

## FAIR RESPONSES TO UNFAIR LABOR PRACTICES: ENFORCING FEDERAL LABOR LAW THROUGH NONTRADITIONAL FORMS OF LABOR ACTION

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*American labor law classifies strikes according to both purpose and form. In terms of purpose, a strike over terms and conditions of employment is an economic strike while one over an employer's violations of federal labor law is an unfair labor practice strike. With respect to form, the subcategories are less clear, but the National Labor Relations Board (NLRB or Board) and the courts have distinguished between full strikes, which receive protection under the National Labor Relations Act (NLRA or Act), and certain categories of nontraditional strikes, such as intermittent and partial strikes, which do not. In removing such strike forms from the protection of federal labor law, the Board and courts have declined to expressly differentiate between nontraditional strikes stemming from different purposes. While unfair labor practice strikers receive greater protection from replacement by employers, neither the Board nor the federal courts have allowed for expansion of the scope of protected nontraditional strike activity for such strikers. Instead, the Board and courts have at times skirted the question of whether a separate standard is necessary, developing elusive exemptions from the traditional rule to protect workers engaged in these strikes. The justifications for finding certain forms of nontraditional strikes unprotected under the Act stem from a theory that such labor action should be left to the free play of economic forces. This Note argues that the scope of protected forms of concerted activity available to unfair labor practice strikers should be broader given that these strikes' primary purpose is not to wage an economic battle but, alternatively, to compel an employer to comply with the requirements of existing labor law.*

### INTRODUCTION

What does it mean to “strike”? Machines screech to a halt. Workers prepare for months without pay, and the company for months without production. Due to economic and legal changes that have weakened the traditional strike, such images of long-term economic contests between labor and capital are largely relics of another time.<sup>1</sup> This is not the only

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1. Workers took part in 381 major work stoppages in 1970, but the number has dwindled to just eleven in 2014. For statistics on declining major work stoppages, see Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Major Work Stoppages in 2014, at 3–4 tbl.1 (Feb. 11, 2015), <http://www.bls.gov/news.release/pdf/wkstp.pdf> [<http://perma.cc/E4qD-XPVQ>].

way that employees withdraw their labor, however. Various forms of short-term protests present an alternative model, a model existing since the formation of modern labor law but gaining attention in recent years with a newfound purpose.<sup>2</sup> Short-term protests originate from diverse causes, but many recent protests have endorsed a goal of labor-law enforcement. That is, the protesters seek through their action to deter and remedy unlawful employer retaliation against employees who exercise their workplace rights.<sup>3</sup> These walkouts are undoubtedly “strikes” in the most basic sense of the term. Yet they face a hurdle. Over time, courts have excluded some nontraditional work stoppages from federal labor-law protection based on the forms that these stoppages take. In essence, the further a protest strays from the traditional-strike model, the more skeptical courts become about participants’ entitlement to protection.

Workers in the United States have a protected right to strike.<sup>4</sup> Employers who discipline or discharge employees for participating in protected “concerted activities” violate the National Labor Relations Act (NLRA or Act).<sup>5</sup> The National Labor Relations Board (NLRB or Board), the independent agency charged with enforcing workers’ right to organize and bargain collectively,<sup>6</sup> can bring unfair labor practice (ULP) charges against employers for retaliating against employees who engage in protected activity. Over time, courts have limited workers’ protected right to strike to exclude certain forms of “intermittent” and “partial” work stoppages.<sup>7</sup> This Note explores these work stoppages and considers

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2. See, e.g., Karen McVeigh, *US Fast-Food Workers Stage Nationwide Strike in Protest at Low Wages*, *Guardian* (Aug. 29, 2013, 1:54 PM), [www.theguardian.com/world/2013/aug/29/us-fast-food-workers-strike-low-wages](http://www.theguardian.com/world/2013/aug/29/us-fast-food-workers-strike-low-wages) [<http://perma.cc/SL6W-U6FF>] (noting workers in dozens of cities went on strike in support of, among other aims, right to unionize).

3. See, e.g., Susan R. Hobbs, *UAW-Represented Workers Back on the Job After One-Day ULP Strike at Bell Helicopter*, 27 *Lab. Rel. Wk. (BNA) No. 37*, at 1763 (Sept. 18, 2013) (describing one-day strike against company’s allegedly unlawful bargaining tactics); Ben Penn, *In Largest Strike Yet, Contract Workers Seek ‘Model Employer’ Order, as Does CPC*, 29 *Lab. Rel. Wk. (BNA) No. 17*, at 867 (Apr. 29, 2015) (noting “12th single-day strike in nearly two years” by federal workers over unlawful workplace practices); Ben Penn, *Workers at Logan Airport Strike Again over ULPs*, 29 *Lab. Rel. Wk. (BNA) No. 34*, at 1741 (Aug. 26, 2015) (highlighting workers’ one-day strike to protest employers’ alleged unlawful threats against unionized workers).

4. See, e.g., 29 U.S.C. § 163 (2012) (“Nothing in this subchapter . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.”).

5. *Id.* § 157 (protecting employees engaged in “concerted activities for the purpose of collective bargaining or other mutual aid or protection”).

6. See *Who We Are*, NLRB, [www.nlr.gov/who-we-are](http://www.nlr.gov/who-we-are) [<http://perma.cc/SKD6-QYYM>] (last visited Sept. 19, 2015) (“The National Labor Relations Board is an independent federal agency that protects the rights of private sector employees to join together, with or without a union, to improve their wages and working conditions.”).

7. There is no settled term for identifying these types of unprotected strikes collectively, although commentators and decisionmakers sometimes use “intermittent” and “partial” interchangeably to refer to the entire category. When referring to this group of

whether current doctrine appropriately carries out the objectives of the NLRA in its treatment of such nontraditional forms of labor action.

It is important at the outset to understand intermittent and partial strikes. These are two types of nontraditional labor action excluded from protection, not for strikers' objectives, but for the form protests take. The NLRB has defined an intermittent strike as "a plan to strike, return to work, and strike again."<sup>8</sup> Federal law protects one-time strikers from employer retaliation;<sup>9</sup> it does not protect similar strikers once their action becomes part of a larger plan to strike multiple times.<sup>10</sup> Relatedly, the Board has characterized "partial" strikes as work stoppages in which "within any given working day the employees refuse[] to perform part of their assigned duties or to work the full day."<sup>11</sup> Current law makes it difficult to discern when a strike loses protection due to its form.<sup>12</sup> Reverting to case-by-case factual assessments about the type of strike conducted, the Board and courts have declined to offer clear line drawing on legal issues underpinning the doctrine of unprotected labor action.<sup>13</sup> As

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unprotected strikes collectively, this Note often uses the term "nontraditional strike" to differentiate the category from the traditional form of labor action, in which employees leave their workstations completely for an indefinite period of time, opening the door for company replacements. See, e.g., Craig Becker, "Better than a Strike": Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act, 61 U. Chi. L. Rev. 351, 369 (1994) (characterizing traditional strike as one in which "[a]fter the initial surprise of the walkout, the company knows what it has to do and plans accordingly" (quoting *UAW Local 232 v. Wis. Emp't Relations Bd.*, 336 U.S. 245, 249 (1949))).

8. *Farley Candy Co.*, 300 N.L.R.B. 849, 849 (1990); see also *Polytech, Inc.*, 195 N.L.R.B. 695, 696 (1972) (defining intermittent strike as work stoppage that is "part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer").

9. See *Daniel Constr. Co.*, 277 N.L.R.B. 795, 795 (1985) (finding NLRA protects one walkout in contrast to "plan or pattern of intermittent walkouts"); cf. *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962) (finding NLRA protects one-time strike over working conditions).

10. See *Swope Ridge Geriatric Ctr.*, 350 N.L.R.B. 64, 68 (2007) (finding employees' "intent to continue engaging in repeated work stoppages as a part of [their] underlying bargaining strategy . . . was unprotected").

11. *Honolulu Rapid Transit Co.*, 110 N.L.R.B. 1806, 1814 (1954); see also *Elec. Data Sys. Corp.*, 331 N.L.R.B. 343, 343-44 (2000) (finding unprotected partial strike where employee encouraged coworkers to refuse to perform essential portion of larger job); *Yale Univ.*, 330 N.L.R.B. 246, 247 (1999) (finding unprotected graduate teaching fellows' refusal to submit final student grades); *Valley City Furniture Co.*, 110 N.L.R.B. 1589, 1592 (1954) (finding unprotected strikes lasting one hour per day).

12. See Archibald Cox et al., *Labor Law: Cases and Materials* 488 (15th ed. 2011) (describing decisions whether activity is "protected" or "unprotected" under NLRA offer "very little by way of analysis or even by way of a realization that the Board is engaging in a lawmaking enterprise of major dimensions").

13. See, e.g., *U.S. Serv. Indus., Inc.*, 315 N.L.R.B. 285, 285 (1994), enforced, 72 F.3d 920 (D.C. Cir. 1995) ("[T]he mere fact that some employees may have struck more than once does not render their conduct intermittent striking."); *Robertson Indus.*, 216

one administrative law judge (ALJ) recently noted, “The Board has not articulated a rigid framework for analyzing whether a series of strikes constitute unlawful intermittent strikes.”<sup>14</sup> This Note aims to articulate some principles for such a framework in the context of nontraditional strikes seeking to compel employer compliance with federal law.

The Our Walmart campaign recently brought attention to the intermittent-strike issue. The campaign, which began in 2011, sought to organize employees at America’s largest employer.<sup>15</sup> Walmart has a well-known stance against unionization.<sup>16</sup> In January 2014, the NLRB filed ULP charges alleging that the company unlawfully disciplined workers engaged in a one-day work stoppage.<sup>17</sup> One of the policies at issue was a corporate memorandum stating, in part, that Walmart did not believe the workers’ “hit-and-run work stoppages are protected” and notifying employees that, should they participate in further “union-orchestrated intermittent work stoppages that are part of a common plan or design to disrupt and confuse the Company’s business operations,” their non-appearance at work would be treated as any other unexcused absence.<sup>18</sup>

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N.L.R.B. 361, 362 (1975) (“[T]here is no magic number as to how many work stoppages must be reached before we can say that they are of a recurring nature . . .”).

14. Davies, Inc., 196 L.R.R.M. (BNA) 1680, 1686 (NLRB Div. of Judges Feb. 26, 2013).

15. See Rani Molla, Top U.S. Based Employers by Number of Employees, Wall St. J.: Numbers (Oct. 7, 2014, 3:05 PM), <http://blogs.wsj.com/numbers/top-employers-in-the-us-by-number-of-employees-1815/> (on file with the *Columbia Law Review*) (noting Walmart is largest U.S. employer with roughly 1.4 million employees).

16. See Steven Greenhouse, How Walmart Persuades Its Workers Not to Unionize, Atlantic (June 8, 2015), <http://www.theatlantic.com/business/archive/2015/06/how-walmart-convincing-its-employees-not-to-unionize/395051/> [<http://perma.cc/9QPG-3KMZ>] (describing company’s policies for resisting unionization, including orientation video, manuals for local management, and training presentations); see also Steven Greenhouse, Walmart Illegally Punished Workers, Judge Rules, N.Y. Times (Dec. 10, 2014), <http://www.nytimes.com/2014/12/11/business/walmart-illegally-punished-workers-judge-rules.html> (on file with the *Columbia Law Review*) (“Walmart has a long history of vigorously battling unionization efforts.”).

17. Press Release, NLRB, NLRB Office of the General Counsel Issues Complaint Against Walmart (Jan. 15, 2014), <https://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-issues-complaint-against-walmart> [<https://perma.cc/L26Q-ZAU7>] (“[C]onsolidated complaint involves more than 60 employees, 19 of whom were discharged allegedly as a result of their participation in activities protected by the National Labor Relations Act.”).

18. The relevant section of Walmart’s memorandum provided:

[I]t is very important for you to understand that the Company does not agree that these hit-and-run work stoppages are protected, and now that it has done the legal thinking on the subject, it will not excuse them in the future . . . . Should you participate in further union-orchestrated intermittent work stoppages that are part of a common plan or design to disrupt and confuse the Company’s business operations, you should expect that the Company will treat any such absence as it would any other unexcused absence . . . . [T]he Company does not believe that these union-orchestrated hit-and-run work stoppages are protected activity.

Although the ALJ decision that followed in December of 2014 did not address the intermittent strike issue directly,<sup>19</sup> Walmart's arguments brought the issue into the spotlight and will likely arise again in similar cases. When the NLRB issued the complaint, the *Wall Street Journal* noted that the charges against Walmart set up "a legal test of a phenomenon that is reshaping relations between companies and labor."<sup>20</sup>

This Note focuses on a legal question buried within, but central to, the short-term walkout issue: What is the scope of protected labor action when the focus of a nontraditional strike is ending an employer's unlawful actions? Can management fire workers for participating in intermittent or partial strikes when those strikes aim to end unlawful employer interference with concerted activities? This invokes two previously disconnected doctrines: (1) the law of intermittent, partial, and other forms of less-than-full strikes,<sup>21</sup> and (2) the law of unfair labor practice strikes.<sup>22</sup> Labor law has yet to fully address the tensions surfacing where these separately developed doctrines intersect in practice.

This juncture needs further clarification. Confusion about the law in this area persists,<sup>23</sup> and this lack of clarity is problematic due to the

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Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing at 8, Wal-Mart Stores, Inc. (NLRB Div. of Judges Jan. 14, 2014), <http://apps.nlr.gov/link/document.aspx/09031d45815769dc> (on file with the *Columbia Law Review*).

19. See Wal-Mart Stores, Inc., No. 32-CA-090116, 2014 WL 6901654 (NLRB Div. of Judges Dec. 9, 2014) (finding workers were engaged in protected activity by participating in short work stoppages and holding Walmart violated Act by disciplining workers for this activity).

20. See Shelly Banjo & Melanie Trotman, Wal-Mart Challenges Labor Board's Complaint: Retailer Contends Discipline of Workers over Short Strikes Is Valid, *Wall St. J.* (Feb. 2, 2014, 7:59 PM), <http://on.wsj.com/1NRazjF> (on file with the *Columbia Law Review*) (describing nationwide strategy to use short-term strikes to pressure employers and ambiguity about federal labor-law protection of such strikes). Some labor experts have been quick to reject claims that the specific activity in question in the case involving Walmart would constitute unprotected intermittent striking, even while acknowledging the general importance of the legal question. See Josh Eidelson, Fired Walmart Workers Arrested at Rally Announcing Labor Day, *Nation* (Aug. 22, 2013), <http://www.thenation.com/blog/175875/fired-walmart-workers-arrested-rally-announcing-labor-day-dead-line> [<https://perma.cc/F53F-39PG>] ("I think it would be hard on the facts so far to say that the conduct constitutes intermittent striking." (quoting former NLRB Chairwoman Wilma Liebman)); see also Banjo & Trotman, *supra* (quoting former Chairwoman Liebman saying intermittent strike situation has yet to be tested in this situation).

21. See *infra* section I.B (outlining agency and judicial doctrines limiting types of activity section 7 protects).

22. An unfair labor practice (ULP) strike is a work stoppage in which employees protest an employer violation of the National Labor Relations Act (NLRA). See *infra* section I.C (outlining history and purpose of ULP strikes). Section 8 of the NLRA outlines the categories that constitute "unfair labor practices." See 29 U.S.C. § 158(a) (2012) (outlining ULPs by employers); see also *infra* section I.A (introducing NLRA and providing legislative background to Act).

23. See Becker, *supra* note 7, at 376 ("[N]o distinct line separates protected from unprotected strikes. This confusion is most evident in the case of intermittent strikes."); W. Melvin Haas III & Carolyn J. Lockwood, *The Elusive Law of Intermittent Strikes*, 14 *Lab.*

consequences that stem from stepping beyond protected activity. If workers act on an incorrect assumption that such strikes are protected, they can lose their jobs. Enhanced clarity would help promote workers' awareness of the extent of their right to strike, both to allow them to utilize all options within that boundary and to avoid stepping beyond it.<sup>24</sup> Reducing ambiguity about intermittent and partial strikes would also provide necessary guidance to employers, enabling them to better comply with federal labor law and to accurately convey to employees when their activities can subject them to lawful discipline.<sup>25</sup> When neither labor nor management knows whether federal law protects a given activity, employers may be more likely to act as though the activity is unprotected and discipline employees for participating in it, while employees, in turn, will abstain from the activity.<sup>26</sup> Uncertainty about the protected status of a work action thus chills the activity as though it were unprotected.

While scholars have previously analyzed the development of the intermittent- and partial-strike doctrines,<sup>27</sup> scholarship in this area has yet

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Law. 91, 91 (1998) (describing law of intermittent strikes as "elusive and fact-dependent"); Banjo & Trotman, *supra* note 20 (noting disagreement among labor lawyers about protected nature of intermittent strikes for which "no black-letter rule" exists).

