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Days without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies under the National Labor Relations Act

DAYS WITHOUT IMMIGRANTS: ANALYSIS AND IMPLICATIONS OF THE TREATMENT OF IMMIGRATION RALLIES UNDER THE NATIONAL LABOR RELATIONS ACT

MICHAEL C. DUFF[†]

INTRODUCTION

In the late winter and spring of 2006, a series of massive “pro-immigration” rallies occurred in a number of cities throughout the United States. One of the unusual aspects of the rallies was that many of them took place during the week on traditional work days.¹ As one commentator has noted, large-scale political demonstrations historically have been held on the weekend, presumably so that potential participants would not have to miss work to attend and would not face the possibility of being disciplined by their employers.² A number of employees attending the immigration rallies on a work day were fired by their employers.³ According to newspaper accounts, at least some of these fired employees filed charges with the National Labor Relations Board (NLRB)⁴ alleging that their discharges violated Section 8(a)(1) of the National Labor Rela-

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1. A review of approximately seventy-five news stories (list on file with author) reveals the following general timeline: Major rallies were held in various locations throughout the nation on Tuesday, February 14; Friday, March 10; Thursday through Monday, March 23 through March 27; Wednesday, March 29; Saturday, April 1; Saturday, April 8; Sunday, April 9; Monday, April 10 (102 cities simultaneously); Tuesday, April 11; and Monday, May 1 (El Gran Paro Americano – the Great American strike). Thus, two of the most significant of these rallies, in which hundreds of thousands of individuals participated, were held on Mondays-April 10 and May 1.

2. Nelson Lichtenstein, *The Roots of May Day: Today's Marchers are Liberals' Best Hope*, SLATE MAGAZINE, May 1, 2006, <http://www.slate.com/id/2140846/>. Of course, there is a tacit assumption by the author that the term “work day” continues to make sense in the American economy. As of 2004, one-third of employed Americans worked Saturdays, Sundays or both weekend days. Harriet B. Presser, Extended Abstracts from Conference, Nat'l Inst. for Occupational Safety and Health, *Working in a 24/7 Economy: Challenges for American Families*, April 29-30, 2004, <http://www.cdc.gov/niosh/topics/workschedules/abstracts/presser.html#prev>.

3. The thrust of these accounts is that the employees were fired for absenteeism. It is also conceivable that employees may have been discharged for mere attendance at an immigration rally. While this article will not discuss the second theory, if immigration rallies are protected activity under the NLRA, it could be argued forcefully that a discharge for engaging in the activity during nonworking time presumptively violates the NLRA because it would not invade a management interest. See *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 572 (1978) (employer retaliation for employee distribution of union newsletter—a protected NLRA activity—off the employer's property “clearly would be protected by [section 7 of the NLRA] against employer discipline”).

4. Georgia B. Pabst, *Restaurant Workers File Labor Charge*, MILWAUKEE JOURNAL SENTINEL, Apr. 16, 2006, available at <http://www.jsonline.com/story/index.aspx?id=416449>.

tions Act (NLRA).⁵ This article explores legal issues arising from these discharges through the prism of the NLRA.⁶ The relationship between federal labor law and immigration rallies may not be immediately apparent. However, as will be developed through this article, immigration rallies protesting congressional legislation likely to lead to the loss of immigrant workers' jobs—through increasingly aggressive enforcement of immigration laws—can be readily conceived as both “work” disputes and mass political protests over immigration policy. Indeed, this article argues that for reasons of policy and efficacy the rallies are *best* viewed as labor disputes.

The immigration issue intensified in the early months of 2006 in reaction to legislation proposed in the House of Representatives that would have essentially classified employees working without required immigration documentation as felons.⁷ The proposal sparked the rallies under discussion. Following these “days without immigrants,”⁸ many politi-

5. 29 U.S.C.A. §§ 151-69 (2007). Unless otherwise indicated, “NLRA” is used throughout this article to refer to the National Labor Relations (Wagner) Act of 1935 and its major amendments, the Labor Management Relations (Taft-Hartley) Act of 1947, and the Labor-Management Reporting & Disclosure (Landrum-Griffin) Act of 1959. “Internal” statutory citations will also be utilized, for example, Section 8(a)(1) of the NLRA. Section 8(a)(1) of the NLRA states that “[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.” 29 U.S.C.A. § 158. Section 7 states in turn that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.” 29 U.S.C.A. § 157.

6. At the conclusion of 2006, the NLRB’s chief prosecutor, the General Counsel, had publicly issued a handful of “Advice” memoranda addressing the subject of whether employee participation in the immigration rallies is protected concerted activity under the NLRA. Advice memoranda are documents that announce the willingness of the NLRB to pursue legal issues, particularly issues that are novel or controversial. If the General Counsel will not pursue a legal theory, it cannot be presented to the adjudicatory arm of the NLRB or to the courts for consideration. Some of the immigration rally memoranda will be discussed in this article. There is no easy way for observers outside the NLRB to divine from the issued memoranda the total number of charges filed in the regional offices raising the same or similar issues. Presumably, the issued documents effectively dispose of other similar pending cases. Although those memoranda, and this inquiry, were prompted by the 2006 rallies, the issues arising from those rallies would probably arise in most immigration protest scenarios. In light of present immigration trends, the emergence of immigration protest issues will likely continue, notwithstanding the poor turnout at subsequent immigration rallies staged in the Fall of 2006. See Daryl Fears & N.C. Aizenman, *Immigration Rally’s Low Turnout Disappoints Advocates*, WASH. POST, Sept. 8, 2006, at A6, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/07/AR2006090701247.html>.

7. The newspaper reports are legion. A few examples include: Monica Davey, *Protest Rallies End in Job Loss for Immigrants*, N.Y. TIMES, Apr. 15, 2006, at A1, available at <http://www.truthout.org/cgi-bin/artman/exec/view.cgi/59/19116> [hereinafter Davey, *Protest*]; Monica Davey, *Employers Gird for Immigrant Boycott*, N.Y. TIMES, May 1, 2006, at A12 [hereinafter Davey, *Employers*]. Rallies occurred nationwide throughout this period. Attendance at a rally held on Mar. 25, 2006 in Los Angeles was estimated at between 500,000 and 750,000 protesters. See Jim Newton, *Villaraigosa Tells Where He Stands*, L.A. TIMES, Apr. 15, 2006, at A1, available at <http://www.truthout.org/cgi-bin/artman/exec/view.cgi/59/19116#1>; see also *Thousands March for Immigrant Rights: Schools, Businesses Feel Impact as Students, Workers Walk Out*, CNN.Com, May 1, 2006, <http://www.cnn.com/2006/US/05/01/immigrant.day/index.html>.

8. The colorful term used to advertise many of these rallies was “A Day Without Immigrants.” See, e.g., Jon Sarche, *US Prepares for ‘Day Without Immigrants,’* ABC NEWS.COM, May 1, 2006, <http://sfgate.com/cgi-bin/article.cgi?f=/n/a/2006/05/01/national/a045601D96.DTL>.

cians and legislators have called for immediate reform, and the subject of illegal immigration⁹ has frequented the headlines of the popular press. The policy questions surrounding the immigration debate over roughly the last decade are profound and sweeping. But economic evidence as to whether immigration represents a net gain or loss to the American economy remains complex, often in conflict and, by any estimation, still evolving.¹⁰ Nevertheless, a significant portion of the American “general public” appears to view present immigration trends as a *de facto* “invasion,”¹¹ and demands that the government immediately close the borders and classify undocumented immigrants already present in the country as felons.¹² Much of the anti-immigration frenzy seems driven substantially by the largely erroneous notion that undocumented immigrants draw more in public benefits than they contribute to the treasury.¹³ Regard-

9. Any discussion of immigration immediately presents a terminological mine field. See Beth Lyon, *When More Security Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 573-82 (2004). Following Lyon, throughout this article the term “unauthorized worker” is utilized to refer to anyone whom immigration laws forbid to work, and “undocumented immigrant” to refer to any individual whose presence in the United States is unauthorized. Not all undocumented immigrants work or seek to do so.

10. For example, compare Gianmarco I.P. Ottaviano & Giovanni Peri, *Rethinking the Gains From Immigration: Theory and Evidence from the U.S.*, (Fondazione Eni Enrico Mattei, Working Paper No. 52.06, 2006), available at <http://ssrn.com/abstract=896667> (net gain to economy) with GEORGE J. BORJAS, *HEAVEN'S DOOR: IMMIGRATION AND THE AMERICAN ECONOMY* (1999) (net loss to economy). For a general survey of economic assessments of immigration, see Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 2 n.4 (2006).

11. Lipman, *supra* note 10, at 2 n.1. A flurry of legislative activity at the close of the 109th Congress reflected this mood. During the 2nd Session, the House of Representatives passed (but the Senate did not approve) the following measures: Secure Fence Act of 2006, H.R. 6061, 109th Cong. (2006) (a bill authorizing building 700 miles of fencing along the U.S.-Mexico border); Federal Election Integrity Act of 2006, H.R. 4844, 109th Cong. (2006) (a bill requiring people registering to vote to provide proof of U.S. citizenship); Border Tunnel Prevention Act of 2006, H.R. 4830, 109th Cong. (2006) (a bill making it a crime to build or finance a tunnel between the U.S. and Mexico or Canada); Community Protection Act of 2006, H.R. 6094, 109th Cong. (2006) (a bill purporting to combat “alien gang crime” that would give the Department of Homeland Security the authority to detain illegal aliens); Immigration Law Enforcement Act, H.R. 6095, 109th Cong. (2006) (a bill affirming the authority of state and local law enforcement agencies to enforce immigration laws). Taken together the legislation seemed to reflect the sense of the Congress that constituents in certain quarters felt besieged. Whether that sense will be perceived and pursued with equal energy by future Congresses remains to be seen. An articulate exposition of the invasion theme is set forth in PATRICK J. BUCHANAN, *STATE OF EMERGENCY: THE THIRD WORLD INVASION AND CONQUEST OF AMERICA* (2006).

12. Border closure as a remedy to alleged immigration onslaught is not a new phenomenon in American history. Michelle Wucker states that “[i]n the early 1920s, the American nativist movement that had been growing over a half century finally succeeded in dramatically cutting back immigration and intimidating immigrants into trying to obscure their foreign origins.” MICHELE WUCKER, *LOCKOUT: WHY AMERICA KEEPS GETTING IMMIGRATION WRONG WHEN OUR PROSPERITY DEPENDS ON GETTING IT RIGHT* xiii (2006). However, as Professor Reich has noted, “Nativists assume that unlawful immigration can be easily controlled, ignoring the ineffectiveness of INS enforcement and denying the reality of a continued undocumented presence.” Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law into the Breach Once More*, 21 N.M. L. REV. 219, 243 (1991).

13. Seventy-five percent of illegal immigrants have their income taxes withheld, and less than a third of these taxpayers file for a refund. Larry J. Obhof, *The Irrationality of Enforcement? An Economic Analysis of U.S. Immigration Law*, 12 KAN. J.L. & PUB. POL’Y 163, 175 (2002). Though

less, with an estimated 12 million undocumented immigrants residing in the United States, roughly 7 million of whom are unauthorized workers (about 4.9 percent of the overall work force),¹⁴ mass immigrant “round-ups” and deportations would be extremely contentious and destabilizing. Leaving aside the multitude of ethical objections to such a policy, mass deportation would also be extremely expensive.¹⁵

Although such dramatic events involving the forcible suppression of millions of people could however unadvisedly transpire, it is difficult to imagine how that could happen soon.¹⁶ Accordingly, because undocumented immigrants will keep working in the United States for the foreseeable future, their status under American labor and employment laws, and the implications of that status, will remain significant.¹⁷ Furthermore, the policies underlying the dizzying array of federal and state workplace regulation will accordingly continue to collide with immigration policy in complex and unexpected ways.¹⁸

surprising to many observers, a variety of tax devices allow unauthorized workers to report income and pay taxes and allow employers to withhold payroll taxes. Many of these devices appear to center on the use by unauthorized workers of fraudulently obtained social security numbers. Lipman, *supra* note 10, at 20-26.

14. JEFFREY S. PASSEL, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY, PEW HISPANIC CENTER (2006), <http://pewhispanic.org/files/reports/61.pdf>.

15. A report by the Center for American Progress estimated the cost of deportation as of 2005 at between \$206 and \$230 billion dollars over five years. RAJEEV GOYLE & DAVID A. JAEGER, CENTER FOR AMERICAN PROGRESS, DEPORTING THE UNDOCUMENTED: A COST ASSESSMENT, (2005), http://www.americanprogress.org/kf/deporting_the_undocumented.pdf. This represents a minimum annual expenditure during that period of about \$41 billion dollars, a figure exceeding the entire 2006 budget of the Department of Homeland Security, and representing half of the 2006 spending on the Iraq War and double the amount spent on the Afghanistan campaign the same year.

16. Recognition of this fact appears to be the rationale behind passage of H.R. 6095, *see* Fears & Aizenman, *supra* note 6, which seeks reaffirmation for the authority originally granted in the Immigration and Nationality Act of 1952 (McCarran-Walter Act), the initial effort by Congress to “deputize” State and Local officials to perform aspects of immigration enforcement, an inherently Federal function. As a general proposition, the delegation is permissible. *See* De Canas v. Bica, 424 U.S. 351, 356-58 (1976) (while immigration is an inherently Federal function, state regulation only speculatively touching on immigration is not proscribed because there is insufficient evidence that Congress intended to preempt the entire field of immigration). Thus, while state involvement in immigration enforcement is hardly novel, *see, e.g.*, Gonzales v. City of Peoria, 722 F.2d 468, 473-75 (9th Cir. 1983), the idea has reached new levels of urgency because the forcible “removal” of 12 million immigrants from the United States without heavy resort to State and Local law enforcement is virtually unimaginable. The uneasiness reflected by the duplication of efforts inherent in H.R. 6095 appears well-founded. An undertaking of such magnitude and complexity cries out for the clearest authorization.

17. The impact of foreign-born workers on policy issues involving organized labor seems to be increasing. Statistics compiled by the Migration Policy Institute reveal that while the percentage of both native born and foreign born workers represented by a union declined between 1996 and 2003, from 17% to 15% in the case of native born workers and from 14% to 11% in the case of immigrant workers, the absolute number of foreign-born workers represented by a union rose by 23% during the same time period while the number of native-born workers represented by a union declined by 7% during that period. ELIZABETH GRIECO, MIGRATION POLICY INSTITUTE, FACT SHEET NO. 7, IMMIGRANT UNION MEMBERS: NUMBERS AND TRENDS (May 2004), http://www.migrationpolicy.org/pubs/7_Immigrant_Union_Membership.pdf.

18. One of the more recent and powerful examples of this collision was the Supreme Court’s decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148-50 (2002). In *Hoffman*,

Part I of this article addresses whether immigration rallies are protected activity under the NLRA and, if so, the best way to characterize the protected activity. Part II discusses the employee status of unauthorized workers under the NLRA. Part III considers whether NLRA protection of employees engaging repeatedly in immigration rallies could be lost if the rallies are unprotected intermittent work stoppages. Part IV addresses whether the immigration rallies constitute unlawful "secondary activity" because they enmesh unoffending employers in a labor controversy "not of the employers' making." Assessing the above strands of inquiry, Part V considers the significance of the rallies being classified as NLRA-cognizable conduct. The assessment takes due account of recent Supreme Court authority holding that unauthorized workers are not entitled to important NLRA remedies, but expands the inquiry to systemic considerations deriving from federal labor law preemption principles and to conflicts between federal labor law and national immigration policy. The article concludes that federal labor law could in some instances protect participation in the rallies and in other instances render the rallies unlawful. Without explicit congressional authorization, legal actors should not in either case abandon the labor law model for a risky and untested amalgam of federal and state enforcement of immigration law when addressing legal issues arising from the rallies. Such a course would unnecessarily generate conflicts with federal labor law, which in any event possesses a superior model for dealing with concerted work-related protests.

I. RALLY PARTICIPATION AS PROTECTED ACTIVITY UNDER THE NLRA

The discussion of whether employee participation in immigration rallies is protected by Section 7 of the NLRA¹⁹ will operate under the general assumption that activities surrounding immigration rallies have nothing to do with *formal* "self-organization" of employees. The discussion will also assume that activities surrounding immigration rallies generally do not represent an attempt by employees to "form, join, or assist labor organizations," "bargain collectively through representatives of their own choosing," or "engage in other concerted activities for the purpose of collective bargaining" as each of these phrases is defined in Section 7.²⁰ Accordingly, whether the NLRA *could* in general be applied to

the Court held that an unauthorized worker found by the NLRB to have been unlawfully laid off was not entitled to back pay, the only significant remedy available in the circumstances. The literature discussing the *Hoffman* case is already substantial. For a very readable discussion, see Catherine L. Fisk & Michael J. Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights Without Remedies*, in *LABOR LAW STORIES* 399-438 (Laura J. Cooper & Catherine L. Fisk eds., 2005). The discussion chronicles the mainly unsuccessful attempts by employers to extend the *Hoffman* holding beyond the confines of the NLRA to an array of State and Federal labor and employment law regimes. *Id.* at 432-36.

19. 29 U.S.C.A. §§ 151-69 (2007) (relevant statutory language).

20. By all accounts, the 2006 protest rallies were solely an appeal to the Government. *See, e.g., Greg Miller, Immigration Activists March Again*, L.A. TIMES, Apr. 10, 2006, at 11, available at

immigration rallies depends on the characterization of rally participants' conduct as engaging "in other concerted activities for the purpose of . . . other mutual aid or protection."²¹

The Supreme Court discussed the scope of Section 7's "mutual aid or protection" language in *Eastex, Inc. v. NLRB*.²² The seemingly narrow issue in *Eastex* was whether an employer that prevented its union-represented employees from distributing a union newsletter in non-working areas of the employer's property during non-working time had violated the NLRA by interfering with statutory employees engaged in "other concerted activities" for the purpose of "mutual aid or protection."²³ The newsletter in question urged employees to support the union and discussed a proposal to incorporate the state "right-to-work" statute into the state constitution as well as a presidential veto of an increase in the federal minimum wage.²⁴ In defense of its action of forbidding distribution of the newsletter, the employer argued that the sections of the newsletter treating the right-to-work and presidential veto issues did not fall within the purview of Section 7's coverage of concerted activity for the mutual aid or protection of employees.²⁵ The NLRB administratively rejected the employer's argument, and on appeal the Fifth Circuit also rejected the employer's additional argument that the "mutual aid or protection" clause of Section 7 protected only concerted employee activity directed at conditions that the employer had the authority or power to change or control.²⁶ The Fifth Circuit found that all of the material in the newsletter was reasonably related to the employees' jobs or to their status or condition as employees in the involved plant.²⁷

The Supreme Court characterized the issues in *Eastex* as whether the distribution of the newsletter was protected activity and, if it was,

2006 WLNR 6968120. It does not appear that there were attempts by employees or organizations involved in the rallies to approach employers during these events to directly advocate changes in immigration policy. As discussed later in the article, some organizations involved in organizing the rallies are labor unions and some involved organizations that are not labor unions in the traditional sense may have nonetheless been statutory labor organizations. See *infra* Part V.

21. 29 U.S.C.A. § 151.

22. 437 U.S. 556, 563-70 (1978).

23. *Id.* at 558.

24. *Id.* at 559-60. The union argued that the elevation of the state right to work law to state constitutional status was objectionable and urged its members to write to their legislators to oppose it. The union also criticized the President's veto of the minimum wage increase while the profits of the oil industry were increasing and argued that "as working men and women we must defeat our enemies and elect our friends." *Id.* The newsletter concluded by urging its recipients to vote.

25. See *id.* at 561.

26. *Id.* at 561-62 (citations omitted). The analysis of the Fifth Circuit's opinion in this section is based on the Supreme Court's discussion of it.

27. *Id.* at 562. As Professor Hyde notes, it is far from clear whether the Court approved, *sub silentio*, the Fifth Circuit's rejection of the NLRB's further administrative determination that, if the newsletter contained *any* statements protected by Section 7, it would be protected in its entirety. See Alan Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Legal Liberalism*, 60 TEX. L. REV. 1, 7 (1981). For purposes of this discussion the distinction is not critical because the Court agreed that the contested statements contained in the newsletter *were* protected by Section 7.

whether the employer had a countervailing interest justifying interference with the activity.²⁸ With respect to the first question, the Court concluded that the mutual aid or protection clause of Section 7 was, among other things, intended to protect employees “when they engage in otherwise proper concerted activities in support of employees of employers other than their own.”²⁹ The Court rejected the employer’s argument that employees lost their protection under the clause when they sought to improve their terms and conditions of employment or “lot as employees” through channels outside the immediate employee-employer relationship.³⁰

In advancing its argument regarding the breadth of the “mutual aid or protection” clause, the *Eastex* Court took pains to note that Congress had deliberately included the clause’s ostentatiously expansive language delimiting “concerted activity” with the narrower modifying purposes of “self-organization” and “collective bargaining” precisely *because* it realized “that labor’s cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context.”³¹ The Court also noted that the “mutual aid or protection” clause had *already* been interpreted by courts as protecting employees from retaliation by their employers when seeking to improve working conditions through resort to administrative and judicial forums, or when employees appealed to legislatures to protect their interests as employees.³² In short, the Court had no difficulty in broadly extending (or ratifying the extension of) the “mutual aid or protection” clause beyond collective bargaining negotiations between employees and employers in a discrete place of employment.

