped to diminish sales, and had the purpose of obtaining bargaining demands. Although the cases do contain some factual differences,¹⁷⁴ there is no persuasive or worka-

¹⁶⁸ 134 N.L.R.B. 834 (1961), *enforced in part*, 315 F.2d 280 (7th Cir. 1963).

¹⁶⁹ *Id.* at 840 (Trial Examiner's report).

¹⁷⁰ *Id.* at 841; *see also infra* notes 301-05 and accompanying text (discussing additional factors in the case).

¹⁷¹ *National Furniture*, 134 N.L.R.B. at 836.

¹⁷² *Id.* at 843 (Trial Examiner's report).

¹⁷³ The employees in *Jefferson Standard* also criticized the technical quality of the programs. *See supra* note 27 and accompanying text.

¹⁷⁴ A key distinction noted by the court was that National Furniture's employees engaged in "no disparagement of National's furniture." *NLRB v. National Furniture Mfg. Co.*, 315 F.2d 280, 286 (7th Cir. 1963). Other distinctions included the fact that the

ble distinction based on the degree of *loyalty* of the two sets of employees. If disloyalty means causing or desiring economic harm, public disdain, or ridicule, then many "disloyal" employees, both before and since *Jefferson Standard*, have been protected. Indeed, as I discuss more fully later, most collective activity, such as community publicity, union organizing rallies, lawful boycotts, and strikes, arguably is "disloyal."¹⁷⁵

In wrestling with this unworkable test, some decision makers have resorted to bifurcating disloyalty into two levels: disloyalty that forfeits protection and disloyalty that does not.¹⁷⁶ For instance, *National Furniture* framed the issue as whether the concerted activity was "illegal, or an example of *such disloyalty that we may term it 'indefensible'* in the sense enunciated [in *Jefferson Standard*]."¹⁷⁷ Under *Jefferson Standard*, as interpreted in *National Furniture*, disloyalty so egregious that it is "indefensible" loses protection, but "defensible" disloyalty, such as that in *National Furniture*, does not.¹⁷⁸ In a different vein, in one case, the Board applied a criterion of whether conduct is "organized [and] widespread" to distinguish *Jefferson Standard* and justify the reinstatement of cafeteria workers who told customers that there were roaches and rat hair in food.¹⁷⁹ Still another group of decisions has split the disloyalty test into subcategories based on whether the comments are "so disloyal, reckless, or maliciously untrue as to deny . . . [them] protection."¹⁸⁰ Under this standard, one must assess not only whether an employee is disloyal, but also the subtle degrees of loyalty to determine if the disloyalty is of the "indefensible" or "egregious" type that is "beyond the pale."¹⁸¹ Such bifurcated standards have not been well received

furniture employees' leaflets clearly specified a labor dispute, identified some of the specific employee complaints regarding the dispute, and called for public support in the employees' cause. *Id.*

¹⁷⁵ See *infra* part IV.A.

¹⁷⁶ Cf. *Patterson-Sargent Co.*, 115 N.L.R.B. 1627, 1634-38 (1956) (Murdock & Peterson, Members, dissenting) (distinguishing between attacks of invidious character and lesser attacks).

¹⁷⁷ 315 F.2d at 284 (emphasis added).

¹⁷⁸ *Accord* *NLRB v. Red Top, Inc.*, 455 F.2d 721, 727-28 (8th Cir. 1972) (stating that only "egregious" improprieties committed in connection with § 7 lose protection); see also *supra* note 22.

¹⁷⁹ *Furr's Cafeterias, Inc.*, 251 N.L.R.B. 879 (1980), *enforced without opinion*, 656 F.2d 698 (5th Cir. 1981).

¹⁸⁰ *Alaska Pulp Corp.*, 296 N.L.R.B. 1260, 1273 (1989) (A.L.J. decision) (citations omitted), *enforced*, 944 F.2d 909 (9th Cir. 1991); *accord* *Champion Int'l Corp.*, 303 N.L.R.B. No. 11, 138 L.R.R.M. (BNA) 1295 (May 28, 1991) (citing *Alaska Pulp Corp.*, 296 N.L.R.B. at 1260); *Brownsville Garment Co.*, 298 N.L.R.B. 507, 508 (1990), *enforced without opinion*, 937 F.2d 609 (6th Cir. 1991); *Emarco, Inc.*, 284 N.L.R.B. 832 (1987).

¹⁸¹ *Jefferson Standard Broadcasting Co.*, 94 N.L.R.B. 1507, 1512 (1951), *rev'd sub nom.* *Local Union No. 1229, IBEW v. NLRB (Jefferson Standard)*, 202 F.2d 186 (D.C. Cir. 1952), *set aside*, 346 U.S. 464 (1953). Assessing egregiousness of conduct to determine if

by some courts,¹⁸² and in the case of disloyalty, they add yet another layer that must be evaluated in order to apply the nebulous exception.

Even when one sets aside definitional problems, and even when disloyalty and disparagement appear to have similar meanings to various Board members and judges, there have been widely divergent results when these individuals have attempted to apply these terms to the facts of a given case. Thus, there is little uniformity in outcomes even when the reviewers approach definitional consistency. These problems, their causes, and their consequences are the subject of the following sections.

C. *Inconsistent Application*

1. Differing Focus on Disloyalty—Objective or Subjective?

One source of confusion is whether disloyalty is an objective term, based on external conduct, or a subjective one, based on the employee's state of

protection is lost did not originate with the *Jefferson* line of cases. For policy reasons the Board has long ruled that minor instances of insubordination, momentary outbursts during bargaining or grievance processing, name-calling or minor misconduct on the picket line may be excused. See *infra* part III.C.5.b.i. The Board recognizes that union organizing, bargaining, presenting grievances, striking, and other collective conduct cannot be exercised in *parlour politesse*, and that to provide any meaningful protection, § 7 must allow for some minor excesses in the exercise of those rights. This is especially true when an employer's violation of the law provoked an employee's conduct. See generally Getman, *supra* note 15, at 1231, and authority cited therein.

In 1948, the Board set the following standard:

A line exists beyond which an employee may not with impunity go, but that line must be drawn "between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in 'a moment of animal exuberance' or in a manner not activated by improper motives, and those flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service.

Bettcher Mfg. Corp., 76 N.L.R.B. 526, 527 (1948) (citations omitted). The Board noted that its standard would not always preclude an employee's discharge for statements or actions occurring during bargaining. *Id.*; cf. Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044, 1047 (1984) (holding that strikers' reinstatement rights may be forfeited by picket line misconduct that reasonably tends to coerce or intimidate, including verbal threats not accompanied by violence), *enforced without opinion*, 765 F.2d 148 (9th Cir. 1985), *cert. denied*, 474 U.S. 1105 (1986). Although it might not be easy to assess egregiousness in such cases, it seems more straightforward to decide if an outburst or momentary transgression may be excused under the circumstances without seriously jeopardizing production, safety, physical property, or other interests than it is to evaluate the egregiousness of someone's disloyalty.

¹⁸² See, e.g., *Red Top, Inc.*, 455 F.2d at 728. The court in *Red Top, Inc.* framed the Board's rule as "a general principle that insolent, rough, and intimidating conduct cannot serve as a basis for discharge if that conduct is carried out in connection with the assertion of protected activity . . . and that unless such improper conduct . . . is 'egregious,' the same must be accepted as a normal and usual incident of labor-management relationships"—and then the court rejected such a principle.

mind.¹⁸³ Most commonly, decision makers consider the term to be a subjective one, and they analyze whether the employee was spiteful or was subjectively hoping to embarrass, harass, ridicule, or harm the employer.¹⁸⁴

However, on occasion disloyalty is described as an objective criterion that may be found even if the employee has innocent intentions. Thus, at least one Board member and one appellate court would find disloyalty if they determined that an employee had *constructive knowledge* of the likely harmful effects of her conduct. In *Knuth Brothers*, mentioned in another context above,¹⁸⁵ the print shop pressman telephoned Schlitz Brewing Company to ask if Schlitz preferred that its printing needs be met by unionized companies. Although the Board ruled the call protected,¹⁸⁶ a dissenting member concluded that the pressman "never had any excuse whatever for meddling in his Employer's dealings with its customers," and that his conduct was "clearly far beyond the scope of duties for which he was paid."¹⁸⁷ For these reasons,

he must be held to have been aware that he was meddling in his Employer's business affairs without authorization. Therefore, Respondent was *legally entitled to treat him* just as it would any other employee who so seriously disrupts his employer's business.

In my view, [the employee] was clearly and flagrantly disloyal to his Employer.¹⁸⁸

The United States Court of Appeals for the Seventh Circuit agreed with the dissent, ruling that an employee who proceeds "apparently heedless" of the "potentially denigrating impact" of his actions can be considered disloyal.¹⁸⁹ Under this analysis, it was the fact that the employee did *not* stop to think that made him disloyal.¹⁹⁰

¹⁸³ Disparagement has generally been treated as objective, such that intent is immaterial. See, e.g., *American Arbitration Ass'n*, 233 N.L.R.B. 71, 74 (1977) (A.L.J. decision).

¹⁸⁴ See, e.g., *New River Indus. v. NLRB*, 945 F.2d 1290, 1295 (4th Cir. 1991) (finding silly letter ridiculing free ice cream prepared with the sole purpose of belittling the company unprotected); *American Arbitration Ass'n*, 233 N.L.R.B. at 75 (A.L.J. decision) (finding letter ridiculing management's dress code sent by an employee "not completely innocent or unaware of the possible results . . . [but with] pique or vengeance").

¹⁸⁵ 218 N.L.R.B. 869 (1975), *enforcement denied*, 537 F.2d 950 (7th Cir. 1976); see also discussion *supra* notes 164-67 and accompanying text.

¹⁸⁶ 218 N.L.R.B. at 869. The pressman was trying to obtain information that would motivate his co-employees to join the union. *Id.*

¹⁸⁷ *Id.* at 871 (Kennedy, Member, dissenting).

¹⁸⁸ *Id.* (emphasis added).

¹⁸⁹ *NLRB v. Knuth Bros.*, 537 F.2d 950, 956 (7th Cir. 1976). With some degree of skepticism, the Court assumed for the appeal that the employee did not intend "to betray a valued business relationship of his employer." *Id.* at 953 n.4. The contact, however, arguably revealed a sensitive, confidential subcontracting relationship.

¹⁹⁰ "In revealing the information, Popovitch acted in reckless disregard of his employer's business interests. Respondent had the right to expect its employees to use

An even more extreme interpretation of the subjective/objective dilemma recently arose out of the widely publicized meat packers' strike against Hormel & Co.¹⁹¹ The United States Court of Appeals for the District of Columbia Circuit evaluated if a former striker was disloyal for having attended a labor parade and rally. Participation in employee rallies, parades, and consumer boycotts, of course, usually is protected, but the court adjudged the boycott promoted at the rally to be illegal.¹⁹² Given these facts, employees

greater care in using information acquired in the course of their employment. *Failure to use such care was an act of disloyalty to respondent.*" *Id.* at 956 (emphasis added).

¹⁹¹ *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061 (D.C. Cir. 1992), *denying enforcement to* 301 N.L.R.B. 47, 60 (1991).

¹⁹² The court did not clearly articulate why the support of the boycott was unprotected, and the usual non-secondary boycott is classic protected activity. The Administrative Law Judge explained that this boycott was contrary to the directives of the unions involved. *George A. Hormel & Co.*, 301 N.L.R.B. 47, 60 (1991) (A.L.J. decision), *enforcement denied*, 962 F.2d 1061 (D.C. Cir. 1992). But that alone ought not have made it illegal, because union members have a protected right to dissent from their union's decisions. *See, e.g.*, Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, § 101, 29 U.S.C. § 411(a)(2) (1988). The Administrative Law Judge apparently interpreted the boycotters' demands on the employer as a demand for separate and direct dealing with them, as opposed to, and contrary to the bargaining posture of, the local and international unions representing them. *George A. Hormel & Co.*, 301 N.L.R.B. at 60, 80-82 (A.L.J. decision). Employers are not required to respond to demands for separate "bargaining," and because such demands frustrate statutory rights and obligations, they are unprotected. *See, e.g.*, NLRA, § 9, 29 U.S.C. § 159(a) (1988) (allowing voluntary redress of grievances unless in violation of contract); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975) (holding that the Act does not protect minority employees' demand to bypass union and to bargain directly with them). If the Administrative Law Judge did indeed determine the boycotters' request to be a minority demand such as the one made in *Emporium Capwell*, then there is nothing unusual about concluding that the boycotters were unprotected.

The Administrative Law Judge also ruled that the boycott had an objective of demanding the immediate return of former strikers who had already permanently and lawfully been replaced. This demand was considered as the equivalent of demanding a breach of contract. *George A. Hormel & Co.*, 301 N.L.R.B. at 80-82 (A.L.J. decision). Neither the Board nor the Court of Appeals went into detail on this questionable point.

Without having seen the settlement agreement, however, it is not clear to me that to protest the permanent replacement of former strikers, and to demand their immediate reinstatement, is the equivalent of demanding breach of the recall arrangements in a strike settlement. Surely the company could voluntarily do *more* on behalf of former strikers than the settlement required it to do without breaching the settlement rights of replacements and crossovers. For example, presumably a company in response to such demands voluntarily could temporarily expand its workforce to provide jobs for both replacements and former strikers without altering the jobs of, or seniority of, those replacements in breach of their strike settlement rights. Alternatively, the dissident employees might seek to persuade their union and Hormel to renegotiate the strike settlement, providing for their inclusion in the post-strike staffing arrangements. This result, if voluntarily adopted by the union and Hormel, would not breach a strike settlement con-

engaging in the boycott would be unprotected. The case is significant, however, because the employee at issue did *not* boycott. He believed that the boycott reduced his chances of being recalled, and thus took no action to support it.¹⁹³ The Court ruled that the mere *presence* of an employee at a largely pro-boycott parade and rally evidenced the *appearance of disloyalty*.¹⁹⁴

In addition to disagreement over the objective or subjective aspect of disloyalty, fundamental philosophical and ethical differences among the reviewers will prevent consistent application of any disloyalty test. These differences are explored in the three subparts that follow.

2. Differing Labor Relations Paradigms—Harmony or Adversary?

A major problem the Board and courts have encountered when analyzing the disloyalty issue stems from the longstanding controversy over the degree

tract, because labor contracts can be renegotiated upon mutual agreement of the parties. Nor would it deprive replacements of any contract rights, because employees' seniority rights can be renegotiated prospectively, as long as benefits owed are not withheld (for example, vacation pay due, previously accrued). Apparently the court determined that the union permanently had waived the employees' right to continue bargaining about replacements and recall. *George A. Hormel & Co.*, 962 F.2d at 1063 (citing *Emporium Capwell*, 420 U.S. at 61-64).

It also is not clear to me as a factual matter that the Freemont collective bargaining agreement at issue forbade boycotts, an issue that the Administrative Law Judge did not clearly resolve. See *George A. Hormel & Co.*, 301 N.L.R.B. at 51, 81. The agreement did not on its face prohibit boycotts (in sharp contrast to a contract at the Austin plant) though it did prohibit sympathy strikes. As a matter of labor contract law, the two are not necessarily synonymous. The employee at issue was willing to work; he was *not* striking, neither primarily nor in sympathy with the sister local at Austin.

¹⁹³ *George A. Hormel & Co.*, 301 N.L.R.B. at 84, 86-87.

¹⁹⁴ *George A. Hormel & Co.*, 962 F.2d at 1066. The holding is problematic on multiple grounds. See *supra* note 192. Furthermore, the Court made factual findings about the rally and parade that were inconsistent with the Administrative Law Judge's findings, when it should have remanded to the Board to make an initial ruling. See *infra* notes 234-39 and accompanying text. (The Board had not addressed the rally or parade or the boycott's legality, because it found the employee not to have supported the boycott.) The boycott was only one of the rally's purposes, albeit a major one. Those in attendance included some who manifested support of the boycott and some who did not. *George A. Hormel & Co.*, 301 N.L.R.B. at 76 (A.L.J. decision).

The court determined that a subjective definition of disloyalty would not be "a permissible construction" of the Act, making a remand unnecessary. The Court's conclusion assumes too much. See *infra* part IV.A. This new "appearances of disloyalty" test seems questionable. Moreover, not even the employer had argued that mere presence at the parade and rally constituted support of the boycott. *George A. Hormel & Co.*, 301 N.L.R.B. at 76, 86 (A.L.J. decision). The court created an objective disloyalty defense to the unfair labor practice that neither the Board nor the employer had advanced in the litigation. Additionally, the court does not have the benefit of the Agency's expertise concerning this new "appearances" test.

to which the interests of employees and management are invariably antagonistic and, accordingly, over the degree to which a fair and wise national labor policy has made and should make allowances for such inherent conflict.¹⁹⁵ Some decision makers adopt a "harmony paradigm," emphasizing the aspects of labor law that promote harmony and cooperation. Others adopt an "adversary paradigm,"¹⁹⁶ recognizing the inevitably opposing interests of labor and management. The paradigm one adopts provides the lens through which one evaluates conduct and interprets labor law. This potential for difference becomes significant when decision makers with different perspectives apply the "disloyalty" exception. Their differences affect their views on how "polite" employees must be, what motives employees may have,¹⁹⁷ how far the language may go when making criticism, to whom employees may appeal for redress of grievances, how much subjective loyalty employees must feel to retain protection, and other issues that factor into a disloyalty analysis.¹⁹⁸ The debate is complex, but put simply for my purposes here, it includes the following general points.¹⁹⁹

Basic to the National Labor Relations Act is the goal of preserving industrial peace. This goal lends support to the proposition that labor and management's interests are necessarily aligned, and that cooperation and harmony are more important national policies than preserving the ability to advance one's own interests. The policy behind the labor laws is that "industrial strife and unrest" are not in the public interest.²⁰⁰ Proponents of the harmony paradigm point to the fact that the Act seeks to encourage the

¹⁹⁵ The issue is not necessarily whether the relationships are adversarial. Hard bargaining and intransigence in pursuit of one's own interests can occur without animosity. Union negotiators and people administering contract grievances may engage in what appears to be a heated battle, only to enjoy a cup of coffee together when the issue is ultimately settled. The issue is whether the goals and interests of labor and management are invariably opposed.

¹⁹⁶ My terms.

¹⁹⁷ For a discussion of whether motives are relevant to disloyalty, see *infra* part III.C.5.a.

¹⁹⁸ When the reviewing courts differ from the NLRB concerning the appropriateness and significance of each of these models, principles of deference to administrative agencies and limited review suggest that the Board's paradigms generally should prevail. See *infra* part III.C.4. When the courts accord deference, the frequency of inconsistent results caused by philosophical differences between the courts and the Board decreases; however, Board members may differ among themselves concerning the paradigms. For an analysis of some factors often considered in disloyalty determinations, see *infra* part III.C.5.

¹⁹⁹ All agree that the employee and the employer have some shared interests, most notably the profitability of the enterprise, but beyond such generalities the paradigms diverge. Further, in some ways both sides in this debate are "right": mutual cooperation and self-interest can co-exist at times. The discussion in the text is intended as an introduction to the arguments in this debate.

²⁰⁰ NLRA, § 1, 29 U.S.C. § 151 (1988); see also *NLRB v. Financial Inst. Employees*

“friendly adjustment of industrial disputes” arising out of labor and management’s differences.²⁰¹ National labor policies acknowledge managerial interests as well as employees’ interests.²⁰² Several provisions of the Act place specific timing constraints on behavior to preserve stability.²⁰³ Others forbid certain economic tactics altogether.²⁰⁴ There are limits on the right to picket and strike.²⁰⁵ Further, the Act has imposed bargaining obligations requiring parties to confer in “good faith.”²⁰⁶

Conversely, those who believe that the interests of employees and management are always potentially conflicting point to the Act’s central goal of redressing the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers.”²⁰⁷ Congress expressed concern for “depress[ed] wage rates and the purchasing power of wage earners.”²⁰⁸ It recognized that employers caused pervasive unrest by refusing to allow employees to associate, refusing to recognize and bargain with unions, and discriminating against pro-union employees.²⁰⁹ Acknowledging “differences as to wages, hours, or other working conditions,” Congress sought to enable workers to deal more effectively with management to better their lot.²¹⁰ Section 7 creates protection for employees, motivated by the foregoing concerns.

of Am., Local 1182, 475 U.S. 192, 208 (1986) (stating that the “basic purpose of the . . . Act is to preserve industrial peace”).

²⁰¹ NLRA, § 1, 29 U.S.C. § 151 (1988).

²⁰² See, e.g., Labor Management Relations (Taft-Hartley) Act § 1(b), 29 U.S.C. § 141 (1988) (asserting policy of “prescrib[ing] the legitimate rights of both employees and employers”).

²⁰³ § 8(b)(7)(A), 29 U.S.C. § 158(b)(7)(A) (1988) (prohibiting recognitional picketing by employees represented by a recognized union); § 8(b)(7)(B), 29 U.S.C. § 158(b)(7)(B) (1988) (prohibiting recognitional picketing within one year of election); § 9(c)(3), 29 U.S.C. § 159(c)(3) (1988) (prohibiting elections within one year of a prior election).

²⁰⁴ § 8(b)(4), 29 U.S.C. § 158(b)(4) (1988) (prohibiting certain secondary boycotts); § 8(e), 29 U.S.C. § 158(e) (1988) (prohibiting hot cargo agreements).

²⁰⁵ See, e.g., § 8(b)(4), 29 U.S.C. § 158(b)(4) (1988) (outlawing secondary boycotts); § 8(b)(7), 29 U.S.C. § 158(b)(7) (1988) (outlawing recognitional and organizational picketing for more than 30 days without having filed a petition for an election); Labor Management Relations (Taft-Hartley) Act § 206, 29 U.S.C. § 178(a)(2) (1988) (allowing injunctions against strikes or lockouts jeopardizing national health or safety).

²⁰⁶ § 8(d), 29 U.S.C. § 158(d) (1988); see also *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 125-54 (1956) (discussing the Act’s good faith bargaining requirement).

²⁰⁷ NLRA, § 1, 29 U.S.C. § 151 (1988).

²⁰⁸ *Id.*

²⁰⁹ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 23-24 (1937) (discussing congressional findings). Section 8 outlaws employer interference or coercion regarding these rights. 29 U.S.C. § 158(b)(1) (1988).