24. In 1996, the AFL-CIO, the nation's largest federation of labor unions, stated in a press release that how far recent NLRB decisions "reach in protecting short and intermittent strikes remains to be seen." Press Release, AFL-CIO, Union Survival Strategies for the Twenty-First Century (Mar. 20, 1996), <http://www.aflcio.org/Press-Room/Press-Releases/Union-Survival-Strategies-for-the-Twenty-First-Cen> [<http://perma.cc/QK3J-2CUK>].

25. As one management lawyer has noted, a decision as to the protected status of intermittent strikers "could provide greater guidance to employers regarding the ability to discipline those engaged in such activity." James H. Fowles III, One-Day Walkouts: Protected Activity or Unprotected Absenteeism?, Ogletree Deakins (Feb. 19, 2014), <http://www.ogletreedeakins.com/shared-content/content/blog/2014/february/one-day-walkouts-protected-activity-or-unprotected-absenteeism> [<http://perma.cc/6YYT-U39R>].

26. This chilling effect comes from a risk imbalance under federal labor law. If an employee is wrong that her activity is protected and the employer fires her, she permanently loses her job—a life-changing event for the individual. If an employer is wrong that labor action is unprotected and fires the employee, the ultimate penalty will be reinstatement and, subject to mitigation, backpay—a fairly minor accounting cost to the company. Cf. Calvin William Sharpe, "By Any Means Necessary"—Unprotected Conduct and Decisional Discretion Under the National Labor Relations Act, 20 *Berkeley J. Emp. & Lab. L.* 203, 207 n.16 (1999) (noting inconsistency in treatment of protected activity under section 7 leads to chilling effect on exercise of rights).

27. Craig Becker, a labor lawyer and former member of the NLRB, has suggested that current law protects intermittent strikes in the form of stoppages over discrete grievances. See Becker, *supra* note 7, at 355 ("[C]urrent law can be read to protect one form of collective work stoppage short of a traditional, full-scale, open-ended strike: repeated grievance strikes. These are strikes aimed at discrete grievances, deployed repeatedly, and typically of short duration."). This Note draws from and builds on Becker's analysis of the intermittent-strike doctrine. It does not challenge Becker's conclusion about repeated grievance strikes but focuses on another dimension of the problem, which is the potential for separately categorizing ULP work stoppages short of traditional full-scale strikes as protected because of the role such strikes play in compelling compliance with federal labor law.

to examine the unique role that strikers' status as ULP strikers should play in drawing the boundaries of protected activity. This Note attempts to sort out this puzzle. Part I provides an overview of NLRA protection of the right to strike, focusing on the development of the unprotected-strike as well as the ULP-strike doctrine. Part II addresses the current treatment of labor disputes where these doctrines intersect. Finally, Part III offers a renewed examination of the appropriate scope of protected action in response to ULPs in light of the idea that, in a ULP strike, workers are not seeking to unilaterally control the terms and conditions of their workplace or to benefit from a one-sided economic advantage. Instead, they are attempting to pressure employers to comply with longstanding federal laws governing labor-management relations. The Note concludes that work stoppages in this realm rarely warrant removal of protection. It recommends that the NLRB reconsider blanket removals of intermittent- and partial-strike activity from protection in order to more faithfully carry out the objectives of federal labor law.

#### I. THE RIGHT TO STRIKE: NLRA PROTECTION FOLLOWED BY INTERPRETIVE NARROWING

The National Labor Relations Act of 1935 is the foundation of American labor law. By identifying protected employee activities in the workplace,<sup>28</sup> and also establishing the NLRB to enforce workers' rights,<sup>29</sup> the Act safeguards workers engaged in collective action from retaliation by their employers.<sup>30</sup> Despite the broad protection of the right to strike granted in the NLRA's express language, the NLRB and federal courts have interpreted the Act in a way that excludes some forms of labor action from protection.<sup>31</sup> These exclusions arise from inexact policy notions about what constitutes a true strike. This Part examines the inter-

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28. See *supra* note 5 and accompanying text (introducing section 7 rights under NLRA).

29. See 29 U.S.C. § 153 (2012) (establishing NLRB and outlining structure).

30. The term "protected" refers to the fact that employers generally cannot discharge or discipline employees engaged in this type of activity. Under the NLRA, an employer commits a ULP by, *inter alia*, "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of" their section 7 rights or by "discriminat[ing] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *Id.* § 158(a) (outlining employer ULPs). As for remedying ULPs, section 10(c) of the Act states:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board . . . shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.

*Id.* § 160(c).

31. See *infra* section I.B (describing judicial restrictions on scope of protected concerted activities).

pretive narrowing of the right to strike in the years since 1935. Section I.A briefly outlines the foundation of the “right to strike” in American law. Section I.B provides an overview of the narrowing mechanisms used to move some forms of collective action outside statutory protection. Finally, section I.C summarizes the development of the ULP strike—a unique subset of concerted activity granted additional protection, not because of the form it takes but due to the importance of its underlying purpose. Overall, this Part provides a short background on the development of what it means to strike in American labor law.

A. *The Foundation of the Right to Strike Under the NLRA*

American workers have a protected right to strike. Although not the first protection of labor rights in the United States,<sup>32</sup> the NLRA has endured as their “permanent foundation.”<sup>33</sup> Congress passed the NLRA in 1935 following a year of labor unrest.<sup>34</sup> Among the numerous and, at times, discordant purposes that Congress endorsed through the legislation were correcting inequality of bargaining power,<sup>35</sup> promoting industrial peace,<sup>36</sup> enhancing worker purchasing power,<sup>37</sup> fostering industrial democracy,<sup>38</sup> and protecting employee freedom of choice in selecting a

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32. The National Industrial Recovery Act of 1934 (NIRA) provided nominal protection prior to the NLRA. While the NIRA language formed the foundation for the NLRA, the NIRA failed to provide an effective enforcement mechanism and instead relied primarily on voluntary employer enforcement. See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 *Harv. L. Rev.* 1379, 1402 (1993) (noting NLRB precursor “failed to turn back the tides of worker rebellion and of employer opposition to unionism” and “more thoroughgoing labor reform was required”). Further, the Supreme Court invalidated the NIRA in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

33. Cox et al., *supra* note 12, at 43 (identifying NLRA as “permanent foundation [for] the legally protected right of employees to organize and bargain collectively through representatives of their own choosing”).

34. See Barenberg, *supra* note 32, at 1401–02 (noting 1934 strike wave was impetus for NLRA passage).

35. See 29 U.S.C. § 151 (explaining “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association” negatively affected commerce).

36. See *id.* (“The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest . . .”).

37. See *id.* (highlighting workers’ lack of full freedom of association caused negative effect on commerce, leading to depression of “purchasing power of wage earners in industry”).

38. See *id.* (noting need to protect employees’ right to organize and bargain collectively to “encourag[e] practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions”).



bargaining representative.<sup>39</sup>

The right to strike appeared in two places in the NLRA. The first was section 7, the relevant part of which stated: “Employees shall have the right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .”<sup>40</sup> The Act did not further define “concerted activities,”<sup>41</sup> but the inclusion of the right to strike within this term was readily apparent from the remainder of the NLRA.<sup>42</sup> Section 13 of the Act initially provided that nothing in the NLRA “shall be construed so as to interfere with or impede or diminish in any way the right to strike.”<sup>43</sup> The NLRA thus offered broad protection to strikers.<sup>44</sup> By codifying the right to engage in concerted activities, Congress enhanced employee bargaining power, creating a system that bolstered workers’ ability to bring the employer to the bargaining table peacefully, thereby reducing the need to resort to strikes.<sup>45</sup>

The Labor Management Relations Act (LMRA) of 1947, also known as the Taft-Hartley Amendments, pulled back from the original NLRA. The LMRA outlined a variety of union ULPs to supplement limitations on employers.<sup>46</sup> It included an express ban on some strike forms, such as

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39. See *id.* (establishing policy to “protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing”).

40. *Id.* § 157.

41. The term “concerted activities” had previously appeared in the 1932 Norris-LaGuardia Act. *Id.* §§ 101–115 (providing employees “shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”).

42. Even where courts later limited the right to strike, they recognized that the NLRA protected the right. See, e.g., *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 241, 256 (1939) (“Congress . . . recognized the right to strike—that the employees could lawfully cease work at their own volition because of the failure of the employer to meet their demands.”).

43. 29 U.S.C. § 163 (1940) (amended 1947); cf. *infra* note 48 and accompanying text (providing version of NLRA section 13 as amended by Labor Management Relations Act of 1947).

44. See, e.g., John Paul Jennings, *The Right to Strike: Concerted Activity Under the Taft-Hartley Act*, 40 *Calif. L. Rev.* 12, 16 (1952) (“[T]aken at face value, [the NLRA] protected any strike activity and forbade any employer retaliation against strikers regardless of the extremes to which they might go in their strikes.”).

45. See Becker, *supra* note 7, at 360 (describing NLRA “paradox” of promoting industrial peace through protecting labor’s right to strike); *supra* notes 33–39 and accompanying text (identifying purpose of NLRA to create peaceful employee–employer bargaining through protection of right to strike); see also 84 *Cong. Rec.* 4066 (1939) (statement of Sen. Wagner on proposed amendments to NLRA) (“The design of [the NLRA] is to reduce the number of strikes by eliminating the main wrongs and injustices that cause strikes . . . . [I]mposition of legal restrictions upon the right to strike, instead of removing these wrongs, would merely deprive the worker of his inalienable right to protest against them.”).

46. See 29 U.S.C. § 158(b) (outlining ULPs by labor organizations).

the secondary boycott, in which employees targeted a company other than their direct employer.<sup>47</sup> It did not limit intermittent or partial strikes, however. The LMRA left in place the preservation of the right to strike as embodied by the original Act, although it added language recognizing that the LMRA would not affect “limitations or qualifications” on the right to strike.<sup>48</sup> The LMRA also provided a definition of the term “strike,” something the NLRA had left out. This definition was broad in scope, including “any strike or other concerted stoppage of work by employees . . . and any concerted slowdown or other concerted interruption of operations by employees.”<sup>49</sup> Overall, even as the broad thrust of the LMRA was to pull back from the original NLRA, the 1947 amendments largely left intact the strong protection of the right to strike aside from expressly delineated limitations.<sup>50</sup>

Even after passage of the LMRA, the express terms of federal labor law protect a broad range of concerted activities, particularly strikes. Although the language seems to leave little room for further limiting employees’ right to strike beyond express prohibitions, it does refer vaguely to preexisting limitations and qualifications. Understanding how intermittent and partial strikes might fit under this clause requires examining the ways in which courts took to reading implied limitations into the right to strike despite the Board’s broad post-enactment treatment of that right.

#### B. *Interpretive Narrowing of the Protected Right to Strike*

Courts and the Board construe the NLRA in a way that leaves some concerted work stoppages outside the Act’s protection. One type of

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47. See *id.* § 158(b)(4) (prohibiting labor action directed at company other than strikers’ employer).

48. *Id.* § 163 (“Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications of that right.”).

49. *Id.* § 142(2). Debate later arose as to whether this definition applied only to sections in the LMRA that restricted strikes in certain contexts or also applied to the preservation of the right to strike in the original version of the NLRA, but the courts never resolved this debate. See J. Leighton Green, Jr., *Employer Responses to Partial Strikes: A Dilemma?*, 39 *Tex. L. Rev.* 198, 201 n.22 (1960) (“If [29 U.S.C. § 142(2)] does apply to [the original sections of the NLRA,] there is a further argument whether the strike definition applies only to the sections *prohibiting* certain strike action . . . or also to the section *protecting* the right to strike, § 13.”). The Supreme Court has even expressed some support for this idea of a broad understanding of the right to strike. See, e.g., *Lodge 76, Int’l Ass’n of Machinists v. Wis. Emp’t Relations Comm’n (Machinists)*, 427 U.S. 132, 150–51 n.12 (1976) (“[I]n determining the sense of the entire structure of the federal law respecting the use of [available economic weapons], it is not insignificant that [29 U.S.C. § 142(2)] in defining the term ‘strike’ refers to the use of ‘any concerted slow-down or other concerted interruption of operations by employees.’”).

50. See Becker, *supra* note 7, at 360 n.35 (“Taft-Hartley did not qualify the right to strike except by prohibiting strikes for secondary purposes . . . and requiring notice before strikes to modify or upon termination of a collective bargaining agreement.”).

activity unsurprisingly excluded from protection is unlawful strike action, such as strikes to induce an employer to violate the NLRA,<sup>51</sup> strike forms expressly prohibited in the NLRA,<sup>52</sup> or conduct that violates state criminal or tort law.<sup>53</sup> More curiously, however, some judicial carve-outs from section 7 eliminate protection for strike conduct lawful under state and federal law but nonetheless intermittent, partial, or in some other way distinct from the traditional conception of concerted activity. Courts, in many cases, leave such conduct to the “free play of economic forces,”<sup>54</sup> meaning federal law neither protects nor prohibits it. This places certain forms of protest in a “no-man’s land.”<sup>55</sup> Strikers do not face legal action for their involvement in the activity, but they may nonetheless lose the protection of the NLRA. Employers are free to discharge or discipline those who participate.

1. *Early Interpretations of the Boundaries of Protected Concerted Activities.* — Soon after Congress passed the NLRA, the Board set out to define the scope of protected activity under section 7. Many decisions handed down during this immediate post-enactment period embraced a broad construction of the statutory rights involved. Yet these agency decisions recognizing a broad right to strike were at times constrained by a judiciary reluctant to recognize the full breadth of that right.

One of the earliest decisions to begin to distinguish between protected and unprotected concerted activity was *Harnischfeger Corp.*<sup>56</sup> The employer, a Milwaukee-based industrial machinery manufacturer, refused to bargain with its employees’ certified union, the Amalgamated Association of Iron, Steel & Tin Workers, thereby committing a ULP.<sup>57</sup> In response, shop stewards at the company decided to institute a protest in which each participating employee would work only eight hours on a shift.<sup>58</sup> The practical effect was a refusal to work overtime hours.<sup>59</sup>

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51. See 29 U.S.C. § 158(b)(2) (making it ULP for union to “cause or attempt to cause an employer to discriminate against an employee in violation” of NLRA).

52. See *Limbach Co. v. Sheet Metal Workers Int’l Ass’n*, 949 F.2d 1241, 1249, 1255–56 (3d Cir. 1991) (finding union engaged in ULP by encouraging workers to engage in “secondary boycott” in violation of section 8(b)(4)(ii) of NLRA); see also 29 U.S.C. § 163 (providing right to strike preserved “except as specifically provided for” within NLRA).

53. See *NLRB v. Mt. Clemens Pottery Co.*, 147 F.2d 262, 268 (6th Cir. 1945) (finding striker convicted of assault and battery not entitled to reinstatement and backpay).

54. See *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (recognizing congressional objective to leave some activities “controlled by the free play of economic forces”); see also *Machinists*, 427 U.S. at 134 (applying “free play of economic forces” language from *Nash-Finch* to partial-strike context).

55. William B. Gould IV, *A Primer on American Labor Law* 165 (5th ed. 2013) (“Activity that is neither protected nor prohibited is in a ‘no-man’s land’; employees may be dismissed or disciplined for engaging in it.”).

56. 9 N.L.R.B. 676 (1938).

57. *Id.* at 685.

58. *Id.*

59. *Id.* at 686.

Harnischfeger discharged the stewards for instructing workers to take part in this work stoppage. The Board, acknowledging that the employer discharged the workers because of their planned protest, considered whether section 7 protected the nontraditional action, which the Board termed a “partial strike.”<sup>60</sup> The Board concluded it did:

We do not interpret [section 7] to mean that it is unlawful for an employer to discharge an employee for *any* activity sanctioned by a union or otherwise in the nature of collective activity. The question before us is, we think, whether this particular activity was so indefensible, under the circumstances, as to warrant the [employer], under the Act, in discharging the stewards for this type of union activity. We do not think it was.<sup>61</sup>

Although the Board did not find that section 7 protects all labor action in the realm of collective activity, it set a high bar—a “so indefensible” standard—for classifying such action as outside protection.

The first judicial check on this expansive treatment of protected activity came in 1939, when the Supreme Court declared the sit-down strike unlawful. In a sit-down strike, employees stop work but remain at their stations.<sup>62</sup> During the 1930s, this became one of the most effective tools for labor,<sup>63</sup> and it is widely credited with leading to unionization of the automobile industry.<sup>64</sup> In 1937, workers at Fansteel Metallurgical Corp. in North Chicago orchestrated such a strike—taking over two of their employer’s key buildings.<sup>65</sup> Over the preceding months, the workers had led an organizing campaign at Fansteel and, in response, the company had engaged in a long string of ULPs to thwart the effort.<sup>66</sup> The strikers occupied the buildings for a total of nine days, sustained by supporters and coworkers who delivered supplies to keep them fed and warm.<sup>67</sup> Ultimately, the police gained control of the property and arrested the strikers.<sup>68</sup> Upon finally hearing the case, the NLRB found

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60. *Id.*

61. *Id.*

62. See Jeremy Brecher, *Strike!* 175 (2014) (“The sitdown action occurs wholly inside the plant, where the workers, who know every detail of the interior, have obvious advantages.” (quoting Louis Adamic, *My America*, 1928–1938, at 309 (1938))).

