Article

Profit, Mission, and Protest at Work

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The classic understanding of capitalism maintains that the social responsibility of business is to increase its profits. But in the last decade, many firms have announced commitments to various social justice issues, folding them into corporate mission statements, codes of corporate social responsibility, and branding. Firms engaging in so-called "woke capitalism" signal their virtuous support for progressive social causes favored by both their consumer base and their idealistic young workers. This has become particularly important in a tight labor market: by targeting workers' values, savvy firms increase recruiting yields, enhance productivity, and reduce training costs as retention rates rise, while simultaneously providing better service for customers who share the workers' values and are attracted to the brand—all of which translate into larger profits.

When workers undertake employment at these firms, they assume that the firm's social justice commitments are both authentic and enforceable and that they will dedicate their labor toward producing goods and services that are consistent with their values. Indeed, the Wall Street Journal *and the* Harvard Business Review *recently characterized the effort by corporations to reframe their corporate commitments to purposes beyond profit-maximization as forging a "new social contract" with employees, offering workers a sense of higher purpose at work and an opportunity to make a positive difference in the world in exchange for deeper engagement and, in some cases, lower compensation.*

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Unfortunately, many representations of corporate commitment to political and social agendas are anemic at best, and inauthentic at worst. When workers learn that the firm's commitment to its version of woke capitalism is weak or nonexistent and that they have invested their single greatest resource—their labor—towards the unrealized goal, they have protested around topics spanning social justice, environmental, and political arenas. Because most nonunion workers are employed at will, and because labor and employment law have long bowed to firms' managerial prerogative to control and to alter the entrepreneurial direction of the firm as necessary in order to thrive in a competitive market, workers who lack explicit contractual protection can be disciplined or fired for engaging in such protests.

This Article outlines a proposal for interpretation of the National Labor Relations Act that would protect workers against retaliation where employers deliberately utilize social justice commitments in mission statements, CSR codes, and brand marketing campaigns as a carrot to attract and retain workers, effectively converting those commitments into a form of fringe benefit or a working condition that relates to workers' material self-interest. At stake is a clash between workers' statutory rights under the labor laws to speak collectively at work, and firms' First Amendment rights to control the public presentation of their brand, even when doing so is duplicitous. As economic and political power becomes increasingly concentrated in the hands of private parties, including large firms, collective workplace protest seeking to hold firms to their marketing messages and mission statements offers the greatest possibility for worker influence and voice. Protecting workers' voices also serves the public interest: firms should not be permitted to use the First Amendment as a sword to leverage social justice movements to increase corporate profit while simultaneously blocking real change.

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INTRODUCTION

The classic understanding of capitalism maintains that the social responsibility of business is to increase its profits. Thus, a corporation's primary goal is to serve the financial interests of its shareholders.[1] But in the last decade, firms have increasingly made public commitments in support of social justice movements like Black Lives Matter (BLM), #MeToo, and Lesbian, Gay, Bisexual, Transgender, Queer/Questioning Plus (LGBTQ+) rights.[2] In 2018, *New York Times* columnist Ross Douthat coined the term "woke capitalism" to describe the trend.[3] Douthat ob-

1. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133–36 (40th anniversary ed. 2002) (stating that in a free economy, a company's only social responsibility is to increase profits); Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/2C28-QNRR] (asserting that corporate executives' responsibility is to run the business to make money for the business owners).

2. *See, e.g.*, Tracy Jan et al., *Corporate America's $50 Billion Promise*, WASH. POST (Aug. 23, 2021), https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice [https://perma.cc/8ZN2-YK7H] (describing the wave of corporate statements supporting BLM following George Floyd's murder); Yvette Lynne Bonaparte, *Meeting the Moment: Black Lives Matter, Racial Inequality, Corporate Messaging, and Rebranding*, ADVERT. & SOC'Y Q., Fall 2020, https://muse.jhu.edu/article/769127 [https://perma.cc/6SHS-N5KY] (describing messaging by Nike, Starbucks, and others in support of BLM); Nicole Torres, *#MeToo's Legacy*, HARV. BUS. REV., Jan.–Feb. 2020, https://hbr.org/2020/01/metoos-legacy [https://perma.cc/QX4F-7SE5] (discussing aftermath of #MeToo and its impact on corporate culture); Yvette Lynne Bonaparte & Martha E. Reeves, *Cause-Related Advertising, the #MeToo Movement, and Implications for Marketers*, ADVERT. & SOC'Y Q., Winter 2020, https://muse.jhu.edu/article/780903 [https://perma.cc/5SAS-BLFU] (discussing cause-related advertising campaigns focusing on issues important to women and the #MeToo movement); *Disney Parks Releases New Statement in Support of LGBTQIA+ Cast, Crew, and Guests Opposing Florida's 'Don't Say Gay' Bill*, WDWMAGIC (Mar. 22, 2022), https://www.wdwmagic.com/other/walt-disney-company/news/22mar2022-disney-parks-releases-new-statement-in-support-of-lgbtqia-cast,-crew-guests-and-fans.htm [https://perma.cc/J7D6-89YV] (describing Disney's messaging in support of the LGBTQIA+ community).