²¹⁰ NLRA, § 1, 29 U.S.C. § 151; *NLRB v. Local Union No. 1229, IBEW (Jefferson Standard)*, 346 U.S. 464, 480 (1953) (Frankfurter, J., dissenting); *Harnischfeger Corp.*, 9 N.L.R.B. 676, 684 (1938) (stating that the purpose of collective bargaining is to allow employees to bargain with employers as equals).

Moreover, the Act either expressly acknowledges or expressly confers the right to two forms of concerted activity that are successful only when they cause or threaten economic harm: strikes and lockouts.²¹¹ The Supreme Court has acknowledged the intrinsically conflicting interests of labor and management in its exemption of supervisors from section 7 protection,²¹² its treatment of collective bargaining,²¹³ and its acceptance of economic weapons such as the strike, boycott, and lockout. The Act preserves the right of all parties to act in self-interest, and collective bargaining presupposes that each party seeks to satisfy self-interests. Often, section 7 rights are especially important in situations when the interests of management and labor are *most* antagonistic.²¹⁴ The Act even *requires* employees to act out of self-interest, as union officials will violate the law (the duty of fair representation) if they act to further management's interests to the detriment of the bargaining unit's self-interest.²¹⁵ Employees must have the purpose of mutual aid or protection to invoke section 7.²¹⁶ Mutual aid or protection runs between employees; it has never been construed to run between employees and management. In fact, the Act forbids excessive management involvement in the

²¹¹ See, e.g., NLRA, § 13, 29 U.S.C. § 163 (1988) (protecting right to strike); NLRA, § 8(d), 29 U.S.C. § 158(d) (1988) (acknowledging right to lock-out).

²¹² *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653, 659-60 (1974).

²¹³ [C]ollective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.

NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 488-89 (1960).

²¹⁴ Examples arise when an employer has refused to recognize a union desired by the employees, or when an employer is considering firing an employee. That the interests are especially conflicting in the latter example is reflected by the Board's having read into § 7 a right to fellow-employee assistance during investigatory interviews that may lead to discipline. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) (upholding the Board's determination that the denial of union representation in an investigatory interview was an unfair labor practice). *But see* *E.I. Dupont de Nemours*, 289 N.L.R.B. 627 (1988) (*per curiam*) (concluding that *Weingarten* protection should not be extended to non-union employees), *review denied sub nom. Slaughter v. NLRB*, 876 F.2d 10 (3d Cir.), *amended*, 132 L.R.R.M. (BNA) 2221 (3d Cir. 1989).

²¹⁵ See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 190-93 (1967) (stating that a breach of the duty of fair representation occurs when a union's conduct toward a member is "arbitrary, discriminatory, or in bad faith"); *Steele v. Louisville & N. R.R.*, 323 U.S. 192, 202 (1944) (discussing obligation to "act for and not against those whom it represents"); see also NLRA, § 8(b), 29 U.S.C. § 158(b) (1988) (discussing obligations of union representatives).

²¹⁶ See *infra* notes 400-01 and accompanying text.

administration of unions.²¹⁷ Special provisions in the statutory scheme allow the expression of negative opinions without sanction, demonstrating that expression of antagonism between the parties is allowed and expected.²¹⁸ To the extent the Act seeks “harmony,” it is driven simply by the goal of preventing interruption of commerce from labor unrest and employer intransigence or coercion contributing to that unrest.²¹⁹

In *Jefferson Standard*, the Court’s “harmony” paradigm was the clay out of which the disloyalty exception was molded:

There is no more elemental cause for discharge of an employee than disloyalty to his employer. It is equally elemental that the Taft-Hartley Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise.

Congress, while safeguarding, in § 7, the right . . . to engage in ‘concerted activities for the purpose of collective bargaining or other mutual aid or protection,’ did not weaken the underlying contractual bonds and loyalties of employer and employee.²²⁰

To the dissent, disloyalty was an imprecise and unhelpful notion, one that conflicted with the policies behind legislation designed to elevate labor’s vulnerable position vis-a-vis management.²²¹ Subsequent attempts to apply the disloyalty exception reflect the tension between these two philosophical paradigms.²²²

3. Differing Emotions and Personal Ethics

Even if reviewers were to agree on a guiding labor law paradigm, no useful standard exists to help determine how “loyal” an employee must be to retain protection. The term disloyalty inherently invites disagreement and has gen-

²¹⁷ See, e.g., NLRA, § 8(a)(2), 29 U.S.C. § 158(a)(2) (1988) (prohibiting employer domination of or financial support to unions).

²¹⁸ NLRA, § 8(c), 29 U.S.C. § 158(c) (1988). This clause may also reflect congressional opinion that some amount of adversity is salutary within our society.

²¹⁹ [T]he fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining and thus the promotion of industrial peace to remove obstructions to the free flow of commerce . . . [T]he purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees’ rights.

NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 257-58 (1939); see also *Associated Press v. NLRB*, 301 U.S. 103, 129-30 (1937) (explaining that safeguarding employees’ right to advance their own interests by protecting unionization and bargaining rights will prevent disturbances in commerce and labor unrest).

²²⁰ *NLRB v. Local Union No. 1229, IBEW (Jefferson Standard)*, 346 U.S. 464, 472-73 (1953) (footnotes omitted).

²²¹ *Id.* at 480-81 (Frankfurter, J., dissenting).

²²² See *infra* part III.C.5. This Article need not resolve definitively or for all purposes the adversary/harmony question in order to evaluate the disloyalty test, because disloyalty simply is not a criterion grounded in § 7. See *infra* part IV.A-B.

erated many dissenting opinions and reversals.²²³ As the *Jefferson Standard* dissenters foresaw,²²⁴ any assessment becomes the subjective expression of the personal values and opinions of the decision maker.

There are several reasons for these inconsistencies. First, Board members and appellate judges do not have the benefit of observing witnesses.²²⁵ In the murky area of "loyalty," subtle nuances of the employee's comments or activity are critical. The attitudes of a witness may be best reflected in his body language.²²⁶ The tone of his allegedly disloyal words may be accurately ascertained at trial only by hearing a witness describe the speaker's volume, tenor, or facial expression.

Second, these problems are accentuated when courts of appeals review Board decisions. Federal judges are not faced on a daily basis with the task of applying the delicately balanced policies of the Act to various workplace facts. As the Supreme Court has acknowledged, "courts are generally not in close contact with the pressures of labor disputes."²²⁷

Third, the term disloyalty invites a differing application because of the subjectivity of its application. For example, in the case mentioned earlier in which an employee called the plant manager "Castro," the Trial Examiner interpreted the comment as an unprotected comparison to a Communist leader.²²⁸ To the Board the reference was merely "frank," not especially noteworthy, and certainly no more uncomplimentary than much protected language.²²⁹ To the court of appeals it was flagrant insubordination, deliberate, defiant, blunt, vindictive, disloyal, and disparaging.²³⁰

²²³ See, e.g., *H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989); *NLRB v. Truck Drivers, Oil Drivers, Filling Station & Platform Workers Union, Local 705*, 630 F.2d 505 (7th Cir. 1980), *cert. denied sub nom. Gilmer v. Truck Drivers, Oil Drivers, Filling Station & Platform Workers Union, Local 705*, 450 U.S. 1030 (1981); *Boaz Spinning Co. v. NLRB*, 395 F.2d 512 (5th Cir. 1968); *NLRB v. National Furniture Mfg. Co.*, 315 F.2d 280 (7th Cir. 1963); see also *infra* part III.C.4 (discussing lack of deference to the Board).

²²⁴ See *Jefferson Standard*, 346 U.S. at 481 (Frankfurter, J., dissenting) ("[T]o float such imprecise notions as 'discipline' and 'loyalty' in the context of labor controversies, as the basis of the right to discharge, is to open the door wide to individual judgment by Board members and judges.").

²²⁵ Cf. FED. R. CIV. P. 52(a) (stating that due regard shall be given to the opportunity of the trial court to judge credibility of witnesses).

²²⁶ See, e.g., *NLRB v. Red Top, Inc.*, 455 F.2d 721, 723 (8th Cir. 1972) (noting that the trial examiner had discredited the testimony of a witness because "his demeanor made an unfavorable impression on me").

²²⁷ *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 65 (1966); see also *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (explaining that unlike administrative agencies, judges are not experts in the field).

²²⁸ *Boaz Spinning Co.*, 165 N.L.R.B. 1019, 1024 (1967) (Trial Examiner's report), *enforcement denied*, 395 F.2d 512 (5th Cir. 1968). See *supra* note 135.

²²⁹ *Boaz Spinning Co.*, 165 N.L.R.B. at 1020.

²³⁰ 395 F.2d at 515-16.

Another example, which starkly contrasts with the unprotected Castro comment is the following diatribe in leaflets that the court ruled protected:

“The bosses are making it harder for us everyday! . . . [T]he NYU bosses have turned their security guards into a fascist gestapo illegally searching workers and firing them. . . .”

“. . . At the same time the bosses are building up Klan and Nazi ‘white power’ punks to further divide us. . . .”

“Turn [the Union] into an anti-fascist union”

“[T]he NYU management is using the security guards for fascist gestapo tactics to intimidate black and Spanish workers. . . .”²³¹

One is hard-pressed to discern why is it unprotected to refer to an individual’s management style as Castro-like, when it is protected to call another’s style and intentions fascist, racist, Nazi- and gestapo-like, and supportive of the Ku Klux Klan.²³² Evidently, a comparison to Hitler or the Imperial Wizard is less odious than a comparison to Castro.

Moreover, the subject of disloyalty is not merely subjective; it is also particularly emotional. The concepts of loyalty and disloyalty evoke powerful and highly individual images that are conditioned by one’s own experiences, religion, and ethics: loyalty to one’s spouse (fidelity), one’s country (patriotism), one’s God (worship). No wonder disloyalty as a legal standard is elusive to the best-intentioned administrative or judicial decision maker.

Last, inconsistency results from the fact that the Board members are political appointees with five-year terms.²³³ They are pressured to follow the prevailing political winds. These political vagaries become magnified when legal standards are set by terms as ill-defined, subjective, emotional, and generally problematic as disloyalty.

Do the mandates of administrative law not serve as a check on decision makers’ subjectivity—at least to the extent that the courts would uphold disloyalty determinations made by the Board? After all, reviewing courts must defer to administrative expertise and must respect limiting standards of review. To that question I now turn.

4. Varying Willingness to Accord Administrative Deference

The Supreme Court, in its landmark decision *Chevron USA Inc. v. Natural*

²³¹ *NLRB v. New York Univ. Medical Ctr.*, 702 F.2d 284, 286-87 (2d Cir.), *vacated on other grounds*, 464 U.S. 805 (1983).

²³² Among other things, the United States Court of Appeals for the Second Circuit noted that the employees used the leaflets to communicate with each other about union matters, and that the leaflets were rhetorical and did not jeopardize plant discipline. *Id.* at 290-91.

²³³ NLRA, § 3(a), 29 U.S.C. § 153(a) (1988). The members’ terms are staggered such that there is no complete change in Board membership at any one time. *Id.*

Resources Defense Council, Inc.,²³⁴ clearly ruled that courts are not free to substitute their own judgment for that of administrative agencies. Under *Chevron*, when Congress has not directly spoken to a given question of statutory interpretation, the reviewing court must defer to *any* "reasonable" construction by an agency. When a statute is silent or ambiguous, the Court may only examine whether the agency's interpretation is based on a "permissible construction of the statute."²³⁵ In *Chevron*, the Court openly acknowledged statutory interpretation for what it often is: policymaking, which is within the province of the agency.²³⁶ With regard to responsibility for interpreting section 7 in particular, the Supreme Court has frequently stated that the Board is charged with this responsibility and is to be given "wide latitude" in this task.²³⁷

Because section 7 is silent on the question of exceptions, both *Chevron* and the Act mandate that its interpretation be delegated to the Board.²³⁸ Theoretically, these principles of administrative law ought to lend some measure of stability to the law on disloyalty. However, it is precisely because disloyalty arouses emotions, implicates ethics, and begs for subjective assessment, that it is a subject on which appellate courts have had great difficulty according deference.²³⁹ Because the area is inherently social and political, it tempts the substitution of one's own policy preferences.

²³⁴ 467 U.S. 837 (1984).

²³⁵ *Id.* at 842-43. By contrast, when Congress has "directly spoken to the precise question," the court and the agency "must give effect to the unambiguously expressed intent." *Id.* The reasons for deference include the following: (1) the agency generally has a better understanding than the courts of facts and the practical impact of legal interpretations because of its expertise in the area; (2) it has superior understanding of how a ruling fits into the overall field and into the Agency's overall mission; (3) it is the initial decision maker, with the statutory scheme conferring on courts only the power to review or delay; (4) review of its decisions are expressly and statutorily limited by specific standards of review; (5) Congress has granted it broad standards within which to act, and within which differing results legitimately could be reached. Adapted from RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 331-33 (2d ed. 1992).

²³⁶ 467 U.S. at 864-66. The Court noted that the agency may rely on the "incumbent administration's views of wise policy to inform its judgments," and held that "it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests." *Id.* at 865.

²³⁷ See, e.g., *Meyers Indus. (Meyers II)*, 281 N.L.R.B. 882, 882-883 (1986), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied sub nom. Meyers Indus. v. NLRB*, 487 U.S. 1205 (1988). There are both express and implied delegations of power to the Board. The Act expressly delegates to the Board the power to prevent persons from engaging in commerce upon a finding of an unfair labor practice. NLRA, § 7, 29 U.S.C. § 157 (1988); NLRA, § 8(a), 29 U.S.C. § 158(a) (1988); NLRA, § 10, 29 U.S.C. § 160 (1988). The Board has the power to investigate and issue complaints, NLRA, § 10(b), 29 U.S.C. § 160(b) (1988), and to remedy unfair labor practices, so as to effectuate the Act. § 10(c), 29 U.S.C. § 160(c) (1988).

²³⁸ See *infra* note 466.

²³⁹ In all fairness, the degree of deference required was less clear prior to the 1984

Purporting to give due deference, many judges have not hesitated to overturn Board conclusions about disloyalty,²⁴⁰ and they have gone to extraordinary lengths to "correct" Board findings about disloyalty.²⁴¹ An example is *Knuth Brothers*, mentioned above in another context, in which a Knuth Brothers pressman had telephoned Schlitz Brewing Company to ask whether it preferred that its printing be done by unionized companies.²⁴² The call allegedly revealed a confidential subcontracting relationship that could jeopardize the Schlitz printing order. The Schlitz order was later canceled, which Knuth apparently attributed to an unrelated paper shortage at the time the Board investigated the initial charges.²⁴³ Subsequently at trial, the company implied that the cancellation was a result of the call, though Knuth testified he could not remember the reason for the cancellation.²⁴⁴ The Administrative Law Judge found no disloyalty, in large part because of the lack of credibility of Mr. Knuth, and also because of four factual findings: the subcontract was not confidential, the employee was unaware the call might cause harm, the employee did not intend harm, and the employee had no intent to instigate a boycott against Knuth.²⁴⁵ In short, Knuth's

Chevron decision, as courts adopted competing theories of the appropriate degree of deference. Nonetheless, both of the accepted theories called for considerable deference to the agency. See, e.g., *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (illustrating the deferential rational basis review model); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) (illustrating the independent review model), *overruled by* *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981). See generally PIERCE, *supra* note 235, at 248-53.

Because the Board members themselves disagree so greatly about disloyalty, even if judicial deference were consistently accorded, this would not lead to consistency.

²⁴⁰ See *supra* note 223.

²⁴¹ See, e.g., *NLRB v. Knuth Bros.*, 537 F.2d 950 (7th Cir. 1976), *denying enforcement to* 218 N.L.R.B. 869 (1975). For a discussion of *Knuth Brothers*, see *supra* notes 164-67 and 185-90. In what has become commonplace in disloyalty cases, the United States Court of Appeals for the Seventh Circuit court performed a detailed factual inquiry into the Board's analysis. *Knuth Bros.*, 537 F.2d at 954-57; see also *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061, 1064-66 (D.C. Cir. 1992) (engaging in extensive judicial factfinding), *denying enforcement to* 301 N.L.R.B. 47 (1991). For a discussion of *George A. Hormel & Co.*, see *supra* notes 191-94 and accompanying text.

²⁴² 537 F.2d 950 (7th Cir. 1976); see also *Knuth Bros.*, 218 N.L.R.B. at 872 (A.L.J. decision); *supra* notes 164-67.

²⁴³ *Knuth Bros.*, 218 N.L.R.B. at 873 n.7, 875 & n.14 (A.L.J. decision).

²⁴⁴ *Id.* at 873 n.7, 875; 537 F.2d at 955 n.6.

²⁴⁵ *Knuth Bros.*, 218 N.L.R.B. at 874-76 (A.L.J. decision). Knuth Brothers was "less than candid," and the alleged confidentiality was "not as significant as [the employer] would have one believe." *Id.* at 874. There were no confidentiality policies, and Knuth Brothers had not clearly informed employees that subcontracts were confidential. *Id.* at 874-75. The Administrative Law Judge ruled that the Board's General Counsel failed to prove anti-union animus, but reinstatement was appropriate because union organizing calls are protected. Knuth Brothers erred in assuming that the employee sought cancella-

claim that it fired him for a breach of confidentiality was untrue.²⁴⁶ The Board agreed on these findings and deferred to the Administrative Law Judge on credibility.

The appellate court reversed the Board's findings. The employee may not have intended harm, but he recklessly disregarded its possibility.²⁴⁷ The subcontract must have been confidential, because employer witnesses testified the client was very angry that the call had been made.²⁴⁸ The employee must have known the call could harm, because when the Company fired him, in his exit interview he "then understood" that he could have caused his employer a loss of business.²⁴⁹ In the disloyalty cases this degree of detailed, factual involvement by a reviewing court is not unique.²⁵⁰

There is another reason why appropriate deference by the courts (or, for that matter, consensus among Board members) is lacking: there is no agreement over what factors comprise disloyalty. Some of the differences that have led to inconsistent results are explored below.

5. Disagreement Over Disloyalty's Components

There are many legal determinations that, like the disloyalty inquiry, involve assessing "all the facts and circumstances." This aspect of the disloyalty test, without more, would not necessarily be objectionable. What makes this test particularly difficult is disagreement over what "facts and circumstances" legitimately may be considered in light of the statutory scheme; of those that may be considered, which ought to be treated as relevant; and of those that are relevant, what weight should be accorded each.

a. Purpose and Motive

The reviewers frequently discuss whether employees' purposes or motives

tion of the subcontract, a purpose that would be unprotected (though incorrectly referred to in the case as a "secondary boycott"). *Id.*

²⁴⁶ The Board held that Knuth Brothers' motive for discharging the employee was its unfounded fear that he was attempting to pressure Knuth by causing cancellation of the Schlitz account. *Id.* at 869.

²⁴⁷ *Knuth Bros.*, 537 F.2d at 956.

²⁴⁸ The court determined that the employer needed confidentiality, and that the employee could have proceeded without revealing the subcontract. *Id.* at 955-56. The court relied on typical contracts in the industry referring generally to confidences, although Knuth Brothers was not party to one. *Id.* at 955. The employer's concern about confidentiality, the court said, was demonstrated by its discharge decision. *Id.*

²⁴⁹ *Id.*

²⁵⁰ *See, e.g.*, *NLRB v. Red Top, Inc.*, 455 F.2d 721 (8th Cir. 1972) (rejecting Board findings when, in an acrimonious context, employee called manager a liar and threatened to hit him), *denying enforcement in part and granting enforcement in part* to 185 N.L.R.B. 989 (1970); *see also* *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061 (D.C. Cir. 1992) (ruling as a matter of law that employee supported a boycott, when Administrative Law Judge and Board found employee had not); discussion *supra* notes 191-94 and accompanying text.

are relevant to the determination of disloyalty, but these discussions are fraught with confusion, and the decisions fail to distinguish between purpose and motive.²⁵¹ *Purpose* is a goal, an “end” or “object.”²⁵² An individual, a group of employees collectively, or a union as an organization can have a purpose. As discussed above, section 7 only protects activity for the specific purpose of organizing, bargaining, or other mutual aid or protection.²⁵³ For that reason, employees’ and unions’ purposes are always relevant in the *Jefferson Standard* line of cases, but they are relevant at step two of the analysis (section 7 purposes), not step three (loss of protection under an exception). If there is no section 7 purpose, decision makers do not need to reach the question of disloyalty or disparagement.

Motive is the “[c]ause or reasons that moves the will and induces action.”²⁵⁴ Motive, thus, refers to a person’s individual subjective state of mind, the reason why he is engaged in an activity.²⁵⁵ Although a union can-

²⁵¹ See, e.g., *NLRB v. Local Union No. 1229, IBEW (Jefferson Standard)*, 346 U.S. 464, 476-77 (1953) (“The only connection between the handbill and the labor controversy was an ultimate and undisclosed *purpose* or *motive* on the part of some of the sponsors that, by the hoped-for financial pressure, the attack might extract from the company some future concession. A disclosure of *that motive* might have lost more public support for the employees than it would have gained” (emphasis added)); *Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 218 n.13 (9th Cir. 1989) (using purpose, motive, and intent interchangeably). The cases also confuse the term “intent” with purpose and motive. See *infra* note 264.

²⁵² BLACK’S LAW DICTIONARY 1236 (6th ed. 1990). In a criminal context, it might be “I want Joe dead.”

²⁵³ A union’s purpose might be reflected in a union constitution or resolution or be implicit in the organization’s actions. For simplicity, references in the text to employees include their unions as well (if they are unionized) unless the context indicates otherwise. Section 7 purposes would include, for example, an ultimate goal of obtaining a favorable contract, achieving recognition as the bargaining representative, or persuading an employer to grant a grievance request. As part of such broad purposes, employees also may have intermediate, short-term purposes such as preventing other employees from crossing a picket line, persuading purchasers not to buy products during a boycott, or publicizing a labor dispute so that labor policies will be placed on the next shareholders’ agenda. Such intermediate purposes are also within those covered by § 7, for they are interim steps towards larger goals of mutual aid or protection.

²⁵⁴ BLACK’S LAW DICTIONARY 1014 (6th ed. 1990).