63. See Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958*, 24 *Law & Hist. Rev.* 45, 70 (2006) (explaining sit-down was effective tactic because any other strike form led to strike-breaking, leaving strikers just “men out of jobs” (quoting Summit County Labor News, Feb. 12, 1937, at 1)).

64. See, e.g., Ahmed A. White, *The Depression Era Sit-Down Strikes and the Limits of Liberal Labor Law*, 40 *Seton Hall L. Rev.* 1, 15–16 (2010) (detailing successful Flint sit-down strike at GM followed by similarly successful strike at Chrysler).

65. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 248 (1939).

66. See *id.* (describing attempted creation of company union, refusal to bargain with union as to mandatory subjects, refusal to recognize union, and discipline of union leaders, among other NLRA violations).

67. *Id.* at 249 (noting supporters brought strikers “food, blankets, stoves, cigarettes and other supplies”).

68. *Id.* (describing ouster and arrest of striking workers by sheriff and deputies).

that *Fansteel* had committed a number of ULPs. As a remedy, it ordered *Fansteel* to reinstate striking employees to their former positions.<sup>69</sup> The Seventh Circuit set aside the order;<sup>70</sup> the Supreme Court affirmed.<sup>71</sup> The Court reasoned that the strikers lost section 7 protection when they engaged in an “unlawful” strike—one that deprived owners of their lawful possession of property.<sup>72</sup> It saw no conflict between this holding and the express language of the NLRA, reasoning that the “recognition of ‘the right to strike’ plainly contemplates a lawful strike[]—the exercise of the unquestioned right to quit work.”<sup>73</sup> A sit-down did not qualify as a strike under this characterization because those involved in such an action partook in an unlawful takeover of employer property.

While *Fansteel* represented a significant limitation on the right to strike, the Board found forms of intermittent and partial strikes to be protected even after the decision. In *Cudahy Packing Co.*, decided in 1941, the Board held that the NLRA protected workers engaged in several short, intermittent work stoppages on a beef slaughter line.<sup>74</sup> The *Cudahy* workers remained at their workplace positions but, on cue, refused to perform their required tasks for short periods.<sup>75</sup> They orchestrated a complex stoppage in which those on the line stopped work for twenty-minute periods at a time, in two different departments, at multiple times during one workday.<sup>76</sup> *Cudahy* believed it was entitled to discharge the workers because, citing *Fansteel*, it viewed their plan as “a sit-down strike, an outlaw enterprise.”<sup>77</sup> The Board disagreed. Distinguishing *Fansteel*,<sup>78</sup> the Board held that the stoppage on the slaughter line “did not involve seizure or destruction of or damage to the respondent’s property with resultant financial loss to the respondent.”<sup>79</sup> Thus,

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69. *Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930, 953 (1938) (holding *Fansteel* must offer employees “immediate and full reinstatement to their former positions”), enforcement denied, 98 F.2d 375 (7th Cir. 1938), aff’d, 306 U.S. 240.

70. *Fansteel*, 98 F.2d at 382 (setting aside Board’s reinstatement order based on strikers’ illegal seizure of employer property), aff’d, 306 U.S. 240.

71. *Fansteel*, 306 U.S. at 253.

72. *Id.* (“[T]he ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company, or the seizure and conversion of its goods, or the despoiling of its property or other unlawful acts in order to force compliance with demands.”).

73. *Id.* at 256.

74. 29 N.L.R.B. 837, 868 (1941) (holding workers’ activities fell under section 7 protection), enforced sub nom. *Omaha Cudahy Plant Workers’ Union v. NLRB*, 123 F.2d 63 (8th Cir. 1941).

75. *Id.* at 865 (describing stoppages lasting ten to twenty minutes and occurring during morning, midday, and afternoon shifts).

76. *Id.*

77. *Id.* at 867 (characterizing *Fansteel* as allowing employer to discharge employees engaged in these types of work stoppages without violating NLRA).

78. See supra note 72 (explaining *Fansteel* as premised on notion of unlawful occupation of employer premises in violation of state and local property law).

79. *Cudahy*, 29 N.L.R.B. at 868 (footnote omitted).

the Board found no reason to find that these intermittent strikes were unlawful or otherwise outside the Act's protection of concerted activity.<sup>80</sup> The Eighth Circuit affirmed.<sup>81</sup>

Other Board decisions continued to treat partial and intermittent strikes as protected activity so long as they did not involve unlawful activity. In *Mt. Clemens Pottery*, for example, the Board declared: "The guarantee in the Act extends to a partial strike as well as to a total strike."<sup>82</sup> In another decision, *Carter Carburetor Corp.*, the Board found an employer violated the Act by discharging employees who, in response to an employer's unlawful discharge of their coworker, refused to work for short periods during the day of the discharge.<sup>83</sup> In yet another decision, *Niles Fire Brick Co.*, the Board found that, although union workers' refusal to take a job from which their coworker had been removed was a "partial strike," it was protected activity for which the employer had no right to discipline or discharge the strikers.<sup>84</sup> The basis of this opinion was that the employer had provoked the activity through its own ULPs.<sup>85</sup> These cases continued the Board's high standard for removing conduct from protection even in light of the Supreme Court's decision in *Fansteel*.

Cases from the early administration of the Wagner Act revealed the Board's reluctance to find types of labor action unprotected based on their form. This approach made sense given the protection of concerted activity within the NLRA's express language and implicit in its purposes. While unlawful employee conduct, per *Fansteel*, could not fall under the banner of protected concerted activity, this exception had a limited reach. As the next section addresses, this reluctance to constrict section 7 protection changed as judicial concern about providing too much leverage to employees superseded broad legislative protection of concerted activity.

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80. *Id.* ("Under the circumstances, we find no warrant for holding that these 'concerted activities for the purpose of . . . mutual aid or protection' are not protected by the Act.")

81. *Omaha Cudahy Plant Workers' Union v. NLRB*, 123 F.2d 63, 63 (8th Cir. 1941).

82. *Mt. Clemens Pottery Co.*, 46 N.L.R.B. 714, 765 (1943).

83. See *Carter Carburetor Corp.*, 48 N.L.R.B. 354, 397-98 (1943) ("To permit an improper discharge to go unremedied in the course of a lawful strike or concerted activity because *ipso facto* production is affected . . . [would] not leave much of the oft-asserted 'right' to strike and, it may be added, not much of the [NLRA]."), enforced, 140 F.2d 714 (8th Cir. 1944).

84. See *Niles Fire Brick Co.*, 30 N.L.R.B. 426, 435 (1941) (noting employees' refusal to take coworker's job, "while not a total strike, is analogous conduct in the nature of a partial strike and is equally permissible under the Act as concerted activities for the purpose of mutual aid and protection"), enforced, 128 F.2d 258 (6th Cir. 1942); see also *Pinaud, Inc.*, 51 N.L.R.B. 235, 242 (1943) ("A strike or a partial strike is a form of concerted activity that is protected under the Act.")

85. See *Niles Fire Brick*, 30 N.L.R.B. at 435 (deciding "employees are not limited to the right to engage in an organized total strike" in response to employer ULPs).

2. *Restrictions on Strike Forms Emerging from Judicial Review.* — To enforce its orders, the NLRB must obtain a favorable judgment in the federal courts of appeals.<sup>86</sup> This leaves room for courts to determine the boundaries of protected activity by denying enforcement petitions in cases where judges conclude that employees stepped beyond the contours of section 7 protection.<sup>87</sup> Following the early period of NLRA enforcement, courts began to introduce new restrictions on the scope of protected concerted activities.<sup>88</sup> Judges introduced some limitations, not out of concern about unlawful strike action,<sup>89</sup> but premised on the need to constrain strike tactics that were proving so effective as to essentially grant employees unilateral control over the terms of their employment. These limitations introduced into labor-law jurisprudence a policy-based distinction between protected and unprotected labor activity.

One of the earliest judicial decisions to address the question of concerted activity falling outside the protection of the Act was *C.G. Conn, Ltd. v. NLRB*.<sup>90</sup> Conn was an Indiana-based corporation that manufactured cornets, trumpets, and other band instruments. In 1935, after Conn refused its employees' demands for an increase in overtime wages, the employees declined to follow the company's requirement that they work more than their regular weekly hours.<sup>91</sup> The employees devised and began to implement a plan to refuse to work overtime hours over the course of several weeks.<sup>92</sup> Although the Board found this activity protected,<sup>93</sup> the Seventh Circuit found it unprotected on the basis of the strike tactics employed. The court stated: "We are aware of no law or logic that gives the employee the right to work upon terms prescribed

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86. Respondents appeal Board decisions directly to courts of appeals rather than to district courts. See Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law: Unionization and Collective Bargaining* 14 (2d ed. 2004) ("A decision or order issued by the [NLRB] is not self-executing. If the Board would enforce an order against a recalcitrant party, it must convert its own order to a court order, and this is done by petitioning a federal court of appeals . . .").

87. Today, courts reviewing Board determinations of protected versus unprotected activity apply a substantial evidence standard of review. See, e.g., *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837, 845 (6th Cir. 2003) (concluding "substantial evidence supports the NLRB's conclusion that the Union's activity did not merit the loss of Section 7 protections" based on either intermittent- or partial-strike objections).

88. Many of the judicial restrictions noted in this section came about prior to modern judicial deference to agency decisionmaking. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (holding, if statute is silent or ambiguous on issue, "question for the court is whether the agency's answer is based on a permissible construction of the statute").

89. See *supra* note 72 and accompanying text (describing *Fansteel* decision as covering *unlawful* activity).

90. 108 F.2d 390 (7th Cir. 1939).

91. *Id.* at 395.

92. *Id.* (noting employees would refuse to work roughly two hours each day, or whatever overtime employer asked them to work).

93. *C.G. Conn Ltd.*, 10 N.L.R.B. 498, 515 (1938).

solely by him.”<sup>94</sup> To the court, this strike threatened managerial control over the workplace, placing the work stoppage outside section 7 protection.<sup>95</sup>

Some cases even emphasized the lawfulness of the employer’s actions in justifying finding types of employee action outside the protection of the Act. In *Home Beneficial Life Insurance Co. v. NLRB*, the Fourth Circuit found that employees who “refuse to obey the rules laid down by a law-abiding management for the conduct of the business . . . may be discharged and their places may be permanently filled.”<sup>96</sup> The court stressed the law-abiding nature of the employer’s conduct as worthy of consideration in deciding whether the NLRA protected the conduct of the employees,<sup>97</sup> an idea that helped justify the court’s tightening of the boundaries of protected concerted activities.

Other cases during this period recognized further restrictions on the form in which employees could exercise their right to strike. For example, the Third Circuit rejected an NLRB order holding an employer unlawfully discharged employees who temporarily stopped work in the middle of the workday, since the employer had stated it would deal with the employees’ demands at the close of the workday.<sup>98</sup> The Eighth Circuit, meanwhile, found three employees’ refusal to process orders rerouted to their Kansas City plant from a Chicago plant on strike to be unprotected activity.<sup>99</sup> The court stated that, while the employees undoubtedly had the right to strike, “they could not continue to work and remain at their positions, accept the wages paid to them, and at the same time select what . . . tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer’s damage, to do other work.”<sup>100</sup> The common theme of these decisions was that employees could not rely on section 7 to protect insubordination. The line between insubordinate forms of work and protected forms of work stoppages, however, remained abstract and unclear.

These early judicial decisions departed from the broad approach that the NLRB adopted in its early days of delineating the reach and

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94. *C.G. Conn.*, 108 F.2d at 397 (“If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment.”).

95. *Id.* (identifying managerial control over workplace as feature NLRA sought to maintain and protect in industrial labor relations).

96. 159 F.2d 280, 284 (4th Cir. 1947).

97. See *id.* (incorporating analysis of employer’s conduct into reasoning for whether employee activity was protected).

98. See *NLRB v. Condenser Corp. of Am.*, 128 F.2d 67, 77 (3d Cir. 1942) (“Employees cannot insist that their demands be met in the middle of a working day, when the employer has promised to deal with them as a group at the end of the day.”).

99. See *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486, 497 (8th Cir. 1946) (“The Board was in error in holding that by refusing to process the Chicago orders these employees engaged in lawful assistance of their union, protected by Section 7 of the Act.”).

100. *Id.* at 496.



meaning of the right to strike. The opinions reflected concerns arising from the notion that employees engaged in these strikes were working only on their own terms and that the sacrifice involved in such strikes was one-sided, in that employers lost production while employees maintained their usual incomes. This reasoning cleared the way for further judicial restriction of the right to strike by both federal courts and the Board in the decades to follow.

3. *Supreme Court Decisions Affecting the Scope of Legal but Unprotected Activity.* — For the most part, the Supreme Court has left open the legal question of the extent to which federal law protects partial and intermittent work stoppages.<sup>101</sup> Even so, there are Supreme Court precedents that offer insight into how to draw the boundaries of protection. At times, courts have interpreted these decisions overly broadly, unnecessarily restricting the reach of federal labor-law protection.

The Court first considered the question of unprotected but lawful activity in its 1949 decision in *Briggs-Stratton*.<sup>102</sup> Wisconsin's State Employment Relations Board enjoined a union at two Briggs & Stratton Corp. manufacturing plants from engaging in intermittent, unannounced special meetings during normal work hours.<sup>103</sup> Despite a strong dissent relying on the Board's protection of partial strikes,<sup>104</sup> the Court determined that Congress had not intended to protect the union when it engaged in this form of work stoppage and that the NLRA did not preempt Wisconsin and other states from regulating the activity.<sup>105</sup> In deciding the conduct was unprotected, the Court relied heavily on language from *Harnischfeger Corp.*<sup>106</sup> It reasoned that, in view of the Board's prior statement that the NLRA does not protect all "activity sanctioned by a union or otherwise in the nature of collective activity,"<sup>107</sup> the present

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101. Many decisions concerning responses to such strikes assume without deciding that the activity is unprotected. See, e.g., *Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp't Relations Comm'n (Machinists)*, 427 U.S. 132, 152 n.14 (1976) (concluding disposition of case meant Court had no occasion to address whether section 7 protected employee action in question); *NLRB v. Ins. Agents Int'l Union*, 361 U.S. 477, 483 n.6 (1960) ("We will assume without deciding that the activities in question here [which involved planned, concerted slowdown activities] were not 'protected' under § 7 of the Act.").

102. *UAW Local 232 v. Wis. Emp't Relations Bd. (Briggs-Stratton)*, 336 U.S. 245 (1949).

103. *Id.* at 249–50 (noting union engaged in these work stoppages total of twenty-six times).

104. *Id.* at 270 (Murphy, J., dissenting) ("The Court chooses to ignore the consistent policy of the agency charged with primary responsibility in interpreting and administering § 7. The [NLRB] has repeatedly held that work stoppages of this nature are 'partial strikes' and 'concerted activities' within the meaning of § 7.").

105. *Id.* at 254 (majority opinion).

106. *Id.* at 256. Since *Harnischfeger Corp.*, 9 N.L.R.B. 676, 686 (1938), held that the NLRA protected the partial strike involved, the Court in *Briggs-Stratton* relied only on the Board's dicta to determine that the employees' strikes fell outside the Act's protection. See *supra* notes 56–61 and accompanying text (highlighting *Harnischfeger* decision upholding partial strike as protected activity).

107. *Briggs-Stratton*, 336 U.S. at 256 (quoting *Harnischfeger Corp.*, 9 N.L.R.B. at 686).

case did not fall within the protection of the NLRA.<sup>108</sup> Consequently, the NLRA did not preempt Wisconsin from regulating—in this case enjoining—employees engaged in partial strikes.

The Court's early restriction on the right to strike unsurprisingly found its way into Board law. In 1954, the NLRB decided *Pacific Telephone & Telegraph Co.*<sup>109</sup> Employees at Pacific Telephone & Telegraph began a strike over a contract dispute by announcing a strategy of multiple "hit-and-run" work stoppages.<sup>110</sup> Employees walked off work on different days for short periods of time, returned, and then struck again for short periods.<sup>111</sup> Looking to the precedents established in *Briggs-Stratton*,<sup>112</sup> *Fansteel*,<sup>113</sup> and *C.G. Conn.*,<sup>114</sup> the Board found these stoppages unprotected because they constituted "a form of economic warfare entirely beyond the pale of proper strike activities" and represented an effort "deliberately calculated, in [the employees'] own words, to 'harass the company into a state of confusion.'"<sup>115</sup> Arriving at this decision, the Board looked to a publication distributed before the strike that expressly highlighted the advantage of the hit-and-run tactic as allowing workers to "harass" the company by simultaneously stopping work and drawing pay.<sup>116</sup>

The *Briggs-Stratton* ruling lasted a quarter of a century before the Court revisited it in its 1976 *Machinists* decision.<sup>117</sup> This case involved a cease-and-desist order that the Wisconsin Employment Relations Commission issued against a nontraditional strike.<sup>118</sup> Employees at a machine tool manufacturer carried out a work stoppage in which they continued to work regular hours but refused to work overtime hours that

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108. *Id.* at 264–65 ("We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by Federal statute nor was it legalized and approved thereby.")