As a practical matter, the Court’s opinion in *Eastex* might have settled most questions regarding the scope of Section 7’s mutual aid or protection clause had it not “pulled back” on the holding by also announcing a powerful caveat to its otherwise broad formulation. The Court stated:

It is true, of course, that some concerted activity bears a less immediate relationship to employees’ interests as employees than other such activity. We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the “mutual aid or protection” clause. It is neither necessary nor appropriate, however, for us to attempt to delineate precisely the boundaries of the “mutual aid or protection” clause. The task is for

28. *Eastex*, 437 U.S. at 563. Discussion of the non-germane second question has been omitted.

29. *Id.* at 564.

30. *Id.* at 565.

31. *Id.*

32. *Id.* at 565-66.

the Board to perform in the first instance as it considers the wide variety of cases that come before it.³³

Thus, the NLRB was to do the line-drawing as to the appropriate ambit of Section 7 and, as it happened, had done so already in a recent case highlighting early conceptual problems at the intersection of labor law and immigration policy.

Four years before the Court decided *Eastex*, the NLRB had considered whether Section 7 protected employee communications to Congress that protested proposed changes in immigration rules. In *Kaiser Engineers*,³⁴ four employees of Kaiser³⁵ signed a letter authored by employee Allen, which the employees then sent to three United States Senators and two United States Representatives.³⁶ The employees had become concerned that Bechtel Corporation, a company with which Kaiser had a cooperative arrangement for hiring engineers, was reportedly applying to the Department of Labor "to ease restrictions on the importation of foreign engineers."³⁷ The Kaiser employees were of the opinion that "such action was contrary to the engineering profession."³⁸ Upon learning of the letter, Kaiser "offered" Allen the "opportunity to resign or be fired," and Allen chose to resign.³⁹

The NLRB characterized the issue in *Kaiser* as "whether or not the sending of the letter to the legislators constituted protected activity within the meaning of Section 7 of the Act."⁴⁰ In answer to that question it concluded:

33. *Id.* at 567-68.

34. 213 N.L.R.B. 752 (1974).

35. *Id.* at 754-55. The four employees were members of an in-house "society" of approximately seventy engineering employees which the NLRB found to be a labor organization within the meaning of Section 2(5) of the NLRA.

36. *Id.* at 754.

37. *Id.* The text of the letter in its entirety read:
Dear Sir,

We write on behalf of a group of about 70 civil engineers at Kaiser Engineers. It has come to our attention that Bechtel Corp. is seeking authorization [sic] from the Dept. of Labor to obtain resident visas for any engineers they may recruit outside the country. We realise [sic] that at the minute engineers are in demand. However, to import engineers at this time of boom will be extremely shortsighted for as the market is bound to ease, engineers will be made redundant, and we could have conditions that existed immediately after the big cut-back in the aerospace industry recently.

Engineers as a profession are not well organised [sic] at present and so cannot influence such matters as, say, the unions of the AMA can. So it is to our legislators that we must look for some protection from the indiscriminate importation of engineers by large companies.

We hope you can exert some influence on our behalf . . .

Id.

38. *Id.*

39. *Id.*

40. *Id.* at 755.

It appears that the reason for the letter was a fear on the part of the Society [of Engineers] and its members that relaxing immigration laws to permit increased importation of alien engineers might affect the job security of the members of the Society and their fellow engineers. It is concluded that the action to persuade legislators to prevent the influx of alien engineers was for the mutual aid or protection of the Society as well as their fellow engineers in the profession.⁴¹

In support of the proposition that the “mutual aid or protection” clause extended broadly to include activities beyond those immediately involving a particular employment relationship, the NLRB cited one of its earlier cases, *G & W Electric Specialty Company*,⁴² and a 1940 First Circuit case, *Bethlehem Shipbuilding Corporation v. NLRB*.⁴³

In the course of affirming the NLRB, the Ninth Circuit noted that cases addressing the extension of Section 7 beyond the strict confines of the employment relationship were conflicting,⁴⁴ and agreed with Kaiser that employees sending a letter to their legislators “involved no request for action on the part of the company, did not concern a matter over which the company had direct control, and was outside the strict confines of the employment relationship.”⁴⁵ The court nevertheless concluded that the NLRB’s decision was supported by substantial evidence and had a reasonable basis in the law because the NLRB could properly have found that “the members of the [Society of Engineers] had a legitimate

41. *Id.* Ultimately, the NLRB found that Kaiser violated both Sections 8(a)(1) and 8(a)(3) of the NLRA. *Id.* at 756. Section 8(a)(3) provides, in relevant part, that it is an unfair labor practice for an employer “to encourage or discourage membership in any labor organization” by means of “discrimination in regard to hire or tenure of employment” 29 U.S.C.A. § 158 (2007). A labor organization is defined in Section 2(5) of the NLRA as any “employee representation committee or plan . . . which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” *See also Kaiser Eng’rs*, 213 N.L.R.B. at 755. Thus, the Board found that the Society was a labor organization and that Allen had been discriminated against by being forced to resign his employment in part for the purpose of discouraging his membership, and the membership of other Kaiser employees, in the Society. *Id.* The decision lacked the detailed allocation of burdens utilized under present law to analyze whether the Government has established a violation of Section 8(a)(3). That refined analysis was adopted by the NLRB and approved by the courts about four years later. *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 399-403 (1983); *Wright Line*, 251 N.L.R.B. 1083, 1088 (1980), *enforced*, 662 F.2d 889 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). That analysis would have required the General Counsel to explicitly find the existence of protected activity as part of a *prima facie* case in considering whether Allen was forced to resign. The implied establishment of the Section 8(a)(3) *prima facie* case was in any event bolstered by the additional finding that the forced resignation independently violated Section 8(a)(1). *Kaiser Eng’rs*, 213 N.L.R.B. at 756 n.7.

42. 154 N.L.R.B. 1136, 1137 (1965). In *G & W*, the NLRB opined that employing Section 7 as protecting only activities “directly and immediately” involving a particular employment relationship had the effect of reading the mutual aid or protection clause out of the NLRA. *Id.* at 1137-38.

43. 114 F.2d 930, 937 (1st Cir. 1940). In *Bethlehem Shipbuilding*, the First Circuit held that “. . . the right of employees to self-organization, and to engage in concerted activities, . . . is not limited to direct collective bargaining with the employer, but extends to other activities for ‘mutual aid or protection’ including appearance of employee representatives before legislative committees.” *Id.* In *Kaiser*, the NLRB had no difficulty extending this principle to written communications from employees to legislators.

44. *Kaiser Eng’rs v. NLRB*, 538 F.2d 1379, 1384-85 (9th Cir. 1976).

45. *Id.* at 1385.

concern in national immigration policy insofar as it might affect their job security,” and that lobbying legislators regarding changes in such policy could be “action taken for ‘mutual aid or protection’ within the meaning of section 7”⁴⁶

Then-Circuit Court Judge Anthony Kennedy dissented from the opinion. Kennedy flatly disagreed that the Society’s lobbying with regard to national immigration policy was protected activity under the NLRA.⁴⁷ Kennedy adhered to the “general rule,” previously articulated by the Seventh Circuit, that Section 7 activity *necessarily* concerns “a matter with respect to which the employer had the power and right to do something about.”⁴⁸ The Ninth Circuit had been following the same rule, in slightly altered language, that “a protected activity must seek a specific remedy for a work related complaint or grievance.”⁴⁹ The Supreme Court later noted in *Eastex*, however, that the Seventh Circuit rule espoused by Judge Kennedy in *Kaiser* “ignore[d] [the] substantial weight of authority to the contrary, including the Seventh Circuit’s own prior holding.”⁵⁰

The *Eastex* majority cited the NLRB’s decision in *Kaiser* twice with apparent approval.⁵¹ There was no suggestion by the Court that any federal court had at that juncture questioned *Kaiser*’s rule that employee entreaties to legislators concerning immigration policy impacting employment fell within the ambit of Section 7. There continues to be no adverse authority on this point, and federal courts have had no subsequent occasion to disturb *Kaiser*.⁵²

A recent memorandum issued by the General Counsel of the NLRB in *Reliable Maintenance* states that “employee concerted activity engaged in to support a protected subject matter may not itself be protected if it exerts economic pressure on an employer with no control over the subject matter.”⁵³ Curiously, the memorandum cites to *Eastex*, which had in turn favorably cited *Kaiser*, a case that had also involved employee protest over immigration policy over which the employer had “no

46. *Id.*

47. *Id.* at 1386 (Kennedy, J., dissenting).

48. *Id.* at 1387 (quoting *G & W Elec. Specialty Co. v. NLRB*, 360 F.2d 873, 876 (7th Cir. 1966)).

49. *Id.* (quoting *Shelley & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200, 1202-03 (9th Cir. 1974)).

50. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567 (1978).

51. *Id.* at 566-67 nn.16-17.

52. *See, e.g., Tradesmen Int’l v. NLRB*, 275 F.3d 1137, 1143-45 (D.C. Cir. 2002) (upholding the principle that employees may direct concerted activities toward entities other than their own employers, or even entities other than other employees’ employers, in order to protect job security, but, distinguishing *Kaiser*, denying the union’s activities in *Tradesmen* had either that effect or that objective).

53. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Robert W. Chester, Reg’l Dir., Region 18, NLRB, regarding *Reliable Maint.*, Case 18-CA-18119 (October 31, 2006), available at http://www.nlr.gov/shared_files/Advice%20Memos/2006/18-CA-18119.pdf [hereinafter Kearney, *Reliable Maint.*].

control.” The factual distinction between *Kaiser*, to which the General Counsel did *not* cite, and *Reliable Maintenance*, is presumably⁵⁴ that the latter case involved a cessation of work while the former did not. Although the General Counsel purported not to be deciding whether “the employee’s participation in, or support for, such demonstrations would have been conduct protected by the ‘mutual aid or protection’ clause of Section 7,”⁵⁵ in the next sentence he nevertheless concluded that “economic pressure directed at an employer that has no control over the demonstration’s subject matter is also not protected.”⁵⁶ This statement asserts, albeit stealthily, that immigration protests involving work stoppages are *not* protected as a matter of law. But many forms of protected activity, particularly those involving “work stoppage,” apply “economic pressure” to an employer.⁵⁷ If a concerted employee protest concerning immigration taking the form of a letter written to Congress is subject to protection, as *Kaiser* held, why should the protection evaporate simply because the concerted approach to Congress takes the form of a work stoppage?⁵⁸

The General Counsel argued in the *Reliable Maintenance* memorandum that a footnote in *Eastex* compelled the conclusion that concerted work stoppages in opposition to changes in national immigration policy are not protected by the NLRA.⁵⁹ In the footnote cited by the General Counsel, the Supreme Court opined that the forms concerted activity can

54. *Id.* The General Counsel’s memorandum reveals the underlying facts of the case sparingly. Apparently, a single employee missed work to attend an immigration rally; the employer terminated her for violation of its attendance policy. *Id.* at 1-2. While there is some indication that the employee “no-call, no-showed” for “several days thereafter,” there is no information provided as to how *precisely* the employee’s record compared to other employees purportedly discharged for “similar infractions.” *Id.* at 2-3. The employer apparently provided evidence to the NLRB that it had discharged 140 other employees for such “similar infractions.” *Id.* at 4. This suggests high employee turnover. One logical inference is that *minor* attendance infractions would more likely be ignored than acted upon and inquiry would be warranted to distinguish major from minor infractions.

55. *Id.* at 1.

56. *Id.*

57. The General Counsel additionally suggests in *Reliable Maintenance* that the denial of protection to otherwise protected conduct because the employer lacks control over the subject matter is consistent with the secondary boycott provisions of Section 8(b)(4) of the NLRA. See *infra* note 194 and accompanying statutory text. But this argument is silent with respect to Section 8(b)(4)’s threshold requirement that a *labor organization* be involved in such a secondary boycott, a fact not found in *Reliable Maintenance*. Secondary boycott, or “unoffending employer,” considerations will be further discussed later in this article. See *infra* Part IV.

58. It will be recalled that in *Kaiser* the involved employee was discharged because the employer “considered the letter [to legislators protesting immigration policy] embarrassing and a very serious matter because it might be construed as indicating that [the employer] advocated discrimination against foreign engineers.” *Kaiser Eng’rs*, 538 F.2d at 1382. Whether the employer’s concern was that it might in the future have difficulty recruiting foreign engineers, be subject to a lawsuit, or might in some other manner suffer reputational injury, it is difficult not to view the letter as a form of “economic” pressure. The employer feared adverse economic consequences resulting from the letter; employees intended to exert pressure to change certain of the employer’s policies. This pressure was not deemed sufficient to remove the activity from the protection of Section 7.

59. Kearney, *Reliable Maint.*, *supra* note 53, at 2-3.

permissibly take “may well” depend on their object;⁶⁰ the Court quoted the following passage from a 1967 law review article by Professor Julius Getman: “The argument that the employer’s lack of interest or control affords a legitimate basis for holding that a subject does not come within mutual aid or protection is unconvincing. The argument that *economic pressure* should be unprotected in such cases is more convincing.”⁶¹

It cannot be contended seriously that in citing this scholarly footnote the Supreme Court was making a significant positive pronouncement. It is far more likely that the Court’s mere gloss on *unprotected* concerted activity was a passing reference to the conduct already proscribed, when coupled with certain forbidden “objects,” by Section 8(b)(4) of the NLRA.⁶² That conduct enjoined by a statute may not simultaneously be protected by it seems clear. And a nuanced reading of the balance of Professor Getman’s article supports the view that the General Counsel was overreaching in his interpretation of the footnote. As the Court was surely aware, Getman explained later in the same passage that “walkouts” causing economic damage to an employer who is not a party to a controversy should be unprotected “unless it is determined that the activity was in substantial part a protest against existing conditions by *unorganized* workers and, thus, the first step towards self organization.”⁶³ Indeed, a careful reading reveals that Getman tacitly assumed, for purposes of his discussion, the existence of a unionized workplace with a well-developed tradition of grievance arbitration as the type of workplace in which “[i]n most cases employees can achieve the same results without resorting to such tactics [W]alkouts of this type are less likely to be the result of general dissatisfaction.”⁶⁴ This was the actual context supporting the conclusion that some concerted walkout activity inflicting “economic pressure” should be unprotected. The *organized* workplace, presumably possessing less *general* dissatisfaction, was deemed a workplace in which it was easier “to distinguish cases involving economic pressure from those involving an expression of opinion.”⁶⁵

Thus, Getman’s views on this issue were in reality much more complex than the General Counsel’s interpretation of them suggests, as the Supreme Court surely realized. First, Getman was *not* convinced that an employer’s mere inability to control a subject removed the subject from

60. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978).

61. *Id.* (quoting Julius G. Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1221 (1967) [hereinafter Getman, *Economic Pressure*] (emphasis added)).

62. Under Section 8(b)(4) of the NLRA, a union may not engage in activity directed against a “neutral” employer with whom it does not have a primary dispute where the object of that activity is proscribed. 29 U.S.C.A. § 158(b)(4) (2007). *See infra* Part IV.

63. Getman, *Economic Pressure*, *supra* note 61, at 1222 (emphasis added).

64. *Id.* at 1221-22. Alternatives for employees include filing grievances and obtaining arbitration awards.

65. *Id.* at 1222.

the scope of Section 7; indeed this was the Court's central conclusion in *Eastex*. Second, Getman argued that protection of concerted work stoppages may be warranted even in the case of an "unoffending" employer when the involved employee group is not organized into a union. Finally, Getman asserted that there may be an additional basis for the protection of concerted work stoppages when it is possible to clearly discern that the "walkout" involved an "expression of opinion."⁶⁶ In short, an immigrant protest rally is worlds apart from the type of conduct that Getman's article suggested was unprotected. The work stoppage accompanying such a rally would *usually* result from the general dissatisfaction of *unorganized* employees over terms and conditions of employment rather than from an attempt by an organized group to gain tactical advantages in formal bargaining negotiations or for political objectives not implicating an employment subject. Moreover, rallies of this type would be much more likely at their core to present "an expression of opinion."

Ultimately, *Eastex* is harmonious with the central lesson of *Kaiser* that concerted overtures to legislators concerning the impact of immigration policy on "job security" are not so attenuated from the employment relationship to fall outside the protection of the NLRA. But the logical ensuing question is whether the job security holding in *Kaiser* is sufficiently analogous to the issue presented in employee protests over immigration *status* to be properly deemed relevant. *Kaiser* is factually distinguishable from the immigration context at issue. In *Kaiser* the engineers feared being supplanted by immigrants. The complaint of the rally participants is that they do not want to lose their jobs through automatic arrest and deportation. But both groups were seeking to maintain job security or tenure. And if immigrants engaging in such protests are employees within the meaning of the NLRA,⁶⁷ there does not seem to be a principled distinction under *Kaiser* between the rally protesters and the citizen-engineers.

A "work dispute" must have a connection with work to be cognizable under labor law. At the most basic level, unauthorized workers come to the United States to engage in employment,⁶⁸ though they may also enjoy the many other benefits of living in the United States.⁶⁹ Increasingly restrictive immigration laws impact unauthorized workers' ability

66. *Id.*

67. See discussion *infra* Part II.

68. *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988); see Obhof, *supra* note 13, at 175 (citing RONALD G. EHRENBERG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY* 363 (5th ed. 1994)).

69. Marc L. Berk et al., *Health Care Use Among Undocumented Latino Immigrants: Is Free Health Care the Main Reason Why Latinos Come to the United States? A Unique Look at the Facts*, 19 *HEALTH AFFAIRS* No. 4, 55 (2000); MANHATTAN INST. FOR POLICY RESEARCH, NAT'L IMMIGRATION FORUM, *REPORT OF FINDINGS FROM OCTOBER 2005 POLL OF UNDOCUMENTED IMMIGRANTS 2* (Mar. 30, 2006) (showing that the main reason immigrants come to the United States is to work).

to engage in employment. It does not seem possible to separate “immigration” issues from “employment” issues fully or in any meaningful way. This is undoubtedly why the NLRB has consistently held that an employer’s threat to contact immigration authorities in retaliation for protected concerted activity by employees violates Section 7: Though a report by an employer to immigration officials that one of its employees is an unauthorized worker would seem to implicate only the immigration laws, it may also chill employee activity protected by the NLRA.⁷⁰ Employee protest over proposed increased penalties and restrictions in immigration law similarly goes to the heart of an unauthorized worker’s employment relationship, particularly when those changes would operate to suspend the employment relationship altogether.⁷¹ Such protest seems to be “lobbying [of] legislators regarding changes in national immigration policy which affect [employees’] job security.” These are activities that the Ninth Circuit, and earlier the NLRB, held to be “mutual aid or protection” within the meaning of Section 7.⁷² Thus, the weight of authority appears to establish that employee participation in “immigration protest” is protected activity.

Kaiser admittedly did not specifically address whether a work stoppage as a form of protected concerted activity was permissible as a protest against immigration policy impacting work. There is no reason apparent in the decision for differentiating between forms of protected activity. This is significant because a work stoppage is one paradigm for viewing immigration rallies attended by employees temporarily abandoning work to participate in them. And it appears to be the clearest. The text of the NLRA protects the right of employees to engage in work stoppages and strikes.⁷³ The right applies to all employees engaging in concerted work stoppages, not only to those represented by labor organi-

70. QSI, Inc., 346 N.L.R.B. No. 97, 16 (2006) (“Threats of resort to contacting Federal immigration authorities are inherently coercive as ‘they place in jeopardy not only the employees’ job[s] and working conditions, but also their ability to remain in their homes in the United States’”) (citing *Viracon, Inc.*, 256 N.L.R.B. 245, 247 (1981)).

71. 29 U.S.C.A. § 152(9) (2007) (defining a labor dispute as “any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.” Protests over the prospect of immediate deportation appear to implicate employment “tenure” because the action would sever the employment relationship).

72. *Kaiser Eng’rs v. NLRB*, 538 F.2d 1379, 1385 (9th Cir. 1976).

73. 29 U.S.C.A. § 163 (2007). The right is clearly the default position of Federal labor policy and any reasonable gloss on the statutory language would suggest that restrictions of the right would be exceptional. However, as every student of labor law soon discovers, the Supreme Court has managed to severely constrain or even eviscerate the right, primarily by inventing (or upholding the invention of) the right of employers to permanently replace employees engaging in an economic strike. See James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 528-31 (2004-2005) [hereinafter Pope, *American Workers*]. This employer right is not to be found in the statutory language. *Id.* The term strike “includes a strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.” 29 U.S.C.A. § 142(2) (2007).

zations.⁷⁴ Moreover, employees do not “lose their right to engage in concerted activities under [Section 7] merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable.” Given the statutory definition of a “strike” and the general protection afforded to employees to engage in concerted strikes or work stoppages, a defensible presumption is that attendance by employees at rallies protesting anticipated adverse immigration legislation is protected concerted activity under *Kaiser*. This conclusion seems warranted because the contemplated legislation would threaten to sever the protesting employees’ employment relationship through deportation and by rendering the employment a felony. The ability of the protesting employees’ employers to control or direct federal immigration policy does not appear to alter the protected nature of the employee conduct.

It might be argued that employers discharging employees for absenteeism in connection with attendance at the April and May 2006 rallies were unaware that employee absences resulted from a *concerted* work stoppage.⁷⁵ In all cases involving presumptive protected concerted employee activity, with or without a union, it is necessary that an employer be aware that a protected work stoppage is concerted before employees engaging in the work stoppage receive the protection of the Act.⁷⁶ Knowledge of the purpose of the activities may be inferred from surrounding circumstances.⁷⁷ There is little doubt that employers knew generally, and would also know on similar future occasions, about well-publicized immigration protest rallies on a massive scale. On such occasions, the inference that employers would at least suspect that immigrant employee absences contemporaneous with the rallies resulted from attendance at those rallies should be maintainable.