3. Ross Douthat, Opinion, *The Rise of Woke Capital*, N.Y. TIMES (Feb. 28, 2018), https://www.nytimes.com/2018/02/28/opinion/corporate-america-activism.html [https://perma.cc/V6DX-LKK9]. Douthat is an outspoken critic of the trend, viewing it as superficial cultural leftism designed to advance corporate profit.

served that companies signal their virtuous support for progressive social causes favored by their consumer base and their workers in an effort to attract them and retain them, rather than as a part of an authentic commitment to do good.[4]

Whether woke capitalism represents an authentic commitment to social justice issues or is simply lip service, corporate social justice commitments have powerful influences on the corporate bottom line. The COVID-19 pandemic intensified market competition for labor as workers from the most privileged white-collar office workers to front-line essential workers re-examined their priorities and demanded more from work.[5] Employers responded by redesigning recruitment and retention strategies.[6] By targeting prospective workers' values in mission statements, corporate social responsibility codes, and brand development and marketing strategies, savvy firms found that they could increase recruiting yields, enhance productivity, improve retention rates, and reduce training costs, while simultaneously providing better service for customers—all of which translate into larger profits.[7] A "new social contract" emerged in which firms offer

4. *Id.* "Woke capitalism" is a pejorative reference to an extension of Environmental, Social, and Governance (ESG) approaches to corporate management and investment, which are designed to enhance the long-term value of the corporation while simultaneously doing good for society. ESG initiatives include commitments to diversity, equity, and inclusion or sustainable production, and are generally responsive to market demand from investors, consumers, and employees. *See* Brian Stafford, *ESG Critics Must Understand That 'Woke Capitalism' Is Driven by Supply and Demand*, FORTUNE (Dec. 27, 2022), https://fortune.com/2022/12/27/esg-critics-woke-capitalism-supply-demand-investing-brian-stafford [https://perma.cc/W5NZ-3N9F].

5. *See* Neil Irwin, *Workers Are Gaining Leverage over Employers Right Before Our Eyes*, N.Y. TIMES (June 5, 2021), https://www.nytimes.com/2021/06/05/upshot/jobs-rising-wages.html [https://perma.cc/GJB5-QW88] (analyzing the erosion of employer power as a result of demographic shifts, sustained low unemployment, and pandemic-era reluctance to enter or stay in the labor market).

6. *See* Katy George, *Competing in the New Talent Market*, HARV. BUS. REV. (Oct. 3, 2022), https://hbr.org/2022/10/competing-in-the-new-talent-market [https://perma.cc/J6G9-DRD3] (noting the pandemic accelerated workers' desire for meaning and flexibility, pushing organizations to examine their methods of talent recruitment, development, and retention); Braedon Leslie et al., *Generation Z Perceptions of a Positive Workplace Environment*, 33 EMP. RESPS. & RTS. J. 171, 184 (2021) (recommending employers invest in a company culture reflecting Generation Z values of high ethical standards).

7. *See infra* notes 101–26 and accompanying text.

workers a sense of purpose and meaning at work and an opportunity to make a positive difference in the world in exchange for deeper engagement and loyalty to the firm.[8]

When workers with high expectations undertake employment at these firms, they assume that the firm's social justice commitments are authentic and that they will dedicate their labor toward producing goods and services consistent with their values.[9] Unfortunately, many representations of corporate commitment to social agendas are anemic at best, and inauthentic at worst.[10] When workers learn that the corporate mission is an empty promise, they suffer both moral and material harm.[11] Frustrated workers have made clear their desire for voice on how their labor is deployed, mounting protests against deviation from corporate mission and risking discharge to make their voices heard.[12] Consider two recent examples.

