DOUBLY-UNPROTECTED DISPARAGEMENT:
EMPLOYEE VOICE ON PRODUCT QUALITY UNDER THE NLRA

ABSTRACT:

The Supreme Court’s 1953 Jefferson Standard decision is most famous for its harsh treatment of employee “disloyalty” in the context of the National Labor Relations Act (NLRA). Yet while this disloyalty jurisprudence lives on more than 60 years later, another strand of the Jefferson Standard decision has had an even greater impact: the idea that certain work-related spheres are solely subject to the prerogatives of management, and are not covered by the “mutual aid or protection” clause of NLRA § 7 when acted upon by employees in concert.

This Comment examines the legal assumption of these “managerial prerogatives,” as laid out in opposition to “employees’ interests as employees,” in the context of product quality, an area of worker concern that has proven particularly resistant to the coverage of the mutual aid or protection clause. Starting with the passage of the NLRA in 1935, through the Supreme Court opinions in Fibreboard and Eastex, and continuing on to the 21st-century workplace, the managerial prerogatives assumption that underlies so many National Labor Relations Board and federal appellate decisions is traced and deconstructed. Recent cases applying this approach to particularly expansive conceptions of product quality, encompassing areas such as patient health, children’s safety, and newspaper content, are examined to determine whether the ongoing cabining of NLRA worker protection in this area is faithful to the spirit of solidarity that bolstered the Act’s passage and sensible in light of the modern context of management-employee dynamics.

I argue that these dynamics have long since evolved beyond the outdated hierarchical conception of management and worker interests that courts continue to apply. The Comment examines key developments in managerial philosophy and general trends in labor relations that have transformed the modern workforce and removed the rationale for both the managerial prerogatives and disloyalty doctrines when it comes to employee communications regarding product quality. The Comment posits that the expansive nature of the Act, along with its original vision, creates the opportunity to reformulate the managerial prerogatives doctrine with respect to product quality in order to match the current reality of labor relations. This reformulation is especially needed given the imbalance of power in the modern labor-management relationship and the consequent illogicality of the judicially created disloyalty doctrine.
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I. The origins of “managerial prerogatives” in NLRA interpretation

The Supreme Court’s 1953 Jefferson Standard decision read an expansive conception of disloyalty into U.S. labor law. As part of a union-backed dispute, TV technicians in Charlotte, NC distributed a handbill denigrating the quality of their station’s production and questioning whether the non-local, tape-delayed status of its programming resulted from a determination by management that Charlotte was a “second-class community.” In finding this message beyond the scope of activity protected by § 7 of the National Labor Relations Act (NLRA or the Act), which covers concerted employee effort made for “mutual aid or protection” from retaliatory employer action, the Court proclaimed that “[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer.” This bold—yet vague—assertion has had a lasting impact on § 7 jurisprudence, as it continues to be marshalled against worker protection, despite questions over its meaning, scope, and appropriateness for the modern workplace.

Yet while Jefferson Standard chiefly stands for the disloyalty doctrine, a separate judicial conception of industrial relations also animates the opinion. In detailing the factors behind its holding, the Court reasoned that the technicians made no reference to their working conditions in the handbill, and that “[t]he policies attacked were those of finance and public relations for which management, not technicians, must be responsible.” Because the technicians’ criticism touched on an area of “managerial prerogatives” beyond their interest as employees, the Court found it easier to condemn their conduct. This underlying idea—that if concerted employee action is

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1 NLRB v. Local Union No. 1229, 346 U.S. 464 (1953) [Jefferson Standard].
2 Id. at 468.
3 Section 7 gives workers the right to “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157 (2012). Section 8(a)(1) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7].” Id. § 158(a)(1). For a dispute to qualify, it must concern the “terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee,” per § 2(9). Id. § 152(9).
4 346 U.S. at 472.
6 346 U.S. at 476 (emphasis added). Such an assertion “assumes that employees have no legitimate interest as employees in the quality of what they do.” Finkin, supra note 5, at 557.
directed at one of these “managerial” aspects of a business, it is stripped of legal protection—has left a major imprint upon labor law through its primary channel of NLRA interpretation.7

Commentators have criticized the motivation and assumptions behind the utilization of managerial prerogatives in labor law cases. Professor Cynthia Estlund writes that it involves “a normative claim that . . . the rights of employees created by the Act are limited by the rights of employers to run their businesses and to make basic business decisions without the interference of employees and unions.”8 Judicial formulations of managerial prerogatives also lay bare, in the words of Professor James Atleson, “certain values or presumptions about the role of management and the place of employees deemed by many decision makers to be inherent in our industrial society.”9 These values or presumptions are reflected in the idea of a core of workplace issues within management’s sole purview, outside the scope of legitimate worker interests, which must be actively, continuously protected from any interference in the form of concerted worker voice.

Such values or presumptions do not inevitably stem from the Act’s history and purpose. Congress expressly sought to break with the traditional “invocation of managerial prerogatives . . . to limit employee rights” in enacting § 7.10 The statute’s original aim was to place employees on a more equal playing field with management,11 yet the Jefferson Standard Court, in clearly delineating lines of appropriate concern between management and labor, was “assum[ing] that

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7 See generally 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, 994–1002 (1992) [hereinafter What Do Workers Want?] (arguing that this concept of managerial prerogatives represents the imposition of a normative valuation by the Court unsupported by the text and purpose of the NLRA).
8 What Do Workers Want?, supra note 7, at 995.
9 James B. Atleson, Values and Assumptions in American Labor Law 91 (1983) [hereinafter Values and Assumptions]. Regarding Jefferson Standard, Atleson found it “surprising, but perhaps revealing, that the Board would feel that quality of equipment and programming would be irrelevant to the station’s technicians.” Id. at 85.
10 What Do Workers Want?, supra note 7, at 997 (“Employees were given broad rights in section 7 that necessarily undermined and compromised the managerial prerogatives that employers had before. . . . [T]he Act sanctions and even encourages employee ‘interference’ . . . with what had been considered fundamental managerial prerogatives.”).
the law supports a hierarchical and autocratic structure of enterprise,” a structure in which “employees have no right to participate in the planning or operation of the production process.”

In Professor Katherine Stone’s “industrial pluralism” paradigm, the attempt to create an equitable power balance between management and labor provided the interpretive cover to advance managerial prerogatives in official forums and suppress any meaningful form of industrial democracy, by invoking the illusion that management and labor were now clashing on a legislatively levelled field, and should thus be left to their private ordering of the workplace.

The “vague notion of a ‘managerial core’” traces back to the common law of business, which the courts first charged with implementing the NLRA knew well. Familiarity with and deference to managerial interests has led to widespread, consistent judicial interpretation of the Act into the language of business—that of economics, self-interested behavior, and the profit motive—betraying the original, radical vision of the NLRA at the time of its passage. Neither conceived of nor written in that language of business and management, the Act was expressly set up as a way to promote its opposite: worker solidarity, “the idea that workers would improve

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12 VALUES AND ASSUMPTIONS, supra note 9, at 102. The historical origins of the Court’s robust conceptual framework of this “hierarchical and autocratic structure of enterprise” are traced in KATHERINE V.W. STONE, FROMWidgets to Digits: Employment Regulation for the Changing Workplace 17–27 (2004) [hereinafter Widgets to Digits], which outlines how control of the U.S. production process by skilled workers was broken.

13 Katherine Van Wezel Stone, The Post-War Paradigm in American Labor Law, 90 Yale L.J. 1509, 1513–14 (1981) [hereinafter Post-War Paradigm] (analyzing the interpretative tradition of industrial pluralism, which was “premised upon an assumption of equality of power between management and labor, the very equality that the Act was intended to create,” and which “has rendered the Act incapable of actually creating that equality.”).

14 Management Prerogatives, supra note 11, at 102. Professor Atleson views the judicial language of managerial prerogatives as reflecting a “timeless historical imperative,” “a Genesis view of labor-management relations: In the beginning there was management and labor.” Id. at 95. Another scholar’s analogy positions organized labor as the lower house of a bicameral legislature, with management occupying the upper House of Lords. James Gray Pope, Class Conflicts of Law I: Unilateral Worker Lawmaking Versus Unilateral Employer Lawmaking in the U.S. Workplace, 56 Buff. L. Rev. 1095, 1096 (2008) [hereinafter Class Conflicts I].

15 Class Conflicts I, supra note 14, at 1095–96. The common law of business draws much from the agency relationship, with its master-servant formulation, and that “feudal notion” as applied to the workplace animates both managerial prerogatives decisions and disloyalty jurisprudence. Finkin, supra note 5, at 548–51.

their lives through mutual assistance and united action." Yet courts were not comfortable with, nor well equipped to adjudicate, such an expansive, radical notion as solidarity, which does not lend itself to the clean lines of decision nor clearly justiciable spheres of influence and control produced by economic motives and business enterprise hierarchies. Thus NLRA interpretation shifted toward teasing out the self-interested, monetary incentives that ostensibly motivated all workplace activity, an approach naturally favoring those who controlled the means of production and whose decisions were in all significant respects motivated strictly by profit maximization.

The managerial prerogatives concept operates within several of the Act’s core provisions. It is worth examining such operation in three of the NLRA’s critical contexts, as applied to the definition of key statutory phrases, paying close attention to how product quality is factored in.


The core promise of the NLRA, outlined in § 7, is to guarantee employees the right “to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining.” Per § 8(d), this bargaining right involves a mutual obligation on the part of management and employee representatives to “confer in good faith with respect to wages, hours, and other terms and conditions of employment.”

While expressing no inherent facial limitation, these words have been deemed to define the full ambit of the employer’s obligation, while all other potential topics have been labeled only “permissive.” Justice Stewart made this clear in his influential concurrence in *Fibreboard Paper Products Corp. v. NLRB*, stating that “the words of the statute are words of limitation. . .

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17 Class Conflicts I, supra note 14, at 1095.
18 See, e.g., NLRB v. Oakes Mach. Corp., 897 F.2d 84, 89 (2d Cir. 1990) (inferring economic motive for concerted activity where none was explicitly stated so as to find an employee complaint letter about the company’s president to be protected by § 7). See generally Richard Michael Fischl, Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act, 89 COLUM. L. REV. 789, 793–800 (1989) [hereinafter Self, Others, and Section 7] (NLRB economic interpretation of a letter sent in altruistic support of a fired comrade).
20 Id. § 158(d). The Act does not specify what other terms and conditions may or must be covered in bargaining.
21 379 U.S. 203, 217 (1964) [Fibreboard].
The specification of wages, hours, and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining.” Stewart went on to significantly narrow the scope of compulsory bargaining, arguing that not even all managerial decisions that directly affect job security fall under the mandatory rubric. It is “hardly conceivable,” according to Stewart, that “[d]ecisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales . . . so involve ‘conditions of employment.’”

Business-related matters that “lie at the core of entrepreneurial control” should not be understood as susceptible to mandatory bargaining, despite encompassing “areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely.”

