LABOR LAW INSIDE OUT

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Today, some sixty years after passage of the Taft-Hartley amendments to the National Labor Relations Act, it seems that the centerpiece of the Act has become the right to refrain from protected, concerted or union activity. The original 1935 legislation was enacted, of course, to protect the right to engage in that activity, and to encourage the practice of collective bargaining. For nearly sixty years after Taft-Hartley added the “right to refrain” to Section 7’s employee protections, the Board has struggled to reconcile the sometimes competing statutory goals of promoting the stability of collective bargaining relationships and the individual freedom of choice, preserved by Section 7. That has changed, however, as the National Labor Relations Board, in several recent decisions, has said for the first time, that freedom of choice—which is to say, the freedom to reject union representation—prevails in the statutory scheme. It is as if the law, in abandoning the primacy of achieving economic justice through collective action, has been turned inside out. The stakes for this shift in policy are great.

For sixty years, since the Taft-Hartley Act refashioned federal labor law, the National Labor Relations Board has struggled to reconcile two competing statutory goals: promoting collective bargaining and preserving employee free choice, as defined to include the right to reject union representation. To address the “inequality of bargaining power” between employees and employers, and to promote industrial peace, the Wagner Act of 1935 had famously declared that it was the “policy of the United States” to “encourage the practice and procedure of collective bargaining.” Section 7 of the Wagner Act furthered that policy by providing that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

In 1947, the Taft-Hartley Act—enacted in part in response to the postwar strike wave and business resentment over the growth of labor—added a crucial qualifier to Section 7. Employees were now granted the statutory “right to refrain” from engaging in the activities protected by the law and so to deal with their employer individually.

This tension between collective and individual rights, between stability in collective bargaining and employee free choice, arises in a variety of factual and
legal contexts and has led the Board to develop a set of legal rules and presumptions designed to balance labor law’s competing policies. As the Supreme Court has explained:

These presumptions are based not so much on an absolute certainty that the union’s majority status will not erode following certification, as on a particular policy decision. The overriding policy of the National Labor Relations Act is “industrial peace.” . . . The upshot of the presumptions is to permit unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace. (Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 38–39 [1987] [footnote and citations omitted]).

But the Board’s balancing act seems to be ending. For the first time, the Board has said that freedom of choice—which is to say, the freedom to reject union representation—prevails in the statutory scheme. In a series of recent decisions, the Board has demonstrated as much. At a time when union membership is at a historic low point, the Board’s decisions are reinforcing trends that imperil collective bargaining as a national policy goal and that threaten to undo the assumptions of the New Deal about collective action as a means to redress the economic disadvantage faced by individual employees attempting to negotiate employment terms directly with their employer. In short, labor law is being turned inside out.

I. The Board Shifts Course

A series of decisions of the past five years signal a serious shift in policy. These decisions, each with significant dissenting opinions, can be explained only by the Board’s present orientation toward protecting employee free choice only in the narrow sense: taking special care to ensure that employees are free to refrain from union activity and to reject union representation, while showing less concern about the right of employees to choose (and keep) a union. The policy shift is best illustrated by contrasting a trio of cases issued by the Clinton Board during 1999–2001, with a series of decisions that followed the 2002 change in composition of the Board. The difference in language, reasoning, and holdings has both symbolic and substantive significance.

A. 1999–2001

To begin, in St. Elizabeth Manor, 329 NLRB 341 (1999), a Board majority extended the long-established voluntary recognition bar rule, applicable in initial bargaining relationships to cases where a successor employer acquires the business of a predecessor employer whose employees are represented by a union. It held that once a successor employer’s obligation to recognize the incumbent union attaches, the union is entitled to a reasonable period of time for bargaining with the successor without challenge to its majority status. Correspondingly, the
employees must be given a reasonable opportunity to determine the effectiveness of the union’s representation free of any attempts to challenge its majority status.