109. *Pac. Tel. & Tel. Co.*, 107 N.L.R.B. 1547 (1954).

110. *Id.* at 1547–48.

111. *Id.*

112. *Id.* at 1549 n.5 (citing *NLRB v. Fansteel Metallurgical Co.*, 306 U.S. 240 (1939)).

113. *Id.* (citing *C.G. Conn., Ltd. v. NLRB*, 108 F.2d 390 (7th Cir. 1939)).

114. *Id.* at 1550 n.6 ("Our conclusion here finds support in the Supreme Court decision in [*Briggs-Stratton*], holding that similar intermittent work stoppages did not fall within the protection of the National Labor Relations Act and could therefore properly be enjoined by the State courts of the State of Wisconsin." (citing *UAW Local 232 v. Wis. Emp't Relations Bd. (Briggs-Stratton)*, 336 U.S. 245 (1949))).

115. *Id.* at 1547–48.

116. See *id.* at 1548 n.3 (describing situation in which workers "suffer[] no great loss" and where "most of the workers are on the job, maintaining their financial take home while harassing the company into a state of confusion").

117. *Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp't Relations Comm'n (Machinists)*, 427 U.S. 132 (1976).

118. *Id.* at 134–36 (describing procedural history of case).

the employer unilaterally imposed.<sup>119</sup> The Court characterized the employees' refusal to work overtime as "peaceful conduct constituting activity which must be free of regulation by the States."<sup>120</sup> It did not go so far as to find the conduct protected under the Act, however. Rather, the Court suggested that the employees' workplace action, even if unprotected, fell into the category of conduct left "to the free play of economic forces."<sup>121</sup> That is, the strikers' conduct was legally permitted, so the employer could not resort to the aid of state government to enjoin the action.<sup>122</sup> The decision viewed the dispute from the lens of a classic economic contest. Quoting a concurring opinion by Justice Harlan in a prior case, the Court wrote, "It cannot be said that the Act forbids an employer . . . to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining."<sup>123</sup> Even so, the NLRA did not permit an employer to rely on the aid of a state court to enjoin strikers' otherwise lawful work stoppage.

The *Machinists* Court largely left determination of the protected status of lawful strikes to the Board. It suggested that the facts of the case before it might be different than others in which the Court had assumed that nontraditional strikes were unprotected,<sup>124</sup> and it indicated that the Board might find through adjudication that the NLRA actually protected the type of activity in question in *Machinists*.<sup>125</sup> The holding went only so far as to prohibit the state commission from regulating the conduct.<sup>126</sup> In so doing, the Court left the Board with discretion to draw the contours of protected concerted activity.<sup>127</sup>

Supreme Court jurisprudence on the scope of protected activity does not clearly dictate the proper contours of section 7 protection of

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119. See *id.* at 134 ("The Union response was a membership meeting . . . at which strike action was authorized and a resolution was adopted binding Union members to refuse to work any overtime . . .").

120. *Id.* at 155.

121. *Id.* at 144.

122. *Id.* at 145 n.6.

123. *Id.* at 147 (quoting *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 109 (1970)).

124. *Id.* at 152 n.14 (noting concerted refusal to work overtime was "wholly free of . . . overtones" appearing in cases holding sit-down strikes and other "disloyal" employee activity unprotected).

125. *Id.* ("It may be that case-by-case adjudication by the federal Board will ultimately result in the conclusion that some partial strike activities such as the concerted ban on overtime in the instant case . . . are 'protected' activities within the meaning of § 7 . . .").

126. The Court did not hold that the conduct was unprotected under federal law, as its holding did not depend upon that determination. The question was only whether the state agency could enjoin the strikers' action. See *id.* at 155 (explaining labor action, whether protected or unprotected under section 7, must be free of state regulation).

127. The Board has significant policymaking discretion to decide central questions in the field of labor relations. See Daniel P. O'Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, 81 *Temple L. Rev.* 177, 185 (2008) (detailing administrative-law background of discretion afforded to Board in labor-law policymaking).

strike activity beyond the full-scale strike.<sup>128</sup> Overturning *Briggs-Stratton*, the *Machinists* decision delegated power to the Board to decide the full extent of protected activity in situations where employees carry out non-traditional strikes.<sup>129</sup> Overall, the Court's treatment of nontraditional strike forms endorsed a narrow exception to protection for particular forms of concerted action beyond the traditional strike, a reluctance to allow this exception to grow too large, and deference to the Board to find the proper balance.

C. *Development of the ULP Strike Within the Right to Strike*

While the previous two sections provided a roadmap of the changing right to strike based on the *form* that a strike takes, a separate line of cases distinguishes between two *purposes* that motivate strikes: economic aims and stopping ULPs. The classic strike form is an economic strike, in which employees engage in a work stoppage "as a means of extracting some bargaining concession from the employer."<sup>130</sup> The Board and courts have recognized and provided enhanced protection for an alternative form of strike based on an employer's commission of ULPs.<sup>131</sup> A ULP strike places pressure on employers to comply with federal labor law. The object of the strike, rather than to secure an economic gain, is to return employee-employer relations to the NLRA baseline.

A strike becomes a ULP strike if "the employer's unfair labor practice had anything to do with causing the strike."<sup>132</sup> The NLRA does not include the term "unfair labor practice strike."<sup>133</sup> Nonetheless, references to strikes started in response to employer violations of the NLRA's predecessor, the National Industrial Recovery Act (NIRA), appear throughout the legislative history of the NLRA.<sup>134</sup> Thus, when Congress

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128. See *Machinists*, 427 U.S. at 152 n.14 (suggesting Board could engage in case-by-case review of decisions on margins of protected section 7 activity).

129. See *supra* notes 124-127 and accompanying text (detailing how *Machinists* Court overturned preemption precedent set in *Briggs-Stratton* and also delegated to Board discretion in determining extent of protection).

130. Cox et al., *supra* note 12, at 506.

131. See, e.g., *George Banta Co. v. NLRB*, 686 F.2d 10, 14 n.5 (D.C. Cir. 1982) (defining ULP strike as "strike caused by an employer's commission of unfair labor practices").

132. *Domsey Trading Corp.*, 310 N.L.R.B. 777, 791 (1993).

133. The original text of the Act referred generally to a right to strike. See *supra* section I.A (providing background on "right to strike" in NLRA).

134. See Hearings on S. 2926 Before the Senate Comm. on Educ. & Labor, 73d Cong. (1934) (statement of Milton Handler, General Counsel, National Labor Board, and Professor, Columbia Law School) (noting typical example of labor issue in which employees form union in plant and employer refuses to recognize union in violation of NIRA), reprinted in 1 Legislative History of the National Labor Relations Act, 1935, at 59-60 (1949); see also Hearings on S. 1958 Before the Senate Comm. on Educ. & Labor, 74th Cong. (1935) (statement of Lloyd K. Garrison, Dean, University of Wisconsin Law School) (describing situation in which employees initiated strike over employer's unlawful refusal to bargain, Board arranged meetings between employer and union representatives, and as

passed the NLRA, the strike was already a valid tool to pressure employers to recognize and bargain with union representatives in accordance with federal law.

As labor law developed, courts and the Board created a uniquely protected realm for ULP strikers.<sup>135</sup> One of the most important forms of enhanced protection that workers engaged in a ULP strike receive is protection from permanent replacement.<sup>136</sup> In *NLRB v. Mackay Radio & Telegraph Co.*, the Supreme Court held that an employer that had not committed any ULPs could permanently replace economic strikers.<sup>137</sup> This provided employers with a crucial weapon against economic strikers, severely weakening the threat that a traditional strike poses.<sup>138</sup> By con-

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result employer finally agreed to negotiate with union), reprinted in 1 Legislative History of the National Labor Relations Act, 1935, at 1517–18 (1949).

135. See, e.g., *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 288–89 (1956) (holding statutory provisions requiring sixty-day notice prior to strikes did not apply in context of ULP strikes, despite lack of express language indicating this distinction). The Court looked to legislative history, which indicated congressional desire to protect those who engage in ULP work stoppages. See *id.* at 288 & n.20 (“[S]upporters of the bill were aware of the established practice which distinguished between the effect on employees of engaging in economic strikes and that of engaging in unfair practice strikes.”); S. Rep. No. 573, at 6–7 (1935) (“[T]o hold that a worker who because of an unfair labor practice has . . . gone on strike is no longer an employee, would be to give legal sanction to an illegal act and to deny redress to the individual injured thereby.”).

136. The prohibition on permanent replacement of ULP strikers means that, even if an employer has hired replacements during the course of a strike, “[w]hen the strike ends, unfair labor practice strikers, absent serious misconduct on their part, are entitled to have their jobs back even if employees hired to do their work have to be discharged.” The Right to Strike, NLRB, <http://www.nlr.gov/strikes> [<http://perma.cc/T4D7-TZ4X>] (last visited Sept. 19, 2015).

137. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938). Permanent replacement allows the employer to fill the strikers’ positions and promise to replacement workers that they will not face termination upon strikers’ offer to return to work. *Id.* (“[The employer] is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.”).

138. See Becker, *supra* note 7, at 364 (“The Court’s holdings have rendered a traditional strike an extremely risky enterprise for most workers who wish to act collectively to improve their lot.”); Michael H. LeRoy, Creating Order Out of Chaos and Other Partial and Intermittent Strikes, 95 *Nw. U. L. Rev.* 221, 269 (2000) (noting current treatment requires economic strikers “either to gamble on a high-risk traditional strike that exposes them to permanent replacement, or to engage in a short-term work stoppage—and risk being fired”); Victor Luckerson, The One-Day Strike: The New Labor Weapon of Last Resort, *Time* (Dec. 7, 2013), <http://nation.time.com/2013/12/07/the-one-day-strike-the-new-labor-weapon-of-last-resort/> [<http://perma.cc/T724-QTCC>] (“It’s hard to convince workers to sign on to a lengthy walk-out when it would almost certainly cost them their jobs. A one-day strike allows fast food employees to call attention to their cause without losing employment.”); see also Peter T. Kilborn, Clinton Order Discouraging Striker Replacement Is Voided, *N.Y. Times* (Feb. 3, 1996), <http://www.nytimes.com/1996/02/03/us/clinton-order-discouraging-striker-replacement-is-voided.html> (on file with the *Columbia Law Review*) (quoting Chamber of Commerce General Counsel Stephen Bokart saying management’s permanent replacement right “is a key economic weapon in dealing with unions and dealing with strikes”).

trast, employees engaged in a ULP strike are not subject to permanent replacement.<sup>139</sup> Employers may only temporarily replace ULP strikers to reduce economic loss during the strike's duration. Once ULP strikers make an unconditional offer to return to work, employers must reinstate the strikers, even if that means terminating their replacements.<sup>140</sup>

In addition to the right to reinstatement, workers engaged in ULP strikes enjoy several protections over economic strikers. For example, the Supreme Court, in *Mastro Plastics Corp. v. NLRB*, found that some ULP strikers do not lose the protection of the NLRA or violate the Act even when their collective bargaining agreement (CBA) includes a no-strike clause,<sup>141</sup> or when the strikers fail to wait for the conclusion of the statutorily required waiting period at the expiration of a CBA.<sup>142</sup> In so doing, the Court stressed that there is something inherently unfair in allowing an employer to terminate employees engaged in a strike against the employer's own unlawful conduct.<sup>143</sup> It found that depriving the employees of their ability to engage in all ULP strikes, even through an apparently mutual agreement, would mean the employees would have no recourse against "unlawful practices destructive of the foundation on which collective bargaining must rest."<sup>144</sup> The Board later limited the holding in *Mastro Plastics* to strikes responding to "serious" unfair labor

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139. See, e.g., *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (finding employer violated NLRA by refusing to reinstate ULP strikers).

140. See Note, Reinstatement Rights—Conversion of an Economic Strike into an Unfair Labor Practice Strike, 51 Colum. L. Rev. 876, 877 (1951) ("An employer who refuses to reinstate unfair labor practice strikers who seek to return to work violates the NLRA, and the Board will order reinstatement of the strikers, even though compliance with the order necessitates the discharge of replacements hired during the strike to work on a permanent basis.").

141. See 350 U.S. 270, 284 (1956) (noting CBA containing general no-strike clause did not waive employees' right to engage in strike against employer ULPs). In arriving at this decision, the Court noted the unfairness of an interpretation that would construe a general no-strike clause to prohibit even strikes against the most egregious employer ULPs. See *id.* at 283 ("[The employer's] interpretation would eliminate, for the whole year, the employees' right to strike, even if [the employer], by coercion, ousted the employees' lawful bargaining representative and, by threats of discharge, caused the employees to sign membership cards in a new union.").

142. See *id.* at 289 (finding neither express NLRA language nor legislative history support interpretation that waiting period applies to ULP strikes). The waiting period appears in section 8(d) of the Act and requires that, upon expiration of an existing CBA, employees must wait at least sixty days before engaging in a strike or forfeit their status as employees. 29 U.S.C. § 158(d) (2012) ("Any employee who engages in a strike within any notice period specified in this subsection . . . shall lose his status as an employee of the employer engaged in the particular labor dispute . . .").

143. *Mastro Plastics*, 350 U.S. at 286 (observing prohibiting ULP strikes in this context "would deprive [workers] of their most effective weapon at a time when their need for it is obvious").

144. *Id.* at 281.

practices,<sup>145</sup> but the fairness principle underlying the holding of the case has persisted.<sup>146</sup>

A ULP strike is one “initiated or prolonged, in whole or in part, in response to unfair labor practices committed by the employer.”<sup>147</sup> Of course, the interwoven nature of “economic” demands with the protections afforded under the NLRA can make this determination difficult. In nearly all cases, the categorization of a strike occurs *ex post*, when the Board considers whether an employer violated the NLRA by hiring permanent replacements for striking workers. At that point, the Board looks to whether the employer committed ULPs prior to the strike and to whether those ULPs were a contributing factor to the work stoppage.<sup>148</sup> Where employees mistakenly believe that an employer is engaged in unlawful practices, but the Board later determines that the employer acted lawfully, the strike does not qualify as a ULP strike and instead assumes the status of an economic strike.<sup>149</sup> Those strikers do not benefit from protection against permanent replacement. Further, the mere existence of ULPs does not make the action a ULP strike where those practices did not motivate the strikers to engage in the work stoppage.<sup>150</sup>

By recognizing an enhanced level of protection for ULP strikers, the Board and courts have signaled the unique connection between the purposes of these strikes and the purposes of federal labor law. As the Court stated in *Mastro Plastics*, “Failure of the Board to enjoin [an employer’s] illegal conduct or failure of the Board to sustain the right to strike against that conduct would seriously undermine the primary objectives of

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145. See *Arlan’s Dep’t Store of Mich., Inc.*, 133 N.L.R.B. 802, 807 (1961) (“[O]nly strikes in protest against serious unfair labor practices should be held immune from general no-strike clauses.”); see also *Dow Chem. Co.*, 244 N.L.R.B. 1060, 1061 (1979) (upholding *Arlan’s* distinction “as a deterrent to possible hasty strike action”).

146. See, e.g., *Servair, Inc. v. NLRB*, 726 F.2d 1435, 1442 (9th Cir. 1984) (affirming NLRB’s finding that employer’s ULPs targeted at union organizing were “pervasive, forceful, and in flagrant violation of the [NLRA]” and, thus, employees were protected in their ULP strike despite no-strike clause).

147. *Gatliff Bus. Prods., Inc.*, 276 N.L.R.B. 543, 563 (1985).

148. See, e.g., *Berkshire Knitting Mills v. NLRB*, 139 F.2d 134, 137 (3d Cir. 1943) (“Where the causes contributing to a strike consist of unfair labor practices and employee desires for wage betterments, the latter should not excuse the employer from the legal consequences that flow from its conduct which transcends the permissible bounds under the National Labor Relations Act . . .”).

149. See, e.g., *Precision Concrete v. NLRB*, 334 F.3d 88, 93 (D.C. Cir. 2003) (concluding Board erred in finding ULP, strike was not ULP strike as result, and thus strikers had no right to reinstatement); see also Michael D. Moberly, *Striking a Happy Medium: The Conversion of Unfair Labor Practice Strikes to Economic Strikes*, 22 *Berkeley J. Emp. & Lab. L.* 131, 140 (2001) (“[E]mployees who strike in protest of what they mistakenly believe to be unfair labor practices run the risk of being permanently replaced.”).

150. See, e.g., *Gen. Indus. Emps. Union, Local 42 v. NLRB*, 951 F.2d 1308, 1313 (D.C. Cir. 1991) (“[A] strike’s coexistence in time with even an unfair labor practice that the [employer] has made *no* effort to repudiate does not ineluctably lead to a determination that the unlawful practice is a contributing cause of the strike.”).

the Labor Act.”<sup>151</sup> Unlike courts’ frequent dismissal of purpose as a factor in whether protection extends to certain strike forms,<sup>152</sup> the courts have reasoned that illegal employer conduct spurring a ULP strike warrants greater protections for employees protesting against that conflict. The ULP-strike doctrine thus highlights an important value underlying the enforcement of American labor law: ULP strikers need enhanced protection in order to give effect to the NLRA.