²⁵⁵ *Intent* and *motive* are not identical but are often used interchangeably. Motive is the reason that a person acts, the moving impulse which prompts or incites him to act. Intent is the “[d]esign, resolve, or determination with which a person acts.” *Id.* at 810. Intent may also be the purpose to use a particular means to effect such result, or the state of mind with which the act is done or not done. *Id.* at 810, 1014. The distinction is illustrated in the example, “I’m going to pull the trigger [intent] because I hate Joe [motive].”

Intent is generally most relevant in the *Jefferson* line of cases in one of two contexts: First, intent might mean the specific *action* the employees did or did not desire to take. For example, the employees intended to stand and yell at the shareholders’ meeting; or

not have a motive because it has no mind, the Board and courts often speak of a "union's motive."²⁵⁶ Section 7 does not require, at least not on its face, that actors have any particular motives, as long as they have section 7 purposes.

Different employees engaging in the same activity might have different motives. During contract negotiations, one employee might distribute leaflets because he hates working overtime, and its elimination is on the bargaining agenda. Another might distribute them because she desires visibility as a candidate for union president. Another might do so because he is furious at the company president for being "a terrible union-buster." Another might do so fearing ostracism from co-workers if she does not. Another might participate because he seeks revenge against the company president for having just ended their extra-marital affair. All have a section 7 purpose, the distribution of persuasive literature during bargaining, but not all have motives related to that purpose.

Before *Jefferson Standard*, the relevant section 7 inquiry addressed not the motive but the purpose of the activity:

It is clear . . . that to be protected the *purpose* of the concerted activities must be the mutual aid or protection of the employees

It is true as argued by the Board that, where there is a bona fide concerted activity for any of the purposes named in the statute, its protection will not be decided because of the motives of those engaging in the activity; but it is not the motive of the participants that we are concerned with here but the "purpose" of the activity.²⁵⁷

the union did not intend to distribute any leaflets in draft stage, but the wind blew some out of the car window before the union attorney had approved distribution. Used this way, the inquiries should be if the action had a § 7 purpose at step two, and if it lost protection under a step three exception. Second, intent may mean the specific *desired result* of action. For example, the intent to obtain the long-term result of a favorable labor contract, or to obtain the short-term result of customers not purchasing products during a boycott. Both of these results have § 7 purposes and the latter is an example of an interim or subsidiary § 7 purpose, part of a strategy to achieve an ultimate § 7 goal. Used this way, intent often becomes part of the step two analysis of whether this desired result is the product of a § 7 purpose. Intent is thus not particularly helpful in this area of the law except as it overlaps with step two. However, if action is unintended, this might shed light on an exception. Also, if loyalty involves one's subjective feelings, then unintended incidents could have a bearing on loyalty, such as when employees drafted leaflets but had not intended to distribute them before approval of counsel.

²⁵⁶ Theoretically, all sponsors of a union activity might have identical motives, but this would be unusual and difficult to ascertain.

²⁵⁷ *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749, 750 (4th Cir. 1949) (emphasis added). In *Joanna Cotton*, a foreman had warned an employee about operating raffles and loitering around co-workers. The employee was discharged for responding in harsh and insulting language and enlisting others to sign a petition asking that the foreman be discharged. While negative motives such as desiring to vent one's spleen are not normally grounds for loss of protection, the court ruled that the employee was not acting for

Under the statutory scheme, it makes sense to focus on purpose instead of motive. Frequently, and in certain contexts such as strikes or boycotts, one of the short-term goals is economic injury to the company. In order for the employees to achieve results in recognition, bargaining, grievance processing, or other workplace goals, the Act protects their ability to resort to economic pressure if they are willing to pay the price.²⁵⁸ Likewise, employers are allowed to use economic weapons such as lockouts, demands for pay cuts, and firm positions in bargaining. In the context of other lawful statutory activity such as strikes, leaflets, boycotts, organizing drives, and lockouts, “nice” personal motives have never been required, and there are no compelling reasons to change the rule. In short, when the activity has a section 7 purpose, the intent to cause economic harm cannot be a factor justifying a label of disloyalty, even when the diverse personal motives of the participants who are exercising those rights include anger, resentment, or hostility. If the economic harm is lawful, then the “not nice” motives of those desiring to exercise their rights generally should be irrelevant.²⁵⁹

To require employees to entertain kindly feelings in order to receive protection would create a double standard. Section 8(c) allows employers to communicate unkind thoughts or outright disgust without risk of Board sanction.²⁶⁰ To require warm feelings in the exercise of section 7 rights also would impermissibly tamper with the balance of private power between

a § 7 purpose: the petition was a personal vendetta to humiliate the supervisor, not connected to bargaining, working conditions, or other aid or protection. *Id.* at 751-53. There is some overlap in this case between motive and step two purpose: that the conduct was in the nature of a personal vendetta (for example, motivated by anger and resentment) was part of the proof that it lacked a purpose of mutual aid or protection. But had the employees been concertedly seeking mutual aid or protection, then the fact that one or more of them felt anger or resentment would not have caused forfeiture of protection for their petition. Nothing in the opinion implies to the contrary.

²⁵⁸ As long as employees have not waived contractually the right to strike, they are protected in striking to further these purposes. Of course, employees are not paid for the time they are striking, and except when the strike was caused or prolonged by unfair labor practices, they may lose their jobs absent later job openings. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 344 (1938) (dictum).

²⁵⁹ Indeed, having an *acceptable* motive for a concerted activity such as wanting to warn the public about health risks of a product, has not ensured § 7 protection. *See, e.g.*, *Retail, Wholesale & Dep’t Store Union v. NLRB*, 466 F.2d 380, 382-85 (D.C. Cir. 1972) (unprotected employees were honestly concerned with public health and loss of jobs due to changes in production process). On occasion, employees’ acceptable motives have been a positive factor in a finding that there was no disloyalty. *See, e.g.*, *Richboro Community Mental Health Council, Inc.*, 242 N.L.R.B. 1267, 1268 (1979) (motives were neither malicious nor ridiculing).

²⁶⁰ 29 U.S.C. § 158(c) (1988) (prohibiting only “threats of reprisal or force or promise of benefit”). That section prohibits only certain coercive threats and promises, and it was passed for the express purpose of allowing employers to respond to accusations with explanations and counter-accusations. *See supra* notes 108-09 and accompanying text.

unions and employers, tampering which in other contexts has been decried and forbidden.²⁶¹

On a practical level, inquiring into motive is difficult because of its inherent subjectivity, the difficulty of its proof, and the multiplicity of motives underlying a particular goal. On a policy level, there is nothing in section 7 that indicates that the “magnanimous” exercise of section 7 rights is protected but the “selfishly motivated” or “spitefully motivated” exercise of those rights is not.²⁶² Any “nice-motives” test imposed by the Board or the judiciary unfairly conditions and restricts the exercise of section 7 rights.

For the above reasons, motive is not, and cannot legitimately be, a factor justifiably warranting a conclusion that an employee is “disloyal” and thereby undeserving of protection.²⁶³ The United States Court of Appeals for the Ninth Circuit appropriately expressed reservations about the statutory legitimacy of inquiring into employee motives—whether malicious or otherwise—in evaluating disloyalty.²⁶⁴

b. *Tone*

Heated or sarcastic exchanges have led the Board and courts to address if the tone of oral or written comments causes forfeiture of protection. “Tone”

²⁶¹ NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937) (commenting that the theory of the Act is that opportunity for negotiation will bring about adjustments that the Act does not compel); see, e.g., NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952) (noting that the Board and courts generally decline to consider the fairness or justifications for a party's substantive proposals); NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960) (stating that even when a party insists on positions that are “inherently unreasonable, unfair, or impracticable, or unsound” and will cause stalemate, the Board may not force the party to make concessions).

²⁶² Indeed, the exercise of § 7 rights possibly is most critical and most desired by the employee precisely when good relations with management have broken down and anger is expected. For example, organizing activity including recognitional strikes, picketing, and leafleting; bargaining conduct when the company is refusing requested contract terms; exercising the grievance process when an employee has been wrongly fired; and protesting activity prompted by an employer's unfair labor practice. Further, the step two “purpose” requirement demands a certain level of selfishness. See Richard M. Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 791 (1989); *infra* notes 398-401 and accompanying text.

²⁶³ In contexts other than disloyalty, there may be exceptions to § 7 in which motives are relevant. See *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 62-63 (1966) (noting that malicious defamation is not condoned). Nonetheless, because certain motives are not required by the statute on its face, a specific subjective state of mind should be required only if clearly called for or if expressly or necessarily dictated by the statutory scheme.

²⁶⁴ *Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 218 n.13 (9th Cir. 1989) (“How much reliance to place on motive is problematic because of the Janus-like nature of legitimate and illegitimate intent.”).

is used here to mean the tenor of comments made; that is, how decision makers characterize the manner in which the words are delivered and the word choice used. Examples include speech that is considered to be sarcastic, frivolous, humble, respectful, insincere, flippant, ingratiating, ironic, positive, ridiculing, temperate, or uttered with pique or vengeance.²⁶⁵ One employee, for example, was adjudged unprotected because he was perceived by the court to have been “loud and arrogant” and exhibiting “deliberate defiance,” even though the employer was not offended.²⁶⁶ The disloyalty determination often turns on whether the decision maker considers the language “reasonable,” or too vulgar, inappropriate, or extreme. Several factors, of which the decision maker might or might not be conscious, influence his conclusions; however, these factors are rarely acknowledged in the disloyalty decisions.²⁶⁷

i. Whether the Reviewer Believes in the “Venting” and “Robust Debate” Aspects of National Labor Policy

One factor that appears to be important in tone assessment is the extent to which the decision maker places a value on the functional aspect of section 7 (and of the statutory scheme in general) of fostering robust debate about labor matters. The Board and courts have often made allowances for a certain amount of emotional “venting” in the labor context because, inevitably on occasion, labor relations will be fervent.²⁶⁸ “Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable *per se* in some state jurisdictions.”²⁶⁹

²⁶⁵ See, e.g., *Sierra Publishing Co.*, 291 N.L.R.B. 540, 550 (1988) (A.L.J. decision) (not ridiculing), *enforced*, 889 F.2d 210 (9th Cir. 1989); *Jefferson Standard Broadcasting Co.*, 94 N.L.R.B. 1507, 1526 (1951) (Murdock, Member, dissenting) (temperate), *rev'd sub nom.* *Local Union No. 1229, IBEW v. NLRB* (Jefferson Standard), 202 F.2d 186 (D.C. Cir. 1952), *set aside*, 346 U.S. 464 (1953); *American Arbitration Ass'n*, 233 N.L.R.B. 71, 75 (1977) (A.L.J. decision) (pique or vengeance).

²⁶⁶ *NLRB v. Prescott Indus. Prods. Co.*, 500 F.2d 6, 11 (8th Cir. 1974). *But see* *Farah Mfg. Co.*, 202 N.L.R.B. 666 (1973) (reinstating employee fired for refusing to lower voice).

²⁶⁷ See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 *STAN. L. REV.* 591 (1981) (discussing conscious and unconscious interpretive constructs that lie behind rational rhetoricism).

²⁶⁸ See, e.g., *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 271-72 (1974) (observing that labor disputes are often heated affairs); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 62 (1966) (tolerating intemperate speech so long as not intentionally defamatory); *Great Lakes Steel*, 236 N.L.R.B. 1033, 1041 (1978) (holding that use of rhetorical hyperbole is within protected right of employees), *enforced*, 625 F.2d 131 (6th Cir. 1980); *Farah Mfg. Co.*, 202 N.L.R.B. at 669 (holding that even though on company property, employer had no right to limit employee's loud tone, absent a showing that it was having some demonstrably disturbing effects on plant business or operations such as distracting employees).

²⁶⁹ *Linn*, 383 U.S. at 58 (holding that only libel uttered with malice and causing dam-

Some decision makers express consciously their value choices regarding the appropriateness of robust debate in labor disputes. Not infrequently they express a belief that it is wise to allow some margin (short of violence) as a "safety valve" for the blowing off of excess steam. On occasion, they openly express their reason for allowing venting as simple pragmatism, in light of the realities of typical labor disputes.²⁷⁰ For example, the Board assessed politeness in a case in which an employee cursed a supervisor, telling him to "piss on" a letter, and accused a supervisor at an NLRB trial of being "the lyingest son-of-a-bitch I have ever seen."²⁷¹ The Board disapproved of this method of expression to supervisors but noted "that such a mode of expression is not at all unusual in work-a-day associations among industrial workers. It is also a fact that tempers are aggravated and attitudes are hardened in the stress and strain of hotly contested labor disputes."²⁷² Similarly, when publicity by strikers included allegedly truthful comments about defective paint made by non-strikers, several dissenting Board members reasoned that restraining the language would be "incompatible . . . with the realities of legitimate industrial contest between employer and employee."²⁷³ Finally, the Supreme Court has acknowledged that heated exchange in labor issues is inevitable.²⁷⁴

age could be the subject of state tort suits); *see also* *Misericordia Hosp. Medical Ctr. v. NLRB*, 623 F.2d 808, 814 n.8 (1980) (rejecting arguments that statements in organizing efforts receive greater § 7 protection than other efforts to further employee interests). Though the quoted language refers to representation cases, as opposed to subsequent disputes such as strikes after a union has been elected, the *Linn* Court's characterization of labor dispute language is equally true, if not more so, in the latter context.

²⁷⁰ *See, e.g., Linn*, 383 U.S. at 60-61 (holding certain epithets protected because they are "commonplace"); *Acme-Arsena Co.*, 276 N.L.R.B. 1291, 1292, 1295 (1985) (finding union steward protected, even though he used vulgar language in duties and insinuated he would call the IRS to suggest investigation of the company's books), *enforced*, 804 F.2d 359 (6th Cir. 1986); *Longview Furniture Co.*, 100 N.L.R.B. 301, 304 (1952) (finding that not protecting some cursing on picket line would "ignore the industrial realities of speech in a workaday world"), *enforced as modified*, 206 F.2d 274 (4th Cir. 1953). As the Board noted in *Longview*, because there are vital economic interests at stake, strikers resent those who cross the picket line and will express themselves "in language not altogether suited to the pleasantries of the drawing room or even to courtesies of parliamentary disputation." *Longview Furniture Co.*, 100 N.L.R.B. at 304.

²⁷¹ *National Furniture Mfg. Co.*, 134 N.L.R.B. 834, 842, 859 n.58 (1961), *enforced in part*, 315 F.2d 280 (7th Cir. 1963). The employee was distributing leaflets when management sought to give him the letter, which he assumed to be adverse to his interests. The employer also argued that the employee should not be reinstated because he made certain comments to a customer about the company's finances, but the Board concluded that this conduct did not bar reinstatement. *Id.* at 836; *see also infra* notes 301-05 and accompanying text.

²⁷² *National Furniture*, 134 N.L.R.B. at 835.

²⁷³ *Patterson-Sargent Co.*, 115 N.L.R.B. 1627, 1638 (1956) (Murdock & Peterson, Members, dissenting).

²⁷⁴ *Linn*, 383 U.S. at 64-65.

But the issue of allowing venting is more than a matter of pragmatism; it is a matter of philosophy. Unduly curtailing acceptable means of expression unacceptably "chills" section 7 activities.²⁷⁵ Decision makers understanding this premise weigh this danger of overdeterrence more heavily on the scale when assessing degrees of loyalty than will other decision makers. In many disloyalty cases, the Board has ruled that very extreme language is protected.²⁷⁶

Similarly, the Supreme Court has determined that robust debate in labor-management relations is desirable as a matter of national policy.²⁷⁷ It has evidenced its concerns about rules that might "dampen the ardor of labor debate and truncate the free discussion envisioned by the Act."²⁷⁸ The Court has approved the Board's conclusion that section 7 protects much erroneous and defamatory language. The Court has agreed that the following examples of disrespectful and pejorative speech are protected: characterizing an employer or a strike replacement worker as a "scab," with "rotten principles," and lacking "character";²⁷⁹ calling an employer a "liar,"²⁸⁰ "traitor,"²⁸¹ "fascist," or "unfair;"²⁸² and accusing an employer of "black-mail" during bargaining.²⁸³ Accordingly, it is important to appreciate that the Board and courts have not only tolerated but valued the role of venting in labor-management disputes, for both practical and policy reasons.

²⁷⁵ See *Longview Furniture Co.*, 100 N.L.R.B. 301, 304 (1952), *enforced as modified*, 206 F.2d 274 (4th Cir. 1953); see also *NLRB v. City Disposal Sys.*, 465 U.S. 822, 833 n.10 (1984); *Meyers Indus. (Meyers II)*, 281 N.L.R.B. 882, 888-89 (1986), *aff'd sub nom. Prill v. N.L.R.B.*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied sub nom. Meyers Indus. v. NLRB*, 487 U.S. 1205 (1988); *Farah Mfg. Co.*, 202 N.L.R.B. 666, 667 (1973).

²⁷⁶ See, e.g., *Misericordia Hosp. Medical Ctr.*, 246 N.L.R.B. 351, 354, 356 (1979) (report presented at public hearing stating that hospital has "unsanitary conditions" and "serious deficiencies in quality of care"), *enforced*, 623 F.2d 808 (2d Cir. 1980); *Golden Day Sch., Inc.*, 236 N.L.R.B. 1292, 1296 (1978) (statements to parents of children in child development center that children are served spoiled food, ride unsafe buses, are depressed, and are not taken on field trips as parents are told, and that teachers falsified evaluations of children), *enforced*, 644 F.2d 834 (9th Cir. 1981); *Great Lakes Steel*, 236 N.L.R.B. 1033, 1035 (1978) (claims to co-employees that company lets employees "DIE WAITING" and engages in "MURDER TO SAVE PROFITS" because company lacks ambulances), *enforced*, 625 F.2d 131 (6th Cir. 1980).

²⁷⁷ *Linn*, 383 U.S. at 64-65.

²⁷⁸ *Id.* at 64. For such reasons the Court severely limited state tort remedies for defamation in labor matters. *Id.* at 64-65. The Court also noted, however, that the Board does not construe § 7 as protecting conduct that intentionally injures someone by circulating known falsehoods that are defamatory or insulting. *Id.* at 61.

²⁷⁹ *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974).

²⁸⁰ *Linn*, 383 U.S. at 60.

²⁸¹ *Id.* (liar); *Letter Carriers*, 418 U.S. at 283 (traitor).

²⁸² *Letter Carriers*, 418 U.S. at 284 (quoting Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293, 295 (1943)).

²⁸³ *Id.* at 284-85.

The question of how “polite” employees must be to retain their jobs under the statute arises in many cases when language used in venting includes vulgarity or sexual innuendo.²⁸⁴ The facts in these cases mirror the employee’s social background, which is reflected in his choice of words, how he communicates generally, and whether he is fortunate to have an attorney draft the critical speech. Therefore, fashioning a test that turns too narrowly on the degree to which the speaker is genteel has class-based ramifications. Moreover, the “politeness test” also turns on the decision maker: her own cultural predilections, familiarity with the particular vulgarity used, knowledge of common parlance in many workplaces, and sensibility to crude, harsh, or critical language.²⁸⁵

ii. Whether the Reviewer Adopts an “Adversary” or a “Harmony” Model of Labor Relations

A related philosophical dispute involves whether management’s and labor’s interests are necessarily adversarial or aligned. The broader implications for disloyalty regarding the reviewer’s paradigm choice were explored earlier.²⁸⁶ That choice becomes particularly significant when the decision maker evaluates the tone of speech.

The decision maker’s paradigm choice affects whether he looks to tone at all. If he does, his choice influences the way in which he relates tone of speech to his disloyalty assessment. The importance of exercising section 7 rights “politely” depends on his perspective of the conflict between employees’ right under the Act to further their own interests and management’s desire to control in name of “discipline” and workplace peace.

The paradigm choice affects the reviewer’s attitude towards insulting or heated language. For example, ridicule and sarcasm are inevitable on both “sides” of economic warfare, especially when it is fought in the public arena and assisted by the media, as often happens in the corporate campaign. The employee’s glee at irreverently ridiculing the employer is proportionate to the latter’s dismay. Both perspectives are natural human responses. The humor in language that is gleefully and irreverently sarcastic, such as comparing the boss to a goose, vulture,²⁸⁷ or “Wrangle head,”²⁸⁸ is a source of

²⁸⁴ NLRB v. New York Univ. Medical Ctr., 702 F.2d 284, 290 n.6 (2d Cir.) (citing cases in which obscenities and sexual innuendo marked language found unprotected), *vacated on other grounds*, 464 U.S. 805 (1983).

²⁸⁵ See Kelman, *supra* note 267, at 670 (suggesting conscious and unconscious interpretive constructs are products of a person’s class).

²⁸⁶ See *supra* part III.C.2.

²⁸⁷ Maryland Drydock Co. v. NLRB, 183 F.2d 538, 539, 541 (4th Cir. 1950) (opining that when language compared company officials to goose, vulture, and Hitler, “[f]reedom of speech nowhere means freedom to . . . wantonly lampoon or insult anyone”). *But see infra* notes 411-20 and accompanying text.

²⁸⁸ See, e.g., Champion Int’l Corp., 303 N.L.R.B. 102, 107 (1991) (protecting offensive newsletter that referred to a supervisor as “Wrangle Head”).

solidarity and comradery. Indeed, the primary motive in using “gleefully irreverent” language is to create solidarity and further comradery in the concerted cause, not necessarily to harm the employer’s operations.

Conversely, sometimes the employer’s primary motive in disciplining sarcastic employees is not to advance its direct or indirect economic interests, but rather to respond to the natural humiliation or anger from the ridicule.²⁸⁹ When such a case comes before the decision maker for a “loyalty screening,” to one reviewer the tone of speech shows comradery and solidarity epitomizing the essence of the union’s cause within the adversarial paradigm. To another, it reflects disrespect and intolerable embarrassment of the employer.

iii. Whether the Reviewer Characterizes the Tone as an “Attack”

Moving from the reviewer’s philosophy to her own choice of language, there is one especially frequent characterization of tone accompanying findings of disloyalty: that the employee’s comments were an “attack.” In *Jefferson Standard*, the Board had concluded that the “second class handbills” constituted a “verbal attack upon the employer.”²⁹⁰ When the case reached the Supreme Court, to say that this characterization resonated with the Court would be an understatement, for the majority used the word “attack” and its derivatives over twenty times. The Court’s captivation with the metaphor reached its apex when the Court used “attack” five times in four consecutive sentences:

[T]he *attack* of August 24 was not part of an appeal for support in the pending dispute. It was a concerted separable *attack* purporting to be made in the interest of the public rather than in that of the employees.