In *Levitz Furniture Company of the Pacific*, 333 NLRB 717 (2001), a divided Board reconsidered the circumstances under which an employer may lawfully withdraw recognition from an incumbent union. For years, the Board had applied the anomalous rule of *Celanese Corp.*, 95 NLRB 664 (1951), that an employer could withdraw recognition not only when the union had actually lost the support of a majority of the bargaining unit employees, but even where the employer merely had a *good-faith doubt*, based on objective considerations, of the union’s continued majority status. Some appellate courts had differed with the Board’s application, in practice, of the “good-faith doubt” standard, insisting that the Board was essentially requiring proof of actual loss of majority status. While the *Levitz* case was pending, the Supreme Court decided *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998), which addressed the Board’s good-faith doubt standard, criticizing the Board for its confusing application of the test.

In response, the *Levitz* Board declined to require an election to permit withdrawal of recognition (as some had urged), but decided that an employer may rebut the presumption of an incumbent union’s continuing majority status only by proving, by a preponderance of the evidence, that the union had, in fact, lost majority support at the time the employer withdrew recognition. The Board found “compelling legal and policy reasons why employers should not be allowed to withdraw recognition merely because they harbor uncertainty or even disbelief concerning unions’ majority status” and overruled *Celanese* and its progeny insofar as they permitted withdrawal on the basis of good-faith doubt. 333 NLRB at 717.

*Levitz* made clear that, to the extent that uncertainty about employee sentiment exists, it is best resolved by means of a Board election. An election, rather than allowing an employer to choose on its employees’ behalf, is “the preferred means of testing employees’ support” (Id. at 725–726). An employer withdraws recognition in reliance on an employee petition “at its peril” (Id. at 725). “An employer who withdraws recognition from a majority union, even in good faith, invades his employees’ Section 7 rights every bit as much as an employer who unwittingly extends recognition to a minority union” (Id.).

Later that year, the Board decided *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002), in an attempt to accommodate the competing statutory goals in remedying an employer is unlawful withdrawal of recognition from an incumbent union. A unanimous Board reconsidered the “reasonable period of time for bargaining” remedial standard, referencing the Board’s earlier holding in this case that “‘when a bargaining relationship . . . has been restored after being broken, it must be given a reasonable time to work and a fair chance to succeed’ before the union’s representative status can properly be challenged” (334 NLRB at 401 [footnote omitted]). That “reasonable time” allows the union to “prove its mettle in negotiations, so that
when its representative status is questioned, the employees can make an informed choice, without the taint of the employer’s prior unlawful conduct” (Id. at 405). Until that time has elapsed, the Board stated, employees are unable to exercise “free choice” (Id. at 401 [emphasis in original]). The Board decided that a reasonable time for bargaining before the union’s majority status can be challenged will be no less than six months, but no more than one year.4

Each of these three decisions—St. Elizabeth Manor, Levitz Furniture, and Lee Lumber—was in accord with the balance traditionally struck by the Board. Each served the Act’s “overriding policy” of achieving “industrial peace” by clarifying or strengthening doctrine to promote collective bargaining without impairing employee free choice. St. Elizabeth Manor and Lee Lumber sought to preserve the stability of the bargaining relationship by giving the parties a chance to make the process work before the union’s status was tested, and yet both respected employees’ freedom to reject or change representation after a reasonable period for bargaining had elapsed. Levitz Furniture permitted the employer acting on its own, without a Board election, to honor the freely expressed choice of a majority of its employees to reject union representation, but by eliminating the “good faith doubt” standard effectively shortened the employer’s “leash . . . as vindicator of its employees’ organizational freedom” (Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 790 [1996]).5

B.

A reconstituted Board’s 2002 decision in MV Transportation, 337 NLRB 770 (2002), overruling the successor bar rule recently imposed in St. Elizabeth Manor, signaled a change in focus.