Stewart’s reasoning thus began with the assumption that only those subjects with a direct economic impact on employees were terms and conditions of employment, then whittled down further using a robust, traditional, hierarchical understanding of entrepreneurial autonomy.

Justice Stewart’s opinion was couched in the language of self-evident tenets of labor relations, but its conclusions were not so inevitable. Six years prior, in NLRB v. Borg-Warner Corp., Justice Harlan noted that the key statutory phrase—terms and conditions of employment—“is inherently vague,” and had previously “been accorded by the Board and courts an expansive rather than a grudging interpretation.” He emphasized “the unsettled and evolving character of collective bargaining agreements,” as opposed to any static hierarchy of managerial prerogatives imbedded in the Act’s formulation of the all-important duty to bargain:

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23 379 U.S. at 223 (emphasis added). Of this list, product design is the one topic that does not directly implicate a company’s bottom line, yet it nonetheless is, in Justice Stewart’s view, still susceptible only to managerial influence.
24 Id. (“Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not . . . primarily about conditions of employment, though the effect . . . may be necessarily to terminate employment.”)
25 The use of “hardly conceivable” to support “the prerogatives of private business management,” 379 U.S. at 226, is an example of what Professor Atleson labeled “the ‘of course’ statements in the area that betray[] a notion of the employee’s relative ‘place’ in the employment relationship.” VALUES AND ASSUMPTIONS, supra note 9, at 85.
26 356 U.S. 342 (1958). Borg-Warner first introduced the mandatory-permissive bargaining dichotomy. Id. at 349.
27 Id. at 353 (Harlan, J., dissenting).
28 Id. at 358.
The bargaining process should be left fluid, free from intervention of the Board leading to premature crystallization of labor agreements into any one pattern of contract provisions, so that these agreements can be adapted through collective bargaining to the changing needs of our society and to the changing concepts of the responsibilities of labor and management.29

The hardened law on bargaining created by *Fibreboard* is exactly this sort of premature crystallization of managerial prerogatives.30 Any evolution in the “needs of our society” or “responsibilities of labor and management” that the Act’s expansive phraseology might have incorporated into the bargaining duty was cut off by Stewart’s influential reasoning, via the triumph of the assumptions about the industrial relationship that undergird its foundation.31 This nature of managerial prerogatives in relation to bargaining topics has been largely preserved in its 1960s form, with product quality excluded, and any chance at bargaining equality cut off.32

b. Prohibition of Company Unions: “Conditions of Work”

Another aspect of the NLRA implicating managerial prerogatives is § 2(5). It defines a “labor organization” as “exist[ing] for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”33 This definition is enforced through § 8(a)(2), which stipulates that “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it” is an unfair labor practice by an employer.34 This pair of provisions bans the

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29 Id. at 358–59. Responding to *Borg-Warner*, Archibald Cox argued that reliance on statutory interpretation to fix the boundaries of bargaining “gives undue prominence to legal techniques at the expense of policy considerations.” *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057, 1083 (1958). For Cox, “[t]he demarcation lines between the sphere of joint responsibility and the respective prerogatives of management and union should be drawn at different points in different industries. . . . Collective bargaining is too dynamic for us to decide today what should be required or permissible subjects of collective bargaining tomorrow.” Id. at 1083–84.

30 See also David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 YALE L.J. 689, 711–12 (1990) (“[L]egal restrictions on the subjects of mandatory bargaining have allowed labor boards and courts to impose their values on the collective bargaining relationship.”).

31 See, e.g., General Motors Corp., 191 N.L.R.B. 951, 951 (1971) (“Consistent with the expressly restricted scope of *Fibreboard*, the courts have . . . rejected Board decisions requiring bargaining over more elemental management decisions. . . .”). *General Motors* also invoked *Fibreboard*’s “core of entrepreneurial control.” Id. at 952.

32 See *Post-War Paradigm*, supra note 13, at 1566 (“[T]he mandatory-permissive bargaining distinction limit[s] the union’s ability to contribute equally to the most crucial aspects of plant life.”).


34 Id. § 158(a)(2).
“company union”: that pretextual employee organization dealing with employment matters that is arranged and controlled by the employer, and that consequently undermines the independent formulation and functioning of labor representation in opposition to the interests of management.

In Electromation, Inc., the NLRB held that employee “Action Committees” set up by the employer constituted labor organizations with which management improperly interfered. In so ruling, the Board thoroughly analyzed the statutory definition of a labor organization. While the majority found that Congress aimed to encompass an expansive list of employee groups, in order “to ensure that such groups were free to act independently of employers in representing employee interests,” it also noted that an employee committee designed to perform “essentially a managerial or adjudicative function” does not fall within the definition. Moreover, “quality” or “efficiency” were implicitly counted among these exempted managerial functions.

Each concurring opinion also characterized efficiency and product quality as managerial prerogatives in opposition to the “conditions of work” with which a labor organization must deal to earn that statutory label. Member Devaney found no evidence of legislative concern over employer-initiated programs dealing with “efficiency, quality, productivity, or other essentially managerial issues.” Likewise, Member Oviatt determined that “production methods and product quality” were unrelated to any of the conditions of work articulated in the statutory definition. Member Raudabaugh noted the broadness of “conditions of work” and “labor disputes” in § 2(5), but nevertheless set “such entrepreneurial concerns as product quality or workplace efficiency” outside of these discretionary components of a labor organization.

36 Id.
37 Id. at 994–95.
38 Id. at 998 (“The purpose of the Action Committees was, as the record demonstrates, not to enable management and employees to cooperate to improve ‘quality’ or ‘efficiency,’ but to create in employees the impression that their disagreements with management had been resolved bilaterally.”).
39 Id. at 999.
40 Id. at 1004–05.
41 Id. at 1008.
Product quality, productivity improvements, and enhanced efficiency were thus reinforced as managerial concerns apart from the employee conditions of work worthy of statutory protection.

Behind these disclaimers about managerial functions that fail to implicate the definition of a labor organization was the desire to avoid proscribing “employee-participation groups” set up by management. Member Oviatt singled out such groups, finding it “of critical importance that management and employees be able . . . to engage in cooperative endeavors to improve production methods and product quality.”42 This aspect of the decision reflects the history of courts chafing against NLRA definitional strictures regarding the interplay between §§ 2(5) and 8(a)(2), given the preferred pro-business values of “employee free choice, employer motivation, and the desirability of cooperation between labor and management.”43 Such clamoring increased in the 1970s and 80s as concern grew over declining U.S. dominance in global markets, leading to the search for ways to improve quality, efficiency, and productivity, and declining concern for enforcing what could be construed as statutory technicalities of domestic workforce protection.44

Four years after Electromation, In re Simmons Industries, Inc.45 reaffirmed the Board’s separation of managerial functions from “conditions of work” in the context of a Total Quality Management (TQM) committee, differentiating “quality of product” from “the needs or convenience of employees.”46 Going further, the In re Simmons Board found that the information communicated through the committees at issue—relating to proper placement of machines for better product flow, reduction of errors in cutting meat, and improved adherence to key customer specifications—was related to “matters which would have been of relative

42 Id. at 1004–05 (Oviatt, M., concurring).
43 Rabban, supra note 30, at 749. See generally id. at 748–53 for a rundown of the pro-business arguments used by adjudicators to avoid enforcing strict traditional company union prohibitions, accompanied with illustrative cases.
44 See, e.g., E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 899 (1993) (amicus argument that “‘indiscriminate’ application” of the company union prohibition would “thwart the myriad efforts being undertaken by labor unions, employee groups, and employers to develop human resource policies to meet the challenges of the 21st century”).
46 Id. at 254. For more on TQM, see infra Part III.a.i.
indifference to employees in absence of management informational solicitation.”

The Board’s company union jurisprudence recognizes that worker input on key areas of traditional managerial concern is critical to the competitive functioning of U.S. enterprise in an evolving global economy, through an emphasis on the necessity of firm-sponsored cooperative committees that deal with quality and efficiency issues and brainstorm improvements. Yet these spheres of interest are still deemed solely managerial, such that the employees whose voice is utilized to help aid production to create greater profit lack a legitimate interest in turning such contributions into concerted activity for mutual aid or protection—as, indeed, workers are seen as being indifferent to these issues without “management informational solicitation.” The result, as articulated in *E.I. du Pont de Nemours & Co,* is a system where employers have “significant freedom . . . to involve rank-and-file workers in matters *formerly seen as management concerns,* to call on employees’ full ability and know-how, and to increase their enthusiasm for and commitment to quality and productivity,” while employees lack the corresponding freedom to take collective action regarding those critical concerns without fear of employer retaliation,

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47 321 N.L.R.B. at 254. That the committee did not deal with any mandatory subjects of bargaining was also found relevant, circularly connecting the delineation of managerial prerogatives in the “conditions of work” labor organization context to that of § 8(d)’s “terms and conditions of employment.” On this circularity, compare Rabban, *supra* note 30, at 754–56 (arguing to expand mandatory bargaining to the topics of traditional managerial concern most often discussed with professional employees via employer-dominated committees, to rebalance the controversial labor organization jurisprudence under the Act). Professor Rabban stressed the correlative nature of the collective bargaining and labor organization aspects of the NLRA: “Loosening exclusive representation and company domination without broadening the scope of mandatory bargaining would unduly weaken a union’s ability to exercise collective strength in matters of legitimate professional concern to its members.” *Id.* at 757. This logic can be applied to the interplay between employer reliance upon worker quality committees and a necessary broadening of legitimate employee interests under § 7 to include product quality.

48 *See Electromation, Inc.,* 309 N.L.R.B. at 1005 (“Cooperative programs are seen by many as a necessary response to competition in a global economy.”); Dennis M. Devaney, *Electromation and Du Pont: The Next Generation,* 4 CORNELL J. L. & PUB. POL’Y 3, 3 (1994) (“Spurred by the perception that fundamental changes in the global economy are reducing American competitiveness and that the standard of living in the United States may be declining, American business leaders, labor leaders, government officials, and academics have begun to re-evaluate traditional methods of management.”). In 1995, the Teamwork for Employees and Managers Act passed Congress before receiving a veto. A House member stated that “[e]scalating demands of global competition have compelled an increasing number of employers in the United States to make dramatic changes in workplace and employer-employee relationships,” which involve an “enhanced role for the employee in workplace decision-marking.” Rafael Gely, *Where Are We Now?: Life After Electromation,* 15 HOFSTRA LAB. & EMP. L.J. 45, 46–47 (1997).

49 311 N.L.R.B. 893 (1993), another influential company union Board adjudication.