In the course of the 2006 rallies, for example, news accounts broadly reported that many employers closed their businesses because they *expected* widespread employee absences.⁷⁸ The *New York Times*, among others, noted further that rally organizers in several cities claimed that a number of employers who had been advocating for the government to give legal status to unauthorized workers “cooperated with the demon-

74. 29 U.S.C.A. § 142(2); *NLRB v. Wash. Alum. Co.*, 370 U.S. 9, 10-17 (1962); *Iowa Packing Co.*, 338 N.L.R.B. 1140, 1144 (2003).

75. To be persuasive this argument would of course require the absence of obvious concert in an individual workplace. The argument would, for example, have been difficult to advance in the case of the 200 discharges from Wisconsin employers in connection with an April 2006 rally. *Davey, Protest*, *supra* note 7.

76. See generally *Meyers Indus.*, 281 N.L.R.B. 882 (1986) (illustrating cases in which employers became aware of the concerted stoppage prior to its protection under the NLRA).

77. *Wash. Alum.*, 370 U.S. at 14.

78. If it could be proved in an NLRB fact finding proceeding that an employer having such advance warning of imminent absenteeism failed to warn employees of adverse consequences in connection with the absenteeism, a persuasive argument could be made that any resulting discipline was in retaliation for attending the rallies, not for absenteeism. See *infra* note 82 and accompanying text.

strations and allowed workers time off.”⁷⁹ This “pre-authorization” suggests widespread employer knowledge of these well-coordinated and publicized events. In advance of one rally on May 1, 2006, the Los Angeles police “prepared for hundreds of thousands of people to attend demonstrations, while smaller rallies were expected in other West Coast cities.”⁸⁰ In these circumstances, NLRB case authority would permit inferences that an employer discharging an employee who had participated in one of the massively publicized rallies, where the discharge occurred in close temporal proximity⁸¹ to the employee absence, knew or suspected that the employee had engaged in a concerted work stoppage.⁸²

79. Davey, *Protest*, *supra* note 7.

80. Davey, *Employers*, *supra* note 7.

81. World Fashion, Inc., 320 N.L.R.B. 922, 926 (1996) (“Motivation can be demonstrated by the timing of discharges soon after a work stoppage”) (citing City Dodge Ctr., 289 N.L.R.B. 194, 195 (1988)).

82. The NLRB routinely infers the existence of employer knowledge of protected activity where other surrounding factors support the inference. Shattuck Denn Mining Co., 362 F.2d 466, 470 (9th Cir. 1966). Assuming an employer asserted that the basis of the discharge was that the employee engaged in absenteeism, it would be a relatively simple investigative matter for the NLRB to evaluate the employer’s claim by comparing the discharged employee’s attendance record to the attendance records of employees who were not discharged. If the employer’s defense is demonstrably false, a sustainable inference can be made that the employer’s true motive in discharging the employee was to retaliate against protected activity. *Id.* Questions have occasionally arisen as to whether employer knowledge is a necessary threshold element for the NLRB to find that a discharge violated Section 8(a)(1). Violations of Section 8(a)(1) tend to hinge on the objective impact of an action on a group of employees rather than with discrimination against an employee for supporting a union. 29 U.S.C.A. § 158(a)(1) (2007); compare *In re Alliance Products, Inc.*, 340 N.L.R.B. 495, 501 n.4 (2003), and *Waste Stream Management, Inc.*, 315 N.L.R.B. 1099, 1100 (1994) (denying knowledge as an element of prima facie case where employer fails to establish legitimate and substantial business justification for its conduct), with *Meijer, Inc. v. N.L.R.B.*, 463 F.3d 534, 542 (6th Cir. 2006) (requiring knowledge at all times as an element of a prima facie case). Despite this established body of law, there is no guarantee that the General Counsel, the NLRB’s chief prosecutor, will pursue “inference” cases under even the most compelling facts. Consider, for example, the facts of *El Cerrito Elec. Co.* The issue in that case was whether an employer discharged an employee because it suspected he attended an immigration rally. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Alan Reichard, Reg’l Dir., Region 32, NLRB., regarding *El Cerrito Elec. Co.*, Case 32-CA-22661 (August 16, 2006), available at [http://www.nlr.gov/shared_files/Advice%20Memo/2006/32-CA-22661\(08-16-06\).pdf](http://www.nlr.gov/shared_files/Advice%20Memo/2006/32-CA-22661(08-16-06).pdf) [hereinafter Kearney, *El Cerrito*]. There was no dispute that he did *not* in fact attend, but an employer who discharges an employee because of mere suspicion that the employee engaged in protected activity violates the NLRA irrespective of whether the employee actually did so. *Id.* Thus, in *El Cerrito*, the employer, on May 1, 2006, a date on which a massive immigration protest was occurring, telephoned an employee, who was prone to habitual absenteeism, to inquire “what happened.” *Id.* The employee, no doubt surprised to be receiving the call in light of his routine absenteeism and the employer’s apparent disregard of it, said that he “was sick.” *Id.* The employer immediately asked him “if he went to the march,” an arguable instance of unlawful interrogation under the NLRA in itself. *Id.* Not surprisingly, the employee stated that he did not attend. *Id.* The employee at one juncture stated that the march was nevertheless “for the people.” *Id.* The employer responded that “he did not give a f___ about those f___ Mexicans and that he was pissed.” *Id.* It is a true instance of the peculiar administrative imagination to conclude that the source of the employer’s anger was *not* its belief that the employee had participated in “the march.” *Id.* In fact, the employer did not indicate that the employee was not to return to work until after the comments about the march and the “f___ Mexicans” had been uttered. *Id.* The General Counsel refused to issue a complaint. *Id.*

Early indications, however, are that the present composition of the NLRB⁸³ may not easily concede that employee participation in immigration rallies is protected activity, let alone a species of work stoppage. For example, in a recent General Counsel memorandum in *La Veranda*, the General Counsel appeared to ignore the “work stoppage” model for immigration rally attendance and to equate such attendance to participation in a union meeting.⁸⁴ Although the General Counsel purported to assume without deciding that participating in the involved rally was protected by Section 7, parsing the language of the memorandum reveals that the possibility the rally was a protected work stoppage was *not* considered. The General Counsel uncritically *presumed* that employees participating in the rallies during working time were not entitled to NLRA protection because “[e]mployees have no Section 7 right to time off, even when the reason for missing work is to engage in protected activity elsewhere.”⁸⁵ The cases cited by the General Counsel in support of this proposition are readily distinguishable from the circumstance under discussion. The principal authority relied on by the General Counsel was *Quantum Electric*,⁸⁶ and presumably the cases cited therein.⁸⁷ *Quantum*,

83. The NLRB consists of a five-member board appointed by the President, subject to Senate confirmation. STANLEY D. HENDERSON, *LABOR LAW: CASES AND COMMENT* 66 (2d ed. 2005).

84. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Dorothy L. Moore-Duncan, Reg'l Dir., Region 4, NLRB, regarding *La Veranda*, Case 4-CA-34718 (November 15, 2006), available at http://www.nlr.gov/shared_files/Advice%20Memos/2006/4-CA-34718.pdf [hereinafter Kearney, *La Veranda*]. The facts are straightforward. In early February 2006 employees decided to take part in a “Day Without Immigrants” rally being held in Philadelphia, Pennsylvania on February 14, 2006. *Id.* at 1. The employer not surprisingly learned of the plan and one of its co-owners questioned an employee about the intention. *Id.* When the interrogated employee essentially informed the employer that employees planned to attend the Valentine’s Day rally whether or not “permission” was granted, the employer proceeded to poll employees regarding their intention to miss work. *Id.* at 2. When the polled employees indicated their “unequivocal” intention to attend the rally, the employer summarily terminated them. *Id.* Not considered by the memorandum is the well established law holding that discussion of “a work stoppage constitutes protected activity, even if the work stoppage itself arguably would be unprotected.” ATC of Nev., 348 N.L.R.B. No. 43, slip op. at 3 n.3 (2006) (citing *Sunrise Senior Living, Inc.*, 344 N.L.R.B. No. 151, slip op. at 11 (2005), *enforced*, 179 L.R.R.M. (B.N.A.) 2920 (4th Cir. 2006)). Thus, the discharges, effectuated not because of actual participation in a rally, but because of an expressed intention to do so some two weeks hence probably violated Section 8(a)(1) irrespective of the rally’s categorization as protected activity. “[A]llowing employers to discipline employees for discussing concerted protests that might fall outside the protection of the Act would undoubtedly chill employees from discussing other forms of concerted activity, including many forms that are protected by Section 7.” *Sunrise Senior Living*, 344 N.L.R.B., slip op. at 18.

85. Kearney, *La Veranda*, *supra* note 84, at 2. The reference to the locus of the protected activity is puzzling. Assuming the activity involves an employment dispute, the locus of the activity should not be relevant except in a very narrow range of circumstances not present in the case.

86. 341 N.L.R.B. 1270, 1279 (2004) (NLRB upholds ALJ’s finding that unrepresented employees *not* participating in a work stoppage were lawfully discharged for leaving work early on a scheduled work day after a request for the early departure had been denied earlier the same day). The absence of a concerted work stoppage in *Quantum Electric* renders the case inapposite to *La Veranda* if participation in the immigration rally was a protected concerted work stoppage. In any event, the ALJ clearly overstated the basis for her decision in concluding that “[l]eaving work early is not protected activity even when the object of leaving is to engage in protected activity.” *Id.* That proposition would plainly depend on surrounding factual circumstances and certainly cannot be applied formulaically, particularly in the context of work stoppages. Indeed, taken at face value, the statement cannot be squared with many cases, including *Wash. Alum., Co.*

however, merely followed “partial strike” theory⁸⁸ by reaffirming that employees do not have the right to set their own terms of employment.⁸⁹ But the employees in the cited cases, unlike the employees in *La Veranda*, “walked out” of their workplaces during the course of a work day and were therefore at least arguably attempting to “set the terms of their employment” in a manner that is theoretically similar to an unlawful “sit-down strike.”⁹⁰ In a prototypical immigration rally case, the issue is the complete *absence* from work, not the attempt to alter the nature of the job by leaving the workplace once an employee has arrived. Stated somewhat differently, many, perhaps all, strikes violate an employer’s absentee policy, but that does not operate to defeat the right to strike.⁹¹

The general proposition that “working time is for work” is well-established in the decisional law of the NLRB, but in dissimilar contexts.

87. House of Raeford Farms, 325 N.L.R.B. 463, 463 n.2 (1998) (employees leaving work before the end of their shifts to get an early start to the Thanksgiving holiday were not engaging in protected concerted activity); Specialized Distribution Mgmt., 318 N.L.R.B. 158, 159 (1995) (NLRB upheld an ALJ’s deferral to an arbitrator’s decision that an employer’s discipline of employees for attending, without authorization, “some sort of union meeting” after their work shift had commenced was not repugnant to the NLRA; the ALJ specifically noted that employees had not been engaging in a work stoppage); Bird Eng’r, 270 N.L.R.B. 1415, 1415-16, n.3 (1984) (employees disregarded an employer’s newly-implemented rule forbidding employees from leaving the workplace during their lunch breaks, in overt defiance of both the rule and of immediate managerial directives not to leave; the NLRB specifically found that employees had not engaged in a protected work stoppage); Scioto Coca-Cola Bottling Co., 251 N.L.R.B. 766, 766-67 (1980) (employer lawfully terminated nine drivers for absenteeism where there was no evidence the employer knew the drivers had engaged in a “strike” or protected work stoppage when they were absent from work during the period September 1 to September 5, 1978; there was no evidence from which knowledge of protected concerted activity could be inferred); see cases cited *supra* note 82; Crown Coach Corp., 155 N.L.R.B. 625, 634-35 (1965) (eleven of fourteen employees engaging in a strike were “replaced” or “discharged,” but in any event were reinstated; there was no evidence that the remaining three strikers applied for reinstatement; the NLRB held that the employer had a right to operate his business, but in context this amounted to no more than a right to hire striker replacements).

88. See *infra* note 119.

89. See Kearney, *La Veranda*, *supra* note 84, at 3. The General Counsel buttresses his conclusion with a “business necessity” argument. *Id.* That rationale is incoherent if employees in fact engaged in a protected concerted work stoppage because employees have the right to strike even if it interferes with an employer’s business; that is the point of a strike. The General Counsel characterized the employer’s assertions that Valentine’s Day was “unusually busy” as a “claim” that had not been contradicted by evidence. *Id.* This wan characterization invites scrutiny. Did comparative documentary evidence support the claim? Were the discharged employees confronted with the claim? If they were, did they agree or disagree with it? Why would the factual underpinnings of this central issue in the case—the “rule”—be omitted from the memorandum?

90. See generally NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 256 (1939). The exceptions are the *Scioto Coca Cola Bottling Co.* and *Crown Coach Corp.* cases. See *supra* note 87. But in *Scioto Coca Cola*, the employer had no knowledge that employees were engaging in protected activity and in *Crown Coach* striking employees were in reality immediately reinstated in accordance with law following the cessation of a brief strike, situations that were not arguably present in *La Veranda*.

91. See Kearney, *La Veranda*, *supra* note 84, at 3 (discussing the employer’s defense that he needed all of his employees on Valentine’s Day due to an increase in business). At a practical level, the employer’s defense in *La Veranda* makes little sense; if it would suffer significant disruption by not having employees available on an allegedly busy day, how was the potential for disruption ameliorated by discharging those same employees shortly before the same day?

For example in the 1943 case *Peyton Packing Co.*,⁹² the NLRB stated the following maxim in connection with the discharge of nine employees for violating a “no solicitation” rule:

The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose.⁹³

The NLRB never reached the question of whether the discharged employees in *Peyton* had in fact violated the rule because it found that “the respondent promulgated and enforced the rule for the purpose of preventing self-organization.”⁹⁴

Considering attendance at immigration rallies as work stoppages casts cases like *La Veranda* in a different light. First, because the employer knew in advance that certain employees intended not to appear at work on Valentine’s Day, it had the obvious lawful option of permanently replacing them if they effectuated the intention.⁹⁵ Second, while it is axiomatic that even non-union employees engaging in a concerted walkout are protected against retaliatory discharge,⁹⁶ it is also true that an employer deciding to discharge employees in such circumstances may attempt to show that it would have carried out the discharges for reasons not involving the protected work stoppage. This could be accomplished by, for example, showing that other employees had previously been discharged for violating a uniformly enforced attendance rule.⁹⁷

In *La Veranda*, however, the General Counsel made the decision not to remedy the discharges “because . . . there is no evidence to suggest that the Employer’s response to the employees’ request in this case differs from its response to similar requests.”⁹⁸ The memorandum fails to

92. 49 N.L.R.B. 828 (1943); see also *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 805 (1945) (Supreme Court ratified the principle that a rule limiting union solicitation to non-working time was presumptively valid, but that limitations on solicitation during non-working time were invalid unless an employer could show they were necessary to maintain production or discipline).

93. *Peyton Packing Co.*, 49 N.L.R.B. at 843.

94. *Id.* at 847.

95. *NLRB v. Browning-Ferris Indus.*, 700 F.2d 385, 389 (7th Cir. 1983) (“If an employer can protect the reasonable needs of his business by permanently replacing a worker he has no right to go further and discharge him.”).

96. *NLRB v. Wash. Alum. Co.*, 370 U.S. 9, 10-17 (1962); *Arrow Electric Co. v. NLRB*, 155 F.3d 762, 766 (6th Cir. 1998).

97. *Arrow Electric Co.*, 155 F.3d at 766 (citing *Wright Line*, 251 N.L.R.B. 1083, 1088 (1980), *enforced*, 662 F.2d 889 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982)); see also *Assoc’d. Milk Producers, Inc.*, 259 N.L.R.B. 1033, 1035-36 (1982). This presumes both that the rule is lawful on its face and that the real reason for the discharges was not the protected activity—in other words that the application of the rule was not in itself pretextual.

98. Kearney, *La Veranda*, *supra* note 84, at 3.

reveal whether the employer demonstrated that any employees had in fact previously made similar requests to be absent or, more importantly, whether any employee had ever been discharged for not complying with this "rule." Also, if the "no taking off on Valentine's Day" rule was discriminatorily promulgated to interfere with the February 14 rally, it was unlawful in application, even if it arguably would have been necessary to maintain production.⁹⁹

In the end, the "union meeting" rationale is not compelling because immigration rallies, unlike union meetings in organized workplaces, are not routine (and therefore subject to immediate rescheduling). The timing of the regionally and nationally planned rallies was obviously beyond the control of employees in any particular workplace. The scope and uniqueness of the rallies were obvious. To command "rescheduling" was to command employee nonparticipation in a vast concerted work-related protest.

The "work time is for work" proposition, in the context of solicitation rules, is a regulation of what happens once an employee arrives at work. If an employee does not arrive at work, or expresses an intention not to arrive at work, the situation is radically different. The employer's option in that situation is employee *replacement*, not employee discharge.¹⁰⁰ Ultimately, the General Counsel has succeeded in affording employees the Hobson's choice of making a request for time off, which will be denied by many employers. The denial of the request will invite disciplinary action for insubordination if the time off is nevertheless taken. Alternatively, employees may simply attend the rally without providing advance warning, which will also make them vulnerable to discipline for absenteeism. Many rational employees caught in this dilemma may simply opt not to participate in the rallies. Thus, the practical outcome is to render employee exercise of Section 7 activity subject to employer discretion.¹⁰¹

While the distinction between replacement and discharge of an employee may appear unimportant on the surface, there are some important differences between the two statuses.¹⁰² A replaced striking employee will often be entitled to immediate reinstatement following the strike replacement's separation from employment with the "struck" em-

99. See *Peyton Packing Co.*, 49 N.L.R.B. at 847.

100. *Browning-Ferris Indus.*, 700 F.2d at 389.

101. Discharge for cause pursuant to an employer rule "cannot mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which Section 7 of the Act protects . . . for it would prohibit even the most plainly protected kinds of concerted work stoppages until and unless the permission of the company's foreman was obtained." *Wash. Alum. Co.*, 370 U.S. at 17.

102. *Browning-Ferris Indus.*, 700 F.2d at 389 ("Discharge severs the employment relationship entirely; should the discharged worker apply for reemployment he would have to take his turn in the queue with any other applicants. In contrast, a worker who has been permanently replaced jumps to the head of the queue; in addition he is entitled to notice of job openings . . .").

ployer.¹⁰³ In a high-turnover industry, the departure of a strike replacement might not take long to transpire, so reinstatement of a striker could occur quickly. It is also highly unlikely that, in the extremely low paid industries in which unauthorized workers—the likely actors in these disputes—tend to be employed, a strike replacement could even be located on short notice.¹⁰⁴ If no strike replacement is hired, an employer is required to reinstate a striking employee immediately upon the employee's unconditional offer to return to work.¹⁰⁵ An employer aware of technical reinstatement obligations may opt not to go through the trouble of replacement, particularly if it is aware that the striking employee intends to immediately return to work. On the other hand, a discharged employee has little hope of reinstatement with the same employer. Even if the employee might have left that employer in any event—on his or her own accord—there is a significant difference between leaving employment when one is prepared to do so and leaving when one is unprepared.

II. THE EMPLOYEE STATUS OF UNAUTHORIZED WORKERS

While the NLRA protects the right of *employees* to engage in protected concerted work stoppages and strikes, at least some of the participants in “Days Without Immigrants” were—and may continue to be in future rallies—unauthorized workers.¹⁰⁶ One question in assessing whether individuals participating in these rallies are protected, therefore, is whether unauthorized workers are employees within the meaning of the statute, for it is clear that the NLRA would not otherwise protect rally participation by unauthorized workers.¹⁰⁷

103. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379-81 (1967). The striking employee must make an unconditional offer to return to work to become eligible for reinstatement. *Browning-Ferris Indus.*, 700 F.2d at 389.

104. See Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO STATE L. J. 961, 973-76 (2006) (discussing, among other things, the low wage nature of the immigrant workplace and employers' structuring of jobs to ensure that mainstream workers will be much less likely to accept them).

105. *Browning-Ferris Indus.*, 700 F.2d at 389.

106. See, e.g., Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Peter B. Hoffman, Reg'l Dir., Region 34, NLRB, regarding Gargiulo Constr. Co., cases 34-CA-11473 and 34-CA-11499 (July 12, 2006), available at http://www.nlr.gov/shared_files/Advice%20Memos/2006/34-CA-11473.pdf [hereinafter Kearney, *Gargiulo Constr. Co.*]. Although the cases were dismissed by the NLRB without deciding the ultimate question of whether participation in the rallies was protected activity, which has become the NLRB's pro forma approach to the issue, the charges filed in connection with the cases explicitly acknowledged that some of the discharged employees at issue were unauthorized workers who had been interviewed on CBS Television and admitted their unauthorized status to a nationwide audience. *Id.* at 1. The charges alleged that retaliatory discipline and discharges resulted from the interviews. *Id.* at 2.

107. Before Taft-Hartley, the definition of employee under the NLRA was extremely broad. See *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 120-32 (1944). Currently, Section 2(3) of the NLRA continues to define “employees” broadly as:

any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but

The Supreme Court's 2002 opinion in *Hoffman Plastic Compounds, Inc. v. NLRB*¹⁰⁸ undoubtedly limited the remedies available to unauthorized workers,¹⁰⁹ but it did not alter the NLRA employee status of those workers. The Court implicitly reaffirmed the conclusion it had reached in *Sure-Tan v. NLRB*¹¹⁰ that unauthorized workers are employees under the NLRA.¹¹¹ Therefore, the NLRA should apply or not apply to unauthorized workers participating in the rallies in the same manner as other statutory employees.

The analysis of whether "documented"¹¹² statutory employees participating in immigration rallies are protected by the NLRA is different from the analysis pertaining to unauthorized workers. Assuming that the immigration rallies sufficiently concern the terms and conditions of unauthorized workers,¹¹³ "documented" employees participating in the rallies in sympathy with unauthorized workers are engaging in protected

shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C.A. § 152(3) (2007). The NLRB has historically been entrusted with making factual determinations of employee status. See *Hearst Publ'ns*, 322 U.S. at 130-31.

108. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 137 (2002); see *supra* note 18.

109. See *supra* note 18.

110. 467 U.S. 883, 892 (1984) ("Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of 'employee.'"); see the statutory definition for "employee" *supra* note 107.

111. The Court initially suggested that the *Sure-Tan* holding was contingent on the substantive immigration statute in effect in 1984 when that case was decided. *Id.* Thereafter, the Court quoted language from *Sure-Tan* stating that, because the immigration statute had not made it a separate criminal offense for employers to hire unauthorized workers, or for unauthorized workers to accept employment after entering the country illegally, there was "no reason to conclude that application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the [immigration statute]." *Id.* at 892-93. Because the new immigration statute under consideration had made the employment of unauthorized workers unlawful, the *Hoffman* Court seemed to be signaling that the employee status of unauthorized workers was at issue. Later in the opinion, however, the Court clearly upheld the availability of other NLRA remedies, not including back pay or reinstatement, which could only be relevant in the case of violations of the rights of employees. *Id.* at 906. Further, the Court did not expressly dispute *Sure-Tan's* conclusion that unauthorized workers are NLRA employees. Thus, the Court implicitly conceded that unauthorized workers are employees within the meaning of the NLRA. Lower Federal courts appear to have read *Sure-Tan* as unambiguously concluding that unauthorized workers enjoy employee status under the NLRA. See, e.g., *Patel v. Quality Inn S.*, 846 F.2d 700, 703 (11th Cir. 1988) (finding that unauthorized workers are employees under the FLSA). In *Patel*, the court noted that "courts frequently look to decisions under the NLRA when defining the FLSA's coverage," and read *Sure-Tan* as clearly establishing that Congress did not intend to exclude unauthorized workers from the NLRA's ambit. *Id.* The court also noted that undocumented "aliens"—alien prisoners of war—were deemed by the Department of Labor to be covered by the FLSA as early as 1942. *Id.* This raises the interesting question of whether Congress may have been sufficiently aware of the prospect of extension of "the social legislation of the 1930's," to have implicitly included unauthorized workers in the employee classification by not specifically exempting them in the labor law amendments of 1947 (Taft-Hartley Act).

112. The term "documented employees" is meant simply to distinguish these employees from unauthorized workers.

113. See *supra* Part I.

activity. In the event that the unauthorized workers and “documented” employees are employed by different employers, “[i]t is well settled that employees’ conduct on behalf of the employees of another employer who are engaged in protected concerted activity is itself protected concerted activity.”¹¹⁴ The principle is even more settled when the employees in question are employed by the same employer. As the Supreme Court restated in *Houston Insulation Contractors Ass’n v. NLRB*:¹¹⁵

When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a “concerted activity” for “mutual aid or protection,” although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping, and the solidarity so established is “mutual aid” in the most literal sense, as nobody doubts.¹¹⁶

Thus, an employer discharging documented employees for participation in lawful immigration rallies in sympathy with unauthorized workers will *prima facie* violate the NLRA once a nexus between the rallies and the terms and conditions of unauthorized workers’ employment is established.

III. COULD STRIKE INTERMITTENCY DEPRIVE EMPLOYEES PARTICIPATING IN IMMIGRATION RALLIES OF THE PROTECTION OF THE NLRA?

Assuming *arguendo* that a “day” without immigrants is protected concerted activity because it is a concerted work stoppage in furtherance of a legitimate protected employment aim, an additional complication is whether “days” without immigrants—employees concertedly engaging in multiple such stoppages—at some point lose the protection of the NLRA because the repetition renders the strikes “intermittent.” A number of the 2006 rallies occurred in different cities on different dates.¹¹⁷ But an intermittency issue could be presented if the same employer was “struck” multiple times by the same employees.

114. *Office Depot*, 330 N.L.R.B. 640, 642 (2000) (citing *Boise Cascade Corp.*, 300 N.L.R.B. 80, 82 (1991)).

115. 386 U.S. 664 (1967).

116. *Id.* at 668-69 (1967) (quoting *Labor Bd. v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-06 (2d Cir. 1942)).

117. *See supra* note 1.

Traditionally, the NLRB has considered “partial” strikes,¹¹⁸ including intermittent strikes, unprotected under the NLRA.¹¹⁹ As scholars have noted, the rationale for denying protection to employees engaged in these work stoppages has been “muddled” and at times has taken on a “moral” tone.¹²⁰ Nevertheless, the NLRB has generally held that intermittent work stoppages become unprotected when “the stoppage 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.”¹²¹ The general objection to employees or their representatives being able to engage in this conduct is that they would thereby be able to unilaterally “dictate the terms and conditions of employment.”¹²² Historically, the NLRB and the courts

118. A partial strike is one in which employees refuse to work on certain assigned tasks while accepting pay or while remaining on the employer’s premises. *Audubon Health Care Ctr.*, 268 N.L.R.B. 135, 136 (1983). The Board and courts have historically distinguished partial strikes from “intermittent” strikes. *See, e.g., Honolulu Rapid Transit Co.*, 110 N.L.R.B. 1806, 1810-11 (1954) (in which the NLRB appears to classify a repetitive weekend strike as “intermittent” by comparing it to the “intermittent” work stoppages considered by the Supreme Court in its opinion in *Briggs-Stratton*, 336 U.S. 245, 264 (1949)); *see infra* note 127 and accompanying text. The reference fails to result in terminological clarity, however, since the employee action in *Briggs-Stratton*, a cessation of work on the employer’s premises during working hours, seems barely distinguishable from the circumstances in *Audubon Health Care*, which involved a refusal by on-duty nurse aides to cover for absent employees by working outside the aides’ assigned areas. The NLRB’s General Counsel has employed the additional term “recurrent strike activity” in an apparent attempt to mask the doctrinal incoherency in this area. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to James J. McDermott, Reg’l Dir., Region 31, NLRB, regarding *Univ. of S. Cal.*, Case 31-CA-23538 (Apr. 27, 1999), available at http://www.nlr.gov/Research/Memos/Advice_Memos/template_html.aspx?file=http://www.nlr.gov/shared_files/Advice%20Memo\1999\aa042799_universit_yofsocialif.html&size=13 [hereinafter Kearney, *Univ. of S. Cal.*].

119. “Traditionally” is not tantamount to “originally,” for in its early days the NLRB appeared to apply the opposite presumption, viewing intermittent strikes through the same lens as any other strike, presumably because the statute fails to distinguish strikes in this fashion. *See* Michael H. LeRoy, *Creating Order Out of Chaos and Other Partial and Intermittent Strikes*, 95 *NW. U. L. REV.* 221, 239 (Fall 2000).

120. *Pac. Tel. & Tel.*, 107 N.L.R.B. 1547, 1547-48 (1954) (“[the union] chose . . . to resort to a form of economic warfare entirely beyond the *pale* of proper strike activities.”) (emphases added); *see also* LeRoy, *supra* note 119 at 239-40; 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, 380 (1994) [hereinafter Becker, *Better Than a Strike*].

121. *Polytech, Inc.*, 195 N.L.R.B. 695, 696 (1972).

122. *Valley City Furniture Co.*, 110 N.L.R.B. 1589, 1595 (1954), *enforced*, 230 F. 2d 947 (6th Cir. 1956). This is a paradoxical formulation. The objective of every strike is the “unilateral dictation” to an employer of some term and condition of employment. The striking party (usually a union) wants something. The struck employer refuses to voluntarily provide it. Negotiations break down. The striking party attempts to unilaterally *compel* provision of the disputed item through resort to economic weaponry, which is by definition outside of a “bargaining” model. Subtly embedded in this language of “fairness” is the notion that the strike action may succeed because the employer is unable to utilize its standard weapon against a strike action: the permanent replacement of striking employees. Employers may have difficulty replacing employees in unpredictable work stoppages of short duration for two very practical reasons: 1) There is not enough time to find replacements; and 2) Even when replacements can be found the unpredictable status of their subsequent employment makes recruitment of desirable candidates problematic. The characterization of this species of employee tactics as unfair is extremely ironic. Permanent replacement of strikers is itself a legal fiction of the courts that has operated to the extreme detriment of union rights in apparent disregard of the policies of Section 1 of the NLRA. *See generally* Pope, *American Workers*, *supra* note 73, at 528-34.

have treated intermittent work stoppages by employees not represented by a union differently than those by employees with union representation.¹²³ There is little if any NLRB authority finding intermittent work stoppages unprotected without union involvement. The probable explanation for this is that the NLRB has been much more likely to construct a theory of unlawfulness when employees' actions evince a plan or pattern of intermittency,¹²⁴ a difficult construction in the absence of a "planner," like a union, or of a broad "tactical" objective like achievement of a collective bargaining agreement.

Against this patchwork of administrative cases turning rather transparently on elusive notions of motive and "morals" stands the Supreme Court's 1960 opinion in *NLRB v. Insurance Agents' International Union (Insurance Agents)*.¹²⁵ In this opinion, the Court attempted to clarify doctrinal confusion arising from a 1949 opinion dealing with the legitimate use of economic weapons in labor relations.¹²⁶ In that earlier opinion, *UAW Local 232 v. Wisconsin Employment Relations Board (Briggs-Stratton)*,¹²⁷ a Wisconsin state labor relations board ordered a union to cease and desist from calling repeated "membership meetings" during working hours.¹²⁸ The Wisconsin Supreme Court affirmed the order in limited form.¹²⁹ The union advanced a series of arguments clustered around the proposition that the order violated the Constitution, but the Court concluded that "[t]he substantial issue is whether Congress has protected union conduct which the state has forbidden, and hence the state legislation must yield."¹³⁰ Answering the question in the negative, the Court found that the meetings were unprotected, stating in relevant part: "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."¹³¹ In the wake of this congress-

123. See, e.g., *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355, 1359-60 (8th Cir. 1989) (unrepresented employees who engaged in two work stoppages in a one-week period protected by the NLRA).

124. See *Pac. Tel.*, 107 N.L.R.B. at 1547-50. But see *Robertson Indus.*, 216 N.L.R.B. 361, 361-62 (1975), enforced, 560 F.2d 396 (9th Cir. 1976) (no unlawful plan of intermittent work stoppage where in roughly a two month span employees ceased working twice, first when they were not represented by a union and then after they had obtained representation).

125. 361 U.S. 477 (1960).

126. *Insurance Agents* was the second in a triumvirate of Supreme Court cases, starting with *Briggs-Stratton*, 336 U.S. 245 (1949), and culminating in *Lodge 76, IAM v. Wis. Employment Relations Bd.* [hereinafter *Lodge 76, Machinists*], 427 U.S. 132 (1976). See extended discussion *infra* notes 141-52, possessing underlying factual scenarios involving union utilization of partial or intermittent strike tactics. All three cases arose in unionized settings.

127. 336 U.S. 245 (1949).

128. There was no contention that the meetings did not constitute work stoppages. Indeed, the union admitted that it thought the meetings to be "better than a strike." *Id.* at 264 n.17. (Hence the title of Professor Becker's article cited *supra* note 120.)

129. *Id.* at 250-51.

130. *Id.* at 252.

131. *Id.* at 264-65.

sional silence, the Court further concluded that state intervention attempting to regulate the work stoppages was not preempted.¹³²

In *Insurance Agents*, the Court did *not* purposefully disturb¹³³ the conclusion of *Briggs-Stratton* that "employee conduct quite similar to the conduct at bar was neither protected by [Section] 7 of the Act nor prohibited (made an unfair labor practice) by [Section] 8,"¹³⁴ but it took issue with the NLRB's arguments that "nontraditional" tactics by a union independently violated the NLRA and that these tactics were worthy of legal sanction because of the "public's moral condemnation" of them.¹³⁵

Before discussing the Court's responses to the NLRB's arguments that the tactics employed by the union in *Insurance Agents* were unlawful because they were "nontraditional" and "immoral," it would be useful to catalogue the tactics. Following the expiration of a collective bargaining agreement between Prudential Insurance Company and the Insurance Agents International Union, the union initiated a "Work Without a Contract" program, which utilized a number of devices designed to exert economic pressure on the employer while the parties continued to engage in collective bargaining for a successor collective bargaining agreement.¹³⁶ The stratagems included outright refusals to perform various duties, reporting to work late, engaging in "sit-in mornings" where employees did "what comes naturally" and then left at noon on the same days, skipping business conferences, picketing and leafleting in front of company offices, distributing leaflets to and soliciting signatures from customers, and presenting policyholder petitions at corporate headquarters while simultaneously conducting mass demonstrations there.¹³⁷ In sum, the union very effectively combined elements of a partial strike (it does not appear that employees absented themselves from the workplace for entire work days) with what would now be termed a corporate campaign.¹³⁸

In discussing these nontraditional immoral tactics, the Court stated:

The Board contends that because an orthodox "total" strike is "traditional" its use must be taken as being consistent with [Section] 8(b)(3); but since the tactics here are not "traditional" or "normal," they need not be so viewed. Further, the Board cites what it conceives to be the public's moral condemnation of the sort of employee tactics involved here. But again we cannot see how these distinctions

132. *Id.* at 265.

133. NLRB v. Ins. Agents' Int'l Union (*Insurance Agents*), 361 U.S. 477, 483 n.6 (1960).

134. *Id.* at 495 n.23.

135. *Id.* at 495.

136. *Id.* at 480-81.

137. *Id.*

138. "The corporate campaign has been accurately described as a 'cafeteria plan of confrontational tactics' conducted outside the workplace." James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889, 904 n.77 (1991) (citing CHARLES R. PERRY, *UNION CORPORATE CAMPAIGNS* 4 (1987)).

can be made under a statute which simply enjoins a duty to bargain in good faith [T]he use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining.¹³⁹

Thus, though the Court was willing to assume for the sake of argument that the union's actions were both "unusual" and "bad," it was unwilling to conclude that they were sufficiently unusual or bad to establish that the union's resorting to them violated its statutory duty to engage in good faith bargaining, which was the only theory of *unlawfulness* advanced by the NLRB.¹⁴⁰ The language of the Court's opinion also called into question NLRB decisions like *Pacific Telephone & Telegraph Co.*,¹⁴¹ which had refused employees the protection of the NLRA because their union had utilized economic weapons that were "beyond the pale" of "proper" strike activities;¹⁴² tactics which were, in other words, immoral or nontraditional.

Subsequent to *Insurance Agents*, the Court had occasion to revisit the issue of "nontraditional" strike tactics in a second preemption case presenting facts similar to those considered in *Briggs-Stratton* twenty-seven years earlier. In *Lodge 76, IAM v. Wisconsin Employment Relations Board (Lodge 76, Machinists)*,¹⁴³ a union engaged in a series of concerted refusals to work overtime after negotiations for a successor collective bargaining agreement to the employer-terminated predecessor agreement had dragged on for over a year.¹⁴⁴ Shortly after the expiration of the predecessor agreement, the employer announced its intention to unilaterally implement an increase in the standard work week from 37½ to 40 hours, and an increase in the standard work day from 7½ to 8 hours.¹⁴⁵ In response, members of the union decided that they would refuse to work any of the extra hours the employer *might* implement.¹⁴⁶

139. *Insurance Agents*, 361 U.S. at 495 (footnote omitted).

140. *Id.* at 496. Pursuant to Section 8(b)(3) of the NLRA, a union has a duty to bargain in good faith with an employer over terms and conditions of employment that is the correlative of an employer's duty to bargain with a union pursuant to Section 8(a)(5) of the NLRA. 29 U.S.C.A. § 158(b)(3) (2007).

141. 107 N.L.R.B. 1547 (1954); *see also supra* notes 121, 125.

142. *Pac. Tel. & Tel.*, 107 N.L.R.B. 1547, 1548 (1954).

143. 427 U.S. 132 (1976).

144. *Id.* at 133-34.

145. *Id.* at 134.

146. *Id.* There is no analysis in the Court's opinion, or in the underlying proceedings before the Wisconsin Supreme Court, as to whether the union had *in fact* refused to work "overtime" since it had merely insisted that it would continue to adhere to the status quo—which did not include the overtime—following the contract's expiration. Because the overtime had been *unilaterally* defined and implemented by the employer following the expiration of the effective collective bargaining agreement, the union was arguably privileged not to work it. Fourteen years prior to *Lodge 76, Machinists*, the Court had issued its opinion in *NLRB v. Katz*, 369 U.S. 736 (1962), a case standing for the proposition that an employer is precluded from making unilateral changes to terms and conditions of employment during the course of negotiations. It is now settled under *Katz* that unilateral changes implemented following the expiration of a collective bargaining agreement are as unlawful

The employer decided in these circumstances not to implement the announced changes and decided instead to file a charge with the NLRB alleging that the union's threatened refusal to work the overtime hours violated Section 8(b)(3) of the NLRA.¹⁴⁷ The NLRB dismissed the charge at the local administrative level pursuant to *Insurance Agents*.¹⁴⁸ The employer then decided to file a complaint with the Wisconsin Employment Relations Commission, alleging that the union's threatened action would violate state law.¹⁴⁹ As in *Briggs-Stratton*, the state commission ordered the union to "cease and desist" from engaging in partial strike tactics and the Wisconsin Supreme Court ultimately affirmed the order.¹⁵⁰

The U.S. Supreme Court reversed, observing that:

[while] a State still may exercise "its historic powers over such traditionally local matters as public safety and order and the use of streets and highways," . . . the Union's refusal to work overtime is peaceful conduct constituting activity which must be free of regulation by the States if the congressional intent in enacting the comprehensive federal law of labor relations is not to be frustrated.¹⁵¹

In reaching this decision, the Court specifically overruled *Briggs-Stratton*.¹⁵² But in addition to articulating its central holding, the Court also made two interesting observations by way of dicta. First, it made plain that even if *states* were not permitted to regulate labor relations having only vague connections with their traditional police powers, *employers* were not precluded from taking action against unions utilizing weapons that were not *protected* by the NLRA. In other words, tactics such as intermittent strikes may be permitted by federal law because they are not specifically precluded by Congress, but not protected against employers' exercise of *their* economic weapons.¹⁵³ Second, the Court asserted:

as those made during the course of negotiations. *Laborers Health & Welfare Trust Fund v. Advan. Lightweight Concrete Co.*, 484 U.S. 539, 545 n.6 (1988). A finding that the employer had unlawfully implemented the overtime provisions at issue in *Lodge 76, Machinists* would likely have compromised its position. Under present law, an arguably unlawful implementation of the overtime policy would have mandated preemption of state regulation of the controversy. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). *Katz* is notable in the context of this intermittency discussion because the Court was unimpressed that the relevant unilateral changes had allegedly been implemented in response to the union's partial strike tactics. *Katz*, 369 U.S. at 742 n.7.

147. *Lodge 76, Machinists*, 427 U.S. at 134-35.

148. *Id.* at 135.

149. *Id.*

150. *Id.* at 136.

151. *Id.* at 137 n.2, 155 (citation omitted).

152. *Id.* at 155.

153. As scholars have noted, this has left intermittent strikes, and perhaps other non-traditional job tactics, in a "no man's land" between prohibition and protection. See Becker, *Better Than a Strike*, *supra* note 120, at 381.

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, when unaccompanied by other aspects of conduct such as those present in *Insurance Agents* or those in *Briggs-Stratton* (overtone of threats and violence and a refusal to specify bargaining demands), are “protected” activities within the meaning of [Section] 7, although not so protected as to preclude the use of available countervailing economic weapons by the employer.¹⁵⁴

The passage suggests that, in the event a union was engaged in concerted job actions utilizing weapons short of a full scale strike—not involving “threats and violence” and unaccompanied by a refusal to specify bargaining demands—the NLRB would have a good deal of discretion to nevertheless hold the activity “protected.”¹⁵⁵ The degree of protection would be limited by the employer’s right to use “available countervailing economic weapons,” presumably the right to lock out employees engaging in the “protected” activity.¹⁵⁶ The mystery, however, is at what type of “partial strike” activity the Court might have been hinting.

A number of subsequent cases suggest what the NLRB may have come to think the Supreme Court had in mind. In *City Dodge Center, Inc.*,¹⁵⁷ for example, the NLRB found that two work stoppages by six unrepresented mechanics carried out between August 29 to September 3, 1986, in response to the alleged refusal of the employer to discuss various work-related grievances did not constitute an intermittent strike because the stoppages “appear[ed] to be a series of reactions to steps taken by [the employer],” and thus could not “reasonably be construed as a plan to strike, return to work, and strike again.”¹⁵⁸ In upholding the NLRB’s decision, the Eighth Circuit noted that the employees “did not have a preconceived plan to engage in a series of strikes to harass [the employer].”¹⁵⁹

154. *Lodge 76, Machinists*, 427 U.S. at 153 n.14 (citations omitted).

155. Julius G. Getman, *The Protected Status of Partial Strikes After Lodge 76: A Comment*, 29 STAN. L. REV. 205, 209 (1977).

156. The limitation may swallow the rule because distinctions between discharges and lockouts of limitless duration seem practically negligible to an out-of-work employee. However, the distinction could be substantial where employees are represented by a union sufficiently strong to eventually achieve a collective bargaining agreement. Cent. Ill. Pub. Serv. Co., 326 N.L.R.B. 928, 928 (1998) (employer lawfully locked out two unions representing its employees following commencement of non-traditional “inside game” tactics but ultimately ended lockout following successful negotiations for collective bargaining agreements).

157. 289 N.L.R.B. 194 (1988) *enforced sub. nom.*, *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355, 1359 (8th Cir. 1989); see *supra* note 124.

158. *City Dodge Center*, 289 N.L.R.B. at 194.