MV Transportation involved an employee decertification petition filed with the Board after a successor company acquired a business and the duty to bargain with the incumbent union attached. The Board majority, agreeing with the dissenters in St. Elizabeth Manor, held that employees of the acquired company should be allowed to “exercise their statutory rights and vote out the incumbent union.” (Id. [emphasis added]). In other words, the incumbent union in a successorship situation will not be entitled to a reasonable period for bargaining with the new employer, insulated from challenge to its status. The majority distinguished successorship from other contexts in which the Board has created an insulated period, including initial certification (where the employees have just chosen a union) and voluntary recognition (where the relationship between the employees and the union is new and so the union needs time “to learn the ropes and prove its worthiness”). In the successor situation, according to the Board majority, the relationship between the employees and the union is long-standing and so does not warrant an insulated period, despite the entirely new relationship between the union and the successor employer.

In so holding, the MV Transportation majority suggested, curiously, that preserving the stability of bargaining relationships was somehow secondary in the statutory scheme, because it “is a matter of policy and operates with respect
to those situations where employees have chosen a bargaining relationship” (Id. at 772). (Of course the MV Transportation employees had chosen a bargaining representative.) On the other hand, the majority reasoned, the protection of employee freedom of choice is “explicitly set forth in Section 7 of the Act” and has “paramount value” (Id.). It criticized the St. Elizabeth Manor decision as purporting to strike a balance—by affording the union an irrebuttable presumption of majority status for a “reasonable period of time”—but as actually promoting the stability of bargaining relationships to the exclusion of employees’ Section 7 rights (in this case, of course, the right to refrain) (Id. at 773).

The majority’s take on the relative strengths of the statutory policies was made explicit in Nott Co., 345 NLRB 396 (2005). There, the Board permitted a unionized firm to withdraw recognition from its employees’ union representative, during the term of their collective bargaining agreement, after the firm acquired and merged operations with a nonunion business with the same number of employees. Although its holding was consistent with existing precedent, the majority said bluntly (in response to the dissent’s urging reconsideration of doctrine):

> [A]lthough industrial stability is an important policy goal, it can be trumped by the statutory policy of employee free choice. That policy is expressly in the Act, and indeed lies at the heart of the Act. (Id. at 401 [emphasis in original])

The statutory policy of stability in bargaining relationships was held to be merely “implicit” (Id. at 402 [emphasis in original]).

This description represents a break with tradition. Historically, the Board has explained its rules and presumptions as best serving the Act’s “overriding policy” of achieving “industrial peace.” In St. Elizabeth, for example, the Board stated that “[e]mployee freedom of choice is, of course, a bedrock principle of the statute. Equally so, however, . . . are the goals of ‘promoting sound and stable’ labor-management relations . . . by ‘encouraging the practice and procedure of collective bargaining’” (329 NLRB at 344). Now, however, by reasoning that employee free choice is superior in the statutory scheme because it is expressly in the Act, while “industrial stability” is somehow subordinate because it is just a “matter of policy,” the Board has presented its own, dramatic policy decision as a simple matter of statutory interpretation.

The consequences of this reorientation of the law are illustrated by three subsequent decisions. The majority in Shaw’s Supermarkets, Inc., 350 NLRB No. 55 (2007), permitted an employer to “vindicate” its employees’ freedom of choice by withdrawing recognition from a union after the third year of a five-year agreement. (Id., slip op. at 4). This “wider freedom of action” was allowed even though the employer would not be permitted to file a petition for an election at that point,7 and even though a decertification petition filed by employees was pending at the Board (Id.). In response to the dissent, the majority stated:
This is a case where the employer is responding to an unsolicited and uncoerced expression of a loss of majority support for the union as a bargaining representative. Our dissenting colleague states that we do not seem to believe that a Board election, based on the employee-filed petition, will vindicate employee freedom of choice. This is untrue. Rather, our concern is that, in the time it takes to ultimately resolve the representation case, employees will be forced to endure representation that they have unquestionably rejected. (Id., slip op. at 4–5 [emphasis added])