50 *Id.* at 899 (Devaney, M., concurring) (emphasis added).
thanks to the strictures of managerial prerogatives imbedded in the Act’s interpretive strata.

c. § 7’s “Other Mutual Aid or Protection”

Bargaining is defined in the Act as relating to the “terms and conditions of employment,” and a “labor organization” expressly deals with the “conditions of work.” With each of these provisions, therefore, there is at least some textual basis for establishing a core of managerial prerogatives apart from and above a delineated set of employment conditions. The argument against allowing that entrepreneurial core to choke out valid employee interests then centers on the attempt to expand the sphere of legitimate employment terms in a given industry—an uphill battle against the entrenched conception of management’s “retained rights.”

But with regard to the § 7 right of employees to “engage in other concerted activities for the purpose of . . . mutual aid or protection,” the textual argument for superimposing a limitation based upon managerial prerogatives is far weaker: “mutual aid or protection” is not broken down in other sections of the Act, nor explicitly linked to “terms and conditions of employment” or “conditions of work.”

Indeed, “‘mutual aid or protection’ can be read to encompass almost any goal-oriented group action.” The phrase evokes collaboration in the face of a stronger force, rather than self-interested behavior spurred by economic incentive. Furthermore, the expansive language was likely derived from the philosophy of the labor movement itself. Its first statutory appearance was in 1932’s Norris–LaGuardia Act, a selection traced by Professor Richard Fischl and labor historian David Montgomery to “the working class and trade union philosophy of ‘mutualism’

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51 See generally Post-War Paradigm, supra note 13, at 1548–57. See also Management Prerogatives, supra note 11, at 95 (“The power of an employer is analogized to that of a state, which retains powers not expressly denied or prohibited by the state’s constitution.”)
52 See What Do Workers Want?, supra note 7, at 944–45 (describing the implications of the notable absence in § 7 of “terms and conditions of employment” for how “mutual aid or protection” was meant to be interpreted).
54 What Do Workers Want?, supra note 7, at 946; Self, Others, and Section 7, supra note 18, at 842 (“The genesis of the ‘mutual aid or protection’ language may well have been the working class experience of solidarity.”).
55 Self, Others, and Section 7, supra note 18, at 846. Norris–LaGuardia banned Yellow Dog contracts and stripped federal jurisdiction to issue injunctions against many labor disputes.
and ‘mutual support.’” It showed up again in 1933’s National Industrial Recovery Act, where it was a union leader who secured its inclusion. When the NIRA was struck down in 1935, “mutual aid or protection” lived on by migrating to § 7 of the NLRA, passed that same year.

From the words’ plain meaning to their legislative history, there is thus evidence that the mutual aid or protection clause imported an employee-centric paradigm into management-labor relations: the worker interest in solidarity, instead of only the promise of economic reciprocity. Solidarity made up the “core principle of the common law of labor,” in polar opposition to the competitive, economic self-interest that formed the backbone of the common law of business. This original understanding expands the scope of which interests should be held protected under the clause beyond simply those that can be tied directly to a profit motive, a level of businesslike self-interest suggested to a greater degree by the more concrete, transactional phrase “terms and conditions of employment.” The inclusion of mutual aid or protection as § 7’s catchall held the promise of codifying a broader, more flexible set of statutory worker rights to meet employees on their favored terms, a promise at times realized in the first decades of NLRA adjudication.

In Eastex, Inc. v. NLRB, concerted activity for mutual aid or protection was classified as being for a “somewhat broader purpose” than “self-organization” and “collective bargaining.”

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56 Self, Others, and Section 7, supra note 18, at 850 (citing DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR (1987)).
57 American Federation of Labor president William Green. Self, Others, and Section 7, supra note 18, at 852.
58 Self, Others, and Section 7, supra note 18, at 793 (“the ‘promise of reciprocal benefit’—and the contractual imagery it invokes—assumes a relationship between self and others that is oppositional and thus obscures the sense of solidarity and genuine connection among working people, born of their experience of workplace struggles.”); see also James Gray Pope, Class Conflicts of Law II: Solidarity, Entrepreneurship, and the Deep Agenda of the Obama NLRB, 57 BUFF. L. REV. 653 (2009) (framing solidarity as labor’s answer to business’s embrace of entrepreneurial self-interest, and arguing that § 7 should be interpreted as the advancement of solidarity over economic motives).
59 Class Conflicts I, supra note 14, at 1095.
60 See What Do Workers Want?, supra note 7, at 947–48 (arguing that the grounding of “mutual aid or protection” in historical labor movement solidarity allows for employee interests “that lie some distance from labor’s traditional economic demands but still plainly arise from the work experience”).
61 See, e.g., G&W Elec. Specialty Co., 154 N.L.R.B. 1136, 1138 (1965) (“To construe this provision as protecting only activities directly and immediately involving the employment relationship would be to read the phrase ‘or other mutual aid or protection’ out of the Act.”).
62 437 U.S. 556 (1978) [Eastex].
63 Id. at 565.
The Court found that “concerted activities for . . . mutual aid or protection” encompassed any “legitimate activity that could improve [employees’] lot as employees,” and even allowed for the use of “channels outside the immediate employer-employee relationship.” Therefore, a union newsletter that supported raising the federal minimum wage, and advocated a vote to “defeat our enemies and elect our friends,” was held to represent protected concerted activity, despite being addressed to workers making well above the minimum wage, and thus despite the employer having no direct ability to alter the conditions under protest. By including concerted activity aimed at issues not directly related to the working conditions or wages of the target employees, but instead relevant to the issues of “employees generally,” the Court affirmed its statement on the broader purpose of the clause, and gave at least theoretical support to an unadulterated form of worker solidarity serving as a legitimate, protected goal for concerted labor action.

Yet far from proving a validation of expanded § 7 rights, Eastex exemplified the judicial transformation of labor’s original hope for the NLRA—that it might place worker solidarity on par with the profit motive—into a legal regime thoroughly marked by managerialism’s imprint. The Court decided upon the supposed individual interests of the workers in question, rather than on broader notions of “the union concept of strength through solidarity.” For the majority, Justice Powell reasoned that since “few topics are of such immediate concern to employees as the level of their wages,” the Board was justified in finding that a rise in the minimum wage may have led to a “widely recognized impact” on the “level of negotiated wages generally,” an economic connection to their own labor market position that “would not have been lost on

64 Id. at 567, 565.
65 Id. at 569–70. See also Kaiser Engineers v. NLRB, 538 F.2d 1379, 1384–85 (9th Cir. 1976) (lobbying in opposition to national immigration policy fell under “mutual aid or protection” immunity despite the fact that it “involved no request for action on the part of the company, did not concern a matter over which the company had direct control, and was outside the strict confines of the employment relationship”).
66 437 U.S. at 570 (“The union’s call, in the circumstances of this case . . . fairly is characterized as concerted activity for the ‘mutual aid or protection’ of petitioner’s employees and of employees generally.”) (emphasis added).
67 This was the reasoning that the Board below used in its original adjudication of the case to uphold a separate section of the union newsletter as being protected under § 7. Id. at 569.
petitioner’s employees.”\textsuperscript{68} This logic was drawn upon despite “the newsletter on its face suggest[ing] that the only motive behind the distribution at issue was the employees’ concern not for themselves, but for other workers.”\textsuperscript{69} The Court thereby skirted the legitimacy of solidarity as the motivating force behind § 7 protection, instead translating that motivation into a judicially palatable economic format. Labor, in a sense, won the battle but lost the war: it was forced to fight on management’s terms,\textsuperscript{70} which has had enduring implications for workers.\textsuperscript{71}

The \textit{Eastex} Court also muted the impact of § 7 by stating that “some concerted activity bears a less immediate relationship to employees’ interests as employees than other such activity. . . . [A]t some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the ‘mutual aid or protection’ clause.”\textsuperscript{72} This language was seized on to curtail the sorts of concerted activity that could be found protected under § 7, based on the conceptions of “employees’ interests as employees” held by the federal circuit courts and the Board.\textsuperscript{73} Taking cues from the Court and from the long history of ruling through the prism of

\textsuperscript{68} Id. See also \textit{Kaiser Engineers}, 538 F.2d at 1385 (“[T]he concerted activity of employees, lobbying legislators regarding changes in national [immigration] policy which affect their job security, can be action taken for ‘mutual aid or protection’ within the meaning of § 7.”).

\textsuperscript{69} \textit{Self, Others, and Section 7, supra} note 18, at 797.

\textsuperscript{70} Courts have resorted to similar conflict-based analogies regarding the NLRA, more evidence of the misconstrued “industrial pluralist” idea that the Act created equal power and a forum to wield it, and thus that courts should avoid interfering with such private contests. See, e.g., Trompler, Inc. v. NLRB, 338 F.3d 747, 750 (7th Cir. 2003) (“The [Act] models labor relations as tests of strength between workers and management. . . . This ‘combat’ model of labor relations does not sort well with a requirement that the combatants act reasonably. Such a requirement would turn war into a war game constrained by rules that would often baffle the combatants.”). This attitude helps explain why the courts have been largely apathetic bystanders to the accelerating diminishment of labor power in recent decades.

\textsuperscript{71} See generally \textit{Self, Others, and Section 7, supra} note 18, at 796 ("The assumption almost invariably emerges in section 7 cases that support rendered by employees to their fellow workers enjoys statutory protection only to the extent that it can be construed as—or . . . misconstrued as—self interested."). Courts have used contorted logic to find an economic motive for worker activity rather than discerning solidarity. See, e.g., Sr. Citizens Coord. Council of Riverbay Cmty., 330 N.L.R.B. 1100, 1104 (2000) (finding a letter by social workers voicing concern with being able to “give our clients the highest quality care” without adequate supervision to be protected, in part, “because the employees could reasonably believe that their jobs might be in jeopardy” if a qualified director was not hired). Professor Fischl traces this tradition of misconstruing the concerted mutual action of employees as self-interested to the widespread misinterpretation of Judge Learned Hand’s opinion in \textit{NLRB v. Peter Callier Kohler}, 130 F.2d 502 (2d Cir. 1942). Per Fischl, courts found that Hand’s reasoning posited a “promise of reciprocal benefit” as the predicate for § 7 protection, when he was likely speaking to solidarity. \textit{Self, Others, and Section 7}, at 854–58.

\textsuperscript{72} 437 U.S. at 567–68 (emphasis added).

\textsuperscript{73} See, e.g., \textit{Tradesman Int’l, Inc. v. NLRB}, 275 F.3d 1137, 1141 (D.C. Cir. 2002) (citing \textit{Eastex}’s required nexus to “employees’ interest as employees” in finding that the “‘mutual aid or protection’ clause is not without bound”).
self-interest, these conceptions inevitably hinged upon evaluations of the respective economic stakes of labor and management to determine the scope of that protection. The courts and the Board therefore veered away from a validation of labor solidarity as legitimate concerted activity under the Act, the type of validation that a different interpretive lens applied to *Eastex’s* facts might have provided. Thus, while “mutual aid or protection” has a theoretically broader range than “terms or conditions of employment,” it has not significantly expanded worker protection, and has largely come to be equated with the latter phrase’s content, despite *Eastex’s* holding that it has the potential to extend protection outside the “immediate employment relationship.”