In 2018, twenty thousand Google workers conducted an internationally synchronized virtual walkout challenging the ethical uses to which Google technologies were being deployed. Drawn to employment at Google in part because of its commitment to developing ethical technology, its refusal to develop technologies that contravene widely accepted principles of inter-

8. *Answering the Call for a New Social Contract*, WALL ST. J., https://partners.wsj.com/servicenow/go-with-the-workflow/new-social-contract [https://perma.cc/6LL2-3T3S]; *see also* Shawn Achor et al., *9 out of 10 People Are Willing to Earn Less Money to Do More Meaningful Work*, HARV. BUS. REV. (Nov. 6, 2018), https://hbr.org/2018/11/9-out-of-10-people-are-willing-to-earn-less-money-to-do-more-meaningful-work [https://perma.cc/JRP5-86RB] (describing the phenomenon as "a new order in which people demand meaning from work, and in return give more deeply and freely to those organizations that provide it").

9. *See* Achor et al., *supra* note 8 (stating that when employees have meaningful work, they "work harder and quit less").

10. *See* Kate Conger & Daisuke Wakabayashi, *Google Employees Protest Secret Work on Censored Search Engine for China*, N.Y. TIMES (Aug. 16, 2018), https://www.nytimes.com/2018/08/16/technology/google-employees-protest-search-censored-china.html [https://perma.cc/6TXK-VVGL] (discussing Google employees accusing Google of violating its promise to use artificial intelligence in only "socially beneficial" ways by "helping China suppress the free flow of information").

11. *See infra* Part IV.B.

12. *See* Conger & Wakabayashi, *supra* note 10 (reporting on Google employees protesting their employer's actions).

national law and human rights, and its stated opposition to internet censorship in China,[13] workers were appalled to learn that the company had a contract to develop a censored search engine for the Chinese market (Project Dragonfly) on which they had unknowingly labored.[14] Over the next year and a half, Google protesters demanded corporate transparency, sought to hold Google to its commitment to the ethical uses of technology, and criticized Google's use of technology to exacerbate human rights violations.[15] Google responded by firing four of the protesting workers, asserting that the protests were unprotected purely political complaints unrelated to workers' material interests at work.[16]

In 2020, workers at Amazon-owned Whole Foods mounted protests against the employer's policy prohibiting them from wearing Black Lives Matters masks at work in the wake of George Floyd's murder by a white police officer.[17] Workers attracted by Whole Foods' commitment to sustainable business practices, community involvement, and an open, transparent

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13. *See* Sundar Pichai, *AI at Google: Our Principles*, GOOGLE: THE KEYWORD (June 7, 2018), https://www.blog.google/technology/ai/ai-principles [https://perma.cc/63SR-L9RC] (stating Google's commitment not to develop AI technology that "cause[s] overall harm"); Conger & Wakabayashi, *supra* note 10 (noting Google's 2010 decision to remove its search engine from use in China after discovering that Chinese hackers had attacked Google's infrastructure to access human rights activists' Gmail accounts).

14. Conger & Wakabayashi, *supra* note 10 (stating that Google employees demanded more transparency regarding the "ethical consequences of their work").

15. *See* Shirin Ghaffary, *Google Employees Are Demanding an End to the Company's Work with Agencies Like CBP and ICE*, VOX (Aug. 14, 2019), https://www.vox.com/2019/8/14/20805562/human-rights-concerns-google-employees-petition-cbp-ice [https://perma.cc/RNQ6-K7LA] (reporting that employees argued that ICE, CBP, and the Office of Refugee Resettlement violated human rights law and signed a petition asking Google not to work with or for them).

16. *See* Martin Coulter, *Google Said Employees Don't Have a Right* [*to*] [sic] *Protest Its Choice of Customers in the First Day of the 'Thanksgiving Four' Trial*, BUS. INSIDER (Aug. 25, 2021), https://www.businessinsider.com/google-thanksgiving-four-trial-protest-2021-8 [https://perma.cc/2P2B-U3W5] (reporting that Google argued its terminated employees engaged in political protest using Google's government contracts as leverage).

17. *See* Frith v. Whole Foods Mkt., Inc., 38 F.4th 263, 268 (1st Cir. 2022) (noting that after Whole Foods banned employees from wearing BLM masks during their shifts, some employees continued to wear them to challenge Whole Foods' policy against them).

workplace culture that values all stakeholders were initially further inspired by Amazon CEO Jeff Bezos's public statements of support for the fight against racial injustice and Whole Foods' alignment with the anti-racist protests occurring across the country in the wake of Floyd's murder.[18] The Whole Foods Markets' website featured prominent contemporaneous declarations that read: "Racism has no place here" and "We support the black community and meaningful change in the world."[19] But when workers donned BLM masks to signal their support for the Black community and to protest racial discrimination they had experienced in the workplace, Whole Foods responded by disciplining and terminating them.[20] Like Google, Whole Foods argued that the BLM protests were political in nature and unconnected to working conditions at Whole Foods, and accordingly the workers who participated in them were unprotected at law.[21]