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This Part has attempted to provide a basic, although necessarily truncated, introduction to the development of the right to strike along two separate lines: form and purpose. With respect to form, despite a very broad protection of the right to strike through legislative action followed by agency adjudication, courts began to confine the protection for strikers to the complete work stoppage—the so-called “traditional” strike. At the same time, courts were developing enhanced protections for certain groups of strikers based on the purposes they sought—correction of employer violations of federal labor law. The next Part considers the interplay, where it arises, between these two considerations about the reach of the right to strike.

## II. DILEMMA: “UNPROTECTED” STRIKES IN RESPONSE TO ULPS

Given the development of the ULP strike and the narrowing of the range of “concerted activities” protected under federal labor law,<sup>153</sup> a question surfaces as to how these doctrines should inform one another. Should employees who respond to employer ULPS by engaging in lawful concerted activity lose the NLRA’s protection because of their use of tactics such as the intermittent or partial strike? Neither the Board nor the courts have expressly adopted a standard that defines the contours of protected forms of concerted activity based on the underlying purposes of participating strikers. Nonetheless, as this Part highlights, some decisions have resisted finding that employees’ conduct extends beyond the borders of protection when those employees strike to compel their employer to comply with federal labor law.

This Part discusses how the Board and courts have addressed this issue to date. A warning is in order, as the treatment has not been consistent. Thus, each section that follows addresses a distinct means of managing the intersection. Section II.A discusses outright rejection of enlarged

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151. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956) (finding ULP strikers entitled to reinstatement even though employer hired replacement workers prior to strikers’ return to work).

152. See *infra* section II.A (outlining reasoning in cases contending employer action should be irrelevant to question of reach of protected concerted activity in given case).

153. See *supra* section I.B (outlining narrowing of protected “concerted activities”).



section 7 protection for strikers engaged in ULP strikes, highlighting cases that treat economic and ULP strikers equally in this regard. Section II.B introduces the most prevalent approach, in which decisionmakers draw factual distinctions between similar forms of legal unprotected strikes in the ULP and economic categories and, in this way, subtly incorporate the ideas raised in this Note. Section II.C highlights a method that finds nontraditional strike forms unprotected but offers an opportunity for the Board to nonetheless grant reinstatement through its remedial powers. Overall, this Part concludes that the use of these approaches has caused decisionmakers to avoid creating clear standards for when an otherwise lawful ULP strike loses NLRA protection because of its form.

A. *Agency Adjudication over Shop-Floor Enforcement: Whether NLRB Mechanisms Are a Sufficient Deterrent to Employer ULPs*

The first approach to this question rejects arguments for offering heightened protection to ULP strikers engaged in intermittent or partial strikes. The premise of this idea is that the reason the NLRB exists is to remedy employer ULPs. Thus, employees are not limited to striking to compel companies to comply with the Act.<sup>154</sup> They may instead resort to Board procedures: filing a ULP charge and seeking agency prosecution of that charge,<sup>155</sup> possibly leading to remedies including backpay and reinstatement.<sup>156</sup> Thus, the fact that employees are not protected in engaging in some forms of ULP strikes is not fatal to their ability to seek labor-law compliance. As addressed in this section, some Board and court opinions have reasoned that this alternative of agency adjudication means that separate treatment of nontraditional ULP strikes is not necessary to afford employees sufficient protection against unlawful employer practices.

Under this approach, the question of whether strikers have engaged in unprotected activity does not turn on the determination of whether

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154. The Board's means of addressing an employer ULP begins with the employee or union filing a charge with the local NLRB Regional Director. The Regional Director then investigates to determine whether to issue a complaint. If the Region issues a complaint, the charge proceeds to a hearing before an ALJ. The ALJ's decision can result in dismissal or in a remedial order. Appeals from an ALJ decision go to the five-member Board in Washington. The agency must ultimately seek enforcement of any of its decisions through a federal court of appeals. For more on the Board process, see Unfair Labor Practice Process Chart, NLRB, <https://www.nlr.gov/resources/nlr-process/unfair-labor-practice-process-chart> [<http://perma.cc/3B3K-ANG2>] (last visited Sept. 19, 2015).

155. See Investigate Charges, NLRB, <https://www.nlr.gov/what-we-do/investigate-charges> [<http://perma.cc/CP3S-LV48>] (last visited Sept. 19, 2015) (detailing how employees who believe their rights were violated may file charges against employers and unions with NLRB Regional Offices).

156. *Id.* ("The agency may seek make-whole remedies, such as reinstatement and backpay for discharged workers, and informational remedies, such as the posting of a notice by the employer promising to not violate the law.").

the action was in fact a ULP or an economic strike.<sup>157</sup> In *Embossing Printers*, for example, the Board considered whether workers who engaged in three distinct short-term work stoppages and whom their employer, a Michigan printing company, then locked out, were entitled to reinstatement.<sup>158</sup> The NLRB General Counsel and the union representing the strikers argued that the work stoppages' focus of ending the employer's ULPs, including failure to bargain in good faith and unilateral adjustment of wages, should factor into the agency's conclusion as to whether the stoppages were protected.<sup>159</sup> Disagreeing with this statement, the Board held that if employees had the right to engage in intermittent strikes, "they had that right regardless of whether it was to protest the Company's unfair labor practices or to achieve some other end," and "[i]f . . . their concerted activity was unprotected, their purpose does not change the unprotected nature of the act."<sup>160</sup> The Board held that the employees engaged in unprotected intermittent strikes by participating in the three work stoppages.<sup>161</sup> It analyzed an analogous decision about a work stoppage and concluded with respect to the case that "[t]hough the objective was lawful, the method was not protected, because intermittent work stoppages transgress the bounds of a genuine strike."<sup>162</sup> Under this logic, the form a work stoppage takes is all that the Board should consider in determining whether it amounts to an unprotected intermittent strike. Purpose is not relevant.

Opinions from the NLRB General Counsel have also signaled the agency's reluctance to recognize a separate standard for protected activity in the context of ULP strikers.<sup>163</sup> The General Counsel serves as the prosecutorial arm of the NLRB.<sup>164</sup> Although not binding authority,

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157. See *Embossing Printers, Inc.*, 268 N.L.R.B. 710, 723 (1984) ("If . . . [employees'] concerted activity was unprotected, their purpose does not change the unprotected nature of the act."), enforced, 742 F.2d 1456 (6th Cir. 1984).

158. *Id.* (deciding whether three work stoppages were more "analogous to the facts" of protected labor action or to unprotected intermittent-strike cases).

159. See *id.* (arguing purpose of work stoppage "was to protest the employer's unfair labor practices and was caused in substantial part by those practices").

160. *Id.* (adopting ALJ decision below).

161. See *id.* (contrasting three walkouts staged in case with single spontaneous walkouts found protected in other Board decisions).

162. *Id.*

163. See, e.g., Memorandum from Ronald Meisburg, Gen. Counsel, NLRB, to All Reg'l Dirs., Officers-in-Charge & Resident Officers 12 (July 22, 2008) (on file with the *Columbia Law Review*) ("Partial or intermittent strikes, sit-down strikes, and work slowdowns are unprotected regardless of the employees' objectives. As the Board long ago held, 'the inherent character of the method used sets th[ese] strike[s] apart from the concept of protected union activity envisaged by the Act.'" (altered by Meisburg) (quoting *Pacific Tel. & Tel. Co.*, 107 N.L.R.B. 1547, 1549-50 (1954))).

164. General Counsel, NLRB, <http://www.nlr.gov/who-we-are/general-counsel> [<http://perma.cc/AK5B-WVPM>] (last visited Sept. 19, 2015) (noting General Counsel "is independent from the Board and is responsible for the investigation and prosecution of unfair labor practice cases").

General Counsel opinions signal which types of cases the agency will take on and, in this context, whether the office believes that ULP strikers should have a wider range of available protected labor action. Opinions from the office have reaffirmed the general policy against intermittent action across cases involving both economic and ULP strikes.<sup>165</sup> The agency's website also signals to employers that they may discharge employees for engaging in sit-down strikes, intermittent strikes, and partial strikes, including slowdowns, and does not list any qualifications as to the purposes underlying the strikes.<sup>166</sup> Such descriptions of the law of unprotected but legal activity do not reflect a need to treat differently employees engaged in such activity in response to employer ULPs.<sup>167</sup>

For the most part, Board cases that directly address whether intermittent and partial ULP strikes are protected flatly categorize such strikes as unprotected regardless of their underlying purposes. For example, in *Valley City Furniture*, the Board stated, "We find no merit in the . . . argument that a partial strike, otherwise unprotected, would gain the protection of the Act by reason of its having stemmed from the . . . [employer's] unfair labor practices."<sup>168</sup> Later decisions have also rejected considering purpose in determining the protected nature of strike forms.<sup>169</sup> In this way, the Board has refused to find the purpose of a strike even a contributing factor as to whether the NLRA protects the methods used in the work stoppage at issue.

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165. See NLRB Gen. Counsel, Opinion Letter on Hedaya Bros., Inc., Case No. 29-CA-10928, 1984 WL 47460, at \*3 (Sept. 5, 1984) ("[E]ven when an intermittent or recurrent work stoppage by employees occurs in response to an employer's unfair labor practice, the employees' work stoppage may still be unprotected."); see also NLRB Gen. Counsel, Opinion Letter on Land Mark Elec., Case No. 31-CA-21751, 1996 WL 323648, at \*30 (May 17, 1996) (finding discharge of employee carrying signs reading "ULP Strike against Land Mark" justified because employee "was not engaged in protected activity when he led three intermittent strikes within four hours").

166. Discriminating Against Employees Because of Their Union Activities or Sympathies, NLRB, <http://www.nlr.gov/rights-we-protect/whats-law/employers/discriminating-against-employees-because-their-union> [<http://perma.cc/UF8R-G5WG>] (last visited Sept. 19, 2015) (informing employers they may "[d]ischarge employees who engage in an unprotected or prohibited strike" and noting "[u]nprotected strikes include sit-down strikes, partial strikes (such as slowdowns), and intermittent strikes").

167. *Id.* (identifying basic NLRB treatment of sit-down, partial, and intermittent strikes, along with strikes prohibited by law, as unprotected, yet acknowledging strikes violating contractual no-strike provisions may be protected when "in protest of serious unfair labor practices").

168. *Valley City Furniture Co.*, 110 N.L.R.B. 1589, 1595 n.14 (1954) (finding unprotected strike where employer unilaterally changed hours and employees refused to work new hours).

169. See *Graphic Arts Int'l Union Local 13-B*, 252 N.L.R.B. 936, 940 (1980) (Panello, Member, concurring) (repeating *Valley City Furniture* statement that partial strike could not gain protection of Act where it stemmed from employer ULPs); see also *Embossing Printers, Inc.*, 268 N.L.R.B. 710, 723 (1984) (finding ULP strike unprotected under intermittent-strike doctrine).

While it is clear that employees may turn to the Board's mechanisms of redressing such violations through filing ULP charges, there are problems with confining employees to this approach. Limitations on the NLRB's power to provide anything other than compensatory damages to ULP victims renders the agency's remedial regime ineffectual as applied to most severe employer misconduct.<sup>170</sup> Even in cases where the Board will step in, it regularly takes years for workers to obtain relief. Waiting so long is quite often fatal to employees' ability to effectuate the policies of the NLRA.<sup>171</sup> Delay in prosecution means non-compliant companies that stifle organizing drives through unlawful means face only the distant possibility of forfeiting backpay to some employees down the road.<sup>172</sup> In its intended form, labor law protects employees by ensuring they are free from ULPs that weaken their collective voice. Rather than granting them a new right, ensuring that employees have the full range of concerted activity available to them to remedy ULPs only restores an existing right that the NLRA provides to employees.<sup>173</sup>

One counterargument to this need for an alternative to Board enforcement is that, if timing is the issue, the Board has power to seek temporary injunctions to stop ULP activity that is causing irreparable damage to a union organizing drive.<sup>174</sup> Through this process, however, many ULPs still go unremedied, as they do not meet the standard for an injunction, the charging party fails to request injunctive relief, or the Board deems the case unsuitable for injunctive relief.<sup>175</sup> Another problem with this means of redressing ULPs is that workers do not have as much involvement in the process.<sup>176</sup> While the injunction option shows that some workers facing ULPs may not be limited to the strike in

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170. See, e.g., Benjamin I. Sachs, *Employment Law as Labor Law*, 29 *Cardozo L. Rev.* 2685, 2694–95 (2008) (noting NLRA's "failure to provide adequate remedies for employer interference with employee organizing activity has rendered protections for collective action ineffectual").

171. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 286–87 (1956) (noting forcing employees to rely on administrative resolution over strike action to remedy employer ULPs "would relegate the employees to filing charges under a procedure too slow to be effective" in manner that would "unduly favor the employers and handicap the employees").

172. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 *Harv. L. Rev.* 1769, 1788–89 (1983) ("To protect the employees' group rights, the NLRA must rely on the preventive force of its sanctions. But the traditional remedies for discriminatory discharge—backpay and reinstatement—simply are not effective deterrents to employers who are tempted to trample on their employees' rights.").

173. See *supra* section I.A (describing right to strike in NLRA).

174. See 29 U.S.C. § 160(j) (2012) (authorizing Board to petition district courts for appropriate temporary relief where complaint charges person is engaging in ULP).

175. See Richard B. Lapp, *A Call for a Simpler Approach: Examining the NLRA's Section 10(j) Standard*, 3 *U. Pa. J. Lab. & Emp. L.* 251, 263 (2001) ("[S]ection 10(j) gives the Board broad discretion to decide in which cases it will seek injunctive relief.").

176. See *id.* (noting Board handles 10(j) injunctions, removing any control by charging union or aggrieved employees).

order to stop their employer's violations, it does not diminish the importance of protecting a wide range of concerted activity in response to employer ULPs.

While the existence of an agency alternative to strike action against ULPs is a useful tool for many employees in theory, it is too slow and ineffective in practice to serve as the sole means of ensuring employer compliance. The NLRB often remains unable to stop ULPs in a way that meaningfully protects workers' rights under federal labor law. In addition, removing protection for nontraditional ULP strikers means employers profit from the option to terminate employees even when employees' intermittent or partial strike is in response to egregious employer violations of federal labor law. For these reasons, as the next section addresses, some decisionmakers have looked to whether employers committed ULPs leading to a strike in determining whether non-traditional labor action falls under federal protection.

B. *Fact-Based Distinctions: When an Intermittent Strike Is Not "Intermittent"*

Given the seemingly comprehensive treatment of intermittent- and partial-strike forms as unprotected, it might appear that the notion of treating ULP strikes differently, in terms of the protection those strikes receive even when intermittent or partial in form, would require a significant change in labor law. That is not the case in practical terms. As the following section reveals, beneath the surface of the seemingly uniform treatment of nontraditional strikes as unprotected, case-by-case determinations of whether a strike uses a method outside the Act's protection show a subtle tendency to look to purpose as a factor in whether activity falls inside or outside NLRA protection.

Many decisions on the scope of protection for nontraditional strikes over ULPs come in the form of case-by-case adjudication focusing on granular factual distinctions.<sup>177</sup> In this area, the Board has at times sidestepped the issue of whether to treat ULP strikers engaged in non-traditional work stoppages as entitled to a broader range of protected concerted action. As an example of the uncertainty, one Board decision has stated, "[T]he mere fact some employees may have struck more than once does not make their conduct intermittent striking."<sup>178</sup> The fact-specific nature of this inquiry allows for more subjective assessment of the relative merits of both strikers' and employers' claims. The downside of this case-by-case determination is that it leaves employees and em-

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177. See Haas & Lockwood, *supra* note 23, at 91 (describing law of intermittent strikes as "elusive and fact-dependent").

178. *U.S. Serv. Indus., Inc.*, 315 N.L.R.B. 285, 291 (1994), enforced, 72 F.3d 920 (D.C. Cir. 1995).

ployers without clear guidelines to enable ex ante decisions about what forms of activity are permissible responses to unfair labor practices.<sup>179</sup>

Case law in this area shows a tendency to find strike activity “intermittent” or “partial,” and thus unprotected, when decisionmakers simultaneously find that the employer did not commit ULPs leading to the strike.<sup>180</sup> Courts have been reluctant to find that short, repeated strikes are “intermittent” strikes when, in addition to being motivated by ULPs,<sup>181</sup> they do not involve damage to property or violence.<sup>182</sup> There is a tendency in such cases to weigh the fairness of both employees’ and employers’ actions and to thereby arrive at a conclusion about whether to extend the protections of federal labor law to the employee conduct in question.