**II. Product quality as a core managerial prerogative**

As Part I illustrates, among the issues comprising the “core of entrepreneurial control” that courts and the Board have exempted from legitimate employee interest under § 7 is concern about or criticism of product quality. “Protest against the quality of the product,” the NLRB unequivocally stated in a 1980 decision, “is not activity which could improve the employees’ ‘lot as employees’ . . . ; that sort of interest is not encompassed by the ‘mutual aid or protection’ clause.”

Per settled NLRA precedent, “employee efforts to affect the ultimate direction and managerial policies of the business are beyond the scope of the [mutual aid or protection]...

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74 *What Do Workers Want?,* supra note 7, at 927 (“The ‘mutual aid or protection’ clause of section 7 extends the scope of protected advocacy beyond that which pertains to actual ‘terms and conditions of employment,’ but not by much.”). Some courts have effectively glossed over “mutual aid or protection” as a separate term in need of exegesis, instead implicitly melding it with terms and conditions. *Compare, e.g., Trompler, Inc. v. NLRB, 338 F.3d 747, 748 (7th Cir. 2003)* (“Section 7 . . . entitles workers to engage in ‘concerted activities’ for the purpose of improving the terms and conditions of their employment.”) *with NLRB v. S. Cal. Edison Co., 646 F.2d 1352, 1364 (9th Cir. 1981)* (“Activities for ‘mutual aid or protection’ within the meaning of section 7 are not limited to those within the employer-employee relationship or those aimed at changing terms and conditions of employment.”).

75 *See* Bob Evans Farms, Inc. v. NLRB, 163 F.3d 1012, 1020–21 (7th Cir. 1998) (“‘for the purpose of mutual aid or protection’ . . . has been interpreted to mean that the underlying dispute must relate to the terms and conditions of work. . . . [T]he Act does not protect employees who protest a managerial action that has no bearing on such terms and conditions.”); *Trompler, 338 F.3d* at 748. *But see* S. Cal. Edison, 646 F.2d at 1364.

76 *See, e.g.,* Damon House, Inc., 270 N.L.R.B. 143, 147 (1984) (“The phrase ‘job interests’ clearly embraces more than the immediate employment relationship as otherwise the Section 7 phrase ‘other mutual aid or protection’ would be read out of the Act.” (citing G&W Elec. Specialty Co., 154 N.L.R.B. 1136, 1138 (1965))).

77 *See What Do Workers Want?,* supra note 7, at 949 (“Current doctrine is based upon the premise that employees are not advancing their interests as employees when they criticize their employer’s products or services.”).

clause,”79 and “[t]he quality of the ‘product’ is an aspect of these managerial prerogatives.”80

Product quality has been carved from § 7 primarily because it is seen as having no rational connection to any economic employee interest. Justice Stewart laid out this rationale in Fibreboard by framing a direct connection to job security—employees’ greatest area of self-interest—as a necessary (yet not sufficient) condition for finding a managerial decision amenable to collective bargaining.81 And while mutual aid or protection might have originally been envisioned as a broader, more labor-friendly NLRA mechanism than the mandatory-permissive dichotomy came to allow for, the same economic necessity typified by Stewart’s approach to bargaining has largely been adopted in legislating the claims of employees in the name of other concerted activity.82 “Employees’ interests as employees” with respect to mutual aid or protection have thus been restricted to a subset of issues centered on economic self-interest—“intent to improve wages, hours, or working conditions”—that cannot include concerted action premised upon exposing deficiencies in or bringing about the improvement of product quality.83

The requisite economic connection between product quality and “employees’ interest as employees” has been found lacking, despite the traditional judicial conception of labor relations being at least in theory fully animated by the effect that product quality unquestionably has upon the concrete terms and conditions of most jobs.84 An obvious causal connection exists between the quality of a firm’s product and its success in a competitive market,85 and the tangible interest

79 Id. at 41.
80 Ampersand Publ’g., LLC v. NLRB, 702 F.3d 51, 57 (D.C. Cir. 2012).
81 Fibreboard, 379 U.S. at 223 (Stewart, J., concurring). See also supra notes 23–24 and accompanying text.
82 See, e.g., NLRB v. Oakes Mach. Corp., 897 F.2d 84, 89 (2d Cir. 1990); see also supra notes 74–76.
83 Orchard Park Health Care Ctr., 341 N.L.R.B. 642, 645 (2004) (Meisburg, M., concurring) (“Absent an intent to improve wages, hours, or working conditions, concerted action . . . cannot be deemed ‘mutual aid or protection.’”).
84 See MikLin Enters., Inc. v. NLRB, 861 F.3d 812, 837 (8th Cir. 2017) (Kelly, J., dissenting) (“In many cases . . . employees’ communications reflect a direct link between an employer’s labor practice and the quality of the employer’s product or service.”). Cf. Post-War Paradigm, supra note 13, at 1558 (“Decisions about plant location, choice of technology, and the nature of the product may affect the workforce more than any other decision the company makes.”) (emphasis added).
85 See, e.g., ALBERT HIRSCHMAN, EXIT, VOICE, AND LOYALTY 23 (1970) (“[R]evenue can at best remain unchanged and will normally decline steadily as quality drops.”).
that employees have in such success is equally as obvious.86 Even viewed from the economic perspective courts favor, then, it is unclear why the connection between the quality of a product (particularly one an employee is directly involved in producing) and worker self-interest would be too attenuated to fall within mutual aid or protection,87 while the connection in Eastex itself—concern over the earning power of other unrelated employees at a lower part of the wage scale—would be sufficient. That the minimum-wage issue in Eastex could be deemed entirely financial, while product quality is at least in part about something besides economics, does not necessarily mean that the connection to workers’ bottom line is more attenuated regarding the latter concern than the former.88 This is especially so in the modern era of robust competition among U.S. firms on the global stage to capture ever slimmer slices of market share, and the consequent decline in employee job security and employer loyalty.89 Today, the link between a decline in product quality and the economic interest of workers is more clearly traceable than ever.

The refusal to align product quality within the purview of “employees’ interests as employees” has been reinforced across a wide range of employment contexts, supported by an expansive view of the outputs that constitute a firm’s “product” so as to therefore be exempted from serving as the legitimate object of activity for mutual aid or protection.90 Three contexts

86 “[P]roduct quality may be a central concern of employees . . . because they fear that a low quality product will lead their employer to go out of business and cost them their jobs.” Diamond Walnut Growers, Inc. v. NLRB, 113 F.3d 1259, 1279 (D.C. Cir. 1997) (Wald, J., dissenting). See also Sr. Citizens Coord. Council of Riverbay Cmty., 330 N.L.R.B. 1100, 1104 (2000) (finding a letter by social workers expressing concern over their continued ability to provide clients with quality care as being animated by a reasonable belief that their jobs could be at risk).
87 For instance, the Ninth Circuit has held that this connection is open for employees to publicly pronounce upon in the context of a labor dispute. See Sierra Publ’g Co. v. NLRB, 889 F.2d 210, 220 (9th Cir. 1989).
88 Eastex is however consistent with the current interpretation of “mutual aid or protection” versus “terms or conditions of employment”—the former reaches farther, beyond the immediate employment relationship, but only regarding subjects that are themselves deemed employment conditions. Those conditions take on the same shape, molded by the same economic self-interest and managerial prerogatives, in the mutual aid or protection context as in the Act’s other contexts (and thus would include wages). See supra notes 74–76 and accompanying text.
89 See Widgets to Digits, supra note 12, at 98–99 (employees increasingly lack promises of long-term employment, and therefore “increasingly have to bear the consequences of firm failure or market fluctuations”); id. at 86 (“As firms find themselves in a more competitive environment through increased trade and global competition, they have to pay more attention to short-term cost reduction.”). See also supra Part I.b; infra Part III.
90 See, e.g., Nat’l Dance Inst.—N.M., Inc., 364 N.L.R.B. No. 35 (2016) (“[C]lassroom instruction culminating in the year-end show is . . . [Dance Institute’s] ‘product,’” and thus instructor’s “suggestions about the artistic direction of
that well-represent the prevailing attitude are patient health, child safety, and newspaper content.

a. Patient Health

Federal adjudicators have favored an expansive definition of product quality that in the health care setting includes patient welfare.\(^91\) As a member of the Board explained in *Orchard Park Health Care Ctr.*: “Although employee interest in *that product* [i.e., patient welfare] is desirable, it is not thereby converted into a working condition. Factory workers, too, may manifest a strong interest in the goods they produce, but the nature of those goods is not a condition of employment.”\(^92\) As a result, the Board rejected the claim of two nursing home employees to a statutorily protected interest in the wellbeing of the residents under their care, finding their action in calling the New York State Department of Health Patient Care Hotline to report excessive heat and a lack of water at the facility unprotected under § 7. Kathleen Reed and Carol Gunnerson failed to disclose their employment affiliation to the authorities, and “called the hotline to express their concern about patients, as distinguished from an effort to improve their lot as employees.”\(^93\) As patient care and wellbeing is in the healthcare field equivalent to product quality, a sphere outside of “employees’ interests as employees,” “the hotline call . . . ha[d] no direct relationship to the working conditions of employees.”\(^94\)

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\(^91\) *Orchard Park Health Care Ctr.*, 341 N.L.R.B. 642, 643 (2004) (“The Board has held repeatedly that employee concerns for the ‘quality of care’ and the ‘welfare’ of their patients are not interests ‘encompassed by the “mutual aid or protection” clause.’ ” (quoting Lutheran Social Serv. of Minn., 250 N.L.R.B. 35, 42 (1980))). The *Orchard Park* Board, however, was quoting an Administrative Law Judge in *Lutheran Social Service* who also believed it callous to equate patient health outcomes with the quality of the “product.” 250 N.L.R.B. at 42.

\(^92\) *Id.* at 645–46 (Meisburg, M., concurring) (emphasis added). Regarding the analogy between nurses and factory workers, the argument advanced by Professor Rabban, *supra* note 30, is instructive. Writing about mandatory bargaining, Rabban distinguishes between the responsibilities of industrial and professional workers. “The view that issues of fundamental policy are managerial prerogatives . . . derives from assumptions about the limited role of industrial employees. This view is inconsistent with the goals of professional employees, who claim persuasively that they have a legitimate and socially useful role to play in determining policies related to their professional expertise, whether or not these policies affect narrowly defined terms of employment.” *Id.* at 712. Nurses are among those professional employees who for Rabban can legitimately make such broader claims. *Id.* at 690–91.

\(^93\) 341 N.L.R.B. at 643.