We find no occasion to remand this cause to the Board for further specificity of findings. Even if the *attack* were to be treated . . . as a concerted activity wholly or partly within the scope of those mentioned in § 7, the means used by the technicians in conducting the *attack* have deprived the *attackers* of the protection of that section.²⁹¹

The dissenters did not use the word at all.

After *Jefferson Standard*, decision writers have frequently used the “attack” appellation. Although it is not specifically portrayed as a factor in, or component of, the disloyalty test, evidently it is perceived as an objective

²⁸⁹ Direct economic interests refers here to output (productivity) and income (profit). Indirect interests refers to auxiliary interests, such as enforcement of plant rules or maintaining discipline, that further the direct interests.

²⁹⁰ 94 N.L.R.B. 1507, 1512 (1951), *rev’d sub nom.* Local Union No. 1229, IBEW v. NLRB (*Jefferson Standard*), 202 F.2d 186 (D.C. Cir. 1952), *set aside*, 346 U.S. 464 (1953).

²⁹¹ NLRB v. Local Union No. 1229, IBEW (*Jefferson Standard*), 346 U.S. 464, 477-78 (1953) (emphasis added).

description of conduct.²⁹² Yet, “attack” has no useful meaning, because all section 7 publicity over circumstances employees wish to change “attacks” some aspect of the employer or its operations. To the reader of the decision, the term serves the function of the canary in the mines; it has no independent value in the setting and is merely a signal: when the word is used, if the employees had any section 7 rights, they soon will be extinguished.

I propose the *Jefferson Standard* Court’s “attack” characterization merely reflected the Court’s reaction to the product disparagement in that case. Since then, the term has expanded because it frequently surfaces as an unstated factor in disloyalty analysis. The choice to saddle the conduct with this appellation, and in doing so to find disloyalty, directly results from the writer’s individual characteristics discussed above, such as whether he values the venting and robust debate aspects of labor law, and whether he adopts the adversary or harmony paradigm.

Turning to specifics, reviewers have characterized a variety of circumstances as “attacking,” including speech critical of products and business policies as in *Jefferson Standard* itself.²⁹³ The term has been applied to silly ridicule and sarcasm, such as a dress code protest asking an employer’s clients, *inter alia*, whether jean jackets look better on dogs or administrators, and whether jeans should be worn at the office by children, monkeys, administrators, dogs, or janitors.²⁹⁴ The term has referred to speech critical of specific individuals and defamation of individuals.²⁹⁵ The term functions both as a shield by those claiming their activity should be protected (because

²⁹² See, e.g., *Retail, Wholesale & Dep’t Store Union v. NLRB*, 466 F.2d 380, 385 (D.C. Cir. 1972) (finding leaflets with intent and effect “to attack the Company’s product rather than to inform the public of a genuine issue in a labor dispute” unprotected); *Maryland Drydock Co. v. NLRB*, 183 F.2d 538, 539 (4th Cir. 1950) (holding that the company lawfully prohibited distribution of union newspaper “attacking” supervisor’s association as a “‘scab’ organization” and lampooning company president); *Cordura Publications, Inc.*, 280 N.L.R.B. 230, 231, 237 (1986); *Knuth Bros.*, 218 N.L.R.B. 869, 870 (1975) (Kennedy, Member, dissenting), *enforcement denied*, 537 F.2d 950 (7th Cir. 1976). *But see Champion Int’l Corp.*, 303 N.L.R.B. at 107-08 (A.L.J. decision) (describing union newsletter as “consistently attack[ing] Respondent’s position in the labor dispute,” and still finding comments protected).

²⁹³ See also *Patterson-Sargent Co.*, 115 N.L.R.B. 1627, 1627 n.3 (1956) (describing employer’s objection to leaflets as “attacking the quality of our paint”). The Board used the term six times in describing *Jefferson Standard*’s holding. *Id.* at 1629-30. *But see id.* at 1633-38 (Murdock & Peterson, Members, dissenting) (arguing that truthful criticism of paint’s quality made by non-regular employees during strike is not an unprotected attack).

²⁹⁴ *American Arbitration Ass’n*, 233 N.L.R.B. 71, 75 (1977) (A.L.J. decision) (finding that a letter to clients asking them to fill out a sarcastic questionnaire concerning dress code constituted an attack).

²⁹⁵ *Kitty Clover, Inc.*, 103 N.L.R.B. 1665, 1688 (Trial Examiner’s report) (noting that the employer viewed comments to customers that company hired “diseased girls” from “skid row” as an “unsubstantiated attack”), *enforced*, 208 F.2d 212 (8th Cir. 1953).

it was not an attack), and as a sword by those claiming it should not be protected (because it was an attack), often on the same facts.

Examining the use of the "attack" characterization underscores the arbitrary results when different reviewers attempt to apply the disloyalty test. A group of examples illustrates the scope of divergent attitudes about disloyalty and demonstrates that the distinctions between what is and what is not an "attack," and therefore what is or is not disloyal, are so ephemeral as to be humorous, if not absurd.²⁹⁶

The Board divided three to two on whether words constituted an unprotected attack in *Patterson-Sargent Co.*²⁹⁷ Several striking paint company employees had distributed a handbill to the public at retail stores. It advised consumers that because the "well-trained, experienced" employees were striking, workers currently making the paint might not know the manufacturing formulas, and the paint might "peel, crack, blister, scale, or any one of many undesirable things that would cause you inconvenience, lost time, and money."²⁹⁸ To the majority, the leaflets triggered loss of protection.²⁹⁹ The two dissenters however, concluded that "[t]he content of the instant handbills fails, in our opinion, to warrant the conclusion so readily drawn by our colleagues that the handbill in fact constitutes an 'attack on the quality of the employer's product.'"³⁰⁰

In *National Furniture Manufacturing Co.*,³⁰¹ the Board agreed with an Administrative Law Judge's finding that negative comments in leaflets dis-

²⁹⁶ This is not to fault those who have struggled with the disloyalty exception. Many decision makers have valiantly attempted to work within its constraints. Their utter lack of success at creating a coherent doctrine merely demonstrates that the disloyalty test is vague and unwieldy and, at bottom, nonsense.

²⁹⁷ 115 N.L.R.B. 1627 (1956). I think this case is distinguishable from *Jefferson Standard* on multiple factual grounds and was wrongly decided. See *infra* note 363.

²⁹⁸ 115 N.L.R.B. at 1628.

²⁹⁹ *Id.* at 1630 (quoting *Jefferson Standard's* "attack" comments).

³⁰⁰ *Id.* at 1633 (Murdock & Peterson, Members, dissenting) (quoting *id.* at 1629 (majority)). The dissent distinguished the handbill from an attack because (1) it did not claim as fact that the paint was inferior; (2) it only cautioned the public about possible future effects of the strike; (3) there was a factual basis for believing the statements true; and (4) employees' speech rights include the right to publicize statements inseparably related to their strike warning of inferior products made by non-regular employees. *Id.* at 1633-34. The dissent also distinguished *Jefferson Standard* on other grounds. *Id.* at 1634. Furthermore, the dissent concluded that the employer committed a separate violation by selectively discharging the union leaders for representing employees and striking. *Id.* at 1639-40.

Perhaps qualifying their conclusion concerning the "attack" term, the dissent also refused to characterize the statements as a product attack "of the invidious character" ascribed by the majority. *Id.* at 1634. This sentence, if taken alone, implies that the dissent believed there are two kinds of attacks, invidious (unprotected) and non-invidious (protected). See *supra* notes 176-82 and accompanying text.

³⁰¹ 134 N.L.R.B. 834 (1961), *enforced in relevant part*, 315 F.2d 280 (7th Cir. 1963).

tributed at a furniture exposition were protected because they did not "attack . . . the quality of the Company's products,"³⁰² even though they were harshly critical. The United States Court of Appeals for the Seventh Circuit agreed that section 7 protected the leaflet distribution.³⁰³ Concurring, Judge Kiley distinguished the case from what he termed the "vitriolic attack on the *quality* of the company's television broadcasts" in *Jefferson Standard*.³⁰⁴ In dissent, Judge Schnackenberg, argued that the leaflets evidenced "such detrimental disloyalty as to provide 'cause' " to discharge the "perpetrators of the attack."³⁰⁵

In *Coca Cola Bottling Works, Inc.*,³⁰⁶ several strikers observed through plant windows that strike replacement workers were not using the usual electronic equipment that detected foreign objects in Coke bottles. The strikers worried that their jobs might have been abolished, and also that the public could be endangered by dirty bottles.³⁰⁷ When they warned the public about their concerns, the company considered these warnings an attack.³⁰⁸ The Board's General Counsel argued that the warnings were "not a direct attack" on the company's product, but "merely publicized" the strikers' protest against a development that they in good faith believed would result in injury to the public.³⁰⁹ However, the Trial Examiner, with the agreement of the Board, found the leaflet distribution an unprotected attack.³¹⁰

³⁰² *Id.* at 836; *id.* at 854 (Trial Examiner's report). See discussion *supra* notes 168-73 and accompanying text.

³⁰³ NLRB v. National Furniture Mfg. Co., 315 F.2d 280, 284-86 (7th Cir. 1963).

³⁰⁴ *Id.* at 287 (quoting *Jefferson Standard*, 346 U.S. at 468, and adding emphasis). Judge Kelly also noted that in *Jefferson Standard*, there had been no prior Board hearing and order, and there the employees picketed off and on for ten days while drawing full pay. *Id.*

³⁰⁵ *Id.* at 288-89 (Schnackenberg, J., dissenting) (concluding that the leaflets were misleading and were a "brutal effort to destroy National's business"). In a different issue in the case, an employee told a customer that the company had had layoffs, "trouble with" certain employees, poor reception at a national exposition, and that "the whole organization was turned upside down" and would soon discontinue making furniture. 134 N.L.R.B. at 857 (Trial Examiner's report). The Board concluded that these remarks should not be treated as an attack, *id.* at 836, but the Court found them unprotected. *National Furniture*, 315 F.2d at 286 n.7.

³⁰⁶ 186 N.L.R.B. 1050 (1970), *enforced in part sub nom.* Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380 (D.C. Cir. 1972).

³⁰⁷ The Company did not dispute that the employees' two stated motives were their actual motives. *Id.* at 1062 n.11 (Trial Examiner's report). The parties stipulated that foreign objects were found in returned bottles. *Id.* at 1063 (Trial Examiner's report).

³⁰⁸ *Id.* at 1063-64 (Trial Examiner's report).

³⁰⁹ *Id.* at 1064 (Trial Examiner's report).

³¹⁰ "I find it was an attack on the Company's product and an effort to persuade members of the public not to purchase Coca-Cola." *Id.* Because the Board had found that the employer condoned the leafleting, the court of appeals did not address the activity's protection. Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 385 (D.C. Cir. 1972).

In *Misericordia Hospital Medical Center*,³¹¹ a report to a hospital's funding source alleged, inter alia, that there were staffing shortages, unsanitary conditions, and "serious deficiencies in the quality of care" proved by the hospital.³¹² To the employer, these accusations were a "vicious and venal," "selfish,"³¹³ disloyal attack. To the Administrative Law Judge, Board, and appellate court, for various reasons they were not a disloyal attack.³¹⁴

In *Richboro Community Mental Health Council, Inc.*,³¹⁵ an employee of a drug rehabilitation center wrote a letter complaining of the discharge of an employee and alleging that the administration's conduct had "signified a decrease in the quantity and quality of service to clients."³¹⁶ The letter named the persons "directly responsible for this decline in service."³¹⁷ It asked that the recipients consider the matter as their "immediate and personal concern," and that the administration be "held accountable" to the community through its congressional representative.³¹⁸ The employee even mailed the letter to the local newspaper, a Congressman, and the government agencies that funded the Center.³¹⁹ To the Administrative Law Judge, these comments were an unprotected "personal attack"³²⁰ on the employer unrelated to a labor dispute.³²¹ To the Board, however, they were not "a personal attack unrelated to [the employee's] protest of Respondent's labor practices."³²²

³¹¹ 246 N.L.R.B. 351 (1979), *enforced*, 623 F.2d 808 (2d Cir. 1980).

³¹² *Id.* at 354.

³¹³ *Id.* at 357.

³¹⁴ The various reasons included the fact that the report was not distributed to the public, except to those present at the public accreditation meeting; that it pertained to working conditions; that management requested a report; that management had ignored complaints; and that some of the allegations were partly true.

³¹⁵ 242 N.L.R.B. 1267 (1979).

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.* at 1273 (A.L.J. decision).

³²¹ Also important to the Administrative Law Judge was that the employee used his employer's letterhead and that by sending it to the hospital's funding sources it threatened the employer's existence. *Id.* at 1272-73 (A.L.J. decision).

³²² *Id.* at 1268 (noting that the employee had no malicious motive and that the criticism "was not so extreme as to reflect a disloyalty").

The Board reached a similar result in *Emarco, Inc.*, 284 N.L.R.B. 832 (1987). A construction company's striking employees told a contractor that their company's president was "no damn good" and "a son of a bitch." They claimed that the company never paid its bills and "can't finish the job" and that "this job is too damn big for them." *Id.* at 833. The two unrecalled strikers had visited the job site to see if their co-workers had been working there and to seek information about their employer's financial viability. *Id.* at 832-833. The remarks passed muster because they did not contain malicious falsehoods and "were not in the nature of a personal attack unrelated to the employee's protest of the Respondent's labor practices," *id.* at 834 (footnote omitted). Dissenting, Chairman

On occasion, the *Jefferson Standard* holding has been restated as denying protection to employees who make a "malicious attack on the product or reputation of their employer."³²³ Often, as in one example above, it is stated in the double negative: protection is allowed when the conduct is "not a personal attack unrelated to" the labor dispute.³²⁴ This last test actually goes more to the issue of whether employees have a section 7 purpose (as opposed, for example, to being on a personal vendetta), but it is sometimes merged into the step three disloyalty inquiry.³²⁵

iv. Conclusions to Be Drawn from the Consideration of Tone

Several important points are gleaned from decision makers' treatment of tone. First, because employers are far more likely to feel attacked than the Board is to label the employee's language as an attack,³²⁶ decision makers must distinguish the lay, or ordinary, meaning of "being attacked" (or "feel-

Dotson labeled the remarks a "broadside, reckless, and malicious attack on the [employer's] general, financial and operational integrity." *Id.* at 838 (Dotson, Chairman, dissenting). Dotson also concluded that the remarks resulted in disparagement of the respondent's "business reputation," that they did not relate to an existing labor dispute, and that they were not based on facts. *Id.*

³²³ *Sahara Datsun, Inc.*, 278 N.L.R.B. 1044, 1045 (1986), *enforced*, 811 F.2d 1317 (9th Cir. 1987). This restatement of the *Jefferson Standard* holding omits critical additional aspects of the holding: that it was the Company's product, not just its "reputation" that was disparaged; that the employees deliberately undertook to alienate customers and cause economic harm; and that they failed to disclose that the flyer was written by union members, for union purposes, in a labor dispute.

³²⁴ *Richboro Community*, 242 N.L.R.B. at 1268 (citing *Springfield Library & Museum Ass'n*, 238 N.L.R.B. 1673 (1978)); *see also Emarco, Inc.*, 284 N.L.R.B. 832, 834 (1987). Presumably, this test is not implying that when it comes to disloyalty and product disparagement, "personal attacks" are deserving of less protection than some other attacks, such as attacks on the business or product.

³²⁵ For example, in *Springfield Library & Museum Ass'n*, 238 N.L.R.B. 1673 (1978), a union president published an article in the union newsletter, which included references to the library administration as "hierarchical" and "non-library, non-public oriented," and "authoritarian," and to an administrator as out of touch with professionals and holding his job as "a form of welfare-for-the-rich." *Id.* at 1676 (A.L.J. decision). The Administrative Law Judge characterized the newsletter as a "gratuitous attack . . . entirely unrelated to any protected union or concerted interest." *Id.* at 1679. The Board agreed with the latter test as stated, but determined that the article conveyed a message concerning concerted and union issues. The Board based its holding on cases setting defamation standards in labor matters and ruled that absent knowledge of the words' falsity or reckless disregard of whether they were true or false, they were protected. *Id.* at 1673-74; *see also Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974). At step three, the "personal attack unrelated to a labor dispute" test makes more sense in disparagement cases than in disloyalty.

³²⁶ *See, e.g., Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 217 (9th Cir. 1989) (describing letter charging that "circulation has plummeted, good employees have left for

ing attacked") from the legal conclusion that often attaches once the label is applied. Reviewers will err if they apply the "attack" language to each situation in which an employer feels attacked. The cases have failed to articulate clearly this pitfall.

Additionally, "attack" cannot be used as a term of art to help discern disloyalty because it has no clear or intrinsic meaning.³²⁷ Even the most routine, protected concerted activity, such as carrying a placard that says "employer unfair—pays lousy wages," could be labeled as an "attack." Military metaphor is commonplace in both management's and labor's preparation for a strike, lockout, boycott, and even some bargaining sessions.³²⁸ If the "attack" were grounds for a loss of protection, then protection would be lost during the most important assertions of labor/management differences. In short, rather than being used consistently as some sort of term of art, the frequently surfacing "attack" appellation appears to be a characterization used to justify a conclusion of protection (not an attack) or lack of protection (is an attack).³²⁹

The cases also reflect that decision makers have virtually no agreement on how to characterize the tone of specific language. Speech that is a "temperate and truthful criticism" to one³³⁰ is a "sharp,"³³¹ "vitriolic attack"³³² to another. This discrepancy among those who sit in judgment of section 7

better jobs, and advertising has suffered," as disparaging to the employer newspaper, positive to the Board, and "constructive and hopeful" to the Court).

³²⁷ Attack would not be unusual in this regard according to some writers who emphasize that no word has one intrinsic meaning. See generally Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) (arguing that because the law needs to be adaptive and flexible in light of changing experiences and perceptions, the text and plain meanings of a word are not dispositive); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417 (1899) (noting that because a word generally has several meanings, to determine the meaning in a particular case, one must consider the context in which a word appears as well as general usages). See also JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri C. Spivak trans., 1st Am. ed. Johns Hopkins Univ. Press 1976) (1967) (espousing an interpretive technique that follows from the premise that language contains infinite possible meanings, and that one may deconstruct or unravel the text to determine that it has no one correct interpretation).

³²⁸ The union "marshals the troops," while the employer plans its "defensive moves."

³²⁹ The Board continues to use the term as a rationale for finding disloyalty, but it implicitly acknowledged that the term refers more to context than to any set meaning when it concluded that words did not warrant "treatment as an attack." *National Furniture Mfg. Co.*, 134 N.L.R.B. 834, 836 (1961) (emphasis added), *enforced in part*, 315 F.2d 280 (7th Cir. 1963).

³³⁰ *Jefferson Standard Broadcasting Co.*, 94 N.L.R.B. 1507, 1526 (1951) (Murdock, Member, dissenting), *rev'd sub nom.* *Local Union No. 1229, IBEW v. NLRB* (Jefferson Standard), 202 F.2d 186 (D.C. Cir. 1952), *set aside*, 346 U.S. 464 (1953).

³³¹ *NLRB v. Local Union No. 1229, IBEW* (Jefferson Standard), 346 U.S. 464, 471 (1953).

³³² *Id.* at 468.

activity indicates that the attack term specifically, and tone generally, are exceedingly difficult to apply consistently.

Furthermore, the Board's treatment of the "attack" characterization, profanity, and sarcasm reflects that the Board often gives greater weight to the venting and robust debate aspects of labor law than do the courts. Whether the speech consists of vulgarity or simply highly emotional rhetoric, the courts have been less willing to allow protection when the employee expresses frustration or anger.³³³ *Boaz Spinning Co.*, mentioned above, exemplifies this point.³³⁴ In *Boaz*, an employee attempted to extol the benefits of unionization following a company anti-union speech.³³⁵ When ordered to sit down, the employee said that the manager was "no different from Castro."³³⁶ Pointing out that the manager had invited questions, and

³³³ See, e.g., *Precision Window Mfg., Inc. v. NLRB*, 963 F.2d 1105 (8th Cir. 1992) (refusing to grant protection to an employee who had threatened to kill his supervisor); *New River Indus. v. NLRB*, 945 F.2d 1290 (4th Cir. 1991) (denying protection to employees who posted a mocking letter of employer); *Sullair P.T.O., Inc. v. NLRB*, 641 F.2d 500 (7th Cir. 1981) (finding an employee who had uttered profanity at his employer to have forfeited protection); *NLRB v. Truck Drivers, Oil Drivers, Filling Station & Platform Workers Union, Local 705*, 630 F.2d 505, 508 (7th Cir. 1980) (reasoning that simply because "employees are protected while presenting wage complaints does not give them carte blanche in choosing the method of presentation"), *cert. denied sub nom. Gilmer v. Truck Drivers, Oil Drivers, Filling Station & Platform Workers Union, Local 705*, 450 U.S. 1030 (1981); *Abilities & Goodwill, Inc. v. NLRB*, 612 F.2d 6 (1st Cir. 1979) (holding that a protest over a change in management personnel is not a protected activity); *NLRB v. Prescott Indus. Prods. Co.*, 500 F.2d 6, 9 (8th Cir. 1974) (stating that employee's "rigorous defiance" gave employer proper cause to dismiss employee); *Chemvet Lab., Inc. v. NLRB*, 497 F.2d 445, 451 (8th Cir. 1974) (refusing to grant protection to an employee who called her boss a "son-of-a-bitch"); *Boaz Spinning Co. v. NLRB*, 395 F.2d 512, 515 (5th Cir. 1968) (finding that an employee's remark that the management representative was a "totalitarian dictator" was unprotected); *NLRB v. National Furniture Mfg. Co.*, 315 F.2d 280 (7th Cir. 1963) (refusing to enforce a Board order requiring an employer to reinstate an employee displaying a disrespectful attitude); *NLRB v. Longview Furniture Co.*, 206 F.2d 274 (4th Cir. 1953) (engaging in name-calling while on picket line rendered employees unsuitable for re-employment).