Much of this treatment of the protected nature of intermittent strikes is based on whether a harassment factor is present. As noted in Part I, the harassment element comes from the Board’s decision in *Pacific Telephone & Telegraph Co.*, which dealt with an economic strike.<sup>183</sup> The element plays an essential role in determinations about whether the NLRA protects nontraditional forms of employee action.<sup>184</sup> When the Board finds that the strikers’ plan to institute an intermittent work stoppage does not constitute an “underlying plan or scheme by the

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179. This lack of clarity, in turn, leads to a chilling effect on activities that the law might in fact protect, providing an advantage to employers seeking to stop their employees from engaging in certain forms of protest that test these boundaries. See *supra* note 26 and accompanying text (describing “chilling” effect of lack of clarity in protected activity under section 7).

180. See, e.g., *Excavation-Constr., Inc. v. NLRB*, 660 F.2d 1015, 1024 (4th Cir. 1981) (overturning NLRB order finding ULP caused strike and simultaneously finding strike was unprotected intermittent labor action); *U.S. Serv. Indus.*, 315 N.L.R.B. at 291 (reasoning strikes were not “intermittent” in part due to lack of evidence “strikes were for any purpose other than to protest and seek redress for what employees considered to be unjust working conditions”).

181. See *Columbia Portland Cement Co. v. NLRB*, 915 F.2d 253, 259 (6th Cir. 1990) (finding repeated work stoppages not intermittent when “substantial evidence that . . . [employer’s] failure to remedy the unfair labor practices was a ‘contributing cause’ of the . . . strike”).

182. See *supra* notes 65–73 and accompanying text (outlining *Fansteel* opinion and separate Board treatment of improper employee strike conduct).

183. *Pac. Tel. & Tel. Co.*, 107 N.L.R.B. 1547, 1547–48 (1954) (describing strike as unprotected because intended to “harass the company into a state of confusion”); see also *supra* notes 109–116 and accompanying text (describing *Pacific Telephone & Telegraph* decision and hit-and-run tactics employees deployed in case).

184. See, e.g., *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355, 1359 (8th Cir. 1989) (looking to whether employees had “preconceived plan to engage in a series of strikes to harass” employer); *A. Montano Elec.*, 335 N.L.R.B. 612, 621 (2001) (noting employee actions amounted to partial work stoppage or intermittent strike because “manner and timing of . . . [employees’] presentation of issues to . . . [their employer] were certainly intended to harass and confuse [employer]”); *WestPac Elec., Inc.*, 321 N.L.R.B. 1322, 1360 (1996) (asking whether employees used “‘hit and run’ tactics intended to ‘harass the company into a state of confusion’” (quoting *U.S. Serv. Indus.*, 315 N.L.R.B. at 285)).

Unions or the strikers to use ‘hit and run’ tactics intended to ‘harass the company into a state of confusion,’”<sup>185</sup> then it can distinguish the intermittent action from the unprotected-activity line of decisions, thereby finding the activity of the ULP strikers to be protected.<sup>186</sup>

In line with this focus on harassment, employers possessing clean slates, or in other words, those not guilty of committing ULPs leading to a strike, are exposed to a narrower variety of concerted activities in practice. Often this takes the form of the Board or a court finding that the employees were not engaged in a ULP strike and then that employee conduct is outside the NLRA’s protections on the facts underlying the conduct.<sup>187</sup> In one case, the Eighth Circuit held that intermittent walkouts over a grievance dispute were unprotected.<sup>188</sup> In doing so, the court stressed that the grievance dispute did not involve any ULPs on the part of the employer and that “the repetitiousness of the intermittent walkouts within a short span of time” removed those walkouts from the Act’s protection.<sup>189</sup> The notion, it seems, is that law-abiding employers should not have to confront such disruptive tactics.

Where the employer does not have a clean slate, the calculus is different. For example, in 1967, the Board considered whether multiple work stoppages during the course of the same week at a textile factory in South Carolina were protected or unprotected.<sup>190</sup> The Board stressed that because the recurrent strikes were in response to the employer’s ULPs,<sup>191</sup> they were not beyond the protection of the Act even if they were

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185. *WestPac Elec.*, 321 N.L.R.B. at 1360 (quoting *U.S. Serv. Indus.*, 315 N.L.R.B. at 285).

186. See *id.* (finding ULP strikers did not lose protection of Act because three separate strikes did not constitute “intermittent” striking); see also *Iowa Packing Co.*, 338 N.L.R.B. 1140, 1145 (2003) (adopting ALJ determination that slaughter-line employees walking away from line multiple times during week did not constitute partial or intermittent stoppage because participating employees “left the plant in short order and in an entirely peaceful manner”); *U.S. Serv. Indus.*, 315 N.L.R.B. at 291 (finding no unlawful intermittent striking where “there is no evidence . . . that the strikes were for any purpose other than to protest and seek redress for what employees considered to be unjust working conditions”).

187. See *Honolulu Rapid Transit Co.*, 110 N.L.R.B. 1806, 1822 (1954) (finding employer lawfully discharged intermittent strikers but first finding union was striking over contract negotiations rather than employer ULPs).

188. *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998, 1005–06 (8th Cir. 1965).

189. *Id.* at 1005.

190. See generally *Schneider Mills, Inc.*, 164 N.L.R.B. 879 (1967). The 1967 decision preceded the *Machinists* decision that overturned *Briggs-Stratton*. See *supra* section I.B (detailing history of Supreme Court treatment of legal but unprotected strike forms).

191. *Schneider Mills*, 164 N.L.R.B. at 879 (describing employer’s “history of unfair labor practices . . . including threats, interrogation, creating the impression of surveillance, refusal to bargain with the certified Union, and the discharge of six employees because they had engaged in union activities”).

seemingly intermittent.<sup>192</sup> It found “inherent inequity in any interpretation that penalizes one party . . . for conduct induced solely by the unlawful conduct of the other, thus giving advantage to the wrongdoer.”<sup>193</sup> In 1994, the Board held that employees who struck more than once were not engaged in unprotected intermittent striking.<sup>194</sup> In issuing this finding, the Board distinguished *Pacific Telephone & Telegraph*.<sup>195</sup> It found no evidence of a planned strategy to bring about a condition that was neither strike nor work “or that the strikes were for any purpose other than to protest and seek redress for what employees considered to be unjust working conditions. There was no unlawful intermittent striking.”<sup>196</sup>

The logic underlying these decisions is that an employer should not profit from its own harassing conduct. Where that conduct stirs employees to strike to end the employer’s unlawful practices, protection is paramount. As some of the cases in this area recognize, this holds true even where the methods strikers employ involve intermittent or partial striking. In this approach to determining the scope of protected strike activity, the question of whether strikers were engaged in ULP strikes merges with the question of whether the NLRA protects the means they adopted for their protest. The Sixth Circuit implicitly relied on this factor in *Columbia Portland Cement Co. v. NLRB*.<sup>197</sup> First, the court highlighted that the employer failed to prove that the strikes at issue were “motivated by the employees’ attempt to simultaneously draw wages and subject Columbia to economic pressure.”<sup>198</sup> In determining that the strikers were engaged in protected activity despite engaging in repeated walk-outs, the court also looked to evidence that the employer’s failure to remedy its ULP was a contributing cause of the employees’ labor action.<sup>199</sup> In this way, the question of the purpose of the strike can inform

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192. *Id.* at 884 n.17 (“[A]s the work stoppages were reasonably responsive to the Company’s persistent and unlawful refusal to recognize and to bargain with the Union, the recurrent character of the otherwise protected strike activity does not place such activity outside the pale of statutory protection.”).

193. *Id.* (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 287 (1956)).

194. See *U.S. Serv. Indus., Inc.*, 315 N.L.R.B. 285, 286 (1994), enforced, 72 F.3d 920 (D.C. Cir. 1995) (finding employer committed numerous ULPs and “exhibited a general disregard for the employees’ fundamental statutory rights”).

195. *Id.* at 291; see also *supra* notes 109–116 and accompanying text (describing *Pacific Telephone & Telegraph* decision).

196. *U.S. Serv. Indus.*, 315 N.L.R.B. at 291.

197. See *Columbia Portland Cement Co. v. NLRB*, 915 F.2d 253, 259 (6th Cir. 1990) (finding section 7 protected employees who walked off job over contract negotiations and returned to work one month later but, upon learning employer discharged employees for involvement in first strike, initiated another strike).

198. *Id.*

199. See *id.* (“[T]here is substantial evidence that . . . [the employer’s] failure to remedy the unfair labor practices was a ‘contributing cause’ of the . . . strike.”).



the question of whether the employees' actions qualify as either "intermittent" or "partial" in form.

The problem with this approach is that questioning the form of a strike is distinct from questioning the purpose that the strikers had in mind. The former inquiry looks to how many stoppages occurred and whether the employees walked off the job indefinitely or intended to return. The latter looks to whether those actions were in support of economic demands at the bargaining table or ending ULPs. These are separate analyses; yet, as the above cases show, the Board and courts have at times concluded that the strikers' activity was neither intermittent nor partial at least in part *because* their purpose was to remedy ULPs. The case-by-case approach has in this way subtly merged these two doctrines through muddled factual assessments.

Although case-by-case adjudication has its virtues, the problem here is that the question of the scope of section 7 activity is in large part a legal, rather than factual, issue.<sup>200</sup> In essence, case-by-case inquiry is a good tool applied to the wrong job. Decisionmakers are drawing very fact-specific distinctions between strikes that are quite similar in form yet disparate in purpose. Such decisions then characterize these differences as based on form. This leads to unpredictable and inconsistent results and poses a danger of obscuring the effect of decisionmakers' subjective preferences with respect to the virtues—or vices—of workplace collective action. Conflating these questions is likely to confuse employees and employers and to lead to a chilling effect on strike tactics that the law might actually protect.

### C. *Unprotected Activity and the Board's Remedial Reinstatement Powers*

This section considers an alternative approach that decisionmakers have adopted to resolve a related issue where strikers engage in misconduct as opposed to merely using nontraditional strike forms. Some cases find that, even when employees step beyond the bounds of section 7 based on the form of their action, the Board may still use its remedial powers to grant reinstatement to strikers when their employer committed egregious ULPs that motivated the strikers to action. The Board has used this approach more frequently in situations in which employees engaged in full-scale ULP strikes but, during the course of those strikes, participated in certain misconduct that removed them from the Act's protection because of the illegal or otherwise improper nature of their activity. Although this Note largely focuses on strikes that do not involve lawbreaking or serious misconduct, this approach offers insight into the relevance of employer ULPs to employees' entitlement to reinstatement.

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200. See Cox, *supra* note 12, at 488 (describing decisions as to whether activity is "protected" or "unprotected" under NLRA as offering "very little by way of analysis or even by way of a realization that the Board is engaging in a lawmaking enterprise of major dimensions").

The First Circuit first addressed the Board's remedial reinstatement power in cases of unprotected action. In *NLRB v. Thayer Co.*, the court considered a situation in which an employer engaged in numerous ULPs and, in response, employees carried out a strike that included violence and property destruction.<sup>201</sup> The question was whether the Board could reinstate a ULP striker who stepped beyond the traditional bounds of protected section 7 activities.<sup>202</sup> In such cases, the First Circuit found that the Board was empowered to offer reinstatement to the employee even if the strike activity was not concerted activity within the meaning of section 7.<sup>203</sup> The key was to "balance the severity of the employer's unfair labor practice which provoked the industrial disturbance against whatever employee misconduct may have occurred in the course of the strike."<sup>204</sup>

The D.C. Circuit also endorsed this approach to unprotected conduct in response to employer ULPs.<sup>205</sup> The court rejected the notion that employee misconduct, which involved violence and intimidation,<sup>206</sup> precluded reinstatement in a ULP strike for two reasons. First, the court recognized that "the employer's antecedent unfair labor practices may have been so blatant that they provoked employees to resort to unprotected action."<sup>207</sup> Further, it found that "reinstatement is the only sanction which prevents an employer from benefiting from his unfair labor practices through discharges which may weaken or destroy a union."<sup>208</sup> The *Kohler* decision took a view of the issue that focused on the employer's responsibility for the misconduct at issue.<sup>209</sup> That is, the court expressed a view that the employer should not be able to profit from its ULPs by inciting employees to take action and then discharging them when they engage in strike misconduct.<sup>210</sup> When an employer violates the law, it takes on increased exposure to Board remedies.

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201. *NLRB v. Thayer Co.*, 213 F.2d 748, 750–51 (1st Cir. 1954) (outlining history of animosity between employer and union in case).

202. *Id.* at 755.

203. See *id.* at 756 (finding recommendation of reinstatement of striking employees "proper" despite unprotected activities because employer ULP provoked strike).

204. *Id.* at 755.

205. See *Local 833, UAW v. NLRB (Kohler Co.)*, 300 F.2d 699, 703 (D.C. Cir. 1962) ("We conclude that the teaching of the *Thayer* case is sound and must be followed in order to assure the Board's compliance with the statutory command that its remedial orders effectuate the policies of the Act.").

206. *Id.* at 702 (describing striker misconduct as including assault of non-striker and prevention of non-strikers from entering employer's premises).

207. *Id.* at 703.

208. *Id.*

209. See *id.* (supporting reasoning through assessment of appropriateness of employer action).

210. See *id.* (focusing on employer action to justify treatment of employee activity).

Although a subsequent Board plurality seemed to repudiate the *Thayer* test,<sup>211</sup> the Sixth Circuit reaffirmed the doctrine in *M.P.C. Plating, Inc. v. NLRB*.<sup>212</sup> This test for discretionary remedial action makes explicit the critical weight of employer labor violations in determining the right to reinstatement of employees who step beyond the traditional boundaries of section 7.<sup>213</sup> Employers, by violating federal labor law, expose themselves to a wider range of responsive concerted activity. Although strikers' activity may technically fall outside the NLRA's protection, the Board can nonetheless order reinstatement as a way to remedy the employer's other ULPs. The practical effect of this in the end is, in many ways, equivalent to protection.

This approach parallels protection of ULP strikers engaged in non-traditional strike action in that both share the underlying principle that employers should not profit from their own misconduct. The weakness in this approach, however, stems from the unpredictability of after-the-fact determinations about which employer ULPs are sufficiently egregious to warrant reinstatement of strikers who otherwise fall outside NLRA protection. For employees who plan to engage in typically unprotected strike action, such as an intermittent strike, this approach would require them to assess before taking action, not just whether the employer committed ULPs, but whether the Board and then a reviewing court would agree with the employees about the seriousness of those ULPs. This is an ex post answer to an ex ante problem. While the approach might make sense in the cases where it has been applied, in which strikers engage in the type of conduct that neither the Board nor courts want to promote in *any* situation—such as violence, intimidation, and other misconduct—it does not adequately capture the need for more careful guidance in the context of intermittent and partial ULP strikes, which may be not only appropriate but also entirely consistent with the aims of the NLRA. If that is the case, then strikers and would-be strikers facing clear ULPs in the workplace should know prior to taking action what forms of concerted activity they are entitled to employ.

Where particularly egregious ULPs prompt employees to engage in strike activities outside the traditional bounds of section 7, some cases authorizing the Board to reinstate such employees recognize that deter-

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211. See *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044, 1046 (1984) (plurality opinion) (finding coercive and intimidating behavior on picket line removed workers from protection despite employer ULPs); cf. *Mohawk Liqueur Co.*, 300 N.L.R.B. 1075, 1075 n.3 (1990) (noting Board plurality in *Clear Pine* rejected *Thayer* doctrine “but there was no holding on the issue because the vote was split 2–2 on this point”).

212. *M.P.C. Plating, Inc., v. NLRB*, 953 F.2d 1018, 1022 (6th Cir. 1992).

213. *NLRB v. Thayer Co.*, 213 F.2d 748, 756 (1st Cir. 1954) (“The trial examiner, in recommending the . . . [strikers’ reinstatement], took into consideration the fact that ‘the strike resulted from the flagrant unfair labor practices of Respondent Companies’. This seems perfectly proper . . . in deciding whether . . . their reinstatement would effectuate the policies of the Act.”).

mining the appropriateness of strike activity requires assessing both employee and employer conduct. Such cases embrace an idea that decisionmakers must view the employees' conduct in light of the employer's conduct.<sup>214</sup> While these cases do not take the approach of creating a separate standard of protected section 7 activity for ULP strikers, they recognize the need to extend more protection to such strikers in other ways. This is a principle that Part III argues should play a role in drawing the boundaries of nontraditional action in response to ULPs.

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Throughout their varied approaches to determining the boundaries of section 7 protected activity in the context of intermittent and partial strikes inspired by employers' labor-law violations, the Board and courts have considered, sometimes explicitly and other times more subtly, the relevance of the employer's unlawful behavior in contributing to a work stoppage. This recognizes a value that Part III contends should expressly guide how labor law addresses the intersection of the intermittent- and partial-strike doctrines with ULP strikes. In determining the range of protected concerted activities available to strikers, decisionmakers should be reluctant to extend doctrines that limit the right to strike to activities inspired by ULPs. Drawing on both the limited applicability of reasons for creating the partial- and intermittent-strike doctrines as well as the well-established status of the ULP strike as a means to curb employer labor violations, Part III calls for a renewed evaluation of the law of legal but unprotected ULP strikes. It argues that the purpose of such strikes—compelling employer compliance with labor law—is something that the law should protect employees in bringing about, rather than constraining these employees to less effective forms of labor action.