\(^94\) *Id.* at 644. The Board was largely following precedent, grounding its decision in the reasoning of several NLRB adjudications that reached a similar result in the patient care setting; *Lutheran Social Serv.*, 250 N.L.R.B. at 42.
The Board’s aversion to including any action directed toward what could be characterized as product quality under the aegis of § 7, even when the link between a profession’s “output” and the traditional vision of industrial production is as highly attenuated as it is with health care,\(^{95}\) was strong enough that it reached this result despite the employees being bound by state law to report any unsafe conditions in the nursing home to the state health department.\(^{96}\) The dissent further argued that “it is illogical to separate patient care from working conditions,” as the two are “inextricably intertwined” in the health care field—the very essence of these employees’ work was to take care of the nursing home residents. “The link between their call to the hotline and their interests as employees [was], therefore, direct and in no way attenuated.”\(^{97}\)

The determination of whether product quality falls within managerial prerogatives in the health care field or is instead a term or condition of employment has grown more muddled since Orchard Park. In Washington State Nurses Ass’n v. NLRB,\(^{98}\) the Ninth Circuit stated that “both the courts and the Board have long recognized that nurses’ working conditions are directly related to patient care and safety”—that is, to the quality of the health care product. In Summit Healthcare Ass’n,\(^{100}\) an administrative law judge relied on Orchard Park to find that a nurse’s (concerted complaints regarding quality of care and “welfare of the children” at a home for troubled youth found unprotected); Good Samaritan Hosp. & Health Ctr., 265 N.L.R.B. 618, 626 (1982) (concern by hospital occupational therapists regarding “quality of the care offered by the program and the welfare of the children” that manifested as complaints regarding management of developmental learning program found unprotected); and Damon House, 270 N.L.R.B. 143 (1984) (letter from drug counselors criticizing impact that executive director of treatment center had upon adolescent residents found unprotected). But see Misericordia Hosp. Medical Ctr. v. NLRB, 623 F.2d 808, 813 (2d. Cir. 1980) (finding the discharge of a head nurse for preparing a report that raised issues related to both patient welfare and employee working conditions to be an unfair labor practice, as “in the health care field such issues often appear to be inextricably intertwined”).

\(^{95}\) In light of this attenuated connection, Member Meisburg’s analogy to the terms and conditions of factory workers and the tangible goods they produce seems particularly strained. See supra note 92.

\(^{96}\) 341 N.L.R.B. at 646 (Liebman & Walsh, M.M., dissenting). This requirement was even posted on the premises—a notice stating that “the Patient Care Hotline may be used 24 hours a day, seven days a week, to report nursing home situations requiring immediate action”—significantly strengthening the argument for the phone call in question being directly related to a term or condition of the nursing home staff’s employment. Id. at 646–47 (“[T]he requirement to protect patients by reporting an unsafe condition, set forth in the prominently displayed State notice, was an important part of the employees’ working conditions in caring for the patients.”).

\(^{97}\) Id. at 648. The “inextricably intertwined” descriptive phrasing came from Misericordia, 623 F.2d at 813.

\(^{98}\) 526 F.3d 577 (2008).

\(^{99}\) Id. at 582.

\(^{100}\) 357 N.L.R.B. 1614 (2011).
comment about the lack of a diet order in a patient file was “an unprotected expression of concern for patient welfare,” determining nurses were not free to band together for the protection of their patients, but the Board found this reasoning faulty. Despite the diet orders in question “undeniably relat[ing] to sound patient care,” their absence affected the ability of nurses to carry out their duties and thus also implicated their working conditions; “[t]he impact on employees and patients was ‘inextricably intertwined.’” Therefore, while it appears that adjudicators feel constrained by precedent to hold that a strict interest in patient health and safety deals with product quality and thus fails to qualify as a term or condition of employment under managerial prerogatives rationale, the “inextricably intertwined” reasoning of Misericordia Medical Center provides an avenue to find that such an interest in the unique quality of the health care product can indeed be logically positioned as the object of protected concerted activity under § 7.

b. Child Safety

Much like patient welfare, the safety of children, when characterized as an employment output, has also been held to be an aspect of product quality for which management is solely

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101 Id. at 1615.
102 Id. at 1616–17 (quoting Misericordia, 623 F.2d at 813). The Board quoted a hospital administrator’s statement that “our responsibilities as a registered nurse within the scope of our practice as a registered nurse is to ensure that our patients have what they need.” Id. at 1616. It is hard to distinguish this rationale from that used by the nursing home staff in Orchard Park. The Summit Healthcare Board attempted to do so by highlighting the disclaimer by the Orchard Park employees of interest in their own working conditions. (This approach to distinguishing Orchard Park was also used by the dissent in Five Star Transportation, 349 N.L.R.B. 42, 51 (2007)). But as the Orchard Park dissenters pointed out, “[t]he motives of the participants are irrelevant in terms of determining the scope of Section 7 protections; what is crucial is that the purpose of the conduct relate to . . . ‘mutual aid or protection’ of employees.” 341 N.L.R.B. at 647 (Liebman & Walsh, M.M., dissenting) (quoting Dreis & Krum Mfg. Co. v. NLRB, 544 F.2d 320, 328 n.10 (7th Cir. 1976)). See also Fresh and Easy Neighborhood Market, 361 N.L.R.B. No. 12, at *4 (2014) (concertedness and “mutual aid or protection” of § 7 both analyzed under an objective standard).
103 See Manor Care of Easton, Pa., N.L.R.B. 2009 WL 196092 (finding that the Misericordia principle of an “inextricably intertwined” relationship between patient welfare and healthcare working conditions was particularly apt in application to a nurse’s letter related to both staffing and negative patient care outcomes); NLRB v. Mt. Desert Island Hosp., 695 F.2d 364, 641 (1st Cir. 1982) (finding that a nurse’s comments to a local paper “were made for the purpose of improving working conditions and thus the level of patient care” and that “criticism of the Hospital’s administration was intertwined inextricably with complaints of working conditions”); Holy Rosary Hosp., 264 N.L.R.B. 1205, 1210 (1982) (deeming nurses’ concern over emergency room staffing, while ultimately directed at patient care, consistent with finding of a statutory labor dispute and thus with § 7 protection, for “[t]o a health care professional, such as a registered nurse, the handling of patient care is a condition of employment”). See also What Do Workers Want?, supra note 7, at 950 (“Can it be doubted that the job satisfaction of nurses is intimately bound up with the welfare of their patients?”).
responsible, and consequently for which no statutory protection of employee voice is extended. In *Five Star Transportation*,\(^{104}\) various school bus drivers for First Student, the losing company in a bid to operate a public school district’s buses, wrote letters to the school committee to raise awareness of dangerous practices that drivers employed by Five Star, the eventual winning bidder, had previously engaged in. These included the on-duty consumption of alcohol by Five Star drivers and the hiring of a convicted sex offender to transport children. After this campaign failed to result in a contract for First Student, several of the bus drivers-turned-writers, needing jobs, applied to drive with Five Star, but were rejected explicitly on account of their letters.

The Board denied § 7 protection to those letter-writers who “focused solely on general safety concerns and did not indicate that their concerns were related to the safety of the drivers as opposed to others,” citing *Orchard Park* in stating that “consistent with long standing precedent, merely raising safety or quality of care concerns on behalf of nonemployee third parties is not protected conduct under the Act.”\(^{105}\) Thus, because the letters were devoted to “generalized safety concerns, as opposed to the drivers’ common concerns involving their terms and conditions of employment,” Five Star was found to be within its rights in denying employment solely on the basis of the letters.\(^{106}\) Three other unemployed drivers were also denied § 7 protection due to letter-writing activity, despite the fact that their letters raised separate, non-safety-related issues implicating the drivers’ common economic terms and conditions of employment, because they used “inflammatory language” and “disparaging remarks” about Five Star in connection with the past serious reports of the company’s negligent hiring. Invoking *Jefferson Standard*, the Board determined that the tone of these letters had breached the drivers’ duty of loyalty to their prospective employer, providing further justification for its denial.\(^{107}\)

\(^{104}\) 349 N.L.R.B. 42 (2007).
\(^{105}\) *Id.* at 44.
\(^{106}\) *Id.* at 44–45.
\(^{107}\) *Id* at 46. For criticism of this unprecedented expansion of the duty of loyalty, see Finkin, *supra* note 5, at 567.
In this context, then, the safety of children transported by a bus driver was not deemed “inextricably intertwined” with employee working conditions in the way that patient welfare can be fused with nurses’ terms and conditions. The Board exempted passenger safety from those bus drivers’ legitimate work-related concerns, labeling the connection too attenuated from their interest as employees.108 Because the drivers expressed an interest in what could be viewed as the quality of their work—the safe transport of students, akin to nurses’ concern for the health of patients—the Board saw their concerted activity as aimed at other than mutual aid or protection. Child safety was, of course, “of the utmost concern to the school board,”109 but to the board alone, with drivers’ like concern qualifying as an infringement upon managerial prerogatives.110

c. Editorial Input

Adherence to product quality as a managerial prerogative was reaffirmed by the D.C. Circuit in Ampersand Pub’g, LLC v. NLRB.111 “[E]mployee efforts to affect the ultimate direction and managerial policies of the business are beyond [§ 7’s] scope,” the court stated, and “[t]he quality of the product is an aspect of these managerial prerogatives.”112 In mediating a dispute over what the Santa Barbara (Cal.) News–Press staff saw as an improper managerial incursion upon its news-gathering and reporting discretion, and thus upon its journalistic integrity and professional ethics, the court held that “a publisher’s editorial policies do not constitute a ‘term or condition’ of employment in which employees have legitimate § 7 interest.”113 Employees were “focused largely on protecting the quality of the relevant product, as they perceived it, from Ampersand’s editorial policies,” efforts which infringed upon the

108 Id. (“[T]he drivers’ letters implicate the safety of children, not the common concerns of employees.”)
109 Id.
110 Even the dissenter, Member Liebman, fought her battle within this managerial paradigm. She argued that the majority erred because bus safety “obviously” affects drivers as well as students, thus directly implicating drivers’ terms and conditions of employment, rather than pressing any larger point about a judicially cognizable, protected interest on behalf of workers in the quality and safety of their labor output. Id. at 51 (Liebman, M., dissenting).
111 702 F.3d 51 (D.C. Cir. 2012).
112 Id. at 57 (quoting Lutheran Social Serv. of Minn., 250 N.L.R.B. 35, 41–42 (1980)).
113 Id.
paper’s managerial purview.114 Also, while legitimate claims regarding wages, benefits, and working conditions were mixed in with those regarding ethics, credibility, and integrity, workers could not receive § 7 protection “by wrapping an unprotected goal in a protected one, by tossing a wage claim in with their quest for editorial control.”115 That is, in the editorial realm, as in Five Star, product quality concerns are not “inextricably intertwined” with the standard protected conditions of employment. And further, management’s reserved rights in the editorial sphere gained sweeping preclusive power, in that the inclusion of any claim infringing upon managerial prerogatives was enough to deny mutual aid or protection, even when employee statements also implicated concerns over traditional economically grounded terms and conditions.116