Under existing law, Google and Whole Foods were on solid ground. Because most nonunion workers are employed at will, workers who lack explicit contractual protection can be disciplined or fired for engaging in such collective protests.[22] Although the National Labor Relations Act (NLRA)[23] protects collective activity by nonunionized and unionized workers alike, it

18. Whole Foods' value proposition is to sell organic, natural, healthy food products to customers who are passionate about food and the environment. Its sourcing emphasizes purchases from local farmers and screens out food containing common ingredients that are either unhealthy or damaging to the environment. *See* Michael E. Porter & Mark R. Kramer, *Strategy & Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV., Dec. 2006, at 78, 88 (discussing Whole Foods' value proposition to customers).

19. *Frith*, 38 F.4th at 275 n.11.

20. *See id.* at 268 (noting that Whole Foods "sent home without pay" employees who wore BLM masks and refused to remove them and assigned disciplinary points to those employees, which accrue to result in termination).

21. *See* Whole Foods Mkt., Inc., 01-CA-263079, at 53, 59 (N.L.R.B. Dec. 20, 2023) (finding no nexus between message conveyed by the masks and the "advancement of mutual aid and protection in the workplace"); Memorandum and Order Granting Motion for Summary Judgment, Kinzer v. Whole Foods Mkt., Inc., 652 F. Supp. 3d 185 (D. Mass. Jan. 23, 2023).

22. *See* Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082, 1085 (1984) (stating the employment at will doctrine eliminated workers' rights that were previously created and upheld in employment contracts).

23. 29 U.S.C. §§ 151–169.

offers no protection for workers whose protests extend beyond traditional areas of worker concern: wages, hours, and a limited array of working conditions connected to workers' material self-interest.[24] Moreover, labor law has long bowed to firms' managerial prerogative to control and alter the entrepreneurial direction of the firm to thrive in a competitive market, meaning that the mission of the firm is solely the employer's prerogative.[25]

This Article argues that the law should protect workers' protests challenging the authenticity of their employers' embrace of a social justice mission. The NLRA is the only source of protection for collective worker speech and actions that are potentially disruptive.[26] The Act protects such activity in order to empower workers and bring democracy to the workplace, core values promoted by the NLRA's commitment to collective bargaining as a route to labor peace.[27] The NLRA reflects the meaning of work in the United States, where paid work has historically signified dignity, autonomy, and citizenship.[28] To work is "to participate in the public conversation about democracy, to *belong*."[29] Work

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24. *See infra* notes 169–73 and accompanying text.

25. *See infra* notes 203–12, 215–32 and accompanying text; JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 8–9 (1983) (discussing courts' assumption that employers control the critical decisions in an enterprise).

26. *See* Frith v. Whole Foods Mkt., Inc., 38 F.4th 263, 275 (1st Cir. 2022) (holding that Title VII of the Civil Rights Act of 1964 did not protect the Whole Foods workers).

27. *See* Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689, 698 ("Collective bargaining . . . was prized as a process for extending constitutional values by bringing 'an element of democracy into the government of industry.'" (quoting H.R. DOC. NO. 380, at 805 (1902)). Senator Wagner, the principal proponent of the NLRA, hoped to support the larger political democracy by injecting a measure of democracy into the workplace. Said Wagner: "[T]he struggle for a voice in industry through the processes of collective bargaining is at the heart of the struggle for the preservation of political as well as economic democracy in America." Robert F. Wagner, *"The Ideal Industrial State"—As Wagner Sees It*, N.Y. TIMES, May 9, 1937, at 8, 23.

28. *See* Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 530–34 (1997); JOHN W. BUDD, THE THOUGHT OF WORK 1–18 (2011) (describing work's fundamental importance to the human condition).

29. Marion Crain, *Work Matters*, 19 KAN. J.L. & PUB. POL'Y 365, 372 (2010).

also shapes our identity, not only at work but beyond the increasingly porous boundaries of the workplace.[30]

As corporations step into the political sphere in order to enhance profits, their power is brought to bear on the democratic process both directly and indirectly, through the suppression of workers' political voice.[31] Firms assert an inherent property right to determine mission and First Amendment rights to market that mission to the public through branding, marketing, and public statements.[32] Further, they contend that these rights necessarily encompass the power to suppress speech by and retaliate against workers who challenge the authenticity of the corporate mission.[33] When corporations deploy the First Amendment not only as a shield protecting their rights to speak on social and political issues, but also as a sword suppressing workers' rights to do the same, they frustrate the NLRA's goals of worker empowerment and workplace democracy. Further, they suppress criticism by those who have the most accurate insider knowledge about their practices and products and the best incentives to call them out on discrepancies between their political speech and the on-the-ground realities.[34]

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30. *See* Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1890–91 (2000) (discussing how work infuses into people's behavior, thoughts, and sense of self).