In Badlands Golf Course, 350 NLRB No. 28 (2007), the Board majority, applying Lee Lumber, supra, permitted the employer to withdraw recognition from the union less than three weeks after a minimum six-month period of insulated bargaining, following a Board order requiring bargaining for a reasonable period to remedy an earlier unlawful withdrawal of recognition. Notwithstanding that the parties were engaged in first-contract bargaining, and that they had reached agreement on all but one minor term, the Board majority refused to extend the insulated period, as contemplated by Lee Lumber. Rather, it found that a reasonable time for bargaining had elapsed, relying heavily on the bargaining that occurred before the first withdrawal of recognition. As the dissent urged, “[i]t should be obvious that bargaining that occurred before an unlawful withdrawal of recognition cannot erase the taint from that violation” (350 NLRB No. 28, slip op. at 6).

And, in Wurtland Nursing & Rehabilitation Center, 351 NLRB No. 50 (2007), the Board majority decided that the employer had lawfully withdrawn recognition from the union based on a petition signed by over 50 percent of employees seeking “a vote to remove the Union.” Purporting to apply Levitz Furniture (supra) (although leaving unresolved whether it was rightly decided or should be overruled), it found that the employer had met its burden of showing, based on the petition, an actual loss of the union’s majority status. The majority found the language of the petition unambiguous and declined to “interpret that language as a mere request for a decertification vote . . .” (Id., slip op. at 2). The “more reasonable interpretation,” the Board held, is that the signatory employees wished “to remove” the union as their representative (Id.). In rejecting the dissent’s argument that the employer should have let a Board election determine employees’ sentiments about representation, the majority reasoned that “[u]nder Board law . . . the Union would have remained the de jure representative until the election results were certified, including any period required for the resolution of challenges and objections” (Id., slip op. at 3).

Each of these three cases deviates from past application of the rules and presumptions aimed at balancing competing statutory goals. And each signals a break from the Board’s past expression of values. The importance of collective bargaining as a national policy goal has receded. In its place, the right to refrain from union activities has assumed center stage. In turn, employee free choice is increasingly construed to minimize the choice of employees who selected union representation. Unionized employers are given a longer “leash” as “vindicator”
of their employees’ rights by unilaterally withdrawing recognition, rather than by using the Board’s election machinery to test the union’s majority.

C.

While unilateral employer action to withdraw recognition from a union is apparently favored (so employees do not have to endure representation if they do not want it), no parallel concern has been shown for employees who have voted for union representation but have to wait for legal challenges to be exhausted in order to enjoy its benefits. Correspondingly, the Board has recently made explicit that unilateral employer action to recognize a union—without a Board election—is not favored. Rather, in that context, a Board election is the “preferred method” of testing employee support.

Remarkably, the same day that the Board issued Wurtland—permitting unilateral withdrawal of recognition based on a supposedly “unambiguous” employee petition seeking a “vote”—it also decided Dana Corp., 351 NLRB No. 28 (2007), establishing, in the name of “employee free choice,” new obstacles to voluntary efforts by employers and unions to negotiate recognition. Reversing a forty-year-old precedent, the Board majority held that, after a union and employer voluntarily enter into a collective bargaining relationship, based on demonstrated evidence of the union’s majority support, an immediate postrecognition insulated period for bargaining is no longer appropriate.

The majority reasoned that the long-established recognition bar rule “does not give sufficient weight to the protection of the statutory rights of affected employees to exercise their choice on collective-bargaining representation through the preferred method of a Board-conducted election” (Id., slip op. at 1). Rather, it held:

In order to achieve a “finer balance” of interests that better protects employees’ free choice, we herein modify the Board’s recognition-bar doctrine and hold that no election bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition. If a valid petition supported by 30 percent or more of the unit employees is filed within 45 days of the notice, the petition will be processed. The requisite showing of interest in support of a petition may include employee signatures obtained before as well as after the recognition. (Id.)