One could speculate on reasons why the circuit courts are less likely than the Board or the Supreme Court to value "venting" concerning working conditions. Perhaps the courts' less frequent exposure to the policies of the Act leads to an increased willingness to sweep issues within broad notions of "managerial rights." The Board's familiarity with the American workplace may lead to greater empathy for the worker. The difference in backgrounds of the judiciary, as compared to those of the Board, provides another possible explanation.

³³⁴ 165 N.L.R.B. 1019 (1967), *enforcement denied*, 395 F.2d 512 (5th Cir. 1968); see also *supra* notes 150, 228-30 and accompanying text.

³³⁵ 165 N.L.R.B. at 1019.

³³⁶ The employee's full statement was:

I want you to know you are no different from Castro; Castro told the people in his country if they did not like the way he was running it, to pack up and leave, and you

that the employer's anti-union speech provoked the remark, the Board ruled that the employee could not be expected to maintain "cool, analytical impartiality."³³⁷ The United States Court of Appeals for the Fifth Circuit found the employee's conduct unprotected and characterized it as "deliberate, vigorous defiance" by an employee who had disobeyed instructions and "resorted to invective," on company time and property.³³⁸

Careful study of decision makers' treatment of tone also reveals the importance of intangible motives. Although one can understand an employer's economic motivation to discharge employees who disrupt operations or otherwise harm the employer, individual egos, reputations, and pride are often more at stake than any actual harm to the employer's economic interest.³³⁹ In this area of the law, aroused emotions are almost as

tell people at Boaz Spinning Company if they do not like the way you are running this plant to punch out and go home.

Id.

³³⁷ *Id.* at 1020. The Board also noted that the employee had not specifically accused the manager of being a communist.

³³⁸ *Boaz Spinning Co. v. NLRB*, 395 F.2d 512, 516 (5th Cir. 1968). The court accepted the Trial Examiner's reasoning and grounded its ruling in "disparagement." *Id.* at 514, 516. Most Board members and judges would have used a disloyalty rationale for the outcome, because the employee did not disparage a company product and made the comments within the plant only. The court did agree with the general rule of granting allowances for certain impulsive behavior while pursuing § 7 purposes. *Id.* at 514. For the argument that this and certain other cases should be treated as straightforward insubordination cases, see *supra* part III.A.2. Placing differing premiums on the value of allowing employees some leeway for use of intemperate language in pursuit of § 7 activities is not confined to post-*Jefferson* cases. See, e.g., *Aintree Corp.*, 43 N.L.R.B. 1 (1942) (finding that distribution of leaflets urging fellow employees to listen to an upcoming radio program, which would discuss recent Board ruling that an opposing union was unlawfully employer-dominated, did not disrupt the workplace), *enforcement denied*, 135 F.2d 395 (7th Cir. 1943) (concluding that employers justifiably disciplined employee "troublemakers" because distribution of leaflets played upon a source of company uneasiness and could have caused hostility).

³³⁹ See, e.g., *New River Indus. v. NLRB*, 945 F.2d 1290 (4th Cir. 1991) (finding sarcastic letter ridiculing free ice cream unprotected); *Maryland Drydock Co. v. NLRB*, 183 F.2d 538 (4th Cir. 1950) (finding silly references to company president unprotected); *Farah Mfg. Co.*, 202 N.L.R.B. 666, 705 (1973) (A.L.J. decision) (finding loud talking and refusal to lower voice protected despite the fact that it made supervisor "look bad").

Economic analysis of law traditionally posits a world in which decisions are based on rationality, not on emotion. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3-10 (2d ed. 1977). Further, decisions not based on rational, self-interest are considered "noncompetitive," and subject to self-correction along with other temporary market failures. See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992) (arguing in employment-at-will context that inefficient decision making will self-correct). A supervisor's "short term" interest in his ego or pride, for instance, may well conflict with his firm's long-run best interests, an example of agency cost. See generally Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Struc-*

important as whether the criticism caused or threatened economic injury. Employers may seek to discharge an employee for ridicule or sarcasm even when the concerted activity is harmless and fails truly to threaten management's "authority."

By including tone of speech as a factor in assessing disloyalty, decision makers will make disloyalty determinations largely based on an unpredictable merger of the speaker's natural language and the decision maker's own cultural predilections, value choices, and adoption of a particular philosophical paradigm.³⁴⁰ Questions such as how the particular decision maker sorts out the matter of the importance of venting and robust debate, where she stands on the issue of politeness in light of her position along the harmony-to-adversary continuum, or why she views the criticism as an attack, are all interpretive constructs. These constructs, however, are usually unconscious, or at least unstated, in the decisions. Therefore, the disloyalty rhetoric is difficult to "unpack" or decipher.³⁴¹ Tone is not predictable, consistent, or particularly helpful as a component of disloyalty.

c. *Striking or Working*

Language in an early case created confusion, later intensified in disloyalty cases, about the extent to which a striking or working employee has section 7 protection.³⁴² In *Montgomery Ward & Co.*, the United States Court of Appeals for the Eighth Circuit considered the activities of employees who had chosen to leave clerical work unprocessed for several days without informing their supervisor.³⁴³ In dictum, the court said,

It was implied in the contract of hiring that these employees would do the work assigned to them in a careful and workmanlike manner; that they would comply with all reasonable orders and conduct themselves so as not to work injury to the employer's business; that they would *serve faithfully and be regardful of the interests of the employer* during the term of their service, and carefully discharge their duties to the extent reasonably required. Any employee may, of course, be lawfully discharged for disobedience of the employer's directions in breach of his

ture, 3 J. FIN. ECON. 305 (1976). To the extent the data reveal reliance on emotional or otherwise "non-rational" decision making, such as altruism or favoritism caused by friendship or politics, the disloyalty arena may be one particularly prone to market imperfections, and thus, one where law's intervention may be especially justified.

³⁴⁰ Perhaps this is not all bad. Maybe it is desirable to use § 7 to legislate manners, acceptable versus unacceptable cursing, and other such norms of civility. But if we really mean to impose a middle-class bias on the ability to claim statutory rights, this intention should be openly acknowledged and debated.

³⁴¹ See Kelman, *supra* note 267, at 591-93 (discussing how interpretive constructs, such as choices in construing facts and framing possible rules, underlie and undercut the law's rational rhetoricism).

³⁴² NLRB v. *Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946).

³⁴³ *Id.* at 496.

contract. While these employees had the undoubted *right to go on a strike and quit their employment, they could not continue to work and remain at their positions*, accept the wages paid to them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work.³⁴⁴

In the context of the case, this language was not particularly noteworthy because section 7 does not license deception, selectively refusing to do one's job, or insubordination.³⁴⁵ Five years later, however, the United States Court of Appeals for the Sixth Circuit quoted much of this language as a rationale for refusing to reinstate discharged employees who were boycotting their employer's products.³⁴⁶ The court said that employees may not seek their own ends while "employed"; they must do so while striking.³⁴⁷ Although the discussion was dictum because the court based its holding upon a finding that the boycott had an unlawful purpose,³⁴⁸ the court had planted the seeds of confusion about the right to engage in collective activity when not striking.³⁴⁹ The Supreme Court echoed this confusion in *Jefferson Standard* when it noted that the technicians there had not struck.³⁵⁰

³⁴⁴ *Id.* (citations omitted) (emphasis added). The United States Court of Appeals for the Seventh Circuit had used similar language in an earlier case. *United Biscuit Co. of Am. v. NLRB*, 128 F.2d 771 (7th Cir. 1942). In *United Biscuit*, salesmen selectively refused to perform certain tasks but did not strike. *Id.* at 776. The Court upheld their discharges, quoting the *employer's* argument that the salesmen were disloyal. *Id.* The holding did not turn on notions of loyalty; the court found the salesmen unprotected for failure to perform their duties. *Id.* The court stated that the salesmen were entitled to strike but not "to remain as employees unless they were willing to perform their duties wholeheartedly and efficiently." *Id.* Thus, as in *Montgomery Ward*, the relevant language referred simply to the insubordination, or selectively working.

³⁴⁵ See *supra* part III.A.2.

³⁴⁶ *Hoover Co. v. NLRB*, 191 F.2d 380, 389 (6th Cir. 1951).

³⁴⁷ *Id.* at 390.

³⁴⁸ The purpose of the boycott was to compel the employer to recognize and bargain with a union other than a union that had filed a petition for election. Achieving this objective would constitute an unfair labor practice, as it was ruled counter to the Board's election processes. The references in the case to forbidding anything that could harm the business could be misconstrued to forbid unionizing, seeking higher wages, and other such classic, protected activity. The language forbidding working for one's own ends while remaining "employed," as opposed to doing so while striking, could be misinterpreted to forbid any § 7 activity until going on strike. I believe the Court intended neither erroneous construction.

³⁴⁹ Shortly thereafter, the Board approved a trial examiner's conclusions that clarified that *Hoover* did not stand for the proposition that boycotts by striking employees were unprotected. *Kitty Clover, Inc.*, 103 N.L.R.B. 1665, 1688, *enforced*, 208 F.2d 212 (8th Cir. 1953). The Board explained that a boycott may be unlawful because of unlawful ends, as in *Hoover*, or may constitute an illegal secondary boycott. *Id.*

³⁵⁰ 346 U.S. 464, 467 (1953) (observing that the employees "confined their respective tours of picketing to their off-duty hours and continued to draw full pay").

Contrary to this misleading language, nothing in the Act restricts one's section 7 rights to strike-time only. To require employees to strike in order to exercise their right to mutual aid or protection would not only lack any statutory basis, but it would also have the counterproductive effect of actually encouraging strikes. Such a rule would therefore stand contrary to the policies of the Act to promote labor peace and avoid obstructions of commerce.³⁵¹ In section 7 cases, including disloyalty cases, whether the employees are striking or working generally should not be a factor in assessing if they are protected.

d. *Calculated or Impulsive*

Decision makers occasionally consider whether conduct was calculated or impulsive in evaluating disloyalty. Before *Jefferson Standard*, employers had used this distinction as a factor to decide if an employee was insubordinate, warranting discipline.³⁵² The Board often used the calculatedness question to determine the egregiousness of concerted actions (especially picket line misconduct), in order to decide if the conduct fell outside the bounds of protection.³⁵³ The Board also made this distinction in section 10(c) inquiries,³⁵⁴ to assess whether an unlawfully discharged employee had forfeited reinstatement remedies by subsequent misconduct.

The Board has good reasons to make allowances in strike conduct and section 10(c) cases for minor transgressions, because the employer's own unfair labor practices might provoke the conduct, or the conduct simply might be understandable as part of the necessarily heated give-and-take of economic warfare.³⁵⁵ To allow employees leeway for impulsiveness in the

³⁵¹ Generally, employees cannot continue to work while acting insubordinately by working selectively, or interrupting production. However, employees do not have to forfeit their paychecks to exercise their § 7 rights. The bans against intermittent strikes and selectively working can lead to ironic results. In *Home Beneficial Life Ins. Co. v. NLRB*, 159 F.2d 280 (4th Cir.), cert. denied, 322 U.S. 758 (1947), some employees decided only to report for work on Wednesdays and Thursdays while others did not report at all. *Id.* at 283. The court found that those who completely eschewed the employer could keep their jobs.

³⁵² See, e.g., *NLRB v. Aintree Corp.*, 135 F.2d 395 (7th Cir. 1943) (finding insubordinate an employee who participated in a calculated design to arouse heated animosities among co-employees through a leaflet distribution). For a discussion of pre-*Jefferson Standard* decisions, see generally *supra* part I.A.

³⁵³ The Board often excuses minor misconduct as momentary "animal exuberance." See, e.g., *NLRB v. Kelco Corp.*, 178 F.2d 578, 582 (4th Cir. 1949) (distinguishing the chasing and beating of a nonstriker from animal exuberance). Though the Board maintains good reasons for distinguishing minor transgressions, the Board's animal metaphor is less than flattering. By contrast, see *American Arbitration Ass'n*, 233 N.L.R.B. 71 (1977) (finding employees unprotected because they compared management with animals).

³⁵⁴ See *supra* part II.B.2.

³⁵⁵ See *supra* notes 268-85 (discussing venting).

context of insubordination or picket line misconduct, however, is not to say that “calculated” conduct should provide a basis for a disloyalty designation. Many activities, such as a carefully planned and orchestrated boycott, although very calculated, are protected.³⁵⁶

e. *Audience*

To ascertain disloyalty, some reviewers have examined the particular audience to which employees have appealed. Alleging disloyal behavior, employers have discharged employees for engaging in criticism externally (outside the plant), and internally (in the workplace). Employers are particularly sensitive, however, to public criticism, fearing that it may injure their business reputation.³⁵⁷ Two conflicting questions arise when an employee lodges criticism outside the “privacy” of the workplace. First, does this public criticism justify adjudging the employee *unprotected*, because the employee has aired publicly what the employer wished to keep private? Second, does this airing justify adjudging the employee *protected*, at least when the subject involves employer violations of the law or other employer misconduct, because the public may have a special interest in or a need to know the information?³⁵⁸ In cases involving the corporate campaign, the audience is likely to be placed in issue often, because the conduct is directed to external entities and individuals as diverse as corporate shareholders, citizen-environmentalists, and state regulatory agencies.³⁵⁹

Prior to *Jefferson Standard*, several cases had affirmed the right of employees under section 7 to appeal to public audiences.³⁶⁰ The *Jefferson Standard* Court, however, created confusion with its concern about the external airing of the information. The Court discussed the “public” nature

³⁵⁶ Hoover Co., 90 N.L.R.B. 1614, 1617 (1950) (finding peaceful boycott is protected), *enforcement denied on other grounds*, 191 F.2d 380, 389 (6th Cir. 1951) (holding that although boycotts are usually protected, here there were unlawful objectives and cooperation with competitors).

³⁵⁷ Internal criticism may undermine a supervisor’s authority and prove equally harmful. In some cases, the question of audience may also overlap with the question of confidentiality. As discussed earlier, the Board has emphasized that it will not consider all public airings of private, personal matters as disclosure of confidences. *See supra* notes 159-67.

³⁵⁸ Section 7 is not a whistleblower statute. However, when the activities are concerted and serve to provide mutual aid and protection in the workplace, § 7 does share some commonalities with whistleblower protections. The current expansion of whistleblower protection laws illustrates that national policy favors protection for employees who serve the public by calling illegality, fraud, environmental abuses, and other problems to the public’s attention.

³⁵⁹ *See supra* notes 6, 10 and accompanying text.

³⁶⁰ NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 506 (2d Cir. 1942) (affirming employees’ right to “subsidize propaganda, distribute broadsides, support political movements, and in any other way further its cause” even though these caused great harm to the employer).

of the technicians' leaflet distribution from at least three different angles: (1) the distribution was public, (2) the leaflets' plea was directed specifically to the public, and (3) the appeal purportedly was made in the public's own interests, without informing the public of the existence of the union or the labor dispute.³⁶¹ The Court emphasized the third point, the fraud perpetrated on the public, but it failed to clarify the legal significance of the three factors. Subsequent decision makers have differed on whether an appeal to a public audience, as opposed to an appeal solely within the workplace, is relevant in disloyalty analysis.

The *Patterson-Sargent Co.*³⁶² case, in which strikers advised the public that paint made by replacement workers might crack and peel, illustrates this confusion. The Board did not specifically find the activity unprotected because the employees appealed to the public, but the only factors *Patterson-Sargent* and *Jefferson Standard* shared were that the employees criticized product quality and took their dispute to the public.³⁶³

Later, the Supreme Court narrowed the question of audience in *Eastex, Inc. v. NLRB*.³⁶⁴ The case involved the distribution of union literature inside a plant, but the subject did not relate to an immediate workplace dispute. The leaflets criticized the President for vetoing increased minimum wage and requested employees to write their legislators to oppose a "right to work" law. The Court found the criticism protected and rejected the employer's argument that employees lose protection "when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship."³⁶⁵ The Board has interpreted the *Eastex* holding as generally protecting appeals to third parties, paraphrasing the rule as "[the employee's] right to appeal to the public is not dependent on the sensitivity of [the employer] to [the] choice of forum."³⁶⁶ The rule has been extended to

³⁶¹ *NLRB v. Local Union No. 1229, IBEW (Jefferson Standard)*, 346 U.S. 464, 468 (1953); see also *supra* notes 55-63 and accompanying text. With regard to the second of these points, the court interpreted the leaflets as a call for a public boycott.

³⁶² 115 N.L.R.B. 1627 (1956); see also *supra* notes 297-300 and accompanying text.

³⁶³ The Board focused on the public airing of the dispute, saying, "we reach the same result on the same broad principle as did the Board and the Supreme Court in the *Jefferson Standard* case, namely that by the means employed here in the preparation and circulation of the handbill the strikers forfeited any right they may have otherwise had to the protection of the Act." 115 N.L.R.B. at 1630 (footnote omitted). Thus, the "means" the Board focused on were the negative expression and public distribution; it overlooked *Jefferson Standard's* other criteria. The two cases differed substantially. Most importantly, in *Patterson-Sargent*, the employees had identified the labor dispute in the handbill, their leaflets discussed vital, strike-related issues, and their conduct lacked any element of deception. *Id.*; see also *supra* note 300. In my opinion the Board wrongly decided this case.

³⁶⁴ 437 U.S. 556 (1978).

³⁶⁵ *Id.* at 565.

³⁶⁶ *Richboro Community Mental Health Council, Inc.*, 242 N.L.R.B. 1267, 1268

cover public appeals that do not directly address a labor dispute, provided that a logical relationship exists between the appeal and the dispute.³⁶⁷ The decision in *Eastex* either reversed what the Court perceived as an erroneous aspect of *Jefferson Standard*, or at least narrowed the erroneous application of *Jefferson Standard* in cases such as *Patterson-Sargent*.³⁶⁸

f. *Conclusions to Be Drawn from Examining Disloyalty's Components*

The foregoing examination of some of the factors used to determine disloyalty and the problems associated with their use shows that the United States Court of Appeals for the Ninth Circuit was correct when it noted recently in *Sierra Publishing Co.* that the various factors have created a test with "shifting boundaries of protection."³⁶⁹ In that case, the court ultimately abandoned any attempt to assess conduct under a coherent "disloyalty" doctrine. Rather, the court simply found the conduct protected "under any of the various ways which that concept has been applied over the years."³⁷⁰ There will never be an acceptable disloyalty exception, for, at base, such an exception is in conflict with the fundamental underpinnings of the statutory scheme itself. To that most basic problem I now turn.

IV. PHILOSOPHICAL AND POLICY PROBLEMS: THE ACT IS NOT PREMISED ON LOYALTY AND THE TEST SHOULD BE ABANDONED

A. *All Exercise of Section 7 Rights Is "Disloyal"*

The most important fact that drains the disloyalty test of legitimacy is that it is profoundly at odds with both lay understandings of disloyalty and the fabric of the statutory scheme. Candid assessment requires acknowledgment of one fundamental and critical truth: to many employers, *any* exercise of section 7 rights is "disloyal." Historically, many employers labeled employees disloyal solely because of the employee's pro-union sentiments.³⁷¹

(1979) (protecting letter to third-parties protesting the discharge of a fellow employee and employer's capacity to manage plant; see also *Allied Aviation Serv. Co.*, 248 N.L.R.B. 229, 231 (protecting public criticism of aircraft mechanical services safety), *enforced*, 636 F.2d 1210 (3d Cir. 1980).

³⁶⁷ See, e.g., *Allied Aviation*, 248 N.L.R.B. at 231; see also *Alaska Pulp Corp.*, 296 N.L.R.B. 1260, 1262 (1989) (discussing protected character of employee's testimony before Congress), *enforced*, 944 F.2d 909 (9th Cir. 1991).

³⁶⁸ The *Eastex* Court did not cite *Jefferson Standard* or *Patterson-Sargent*.

³⁶⁹ *Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 216 n.6 (9th Cir. 1989); see also *supra* note 73 and accompanying text.

³⁷⁰ *Sierra Publishing Co.*, 889 F.2d at 217.

³⁷¹ NLRA, § 1, 29 U.S.C. § 151 (1988) (acknowledging in its declaration of policy that the Act has been implemented to combat the denial by some employers of the right to organize); see also, e.g., *Associated Press v. NLRB*, 301 U.S. 103, 111-12 (1937) (employer arguing that NLRA is unconstitutional, *inter alia*, because allowing union security agreements deprived employer and employee of "friendship, mutual loyalty, and

Employers often feel betrayed by “their” employees’ desire to unionize. Understandably, the very fact that employees seek to be represented in workplace issues is, to many employers, a personal affront, a demonstration of lack of gratitude for management’s efforts to create just or generous working conditions.³⁷² On a less emotional and more factual level, some employers fear that unionization will hurt the company’s profitability and competitiveness and is disloyal on that ground.³⁷³ Additionally, employers have argued vigorously that pro-union employees are unable to be good employees or good American citizens, even though the courts have rejected these arguments for six decades.³⁷⁴

wise cooperation”); *id.* at 138-40 (Sutherland, J., dissenting) (arguing that an employee cannot be both a good newspaper editor and actively pro-union); *Gatliff Business Prods., Inc.*, 276 N.L.R.B. 543, 550 (1985) (discharging supporters of union as “treasonous” and disloyal); *Misericordia Hosp. Medical Ctr.*, 246 N.L.R.B. 351, 357 (1979) (A.L.J. decision) (employer characterizing employees who wrote protected report as “selfish,” “vicious,” and “venal”; equating involvement in protected activities with “disaffection or disloyalty”), *enforced*, 623 F.2d 808 (2d. Cir. 1980); JOHN W. SCOVILLE, *LABOR MONOPOLIES—OR FREEDOM 150* (Arno Press repr. 1972) (1946) (describing union leaders as evil tyrants, and collective bargaining as “plac[ing] loyalty to the labor leaders above loyalty to the nation”).

To be sure, the courts at one time showed equal hostility to the notion of employee collective activity. *See, e.g.*, *Meyers Indus. (Meyers II)*, 281 N.L.R.B. 882, 883 (1986) (discussing Norris LaGuardia Act of 1932 and need for protection from court decisions concerning conspiracy antitrust doctrines), *aff’d sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied sub nom. Meyers Indus. v. NLRB*, 487 U.S. 1205 (1988).