159. *Roseville Dodge*, 882 F.2d at 1359. In making this observation the court distinguished one of its earlier decisions, *NLRB v. Blades Mfg. Co.*, 344 F.2d 998, 1005 (8th Cir. 1965), a case in which the court had found unprotected as intermittent “three one-day work stoppages in less than two weeks, undertaken pursuant to a preconceived and continuing plan to stop work each time the company refused to adjust grievances.” *Roseville Dodge*, 882 F.2d. at 1359. The Eighth Circuit decided *Blades* eleven years prior to the Supreme Court’s opinion in *Lodge 76, Machinists* and the

The NLRB decided another post-*Lodge 76, Machinists* case in *United States Service Industries, Inc.*¹⁶⁰ In that case, the NLRB refused to find that an unspecified number of striking janitors, who had engaged in work stoppages on May 30 and July 26, 1990, lost their entitlement to reinstatement because the work stoppages were unlawful intermittent strikes. The NLRB concluded:

“[H]it and run” strikes engaged in as part of a planned strategy intended to “harass the company into a state of confusion” are not protected activity. However . . . in the instant case there is no evidence that any such strategy was in place, . . . and the mere fact that some employees may have struck more than once does not render their conduct intermittent striking.¹⁶¹

The remarkable aspect of *United States Service Industries* is that the NLRB on its own initiative raised the possibility (under the guise of attempting to “understand” one of the employer’s arguments) that the involved job actions *were* part of a planned strategy because they arose out of the national “Justice for Janitors” campaign.¹⁶² With almost no discussion the argument was rejected because “the mere fact that employees struck more than one time is not sufficient evidence on which to base a finding of unprotected intermittent striking [W]e cannot make a finding that the striking employees . . . were engaged in a campaign to harass the [c]ompany into a state of confusion.”¹⁶³ Surely, a fundamental if sometimes unstated purpose of any strike is to harass an employer into a state of confusion. Unpacking what is really going on in this case requires the additional observation that the employer offered *no* evidence that it had made any attempt to replace the striking employees.¹⁶⁴ Thus, the work stoppages did not “preclude the use of available countervailing economic weapons by the employer.”¹⁶⁵ As a result of this omission by the employer, the NLRB was *not* faced with the problem of grappling with the “harassment” it logically must have been discussing in *United States Services Industries*—namely, conducting a work stoppage in such a way that the employer was precluded from hiring replacements.

Continuation of this post-*Lodge 76, Machinists* development is further reflected in a 1999 memorandum by the NLRB’s Office of the General Counsel in a case entitled *University of Southern California*.¹⁶⁶ In

Roseville Dodge court did not speculate in the course of efficiently distinguishing *Blades* how, if at all, its thinking on intermittency had evolved.

160. 315 N.L.R.B. 285 (1994), *enforced per curiam*, 72 F.3d 920 (D.C. Cir. 1995).

161. *Id.* at 285.

162. *Id.* at 285, 290.

163. *Id.* at 285-86.

164. *Id.* at 293. No doubt this was because of the short duration of the work stoppages, the May 30 strike lasted a single day and the July 26 strike concluded on August 3, when the union made an unconditional offer to return to work. *Id.*

165. *Lodge 76, Machinists*, 427 U.S. 132, 153 n.14 (1976).

166. Kearney, *Univ. of S. Cal.*, *supra* note 118.

this case, the NLRB's General Counsel authorized issuance of a complaint in the face of an employer's suspension of striking, union-represented, food service and custodial employees at the conclusion of five strikes conducted on March 20, 1996 (sixty-minute strike), April 26, 1996 (less than one day strike), April 10, 1997 (one day strike), October 8, 1997 (two day strike), and April 29, 1998 (twelve day strike). Throughout the roughly two years of work stoppages, the parties were at an impasse over a collective bargaining agreement and, in particular, over an agreement concerning limits on the employer's ability to subcontract work of the type performed by the union-represented employees.¹⁶⁷

Notwithstanding the "intermittent" striking, the General Counsel concluded that "all five work stoppages here were protected activity."¹⁶⁸ In coming to this conclusion, the General Counsel devised an analytical framework cobbled together from a number of prior cases. According to the General Counsel, "recurrent" strike activity is rendered unprotected when there is "[a]n occurrence of more than two strikes" and:

[T]he strikes are not responses to distinct employer actions or problems with working conditions, but rather part of a strategy to use a series of strikes in support of a single goal because this would be more crippling to the employer or would require less sacrifice by employees than a single prolonged work stoppage during which strikers could be replaced; . . . the union announces or otherwise states its intent to pursue a plan or strategy of intermittent strikes, or there is clear factual evidence of an orchestrated strategy to engage in intermittent strike activity, and . . . the strikes are of short duration and proximate in time.¹⁶⁹

On the other hand, "repeated" work stoppages are protected when they are "spontaneous attempts to pursue work-related complaints or grievances and/or [sic] . . . which are precipitated by, and in protest against, separate acts of the employer."¹⁷⁰ The General Counsel cited the NLRB's decision in *Westpac Electric*¹⁷¹ for the proposition that the *key* factor in determining whether a series of short strikes is protected or unprotected is whether the strikes were "intentionally planned and coordinated so as to effectively reap the benefit of a continuous strike action

167. *Id.*

168. *Id.*

169. *Id.* (citing *Chelsea Homes, Inc.*, 298 N.L.R.B. 813, 831 (1990); *Robertson Indus.*, 216 N.L.R.B. 361, 362 (1975); *Crenlo, Div. of GF Bus. Equip., Inc.*, 215 N.L.R.B. 872, 878-79 (1974), *enforced*, 529 F.2d 201 (8th Cir. 1975); *Pac. Tel. & Tel.*, 107 N.L.R.B. 1547, 1547 (1954); *see Nat'l Steel & Shipbuilding Co.*, 324 N.L.R.B. 499, 510 (1997); *Embossing Printers*, 268 N.L.R.B. 710 (1984); *Polytech, Inc.*, 195 N.L.R.B. 695, 695 (1972); *John S. Swift Co.*, 124 N.L.R.B. 394, 396 (1959).

170. *Kearney, Univ. of S. Cal.*, *supra* note 118 (citing *Meilman Food Indus.*, 234 N.L.R.B. 698, 712 (1978); *Overboard Door Corp.*, 220 N.L.R.B. 431 (1975) *enforcement denied*, 540 F.2d 878 (7th Cir. 1978); *Westpac Elec.*, 321 N.L.R.B. 1322, 1360 (1996); *Blades Mfg. Co.*, 144 N.L.R.B. 561, 566 (1963), *enforcement denied*, 344 F.2d 988 (8th Cir. 1965)).

171. 321 N.L.R.B. 1322.

without assuming the economic risks associated with a continuous forthright strike.”¹⁷² The citation to *Westpac* is significant because the strikes in that case transpired in the context of a salting campaign.¹⁷³ Whatever else salting may be, it is certainly part of a coordinated plan, and work stoppages in the context of such a campaign are not infrequently a part of that plan.¹⁷⁴ The General Counsel’s reference to such a controversial “strike case,”¹⁷⁵ which clearly raises in the minds of many observers a question as to the “forthrightness” of a strike, in an intermittent strike scenario involving five strikes over a two-year period, speaks volumes to the doctrinal distance on intermittency that the NLRB has traveled since *Lodge 76, Machinists*. The NLRB now seems much more willing to offer statutory protection to repeated work stoppages if there is any argument that they were “spontaneous.”

To date, it does not appear that the NLRB has squarely addressed the legal status of intermittent work stoppages in a non-union workplace directed against specific workplace grievances. Protests by employees against congressionally initiated proposals for changes in immigration policy that would adversely impact unauthorized employees’ terms and conditions of employment would appear to fall into this category. There is no apparent “plan” on the part of employees protesting such changes beyond an attempt to remain employed and free from incarceration. The agenda is set by Congress, and the protests seem merely reactive and more akin to the spontaneous decision by employees to exit their unacceptably cold building in the *Washington Aluminum* work stoppage.¹⁷⁶ However, even if under some theory “a plan” of “harassment” could be conceived,¹⁷⁷ cases like *United States Service Industries* and *Westpac*

172. Kearney, *Univ. of S. Cal.*, *supra* note 118 (quoting *Westpac Elec.*, 321 N.L.R.B. at 1360). Neither the ALJ nor the full NLRB characterized the cited passage as a key factor, and the ALJ appeared to simply be responding to an argument proffered by the employer.

173. “‘Salting a job’ is the act of a trade union in sending a union member or members to an unorganized job site to obtain employment and then organize the employees.” *Aztech Elec. Co.*, 335 N.L.R.B. 260, 260 n.4 (2001); *see also* Pamela A. Howlett, *Salt in the Wound? Making a Case and Formulating a Remedy when an Employer Refuses to Hire Union Organizers*, 81 WASH. U. L.Q. 201, 201 (2003).

174. *See, e.g., Sunland Constr. Co.*, 309 N.L.R.B. 1224, 1234 (1992).

175. There has been a decade-long, contentious legal debate regarding the bona fides of salting campaigns. *See Note, Organizing Worth Its Salt: The Protected Status of Paid Union Organizers*, 108 HARV. L. REV. 1341, 1345-47 (1994-1995).

176. *NLRB v. Wash. Alum. Co.*, 370 U.S. 9, 14-15 (1962) (employees spontaneously left plant alleging it was too cold to work).

177. Professor Hyde has noted that “[s]ome organizations providing services and advocacy for immigrant workers also speak for them on issues at work,” and some of these organizations, termed immigrant work centers, “deserve[] separate treatment because of the more intense level of participation [they] generate[].” Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385, 396-97 (2005-2006) [hereinafter Hyde, *New Institutions*]. According to Professor Hyde, there are “[a]t least 133 immigrant work centers,” and “[a]ll occasionally advocate with employers on behalf of individual workers.” *Id.* at 397 (citing Janice Fine, *Worker Centers: Organizing Communities at the Edge of a Dream*, 50 N.Y.L. SCH. L. REV. 417 (2005-2006)). Accordingly, Professor Hyde concludes that certain worker centers “are quite likely to be statutory labor organizations.” *Id.* at 408. While this point will be taken up later in a different context, *see infra* notes 226-27, it may be noted here that it is conceivable the NLRB

Electric, arising in the context of obvious union orchestration and in which the NLRB nevertheless afforded employees the protection of the NLRA, make denial of protection to non-union, immigration-context “strikers” problematic, especially if statutory protection is initially afforded. Although the Supreme Court’s opinions in *Lodge 76, Machinists* and *Insurance Agents* seem to afford the NLRB discretion to classify intermittent work stoppages as neither protected nor prohibited, the NLRB would probably be hard-pressed to explain its denial of protection in the immigration protest context in light of its recent intermittency decisions.¹⁷⁸

In immigration protest contexts, applying the law of intermittency to repeated work stoppages leads to the general conclusion that in the circumstances in which these rallies have arisen (and are likely to arise in the future), employees should not be denied the protection of the NLRA.¹⁷⁹ The greater the frequency of rallies resulting in work stoppages, particularly in shorter intervals of time, the more likely it will be for the NLRB and courts to deny participating employees NLRA protection. There does not appear to be any adequate justification for denying NLRA protection to employees participating in the immigration rallies during non-working time. Nevertheless, the development of the statute is controlled by the prosecutor in the NLRA scheme. A refusal by the

could view immigrant rallies as planned work stoppages if the rallies were coordinated and implemented by a sufficiently broad network of these immigrant work centers.

178. This likely explains the recent “no go” memoranda issued from the NLRB’s Office of the General Counsel which rather transparently dodge the central issue of NLRA protection. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Irving E. Gottschalk, Reg’l Dir., Region 30, NLRB, regarding Marshall & Ilsley Corp., Case 30-CA-17442 (July 12, 2006), available at [http://www.nlr.gov/shared_files/Advice%20Memo/2006/30-CA-17442\(07-12-06\).pdf](http://www.nlr.gov/shared_files/Advice%20Memo/2006/30-CA-17442(07-12-06).pdf) (need not reach question of protection because employer established violation of attendance policy and employee “dishonesty”); Kearney, *Gargiulo Constr. Co.*, *supra* note 106 (need not reach issue of protection because employees not disciplined or discharged, as alleged, but rather “temporarily laid off”); Kearney, *El Cerrito Elec. Co.*, *supra* note 82 (need not reach issue of protection because there is insufficient evidence to establish that the termination was motivated by any suspicion that the employee attended the rally); Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Martha Kinard, Reg’l Dir., Region 16, NLRB, regarding Joe’s Coffee Shop, Case 16-CA-25014 (October 30, 2006), available at http://www.nlr.gov/shared_files/Advice%20Memos/2006/16-CA-25014.pdf (need not reach issue of protection, assuming wearing of ribbon in support of immigrant rallies was protected activity, “other employees” were not involved in the ribbon wearing or aware of the discipline; insufficient evidence one month later related to “arguably protected conduct”); Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Stephen M. Glasser, Reg’l Dir., Region 18, NLRB, regarding Discount Paper, Case 7-CA-49543 (October 31, 2006), available at http://www.nlr.gov/shared_files/Advice%20Memos/2006/7-CA-49543.pdf (“assuming without deciding” that participation in rallies was protected concerted activity, employer established it would have discharged employee for excessive absenteeism that was “extraordinarily disruptive”); Kearney, *Reliable Maint.*, *supra* note 53 (“assuming without deciding” that participation in immigration rallies is protected concerted activity, the discharge of an employee was warranted because the right to participate does not supersede the requirement to be present at work and is in any event eviscerated when the subject of the protest is not within the employer’s control).

179. This conclusion is fortified if rallies continue to be held on different dates in different cities. In such circumstances the likelihood of an individual employer being “struck” intermittently is reduced. On the other hand, rallies held simultaneously on multiple occasions in the same cities would increase the likelihood of an individual employer sustaining multiple work stoppages with a subsequent finding of unlawful intermittency depriving employees of the protection of the NLRA.

General Counsel of the NLRB to find participation in the rallies to be protected concerted activity, thereby foreclosing the possibility of consideration of the issue by the NLRB or the courts, renders the problem a political one that complainants would have to refer to Congress.¹⁸⁰

IV. ARE IMMIGRATION RALLIES DIRECTED AGAINST “UNOFFENDING” EMPLOYERS UNLAWFUL?

Judge Kennedy’s dissent in the *Kaiser* case¹⁸¹ turned on the argument that employer conduct subject to Section 7 of the NLRA must involve “a matter with respect to which the employer had the power and right to do something about.”¹⁸² This thought serves as an efficient introduction to the problem of NLRA “neutrality,” which is implicit in an immigration protest context. The issue is whether immigration rallies resulting in work stoppages are unlawful because they are directed against employers who are neutral with respect to the dispute between unauthorized workers and the Government.

As a general proposition, the NLRA forbids a labor organization from pressuring an employer with whom it has a dispute, known as a primary employer, by engaging in certain statutorily proscribed conduct directed at “neutral” employers with whom it has no dispute.¹⁸³ There are various policy reasons for this limitation, but one of the central justifications centers on the notion of fairness: a neutral employer does not have “the power [or] right to do something about” a dispute between a union and a primary employer.¹⁸⁴

Because many of the organizations directing the immigration rallies during the winter and spring of 2006 either were or resembled statutory labor organizations as defined by the NLRA, employers could have argued that the 2006 rallies (and may argue that similar future rallies) were unlawful “secondary” activity directed against “neutral” employers. The consequence of the NLRB making such a finding is that temporary injunctions—which are authorized under the NLRA and routinely granted by federal courts to enjoin unlawful “secondary” conduct—could be

180. The dismissal of a charge alleging that an adverse employment action resulting from participation in an immigration rally violated Section 7 of the NLRA could only be appealed to the Office of the General Counsel, the entity that implicitly or explicitly made the decision not to pursue the charge in the first place. 29 U.S.C.A. § 153(d) (2007). The General Counsel’s decision not to pursue a charge is not reviewable by the courts. *See Beverly Health & Rehabilitation Servs., Inc. v. Feinstein*, 103 F.3d 151, 152-53 (D.C. Cir. 1996). However, the General Counsel is a political appointee of the President who must be approved by the Senate. 29 U.S.C.A. § 153(d). In theory, this may exercise a degree of influence over prosecutorial decision making. A clear and consistent disregard of statutory mandate is probably only practically remediable through governmental budgetary processes. Given the super-heated immigration political environment, Congress may be willing to assess the issue in a timely fashion.

181. *See supra* Part I.

182. *Kaiser Eng’rs v. NLRB*, 538 F.2d 1379, 1387 (Kennedy, J., dissenting) (quoting *G & W Elec. Specialty Co. v. NLRB*, 360 F.2d 873, 876 (7th Cir. 1966)).

183. ARCHIBALD COX ET AL., *LABOR LAW: CASES AND MATERIALS* 691-92 (14th ed. 2006).

184. *Kaiser Eng’rs*, 538 F.2d at 1387.

sought.¹⁸⁵ Further, in many instances, depending on the precise nature of the conduct at issue, the NLRA provides employers a civil court action to recover monetary damages arising from unlawful secondary activity.¹⁸⁶

Therefore, assuming that an employer is in no position to control immigration policy,¹⁸⁷ the question presented is whether concerted work stoppages directed against “unoffending employers” violate the NLRA’s prohibition of “secondary” activity.¹⁸⁸ It seems problematic on First Amendment grounds to think of constitutionally protected “political” speech, as the immigration rallies on the surface would appear to be, as being a violation of the NLRA.¹⁸⁹ But the question is not so simply framed. The issue is *not* merely whether employees—leaving the question of citizenship to one side—are privileged to petition the government concerning political grievances. Rather, the issue is whether employees organized as statutorily cognizable labor organizations may lawfully pressure facially innocent employers by engaging either in work stoppages or in other forms of concerted activity with the object of effectuating changes in federal immigration policy.

The Supreme Court addressed the issue of pressure brought to bear by a labor organization on employers for political reasons beyond the employers’ control (and having seemingly little to do with “traditional” labor relations) in *International Longshoremen’s Ass’n, AFL-CIO v. Allied International, Inc. (Allied)*.¹⁹⁰ In that case, the Longshoremen’s Association (the union) ordered its members to stop handling cargoes arriving from or destined for the Soviet Union “to protest the Russian invasion of Afghanistan.”¹⁹¹ The membership complied, and “longshoremen up and down the east and gulf coasts refused to service ships carrying Russian cargoes.”¹⁹² In response, Allied International, Inc. (Allied), an American importing business,¹⁹³ filed an unfair labor practice charge

185. Pursuant to Sections 10(j) and 10(l) of the NLRA. 29 U.S.C.A. § 160(j), (l) (2007).

186. Labor Management Relations Act of 1947 § 303 (Taft-Hartley) [hereinafter *LMRA*], 29 U.S.C.A. § 187 (2007).

187. This article does not address the interesting question of how the ensuing analysis might be altered if employees brought pressure to bear on employers demonstrably implicated in the *development* of immigration policy through lobbying or similar measures. That is to say, it might be argued that employers involved in such sponsorship activity are not neutral entities.

188. The term “unoffending employers” has been frequently employed by the courts to describe neutral employers caught up in “controversies not their own.” *See, e.g., NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951).

189. The subject of the constitutional status of labor activity containing an arguable speech component is complex. For purposes of this article, it will merely be noted that the labor activity in question did not take place on the premises of neutral employers and for that reason “looked” more like speech than coercive conduct directed at neutral employers. The issue addressed here is the work stoppages accompanying the rallies rather than the outright suppression of the rallies.

190. 456 U.S. 212 (1982).

191. *Id.* at 214.

192. *Id.* at 214-15.

193. Allied arranged for the import of the Russian goods by an American shipping company called Waterman Steamship Lines (Waterman), which operated ships of American registry. *Id.* at

alleging that the union had violated the NLRA's secondary boycott provisions.¹⁹⁴ Allied also filed a companion action for damages under Section 303 of the Labor Management Relations Act (LMRA).¹⁹⁵ In assessing the Section 303 action, the Federal District Court of Massachusetts, contrary to the eventual administrative determination of the NLRB, concluded that the union's actions did not violate Section 8(b)(4) because the boycott was "a purely political, primary boycott of Russian goods" and therefore "not within the scope of [Section] 8(b)(4)."¹⁹⁶ The First Circuit Court of Appeals reversed the district court, holding that "the . . . boycott . . . was within [Section] 8(b)(4)'s prohibition of secondary boycotts, despite its political purpose, and that resort to such behavior was not protected activity under the First Amendment."¹⁹⁷

In affirming the First Circuit, the Supreme Court stated that the relevant provisions of the statute "appear to be aimed precisely at the sort of activity alleged in this case."¹⁹⁸ Those provisions appear to govern "activities designed to *influence* individuals employed by 'any person engaged in commerce or in an industry affecting commerce.'"¹⁹⁹ The Court noted that the union had "no dispute with Allied, Waterman or Clark,"

215. Allied had a contract with Clark & Son (Clark) to unload the cargo in the United States. *Id.* Clark was signatory to a collective bargaining agreement with an ILA local union in Boston. *Id.*

194. *Id.* at 216. Section 8(b)(4) of the NLRA provides in relevant part that it is an unfair labor practice for a labor organization:

to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services . . . where . . . an object thereof is . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees in another labor organization or in another trade, craft or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

29 U.S.C.A. § 158 (b)(4) (2007).

195. Section 303 of the LMRA provides monetary damages when a labor organization is demonstrated to have violated Section 8(b)(4) of the NLRA and where that violation is shown to have resulted in monetary damages to any injured party. 29 U.S.C.A. § 187 (2007).