The majority made clear its view that voluntary recognition arrangements are not favored, asserting that union authorization cards are inherently unreliable indicators of employee choice. It concluded:

While the provision of an orderly process for determining whether a fair election has been conducted may result in substantial delay in a small minority
Of Board elections, it remains preferable to determine employee free choice by a method that can assure greater regularity, fairness, and certainty in the final outcome. (Id., slip op. at 6–7)

Of course, the reverence for the Board-conducted election expressed in Dana, involving the right to choose representation, is absent in Wurtland’s and Shaw’s, both involving the right to reject a union. Correspondingly, the worry about the unreliability of union authorization cards expressed in Dana is absent in Wurtland’s involving an employee petition seeking “a vote to remove the union.” And the alarm about Board election delays that justified withdrawals of recognition in Shaw’s and Wurtland’s is minimized in Dana. These three decisions—and in particular their different view of the wisdom of determining employee choice without a Board election—can be reconciled only by affording the right to refrain paramount value (or by application of a double standard).13

What the Board has now created is a complicated bureaucratic procedure that deviates from long-established doctrine by (1) allowing 30 percent of the unit to compel an election to vote on representation, notwithstanding that a majority has just chosen union representation, and (2) permitting a challenge to the union’s majority status without a reasonable time for bargaining having elapsed. Also, by requiring the posting at the workplace—after the voluntary recognition occurs—of an official notice informing employees of their right to file a decertification petition, the Board is breaking new ground. No equivalent workplace posting is required to notify unrepresented employees of their right to select union representation, or of their rights generally under the Act.

II. How Free Is Free Choice?

If it was unclear earlier, the shift in policy is now unambiguous, as recent Congressional testimony by the Board’s then–chairman illustrates. Testifying at a December 2007 Congressional hearing, then Chairman Robert J. Battista quoted with approval the 1947 observation of Archibald Cox that the Taft-Hartley Act “represents a fundamental change in philosophy, which rejects outright the policy of encouraging collective bargaining.”14 The right to refrain from union activities is now paramount in the statutory scheme. The majority’s apparent conviction that Taft-Hartley’s “right to refrain” somehow diminished the primacy of collective bargaining in the statutory scheme is wrong. Taft-Hartley did not eliminate the Wagner Act’s Section 1 statement endorsing collective bargaining as a national policy goal. Indeed, Section 201 of Taft-Hartley expressly reiterates that:

It is the policy of the United States that . . . sound and stable industrial peace and the advancement of the general welfare, health and safety of the Nation and of the best interest of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining.15
Lost in the current balance of statutory goals are the free choice rights of employees who have selected a union. As the Board has earlier emphasized, the right of free choice includes “both the right to have a bargaining representative and the right to decertify,” and this right is “a statutory right of employees, not of employers” (Lee Lumber & Building Material Corp., 322 NLRB 175, 179 [1996]). By effectively giving employers greater freedom to determine whether their workers will have union representation, the current Board’s approach threatens the basic, and unique, aim of federal labor law: empowering employees to act collectively and so to counterbalance the power of employers over their work lives.

Moreover, the Board’s focus on employee free choice is flawed. Unless employees are first truly free to exercise their primary Section 7 rights, the notion of employee free choice is arguably little more than a fiction, for reasons explained by the Supreme Court in examining the limits of employer free speech under the NLRA. Any balancing of employer and employee rights, the Court observed,

must take into account the economic dependence of the employees on their employers. . . . [W]hat is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation. . . . (NLRB v. Gissel Packing, 395 U.S. 575, 617-618 [1969])

Employees may well choose, freely, to decline unionization, to reject the union that has represented them, to deal with their employers individually, and to cede to employers all effective control over the workplace. But the Board is warranted in adopting legal rules to ensure that the choice is genuinely free and that it is exercised by employees themselves, not by their employers in their name.