³⁷² *See, e.g.*, *Yerger Trucking, Inc.*, 307 N.L.R.B. No. 97, 141 L.R.R.M. (BNA) 1156 (May 15, 1992) (furious employer insulted at unionization efforts, fired entire workforce and falsely represented information to lender such that pro-union employee was denied home mortgage loan); *see also NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31-34 (1937) (noting that the Act’s passage was largely motivated by unrest caused by employer discrimination and coercion with regard to union activities).

³⁷³ *Compare* SCOVILLE, *supra* note 371, at 70-71 (asserting that it is “natural and entirely proper” that employers oppose unionization because it will “destroy shop discipline, . . . make it difficult . . . to discharge incompetent workmen . . . [and] interfere with the promotion of men according to merit”) with RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 162-65 (1984) (concluding that unions increase productivity) and *Professor Morris Warns that Union-Free Environment May Fail to Achieve Productivity*, *Daily Lab. Rep.* (BNA) No. 208, at A-6 (Oct. 27, 1992) (arguing that collective bargaining serves as the natural catalyst to promote the cooperation and participation necessary for workplace morale and productivity) and Kenneth G. Day-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 431-34 (1992) (explaining productivity increases associated with unionization).

³⁷⁴ *See, e.g.*, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (rejecting argument that walkout to protest working conditions was disloyal); *Associated Press*, 301 U.S. at 115 (forcing retaining of unwanted employees); *id.* at 137-40 (Sutherland, J., dissenting) (arguing that one cannot be pro-union and be a good newspaper editor); *Willmar Elec. Serv., Inc.*, 968 F.2d 1327, 1330 (D.C. Cir. 1992) (rejecting argument that union-

Given that many employers argue that *to unionize* evidences disloyalty, it is not surprising that for years employers have urged the Board to conclude that classically protected forms of concerted activity, such as boycotts, picketing, and protesting working conditions are disloyal and therefore should not be protected.³⁷⁵ The Board and courts have rejected these arguments as well, but they must remain alert to this temptation to impose obligations of loyalty that are based on arguments using lay terminology, not on carefully circumscribed legal terms of art.³⁷⁶ To rely on common-sense definitions from the viewpoint of owners and managers³⁷⁷ would result in placing protection of the employee “wholly at the mercy of the varied understanding” of employers’ definitions of, and interpretations of, employee loyalties.³⁷⁸ An adoption of lay definitions would chill much union activity because the actor/speaker would fear to act in light of the potentially disastrous consequences (discharge) if a decision maker judges her loyalty negatively.³⁷⁹ Ultimately, such a course would eviscerate section 7 of its meaning. For these reasons, even if a disloyalty test could be adopted consistently with the Act, it would need to have a special meaning as a narrowly circumscribed term of art.

Although adoption of a special definition of disloyalty solves the foregoing problems, it creates others. A technical definition may be intelligible to attorneys but is not useful to employees and employers needing to under-

organizer job applicant necessarily would be a disloyal employee), *cert. denied*, 113 S. Ct. 1252 (1993); SCOVILLE, *supra* note 371, at 150.

³⁷⁵ See, e.g., *Willmar Elec. Serv.*, 968 F.2d at 1330 (refusing to hire job applicant who engaged in picketing and intended to organize on the job on the grounds that hiring him would create “intolerable risks of disloyalty” held unlawful); *Coors Container Co. v. NLRB*, 628 F.2d 1283, 1288 (10th Cir. 1980) (reprimanding employees for advocating boycott against employer and supporting strikers while working held unlawful); *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 506 (2d Cir. 1942) (firing employee for publishing criticism of employer held unlawful); *Hoover Co.*, 90 N.L.R.B. 1614, 1622 (1950) (suspending employees for advocating consumer boycott while working held unlawful), *enforcement denied on other grounds*, 191 F.2d 380 (6th Cir. 1951) (holding boycott unlawful because it was used to force an employer to take illegal action); SCOVILLE, *supra* note 371, at 23 (arguing against labor law reform because “we should stop ‘hacking at the branches,’ and strike at the root of the evil—*collective bargaining*” (emphasis in original)); cf. *NLRB v. Local Union No. 1229, IBEW (Jefferson Standard)*, 346 U.S. 464, 479 (1953) (Frankfurter, J., dissenting) (concluding that conduct considered improper is not necessarily disloyal).

³⁷⁶ Cf. *Jefferson Standard*, 346 U.S. at 479 (Frankfurter, J., dissenting) (arguing that “conduct may be ‘indefensible’ in the colloquial” sense, yet within protection of § 7).

³⁷⁷ The above overgeneralizations speak of lay definitions held by some, but not all, managers. Concerning employee sentiments, an individual may do her job impeccably because of high standards or personal pride, rather than out of loyalty to management.

³⁷⁸ *Red Top, Inc.*, 185 N.L.R.B. 989, 990 (1970) (quoting *Harding Glass*, 158 N.L.R.B. 1366, 1372 (1966) (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945))), *enforcement granted in part and denied in part*, 455 F.2d 721 (8th Cir. 1972).

³⁷⁹ *Id.*

stand and predict their legal rights and obligations in the ordinary work environment. A legal definition at odds with common understandings and common sense is not a practical standard for evaluating conduct. A recent case, *GHR Energy Corp.*,³⁸⁰ crystallized these problems, adding insight and irony to the disloyalty dilemma. The employer, a manufacturer of petrochemicals in Louisiana, established a loyalty policy: "Any actions or statements made by employees against the Company's interests which expose the Company to public contempt and/or ridicule or damages [sic] its business reputation or interferes [sic] with its ability to expand and grow shall be considered as disloyalty."³⁸¹ The Board held that unilateral promulgation of this policy was an unfair labor practice because it conflicted with section 7 rights. The policy imposed "excessively broad restrictions on employee 'actions and statements' protected by section 7."³⁸² Section 7 protects many actions and statements that could interfere with a Company's ability to "expand and grow."³⁸³ Further, the policy was overbroad. It was "so general and ambiguous" that the company could not show that it had "narrowly tailored" the policy to "legitimate and necessary objectives."³⁸⁴ The matter of disloyalty simply was not a core concern of the business.³⁸⁵

The irony of *GHR Energy Corp.* should not be missed. If the petrochemical company's disloyalty policy was ambiguous, a rule that employees cannot possibly be expected to understand, what does this say about the workability of *Jefferson Standard's* test?³⁸⁶ More importantly, if a company cannot show that employee loyalty is essential to its enterprise, and *if demanding it will chill the exercise of section 7 rights*, how can the Board or courts *require it to exercise section 7 rights*?

As the Board implicitly acknowledged in *GHR Energy Corp.*, the disloyalty test is inconsistent with the very fabric of the Act. This is so for a number of reasons. *First*, regardless of whether one adopts a harmony para-

³⁸⁰ 294 N.L.R.B. 1011 (1989).

³⁸¹ *Id.* at 1012 n.10.

³⁸² *Id.* at 1012. The promulgation also violated NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1988), the duty to bargain, because it was issued unilaterally.

³⁸³ *GHR Energy Corp.*, 294 N.L.R.B. at 1012. The Administrative Law Judge, who spoke to the issue in more detail, noted that such § 7 activities might include any employee speech in support of economic demands, recognition, or bargaining. *Id.* at 1030 (A.L.J. decision).

³⁸⁴ *Id.* The company had to prove that disloyalty was a "core" concern. The "narrowly tailored" and "core concern" standards come from duty-to-bargain law, but this does not alter the point for which this case is cited here. See *Peerless Publications, Inc.* (Pottstown Mercury), 283 N.L.R.B. 334 (1987) (establishing the standards governing the unilateral implementation of rules instead of bargaining).

³⁸⁵ *GHR Energy Corp.*, 294 N.L.R.B. at 1031.

³⁸⁶ In *GHR Energy Corp.*, the Administrative Law Judge implied, as I have argued in this Article, that *Jefferson Standard's* loyalty language was simply extra rhetoric employed to justify a lawful discharge under the product disparagement exception. *Id.* at 1028 (A.L.J. decision).

digm or an adversary paradigm of labor relations,³⁸⁷ one cannot deny that the latter is accurate in one fundamental respect: Congress was more interested in advancing employees' rights vis-à-vis employers and in strengthening employees' protections *from* employers than it was in advancing employees' loyalties *to* employers.³⁸⁸ Congress enacted the Act largely in response to the professional associations, oligopolistic competition, and price-fixing that had been increasingly replacing the "atomistic individualism" of free enterprise.³⁸⁹ The Act specifically addressed the "inequality of bargaining power" between employee and employer by preventing employers from interfering with the right to organize, by requiring employers to recognize certified unions, and by requiring collective bargaining with the union.³⁹⁰ Congress found that imposing these requirements on employers would prevent employee coercion.³⁹¹ Congress determined that fostering collective bargaining serves the public interest, and therefore it protected the right to organize and bargain even when opposed by employers.³⁹² The *Jefferson Standard* dissenters succinctly acknowledged the antagonistic underpinnings of the Act: "Many of the legally recognized tactics and weapons of labor would readily be condemned for 'disloyalty' were they employed between man and man in friendly personal relations."³⁹³ This is not to say that Congress would want to foster *disloyalty*; it is only to say that the long-

³⁸⁷ See discussion *supra* part III.C.2.

³⁸⁸ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (stating that the purpose of the Act was to give employees the ability to bargain on fair and equal footing with employers). A marxist critique would go farther than these congressional observations and would posit that the entire economic system of capitalization is premised on, and indeed prays on, the owner-manager/employee schism.

³⁸⁹ CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS* 7-8 (1985). (reporting that political theorists around World War I believed the state was losing its cohesiveness and was increasingly constituted by atomistic, self-interested organizations).

³⁹⁰ NLRA, § 1, 29 U.S.C. § 151 (1988) (redressing "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association"); see also *NLRB v. City Disposal Sys.*, 465 U.S. 822, 835 (1984) (observing that § 7 evidences intent "to create an equality in bargaining power . . . throughout the entire process of labor organizing, collective bargaining, and enforcement of collective-bargaining agreements").

³⁹¹ NLRA, § 1, 29 U.S.C. § 151 (1988).

³⁹² [P]rotection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Id.

³⁹³ *NLRB v. Local Union No. 1229, IBEW (Jefferson Standard)*, 346 U.S. 464, 479-80 (1953) (Frankfurter, J., dissenting). Indeed, it would be difficult ever to carry out a union

range goal of reducing labor strife through the immediate goal of empowering workers and arming them with the full force of the law were by far the pivotal rationales behind the Act, not notions of loyalty.³⁹⁴

Second, a disloyalty standard does not make sense in the context of a labor policy that permits such antagonistic tactics as strikes and lockouts. The strike, and its attendant negative publicity, are the epitome of disloyalty in a colloquial sense, because their object is to turn the public, employees, customers, and suppliers against the employer; yet protection for such conduct is central to the Act. Section 7, and the special acknowledgment of strikes in section 13,³⁹⁵ are premised on Congress's belief that employees must be allowed to publicize their cause without fear of losing their jobs.³⁹⁶ Boycotting employees may publicly vilify their employer while still drawing paychecks. They may even go so far as to withhold their labor to drive the employer into bankruptcy, if necessary in their appeal, just as employers may engage in a devastating lockout.³⁹⁷

organizing drive without appearing "disloyal," because the primary purpose of organizing is to strengthen employees' collective voice and power vis-a-vis the employer.

³⁹⁴ See *supra* notes 200, 207-10. Subsequent amendments to the Act have not altered that rationale. To be sure, Congress enacted the 1947 Taft-Hartley amendments to curb certain union abuses and tactics. See *supra* part II.B.2. But these amendments did not alter the basic premise and rationale underlying the federal labor policy of encouraging collective bargaining.

The Court of Appeals for the District of Columbia stated incorrectly in recent dictum that the *only* reasonable interpretation of the Act was that an employee lost protection for disloyalty because another interpretation would be "inconsistent with the statutory policy of preserving the employer's right to discharge an employee for disloyalty." *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061, 1065 (D.C. Cir. 1992); see also discussion *supra* part III.C.1. Although the Act does seek to protect some employer's interests, see, e.g., NLRA, § 8(b), 29 U.S.C. § 158(b) (1988) (addressing union unfair labor practices, secondary boycotts and secondary strikes, certain recognitional and organizational picketing, work assignments, and hot cargo agreements), the statutory scheme certainly does not subordinate employee rights to these. The *Hormel* court appears not to have included employee rights in reaching this conclusion about disloyalty.

³⁹⁵ 29 U.S.C. § 163 (1988) ("Nothing in this subchapter, except as specially provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications of that right.").

³⁹⁶ Cf. NLRA, § 8(c), 29 U.S.C. § 158(c) (protecting employers' freedom of expression).

³⁹⁷ See, e.g., *Coors Container Co. v. NLRB*, 628 F.2d 1283, 1288 (10th Cir. 1980) (holding that § 7 protects advocating boycott or supporting strikers while working); *Community Hosp. of Roanoke Valley, Inc. v. NLRB*, 538 F.2d 607 (4th Cir. 1976) (holding hospital's issuance of a warning and removal of a nurse from an on call list an unlawful attempt to channel employee organizing activity); *Hoover Co.*, 90 N.L.R.B. 1614 (1950) (holding that advocating consumer boycott although working is protected by § 7), *enforcement denied on other grounds*, 191 F.2d 380 (6th Cir. 1951). The lockout is expressly acknowledged in the Act, though it is not expressly stated to be a "right" of employers as is § 7 for employees.

Congress did not allow any of the lawful economic weapons available in labor disputes because they are, in and of themselves, desirable. Rather, it permitted resort to these tactics to enable each side to press its economic demands. It is this tension created by the possibility of economic warfare when employers or employees seek their goals on which our national labor policies are delicately balanced. In the midst of this tension, a "disloyalty" test cannot stand.

Third, the process of collective bargaining is premised on self-interest, not loyalty to the opposing party. Parties may harbor their own personal anti-union or anti-management beliefs, as long as the beliefs are not reflected in closed-mindedness or obstruction of the process. Parties have an unqualified right to act selfishly and to refuse to agree in bargaining, even if unreasonable, unfair, or morally unjustifiable.³⁹⁸ With regard to the fairness of bargaining proposals, as with the administration of section 7, neither the Board nor the courts may "measure concerted activity in terms of whether the conduct is wise or fair, or satisfies standards which [it] think[s] desirable."³⁹⁹

Fourth, labor law doctrine requires both individual employees and their union officers to act in their self-interest. Excessive solicitude for, or loyalty to, the employer has costly consequences. Employees whose conduct is not for their own "mutual aid or protection" cannot claim section 7 protection.⁴⁰⁰ Union leaders who act for the employer's benefit may be neglecting their obligation to press zealously for employees' interests, and are likely violating their legal duty of fair representation, committing an unfair labor practice, or both.⁴⁰¹ The disloyalty exception, by contrast, would have employees and their union officers act altruistically in the employer's best interests and for the employer's benefit. The current disloyalty doctrine requires employees and their representatives to walk too thin a tightrope between altruism and the required self-interest.

To superimpose a duty of loyalty to the employer on top of the mandate that employees exercise section 7 rights in furtherance of self-interest and, in the case of union officers, in furtherance of the self-interests of the bargaining unit, is not simply inconsistent with the statutory purposes of providing

³⁹⁸ NLRA, § 8(d), 29 U.S.C. § 158(d) (1988) (bargaining obligation does not obligate a party to agree to proposals or make concessions). "Good faith bargaining" is a misnomer. As long as the parties meet minimal requirements of procedure and tactics (such as turning over certain documents, not unduly delaying bargaining sessions, etc.), they need only work toward an agreement; they need not subjectively desire to reach one.

³⁹⁹ *Hoover Co.*, 90 N.L.R.B. at 1621.

⁴⁰⁰ See Estlund, *supra* note 15, at 921; Richard M. Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 791 (1989).

⁴⁰¹ See NLRA, § 8(b), 29 U.S.C. § 158 (b) (1988) (defining certain union conduct as an unfair labor practice); NLRA, § 9(a), 29 U.S.C. § 159(b) (1988) (providing that the union is the exclusive representative of the bargaining unit); *Vaca v. Sipes*, 386 U.S. 171, 183 (1967) (holding that bad faith or arbitrary treatment by a union toward an employee violates duty of fair representation).

employees with section 7 protection; it is directly contrary to those purposes. Indeed, the reason supervisors are not protected by section 7 is precisely because they do not have such practical or statutory constraints on their loyalties to management.⁴⁰²

Fifth, a disloyalty test is incongruous with the Act because, unlike the common law of agency regarding masters and servants,⁴⁰³ the Act imposes on *employers* no reciprocal loyalty obligation toward their employees. Surely, notions of loyalty would be premised on mutuality.⁴⁰⁴ There are some mutual obligations imposed by the labor laws (such as the bargaining obligation to meet, confer, and negotiate), but the Act is not a wrongful discharge statute. It allows employers, even when making a profit, to demand wage concessions and to lock out employees, depriving willing workers of an opportunity to earn an income.⁴⁰⁵ It allows employers (and employees) to refuse to yield to collective bargaining agreement terms, even arbitrarily or unfairly.⁴⁰⁶ One cannot justifiably construe the Act as a vehicle that carries loyalty obligations in only one direction.

⁴⁰² *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653, 659-60 (1974) (observing that "supervisors [are] management obliged to be loyal to their employer's interests," and their unionization would threaten basic ends of labor law); *cf. Getman, supra* note 15, at 1212-13 (noting that because the system is premised on the incompatibility between the interests of management and labor, protests against discharge of top management are unprotected, and discharge of pro-union supervisors is not necessarily unlawful).

⁴⁰³ *See infra* notes 444-60 and accompanying text. The common law did impose on employers certain obligations to servants, but these have been largely eroded. Certain doctrines today do impose fiduciary obligations on company owners and managers. *See, e.g., Perlman v. Feldmann*, 219 F.2d 173 (2d Cir.) (holding that dominant stockholder, chairperson of board, and corporation president, have a fiduciary duty to the corporation), *cert. denied*, 349 U.S. 952 (1955); *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (holding that director's duty to exercise informed business judgment is in nature of a duty of care, not a duty of loyalty).

⁴⁰⁴ *See supra* note 403; *infra* note 460. Some important obligations imposed by the Act, such as the obligation that both sides negotiate in good faith, are mutual. *See supra* note 390 (noting how the Act sought to improve the relationship of employees vis-a-vis management, and to restore "equality of bargaining power"). Notions of mutuality are well established in other labor law contexts as well. For example, a covenant not to compete generally is not enforceable absent consideration given by the employer. *See State Labor Law Developments*, 8 LABOR LAW. 618, 674-85 (1992). Also, in this century mutuality is used as a major justification for the employment at will doctrine. Because employees can quit for any reason, the argument goes, employers should be able to discharge for any reason. For a review of the literature concerning the sufficiency of this justification, see PAUL WEILER, GOVERNING THE WORKPLACE 89-104 (1990).

⁴⁰⁵ *American Ship Bldg Co. v. NLRB*, 380 U.S. 300, 318 (1965) (holding that an employer lockout did not violate §§ 8(a)(1) or 8(a)(3) because it lacked a proscribed purpose).

⁴⁰⁶ *See supra* note 398 and accompanying text. However, certain activities by an employer purporting to act "magnanimously," out of concern for employee welfare, are unlawful. *See, e.g., Electromation Inc.*, 309 N.L.R.B. No. 163, 142 L.R.R.M. (BNA)

Sixth, the law has long recognized that the Board and courts should exercise great restraint in determining, as opposed to letting employees themselves determine, how section 7 rights should be exercised.⁴⁰⁷ The decision makers have acknowledged that as a general rule, they should no more sit in judgment of the particular methods by which employees chose to express themselves, than they should tell a company or a union what terms it ought to request or accept at the bargaining table. The use of economic weapons is "part and parcel" of the statutory scheme.⁴⁰⁸ To allow the Board or courts to determine the acceptable ways in which employees "ought" to engage in collective activity would unduly chill the exercise of section 7 rights and embroil the Agency and judiciary in a time-consuming and endless thicket of detailed decision making about "appropriate" employee conduct. If decision makers were able to evaluate the underlying loyalties of employees' exercise of collective activity, this would superimpose on section 7 "a convenient device whereby a [reviewer] might outlaw union conduct which was contrary to his own economic or social philosophy"⁴⁰⁹ and would upset that natural balance of power between management and labor.⁴¹⁰

Last, to impose a loyalty requirement on employee activity would contra-

1001 (Dec. 16, 1992) (holding that committee established by employer to address employee concerns violated § 8(a)(2)).

⁴⁰⁷ *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (holding an unannounced walkout without making specific demands protected, as employees have right to engage in unwise, unnecessary, unreasonable activity); *Farah Mfg. Co.*, 202 N.L.R.B. 666 (1973) (holding that Board and employer cannot dictate the manner in which employees carry out protected activity); *see also* *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960) (holding that repeated tactics such as sit-ins and reporting late are unprotected but do not violate duty to bargain).

Likewise, absent tactics that are so extreme as to be inherently destructive of § 7 rights, the Board and courts sit in judgment of neither the bargaining power of employers nor the particular tactics they employ. *See* *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 344 (1938) (refusing to interpret rights based on wisdom or reasonableness of collective activity); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952) (stating that the Board may not compel bargaining concessions or review substantive terms of agreements); *NLRB v. Herman Sausage Co.*, 275 F.2d 229 (5th Cir. 1960) (holding that the Board cannot force unreasonable parties to make concessions in bargaining).

⁴⁰⁸ *Insurance Agents' Int'l Union*, 361 U.S. at 489; *see also* *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council (DeBartolo II)*, 485 U.S. 568, 579-81 (1988); *American Ship Bldg. Co.*, 380 U.S. at 318 (holding that an employer may offensively lockout employees); *NLRB v. Brown*, 380 U.S. 278 (1965) (holding that an employer's use of temporary replacements for strikers does not violate § 8).

⁴⁰⁹ *American News Co.*, 55 N.L.R.B. 1302 (1944) (referring to legislative history concerning whether the purposes of concerted activities ought be considered).