31. For an example of the democratic accountability, see *infra* notes 315–23 and accompanying text.

32. *See* ATLESON, *supra* note 25, at 15–16, 94–96, 111–35 (describing deference accorded at law to managerial prerogative); Nike, Inc. v. Kasky, 539 U.S. 654, 664 (2003) (Stevens, J., concurring) (per curiam) (raising but not resolving the question of the scope of First Amendment protection for corporate speech on matters of public concern).

33. For an example of an employer's response to push back by employees, see *infra* notes 245–52 and accompanying text.

34. The Court has acknowledged the importance of protecting employee speech in the public sector because of its function in holding government agencies accountable to the public. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 572 (1968) (observing that teachers are the most likely community members to have informed opinions about the funding and operation of schools); Pauline T. Kim, *Market Norms and Constitutional Values in the Government Workplace*, 94 N.C. L. REV. 601, 641 (2016) (arguing that the public has a particularly strong interest in hearing government employee speech because it functions to draw public attention to abuses of government power, and noting that employee speech that reveals ineptitude or wrong-doing is "valuable precisely because it is disruptive").

This Article explores how the NLRA might shift to encompass and protect collective worker protest aimed at challenging an inauthentic corporate commitment to social justice. Part I describes the rise of the purpose-driven firm and how corporate mission, marketing, and branding have become integrated with employee recruitment and retention in workforce management. Part II explores why the law governing workplace collective action, the NLRA, does not currently offer protection to workers who seek to challenge inauthentic corporate mission statements. Part III delves more deeply into the law's effort to mediate the clash between workers' social justice speech and employer rights to control the public presentation of the corporate image. Part IV lays out arguments for an interpretation of the NLRA that could offer a framework for protection. I suggest that the new social contract be enforceable when an employer publicly proclaims its social justice commitment in a mission statement, corporate social responsibility code, or other public affirmation and deploys that purpose to attract or retain workers. If the employer reneges on its commitment in its dealings with workers, protest activity should be protected under the NLRA because the social justice commitment is a form of compensation or a working condition central to the labor bargain the firm has struck with its workers.

I. THE RISE OF THE PURPOSE-DRIVEN FIRM

This Part describes the evolution of the corporation from a singularly profit-driven entity to one that explicitly embraces a mission that includes political social justice agendas sweeping beyond the workplace, the products produced, and the traditional stakeholders. Increasingly, corporations frame themselves as having multiple stakeholders and an articulated purpose beyond profit that drives not only product and service development, but also hiring and management practices. Yet the very mission-oriented marketing that ostensibly moves beyond profit also yields additional profits for business, particularly by attracting and retaining a committed, loyal workforce.[35]

35. *See* Saabira Chaudhuri, *Does Your Mayo Need a Mission Statement?*, WALL ST. J. (May 20, 2022), https://www.wsj.com/articles/unilever-purpose-marketing-social-cause-11653050052 [https://perma.cc/F2VX-YCSQ] (quoting

A. CORPORATE SOCIAL RESPONSIBILITY PRACTICES

Historically, the proper scope of business in a capitalist system was understood to be the pursuit of economic profit.[36] But business was also seen as owing some responsibility to serve as guardian of the social welfare, whether as a quid pro quo in exchange for the ability to organize in the corporate form, or because it made good business sense for a firm whose capital-intensive operations were located in a particular city or community to further the interests of the community.[37]

Voluntary corporate social responsibility (CSR) practices trace back to the era of the industrial revolution.[38] During the eighteenth and nineteenth centuries, Christian religious philosophy and Victorian social conscience influenced business owners to address the moral failures of society evident in widespread poverty and child and female labor.[39] Business owners responded with a blend of philanthropy and humanism focused on

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a CEO who pointed out that brands with purpose increase sales twice as fast as those without and help to attract top talent, and that many large multinational firms position their brands behind social and environmental issues, including Black Lives Matter, LGBTQ+ rights, gender equality, and climate change).

36. *See* FRIEDMAN, *supra* note 1 (stating that corporate leads have responsibility to increase profit for the owners of the business).