As did the Five Star Board, the Ampersand court went on to invoke Jefferson Standard’s disloyalty specter, finding the employees’ activity “doubly unprotected,” because they used prohibited means—“public disparagement of Ampersand’s product”—to achieve the prohibited ends of achieving a measure of control and voice in an area of sole managerial prerogative.117 Thus, not only were the employees infringing upon the newspaper’s managerial prerogatives, attempting to influence its quality by asserting their professional journalistic ethics, integrity, and

114 Id.
115 Id. at 58. See also Harry G. Hutchinson, Ampersand, Tornillo, and Citizens United: The First Amendment, Corporate Speech, and the NLRB, 8 N.Y.U. J.L. & LIBERTY 630, 702 (2014) (“Linked inextricably to the goal of press responsibility, the workers’ concerted activity cannot be saved from employer discipline simply because the employees’ campaign was also linked to the desire to achieve a contract that would cover newsroom employees’ hours, wages, benefits, and working conditions.”). But cf. NLRB v. Parr Lance Ambulance Serv., 723 F.2d 575, 578 (7th Cir. 1983) (finding that at least in the healthcare context, even when an employee “phrases a complaint about a situation solely in terms of its effect on patient welfare,” such complaint is nevertheless protected if the situation “relates to a working condition” (citing Misericordia Hosp. Medical Ctr. v. NLRB, 623 F.2d 808, 813 (2d Cir. 1980) (finding a hospital employee committee’s report to an accreditation commission to be protected under § 7, because the commission “deal[t] with issues that affect employee working conditions as well as with patient care,” and the report “raised issues that related not only to patient welfare but to the working conditions of employees”)).
116 Ampersand thus went beyond Five Star, which determined only that the drivers’ conventional claims were denied protection due to their being bundled with disloyal remarks. See supra note 107 and accompanying text.
117 702 F.3d at 58. In its role as appellate arbiter of most NLRB adjudications, the D.C. Circuit has been a robust custodian of the Jefferson Standard tradition. For example, in Endicott Interconnect Tech., Inc. v. NLRB, 453 F.3d 532, 537 (D.C. Cir. 2006), the court found that published comments critical of management made by a longstanding worker and union member at an IBM circuit board manufacturing plant “constituted ‘a sharp, public, disparaging attack upon the quality of the company’s product and its business policies,’” and were therefore unprotected (quoting Jefferson Standard). As in Ampersand, the Endicott court thus invoked both the disloyalty and managerial prerogatives ideals to reverse a Board decision extending § 7’s coverage. See also Finkin, supra note 5.
d. Admireable, Yet Unprotected

A common thread across the adjudications finding that worker voice on product quality goes beyond mutual aid or protection is a disclaimer that the activity in question doubtless constitutes a beneficial act. Employee comments on aspects of product quality have been described as “admireable,” “commendable,” “desirable,” “well-intentioned,” “professional,” and “applaud[able].” Yet federal adjudicators have continuously labeled themselves constrained by the Act, through its entrenched deference to managerial prerogatives, to find against employees despite such progressive utilization of voice. In some cases, reasoning in this vein has even gone beyond the statute to indicate that society itself places interest in product quality solely with management, with the Board therefore having no power to controvert the socially preferred workplace ordering. The managerial prerogatives doctrine thus works as a powerful precedential barrier, enabling decisionmakers to wash their hands of the pragmatic, big-picture implications of § 7 decisions. While the voice at issue might be desirable, they can

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118 702 F.3d at 55. The court failed to cite the fact that the comments it found to constitute public disparagement were openly made as part of a labor dispute, accompanied by references to the drive for union recognition and to the employees’ contract demands. The communications in Ampersand therefore differed in a crucial respect from the handbills distributed by the TV technicians in Jefferson Standard, as the omission of any such mention of a labor dispute in those handbills factored heavily into the Court’s disloyalty reasoning. Perhaps, then, even that important limitation on Jefferson Standard disloyalty has now fallen away. See also MikLin Enterprises, Inc. v. NLRB, 861 F.3d 812, 820 (8th Cir. 2017) (“[W]e reject the dissent’s suggestion that Jefferson Standard does not apply in this case because the employees’ disparaging communications ‘expressly reference[d] ongoing labor disputes.’”).

119 Nat’l Dance Inst.—N.M., Inc., 364 N.L.R.B. No. 35 (2016) (dance instructor who criticized artistic direction “was acting in the interest of her constituents which, while admirable, is not protected activity under the Act”).

120 Orchard Park, 341 N.L.R.B. at 645 (“Reed and Gunnerson were acting in the interests of the nursing home residents, and we commend them for their conduct. However . . . that conduct is not protected by Section 7.”).

121 Id. (Meisburg, M., concurring) (“Although employee interest in that product is desirable, it is not thereby converted into a working condition.”).

122 Ampersand Publ’g, 702 F.3d at 57 (newsroom employees’ appeal, “well-intentioned as it may have been,” nevertheless “went directly to the quality and managerial policies of the newspaper”).

123 Lutheran Social Serv., 250 N.L.R.B. at 42 (statements by residential counselors motivated by a threat to “quality of care,” “quality of the program,” and “welfare of the children” at a home for emotionally troubled youth found to be unprotected, despite manifesting a “sort of concern [that] is wholly professional and commendable”).

124 Five Star, 349 N.L.R.B. at 46 (“[W]e may applaud these individuals for raising a matter of public concern. But, the issue here is whether the National Labor Relations Act affords protection to those individuals.”).

125 Lutheran Social Serv., 250 N.L.R.B. at 42 (concern over quality of care and child welfare is “the kind of concern in the first instance confided by the statute, and our society, in management”) (emphasis added).
hold that such effort falls outside the scope of judicial or administrative power to validate, under both the Act and the natural hierarchy of employment relations empowering its implementation.

The notion that concern over product quality is confided by society solely in management is belied by the psychological investment of employees in their work and by the development of labor relations since the NLRA’s enactment. The next Part presents the non-economic case for employee interest in product quality and the evolution of managerial philosophy in this area.

III. Non-economic employee investment in product quality

Viewing worker interest in product quality through an economic prism could reveal a connection with “employees’ interests as employees” not too “attenuated” to pass the Eastex test, as was demonstrated in Part II. Yet a distinct viewpoint provides an independent rationale for removing product quality from the menagerie of managerial prerogatives—that of the non-economic interests motivating workers; the psychological attachment to and pride in one’s work.

Management has been attentive to such psychological employee attachments since at least the 1930s, when the Human Relations School began focusing on worker feelings in its pursuit of productivity.126 Yet interest in product quality from the employee perspective has largely escaped judicial notice, with near-total subjugation to the economic paradigm in § 7 cases premised upon mutual aid or protection.127 As Professor Estlund notes, this approach to adjudicating workplace issues ignores the understanding that “[a]n employee’s job satisfaction may turn just as much on her ability to take pride in the product of her efforts . . . as on her wages and the physical conditions in which she works.”128 Employees care about a multitude of

126 See Post-War Paradigm, supra note 13, at 1566–69 (the Human Relations School of industrial sociology was “self-consciously concerned with the manipulation of workers to increase productivity.”).
127 But see Diamond Walnut Growers, Inc. v. NLRB, 113 F.3d 1259, 1279 (D.C. Cir. 1997) (Wald, J., dissenting) (“[P]roduct quality may be a central concern of employees . . . because they identify with their work and genuinely care that the product with which they have identified their working lives be a worthy one.”).
128 What Do Workers Want?, supra note 7, at 949. “[W]orkers want to contribute meaningfully to a socially productive enterprise, to produce high-quality goods, and to deliver a valuable service. Some work experiences satisfy the deep-seated desire to identify with and take pride in the product of one’s labors, resulting in enhanced ‘job satisfaction,’ morale, and productivity.” Id. at 952–53.
job-related issues besides those that touch upon their immediate economic self-interest,\textsuperscript{129} and desire a greater level of involvement and say in critical company decisions affecting the work experience.\textsuperscript{130} Product quality is one of the issues which empirical data has revealed workers care about a great deal.\textsuperscript{131} This data drives home the assertion that workers have a psychological desire to enhance the quality of the goods or services that they are involved in producing.\textsuperscript{132}

\textit{a. Managerial strategies to harvest employee input on product quality}

Continued delineation of product quality as a managerial prerogative distinct from “employees’ interest as employees” has long been out of step with private workplace dynamics. Recognizing that employees possess both economic and psychological interest in the quality and safety of their labor output, employers have sought worker input on product-related issues for decades. Managerial attempts to capture the knowledge and experience of workers in order to enhance quality, productivity, and efficiency can be traced back to at least the 1950s,\textsuperscript{133} spurred partly by the sense that U.S. industry was falling behind increased global competition, a trend that could be reversed by getting more from workers.\textsuperscript{134} Through the management philosophies outlined below, American corporations have forged a far different conception than adjudicators of the relationship between managerial and employee prerogatives when it comes to product

\textsuperscript{129} Such as “fairness, personal dignity, privacy, and physical integrity.” Clyde W. Summers, \textit{Labor Law as the Century Turns: A Changing of the Guard}, 67 Neb. L.R. 7, 15 (1988). See also Elizabeth Anderson, \textit{Private Government: How Employers Rule Our Lives (and Why We Don’t Talk About It)} 136 (2017) (detailing how Walmart’s nonunion workers “are concerned not simply with wages and hours, but with being treated respectfully.”). Arguably, only when treated unfairly do workers characterize their employment in the more calculating fashion that courts assume as the norm. \textit{Widgets to Digits, supra} note 12, at 97 (“When they encounter what they perceive to be unfair treatment, [workers] revise their assessment of the nature of the overall exchange, retreat from an assumption of reciprocity, and reinterpret the relationship as an economic transaction.”).


\textsuperscript{131} Per Opinion Research Corporation surveys from the 1970s and 80s, 78–88% of blue-collar and 96% of white collar workers sampled wanted “some” or “a lot” of say on product or service quality. Thomas A. Kochan, Harry C. Katz & Robert B. McKersie, \textit{The Transformation of American Industrial Relations} 212 (1986).

\textsuperscript{132} A desire that feeds into the fundamental need of humans “to become masters of their immediate environments and to feel that their work and they themselves are important.” \textit{What Do Workers Want?}, supra note 7, at 949.

\textsuperscript{133} See Finkin, supra note 5, at 559.