⁴¹⁰ *Washington Aluminum Co.*, 370 U.S. at 14. The Board and courts are strongly opposed to meddling in this natural balance in other contexts. *See* *Insurance Agents'*, 361 U.S. at 497 (holding that the Board may not introduce distinctions about "justifiable" and "unjustifiable, proper, and 'abusive' economic weapons" (footnote omitted)); *see also* *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427

vene current legal trends concerning speech, under both labor law and First Amendment doctrine. These trends reflect more appreciation for speech rights and less concern for policing speech, even extreme, exaggerated, false, or misleading speech.⁴¹¹ In union elections, today's campaign rules allow employers in many instances to lie knowingly and to mislead employees in campaign propaganda without consequence, and the rules allow unions and employees to do the same.⁴¹² Regarding secondary boycotts, the Supreme Court recently ruled that peaceful, nonpicketing consumer boycotts are not "coercive" within the meaning of the ban against secondary boycotts, even though from the vantage point of an "innocent, neutral" boycotted employer, they are not only coercive, but they are also disloyal and reprehensible.⁴¹³ With regard to defamation during labor disputes, the Supreme Court has imposed strict limitations on a defamed individual's right to recover.⁴¹⁴ As Board Member Murdock pointed out in *Jefferson Standard*, employees should be encouraged to speak out on matters of concern to the

U.S. 132, 147-51 (1976) (holding that the Act preempts states from regulating economic self-help weapons used between labor and management).

⁴¹¹ Concerning the First Amendment, see, e.g., *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (invalidating an ordinance forbidding "hate speech" directed at certain races and groups as content-based and viewpoint-based); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530 (9th Cir. 1992) (allowing children to challenge discipline for wearing buttons supporting teachers' strike and referring to "scabs," notwithstanding school's claim that buttons were vulgar, offensive, and disrupted discipline). *But see Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990) (holding that the state may prohibit misleading attorney advertising).

⁴¹² *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127, 133 (1982) (holding that the Board will "not probe into the truth or falsity of parties' campaign statements, and . . . will not set elections aside on the basis of misleading campaign statements"). The Board still must review speech in the case of threats or promises of benefit, because the Act expressly requires the Board to review such speech to remedy unfair labor practices.

⁴¹³ *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council (DeBartolo II)*, 485 U.S. 568 (1988) (stating that peaceful handbilling urging consumer boycott of neutral employer, absent picketing, does not constitute coercion under the § 8(b)(4)(ii)(B) secondary boycott prohibitions). The Court reasoned that there was no clear statutory intent to proscribe such handbilling, and that the provisions primarily concerned secondary picketing and strikes. The handbills were merely truthful, persuasive communications that did not induce or encourage employees to strike the secondary employer. There was no violence or patrolling, and economic harm does not invalidate the collective activity. Any other construction, the Court said, would pose serious problems of constitutionality when an activity, such as that challenged, involved merely persuasive speech. *Id.* at 577.

⁴¹⁴ *See Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 269 (1974); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966).

community, such as product quality, not be punished for doing so.⁴¹⁵ The employer is free, of course, to rebut inaccurate allegations.⁴¹⁶

First Amendment principles, like the trends in labor law doctrine, are premised on the positive benefits of encouraging robust debate in society. The Court has long held that a spirited exchange of opinion and information is healthy and desirable, despite the disadvantages or harm that the occasional excess or falsehood may bring. The alternative, involving the policing of speech in both the First Amendment or labor contexts, is too costly.⁴¹⁷ Laws policing speech not only curtail speech that is “impermissible,” but they also chill valuable speech that is lawful. Policing speech also entangles the Board and courts in the task of sifting through speech to separate the acceptable from the unacceptable.⁴¹⁸ Further, it is expensive and time-consuming, delaying the parties’ ability to carry on with their activities.⁴¹⁹ It involves the murky morass of assessing degrees of truthfulness (or for our purposes, degrees of loyalty), which are subject to unpredictable variations on the part of the reviewer.⁴²⁰

For all of these reasons, the Supreme Court was simply wrong in its dictum in *Jefferson Standard* to the effect that activities must be carried out loyally to retain protection. The disloyalty test is so antithetical to the structure of the national labor policy that the test cannot be modified, limited, or otherwise “fixed” in a way that conforms to the Act.

B. *The Flawed Authority for the Disloyalty Exception*

Jefferson Standard’s disloyalty test has been and will continue to be problematic largely because it rests on overstated, if not misstated, historical and legal precedent.⁴²¹ The Court’s rationale was founded on the dubious prem-

⁴¹⁵ 94 N.L.R.B. 1507, 1524 (1951) (Murdock, Member, dissenting), *rev’d sub nom.* Local Union No. 1229, *IBEW v. NLRB* (Jefferson Standard), 202 F.2d 186 (D.C. Cir. 1952), *set aside*, 346 U.S. 464 (1953).

⁴¹⁶ *See supra* part II.B.2.

⁴¹⁷ *See generally* *Whitney v. California*, 274 U.S. 357, 373-75 (1927) (Brandeis, J., concurring) (declaring that the right of free speech is fundamental and essential to liberty), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

⁴¹⁸ *See, e.g.*, *Midland Nat’l Life Ins. Co.*, 263 N.L.R.B. 127, 130-31 (1982) (ruling that the Board will not probe campaign propaganda because it would result in extensive analysis of speech and increased litigation); *cf.* *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2545 (1992) (regulating speech based on hostility or favoritism to its content is unconstitutional).

⁴¹⁹ *See Midland Nat’l*, 263 N.L.R.B. at 132.

⁴²⁰ *See id.* at 131.

⁴²¹ *NLRB v. Local Union No. 1229, IBEW* (Jefferson Standard), 346 U.S. 464, 479 (1953) (Frankfurter, J., dissenting) (arguing that nothing in the legislative history of the Act supports the notion that disloyalty is permissible grounds for dismissal); *Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 216 n.5 (9th Cir. 1989) (stating that disloyalty and “indefensible” conduct standards are vague and inappropriate, citing Justice Frankfurter’s dissent).

ises that (1) “[t]here is no more elemental cause for discharge of an employee than disloyalty,”⁴²² and that (2) the 1947 Taft-Hartley amendments seek to strengthen the “cooperation, continuity of service and cordial contractual relation . . . that is born of loyalty to the[] common enterprise.”⁴²³ The Court listed the policy section of the Taft-Hartley Act for these premises,⁴²⁴ but neither it nor the NLRA mentions loyalty, much less cooperation, continuity of service, or cordiality.

From these premises, the Court next reasoned that section 7, was passed to safeguard collective bargaining and other mutual aid or protection, but that the section “did not weaken the underlying contractual bonds and loyalties of employer and employee.”⁴²⁵ For this proposition, the Court cited a conference report concerning the 1947 amendments,⁴²⁶ but the report does not support the proposition. The 1947 deliberations included debate about amending section 7 to exempt three specific types of activities from protection: unfair labor practices, unlawful activities, and contract breaches.⁴²⁷ Congress determined that the Board sometimes had improperly interpreted section 7 as protecting certain types of undesirable conduct, especially these three.⁴²⁸ The cited report, as well as other parts of the 1947 deliberations, consistently included similar types of extreme conduct as examples of the “unlawful or other improper” conduct that the Act is not intended to protect.⁴²⁹ Ultimately, Congress rejected the proposed amendment as unnecessary for several reasons.⁴³⁰ However, the examples of unlawful and

⁴²² 346 U.S. at 472 (footnote omitted).

⁴²³ *Id.*

⁴²⁴ *Id.* at 472-73 n.9 (quoting Labor Management Relations Act, § 1(b), 29 U.S.C. § 141(b) (1988)). The policy section of the Taft-Hartley Act states the purposes of promoting the flow of commerce, providing orderly procedures to protect the rights of employers, employees, and unions, and proscribing acts that jeopardize public health, safety, or interests. Labor Management Relations (Taft-Hartley) Act, § 1(b), 29 U.S.C. § 141(b) (1988).

⁴²⁵ 346 U.S. at 475.

⁴²⁶ H.R. CONF. REP. NO. 510, *supra* note 110, at 38-39, *reprinted in* 1 LEGISLATIVE HISTORY OF LMRA, *supra* note 104, at 542-43.

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ *Id.* (giving as examples, and citing cases involving: sit-down strikes involving violence, mass picketing, criminal activity, mutiny, acts to compel employers to violate wage stabilization and labor laws, strikes in violation of labor agreements, and acts compelling other workers to violate labor laws); H.R. REP. NO. 245, *supra* note 104, at 27-28, *reprinted in* 1 LEGISLATIVE HISTORY OF LMRA, *supra* note 104, at 318-19 (citing sit-down strikes, mutiny, criminal activity, mass picketing, illegal boycotts, violence, violations of collective bargaining agreements, and acts to compel employers to violate wage stabilization and labor laws); 93 CONG. REC. 6600 (1947) (statement of Sen. Taft), *reprinted in* 2 LEGISLATIVE HISTORY OF LMRA, *supra* note 104, at 1538-39 (citing sit-down strikes and mutiny).

⁴³⁰ Congress gave three reasons for rejecting the amendment: (1) the amendment

undesirable conduct that Congress discussed illustrate its concern with extreme conduct, especially illegal conduct and conduct it expressly made unlawful by other 1947 amendments.⁴³¹ In short, the conference report indicates that Congress believed the Board had gone too far in protecting certain conduct; it does not indicate that loyalty was a driving force behind the Taft-Hartley amendments, or that there is or ever has been a disloyalty exception to section 7, especially a disloyalty exception that has any meaning independent of illegal conduct.⁴³²

As a second source for support of its disloyalty test, the *Jefferson Standard* Court relied on an allegedly large body of case law that the Court said emphasizes the importance of discipline to prevent insubordination, disobedience, and disloyalty.⁴³³ The Court cited fourteen cases⁴³⁴ for the foregoing proposition and nine cases⁴³⁵ for the proposition that employees might lose protection because of the "means" employed. The cited cases do support the proposition that workers are unprotected in instances of insubordination and interruption of production,⁴³⁶ or for violence and other illegality,⁴³⁷ or for

could be misinterpreted to mean that "unlawful" or "improper" activities other than the three mentioned in the amendment were protected; (2) the Board had been following Supreme Court precedent in recent decisions, such that an amendment codifying the principles in these decisions was no longer necessary; and (3) Congress amended the policy declaration of the Act instead, demonstrating its intent that improper and undesirable labor activities will not be protected. H.R. CONF. REP. NO. 510, *supra* note 110, at 38-39, *reprinted in* 1 LEGISLATIVE HISTORY OF LMRA, *supra* note 104, at 543; *see also* H.R. REP. NO. 245, *supra* note 104, at 27, *reprinted in* 1 LEGISLATIVE HISTORY OF LMRA, *supra* note 104, at 318. (stating that the amendment would codify current law); 93 CONG. REC. 6600 (1947) (statement of Sen. Taft), *reprinted in* 1 LEGISLATIVE HISTORY OF LMRA, *supra* note 104, at 1539 (discussing Board's following precedent, amendment as unnecessary, and amended policy statement). The amended policy statement adds that the purpose of the law is to eliminate undesirable union practices such as "strikes and other forms of industrial unrest . . . [and] concerted activities which impair the interest of the public in the free flow of [interstate] commerce." NLRA, § 1, 29 U.S.C. § 151 (1988).

⁴³¹ For example, union coercion of employees, certain secondary boycotts, and attempts to force employers to assign work in union jurisdictional disputes were declared to be union unfair labor practices.

⁴³² The report refers to unlawful "or improper" conduct but only gives examples of unlawful conduct, such as breaching labor contracts, sit-down strikes with violence, and strikes to compel employers to violate the Act or rulings of the Board. H.R. CONF. REP. NO. 510, *supra* note 110, at 38-39, *reprinted in* 1 LEGISLATIVE HISTORY OF LMRA, *supra* note 104, at 542-43. All of the examples of objectionable conduct mentioned in the report are unprotected today under Board law, irrespective of notions of disloyalty.

⁴³³ *NLRB v. Local Union No. 1229, IBEW (Jefferson Standard)*, 346 U.S. 464, 474-75 (1953).

⁴³⁴ *Id.* at 475.

⁴³⁵ *Id.* at 478 n.13.

⁴³⁶ *See, e.g., International Union, UAW, Local 232 v. Wisconsin Employment Relations Bd. (Briggs & Stratton)*, 336 U.S. 245 (1949) (disruption of production by intermit-

reasons unrelated to collective action, such as incompetence.⁴³⁸ However, *not one* case turned on notions of loyalty as a distinct exception to protection.

Of the twenty-three decisions cited, only five mentioned loyalty or disloyalty, and only three are arguably relevant.⁴³⁹ In the first of these three, in which nonstriking salesmen had refused to follow instructions, the United States Court of Appeals for the Seventh Circuit used the term disloyalty in passing in the narrow, ordinary context of not doing one's duties while at work (insubordination).⁴⁴⁰ In the second, involving a petition for rehearing filed by the Board, the United States Court of Appeals for the Fourth Circuit decided unanimously that it unwisely had used the disloyalty term in its first decision. Agreeing with the Agency, the court explained that the imposition of a disloyalty test in section 7 cases would be inappropriate, overbroad, and "subject to misinterpretation."⁴⁴¹ In the third case, the United States Court

tent strikes), *overruled on other grounds*, *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976); *Maryland Drydock Co. v. NLRB*, 183 F.2d 538 (4th Cir. 1950) (preservation of plant discipline); *Home Beneficial Life Ins. Co. v. NLRB*, 159 F.2d 280 (4th Cir.) (insubordination in refusing to obey rules of management and partial striking), *cert. denied*, 322 U.S. 758 (1947).

⁴³⁷ See, e.g., *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 81 (1953) (refusing to follow orders to cross another union's picket line when contract had no-strike clause and refusal breached contract's obligatory grievance/dispute resolution procedure held illegal); *Hotel & Restaurant Employees' Int'l Alliance, Local No. 122 v. Wisconsin Employment Relations Bd.*, 315 U.S. 437 (1942) (committing numerous assaults and blocking access to employer's premises by force and arms held not protected under Fourteenth Amendment Due Process Clause).

⁴³⁸ See, e.g., *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937) ("The Act . . . does not require that the petitioner retain in its employ an incompetent editor."); *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749, 753 (4th Cir. 1949) (holding that employee discharged for circulating a petition against a foreman was on a personal vendetta, not involved in a concerted activity for mutual aid and protection).

⁴³⁹ The other two of the five cases used the terms in other contexts. *Associated Press*, 301 U.S. at 111-12 (Argument for Petitioner) (arguing unsuccessfully that the NLRA and the ban on company unions deprives the employer of friendship, mutual loyalty, and cooperation with employees); *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486, 498 (8th Cir. 1946) (concluding that the employer did not violate the Act by verbally defending itself "before its employees whose loyalty it had a right to ask" when attacked in union propaganda).

⁴⁴⁰ *United Biscuit Co. of Am. v. NLRB*, 128 F.2d 771 (7th Cir. 1942), *enforcing as modified* 38 N.L.R.B. 778 (1942). The employer claimed that the salesmen refused to sell to customers and refused to accompany delivery trucks in sympathy with other striking employees. In passing, the court quoted the employer's argument that the salesmen "failed and refused to perform their duties as salesmen—in other words, they were disloyal." *Id.* at 776. The Board had found that the salesmen did perform their job duties; the Court of Appeals disagreed, but on other grounds enforced the Board's order that they be reinstated. *Id.*

⁴⁴¹ *Hazel-Atlas Glass Co. v. NLRB*, 127 F.2d 118, 118 (4th Cir.), *denying reh'g to* 127

of Appeals for the Sixth Circuit mentioned loyalty only in passing,⁴⁴² but the Board's decision had echoed the Fourth Circuit's warning that vague concepts of disloyalty do *not* supersede section 7 rights.⁴⁴³ Thus, as a matter of case law under the NLRA, the *Jefferson Standard* Court's creation of the disloyalty exception was a novelty, contrary to lower court and agency rulings.

Perhaps the *Jefferson Standard* Court was influenced by the early master/servant doctrine under the common law of agency when it waxed eloquently about loyalty. Under that doctrine, a servant owed to the master a general duty not to act or speak disloyally in matters connected with employment.⁴⁴⁴ The *Jefferson Standard* Court did not mention the common law duty of loy-

F.2d 109 (4th Cir. 1942) (per curiam). At issue was the discharge of a foreman who refused instructions to operate certain machines during a strike with which he sympathized. Under the law at the time, an employer violated the Act if it discharged a supervisor in order to interfere with § 7 rights of employees. The court initially held that the foreman's "disloyalty in refusing to help his employer in an emergency in contrast with the willing assistance of his brother foremen of equal standing, was an all sufficient reason for his discharge." *Hazel-Atlas Glass Co. v. NLRB*, 127 F.2d 109, 118 (4th Cir. 1942). In denying the rehearing, the court withdrew the disloyalty analysis and clarified that the individual was properly discharged because he had supported an illegal strike, not because of notions of disloyalty. *Hazel-Atlas Glass Co. v. NLRB*, 127 F.2d 118, 118 (4th Cir. 1942).

⁴⁴² *Hoover Co. v. NLRB*, 191 F.2d 380, 389 (6th Cir. 1951) (referring in dictum to *United Biscuit*, 128 F.2d 771, as a case holding that "disloyalty in the performance of duties was a cause for employees' discharge"), *enforcing in part and denying enforcement in part on other grounds* 90 N.L.R.B. 1614 (1950).

⁴⁴³ *Hoover Co.*, 90 N.L.R.B. 1614, 1620-22 (1950), *enforced in part and enforcement denied in part on other grounds*, 191 F.2d 380 (6th Cir. 1951). At issue was whether employees could be fired for participating in a consumer boycott, which urged the public not to buy the employer's products. The employer argued that for nonstriking employees to boycott is unjust and disloyal. *Id.* at 1621. The Board responded:

This may well be true, as it is true, to be sure, in certain other individual instances where employees strike, picket, or engage in other forms of concerted activity. But absent any showing that the means employed were other than peaceful or that the objectives sought were as have been held for reasons of clear public policy to be improper, we find no authority to regard the concerted activity involved herein as unprotected.

Id. at 1621-22. The court refused enforcement on the grounds that the boycott was for an unlawful purpose, and that the employees cooperated with competitor-employees.

⁴⁴⁴ See generally *RESTATEMENT (SECOND) OF AGENCY*, § 387 (1958); *SELL*, *supra* note 159, at 18, 131-38. Under the common law the servant also owed the master specific duties, such as to account for profits, follow reasonable instructions, and exercise due care and skill. The "servant" was one who was "employed by another, called the master, who, with respect to his physical conduct in the performance of the service to the other, is subject to the other's control or right of control." *SELL*, *supra* note 159, at 18. Disloyalty by an employee (as agent) towards an employer (as principal) included competing with the principal and using or disclosing confidential information acquired during employment. *RESTATEMENT (SECOND) OF AGENCY*, §§ 393, 395 (1958); see also

alty, but if this was the doctrinal source for its holding, it is not a legitimate source in which to ground a section 7 exception.⁴⁴⁵ The common law duty was not absolute: it contained broad exceptions, such as allowing servants to act in their own self-interest or in the interests of others.⁴⁴⁶ Moreover, any

Estlund, *supra* note 15, at 921 (discussing the relationship between § 7 and the public employee speech doctrine under the First Amendment).

⁴⁴⁵ The Court would have lacked labor law precedent for borrowing this common law doctrine. It is true that some early § 7 insubordination cases refer to “obeying” the employer, a notion reminiscent of the servant’s common law obligation to exercise care and skill and to obey reasonable commands. *See, e.g.*, Southern S.S. Co., 23 N.L.R.B. 26, 38-40 (1940), *enforced*, 120 F.2d 505 (3d Cir. 1941), *rev’d*, 316 U.S. 31 (1942). *See generally* HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* § 67, at 125-27 (2d ed. 1990); SELL, *supra* note 159, at 116-18 (discussing duties of care, skill, conduct, and obedience). However, these cases did not impose any required subjective frame of mind or type of sentiments the employee must possess while obeying orders. Language in several of the early § 7 cases to the effect that employees must “faithfully” serve the employer’s interests is reminiscent of master/servant obligations. *See, e.g.*, NLRB v. Montgomery Ward & Co., 157 F.2d 486 (8th Cir. 1946) (failing to “serve faithfully” by refusing to process clerical orders for several days without informing management). However, these cases involved employees who refused to perform their jobs. *Id.* at 496; Elk Lumber Co., 91 N.L.R.B. 333, 338 (1950) (collective slowdown); *see also* Cox, *supra* note 83, at 330-37 (stating that common law agency doctrine does not furnish a satisfactory test for protected “concerted activities” because the Act modified the doctrine).

⁴⁴⁶ The agent was “not . . . necessarily prevented from acting in good faith outside his employment in a manner which injuriously affects his principal’s business.” RESTATEMENT (SECOND) OF AGENCY, § 387 cmt. b (1958). The servant was even allowed to serve several masters, the critical issue generally being whether one dutifully carried out one’s duties as the servant. RESTATEMENT (SECOND) OF AGENCY, § 226 (service to one must not involve abandonment of service to the other). A similar maxim was that the agent “may, in all cases, act to protect his interests or those of others if they are equal to or greater than the interests of his principal.” SELL, *supra* note 159, at 119-20; *see also* REUSCHLEIN & GREGORY, *supra* note 445, § 68, at 127-28 (describing circumstances under which an agent may serve two masters). Section 7’s protection for collective activity for mutual aid or protection echoes this common law rule. *See* Willmar Elec. Serv., Inc. v. NLRB, 968 F.2d 1327, 1329 (D.C. Cir. 1992) (holding that just as common law allowed servant to serve two masters when service to one does not involve abandonment of service to the other, union-organizer job applicant may not be excluded under NLRA on grounds he intends to retain his title and responsibilities), *cert. denied*, 113 S. Ct. 1252 (1993). *But cf.* H.B. Zachry Co. v. NLRB, 886 F.2d 70, 72 (4th Cir. 1989) (holding that full-time, paid union organizer is not applicant for bona fide “employee” position when, *inter alia*, he would be subject to union’s directive while simultaneously working for employer, and in elections his vote would essentially be paid for by his union salary). *But see id.* at 73 (court’s holding does not turn on notion that employees owe employer “some type of transcendent loyalty”).