In this connection, it is telling that the current Board has granted employers greater freedom of expression under Section 8(c) of the NLRA, another Taft-Hartley addition to the law. In several cases, statements made during an organizing campaign were found, over strong dissenting opinions, not to be unlawful threats but rather lawful expressions of employer free speech. See, for example, Medieval Knights, LLC, 350 NLRB No. 17 (2007), finding that a consultant’s statement that a hypothetical employer could lawfully “stall out” contract negotiations was not a threat that electing a union would be futile; Werthan Packaging, Inc., 345 NLRB 343 (2005), finding no objectionable election conduct where a manager interrogated an employee and stated that voting for the union was not in the best interests of the employee and her family; TNT Logistics No. Am., Inc., 345 NLRB 290 (2005), finding that a supervisor’s unsupported statement that the employer would lose its only customer if employees unionized was a lawful expression of personal opinion; Manhattan Crowne Plaza Town Park Hotel Corp., 341 NLRB 619 (2004), finding that an employer’s statement recounting the mass discharge of recently unionized employees at another of the employer’s hotels was not a threat of reprisal; and Curwood, Inc., 339 NLRB 1137 (2003), enf’d. in part, vacated in part 397 F.3d 548 (7th, cir. 2005),
finding that the employer’s letter to employees, stating, without providing objective basis, that its customers viewed unionization negatively, and that “remaining union-free affects our business,” was not a threat of reprisal. Free speech also prevailed in *Aladdin Gaming, LLC*, 345 NLRB 585 (2005), where a management official’s interruption of off-duty employees’ conversation about signing union authorization cards was found not to be unlawful surveillance. In response to the dissent, the majority defended its approach, stating that it allows a “free exchange of views in ‘a market place of ideas,’ . . . encourages a robust debate and is thus quite consistent with Section 8(c)” (*Id.* at 586).

Taken together, these cases signify a laissez-faire approach to regulating antiunion employer speech during organizing campaigns and suggest that employee free choice may not be that free. While the majority acclaims the “market place of ideas” in the workplace, it ignores the reality that the balance of power between employees and employers is not equal. In turn, its apparent disapproval of voluntary recognition arrangements suggests that there can be no true free choice if employers do not express opposition to unionization.

**III. The Values at Stake**

What is at stake? A great deal. Federal labor law embodies two principles that are today recognized as core labor standards, basic to democracy: the freedom of association and the right to bargain collectively. The existence of a strong independent trade union movement is critical to a democratic society. Similarly, the system of collective bargaining designed and encouraged by this statute has played an important role in our economy. It affords an effective mechanism to distribute resources and as such, it furthers a collective national sense of fairness. It allows flexibility or accommodation to changing market conditions, permits parties to reach their own solutions, and provides a system for resolving workplace disputes. Unquestionably, collective bargaining contributed to the expansion of the middle class, and the decline of organized labor is often linked to the decline of the middle class and growing income inequality.

Today, there are real strains on the collective bargaining system. They result from a variety of social and economic pressures, including: deregulation of industries, accelerating competitive pressures (both domestic and global), downsizing of enterprises, outsourcing and networked relations between companies and their subcontractors and suppliers, changes in the skills composition of the workforce and large-scale demographic changes, including widespread entry of women and immigrants into the labor market. These pressures are now compounded by a legal regime that has made it even harder for the collective bargaining system to work and by an administrative agency that, at bottom, seems to lack commitment to the system.

That today’s Board has deviated from past balancing of policy goals is illustrated in a scholarly study of the disagreements over these issues between the Board and the courts, from 1986 through 1993. Professor Brudney suggested
that underlying this divergence was “a persistent conflict in values.” He described the Board during those years as giving “primary weight to preserving the stability of bargaining relationships, or establishing those relationships, based on earlier evidence of majority employee support. By contrast, the courts tend to worry more about the risk of retaining, or imposing, a representative that current employees may not want.”

As he further explained:

The Board can be seen as emphasizing the primacy of the bargaining relationship based on a sense of fidelity to historical legislative purpose. The appellate courts’ pronounced sympathy for protecting current employee choice reflects, by contrast, sensitivity to the re-established paradigm of individual rights, a paradigm that now dominates both the workplace and the larger legal culture. Such judicial sensitivity to current legal values raises serious questions as to whether courts should engage on their own in reshaping a regulatory scheme when Congress has not chosen to do so.