### III. A DIFFERENT KIND OF STRIKE: REVIVING THE INTERMITTENT AND PARTIAL ULP STRIKE

When employees engage in concerted activity with the intent to stop unlawful employer activity, they participate in a vital means of carrying out federal labor policy.<sup>215</sup> As an essential component of preserving employees' right to organize and bargain collectively in the workplace, the ULP strike requires the full range of federal protection to fully effectuate its purpose. Employee efforts to enforce their rights under the NLRA should not lose protection simply because of the nontraditional methods used. This Part proposes that the Board should adopt a separate

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214. See *Kohler Co.*, 300 F.2d at 703 (noting policies of NLRA may come into conflict when *both* labor and management are at fault for activity extending beyond borders of traditional protection).

215. See *supra* notes 35–39 and accompanying text (outlining policies underlying NLRA).

standard for handling nontraditional ULP strikes, as the policy reasons underlying exceptions to protected section 7 activities for economic strikes similar in form do not apply when the purpose of the strike is stopping an employer's ULPs. Some limitations on nontraditional ULP strike activity may prove necessary to protect employer interests, but the sweeping exclusion of intermittent and partial strikes from section 7 removes from protection some ULP actions that fundamentally advance, rather than counteract, the policies and express terms of the NLRA.

A. *Separate Handling of Nontraditional ULP Strikes from Economic Strikes Similar in Form*

Treatment of ULP strikes taking nontraditional forms as identical to economic strikes similar in form ignores essential differences between the purposes of these strikes. Jurisprudential foundations for treating intermittent strikes differently than traditional full-scale strikes have roots in the archetypal economic strike. This model assumes that workers advocating for increased wages and benefits cannot have the protected right to engage in on-and-off work stoppages that impede an employer's ability to continue its operations uninterrupted. Such protection, under the view courts have articulated, gives too much power to workers to dictate the terms and conditions of their employment.<sup>216</sup> As this section argues, that rationale does not apply in the context of strikes to stop employer ULPs that inhibit collective activity and corrode peaceful employee—employer relations. The purpose of such action is merely to return the workplace to compliance with the provisions of federal labor policy. It aims, in effect, to balance the scales rather than to tip them.

1. *Separating Economic Principles Behind the Unprotected-Strike Doctrine and the Remedial Principles Behind ULP Strikes.* — As Part I outlined, the unprotected-strike doctrine arose out of implied exceptions to protection based on policy concerns about providing workers with too much leverage in the labor–management relationship.<sup>217</sup> Yet unlike in the economic nontraditional strike context,<sup>218</sup> it is unlikely Congress would have wanted to leave ULP strikes to an unregulated test of manpower between employers and employees. Congress passed the NLRA to remedy employer behavior that limited workers' right to organize and bargain collectively.<sup>219</sup> Its central purpose was to combat ULPs responsible for

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216. See *supra* section I.B (tracing narrowing of right to strike in economic-strike context for both partial and intermittent forms of labor action).

217. See *id.* (outlining development of unprotected intermittent- and partial-strike doctrines).

218. See *supra* section I.B.3 (discussing cases in which courts found certain activity unprotected under NLRA, although lawful, because category of conduct was meant to be left to free play of economic forces between labor and management).

219. See *supra* notes 34–45 and accompanying text (detailing NLRA passage).

“substantial obstructions to the free flow of commerce.”<sup>220</sup> Congress could have accomplished this aim by eliminating or restricting the strike, but it chose the opposite course instead.<sup>221</sup> By protecting the right to strike, Congress sought to strengthen employee bargaining power and encourage peaceful and constructive relationships between labor and management.<sup>222</sup> Through simultaneously outlawing employer ULPs and recognizing the strike as an essential tool for employees, federal labor policy attempts to protect employees’ ability to enforce their labor rights through direct action.

The main justifications for limiting nontraditional strikes fail to support excluding similar ULP protests from NLRA protection. The “free play of economic forces”<sup>223</sup> language from decisions adopting the unprotected-strike doctrine portrays the strike as an economic battle in which each side flexes its muscle by showing it can endure interruption of the employment relationship longer than its opponent. In essence, the question posed is which side can hold out longer; the victor shows that it values its bargaining position more than its competitor does.<sup>224</sup> This is not the question in a ULP strike. The purpose of such a strike is to return the parties to a status of conformity with the law.<sup>225</sup> This allows for the NLRA’s process of collective bargaining to take place absent any form of retaliation or coercion.<sup>226</sup> Workers in such a situation do not unilaterally set their own work conditions—the scenario that concerned courts in the

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220. 29 U.S.C. § 151 (2012); see also Richard B. Freeman, What Can We Learn from the NLRA to Create Labor Law for the Twenty-First Century?, 26 ABA J. Lab. & Emp. L. 327, 327 (2011) (“The main architect of the Act, Senator Robert F. Wagner of New York, intended the unfair labor practices provisions to prevent the egregious behavior of firms that he had seen as Chairman of the National Labor Board during the period of the National Industrial Relations Act.”).

221. See supra note 45 and accompanying text (discussing idea in NLRA legislative history that increased protection, rather than limitation, of right to strike was best path to achieving labor peace).

222. See supra notes 34–45 and accompanying text (detailing NLRA passage).

223. Lodge 76, Int’l Ass’n of Machinists v. Wis. Emp’t Relations Comm’n (*Machinists*), 427 U.S. 132, 140 (1976) (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)).

224. See, e.g., Richard A. Posner, Some Economics of Labor Law, 51 U. Chi. L. Rev. 988, 997 (1984) (“The strike imposes costs on both parties: on the employer, by forcing him to reduce or cease production, and on the workers, by stopping their wages. The balance of these costs will determine the ultimate settling point between the union’s initial demand and the employer’s initial offer.”).

225. See supra section I.C (providing background on ULP strikes).

226. Through this process, employees who have organized a union are able to sit down and bargain with the employer, as the NLRA requires. See 29 U.S.C. § 158(d) (2012) (outlining employer obligation to bargain collectively with union of employees’ choice); see also *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 183, 185 (1941) (noting NLRA leaves “adjustment of industrial relations to the free play of economic forces but seeks to assure that the play of those forces be truly free” and discrimination against employees for union affiliation undermines this basic principle).

case of the nontraditional economic strike.<sup>227</sup> Rather, the ULP strike represents a shop-floor employee effort to enforce labor law.<sup>228</sup> The ultimate goal is a state of affairs in which an employer and its employees interact on the level playing field that federal labor policy requires.<sup>229</sup> This effort guides both parties toward peaceful and constructive relations.<sup>230</sup> Protecting the right to strike here allows workers only to impose those conditions that the law already requires the employer to follow.

Another main justification for the unprotected status of alternative forms of labor action is that it is unfair for employees to simultaneously draw wages from their employer while refusing to perform the work that the employer demands.<sup>231</sup> This type of strike, according to the decision in *Pacific Telephone & Telegraph*, allows employees to take home their wages without working.<sup>232</sup> In essence, it creates a stoppage that is “neither work nor strike.”<sup>233</sup> When this is the case, employees are not genuinely striking, as the loss is one-sided.<sup>234</sup> The employer loses services while the employees lose nothing, meaning there is no incentive for employees to ever cease such behavior.<sup>235</sup> Yet what is missing in this analysis is the realization that intermittent and even partial strikes in no way require such an unequal exchange. The same concern would exist in the traditional strike context were employees drawing wages for time spent on

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227. See, e.g., *NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 266 n.2 (9th Cir. 1995) (“Employees are not entitled to determine unilaterally the conditions of their work by engaging in recurring, intermittent, or partial strikes.”); *Audubon Health Care Ctr.*, 268 N.L.R.B. 135, 137 (1983) (“[Employees] cannot pick and choose the work they will do or when they will do it. Such conduct constitutes an attempt by the employees to set their own terms and conditions of employment . . . and is unprotected.”).

228. See *supra* section I.C (outlining treatment and development of ULP strikes).

229. See *supra* notes 35–39 and accompanying text (identifying purpose of NLRA to create peaceful employee–employer bargaining through protection of right to strike).

230. 29 U.S.C. § 151 (“Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption . . .”).

231. See, e.g., *Westpac Elec., Inc.*, 321 N.L.R.B. 1322, 1360 (1996) (defining intermittent strikes as “intentionally planned and coordinated so as to effectively reap the benefit of a continuous strike action without assuming the economic risks associated with a continuous forthright strike, i.e., loss of wages and possible replacement”).

232. See *supra* note 116 and accompanying text (detailing language in *Pacific Telephone & Telegraph* about employees’ ability to simultaneously draw wages and strike).

233. *NLRB v. Robertson Indus.*, 560 F.2d 396, 398 (9th Cir. 1976) (“[E]mployees may not engage in repeated, intermittent slowdowns or stoppages which are neither work nor strike . . . because the . . . [NLRA] has been interpreted to prohibit employees from both drawing wages and attempting to put economic pressure on the employer at the same time.” (citation omitted)).

234. See Becker, *supra* note 7, at 384 (“Arguably, the problem with . . . [some non-traditional strikes] lies in the unfairness of employees continuing to earn wages while . . . intentionally thwarting the interests of their employer.”).

235. *Pac. Tel. & Tel. Co.*, 107 N.L.R.B. 1547, 1549 (1954) (“There is no doubt that the intention of that Union was to bring about a condition that would be neither strike nor work.”).

strike. When employees forego compensation for time spent in a work stoppage, however short or intermittent that time may be, this forfeiture removes the problem.<sup>236</sup> Although it may be more difficult to sort out pay when strikes are partial or intermittent, it is possible to do so. Indeed, the only types of labor action that should be included in the expanded realm of section 7 activity available to ULP strikers are those in which employees are at least willing to forego compensation for the services they withhold.<sup>237</sup> As courts have acknowledged, employers remain free to deduct wages for time when employees are on strike, regardless of what form that strike takes.<sup>238</sup> Renewed consideration of the protected nature of intermittent and partial strikes does not require altering that sensible conclusion about what constitutes a strike.

The harassment element is another reason often invoked to remove nontraditional strikes from section 7 protection.<sup>239</sup> The problem with providing this justification too much breadth, however, is that nearly any strike form could be considered harassing or disloyal under broad constructions of those terms. After all, the purpose of a strike is to pressure an employer in a tangible way, thereby causing it to comply with employee demands.<sup>240</sup> Sometimes economic injury is justified and the methods employed reasonable, but the ultimate goal is still that of pressuring the employer to take action through causing it to incur economic loss. For these reasons, judicial and agency decisionmakers should be hesitant to rely heavily on the harassment factor to limit strike action, at least without further delineating the boundary of that factor so as to ensure it does not inadvertently consume the very types of labor action that Congress created the NLRA to protect. That caution should be even

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236. In suggesting that the NLRA may protect some economic partial strikes over discrete grievances, Becker argues that in most circumstances, employers will be able to calculate and thereafter deduct from employees' wages compensation for time spent engaging in concerted activity against the employer. See Becker, *supra* note 7, at 384–85 (noting employers could lawfully withhold intermittent and partial strikers' pay for any time they spent striking and, though this would be difficult in slowdown situation, in other cases "employers could easily calculate what wages to withhold for the work that employees refuse to do"). These arguments are even stronger in the case of ULP strikes, where the strike's focus is restoring labor-law compliance rather than economic gains.

237. See *infra* sections III.A–III.B (advancing argument for increased protection of ULP strikes taking intermittent and partial forms).

238. See *Solo Cup Co.*, 114 N.L.R.B. 121, 133–34 (1955) (finding employees who shut off machines during workday in protest of discharges of fellow coworkers were not engaged in unprotected strike because employer "would have been free to remove them from the payroll for the hour that they were neither on duty nor at work").

239. See *supra* notes 109–111 and accompanying text (detailing *Pacific Telephone & Telegraph* case and element of harassment involved in employees' intermittent strike plan against company).

240. See Posner, *supra* note 224, at 997 (describing strike as "classic example of bilateral monopoly" in that "union and employer can deal only with each other and a refusal to deal, by imposing costs on the other party, makes him more likely to come to terms").



more pronounced when such decisionmakers address what is actually an effort to protest employer violations of the NLRA. Where the employer has in fact violated the law and deprived employees of their statutory rights, protecting the employer from these tactics would permit only one-sided “harassment”—that of the employer against the employees.

While intermittent and partial strikes in the economic-strike context present legitimate obstacles to achieving the labor–management cooperation that the architects of the NLRA envisioned, the origins of the unprotected-strike doctrine fail to offer sound solutions in the ULP-strike context. As such, the next section considers the possibility for increased protection of ULP strikers through adoption of a clearer standard that recognizes a need to limit the unprotected-strike doctrine where employees merely seek a workplace that complies with federal law.

2. *The Value of Nontraditional Strikes as a Tool to Remedy ULPs.* — Justifications for narrowing the right to strike must be particularly strong—and their reach narrowly construed—in order to give full weight to the NLRA’s purpose of eliminating ULPs.<sup>241</sup> Rather than expanding section 7, protecting those engaged in nontraditional ULP strikes simply reads implied exceptions to section 7 narrowly so as to effectuate the NLRA’s aims. The exceptions created in the intermittent- and partial-strike doctrines should not stretch so far as to remove ULP strikes from protection.

Increasing prevalence of employer ULPs highlights the importance of employees’ use of direct action to enforce labor law. Employer commission of ULPs poses a serious threat to the employee bargaining power that Congress sought to establish through its passage of labor laws.<sup>242</sup> One indicator of the problem is that union membership remains low despite employee interest in joining unions.<sup>243</sup> Board remedies alone are

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241. See *supra* notes 30–32 and accompanying text (detailing NLRA protection of right to strike and engage in other concerted activities).

242. Employer ULPs pose particularly serious problems in the context of representation elections. During these elections, employees choose whether or not to elect a union in their workplace. As one study has shown, “unfair labor practice charges against employers were filed in 46 percent of elections. In more than half of the elections with charges filed, the NLRB found merit to at least one charge.” John Logan, Erin Johansson & Ryan Lamare, Univ. of Cal., Berkeley Ctr. for Lab. Res. & Educ., *New Data: NLRB Process Fails to Ensure a Fair Vote* (2011), [http://laborcenter.berkeley.edu/pdf/2011/NLRB\\_Process\\_June2011.pdf](http://laborcenter.berkeley.edu/pdf/2011/NLRB_Process_June2011.pdf) [<http://perma.cc/98R2-WG38>]; see also John Schmitt & Ben Zipperer, *Dropping the Ax: Illegal Firings During Union Election Campaigns, 1951–2007*, Ctr. for Econ. & Pol’y Res. 15 (Mar. 2009), <http://www.cepr.net/documents/publications/dropping-the-ax-update-2009-03.pdf> [<http://perma.cc/TEG6-6QHG>] (concluding during union election campaign “union organizers and activists faced a 15 to 20 percent chance of being illegally fired”).

243. See Richard B. Freeman, *Do Workers Still Want Unions? More Than Ever, Agenda for Shared Prosperity* (Feb. 22, 2007), <http://www.sharedprosperity.org/bp182.html> [<http://perma.cc//79ZC-4KD4>] (showing “majority of nonunion workers in 2005 would vote for union representation if they could . . . up from the roughly 30% who would vote for representation in the mid-1980s, and the 32% to 39% in the mid-1990s”).

unable to fully effectuate the aims of the NLRA due to the pervasive nature of unlawful employer practices.<sup>244</sup> While the Board provides a means of redressing ULPs, a gap persists between the number of ULPs that employers commit and the number that the Board is able to stop before they cause significant damage to a representation election, a bargaining relationship, or the balance between employee and employer power in general.<sup>245</sup> Protecting the full range of strike activities that employees might use in protest against ULPs is one important way to help preserve the rights labor law purports to offer to workers.

There is also a participatory value to employees' enforcement of labor law through collective action. Under such a system, workers exercise their rights in their workplaces rather than through distant formal processes. This can improve awareness of existing laws that protect employees' collective rights.<sup>246</sup> It thus enhances the likelihood that employees will hold employers accountable for violating those rights. In turn, the prospects of increased employee enforcement should cause more employers to refrain from tactics that violate the law. By recognizing employees' right to engage in these strikes, the Board could dissuade employers from engaging in the unlawful activity that inspires ULP strikers to action, thereby reducing the need for strikes in the first place.