196. *Allied*, 456 U.S. at 217 (citing language from the District Court's denial of the NLRA's request for a preliminary injunction in *Walsh v. Int'l Longshoremen's Ass'n*, 488 F. Supp. 524, 530-31 (Mass. 1980), and its subsequent substantive dismissal of the Section 303 action involving the same parties at 492 F. Supp. 334, 336 (Mass. 1980)). Allied's complaint had been consolidated with Walsh's. *Id.* at 217 n.8.

197. *Allied* at 456 U.S. at 218 (citing *Int'l Longshoremen's Ass'n*, 257 N.L.R.B. 1075 (1981)).

198. *Id.*

199. *Id.* (emphasis added). The Court purported to be quoting Section 8(b)(4) of the NLRA. However, that provision nowhere mentions mere attempts to "influence" as unlawful conduct or as an unlawful object of conduct. See also *supra* note 194.

and did “not seek any labor objective from these employers.”²⁰⁰ The Court quoted the underlying circuit court opinion:

We think it plain that the ILA was not engaged in primary activity and that the boycott against Allied’s goods was “calculated to satisfy union objectives elsewhere.” The ILA concedes it has no dispute with Clark, Waterman, or Allied, and there is no suggestion that it seeks to affect the labor relations of any of these employers. It is also plain that these “unoffending employers” have been embroiled in a “controversy not their own” as a result of union action which “reasonably could be expected” to threaten a neutral party with ruin or substantial loss.²⁰¹

The breadth of the holding calls into question whether concerted employee “political” protest of immigration policy, through engaging in work stoppages, is significantly analogous to the “political” protest of the Soviet invasion of Afghanistan by the ILA to implicate the “secondary boycott” provisions of the NLRA.²⁰²

It is very clear that the Supreme Court would not find the facially political nature of the immigration controversy to be an independently sufficient basis for *not* applying the provisions.²⁰³ After all, the purpose of the “political” immigration rallies was not to effectuate changes in the terms and conditions of the “struck” employers. On the contrary, the manifest object of the rallies was to apply pressure to all employers utilizing immigrant labor in an attempt to compel the *federal government* not to alter immigration policy. While it is tempting merely to observe that the federal government is not a proper “primary” employer as that term has come to be understood in secondary boycott jurisprudence, the failure of the Court to find a “primary” employer in the *ILA* case did not prevent it from finding injured “neutrals.”²⁰⁴ Just as with the three employers in *ILA*, employers drawn into an immigration dispute may be severely hampered or prevented from doing business with each other, albeit temporarily. And although such rallies’ object may not be to in-

200. *Allied*, 456 U.S. at 222.

201. *Id.* at 222 n.19 (quoting *Allied Int’l Inc. v. Int’l Longshoremen’s Ass’n*, 640 F.2d 1368, 1377 (1st Cir. 1981)).

202. For purposes of this discussion, “secondary boycott provisions” will be synonymous with “unoffending employer provisions” and will refer exclusively to Sections 8(b)(4)(B) and 8(b)(4)(D) of the NLRA unless otherwise indicated.

203. “The legislative history does not indicate that political disputes should be excluded from the scope of [Section] 8(b)(4). The prohibition was drafted broadly to protect neutral parties, ‘the helpless victims of quarrels that do not concern them at all.’” *Allied*, 456 U.S. at 225 (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., 23 (1947)).

204. While it might also be argued that the secondary boycott provisions were never intended by Congress to be applied in a “primary-less” political situation, the Court in *Allied* had no difficulty concluding that Congress intended the same provisions to apply to situations like union protests over the Soviet invasion of Afghanistan. “By its exact terms the secondary boycott provisions of [Section] 8(b)(4)(B) of the NLRA would appear to be aimed precisely at the sort of activity alleged in this case.” *Allied*, 456 U.S. at 218. The bare fact of injury to neutrals was sufficient for the Court to find a violation of labor law.

jure neutral employers, the *ILA* opinion strongly suggests that the reasonable foreseeability of potential injury may be sufficient to sweep the rallies within the ambit of secondary activity liability if other doctrinal prerequisites and statutory criteria are met.

The doctrinal prerequisite for finding the existence of unlawful secondary activity is that it be engaged in by a "labor organization."²⁰⁵ The NLRA defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."²⁰⁶ The Supreme Court has upheld a broad construction of the definition as being in accord with Congress's intention that a labor organization need not formally "bargain" with an employer to fall within the statutory provision.²⁰⁷ The Court has also noted that the phrase "dealing with" is broader than "bargaining," and extends to an employee organization's mere proffering of recommendations and proposals regarding the conditions of employment enumerated in Section 2(5), thereby applying to interaction beyond "the usual concept of collective bargaining."²⁰⁸

There are two types of conduct in which a labor organization may engage that could establish a violation of Section 8(b)(4) of the NLRA *if it is coupled with a proscribed object*.²⁰⁹ The first type of potentially violative conduct essentially involves work stoppages of various types, strikes, refusals to handle goods, etc., or the encouragement of other employees to engage in such conduct.²¹⁰ The second type of potentially violative conduct involves threats, coercion, and restraint of employees.²¹¹

One proscribed object designed to prevent enmeshment of neutral, unoffending employers is the NLRA prohibition forbidding "a union from inducing employees to refuse to handle goods with the object of forcing any person to cease doing business with any other person."²¹² In *ILA* there was no evidence that the union's objective was to halt business between the three involved neutral entities: Allied, the importer; Water-

205. 29 U.S.C.A. § 158(b)(4) (2007).

206. 29 U.S.C.A. § 152(5) (2007).

207. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 211 (1959); *see also* *Electromation, Inc. v. NLRB*, 35 F.3d 1148, 1158 (7th Cir. 1994).

208. *NLRB v. Cabot Carbon Co.*, 360 U.S. at 214 (citing *Cabot Carbon Co. v. NLRB*, 256 F.2d 281, 285 (5th Cir. 1958)).

209. The statutory language has been set forth above. *See supra* note 194.

210. 29 U.S.C.A. § 158(b)(4)(i) (2007).

211. 29 U.S.C.A. § 158(b)(4)(ii). Both "employers" and "employees" are extremely broadly defined in Section 8(b)(4), effectively discouraging esoteric argument regarding the status of actors in secondary boycott scenarios.

212. *Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc.*, 456 U.S. 212, 212 (1982) (citing 29 U.S.C.A. § 158(b)(i)(4)(B)). This was the statutory provision at issue in *Allied*.

man, the shipper; and Clark & Son, the stevedore; and the Court appeared to assume for the sake of argument that the object of the boycott against the Russian goods was “simply to free ILA members from the morally repugnant duty of handling Russian goods.”²¹³ Nonetheless, in the critical passage of the case, the Court cited one of its prior opinions,²¹⁴ concluding that “when a purely secondary boycott ‘reasonably can be expected to threaten neutral parties with ruin or substantial loss’ . . . the pressure on secondary parties must be viewed as at least one of the objects of the boycott or the statutory prohibition would be rendered meaningless.”²¹⁵ In other words, if the secondary activity of the union results in “substantial loss”²¹⁶ to the “neutral” employer, an unlawful secondary object will simply be presumed.²¹⁷

213. Int’l Longshoremen’s Ass’n, AFL-CIO v. Allied Int’l, Inc., 456 U.S. 212, 224 (1982).

214. NLRB v. Retail Store Employees Union (*Safeco*), 447 U.S. 607, 614 (1980). The *Safeco* case involved “product picketing,” a particular species of secondary activity in which a labor organization involved in a primary dispute with an employer follows the product of that employer to the premises of a secondary, neutral employer in order to persuade customers of that employer not to purchase the “primary” product. This conduct implicates Section 8(b)(4)(ii)(B) of the NLRA, even if a union makes no appeal to *employees* to cease working. The rationale for these findings is that the union’s appeal has a coercive “cease doing business object” when a large portion of the “neutral’s” business consists in offering the primary product for sale. See HENDERSON, *supra* note 83, at 573-74. The Court’s reliance on product picketing cases throughout the *ILA* opinion is somewhat awkward because those cases involved union picketing of a product that was directed at *the general public and consumers*, which triggered analysis under the “publicity proviso” to Section 8(b)(4), and also, as has been stated, Section 8(b)(4)(ii)(B). The *Allied* case did not involve the publicity proviso and implicated 8(b)(4)(i)(B), a different provision of Section 8(b)(4), because the union was engaging in a full blown work stoppage rather than picketing the product of a neutral employer. This reinforces the notion that the Court was focusing exclusively on the injury to neutral employers in finding a violation—it was discussing the wrong statutory conduct even as it was dispensing with the necessity of a proscribed statutory object.

215. *Allied*, 456 U.S. at 224.

216. In an earlier case, NLRB v. Fruit & Vegetable Packers (*Tree Fruits*), 377 U.S. 58 (1964), the Court held that certain unions did *not* violate Section 8(b)(4) when they limited secondary picketing of retail stores to appeals to customers not to buy the products of firms against which one of the unions was on strike. The Court found that consumer picketing of the neutral retailer was permissible unless “employed to persuade customers not to trade at all with the secondary employer.” *Id.* at 72. The *Safeco* case, cited by the Court in *Allied*, altered the *Tree Fruits* rule by holding that “[p]roduct picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss simply does not square with the language of the purpose of [Section] 8(b)(4)(ii)(B).” *Safeco*, 447 U.S. at 614-15.

217. This interpretation reads the “object” requirement out of the statute entirely. The conclusion begs the question of whether the injured employers are truly neutral because the Court failed to identify *any* object on the part of the union to do injury to them, which is the statutory predicate. The conclusion is actually the fruition of developments begun much earlier with cases focusing on injuries to neutrals in the context of limited “object evidence.” See, e.g., NLRB v. Carpenters Dist. Council, 407 F.2d 804, 806 (5th Cir. 1969) (though statute in fact requires cease doing business object, objective to cause “serious disruption to of an existing business relationship” sufficient to satisfy statutory requirement). In *Allied*, and as the union argued, there was not a “primary” at all, so the primary-neutral distinction was completely collapsed, and reference to statutory “neutrals” was a legal fiction. See Brief of Petitioner at 28-9, *Allied*, 456 U.S. 212 (1982) (No. 80-1663), 1981 WL 390100. While in mixed object scenarios a labor organization will be found to have engaged in unlawful secondary activity where only one of its objects is proscribed by the NLRA, NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 689 (1951), the courts have relaxed even that forgiving standard by whittling away its predicate to a skeletal core requiring merely that the possibility of the fruit of an unlawful object—even an unintended one—be foreseen.

Another proscribed object designed to prevent enmeshment of neutral, unoffending employers is the NLRA prohibition forbidding a labor organization from forcing an employer to assign work to one labor organization, trade, or class of employees rather than to another labor organization, trade or class of employees by engaging in work stoppages, as broadly defined, or by making threats or otherwise engaging in coercion and restraint of employees.²¹⁸ Section 10(k) of the NLRA empowers the NLRB to conduct a hearing whenever a charge of this type has been filed in order to resolve the dispute administratively by ordering an award of the work to one of the competing claims for the work that is in dispute.²¹⁹ Significantly, it is not required that such a work assignment dispute involve only groups of union-represented employees. An attempt by a labor organization to compel a work assignment involving unrepresented employees may equally implicate this proscription.²²⁰

A violation of any of these unoffending employer provisions requires a threshold finding that a *labor organization* has engaged in the proscribed conduct.²²¹ In some instances, traditional labor organizations appear to have been directly involved in organizing the immigration rallies.²²² In such cases there is no serious question whether the provisions could apply. But a more difficult question is presented in the case of nontraditional labor organizations. As discussed earlier, Professor Hyde has concluded that there are “at least 133” immigrant work centers that occasionally advocate with employers on behalf of individual workers,²²³

218. 29 U.S.C.A. § 158(b)(4)(D) (2007); see *Local 30, United Slate, Tile & Composition Roofers v. NLRB*, 1 F.3d 1419, 1421 n.3 (3d Cir. 1993).

219. 29 U.S.C.A. § 160(k) (2007); see *Local 30*, 1 F.3d at 1421, n.4. A 10(k) hearing is generated whenever there is “reasonable cause to believe” that Section 8(b)(4)(D) has been violated. *Bricklayers Local 1 (Shelby Marble & Tile Co.)*, 188 N.L.R.B. 148, 150 (1971). A violation need not be proven, either to generate a hearing or to award work to one of the competing “groups” of employees. *Id.*

220. *NLRB v. Plasterers’ Local Union No. 79*, 404 U.S. 116, 129 n.22 (1971). Section 10(l) of the NLRA authorizes the NLRB to seek injunctive relief from Federal District courts whenever there is an allegation that Section 8(b)(4) (A), (B), or (C) has been violated. 29 U.S.C.A. § 160(l) (2007). The quick conduct of a 10(k) hearing essentially obviates the need for interim injunctive relief from the courts in Section 8(b)(4)(D) scenarios.

221. See *infra* text at 235 for statutory definition.

222. The website of the organization “We Are America Coalition,” an avowed organizer of southern California rallies occurring on April 10 and May 1, 2006, reflects as member organizations Service Employees International Union Locals 99, 434B, 535, 660, and 1877. Other coalition members include the Southern California District Council of Laborers, United Food and Commercial Workers Union Local 324, United Healthcare Workers SEIU and UNITE-HERE. See *We Are America Coalition Members*, http://todayweact.org/en/Coalition_Members (last visited Sept. 4, 2007).

223. Hyde, *New Institutions*, *supra* note 177, at 397 (citing Janice Fine, *Worker Centers: Organizing Communities at the Edge of a Dream*, 50 N.Y.L. SCH. L. REV. 417 (2005-2006)). Some worker centers, like the one located in Pomona, California, are actually created in whole or part by municipalities as a means to control day laborer issues. See *Pomona Day Labor Center*, http://www.pomonadaylabor.org/PLC/ENGLISH/ABOUT_US/History.htm (last visited Aug. 12, 2007). The Pomona center has been in existence since 1998. *Id.* In 1998, the Center required workers to pay fees of \$20 per month and agree not to work for less than a wage specified by the Center. Adriana Chavira, *Pomona Labor Center Proves a Bonus for Day Workers*, DAILY BULLETIN (San Bernardino), Jan. 26, 1999, at A4, available at

and that certain of these work centers “are quite likely to be statutory labor organizations.”²²⁴ To the extent that any of these work centers are, have been, or will be intimately involved in the coordination or direction of immigration protest rallies, employers may argue that the statutory predicate for finding a violation of the unoffending employer provisions has been satisfied because a “labor organization” is implicated. The argument is enhanced by the formal affiliation in August 2006 between the AFL-CIO and the National Day Laborer Organizing Network (NDLON), which describes itself as “the nation’s largest day laborer association.”²²⁵ Involvement by the NDLON in any future immigration rally²²⁶ raises the unoffending employer stakes. Affected employers may argue that NDLON and similar organizations are statutory labor organizations, that the NDLON is a labor organization by virtue of its affiliation with the AFL-CIO,²²⁷ or that the NDLON is an agent of the AFL-CIO.²²⁸

This is no airy conjecture. In a recent case decided by the NLRB’s General Counsel, *Restaurant Opportunities Center of New York (Redeye Grill; Firemen Hospitality Group Café Concepts; Restaurant Daniel)*,²²⁹ a group of employers argued that Restaurant Opportunities Center of New York (ROC-NY) was a statutory labor organization that had en-

http://www.pomonadaylabor.org/PLC/ENGLISH/ABOUT_US/Articles%20PDF/Article%2017.pdf. The Center in some respects resembled a union hiring hall and appeared to be dealing with employers regarding starting rates of pay.

224. Hyde, *New Institutions*, *supra* note 177, at 408.

225. See NDLON, *AFL-CIO & NDLON Enter Watershed Agreement to Improve Conditions for Working Families: Landmark Partnership Marks New Chapter in American Social Justice Movement*, <http://www.aflcio.org/mediacenter/prspmt/pr08092006.cfm> (last visited August 12, 2007). The press release also contends that “[w]orker centers operate as grass roots mediating institutions providing support to communities of low wage workers . . . the centers provide community spaces where employers and laborers can meet . . . to handle workplace violations.” *Id.* (emphasis added). This language appears to bring the worker centers perilously close to the statutory definition for labor organizations, which turns on the requirement that an organization “deal with” employers. Although the language displays a heroic attempt to color these interactions in benign passivity, one suspects some level of involvement by the organization in these “meetings” between employers and employees.

226. Approximately 75% of day laborers are unauthorized and 87% of day laborers were born in either Mexico or Central America. See ABEL VALENZUELA, JR., ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES 4 (Jan. 2006), http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf.

227. The AFL-CIO has another “community affiliate” named “Working America” that it utilizes to communicate with non-union employees. About Working America, <http://www.workingamerica.org/about/> (last visited Sept. 4, 2007). It does not engage in collective bargaining on behalf of these employees and primarily utilizes the affiliation as a “get out the vote” mechanism. Hyde, *New Institutions*, *supra* note 177, at 389. Pointing to other affiliations such as these, the AFL-CIO may be able to persuasively argue that it has expertise in affiliating in a manner that does not require it to “deal with” employers.

228. See *Int’l Bhd. of Elec. Workers*, 342 N.L.R.B. 740, 740 (2004) (one Electrical Workers Local found jointly and severally liable for the unfair labor practices of another, including for a Section 8(b)(4) violation on an agency and “joint venture” theory).

229. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Celeste Mattina, Reg’l Dir., Region 2, NLRB, regarding Rest. Opportunities Ctr. of N.Y., Cases 2-CP-1067, 2-CP-20643, 2-CP-1071, 2-CB-20705, 2-CP-1073, and 2-CB-20787 (Nov. 30, 2006), available at http://www.nlr.gov/shared_files/Advice%20Memos/2006/2-CP-1067.pdf [hereinafter Kearney, *Rest. Opportunities*]

gaged in unlawful recognitional picketing.²³⁰ The General Counsel found that “most of ROC-NY’s activities consist of social advocacy, legal services and job support services that do not fall within the purview of [labor organization status under the NLRA].”²³¹ While it is unclear whether the employers appealed this determination,²³² the important point is that they were fully prepared to argue that the theoretical statutory labor organization was capable of violating the NLRA. The same thought could easily occur to “unoffending employers” subject to immigration rallies.

There are of course defenses to this line of argument. The ROC-NY memorandum reveals, for example, one defense available to immigrant work centers or similar organizations to the claim that they are in reality statutory labor organizations. In the ROC-NY case, the NLRB’s General Counsel concluded that ROC-NY was not a labor organization in part because its “conduct ha[d] not been shown to constitute a pattern or practice of dealing [with employers regarding terms and conditions of employment] over time.”²³³ Many nontraditional organizations of a similar type may share this characteristic. It is likely that most of them have existed for more than a decade, so it may be possible to show that they have not *behaved* like traditional labor organizations over a substantial period of time.²³⁴ There are a number of problems with this defense, however.

First, an infirmity in the General Counsel’s analysis is its focus on the functional relationship between ROC-NY and the few employers involved in specific cases rather than on ROC-NY’s overall purpose. Section 2(5) of the NLRA quite clearly defines a labor organization in

230. Section 8(b)(7) of the NLRA generally makes it an unlawful practice for a *labor organization*

to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees,” when certain addition criteria have been met.

29 U.S.C.A. § 158(b)(7) (2007). The provision applies only to conduct engaged in by a labor organization.

231. This view is strikingly at odds with Professor Hyde’s conclusion that ROC-NY likely is a labor organization because it does “indeed raise grievances with particular employers on behalf of particular employees . . . activity that has been held to constitute . . . dealing with employers.” Hyde concludes that “it is hard to come up with any compelling policy reason why such groups should be exempt from . . . restrictions . . . that bind more traditional unions.” Hyde, *New Institutions*, *supra* note 177, at 408.

232. The General Counsel also concluded on factual grounds that even if ROC-NY was a labor organization it would not have violated the NLRA in the manner alleged. Kearney, *Rest. Opportunities*, *supra* note 229. Thus, there may have been little point in appealing the more difficult theoretical legal issue.

233. *Id.*

234. Hyde, *New Institutions*, *supra* note 177, at 385.

terms of purpose.²³⁵ Admittedly, employees must also participate in the organization, and courts have often scrutinized the functional relationship in a particular workplace between employees, a putative labor organization, and an employer. But that scrutiny is usually undertaken in considering the question of whether an “organization” has been “dominated” within the meaning of Section 8(a)(2).²³⁶ An organization’s stated purpose may be at odds with its actual activities, but because only one of those activities need involve “dealing with” employers, the activities threshold is typically met quite easily. The NLRB has repeatedly held that “[t]he definition of labor organization is to be interpreted and applied broadly.”²³⁷ In the context of an “outside” employee organization, which exists independently of a relationship with an employer, the question becomes almost unimportant; there will necessarily be employee participation in the organization. Thus, the primary consideration in assessing such a labor organization’s NLRA status would appear to revolve around its purpose, which was not the General Counsel’s focus in the memorandum.

Consider the ROC-NY organization. Professor Hyde’s argument that ROC-NY is probably a statutory labor organization²³⁸ is consistent with the manner in which it holds itself out to the public. A visit to the ROC-NY web site reveals the organization’s claim that in the prior two years it had engaged in six campaigns against employers for back wages and discrimination claims for food service workers; negotiated a settlement for workers from a Brooklyn deli; and negotiated a settlement with a “fancy uptown restaurant” involving “compensation for discrimination, paid vacations, promotions, the firing of an abusive waiter, and a posting in the restaurant guaranteeing workers the right to organize and the involvement of ROC-NY in the case of any future discrimination.”²³⁹ Tellingly, on the same website the group advises employees: “If you are a restaurant worker who has problems with your employer, call us or come by ROC-NY!”²⁴⁰ Can there be serious doubt that ROC-NY “exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work?”²⁴¹ Even if ROC-NY has only been engaged in this

235. A labor organization is one that “exists for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” 29 U.S.C.A. § 152(5) (2007).