Moreover, there was an exception to the common law duty when the employer retained employees with knowledge of their adverse interests. SELL, *supra* note 159, at 120-22. Since the passage of the Act, whenever an employer hires an employee, she must be said

common law duty was breached only if the servant took actions “unfairly” adverse to the employer’s interests, with fairness turning on the particular relationship between master and servant in light of community standards.⁴⁴⁷ It would be anomalous to measure today’s fairness against yesterday’s standards for workplace relationships, because in section 7 Congress specifically set new standards for governing that relationship. Today’s standards include the Act’s curtailment of many “management rights” that hampered collective employee activity, such as the “right” to manage plant property,⁴⁴⁸ hire or fire employees,⁴⁴⁹ close the business,⁴⁵⁰ make changes in business operations,⁴⁵¹ and keep employment information confidential.⁴⁵² In contrast, with regard to contemporary standards of expression, section 8(c) is solici-

to have constructive notice that the latter will have a statutory right to act collectively to advance his own interests in wages, hours, and working conditions, to management’s financial detriment.

Many of the common law duty principles are not important to § 7 disloyalty analysis. Many cases involved breach of fiduciary duties, but those who have fiduciary duties (corporate managers, officers, etc.) typically are excluded today from the bargaining unit. The common law cases primarily involved the failure to follow company policies or to perform job duties, which are removed from § 7 under other exceptions. *See supra* part III.A.2. Common law obligations not to engage in dealings detrimental to the employer are not typically involved in § 7 conduct, and, when relevant, are generally exempted from § 7 by exceptions such as illegality (as in diversion of corporate assets) or unlawful contract breach (as in violating a non-competition agreement).

⁴⁴⁷ *SELL*, *supra* note 159, at 120-22.

⁴⁴⁸ Section 7 makes it unlawful to ban certain discussion of union matters or distribution of union literature. *See, e.g.*, *Eastex, Inc. v. NLRB*, 437 U.S. 556, 570 (1978); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803-04 & n.10 (1945); *McDonnell Douglas Corp. v. NLRB*, 472 F.2d 539, 547 (8th Cir. 1973). It may also be unlawful to take steps to discern employees’ feelings about management or if they are predisposed towards unionizing. *See NLRB v. Aero Corp.*, 581 F.2d 511, 513 (5th Cir. 1978).

⁴⁴⁹ NLRA, § 8(a)(3), 29 U.S.C. § 158(a)(3) (1988) (forbidding discrimination to encourage or discourage union membership).

⁴⁵⁰ *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 274-75 (1965) (holding certain plant closures unlawful); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 209 (1964) (holding certain subcontracting unlawful); *Dubuque Packing Co.*, 303 N.L.R.B. No. 66, 137 L.R.R.M. (BNA) 1185 (June 14, 1991) (holding certain work relocation unlawful).

⁴⁵¹ NLRA, § 8(a)(5), 29 U.S.C. § 158(a)(5) (1988); NLRA, § 8(b)(3), 29 U.S.C. § 158(b)(3) (1988); NLRA, § 8(d), 29 U.S.C. § 158(d) (1988). The duty to bargain restricts making changes in matters related to wages, hours, or working conditions that are mandatory subjects of bargaining without first giving the union an opportunity to bargain. When a labor agreement is in effect, the duty to bargain restricts making changes in mandatory terms embodied in the agreement, absent consent of the union.

⁴⁵² The duty to bargain requires, upon request, disclosure of certain information relevant and necessary to bargain, negotiate, and enforce contracts effectively. *See, e.g.*, *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956).

tous of strong and emotional speech, no matter how critical, short of actual promises and threats.⁴⁵³ As the United States Court of Appeals for the Ninth Circuit has recognized, through the years there have been "changing norms regarding what constitutes loyal worker behavior."⁴⁵⁴ The evolution of Board decisions, especially since the early 1980s, reflects a policy of providing for more robust debate in labor/management matters, not less.⁴⁵⁵

Common law agency obligations only required the agent to act for the benefit of the principal in matters within the scope of the agency relationship.⁴⁵⁶ Employers do not hire employees to carry out collective activity,⁴⁵⁷ and, more importantly, the labor laws have expressly placed collective activity *outside* the scope of the master/servant relationship.⁴⁵⁸ If the common law duty has ever applied, then in the context of lawful collective activity for mutual aid or protection that adversely affects employers,⁴⁵⁹ it has been modified by the passage of the Act, which expressly protects such activity. The common law also imposed obligations on *employers*, and these have been eroded as well.⁴⁶⁰

⁴⁵³ 29 U.S.C. § 158(c) (1988) ("The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.").

⁴⁵⁴ *Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 216 n.6 (9th Cir. 1989).

⁴⁵⁵ *See National Micronetics, Inc.*, 277 N.L.R.B. 993, 994 (1985) (overruling precedent concerning dissemination of partial Board decisions); *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127, 131-33 (1982) (overruling precedent concerning campaign propaganda and misstatements).

⁴⁵⁶ *SELL*, *supra* note 159, at 119-20.

⁴⁵⁷ *See id.* at 14-15, 119-20.

⁴⁵⁸ This fact is evidenced by such clauses as the ban against company unions, NLRA, § 8(a)(2), 29 U.S.C. § 158(a)(2) (1988), and against employer contributions to employee representatives, Labor Management Relations (Taft-Hartley) Act, § 302, 29 U.S.C. § 186 (1988); *see also* NLRA, § 14(a), 29 U.S.C. § 164 (1988) (exempting employees from applying laws related to collective bargaining to bargaining units that include supervisors); cases cited *supra* note 448.

⁴⁵⁹ *See supra* notes 448-52 and accompanying text.

⁴⁶⁰ Under the common law of agency, the *master* had obligations to the servant such as duties to provide tools, inspect tools for visible defects, maintain the premises, exercise a "high degree of care" to maintain a safe environment, and a duty of noninterference with the employee's right to work, which have been modified. *See REUSCHLEIN & GREGORY*, *supra* note 445, § 55. The common law duty to furnish a safe work place has been circumscribed by the Occupational Health and Safety Act of 1970, §§ 2-33, 29 U.S.C. §§ 651-678 (1988 & Supp. II 1990), which imposes a general duty to furnish a safe workplace but sets federal standards, limits remedies, imposes caps on recovery, sets statutes of limitations, and imposes monitoring and reporting requirements. The cause of action that principals used to have against third parties for harm to the servant has nearly disappeared. *REUSCHLEIN & GREGORY*, *supra* note 445, § 56 ("[A]n ancient cause of action [that] has outlived its usefulness in modern society."). Today, the principal does not breach his duties by failing to furnish tools for the job. At common law the employer

C. *Practical and Legal Impacts of Abandoning the Disloyalty Test*

1. The Exception Is Not Needed and Its Abandonment Will Not Have Adverse Repercussions

As was shown above,⁴⁶¹ many of the disloyalty cases could have been decided based on other established exceptions to section 7, such as insubordination, interruption of production, illegality, and disclosure of confidences. These exceptions have the advantage of being more clearly defined and more objectively ascertainable. The Board may apply other exceptions as well. Presumably, it also may use the early “totality of the circumstances” test for loss of protection,⁴⁶² provided that it clearly states what circumstances should be considered.⁴⁶³ Thus, abandoning the unworkable and unnecessary disloyalty test will not have adverse ramifications. On the contrary, its abandonment will increase protection for some individuals engaging in collective activity whose conduct does not fall within another exception.⁴⁶⁴ This result is consistent with the Act.⁴⁶⁵

2. The Board and Courts Are Free to Abandon the Test

The Board has the power to reject the *Jefferson Standard* disloyalty test, and such a rejection would not amount to an impermissible attempt to “overrule” a higher Court. I am not suggesting that the Board overturn the

had an obligation not to interfere intentionally and unjustifiably with the servant’s right to work, *id.* § 55; SELL, *supra* note 159, at 141-42, but this notion could not be used as a rationale for denying employers the right to lockout employees, a tactic allowed under the Act even when the employer does so “unjustifiably.” *See also supra* note 403.

The point is not that common law agency obligations are useless or irrelevant. When the common law doctrine still squares with societal notions of the workplace relationship, such as prohibitions against absconding with profits or revealing confidences, it is useful. *See, e.g.*, NLRA, § 2(13), 29 U.S.C. § 152(13) (1988) (concerning when one individual will be deemed agent of another).

⁴⁶¹ *See supra* part III.A.2.

⁴⁶² *See supra* notes 22-24 and accompanying text.

⁴⁶³ Some might contend that a “totality of the circumstances” test will simply reclothe the former disloyalty analysis, with no impact on the cases’ outcomes. Although any test has the potential for misuse, the Board is restrained to some extent in that it must always articulate an outcome that is consistent with the Act. The administrative law requirement that agencies specify which “means” or which “circumstances” serve as a basis for the Board’s conclusion should serve as a check on potential misuse and enable meaningful judicial review.

⁴⁶⁴ For example, calling a supervisor “Castro” in the context of an argument about treatment of employees and the benefits of unions might not interrupt production or rise to the level of insubordination, particularly in the 1990s. *Cf. Boaz Spinning Co. v. NLRB*, 395 F.2d 512, 516 (5th Cir. 1968); *see also* discussion *supra* notes 228-32 and accompanying text. Each situation still will need to be examined on the facts to discern whether it is collective and for a § 7 purpose, and whether it loses its protection under one of the legitimate exceptions.

⁴⁶⁵ *See* discussion *supra* notes 207-19 and accompanying text.

Court: the Board and the Court in *Jefferson Standard* were in agreement; i.e. the employer did not commit an unfair labor practice by discharging the technicians, because section 7 did not protect their conduct. The *Jefferson Standard* Court did not hold that all employees must thereafter pass a loyalty litmus test, separate and distinct from product disparagement considerations when exercising section 7 rights; nor did it hold that the Act only provides protection for employees who could successfully pass such a loyalty screening. The Board is free to abandon the disloyalty rhetoric without disturbing the holdings of the Board and Court in *Jefferson Standard*. I advocate rejecting the disloyalty rhetoric, which merely embellished the holding that the product disparagement lost protection, and rejecting the reasoning in some subsequent decisions that have treated disloyalty as if it were an exception to section 7, distinct from product disparagement or other exceptions.

Moreover, the *Jefferson Standard* Court did not declare that a disloyalty test is the *only* reasonable interpretation of the Act, one that can never be abandoned.⁴⁶⁶ The Court merely *agreed* with the NLRB's ruling and added a new discussion of disloyalty as a supporting rationale for the ruling that

⁴⁶⁶ The Court's disloyalty language in *Jefferson Standard* is, thus, distinguished from instances when the Court has made a prior, express statutory interpretation and has held it to be the "only" reasonable construction of legislation, such as in *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 847-48 (1992). In *Lechmere*, the Court rejected a Board interpretation on the grounds that it was inconsistent with a prior, express judicial determination of the statute's clear meaning. *Id.* at 849; see *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (establishing deference to agency policy making unless contrary to "only" reasonable interpretation of controlling legislation); see also *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) (ruling that prior ICC interpretation of "filed rate doctrine" was the only reasonable statutory construction, based on the clear, fixed statutory terms).

The posture of *Jefferson Standard* is distinguishable from that in *Lechmere* on four grounds. First, *Lechmere* involved a distinction found in the language of the statute. *Lechmere*, 112 S. Ct. at 845. Disloyalty involves statutory silence. The matters of inferring a loyalty requirement from § 7 and the scope of any such unwritten exceptions are *Chevron* Step two issues to which judicial deference is required, not *Chevron* Step one issues. Second, the interpretation invalidated in *Lechmere* contravened a prior Supreme Court interpretation. *Id.* at 847-49. Disloyalty was not a distinct § 7 exception and was judicial dictum. Third, the Board interpretation the Court rejected in *Lechmere* was one the Court said it already had rejected in an earlier case. *Id.* at 848-49. *Jefferson Standard* did not reject an agency interpretation; it upheld one. Fourth, the Court's role in *Lechmere* was distinct from its role in *Jefferson Standard*, and this distinction makes a difference in administrative law. See Wallace Rudolph, *Judicial Deference to Administrative Interpretation: When Is it Proper?*, 2 ADMIN. L.J. 291 (1988) (explaining that the court's role in the particular context determines whether it should apply the "doctrine of deference" or the "doctrine of interpretation"). Specifically, *Lechmere* involved the adjudication of private property rights, matters traditionally within the expertise of courts of general jurisdiction. *Lechmere*, 112 S. Ct. at 845. *Jefferson Standard* involved unfair labor practices, the Act's nuances, and labor policy, all within the Agency's expertise.

the disparagement was unprotected. This rationale does not amount to a pronouncement by the Court that the Act *mandates* the application of a disloyalty test in product disparagement cases or any other cases. Even if the decision were interpreted as supplying disloyalty as an additional, distinct basis for which activities could lose protection, the Court did not say that a different opinion about disloyalty as a distinct exception would not be a rational construction of the Act.⁴⁶⁷ Thus, the disloyalty language is not perpetually binding.⁴⁶⁸

Next, rejection of the disloyalty test would not violate principles of stare decisis.⁴⁶⁹ The stare decisis doctrine provides that when established precedent has proved workable and sound, generally it should be followed in the interest of predictability and judicial economy, absent compelling reasons. The doctrine is not applicable, however, when a rule is incorrect, works an injustice, or does not promote predictability, stability, and uniformity.⁴⁷⁰ The disloyalty test has proved to be, on the practical level, unworkable, unwieldy, and unpredictable. As a legal doctrine, it has been unsound, conflicting with both common sense and the Act's underlying policies. As the

⁴⁶⁷ Even if the *Jefferson Standard* Court had ruled that the Board's holding (that the product disparagement was unprotected and the employer not in violation of the law) were the "only" rational interpretation of the Act, this still would not have amounted to a judicial declaration that there exists a disloyalty exception, distinct from disparagement, much less that the Act mandates one. This Article shows that such a distinct exception is not even a "reasonable" interpretation of the Act. *Cf.* Prill v. NLRB, 835 F.2d 1481, 1484 (D.C. Cir. 1987) (upholding a Board interpretation as a "reasonable" construction of the Act, while emphasizing that it was "by no means" the only reasonable interpretation), *cert. denied sub nom.* Meyers Indus. v. NLRB, 487 U.S. 1205 (1988).

That a disloyalty test is not the "only" reasonable construction is also evidenced by the number of Board members and judges who have questioned the test or rejected it completely, the latter category including the three dissenting Justices and dissenting Member Murdock in *Jefferson Standard* itself, and a unanimous United States Court of Appeals for the Fourth Circuit. *See supra* notes 52-53, 441 and accompanying text.

⁴⁶⁸ The Court also gave a rationale based on its reading of § 10(c). *See* discussion *supra* notes 121-23 and accompanying text (criticizing the Court's injection of a § 10(c) discussion into the analysis). Although the Court said that the disloyalty provided "cause" in its § 10(c) analysis, it is clear that it was actually the disparagement of the product quality in this particular manner, and not the employees' "disloyalty," that provided the § 10(c) "cause." *See also* discussion *supra* notes 123-28 and accompanying text (explaining that the Court found that the "means" used by the employees were sufficiently "disloyal" to constitute "cause" for discharge).

⁴⁶⁹ BLACK, *supra* note 88, at 616-18 (judicial construction of a statute should be followed as precedent unless to do so would work an injustice).

⁴⁷⁰ *Id.*; Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808 (1992) (explaining that the application of stare decisis turns on "prudential and pragmatic" considerations of the rule's workability, the parties' expectations or reliance on the rule, and whether the rule is obsolete or its premises have changed); *see also* BLACK, *supra* note 88, at 619 (stating that judicial construction of a statute should be followed as precedent unless to do so would work an injustice).

agency entrusted with the task of interpreting and applying the policies of labor law to the statute,⁴⁷¹ the Board has the authority to abandon the test. It has the obligation to do so because the test conflicts with the statute. For the same reasons, if the courts have occasion to revisit the issue, they should reject the disloyalty test *sua sponte*, just as the Court created it.⁴⁷²

In fact, there have been steps towards abandoning the disloyalty exception. As early as three years after *Jefferson Standard*, some Board members questioned the usefulness of the new test, saying with skepticism, "the degree of 'detrimental disloyalty' . . . here, *if it is susceptible of measurement at all*, is certainly no greater than that involved in the product boycott situations which have been held protected by Section 7."⁴⁷³ Since then, some decision makers have moved away from the "disloyalty" test for many of the reasons discussed in this Article.⁴⁷⁴ In 1989, the United States Court of Appeals for the Ninth Circuit expressed clear reservations about the exception: "The logic of the 'disloyalty' test has been criticized, and its reach remains unclear."⁴⁷⁵ Yet, as of this writing the Board has not made explicit

⁴⁷¹ The Court has explicitly recognized that it is the Board's responsibility to "adapt the Act to changing patterns of industrial life," *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975), and to define the parameters of § 7 exceptions in particular, *see, e.g.*, *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567-68 (1978) (upholding a Board finding based on its construction of the "mutual aid or protection" clause § 7); *Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 215 (9th Cir. 1989) (upholding a Board finding, and reasoning that the Board has the task of delineating the boundaries of § 7).

⁴⁷² Presumably, the courts of appeals may continue to clarify and refine the ambiguous disloyalty and disparagement terms, or even to avoid using the disloyalty rubric entirely; but given the *Chevron* mandate of deference, the appellate courts are probably the least suited to overhaul this problematic area. Congress may, of course, revisit the question. Until then, in keeping with the spirit of conferring discretionary policy to the agency with day-to-day expertise in the subject, the Board is in the best position to correct the problem.

⁴⁷³ *Patterson-Sargent Co.*, 115 N.L.R.B. 1627, 1634 (1956) (Murdock & Peterson, Members, dissenting) (footnotes omitted) (emphasis added).

⁴⁷⁴ *See, e.g.*, *Sierra Publishing Co.*, 889 F.2d at 216 (questioning disloyalty's basis and parameters); *GHR Energy Corp.*, 294 N.L.R.B. 1011, 1012 (1989) (finding a disloyalty policy to unacceptably infringe on § 7 rights); *Sierra Publishing Co.*, 291 N.L.R.B. 540, 550 (1988) (A.L.J decision) (rejecting the argument that appeals to third parties are unacceptably disloyal), *enforced*, 889 F.2d 210 (9th Cir. 1989). Even in recent decisions purporting to endorse the disloyalty rubric, the courts actually contemplated other exceptions implicitly, such as failure to carry out one's job. *See Willmar Elec. Serv.*, 968 F.2d 1327, 1330-31 (D.C. Cir. 1992) (finding that an employee is not disloyal to the company for also having an employment relation to a union, as long as service to the latter does not involve abandonment of the former), *cert. denied*, 113 S. Ct. 1252 (1993); *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 73 (4th Cir. 1989) (holding that although employee may not simultaneously work under the *direction* of two employers during the same hours, an employee does not owe the employer "some type of transcendent loyalty" (emphasis added)).

⁴⁷⁵ *Sierra Publishing Co.*, 889 F.2d at 216 (footnotes omitted).

what those criticisms suggest and what the Board's *GHR Energy* decision⁴⁷⁶ implied: that the disloyalty test is too vague to be understood by employees, employers, and decision writers, and that it stifles or appears to outlaw much activity that the Act was meant to protect.

CONCLUSION

As one who takes seriously the commitments individuals make to their families, communities, institutions, and faiths, I am not advocating disloyalty—by employees or anyone else—in any setting. And as one who is committed to peaceful resolution of disputes, whether in the workplace or in the community at large,⁴⁷⁷ I applaud and support today's efforts of labor and management to collaborate in a spirit of cooperation for the good of their common enterprise. In saying that the Act is not premised on loyalty, I am not proposing that employees be given *carte blanche* to disrupt the workplace, refuse to do their jobs, and engage in unchecked actions damaging employers. There are numerous other constraints on such undesirable and unlawful activity, both written into the law itself and found in the more objective exceptions the Board and courts have read into section 7. The issue is no more about my individual opinions concerning loyalty than it is about the personal, individual feelings of Board members or judges, who have been given no standards on which to apply the exception other than their own equally subjective personal philosophies, emotions, and ethics.

Should Congress wish to mandate a Model Uniform Termination Act, should Congress wish to turn section 7 into a wrongful discharge statute, or should it wish in some other fashion to rewrite our national labor policies to require levels of mutual cooperation and care, then in that context we can consider the extent to which employees *and employers* must operate within loyal and altruistic constraints. It may well be time to do so, but that is not the model of our current national labor policy.

Congress has given employees and employers the tools of economic warfare to further their respective self interests, not to further the interests of the other. None of the most drastic of these tools—including lockouts, strikes, and consumer boycotts—are desirable in and of themselves.⁴⁷⁸ However, Congress believed them necessary to promote individual and collective liberties under the structure of our delicately balanced national labor policies. One of the vital tools that the Act presupposes is an allowance for robust

⁴⁷⁶ *GHR Energy Corp.*, 294 N.L.R.B. 1011 (1989); see *supra* notes 380-86 and accompanying text.

⁴⁷⁷ I am a community mediator through the Dispute Resolution Centers of King County and Thurston County, Washington.

⁴⁷⁸ No one "likes" the use of such economic weapons; the disagreement is not over whether their use is a positive event, but over whether, and the conditions under which, they must be allowed to occur. In the case of these tactics, the Act has answered the question by allowing their use.

debate in light of the First Amendment and an ability of employers and employees to use rhetoric and propaganda to further their own interests.

The disloyalty test is vague, ambiguous, confusing, and impossible to apply consistently. It leaves employers and employees with no guidance on whether a desired collective activity is protected or an intended discharge is lawful. It leaves a pulp mill worker in Alaska and a meat packer in Texas without guidance on whether they can fly across the country to testify before Congress or drive down the street to attend the local labor parade.⁴⁷⁹

Today, the preferred form of publicizing employee causes often is not the implicit message in a physical picket line, but the express verbal persuasion of a corporate campaign. This is especially true now that the Supreme Court has held it lawful to persuade consumers to boycott "neutral" employers who are indirectly tied to another employer involved in a dispute.⁴⁸⁰ Ironically, if the disloyalty test remains viable, the more egregious the employer's alleged misdeeds, and the more impassioned and creative the appeal, the *less* likely the employees' collective activity is to be accorded the protection section 7 says it provides. Those aspects of today's rhetoric—emotional appeal, negative conduct, and unanticipated tactics—are in substantial and unpredictable jeopardy under a loyalty litmus test. Even if the era of the corporate campaign were not here, it is time to set standards for *Jefferson Standard*. The disloyalty test provides none, and it should be abandoned.

⁴⁷⁹ See *supra* notes 74-75 and accompanying text.

⁴⁸⁰ *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council (DeBartolo II)*, 485 U.S. 568, 578-88 (1988).