It is important to note that protecting nontraditional ULP strikes does not leave employers in a helpless position. First, employers can protect themselves against this type of labor action by running a workplace that complies with labor law. In addition, employers can enter into collective bargaining agreements containing no-strike clauses with employees. So long as they do not commit serious ULPs, employers who are parties to such agreements can protect themselves from labor disruptions during the course of the contract.<sup>247</sup> Even where employers face pro-

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244. A 2008 article by former AFL-CIO Associate General Counsel and later NLRB Board Member Nancy Schiffer highlights this inadequacy of Board mechanisms, contending that Board remedies are a "resounding failure" given the "sensational rise of employer unfair labor practices since the Act's passage." Nancy Schiffer, *Rights Without Remedies: The Failure of the National Labor Relations Act*, ABA Sec. of Lab. & Emp. L. (2008), <http://apps.americanbar.org/labor/lel-annualcle/08/materials/data/papers/153.pdf> [<http://perma.cc/QGB9-6A2H>].

245. See Weiler, *supra* note 172, at 1778 (highlighting failure of Board remedies to stop employer ULPs from infringing employee rights under NLRA).

246. Recently, in support of a rule requiring employers to post NLRA rights, the Board issued findings showing that employees have limited awareness of the full range of rights available to them under federal labor law. See *Notification of Employee Rights Under the National Labor Relations Act*, 76 Fed. Reg. 54,006, 54,006–07 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104) (noting most U.S. employees remain unaware of rights available to them under federal labor law). Despite these findings, courts struck down the proposed rule requiring posting. See, e.g., *Chamber of Commerce v. NLRB*, 721 F.3d 152, 154 (4th Cir. 2013) (holding Board authority must be predicated on filing of ULP charge or representation petition).

247. See *supra* note 141 and accompanying text (outlining Board protection of strikes violating no-strike clauses where strikes arise from serious employer labor violations).

tected, nontraditional ULP strikes, they may still respond by temporarily replacing workers and by denying compensation to strikers for the time spent away from work. Most importantly, employers can offer to sit down with employees at the bargaining table to negotiate a plan for labor peace. Strikes, after all, are not the preferred option for either workers or management. Yet recognizing the potential of the full spectrum of ULP concerted activity as an antidote to employer violations of federal law follows from the NLRA's original prescription: facilitate peaceful and productive employer–employee relations by protecting the right to strike.

This section has presented the many reasons that federal labor law should not remove nontraditional ULP strikes from protection based solely on the form that these strikes take. Employees facing ULPs in the workplace should have the ability to use a form of concerted activity that presents an actual likelihood of stopping the employer's violations. Labor law should protect such efforts as a valid form of employee enforcement—one that strengthens the law itself.

#### B. *Addressing Difficulties Arising from Expanded Protection*

The current approaches to the issue of intermittent and partial strikes reflect the inherent complications of protecting labor action that fails to fit the traditional full-scale-strike model.<sup>248</sup> An approach that extends more protection to ULP strikers engaged in nontraditional labor action must account for the employer's need to lawfully carry out its business. This section addresses some issues that may arise in the course of carrying out this Note's proposal.

Some might be concerned that expanded protection for nontraditional ULP strikers means condoning unlawful labor action in response to unlawful employer action, but that is not the case. That some strikes are outside, or on the borders of, protection does not mean those strikes are illegal. Litigants have recently attempted to blur the distinction between whether a strike is protected and whether it is legal in the language used to describe this doctrine.<sup>249</sup> That blurring is problematic. Mischaracterization of intermittent strikes as illegal helps to build an overbroad presumption against protection for this form of labor action. In the Supreme Court case that first created the unprotected-strike doctrine, *NLRB v. Fansteel Metallurgical Corp.*, the Court found that employees violated state and local property law by participating in a sit-down strike that took control of the employer's premises for days; the NLRA,

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248. See *supra* Part II (discussing three approaches to this issue—absolute rejection of a separate standard, case-by-case adjudication, and reinstatement through Board's remedial powers).

249. See Petition for Review and Cross-Application for Enforcement from the National Labor Relations Board at 23, *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548 (8th Cir. 2015) (No. 14-3001), 2014 WL 5802955 (arguing pledge forbidding employees from engaging in intermittent strikes did not violate NLRA because pledge “only limits returning strikers from engaging in intermittent strikes, which are in fact illegal under the Act”).

according to the Court, could not protect such “unlawful” conduct even in response to employer ULPs.<sup>250</sup> Decisions that followed extended this doctrine to a wide variety of labor action that does not violate any laws, however. Finding an expanded realm of protection for nontraditional ULP strikers does not require protecting *unlawful* labor action. The Board and courts should remain hesitant to protect such behavior, but that hesitation can and should remain separate from their treatment of lawful nontraditional strikes.

Delineating the boundary between absenteeism and striking is also a critical task. This is perhaps the most adamant complaint from the business community regarding intermittent strikes.<sup>251</sup> If employees can, for example, orchestrate a one-shift strike taking place over the course of several weeks,<sup>252</sup> it is important to ensure that they cannot use this opportunity to take unpaid and unexcused leave under the guise of concerted activity.<sup>253</sup> Since the NLRA preserves employers’ right to terminate employees “for cause,”<sup>254</sup> and absenteeism not genuinely related to labor

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250. 306 U.S. 240, 253 (1939); see also *supra* note 72 and accompanying text (detailing unlawful aspects of employee conduct in *Fansteel*).

251. See U.S. Chamber of Commerce, *The Blue Eagle Has Landed: The Paradigm Shift from Majority Rule to Members-Only Representation* 33 (2014), [http://www.workforcefreedom.com/sites/default/files/REPORT%20WFI\\_MembersOnlyUnions\\_Report\\_FIN.pdf](http://www.workforcefreedom.com/sites/default/files/REPORT%20WFI_MembersOnlyUnions_Report_FIN.pdf) [<http://perma.cc/4W2A-MP3W>] (“[A]uthorizing intermittent strikes would affect nearly every employer in the United States. The basic acts of setting a schedule and running a workplace would become almost impossible if employees were permitted to simply walk out at any time, for a duration of their own choosing, without consequence.”).

252. This is just one example of activity included in the expanded approach to section 7 activity for ULP strikers this Note promotes. Workers might, for example, walk off work (and refuse compensation) for one shift of work each week for four weeks to use this time to protest the employers’ unlawful practices. They might alternatively refuse to work overtime while striking against the employer’s unilateral change to the terms and conditions of employment and refusal to bargain with workers as required under the Act. As one further example, workers could organize a series of short-term strikes to call attention to the company’s unlawful retaliation against union supporters in the workforce.

253. In the Walmart ULP charges referenced in the introduction to this Note, *supra* notes 15–20 and accompanying text, the company alleged that employee lack of attendance at work violated its absenteeism policy; there, however, the Board complaint alleged it was clear that employees had failed to attend work in order to participate in protests against the company. See Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing at 8, *Wal-Mart Stores, Inc.* (NLRB Div. of Judges Jan. 14, 2014), <http://apps.nrlb.gov/link/document.aspx/09031d45815769dc> (on file with the *Columbia Law Review*) (quoting Walmart directive to employees threatening discharge or discipline for further participation in “union-orchestrated intermittent work stoppages that are part of a common plan or design to disrupt and confuse the Company’s business operations”). Other cases may be more difficult to distinguish between employee absences from work for alternative reasons and absences from work in order to engage in concerted activity.

254. See 29 U.S.C. § 160(c) (2012) (“No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.”).

action is often sufficient cause for termination, this employer right is a critical aspect to an adequate counterbalance against employees' right to protect against employer ULPs. The problem may require a clear notice requirement that employees must provide with respect to their participation in a strike, identifying their absence as part of a labor action against the employer.<sup>255</sup> It certainly requires notification so as to alert the employer that the employee will not take compensation for the time spent during a work stoppage. Yet the right to terminate employees for cause cannot be so broad as to permit employers to terminate those who leave work, even for short periods, for the purpose of protesting actual ULPs. This, after all, would eviscerate the protected right to strike codified in the NLRA.<sup>256</sup>

Another essential component to drawing the proper bounds of this approach is verifying that an employer actually engaged in the unlawful practices leading to the strike or strikes at issue. The Board would not want to invite employees to engage in ULP-motivated intermittent or partial labor action when an employer has not violated the law. The first step is looking to whether an actual ULP has been committed.<sup>257</sup> If not, the proposed treatment of nontraditional ULP strikes would not extend additional protection. Another step is ensuring that the strikers' actions reveal that the ULP was a contributing cause of their walkout.<sup>258</sup> For this, the Board and courts will look to employees' statements, signs, and other evidence of the ULP as the impetus for the labor action.<sup>259</sup> Each of these

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255. See Banjo & Trotman, *supra* note 20 (describing Walmart worker who participated in five strikes over two years and “[b]efore each strike . . . sent notice to Walmart’s corporate office . . . as well as to his local store manager, telling them he would be absent and that he would be protesting poor working conditions”).

256. The Board has recognized the difficulty in distinguishing between termination “for cause” relating to absenteeism and unlawful termination for participation in section 7 activity. See *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 16–17 (1962) (“[T]he Act does authorize an employer to discharge employees for ‘cause’ and . . . [Board] cases have long recognized this right . . . [b]ut this . . . cannot mean that an employer is at liberty to punish a man by discharging him for engaging in [protected] concerted activities.”).

257. See *supra* notes 147–149 (discussing long-established case law on whether strike is ULP strike, including threshold issue of whether employer committed ULP).

258. See *Child Dev. Council of Ne. Pa.*, 316 N.L.R.B. 1145, 1145 n.5 (1995) (noting strike is ULP strike when ULP had “anything to do with” causing strike (quoting *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir. 1972))); see also *C-Line Express*, 292 N.L.R.B. 638, 638–39 (1989) (noting Board looks to “subjective reactions” and “state of mind of strikers” to determine whether ULPs motivated labor action).

259. Case law for determining whether a strike is a ULP strike is highly developed because this determination is critical to whether employees receive protection from permanent replacement and because strikes may be converted from economic strikes into ULP strikes. See, e.g., *Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 723 (D.C. Cir. 1990) (“The employer’s unfair labor practices need not be the sole or even the major cause or aggravating factor of the strike; it need only be a contributing factor.” (quoting *NLRB v. Moore Bus. Forms, Inc.*, 574 F.2d 835, 840 (5th Cir. 1978))); *id.* (“The dispositive question is whether the employees, in deciding to go on strike, were motivated in part by

safeguards ensures that those who benefit from the full range of protection are those who need it most—employees facing unlawful practices in their workplaces.

Clarity is a further issue. One of the main problems with the current approach to nontraditional ULP strikes is that employees cannot know at the start of a strike whether a reviewing ALJ will be sympathetic or hostile to their approach. Employees thus have trouble knowing whether they are protected in their action.<sup>260</sup> Even under the proposal outlined in this Note, at the start of a strike, workers might remain uncertain about whether the Board will ultimately find that the targeted employer committed ULPs and, consequently, whether the employees can use non-traditional labor action to protest the employer's actions.<sup>261</sup> Yet there is an important difference between uncertainty about whether the Board will ultimately protect a certain strike form and uncertainty about whether an employer has committed ULPs. The former deals with a question that, under current doctrine, is difficult for employees to discern for themselves because of agency and judicial decisionmakers' failure to articulate a bright-line legal framework to govern the implied exemption from protection for certain strike forms. The latter deals with the much more straightforward question of whether the employer has violated the specific provisions of the NLRA, such as by firing workers for their pro-union statements. Undoubtedly, some ULPs will be on the margins of unlawful activity and employees will need to weigh the risks that the Board will find the employer acted lawfully against their desire to stop the action; but many ULPs are quite straightforward, and employees in the workplace can adequately assess the bona fides of the ULP allegation underlying a potential strike before beginning the strike. Further, existing law distinguishing ULP strikes from economic strikes requires workers to assess the likelihood of success on the ULP charge prior to beginning a strike to determine whether they will receive protection from permanent replacement,<sup>262</sup> so this is actually a level of uncertainty that potential ULP strikers must already confront.

A concern might also arise that the purpose-form connection this Note proposes would create another case-by-case inquiry, leading to even more subjectivity and uncertainty than the doctrine currently generates. The Board need not assess this connection as a factual matter in the

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the unfair labor practices committed by their employer . . . .” (quoting *N. Wire Corp. v. NLRB*, 887 F.2d 1313, 1319–20 (7th Cir. 1989)).

260. See *supra* section II.B (detailing case-by-case adjudication as problematic for failing to give employees adequate ex ante notice of which types of activity section 7 protects).

261. If employees wrongly conclude that the employer has committed ULPs, their concerted activity—regardless of its form—would not be considered a ULP strike. See *supra* section I.C (detailing requirements strikers must meet to benefit from enhanced protections for ULP strikers).

262. See *supra* note 137 and accompanying text (detailing *Mackay Radio* doctrine and protection of ULP strikers, but not economic strikers, from permanent replacement).

context of each case, however. Instead, a strike's purpose can play a role in the form of a general rule that a ULP strike is protected even when intermittent or partial in form. What constitutes a ULP strike is a question with well-articulated answers in existing law.<sup>263</sup> This Note proposes extending that legal distinction between types of strikes to the intermittent- and partial-strike doctrines. It does not argue that, in each case, the Board should determine the appropriateness of employees' action in light of their purpose, as the Supreme Court has made clear that the scope of section 7 is not affected by the case-specific reasonableness of employees' decision to stop work.<sup>264</sup> Looking to whether the strike is over ULPs or economic objectives is a separate inquiry, and one that is familiar to the Board.

One final counterargument to ensuring a wider range of protected activity in response to employer ULPs is that ULP strikers actually need less protection than economic strikers. This stems from economic strikers facing a potential for permanent replacement that ULP strikers remain protected against.<sup>265</sup> Yet the very reasons that motivated the existing enhanced protections for ULP strikers support protecting their ability to employ the full range of concerted activity. Here again it is important to consider the basis of the strike. The point of an economic strike is a test of might—a resolution to the question of who values their position more.<sup>266</sup> A strike over a ULP, however, is intended to stop the employer from violating the law.<sup>267</sup> This furthers not only the interests of the employees directly facing those ULPs but also those of law-abiding employers who face competition from law-breaking competitors, of employees in other workplaces who have an interest in the protection of workers' rights, and of society as a whole, which benefits from peaceful and noncoercive labor relations.<sup>268</sup> Given the weight of these interests, it is important to ensure that the ULP strike is the effective tool Congress intended it to be. This is not the case when decisionmakers constrain the forms that such a strike may take without a sound basis.<sup>269</sup> While it might

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263. See *supra* section I.C (outlining Board doctrine distinguishing ULP strikes from economic strikes).

264. See *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 16 (1962) (“[I]t has long been settled that the reasonableness of workers’ decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not.”).

265. See *supra* notes 135–145 (outlining existing enhanced protections for ULP strikers over economic strikers); see also *Cox et al.*, *supra* note 12, at 30 (highlighting argument ULP strikers may need less protection because of alternative means of redressing problem through administrative processes).

266. See *supra* note 224 and accompanying text (outlining purposes of economic strikes).

267. See *supra* section I.C (outlining purpose and history of ULP strikes).

268. See *supra* notes 33–39 and accompanying text (outlining societal interests motivating passage of federal labor policy).

269. A new study shows how employers have used temp agencies to more quickly and efficiently replace striking workers. This applies to the temporary replacement scenario as

make sense to create a high burden in the case of an economic strike,<sup>270</sup> as a test of workers' collective desire for a workplace policy that will benefit them, protest of an employer ULP presents a different scenario. So long as ULPs are taking place, the Board's objective should be to quickly restore compliance with the NLRA.

The obstacles outlined in this section should not conceal the fact that doctrines limiting lawful strikes are the deviations from express labor law, not the other way around. As previous sections highlighted, the reasons that courts, followed by the Board, have excluded intermittent and partial strikes from NLRA protection simply do not apply to the context of the ULP strike. Such a strike, aimed at restoring a neutral baseline for labor relations, deserves a wider umbrella of section 7 protection for the various forms it may take.

#### CONCLUSION

Workers today face an environment where violations of their rights in the workplace do not result in timely or significant remedies. Board orders, on their own, have been unsuccessful in preventing unfair labor practices from interfering with the system of workplace relations Congress sought to establish through the National Labor Relations Act. Meanwhile, judicial and agency constraints on protection of concerted activities extend too far beyond their own economic-strike foundations, undermining direct labor action as a possible solution to pervasive labor violations. Employees seeking to put an end to these practices should have available the full range of lawful concerted action envisioned at the outset of modern labor law, including intermittent strikes and other forms of partial work stoppages. This understanding of protected concerted activities most effectively promotes peaceful and constructive labor relations by ensuring a stronger check against unfair labor practices that violate federal labor law and frustrate labor-management cooperation.

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well as the permanent replacement one, making it much easier for employers facing a labor dispute to ensure a steady supply of labor to minimize disruption. Threat of replacement significantly reduces the effectiveness of traditional strike forms. See Erin Hatton, *Temporary Weapons: Employers' Use of Temps Against Organized Labor*, 67 *Indus. Lab. Rel. Rev.* 86, 104 (2014) (“[E]mployers can use temps (and temp agencies) as a powerful weapon against workers and their unions.”).

270. See *supra* note 224 and accompanying text (outlining traditional strike as classic economic contest).