37. *See* MARION G. CRAIN ET AL., WORK LAW: CASES AND MATERIALS 12 (4th ed. 2020) (discussing the "law's deference to the employer's prerogative to comanage its business" based in part on the "belief that employers would act as guardians of social welfare"); Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 454 (2003) (explaining that a corporate charter created a legal entity whose status and separate governance made it possible to build lasting institutions that could make long-term investments to improve the wealth and standard of living in the community, which endured as individual participants in the entities came and went).

38. *See* Mauricio Andrés Latapí Agudelo et al., *A Literature Review of the History and Evolution of Corporate Social Responsibility*, 4 INT'L J. CORP. SOC. RESP. 1, 3 (2019); Archie. B. Carroll, *A History of Corporate Social Responsibility: Concepts and Practices*, *in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 19, 20–21 (Andrew Crane et al. eds., 2008) (describing the influential welfare movement the mid- to late-1800s). The majority of corporate social responsibility initiatives historically were more philanthropic than anything else, consisting primarily of corporate donations to charities. *See* Carroll, *supra*; Patrick E. Murphy, *An Evolution: Corporate Social Responsiveness*, U. MICH. BUS. REV., Nov. 1978, at 19, 20 (describing the early- to mid-1900s as the "Philanthropic Era" of social responsibility).

39. *See* Agudelo et al., *supra* note 38, at 3.

improving the quality of life of the working class.[40] Beginning in the 1930s, academic journals and books began documenting the rise of CSR practices, tracing what began as a generalized humanistic concern for the plight of the working man and the social problems created by factory production processes to a more specific set of corporate policies and practices.[41]

During the 1920s and early '30s, companies became more aware of and receptive to the idea of responsibility of business for engaging with and supporting the community, prompting investments in community infrastructure, in some cases extending to the construction of company towns complete with housing, parks, playgrounds, churches, shops, theatres, casinos, and hotels.[42] Corporate managers were viewed as trustees for external relations, charged with balancing the maximization of profits with the interests of other stakeholders, principally clients, the labor force, and the community.[43] World War II offered business a pivotal role in supporting the war effort and was followed by the advent of New Deal legislation that reflected an understanding of businesses as institutions with social responsibilities.[44]

The 1950s and 1960s brought a focus on what, exactly, the responsibilities of business to society should be. Pressure for companies to respond to the needs of society stemmed from a moral view that because large corporations enjoyed an outsized influence on society, they owed an obligation to pursue values and objectives beneficial to society as a whole.[45] At the same

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40. *See id.*

41. *See id.* (discussing publications from the 1930s debating corporate social responsibility). *See generally* HOWARD R. BOWEN, SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN (1953) (marking the beginnings of modern literature on CSR).

42. *See* Carroll, *supra* note 38, at 22 (describing the Pullman experiment, a "modern industrial community" built to "improv[e] living conditions for [Pullman's] employees and their families").

43. *See id.* at 23 (describing the "trusteeship management" phase in the 1920s and 1930s).

44. *See* Agudelo et al., *supra* note 38, at 3 (noting the increase in scholarly dialogue regarding corporate social responsibility around this time).

45. *See* BOWEN, *supra* note 41, at 6; Keith Davis, *Can Business Afford to Ignore Social Responsibilities?*, CAL. MGMT. REV., Spring 1960, at 70, 71 (discussing the social responsibility that comes with business people's "social power").

time, strong voices emerged critical of the notion of corporate social responsibility—particularly Milton Friedman.[46] Friedman, a renowned economist and Nobel Laureate in Economics (1976),[47] saw CSR initiatives as inappropriate uses of corporate resources.[48] Indeed, as one commentator put it, "[i]n Friedman's view, corporate social responsibility was not only inefficient, it was theft."[49]

In the United States, social movements in the 1960s and 1970s influenced the development of corporate social responsibility practices around specific issues, including civil rights, anti-war, pollution, and resource depletion.[50] Spurred on by public pressure, civil rights protests, and environmental disasters, legislators began to address the social problems of the day.[51] New legislation such as antidiscrimination law and environmental regulation imposed legal obligations on firms, prompting them to view CSR initiatives in a different light: because CSR initiatives were helpful in avoiding legal liability under the emerging regulatory framework, the social objectives they furthered were compatible with the traditional economic objectives of the firm.[52] CSR initiatives also minimized reputational risk and undermined some unionization appeals, further establishing their economic benefit to the firm.[53]

By the 1980s, CSR focus expanded to encompass business ethics, responding to several widely reported ethical scandals

46. *See* FRIEDMAN, *supra* note 1, at 133–36.

47. *See* Agudelo et al., *supra* note 38, at 5.

48. *See* FRIEDMAN, *supra* note 1, at 133–36.