\textsuperscript{134} See supra Part I.b; see also Note, \textit{Labor-Management Cooperation After Electromation: Implications for Workplace Diversity}, 107 Harv. L. Rev. 678, 678 n.4 (1994) (“much of the enthusiasm for participatory management stems from corporate America’s sense of impending competition from foreign corporations.”).
quality.135 In the words of one commentator, that the courts continue to remain blind to these developments “is not only to perpetuate an anachronism,” but also “to blink at reality.”136

i. Employee Quality Improvement Programs

Employee programs centered on enhancing quality and productivity have been around since at least the 1970s, when global competition began to force a reevaluation of business strategy.137 Such programs aim to involve employees in decision-making, with the expectation of management that this involvement will “enhance their firms’ productivity, improve the quality of the products or services they produced, and increase the job satisfaction of their workers.”138

These ideas originally manifested in Quality Circles, small groups within a work unit that meet to identify product quality issues and present recommended solutions to management.139 Quality Circles evolved into Total Quality Management (TQM), an efficiency- and productivity-based program, first adopted by Japanese firms in the postwar period, that migrated into U.S. managerial philosophy in the 1980s140 and rose rapidly in prominence with American firms in the 1990s.141 TQM “giv[es] ordinary workers responsibility for many core functions,” calls for more open, direct contact between workers and customers, and involves “every employee, at every level, in continuous product and service improvement,”142 so as to “incorporate[e] worker concern for product quality into the organization of the work itself.”143 As the philosophy is “premised on the active mobilization of the knowledge and intelligence of all employees,”144

135 See Finkin, supra note 5, at 557–58 (the assumption of managerial prerogatives with regard to the quality of employee production “has been overtaken by managerial ideology and practice”).
136 Finkin, supra note 5, at 561.
137 See Devaney, supra note 48, at 3; Michael L. Stokes, Quality Circles or Company Unions? A Look at Employee Involvement After Electromation and DuPont, 55 OHIO ST. L.J. 897, 901–02 (1994).
138 Stokes, supra note 137, at 897. “These programs gave groups of hourly workers the opportunity to solve problems and make decisions that once were exclusively within the realm of management.” Id. at 902–03.
139 Stokes, supra note 137, at 903.
140 Finkin, supra note 5, at 559.
141 WIDGETS TO DIGITS, supra note 12, at 115–16 (citing 1997 National Establishment Survey data from 683 firms).
142 WIDGETS TO DIGITS, supra note 12, at 105–07.
143 Finkin, supra note 5, at 559.
144 WIDGETS TO DIGITS, supra note 12, at 106.
managerial implementation of TQM highlights the gap between the terms and conditions of employment many workers are asked to embrace and incorporate, and the narrower subset they can implicate publicly via concerted commentary without fear of losing statutory protection.

Quality of Work Life (QWL) programs were part of the human resource management model of increased workplace collaboration, as that model evolved during the 1970s from the New Deal collective bargaining paradigm. QWL programs were designed to increase worker satisfaction, advantage the firm, and aid the customer through improved quality of manufactured products.145 One prominent study found a positive effect on product quality, showing “that improved trust and individual commitment is likely to have a bigger effect on those dimensions of organizational performance that are more directly under employees’ control,” like product quality improvements, that “can be traced more directly to problems that employees and their supervisors can solve through increased communication, training, and motivation.”146 The intuitive finding of a connection between worker input and product quality, a business dimension “more directly under employees’ control,” further indicts the exclusion of quality from the terms and conditions which, when addressed in concert, earn workers a protected say under § 7.

Six Sigma, a program of “lean” quality improvement made famous by GM CEO Jack Welch in the 1990s, evolved out of TQM into “an all-encompassing management tool for change and customer quality.”147 Six Sigma seeks to maximize quality by bringing a level of statistical rigor and scientific proof to the evaluation of quality enhancement. Like the other programs discussed, it feeds on the knowledge and expertise of trained employees and capitalizes upon their participation in a comprehensive data-driven process for improving quality, while shifting the emphasis of this initiative to “a new paradigm of total customer satisfaction.”148

\[145\] KOCHAN, KATZ & MCKERSIE, supra note 131, at 151.
\[146\] KOCHAN, KATZ & MCKERSIE, supra note 131, at 155–56.
\[147\] GEOFF TENNANT, SIX SIGMA: SPC AND TQM IN MANUFACTURING AND SERVICES 7 (2001).
\[148\] Id. at 8.
ii. **Organizational Citizenship Behavior and the New Psychological Contract**

The level of worker input needed to maximize efficiency and quality presents an issue for management due to the nature of today’s employment relationship. The modern “psychological contract” between private-sector labor and management is built on an understanding that the old one, premised upon at least some measure of loyalty and stability—an expectation of lifetime employment, continual step-ladder promotion, a defined benefit pension plan—is gone.149 Management’s new challenge is to “harness employees’ knowledge and imaginative capacity in the production process” despite the lack of that security and reciprocity—to elicit “commitment without loyalty.”150 To this end, besides the participation programs discussed, firms cultivate “organizational citizenship behavior” (OCB), an ethos of giving extra and going beyond job requirements without being specifically asked or compensated to do so, by “encourage[ing] employees to take an entrepreneurial approach toward their job . . . to feel that they are in control and making decisions about profitability.”151 As an internal method for productively utilizing employees’ creative energy, OCB suppresses the more powerful exercise of external voice and promotes enough commitment to keep workers from exiting until a project is completed.152

Adjudicators have sanctioned this “harnessing” of employee skill and knowledge with regard to product improvement by exempting employer-dominated quality programs from the § 2(5) statutory definition of labor organizations,153 while using managerial prerogatives to exclude concerted activity that speaks to those same product quality issues from mutual aid or protection.

b. **The Archaic Disloyalty Jurisprudence**

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149 WIDGETS TO DIGITS, supra note 12, at 92.
150 WIDGETS TO DIGITS, supra note 12, at 92, 96.
151 WIDGETS TO DIGITS, supra note 12, at 95–96. A more accurate label for what management seeks with regard to the new psychological contract is faith, not loyalty. The latter “retains an enormous dose of reasoned calculation,” while the former demands no influence over outcomes—that is, no voice. HIRSCHMAN, supra note 85, at 78–79.
152 Cf. HIRSCHMAN, supra note 85, at 92–93 (“[Managers’] short-run interest is to entrench themselves and to enhance their freedom to act as they wish, unmolested as far as possible by either desertions or complaints. . . . Such organizations will be looking for devices converting, as it were, conscious into unconscious loyalist behavior.”).
153 See supra Part I.b.
In light of the new “psychological contract,” not just managerial prerogatives, but also the disloyalty doctrine deserves to be reexamined. Jefferson Standard characterized the NLRA as “seek[ing] 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.” Yet the loyalty that this outlook calls for is a “one-way street,” for “there are no or few corollary obligations upon employers to recognize participatory interests of employees.” Since Professor Atleson made that critique, over three decades ago, the incongruence of disloyalty jurisprudence has grown starker, as powerful trends have sloughed off whatever expectations of loyalty remained on each side of the employment relationship.

The traditional U.S. employment model of lifetime tenure, step-ladder promotion, and secure retirement is the ideal of common enterprise invoked by the Jefferson Standard paean to cooperative, cordial labor relationships. But loyalty to such continuous relationships belongs to a bygone era when the manager was felt to have a significant social responsibility, and was expected to run the firm in order to balance in proportion the claims of stockholders, employees, customers, and the public, with profit subservient to institutional stability and reputation. This expression of the corporate equation is archaic: short-term profit maximization and shareholder value creation are now the overriding motivational forces pressuring managerial decisions, while efficiency programs such as Six-Sigma betray the complete focus on and deference to customer desires, often at the expense of employee needs and interests. Employees and the public have largely fallen from this firm equation, leaving only shareholders, customers, and short-run profit.

154 346 U.S. at 472. The text of the Act, however, makes no mention of loyalty. The “Findings and Policies” section instead references inequality of bargaining power between employees and organized employers. See supra note 11.
155 VALUES AND ASSUMPTIONS, supra note 9, at 95.
156 See Edward S. Mason, The Apologetics of “Managerialism,” 31 J. Bus. 1, 3, 6–7 (1958). Mason critiqued the prevailing managerial philosophy—decidedly alien to a modern reader—that credited corporate “conscience” and saw business as a “game in which profit has approximately the same significance as one’s golf score.” Id. at 6–7.
157 See, e.g., ANDERSON, supra note 129, at 129 (describing how large corporations often view workers’ interests as of no account versus those of customers, the latter also serving as a proxy for the actual interests of the corporation).
In 1989, Welch described the “implicit psychological contract based on perceived lifetime employment” as creating a “paternal, feudal, fuzzy kind of loyalty.”\textsuperscript{158} Such loyalty focused employees inward, instead of “outward on a competitive world where no business is a safe haven for employment unless it is winning in the marketplace.”\textsuperscript{159} Faced with those market pressures, firms successfully sought to “break the assumption of long-term attachment and obligation between the firm and the employee,” in order to “‘recasualize’ the employment relationship.”\textsuperscript{160} Business schools caught on to drastically changed aims of employers, teaching future managerial classes that companies no longer seek a longstanding worker base.\textsuperscript{161} The old “retain and reinvest” model of a permanent, loyal, equitably paid workforce has been discarded in favor of “downsize and distribute.”\textsuperscript{162} To maximize shareholder value, operational efficiency is now paramount. A core aspect of such efficiency is minimizing labor costs, and to do so it becomes necessary to employ a far more transient workforce than the traditional model dictated, as loyal, tenured workers use up considerable corporate resources. These responses to global competition and technology have completely transformed the nature of American labor, with one study estimating that freelancers will comprise forty percent of the U.S. workforce by 2020.\textsuperscript{163}

Given these trends, disloyalty jurisprudence seems an archaic barrier. Firms no longer offer nor seek loyalty from employees, but instead try to coax enough commitment to maximize productive output before workers exit or are replaced. And if this inevitable exit, forced or voluntary, is the opposite of workplace loyalty—or at best, a neutral proposition—then any voice workers exert should not be viewed as disloyal. The traditional relationship between voice, exit,
and loyalty should thus be reformulated to better reflect the modern reality of the labor market.

c. Voice, Exit, and Loyalty

With the well-chronicled shrinkage in private sector unionization (down to 7% of the 2017 workforce\textsuperscript{164}) and consequent evaporation of collective bargaining’s import, the mutual aid or protection clause is essentially the only relevant part of the Act for most U.S. workers.\textsuperscript{165} Yet due to the chokehold on that clause exerted by managerial prerogatives, workers have virtually no protected voice under the NLRA when it comes to speaking in concert on product quality.