Inevitably, the question arises whether the notion of collective action as a means to equality and social justice has been abandoned, with a regime of individual rights elevated in its place. From the 1960s forward, “the new generation of workplace statutes focused on two types of individual interests: the right to equal treatment and the right to minimum standards.” By contrast, the NLRA, which uniquely protects collective rights, has been effectively unchanged since 1947. Some might argue that the current Board’s policy shift is simply part of a larger legal trend, and perhaps inevitable.

The decline in density of organized labor suggests a decline in importance, or loss of interest, in collective action. Yet surveys demonstrate strong worker interest in representation. And Board cases prove that concerted activity does occur in the nonunion sector. Workers band together on the job, even without unions, to improve their terms and conditions of employment. In fact, if non-union employees knew they had rights under this statute, no doubt there would be even more cases.

We do well to remember that the individual-rights regime was essentially built on the framework of collective action. It is no coincidence that most worker-protections statutes were passed after the National Labor Relations Act. Labor unions were instrumental in winning, preserving, and enforcing worker-protection laws. But that regime, alone, has real limitations for workers. The basic premise of the Wagner Act—that collective action is the mechanism for achieving employee bargaining power—still holds true, for the average worker. And with respect to economic terms, the individual-rights model is largely empty. Freedom from discrimination, for example, does not guarantee decent wages; ERISA does not mandate pension or welfare benefits; and OSHA guarantees depend on government intervention that is usually missing. Basic rights at work, the kind achieved through collective bargaining, remain unprotected by statute: no law mandates fair treatment, creates a grievance system, requires just cause for discharge, or gives workers a voice in how a business is run. An army of trial lawyers is no substitute for the institution of collective bargaining.
Moreover, an exclusive orientation toward an individual-rights regime could have troubling political and social consequences. Workers may view the employment relationship in purely individual terms and may fail to grasp common economic interests and the potential of collective action at work, as well as in the public sphere. Collective action at work encourages engagement in the community and in politics. Without a functioning collective bargaining system, fundamental economic issues are placed off the table: distribution of wealth, control, and direction of economic enterprises. What institution will be as effective in efforts to minimize the randomness of fortune of democratic capitalism? And without a strong independent trade union movement, what institution will stand effectively as a counterweight in our democracy to the growing political influence of corporations? What institution will speak for working people—indeed for the middle class—as effectively?

Restoring federal labor law to its intended purposes is obviously no panacea. But it would be a step in the right direction. By turning labor law inside out, today’s Board is missing an opportunity to reinvigorate the nation’s understanding of collective action and its value as both a policy goal and an aspect of economic justice.

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Notes

1. The views expressed in this article are mine alone and do not necessarily reflect the views of the NLRB or of any other Member of the Board. Special thanks to my Chief Counsel, John F. Colwell, and to my Deputy Chief Counsel, Gary Shinners, for their contributions to this article.

2. These include the presumption of a union’s continuing majority status, effectuated through several rules that provide insulated periods during which a union’s majority status may not be challenged (by decertification, rival union, or employer), thereby delaying, but not denying, expression of employee choice. A related presumption is that, when an employer unlawfully fails or refuses to recognize and bargain with an incumbent union, any subsequent employee disaffection from the union results from the earlier unlawful conduct. This presumption can be rebutted only by an employer’s showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining.

3. Levitz reaffirmed that “The presumption of continuing majority status essentially serves two important functions of Federal labor policy. First, it promotes continuity in bargaining relationships. . . . Second, the presumption of continuing majority status protects the express statutory right of employees to designate a collective-bargaining representative of their own choosing. . . . Where unions continue to enjoy majority support, promoting stability in bargaining relationships and insuring employee free choice are one and the same” (Id. at 723).