49. C.A. Harwell Wells*, The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 124 (2002).

50. *See* Agudelo et al., *supra* note 38, at 4 (providing anti-war and civil rights protests as examples of such movements).

51. *See id.* at 5 (discussing events leading up to the creation of the Environmental Protection Agency, Equal Employment Opportunity Commissioner, and Occupational Safety and Health Administration).

52. *See id.*

53. Cedric Dawkins, *Beyond Wages and Working Conditions: A Conceptualization of Labor Union Social Responsibility*, 95 J. BUS. ETHICS 129, 130 (2010) (stating that union organizers considered CSR "simply another management system . . . used to undermine union stature and influence").

that surfaced managerial and corporate wrongdoing and the legal and reputational damage stemming from them.[54] Insider trading scandals involving Ivan Boesky, Michael Milken, and others prompted public outrage and doubling down by the Securities and Exchange Commission in its enforcement efforts.[55] The 1987 blockbuster movie *Wall Street*, inspired by these scandals, depicted unscrupulous stockbrokers who explicitly embraced and celebrated a cult of excess and lawlessness.[56] This culture was perhaps best represented in the film by Michael Douglas's character, who famously declared that "greed [is] good."[57] Media coverage and litigation stemming from the 1984 explosion at Union Carbide's pesticide plant in Bhopal, India, resulted in Union Carbide accepting moral and financial responsibility for the widespread injuries and deaths caused by the use of substandard safety equipment and protocols, factors at least partly attributable to corporate negligence.[58] In an effort to rein

54. *See* Carroll, *supra* note 38, at 36 (discussing widely known and reported "ethical scandals that brought the public's attention to managerial and corporate wrongdoing" in the 1980s).

55. *See generally* JAMES B. STEWART, DEN OF THIEVES (1991) (describing the scandals); *Wrestling with Reform: Financial Scandals and the Legislation They Inspired*, SEC. & EXCH. COMM'N HIST. SOC'Y, https://www.sechistorical.org/museum/galleries/wwr/wwr05d-markets-milken.php [https://perma.cc/8SBL-WU8E] (describing the regulatory response).

56. *See* Karen W. Arenson, *How Wall Street Bred an Ivan Boesky*, N.Y. TIMES (Nov. 23, 1986), https://www.nytimes.com/1986/11/23/business/how-wall-street-bred-an-ivan-boesky.html [https://perma.cc/T4H2-RN4B] (describing the culture of the 1980s on Wall Street as "a kind of glorification of the acquisition of money"); *see* Carroll, *supra* note 38, at 36–37 (discussing the movie *Wall Street*).

57. Carroll, *supra* note 38, at 36.

58. *See* Edward Broughton, *The Bhopal Disaster and Its Aftermath: A Review*, ENV'T HEALTH, May 10, 2005, at 1, 2 (noting that the company operated the plant knowing its safety procedures and equipment were far below standards); LARRY EVEREST, BEHIND THE POISON CLOUD: UNION CARBIDE'S BHOPAL MASSACRE 17–43 (1985) (describing the inadequate factory design and shortage of safety devices and procedures that contributed to the damage).

in corporate wrongdoing, firms began operationalizing CSR, examining corporate ethics, and developing social performance disclosures.[59]

In the same time frame, several prominent firms were damaged by unwelcome publicity and resultant consumer pressure around labor standards in manufacturing operations in third-world countries. For example, when media reports revealed that workers in Nike's Indonesian manufacturing operations were laboring for less than subsistence-level wages under abusive working conditions, publicity and pressure from the anti-sweatshop movement and labor activists for consumers to boycott Nike's products were followed closely by drops in Nike's share price and revenue as consumers shunned Nike products.[60] Nike responded with a public relations and advertising campaign.[61] Legal challenges ensued, charging that the public relations campaign contained false and misleading statements.[62] Nike countered by asserting First Amendment protection for its advertising campaigns.[63]

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59. *See* Murphy, *supra* note 38, at 22 (describing these efforts in changing constitutions of boards of directors, establishing stricter ethics rules, and publishing "social performance disclosures"); Carroll, *supra* note 38, at 36–37 (discussing operationalizing CSR through a framework of "principles, processes, and policies").

60. *See* DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 79 (2005) (discussing an internal inspection report leaking to the public regarding Vietnamese workers being exposed to dangerous chemicals during ten-hour workdays for just over $10 per week); Jonah Peretti & Michele Micheletti, *The Nike Sweatshop Email: Political Consumerism, Internet, and Culture Jamming*, *in* POLITICS, PRODUCTS, AND MARKETS 127 (Michele Micheletti et al. eds., 2004) (describing the author's experience triggering media regarding Nike's use of sweatshops).