236. *Electromation, Inc. v. NLRB*, 35 F.3d 1148, 1161-67 (7th Cir. 1994) (focusing on management’s participation in action committees (found to be Section 2(5) labor organizations) and its effect on the employees).

237. *Air Line Pilots Ass’n (ABX Air, Inc.)*, 345 N.L.R.B. No. 51, 2004-2005 NLRB Dec. (CCH) ¶ 16,992 (Aug. 27 2005).

238. Hyde, *New Institutions*, *supra* note 177, at 408.

239. Restaurant Opportunities Center of New York, *Big Victory for Restaurant Workers at Cite and Park Ave. Café, of the Smith & Wollensky Restaurant Group* [hereinafter *ROC-NY*], <http://www.rocny.org/programs-corporatecampaigns.htm> (last visited Sept. 13, 2007).

240. *Id.*

241. 29 U.S.C.A. § 152(5) (2007).

type of endeavor for a limited period of time, the cited language demonstrates that it intends to continue doing so and that that is its reason for existing.

Second, accepting the NLRB's functional approach raises more questions than it answers. The settlement agreement that ROC-NY negotiated with one of the employers admittedly contained provisions addressing terms and conditions of employment, including open-ended, future-oriented terms concerning promotions, workplace language issues, and a fully functional arbitration process.²⁴² Although the NLRB's General Counsel grounded his determination in a finding that there would be no further "back and forth" between the parties,²⁴³ the ROC-NY website indicates that its settlement with the "fancy uptown restaurant" included a promise from the restaurant that workers had "the right to organize and the involvement of ROC-NY in the case of any future discrimination."²⁴⁴ It is unclear to what settlement agreement the organization refers (there are a number from which to choose), but it seems clear that the group has no intention of disengaging from these types of activities.

Under the General Counsel's pattern and practice approach, ROC-NY and similar organizations have no way of knowing when they may have crossed the labor organization threshold. This is undoubtedly unsettling (or should be) in contemplating possible civil court litigation where courts may take a quite different view of the matter.

The better and more likely line of defense for a nontraditional labor organization in the context of widespread immigration protest activity would probably center on causation. It seems reasonably clear that the immigration rallies were intensified through the involvement of media outlets.²⁴⁵ At some point, the attribution of widespread rallies to any particular union must be called into question. Could a particular union reasonably have caused (or even foreseen the possibility of) hundreds of thousands of rally participants (presumably unauthorized workers and their supporters) failing to report to their respective workplaces? Such an outcome might have been desirable to any given union, and this collective motivation may have played a part in collectively initiating a process. But to what extent is that vague collective aspiration susceptible to any rational apportionment? If apportionment or uncoupling along these lines is not feasible, it is difficult to see how liability could be im-

242. *ROC-NY*, *supra* note 239, at 3. It is ironic and perhaps instructive that unions *formally* certified under the NLRA are frequently unable to achieve collective bargaining agreements of any type, let alone agreements containing grievance-arbitration mechanisms.

243. *Id.*

244. *Id.*

245. Gillian Flaccus, *Spanish-language Media Credited on Pro-Immigrant Rallies: Radio, TV Hosts Pushed for Large, Peaceful Protests*, BOSTON GLOBE, Mar. 29, 2006, available at http://www.boston.com/news/nation/articles/2006/03/29/spanish_language_media_credited_on_pro_immigrant_rallies/.

posed on any particular labor organization, especially one that is nontraditional or inchoate. Nevertheless, it seems true that the more successful immigration rallies become, the more tenuous this defense would become because the foreseeability of widespread work stoppages would be easier to establish.

Assuming that the involvement of worker centers or similar organizations in immigration rallies could be proven, and that those organizations were found by the NLRB or courts to be statutory labor organizations, employers might successfully argue that the rallies violated the unoffending employer provisions of the NLRA. For example, regarding the NLRA provision forbidding "a union from inducing employees to refuse to handle goods with the object of forcing any person to cease doing business with any other person,"²⁴⁶ the critical question is whether it is foreseeable to an implicated labor organization that the rallies "[could] reasonably be expected to threaten neutral parties with ruin or substantial loss."²⁴⁷ This would be a vague and dangerous standard from the perspective of the charged organizations. Presumably, it could be met by a finding by the NLRB that an organization had an expectation that some employers subject to work stoppages could be threatened with substantial loss. But questions abound.

To begin with, the employers would have to be found "neutrals" within the meaning of the NLRA. In *ILA*, the Court essentially ignored the union's argument that logically there could be no neutral employer without a primary "employer" by focusing almost exclusively on the ensnarement and injury of presumed neutrals.²⁴⁸ It is hard to predict how this problem would be resolved when the only conceivable "primary" is the United States rather than the Soviet government, and the controversy arguably assumes First Amendment dimensions.²⁴⁹ In that scenario an absence of primary argument might take on renewed vigor.

246. Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc., 456 U.S. 212, 222 (1982).

247. NLRB v. Retail Store Employees Union, 447 U.S. 607, 614 (1980).

248. *Allied*, 456 U.S. at 223-25.

249. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918-19 (1982) (noting that pursuant to the First Amendment, state law may not broadly proscribe peaceful political boycotts including those involving picketing, or subject participants in such boycotts to civil damage awards by virtue of their association with a group, in the absence of evidence that the group possessed unlawful aims). The *Allied* Court's restatement of its consistent rule rejecting the claim that "secondary picketing by labor unions in violation of NLRA § 8(b)(4) is protected activity under the First Amendment," 456 U.S. at 226, presumed the existence of secondary activity without articulating a reason for not requiring the existence of a primary. If the test the Court would apply is at bottom premised on the *effect* that picketing has on "neutrals," and the picketing is directed at the U.S. government, the situation would seem even more problematic than the one presented in *NAACP v. Claiborne Hardware Co.* In *Claiborne*, the boycott was at least directed at the subjects of the boycott, white merchants in Claiborne, Mississippi. 456 U.S. at 889. It is difficult to accept that the Court would have reached a different outcome if the boycott in question, which involved a demand for "racial equality and integration," *Id.*, had been directed at the Government rather than at the private merchants. Immigration protest represents a "mixed" dispute involving "political" and labor questions just as the protest in *Claiborne* involved a mixed dispute of political and commercial trade

It is also unclear what “foreseeability” of “ruin or substantial loss” would mean in this type of unoffending employer context. In the *ILA* case, for example, the importer claimed that it had “lost the great bulk of its twenty-five million dollar a year business of importing wood from Russia.”²⁵⁰ The Court did not indicate the actual financial loss suffered by the employer, the percentage of the employer’s business the loss represented, or the duration of continuing losses, if any; no litigant appears to have questioned the substantiality of the loss.²⁵¹ And the opinion does not indicate why it would have been reasonable for the labor organization to anticipate any particular loss with respect to the *neutral under consideration*.²⁵² In contrast, in *Safeco*, a union picketed the product of an employer, an insurance company, with whom it had a primary dispute, at the premises of five “neutral” employers who were also engaged in the insurance business.²⁵³ The NLRB found that dealing in the product of the primary employer represented *substantially all* of the neutral employers’ business,²⁵⁴ such that the secondary picketing would *necessarily* ruin the neutral employers.²⁵⁵ The Court employed language of foreseeability in concluding that the union had a “cease doing business” object, as required to establish a violation of the statute.²⁵⁶ Quoting language from the NLRB decision below, the Court stated that the union’s secondary appeal was “reasonably calculated to induce customers not to patronize the neutral parties at all.”²⁵⁷ There was little explanation of the

questions. In essence, painting with the broad brush utilized by the Court in *Allied* could mean that any politically motivated boycott or work stoppage by a union resulting in the injury of a “neutral” employer would be swept within the ambit of Section 8(b)(4). It is therefore difficult to believe that the Court’s First Amendment analysis would be as cursory in the context of a secondary boycott analysis in which the U.S. government was the primary.

250. Brief for the Respondent at 4, *Allied*, (No. 80-1663), 456 U.S. at 212.

251. While these facts no doubt occurred in the context of settlement discussions surrounding the Section 303 action, the existence of the losses appears plainly germane in the first instance to that of liability. *Allied*, 456 U.S. at 223.

252. There is a fundamental problem with equating proof that a labor organization had the *object* of enmeshing neutrals in a labor controversy by compelling them to cease doing business with some third party with the foreseeability that such an outcome might result. It is one thing to say that an *inference* of object, intent, or motive is permissibly made because direct evidence of “state of mind” is rarely available. See *State v. Gantt*, 217 S.E.2d 3, 5 (N.C. Ct. App. 1975). It is quite another thing to suspend the requirement of even indirect evidence of object, intent or motive. As previously noted, in *ILA* the Court specifically found that the union did *not* have a cease doing business object, and accepted as bona fide its political objective. *Allied*, 456 U.S. at 221-22. Thus, the Court was not simply making an inference to satisfy a statutory predicate, but was, rather, eliminating the predicate altogether, presumably for policy reasons. In the arena of tort law, Professor Cardi has written about the tendency of courts to substitute judgments of “foreseeability” for breaches of statutorily determined duties in order to surreptitiously satisfy policy objectives. See W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739 (2005). Professor Cardi wrote, “[s]till, no matter how attractive foreseeability may be, to the extent that it masks—or at the very least, distracts from—courts’ resolution of important policy concerns, it in fact endangers courts’ legitimacy, rather than protects it” *Id.* at 767. The observation resonates in this context.

253. *NLRB v. Retail Store Employees Union*, 447 U.S. 607, 609 (1980).

254. The court found that the primary product accounted for 90% of the neutrals’ business. *Id.*

255. *Id.* at 610.

256. *Id.* at 615.

257. *Id.* (citing *Retail Store Employees Local 1001*, 226 N.L.R.B. 754, 757 (1976)).

basis for presuming that “calculation”; the Court simply cited a line of cases arising in a variety of contexts as supporting the proposition that “[t]he Union is responsible for the foreseeable consequences of its conduct.”²⁵⁸ However, the U.S. Court of Appeals for the District of Columbia Circuit had rejected a finding of an 8(b)(4) violation in the case below precisely because of what it termed the NLRB’s “nebulous inferred intent approach to [the operation of Section 8(b)(4)].”²⁵⁹ The Supreme Court failed to explicitly address this fundamental objection. In *Tree Fruits*, the seminal “product picketing” case preceding *Safeco*, “the product picketed was but one item among the many that made up the [primary’s] trade.”²⁶⁰ The *Safeco* Court distinguished *Tree Fruits* in an important footnote:

The picketing in *Tree Fruits* and the picketing in this case are relatively extreme examples of the spectrum of conduct that the Board and the courts will encounter in complaints charging violations of [Section] 8(b)(4)(ii)(B). If secondary picketing were directed against a product representing a major portion of a neutral’s business, but significantly less than that represented by a single dominant product, neither *Tree Fruits* nor today’s decision necessarily would control. The critical question would be whether, by encouraging customers to reject the struck product, the secondary appeal is reasonably likely to threaten the neutral party with ruin or substantial loss. Resolution of the question in each case will be entrusted to the Board’s expertise.²⁶¹

In a scenario involving a series of immigration rallies resulting in work stoppages, assuming a primary employer is *presumed* or deemed *not to be necessary* to make out a violation of Section 8(b)(4) as a matter of law, and further assuming that the involved secondary employers are thereby rendered NLRA neutrals, the question is likely to come down to where on the *Tree Fruits-Safeco* continuum the substantiality of the *foreseeable* loss is deemed to fall. Is it foreseeable that “substantially all” of an employer’s business will be impacted? Must that level of loss be endured by an employer for some period of time before becoming actionable? This speculative quagmire is not rendered less nebulous by the possibility that the NLRB or the courts could aggregate loss among employers for purposes of considering its substantiality.²⁶² Thus, while on any particular day the losses occasioned by an individual employer from an immigrant protest work stoppage might be relatively small, losses on that same day aggregated for all impacted employers, considered as a group, could be considerable. Ultimately, in the absence of a limiting principle for this vague doctrine of foreseeability, actual and arguably

258. *Id.* at n.9.

259. *Retail Store Employees Local 1001 v. NLRB*, 627 F.2d 1133, 1148 (D.C. Cir. 1979).

260. *Safeco*, 447 U.S. at 613 (citing *Tree Fruits*, 377 U.S. at 60).

261. *Id.* at 615 n.11.

262. This is a speculative but conceivable finding.

statutory labor organizations expose themselves to significant risk through involvement in immigration rallies that can be characterized as violating the unoffending employer provisions.²⁶³

In the interest of a complete discussion concerning unoffending employer issues²⁶⁴ in immigration protest scenarios, it should also be noted that unoffending employers might allege that their ensnarement in immigration issues by "labor organizations" violates the provision forbidding a labor organization from coercing an employer to assign work to one labor organization, trade, or class of employees, rather than to another labor organization, trade or class of employees, by engaging in work stoppages, as broadly defined, or by making threats or otherwise engaging in coercion and restraint of employees.²⁶⁵ A labor organization may violate this provision by coercing an employer to assign work to its members rather than to an *unorganized* group of employees.²⁶⁶ As is the case with the other unoffending employer provisions, the provision could not be triggered unless a statutory labor organization was found to be involved in an immigration rally. Upon establishment of the labor organization predicate, however, the situation would become more complex. It could be argued that a labor organization which engages in a work stoppage protesting immigration reforms, or which "threatens" or announces its intention to engage in such a stoppage, is attempting to compel an employer to assign work to immigrants, whether authorized or unauthorized, rather than to citizens. A work stoppage in furtherance of that objective would appear to fall within this unoffending employer provision because it would represent an attempt to require an employer to decide claims of competing "classes" of employees. Moreover, the dispute could be characterized as either a demand by a labor organization that an employer *continue to assign* certain work to one class of employees (immigrants), or as a demand that *in the future* an employer *not refuse* to assign work to the same "class."

Typically, the NLRB will not find a violation of this provision if the labor organization engaging in the putatively unlawful conduct has

263. That liability would play itself out in a Section 303 action which limits recovery for an employer's losses arising from a violation of Section 8(b)(4) to "actual, compensatory damages." *Teamsters Local 20 v. Morton*, 377 U.S. 252, 260 (1964). The aggregation problem that could drag an arguable statutory labor organization into a Section 303 proceeding could become a disaggregation problem for an employer in the same proceeding as it attempted to quantify the losses it sustained as a result of any particular rally. Nonetheless, it would be relatively easy for a large employer suffering many lost employee hours to quantify the replacement value of those hours.

264. Section 8(b)(4) forbids certain "threats" and "work stoppages" directed by labor organizations against "neutrals" when motivated by four specified "objects." 29 U.S.C.A. § 158(b)(4) (2007). This article discusses only two of the objects, as incorporated in Sections 8(b)(4)(B) and 8(b)(4)(D). Discussion of the remaining two objects, incorporated in Sections 8(b)(4)(A) and 8(b)(4)(C), respectively, has been omitted because it is not germane to the analysis.

265. 29 U.S.C.A. § 158(b)(4)(D).

266. See, e.g., *NLRB v. Plasterers' Local No. 79*, 404 U.S. 116, 129 n.22 (1971); *Plumbers Local 195* [hereinafter *Gulf Oil*], 275 N.L.R.B. 484, 485 n.7 (1985).

“work preservation” rather than “work acquisition” objectives.²⁶⁷ However, neither will the NLRB find that a labor organization has a work preservation objective where the labor organization seeks to acquire work not historically performed by “the claiming group of employees.”²⁶⁸ Although the NLRB’s decisional law usually requires *claims* by competing classes of employees, “the Board has held that employees demonstrate a competing claim to disputed work by performing it.”²⁶⁹ Furthermore, the NLRB has made clear that this provision should be interpreted broadly to protect all neutral employers swept up in a work assignment dispute. “The Board has interpreted this language as showing the ‘clear intent of Congress to protect not only employers whose work is in dispute from such strike activity, but *any* employer against whom a union acts with such a purpose.’”²⁷⁰

The contours of a potential argument emerge from this introduction. Employers could argue that undisputed or putative labor organizations’ sponsorship of immigration rallies that threaten or actually result in work stoppages represents an attempt to coerce them to award work *in the future* to immigrants, as opposed to citizens. Work preservation arguments could be overcome by establishing the novelty of the presence of the immigrant employee “class” within particular occupations. The competing claims requirement for establishment of disputed work could be shown through the work stoppages themselves (on the part of labor organizations) and through the present performance of the disputed work by the citizen “class” of employees.

Although these arguments are worth considering, there are three main reasons employers are unlikely to proceed into this thicket. First, a 10(k) award²⁷¹ cannot be obtained as quickly as either a preliminary injunction in connection with establishment of a Section 8(b)(4) violation, and time would presumably be of the essence. Second, aside from the issue of time, the 10(k) hearing required to obtain such an award could be very large in scope and complex.²⁷² Third, employers will likely conclude, contrary to their initial impulses, that there is good reason to think that the NLRB would simply hold under *Safeway Stores*²⁷³ that the dis-

267. See *Highway Truckdrivers & Helpers, Local 107*, 134 N.L.R.B. 1320, 1321 (1961).

268. *Teamsters Local 174*, 340 N.L.R.B. 137, 139 (2003) (citing *Teamsters Local 107*, 336 N.L.R.B. 518 (2001)).

269. *Id.* at 139 (citing *Gulf Oil*, 275 N.L.R.B. at 485 n.7).

270. *Gulf Oil*, 275 N.L.R.B. at 485 (quoting *ILA Local 1911*, 236 N.L.R.B. 1439, 1440 (1978)).

271. *Int’l Longshoremen’s Ass’n, AFL-CIO v. Allied Int’l, Inc.*, 456 U.S. 222, 224 (1982) (relating that “when a purely secondary boycott ‘reasonably can be expected to threaten neutral parties with ruin or substantial loss’ . . . the pressure on secondary parties must be viewed as at least one of the objects of the boycott or the statutory prohibition would be rendered meaningless.”).

272. In theory, each violation of Section 8(b)(4)(D) could generate a 10(k) hearing. 29 U.S.C.A. 160(k) (2007). If many immigration rallies in a short time frame generate a correspondingly large number of 10(k) hearings, one can imagine a large, complex and nationally coordinated proceeding addressing the similar issues at play.

273. *Highway Truckdrivers & Helpers, Local 107*, 134 N.L.R.B. 1320, 1323 (1961).

pute is not of the type Congress meant to address in enacting the provision.

Immigration rallies are probably protected concerted activity under the NLRA. But if courts deem the rallies to be unlawful because they are directed at unoffending employers, labor organizations face potential liability. The difficult issue is whether courts would deem unoffending employers NLRA neutrals in the absence of a cognizable primary. It is also possible that courts could find the rallies primary with respect to certain employers or industries but not with respect to all employers or industries. It is difficult to discern limiting principles in this area. If the *ILA* case²⁷⁴ is any guide, however, the courts may not hesitate to impose liability, and labor organizations would be well-advised to proceed with caution. If employers suffering work-stoppages in connection with immigration rallies are deemed to be unoffending, however, NLRA injunctions offer protections that prudently guard against the spread of secondary activity.

V. THE SIGNIFICANCE OF THE NLRA CLASSIFICATION OF THE RALLIES

This article has argued that in most scenarios in which immigration rallies have arisen or are likely to arise, the underlying concerted conduct *arguably* will be either protected or prohibited by the NLRA. This is not to say that one cannot imagine immigration protests completely lacking a work nexus. For example, an increase in the cost of filing a document with the Immigration and Naturalization Service might be controversial and generate protest, but it would have no apparent nexus to the work relationship. However, if the cost were increased so substantially that a worker would be forced to give up a job and return to the worker's home country, it could take on a new dimension. If the worker were discharged by his or her employer in retaliation for engaging in a concerted protest over the increase in cost, it might be arguable that the discharge violated the NLRA.

Often, the purpose of classifying labor activity is to address remedial consequences flowing from a particular violation of the NLRA. In this regard, the unavailability of back pay under the NLRA for unauthorized workers unlawfully discharged for engaging in union activity has been widely discussed and criticized.²⁷⁵ But much of this criticism fails to take fully into account the now familiar reality that NLRA remedies are often ineffective in deterring employer unfair labor practices regardless of whether affected employees are fully entitled to back pay and

274. *Allied*, 456 U.S. 212.

275. See, e.g., Thomas J. Walsh, *Hoffman Plastic Compounds, Inc. v. NLRB: How the Supreme Court Eroded Labor Law and Workers Rights in the Name of Immigration Policy*, 21 *LAW & INEQ.* 313, 332 (2003).

reinstatement.²⁷⁶ Viewed from this perspective, the actual damage occasioned by the loss of these NLRA remedies is at least questionable, though the psychological impact of stripping these remedies is significant. The failure to provide NLRA remedies evinces on a deeper level a general legal sense that unauthorized workers are not fully “persons” deserving of legal protection.

But there is a structural aspect to federal labor law that reaches beyond case-specific remedies. As Professor Cynthia Estlund has noted, the protection of employee concerted activity matters in part because once subject to protection, the activity “cannot ordinarily be enjoined or prosecuted either criminally or civilly.”²⁷⁷ Indeed, any state law purporting to regulate conduct that is even *arguably* prohibited or protected by the NLRA is broadly preempted under the Supreme Court’s *Garmon* doctrine.²⁷⁸ Furthermore, if reviewing courts deem that Congress intentionally left certain labor conduct unregulated, the conduct is typically deemed not subject to regulation by the states—a judicial invention commonly known as the *Machinists* doctrine.²⁷⁹ Together, the *Garmon* and *Machinists* doctrines substantially remove states from the arena of labor relations.²⁸⁰ Whether Congress actually intended to oust states from labor relations this broadly defined is a matter of legitimate conjecture.²⁸¹ But it is clear that broad preemption remains the operating reality of our national labor policy. Legal issues surrounding preemption are not easy to assess and often seem, to borrow the eloquent words of Justice Frankfurter, “of a Delphic nature, to be translated into concreteness by the process of litigating elucidation.”²⁸² To the present day, when litigants attempt to break through this wall of presumptive state exclusion, they are routinely met with aggressive, perhaps instinctive, opposition from both the courts and the NLRB.²⁸³

276. See e.g., Michael Weiner, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52 UCLA L. REV. 1579, 1584 (2005); Paul Weiler, *Promises to Keep: Securing Workers Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1787-91 (1983).

277. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1608 (2002).

278. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

279. *Lodge 76, Int’l Ass’n of Machinists v. Wis. Employment Relations Bd.*, 427 U.S. 132, 153 (1972).

280. Matthew T. Bodie, *The Potential for State Labor Law: The New York Greengrocer Code of Conduct*, 21 HOFSTRA LAB. & EMP. L.J. 183, 190 (2003).

281. For a fascinating discussion along these lines, see Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355, 359 (1990).

282. *Int’l Ass’n of Machinists v. Gonzales*, 356 U.S. 617, 619 (1958).

283. For example, the NLRB’s unusual intervention in a Ninth Circuit case addressing whether a California “living wage” statute was preempted by the NLRA under the *Machinists* doctrine because it purported to dictate “labor peace.” Brief for NLRB as Amicus Curiae in Support of Plaintiffs-Appellees and in Support of Affirmance, *Chamber of Commerce of U.S. v. Lockyer* [hereinafter *Chamber of Commerce*], 364 F.3d 1154 (9th Cir. 2004) (Nos. 03-55166, 03-55169), 2003 WL 22330725. The bill stated, “[i]t is the policy of the state not to interfere with an employee’s choice about whether to join or to be represented by a labor union. For this reason, the state should not

Against this backdrop of the decades-old, delicate federal-state balance in labor relations loom the storm clouds of the immigration protest controversy. The issue is fairly simply stated. If unauthorized workers are statutory employees within the meaning of the NLRA, as the Supreme Court clearly held in *Sure-Tan, Inc. v. NLRB*,²⁸⁴ arguably protected activity in which they engage, including work-related concerted protests over immigration policy, should be insulated from state regulation under the *Garmon* preemption doctrine. In a similar vein, if those same protests are arguably unlawful secondary activity, *Garmon* should control. Even if the protests are not arguably protected or prohibited, as in the case of intermittent but primary work stoppages, they are nevertheless likely to be labor disputes within the meaning of the NLRA. In that event, the *Machinists* doctrine²⁸⁵ may operate to preempt state regulation. Thus, unless there is some underlying context of violence or another element implicating state prerogative,²⁸⁶ the states would seem precluded as a matter of law from regulating or enjoining these rallies.

If peaceful immigration protests are “labor disputes,”²⁸⁷ they are generally immune from federal court injunctions except in cases implicating a narrow class of injunctions specifically authorized under the NLRA.²⁸⁸ Thus, if in a particular immigration dispute the controversy is deemed to be both related to work and involving a primary employer, precedent dictates that the dispute is beyond the reach of federal injunc-

subsidize efforts by an employer to assist, promote, or deter union organizing. It is the intent of the Legislature in enacting this act to prohibit an employer from using state funds and facilities for the purpose of influencing employees to support or oppose unionization[.]” [the so-called market participation exception]. Cal. Legis. Serv. 872, 2000 Leg., Reg. Sess. (Cal. 2000). The NLRB argued that the ordinance was preempted and the Ninth Circuit substantially agreed. *Chamber of Commerce*, 364 F.3d at 1159, *rehearing granted, opinion withdrawn*, Chamber of Commerce of U.S. v. Lockyer, 408 F.3d 590 (9th Cir. 2005). Though the high-level litigation over the market participation exception continues, the debate underscores the continuing subtlety and relevance of preemption doctrine. See, e.g., *Healthcare Ass’n of N.Y. State v. Pataki*, 471 F.3d 87, 89-90 (2d Cir. 2006) (remanding the case for consideration of applicability of *Machinists* preemption to “market participant” regulation).

284. *Sure-Tan*, 467 U.S. at 893-94.

285. See *supra* text accompanying note 283.

286. See *San Diego Bldg Trades Council v. Garmon*, 359 U.S. 236, 243-44 (1959) (noting that under labor preemption principles, States retain the right to regulate conduct falling within their historic police powers).

287. Section 13(c) of the Norris-LaGuardia Act defines a “labor dispute” as “any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.” 29 U.S.C.A. § 113(c) (2007). The NLRA defines “labor dispute” in precisely the same manner except that “tenure” is added to “terms or conditions” of employment as being among the types of controversy taken cognizance of (the NLRA also deletes “or not” from the terms “whether the disputants stand in the proximate relation of employer and employee.”) 29 U.S.C.A. § 152(9) (2007). Immediate deportation would appear to implicate “tenure” of employment.

288. *Burlington N. R.R. Co. v. Bhd. Maint. of Way Employees*, 481 U.S. 429, 440-44 (1987).

tion. Indeed, in the non-NLRA context the dispute would be beyond federal injunctive authority even if secondary.²⁸⁹

Peaceful immigration rallies and similar protest conduct appear, accordingly, not to be subject to injunction by either the states or by the federal government, and appear further not subject to criminalization by the states.

Immigration policy, traditionally a federal sphere of authority, is also increasingly being enforced by state and local law enforcement actors²⁹⁰ as a result of congressional delegation of federal immigration enforcement to the states.²⁹¹ While clashes between federal labor and employment law and federal immigration policy have generally invited scrutiny,²⁹² the dual *enforcement* of immigration law by federal and state actors may create unique kinds of problems that are likely to generate difficult preemption questions. For example, in a non-immigration context, state interference with an employee rally protected under the NLRA could be enjoined at the request of the NLRB.²⁹³ Assessing whether state law enforcement agents could lawfully interfere with work-related immigration rallies that are arguably protected by the NLRA would be a complex undertaking.

The expanded presence of federal immigration enforcement in private workplaces makes the prospect of a larger role for state law enforcement in workplace immigration matters more likely. A recent widely-reported immigration raid highlights the problem. In December 2006, federal agents of the Department of Homeland Security's Immigration and Customs Enforcement division (the ICE) conducted raids at

289. *Id.* at 440. *But see* *Nw. Airlines Corp. v. Association of Flight Attendants*, 349 B.R. 338, 344 (S.D.N.Y. 2006) (holding that in limited instances under the Railway Labor Act, Federal injunction may issue to enjoin strike by union against bankrupt air carrier).

290. See HANNAH GLADSTEIN ET AL., MIGRATION POLICY INSTITUTE, *BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE*, 2002-2004, at 4 (2005), http://www.migrationpolicy.org/pubs/MPI_report_Blurring_the_Lines_120805.pdf (last visited August 26, 2007).

291. For example, H.R. 4437, passed by the House but not the Senate in the 109th Congress, sought to expand the utilization of State and Local authorities by suspending the requirement under current law that local enforcement be undertaken only after a formal memorandum of understanding between the Federal government and Local law enforcement agency has been executed. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 222 (2006). While the ultimate fate of the bill—including its local enforcement features—is uncertain in light of changed political realities, the concept of local involvement in immigration matters has been on the ascendancy in Congress since the passage of the Illegal Immigration Reform and Immigrant Responsibility Act in 1996.

292. See Katherine E. Seitz, *Enter at Your Own Risk: The Impact of Hoffman Plastic Compounds v. National Labor Relations Board on the Undocumented Worker*, 82 N.C. L. REV. 366, 406-10 (2003).

293. *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971). The NLRB enjoys implied authority to enjoin state action where its Federal power preempts the field. The purpose of the NLRA is to obtain uniform application of substantive rules and to avoid conflicts likely to result from Local procedures and attitudes towards labor controversies.

meatpacking plants in six states.²⁹⁴ The multi-city sweep by 1000 agents appeared solely associated with a discrete federal enforcement action directed at identity fraud.²⁹⁵ ICE arrested 1282 “suspected illegal immigrants” in connection with the raids, which apparently represented 18 percent of the entire morning shift of the targeted work group.²⁹⁶ The employer whose employees were the subjects of the sweep, Swift & Co., had filed an action in a federal district court in advance of the sweep seeking declaratory and injunctive relief to prevent it from going forward.²⁹⁷ Swift argued that its participation in the upcoming mass removal of unauthorized workers pursuant to a “Basic Pilot Program” of the federal government could subject it to criminal or civil liability.²⁹⁸ Swift could have avoided the raids altogether by simply agreeing to hand over its workers’ documents to the federal government en masse under the ICE’s “Mutual Agreement between Government and Employers” program, known under the acronym IMAGE, so that the Government could itself review the documents for fraudulent information.²⁹⁹

The existence of the Basic Pilot Project demonstrates widespread federal government enforcement efforts within the workplace. But the federal government cannot enforce or even monitor such far flung programs by itself. Outside of the workplace setting, about 600,000 illegal immigrants have completely ignored actual deportation orders, and a major ICE push to arrest these most flagrant of immigration law violators has netted only about 13,000 arrests since June 2006.³⁰⁰ The Swift raids required 1000 agents to arrest 1282 alleged unauthorized workers.³⁰¹ This may seem like a large number of arrests, but the ratios of arrests to potential “targets” should compel rational cynicism as to the ability of the federal government to effectively pursue or prosecute apparent immigration violations. This practical inability of federal-only enforcement was the obvious reason for the initial congressional authorization for

294. Spencer S. Hsu & Krissah Williams, *Illegal Workers Arrested in 6-State ID Theft Sweep*, WASH. POST, Dec. 13, 2006, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/12/AR2006121200525.html>.

295. *Id.*

296. Spencer S. Hsu, *ICE Sweep Was Largest Ever Against One Firm*, WASH. POST, Dec. 14, 2006, at A9, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/13/AR2006121301947.html>.

297. *Swift & Co. v. Immigration & Customs Enforcement*, No. 2:06-CV-314-J (N.D. Tex. Dec. 7, 2006) (Order Denying Preliminary Injunction).

298. *Id.* at 2. According to the court’s order Swift had previously agreed to participate in the Basic Pilot Project, which the court described as “a program designed to permit employers to determine whether newly hired employees are legally authorized to work in the United States.”

299. Darryl Fears & Krissah Williams, *In Exchange for Records, Fewer Immigration Raids: Businesses Skeptical of New Federal Program*, WASH. POST, Jan. 29, 2007, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/28/AR2007012801172.html>.

300. Gillian Flaccus, *Immigration Sweep Yields 761 Arrests*, CBS NEWS, Jan. 23, 2007, <http://www.cbsnews.com/stories/2007/01/23/ap/national/mainD8MR6PR00.shtml>.

301. Hsu & Williams, *supra* note 294.

local involvement in immigration enforcement, pursuant to Section 287(g) of the Immigration and Nationality Act.³⁰²

The plausible and even likely outcome of federal government manpower limitations for immigration enforcement will be increased state and local involvement in the workplace and, quite possibly, in enforcement actions impinging on conduct arguably falling under the jurisdiction of the NLRB. It is not, for example, difficult to imagine state agents descending upon large immigration rallies protesting working conditions pursuant to powers ostensibly delegated to the agents by the federal government.³⁰³ A raid of that type would raise at least the risk that a court would conclude that the rally was protected under federal labor law and therefore outside of state jurisdiction, and that the state agents were in any event acting outside of the scope of their limited federal mandate. Because of these kinds of risks, it seems difficult to presume that Congress intended its limited delegation of federal immigration enforcement authority to extend to arguable NLRA activity.

In addition to preemption problems occasioned by situational clashes of federal labor law and state enforcement of immigration laws, there is also the better appreciated direct clash of the federal policies underlying these laws. Notwithstanding *Hoffman Plastic Compounds, Inc. v. NLRB*,³⁰⁴ Congress obviously did not intend that this conflict exist. As the Eleventh Circuit showed in *Patel v. Quality Inn South*,³⁰⁵ and as Justice Breyer emphasized in his dissent in *Hoffman*,³⁰⁶ it is unusually evident from the congressional record that the most recent incarnation of the immigration law, the Immigration Reform and Control Act of 1986 (IRCA),³⁰⁷ was *not* meant to interfere in any respect with the enforcement authority of federal or state agencies administering almost all major workplace laws:

In addition, the [Education and Labor] committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as the Occupational Safety and

302. James Jay Carafano, *Build on Section 287(g) of the Immigration and Nationality Act to Boost State and Local Immigration Enforcement*, THE HERITAGE FOUNDATION, Sept. 14, 2006, <http://www.heritage.org/Research/Immigration/wml212.cfm>.

303. "On the April 10 [2006] edition of Fox News' *Your World With Neil Cavuto*, during a discussion of nationwide protests of proposed immigration legislation, guest host David Asman wondered: 'with so many illegals hitting the streets, is this the perfect time to round up these law-breakers and ship them out?' As Asman spoke, the onscreen text read 'round them up?' Throughout the following segment . . . the onscreen text read: 'perfect chance to arrest illegal immigrants?'" Posting of B.A. to Media Matters for America, <http://mediamatters.org/items/200604110002> (Apr. 17, 2006, 10:48 EST). It is unclear whether there was any discussion as to how the rally participants could be arrested.

304. 535 U.S. 137 (2002).

305. 846 F.2d 700, 704 (11th Cir. 1988).

306. *Hoffman Plastic Compounds, Inc., v. NLRB*, 535 U.S. 137, 157 (2002) (Breyer, J., dissenting).

307. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as 8 U.S.C.A. § 1101 (2007)).

Health Administration, the Wage and Hour Division of the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, or Labor arbitrators, in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.³⁰⁸

Nevertheless, the *Hoffman* Court found conflict between awarding NLRA remedies and the intent of Congress in passing the IRCA.³⁰⁹ Because the basis of that finding is so resoundingly out of step with manifest congressional intent and is therefore a principle of uncertain origin, understandable confusion has descended on, in particular, the labor law regime. Still, it is important to remember what the Court did *not* say. It did not say that unauthorized workers are presumptively not statutory workers, and how could it honestly do so? Even Axis prisoners of war at the height of World War II were found to be statutory employees under federal law.³¹⁰ The Court also did not say that any aspect of the NLRA beyond eligibility for reinstatement and back pay is inapplicable to unauthorized workers. Thus, under *Hoffman*, unauthorized workers retain the right to form and join unions and to engage in protected concerted activity without a union, even if violation of that right has no obvious remedial consequence.

Looking at the situation honestly, it must be acknowledged that neither the immigration nor labor regime speaks precisely to the issue of how to manage a labor system that is to an unprecedented extent populated by unauthorized workers. *Hoffman* merely brought to the fore the expanding collision of these policies that can no longer be ignored: there are millions of unauthorized workers in our economy and, when all is said and done, they are statutory workers. The *Hoffman* Court essentially recognized these deep tensions and responded irrationally by failing to honestly address the labor law landscape as it actually existed—one in which unauthorized workers are fully covered by the NLRA. This honest conclusion would have presented Congress with a choice. In response to such an opinion, Congress might have exempted unauthorized workers from NLRA coverage entirely, or it might have modified the statute partially or conditionally.

CONCLUSION

The immigration rallies in early 2006 glaringly revealed the depth of “the immigration problem.” The sheer enormity of the rallies has ex-

308. H.R. Rep. NO. 99-682, pt. 2, at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5758.

309. *Hoffman Plastics*, 535 U.S. at 149-50.

310. *Patel*, 846 F.2d at 703.

plicitly exposed conflicts between labor and immigration law that the courts have probably tacitly understood for some time. In this new environment, mass immigration protests over potential loss of work from increased criminalization and deportation of unauthorized workers strongly resemble “traditional” collective workplace actions.

We could choose one of two avenues for contending with mass protest phenomena. On the one hand, assuming the rallies were primarily attended by unauthorized workers, we could simply attempt to arrest and deport rally participants. While in some respects this is not as daunting a prospect as arresting and deporting all unauthorized workers and undocumented immigrants present in the country, in other respects it is more daunting—hundreds of thousands of such workers could be subject to arrest in very short windows of time. This raises, among other things, the specter of completely inadequate detention facilities; the Government has already proven unable to house arrestees from much more limited ICE actions.³¹¹ Aside from the impracticality of the idea, it would be a spectacularly bad policy choice, one reminiscent of early American societal responses to collective activity by citizen-workers, which the government wisely abandoned by the middle of the nineteenth century.³¹²

If we wish to make decisions worthy of the twenty-first century, we should take as our point of departure successful twentieth, rather than unsuccessful nineteenth, century ideas. Thus, in the short term we can try to maintain the integrity of the present, twentieth century system. First, it should remain the case that the states have the right to protect their citizens from violence arising out of concerted immigration protests (or out of any other form of mass protest). Second, immigration protest activity that is arguably protected or prohibited by the NLRA should be immune from state regulation, in accord with present preemption doctrine; and, in the event states attempt such regulation, including the use of injunctions, the NLRB should intervene to suspend the regulation pursuant to the Supreme Court’s *Nash Finch* doctrine.³¹³ Third, immigration rallies falling within the broad definition of “labor dispute” under both the Norris-LaGuardia Act and the NLRA should be immune from federal injunction, in accord with present labor law.³¹⁴ Fourth, the NLRB should afford NLRA protection where it is due. It is understandable that the *Hoffman* opinion may have generated general reluctance on the part of

311. Spenser S. Hsu & Sylvia Moreno, *Border Policy’s Success Strains Resources: Tent City in Texas Among Immigrant Holding Sites Drawing Criticism*, WASH. POST, Feb. 2, 2007, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/01/AR2007020102238>.

312. COX ET AL., *supra* note 183, at 8.

313. If the NLRB is willing to extend its *Nash-Finch* resources to block the effectuation of “labor peace provisions” attendant to local “living wage” laws, *see supra* text accompanying note 283, surely it should be willing to take the same action when, as here, the potential for *real* industrial strife exists.

314. *See supra* note 287.

the NLRB to extend NLRA protection to unauthorized workers because traditional back pay and reinstatement remedies are unavailable. But NLRB findings of NLRA violations in mass protest scenarios could prove quite effective in maintaining industrial peace even in the absence of traditional NLRA remedies. Employers and state and local governmental actors may be less likely to act impulsively in an NLRA statutory environment.³¹⁵ Fifth, the NLRB should pursue appropriate injunctions to promptly enforce secondary boycott law under the NLRA. Such injunctive actions will act as a brake on state and local law enforcement's unwarranted and uninformed interference with protected concerted activity. Experience shows that the allowance of such activity within prescribed boundaries prevents a bad situation from becoming worse.

The designers of the labor law paradigm intended to obviate the need for industrial war and to regulate mass agitation in a manner that was protective of interstate commerce.³¹⁶ Can the immigration regime make the same claim? That regime offers the language and policy of concrete enforcement actions as the only appropriate societal response to the widespread presence of unauthorized workers in the national economy. Immigration law enforcement addresses whether particular workers ought to be arrested and deported. Those kinds of actions cannot address (and were not designed to address) the consequences for the economy of mass arrest and deportation of immigrant labor. The societal responses to concerted labor protest should draw heavily on national industrial expertise. It is easy to say, "Arrest everybody."³¹⁷ What comes next?

Congress must act soon³¹⁸ to address in good faith the many tensions and fissures in the labor-immigration amalgam. That might be

315. Anyone doubting the potential for Local law enforcement miscalculating in its attempts to manage immigration rallies would be well served to review the chaos surrounding an immigration rally of only 25,000 held in Los Angeles on May 1, 2007. During that rally, the Los Angeles police allegedly used "batons and more than 200 rounds of rubber bullets to clear out a park where immigration rights activists were rallying," a number of journalists were apparently injured, and eight police officers were hurt. *Post-Rally Furor Grows in L.A.: City's Mayor Cuts Short Trip to Mexico To Deal With Fallout Over Cops' Use Of Force*, CBS NEWS, May 4, 2007, <http://www.cbsnews.com/stories/2007/05/04/national/main2762612.shtml>. One wonders what could have transpired if similar clashes had broken out during the previous year's rally in L.A. of 500,000 people.

316. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41-43 (1937).

317. "Arrest and deportation" is the narrow and overriding policy of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546; *see, e.g.*, § 303, 110 Stat. at 585-87.

318. As this article is being prepared for publication, it is widely assumed that Congress will not be in a position to attempt immigration reform until 2009. *See, e.g.*, Will Sullivan, *This Bargain Wouldn't Sell: Everyone Found Something to Dislike About the 'Grand Compromise' on Immigration, So the Deal Collapsed and a Dysfunctional Status Quo Endures*, U.S. NEWS & WORLD REP., June 18, 2007, at 22, available at http://www.usnews.com/usnews/news/articles/070610/18immigration.htm?s_cid=rss:18immigration.htm. The assumption may be based on a very narrow view of politics—events on the ground may not know to yield to the subtleties of presidential politics.

accomplished by major amendments to either or both regimes. Or, as Professor Jennifer Gordon has argued, perhaps the idea that legal tinkering can have any real impact on macro-migration trends is pure fantasy.³¹⁹ Coping with macro-migration may require the creation of a “transnational” model which addresses these hybrid problems in an entirely different way by creating a new form of “labor citizenship.”³²⁰ Until Congress acts in some fashion, however, it is unprincipled to pretend that existing labor law fails to address familiar labor relations problems. Undoubtedly, it will be politically unpopular in some quarters to extend the protections and prohibitions of labor law to immigration protest activity. Indeed, little else can explain the *Hoffman* opinion. Yet it is precisely when we are in the midst of societal challenge that we should not enervate our better angels; we should reach out and adhere to the rule of law.

319. Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 561-62 (2007).

320. *Id.* at 563.