An underlying motivation for judicial hostility to worker voice is found in the dominant position of its fundamentally opposite force—exit—in the U.S. consciousness and foundational mythology.\textsuperscript{166} The judicial philosophy regarding this issue can be summed up by a proclamation of Justice Henry Jackson in 1944: “In general, the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers.”\textsuperscript{167} The dominant position of exit, according to political economist Albert Hirschman, relates to the traditional American idea that success is achieved through upward social mobility, exiting one’s class and leaving one’s former peers behind, a form of “evolutionary individualism.”\textsuperscript{168} As Hirschman wrote in 1970:

\begin{quote}
[T]he ideology of exit has been powerful in America. With the country having been founded on exit and having thrived on it, the belief in exit as a fundamental and beneficial social mechanism has been unquestioning. It may account for the strength of the national faith in the virtues of . . . competitive enterprise.\textsuperscript{169}
\end{quote}

\footnotesize
\begin{enumerate}
\item \textsuperscript{165} See CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE 29 (2009) (“The collective bargaining system that the labor laws intended to serve as the primary mechanism for determining terms and conditions of employment and settling workplace disputes has become nearly irrelevant to the vast majority of private-sector American workers.”). See also ANDERSON, supra note 129, at 71 (“The vast majority [of workers] are subject to private, authoritarian government, not through their own choice, but through laws that have handed nearly all authority to their employers.”).
\item \textsuperscript{166} HIRSCHMAN, supra note 85, at 106 (“Exit has been accorded an extraordinarily privileged position in the American tradition.”).
\item \textsuperscript{167} Pollock v. Williams, 322 U.S. 4, 18 (1944), as quoted in ANDERSON, supra note 129, at 66. Compare Justice Jackson’s statement in Pollock to ANDERSON, supra note 129, at 139 (for most workers in the modern domestic economy, “even if they have a job, the cost of job loss is so high they have to put up with nearly any abuse just to hang on to an income”).
\item \textsuperscript{168} HIRSCHMAN, supra note 85, at 108.
\item \textsuperscript{169} HIRSCHMAN, supra note 85, at 112.
\end{enumerate}
The at-will employment doctrine that characterizes the U.S. labor market reinforces the ideology of exit. As workers are in theory free to leave their jobs whenever they please, this freedom has been elevated to talismanic status, perceived as the only necessary lever for employee discontent, despite the reality being that it provides a most unhelpful alternative for most wage laborers.170

Individualistic and easily measurable, exit belongs to the realm of economics, whereas voice is political.171 That the judiciary has favored exit over voice thus fits its interpretation of the NLRA in general, and the mutual aid or protection clause in particular, using an economic lens, while consistently rejecting the legitimacy of the more worker-centric ideal of solidarity, infused as that concept is with political activity lacking firm grounding in rational, measurable behavior. Judicial deference to exit and hostility to voice has led to the delegitimizing of political concerted action deemed to be without an economic anchor.172 This betrays the promise of the NLRA, designed as it was to set up something of a political system in the firm: the statute can be seen as a workplace constitution, with bargaining as political debate and the agreement as legislation.173 An exit right without voice fundamentally skews that political system, the “myth of the mini-democracy” in the firm, as perpetuated by the “illusion of industrial pluralism”—the idea that management and labor negotiate with equal power, revealed as fraudulent due to

170 ANDERSON, supra note 129, at 130 (“Those consigned to the status of wage worker for life have no real way out: while they can quit . . . often at great cost and risk, they cannot opt out of the wage labor system that structurally degrades and demeans them.”). Among the barriers to exit for wage laborers is the unavailability of unemployment insurance after quitting, and extreme uncertainty about whether conditions are any better elsewhere. Id. at 141.

171 HIRSCHMAN, supra note 85, at 15–16 (describing exit as “the sort of mechanism economics thrives on”—one that is “neat”, “impersonal,” and “indirect,” as opposed to the “messy,” opinionated, and “direct” concept of voice, which serves as an example of “political action par excellence”). See also FREEMAN & ROGERS, supra note 130, at 64 (“Political scientists, sociologists, psychologists—perhaps everyone but economists—like voice.”).

172 See, e.g., Soft Drink Workers Local 812 v. NLRB, 657 F.2d 1252, 1258 n.11 (D.C. Cir. 1980) (courts have hemmed in statutory definition of “labor disputes” “only to exclude from that category controversies in which a union acts out of a political interest which it may share with all other citizens and which in no way enhances the distinct economic interests of its members”); NLRB v. Int’l Longshoremen’s Ass’n, 332 F.2d 992, 995–96 (4th Cir. 1964) (finding union members’ refusal to work ships engaged in Cuban trade because of the missile crisis not to constitute a labor dispute, as it pertained to a “general political question, in which ILA shares an interest with all citizens,” rather than to the workers’ “terms and conditions of employment”); see also NLRB v. Local Union No. 48, 454 F.2d 879, 883 (4th Cir. 1972) (“The mark of a labor dispute is the presence of economic adversaries.”).

173 ESTLUND, supra note 165, at 28.
management’s retained rights and the mandatory-permissive bargaining framework, among other disparate powers.\textsuperscript{174} Professor Elizabeth Anderson further asserts that holding only exit rights, without voice, “amounts to a grant to the dictatorial employer to harvest the entire ‘producer’s surplus’—all the benefits that make their job better than workers’ next best alternative—that would otherwise accrue to workers before the job gets so intolerable that they quit.”\textsuperscript{175} 

Besides leading to an inequitable monopolizing of the worker’s input without a grant of corresponding political power, the total suppression of voice is also counter-productive for firms, as evidence points to a rise in productivity when workers have the option to voice discontent rather than simply quitting.\textsuperscript{176} Corporations themselves clearly understand and trust this intuitive connection between voice and productivity, as part of the motivation for the introduction of the various employer-dominated internal participation programs is to keep employees satisfied and productive.\textsuperscript{177} But the sort of heavily curated voice that can be expressed through TQM, quality circles, or Six-Sigma is of course a weak substitute for the more politically volatile concerted employee communication of the type utilized in labor disputes and analyzed above in Part II.

The suppression of voice and elevation of exit as the worker cure-all also has significant implications for the treatment of employee loyalty. In \textit{Jefferson Standard}, the TV technicians’ disparagement of their employer’s product in the course of a labor dispute was judged a highly disloyal act worthy of discharge. Yet voluntary exit—quitting—is in many ways more disloyal. The Court’s view of the importance of loyalty should in an important respect have led to a bias in favor of voice, rather than exit, for there is a logical dependence between voice and loyalty (and, 

\textsuperscript{174} \textit{Post-War Paradigm}, supra note 13, at 1566. \textit{See also} Summers, supra note 129, at 9–10 (describing the NLRA’s failure to achieve its purpose of imparting widespread industrial democracy through collective bargaining).

\textsuperscript{175} ANDERSON, supra note 129, at 141. A dictatorial workplace masked by the rhetoric of democracy echoes the Human Relations School of industrial sociology, which initiated the managerial trend of “self-conscious[] concern[] with the manipulation of workers in order to increase productivity.” \textit{Post-War Paradigm}, supra note 13, at 1566.


\textsuperscript{177} \textit{See, e.g.}, Gely, supra note 48, at 47 (citing congressional findings that participatory programs positively impact productivity and job satisfaction); \textit{see generally supra} Part IIIa.
conversely, an inverse relationship between exit and loyalty).\textsuperscript{178} To utilize voice, which amounts to “talking about a problem and seeking to resolve it through discussion, argument, and bargaining,”\textsuperscript{179} the worker often must place the issue in question, and consequently the employer, above the possibility of viewing exit as an individualized solution.\textsuperscript{180} In short, the utilization of voice implies at least some degree of loyalty to the enterprise, or at least to one’s place within it, concepts which can hardly be parsed through the judiciary’s traditional economic paradigm.\textsuperscript{181}

**CONCLUSION: A SIMPLE SUGGESTION FOR REFORM**

For decades, U.S. corporations have experimented with ways to use the knowledge, skill, and creative input of their employees with regard to product quality, efficiency, and productivity. Adjudicators have recognized the competitive necessity of such harvesting of human capital, as evidenced by the rhetoric used to define the debate over the NLRA’s company union provisions. Yet while an explosion of commentary after *Electromation* aimed at ensuring that management maintain its prerogative to capitalize upon the capacity of its workforce to aid profit maximizing strategies focused on areas of traditional managerial control, like product quality, less attention was given to workers’ correlative right to actively promote their own voice and opinions about those quality issues, rather than only seeing them passively assimilated into the corporate bottom line. This is due to the managerial prerogatives doctrine, which pervades NLRA interpretation at every level, turning many of the Act’s promised protections into a one-way street. And when a measure of employee voice does manage to pass that significant hurdle, *Jefferson Standard* acts

\textsuperscript{178} “[T]he likelihood of voice increases with the degree of loyalty.” *Hirschman*, *supra* note 85, at 77. “As a rule . . . loyalty holds exit at bay and activates voice.” *Id.* at 78.

\textsuperscript{179} *Freeman & Rogers*, *supra* note 130, at 64.

\textsuperscript{180} *See What Do Workers Want?, supra* note 7, at 950 (“Employees might even conclude that criticizing the employer’s product or service—informing the public of problems and pressuring the employer to institute changes—serves the long-run interests of the enterprise and its employees.”).

\textsuperscript{181} Adjudicators have occasionally recognized that employee voice nominated for NLRA protection is often aimed at spurring beneficial improvement in the target organization. For example, in *NLRB v. Mt. Desert Island Hosp.*, a letter from a nurse objecting to the working conditions and patient care at a hospital was sent “in a spirit of loyal opposition—not out of malice or anger,” 695 F.2d 634, 641 (1st Cir. 1982), while in *Manor Care of Easton, Pa.*, a letter “constituted an effort to push the Respondent to redress problems at the facility.” N.L.R.B. 2009 WL 196092.
as a backstop to delegitimize any remaining commentary deemed too disparaging or disloyal.

Management and labor both have long since discarded the old paradigm of continuity and security, making disloyalty jurisprudence a vestigial barrier to greater protection for employee voice. None can debate the psychological interest employees have in the output of their labor, whatever it may be, and their economic interest in product quality grows stronger as business competition for market share and worker competition for jobs increase. It is thus fair to say that most issues of product quality are now “inextricably intertwined” with terms and conditions of employment, and represent “employees’ interest as employees,” in the way that patient health outcomes are inevitably bound up with the job-related interests of healthcare workers.

Incorporating this interpretive change into § 7 mutual aid or protection decisions would provide employees some slight relief, while remaining true to the Act’s evolutionary spirit. Removing product quality from the sphere of managerial prerogatives that dominate the NLRA would also help restore Justice Harlan’s vision for the more fluid division of workplace power, responsive to “the changing needs of our society and to the changing concepts of the responsibilities of labor and management.” As those responsibilities regarding product quality have majorly shifted, the 20th century “premature crystallization” of managerial prerogatives requires a shattering blow.

Such an interpretative shift would increase workplace regulation, and limit the freedom of management to run the corporation as it sees fit. Yet the point of regulation, in the long run, is to “constrain the governors, not the governed.” Protecting the ability of employees to speak out on the issues of quality about which they have long been held responsible by management in the workplace would take a small step toward revitalizing the dormant promise of the NLRA.

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182 ANDERSON, supra note 129, at 130. See also id. at 45–47 (discussing the three different concepts of freedom—negative, positive, and republican—and asserting that “[s]tate-enforced constraints on negative liberty can also increase total liberty through their enhancement of republican freedom”); Summers, supra note 129, at 17 (“Most employees do not look upon laws preserving their privacy, upholding their personal dignity, shielding their personal safety, and insuring them fairness of treatment and security in their jobs as encroachments on their freedoms. Workers are more likely to view such laws as a caring government getting employers off their backs.”).