4. The precise duration will be determined by considering a variety of factors, including whether the parties are bargaining for an initial agreement, the complexity of the issues being negotiated, the number of
bargaining sessions, the progress, and the presence or absence of a bargaining impasse. The Board emphasized that “[p]arties engaged in initial contract bargaining are likely to need more time to conclude an agreement than parties who are bargaining for a renewal contract” (Id. at 403).

5. “The Board is accordingly entitled to suspicion when faced with an employer’s benevolence as its workers’ champion against their certified union, which is subject to a decertification petition from the workers if they want to file one” (Id.)

6. Indeed, before this, only former NLRB Chairman Dotson, in a dissenting opinion, had embraced this statutory interpretation. In Central Soya Co., 281 NLRB 1308 (1986), enf’d. 867 F.2d 1245 (10th Cir. 1988), he criticized the majority for “[o]nce again . . . fail[ing] to strike the correct balance between the general, albeit implicit, statutory policy of stability in bargaining relationships and the express statutory right of employees, set forth in Section 7 of the Act, to refrain from collective bargaining. . . . [T]he purpose of the Act is frustrated, not enhanced, when general consideration considerations of labor policy are exalted over specific expressions of statutory rights” (281 NLRB at 1312 [emphasis in original]).

7. To assure employees a free choice of representative at reasonable intervals, the Board has held that a contract having a fixed term of more than three years operates as a bar for only three years, but neither the employer nor the contracting union may challenge the contract during its duration. A rival union or decertification petition may be filed after three years.

8. By contrast, union authorization cards that state that the signatory seeks a vote to select union representation have been held insufficient to justify the imposition of a bargaining order without a Board election, under NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). See, for example, Nissan Research & Dev., 296 NLRB 598 (1989) (no bargaining order where cards included both unambiguous grant of representation rights on the front and a statement on the reverse side that “The purpose of signing this Authorization card is to have the [NLRB] conduct a Secret Ballot Election . . . at your place of work.”).


12. Indeed, the Board openly announced that it chose to reconsider the voluntary recognition bar doctrine because “voluntary recognition has grown in recent years.” Dana Corp., 341 NLRB 1283 (2004). As the dissent stated, “Success, it seems, has prompted greater scrutiny” (Id. at 1284).

13. The inconsistency of these decisions has been criticized by practitioners. See, for example, “Former NLRB Member, Union Counsel Question Dana Recognition Decision,” BNA Daily Labor Report (11/6/07), page A-10; “NLRB: 45 Days to Challenge Voluntary Recognition,” CCH Labor Law Reports Insight, Issue 1535, No. 954, Part 2 (10/24/07).


15. To reinforce that policy, the Federal Mediation and Conciliation Service was created, making government services available for conciliation, mediation and voluntary arbitration.

16. Section 8(c) codified the Supreme Court’s decision in Thomas v. Collins, 323 U.S. 516 (1945), that the First Amendment protected a union official’s speech proclaiming the advantages of workers’ organization and urging them to join the union. The Court similarly stated with respect to employer speech that:

employers’ attempts to persuade to action with respect to joining or not joining unions are within the First Amendment’s guaranty. . . . When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. But short of that limit the employer’s freedom cannot be impaired.

17. At the same time, several Board decisions have more strictly regulated pro-union communications or activities. See, for example, *Randall Warehouse, Inc.*, 347 NLRB No. 56 (2006) (finding that union’s videotaping of campaign-literature distribution was objectionable conduct); *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004) (finding certain pro-union communications by supervisors to be objectionable conduct).


19. *Id.* at 947.

20. *Id.*


22. See, for example, Orly Lobel, “Between Solidarity and Individualism: Collective Efforts for Social Reform in the Heterogeneous Workplace,” *Diversity in the Workforce, Research in the Sociology of Work*, Volume 14, 131, 132 (2004) (“In many ways, the weakening of the labor movement and the increasing tension between workers of different identities echoes a wider crisis—that of fragmentation and self-interest in the political process, in which interest groups struggle to achieve the most for the individuals they represent rather than debating substantive ideological differences of social justice and reform.”).