61. *See* Sonia K. Katyal, *Stealth Marketing and Antibranding: The Love That Dare Not Speak Its Name*, 58 BUFF. L. REV. 795, 811–12 (2010) (stating Nike was "forced to respond" to public protest).

62. *See* Nike, Inc. v. Kasky, 539 U.S. 654, 656 (2003) (Stevens, J., concurring) (per curiam) (stating that respondent sued Nike for false statements regarding work conditions in factories where Nike's products were manufactured).

63. *See id.* (raising but not deciding questions about the level of First Amendment protection enjoyed by Nike in corporate speech on a matter of public concern, namely labor practices in its manufacturing operations in other countries). For good analyses, see Tamara R. Piety, *Grounding Nike: Exposing Nike's Quest for a Constitutional Right to Lie*, 78 TEMP. L. REV. 151, 151–53 (2005); David C. Vladeck, *Lessons from a Story Untold:* Nike v. Kasky *Reconsidered*, 54 CASE W. L. REV. 1049, 1049–50 (2004).

Nike and other corporations subsequently responded to consumer pressure regarding noncompliance with labor standards by adopting and publicizing CSR codes containing commitments to maintain labor standards in manufacturing operations outside the United States.[64] The idea caught hold, and quickly spread beyond the topic of labor standards. Fifty-four founding members of the business community established the Business for Social Responsibility, an organization dedicated to making social equity, environmental responsibility, and sustainability central to corporate decision-making.[65]

By the 1990s and 2000s, the strategic use of CSR had become widely accepted.[66] CSR was considered strategic when it was a core part of a firm's management plan to generate profits, meaning (in its purest form) that CSR activities would be undertaken only when they would result in financial benefit to the firm.[67] Business scholars linked strategic CSR to positive financial performance of the firm vis-à-vis consumers.[68] Strategic CSR

64. *See* Shuili Du et al., *Corporate Social Responsibility and Competitive Advantage: Overcoming the Trust Barrier*, 57 MGMT. SCI. 1528, 1528–30 (2011) (explaining the role of CSR initiatives in enhancing competitive advantage); Porter & Kramer, *supra* note 18, at 78 (labeling CSR "an inescapable priority for business leaders").

65. *See* John Hood, *Do Corporations Have Social Responsibilities?*, FOUND. FOR ECON. EDUC. (Nov. 1, 1998), https://fee.org/articles/do-corporations-have-social-responsibilities [https://perma.cc/DM83-9RCS] (noting that Business for Social Responsibility had more than 800 members and affiliates at the time of the article's publication in 1998).

66. *See* Agudelo et al., *supra* note 38, at 7–10 (noting CSR's growth in "international appeal" throughout the 1990s and the "promotion of CSR as a distinct European strategy" in the 2000s).

67. *See* Geoffrey P. Lantos, *The Boundaries of Strategic Corporate Social Responsibility*, 18 J. CONSUMER MKTG. 595, 595–603 (2001) (discussing the development of the "purely profit-based position on CSR" of Milton Friedman).

68. *See* Lee Burke & Jeanne M. Logsdon, *How Corporate Social Responsibility Pays Off*, 29 LONG RANGE PLAN. 495, 495 (1996) (advocating for a "strategic reorientation" of firms' CSR philosophies to reap financial benefits). To be fully effective, strategic CSR had to display five critical dimensions: (1) centrality—a close fit to the company's mission; (2) specificity—the ability to gain specific benefits for the firm; (3) proactivity—the ability to create policies in anticipation of social trends; (4) voluntarism—discretionary decision making that was not influenced by external compliance requirements; and (5) visibility—that it was observable and recognizable by internal and external stakeholders.

offered firms a competitive advantage in a global marketplace.[69] The most effective CSR programs were implemented as part of brand management and featured a top-down commitment from leadership integrated throughout the company's operations.[70]

The early 2000s saw the evolution of still another phase of CSR called "conscious capitalism" or "stakeholder capitalism."[71] In this iteration, corporate social responsibility merged with marketing and was framed as a branding strategy that entails a commitment to creating sustainable value for all stakeholders, including customers, employees, investors, suppliers and dealers, host communities, the physical environment, and society

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Agudelo et al., *supra* note 38, at 8; *see also* C.B. Bhattacharya et al., *Using Corporate Social Responsibility to Win the War for Talent*, MIT SLOAN MGMT. REV., Winter 2008, at 37, 38–39 (discussing CSR strategies geared towards retaining employees). Companies that implemented CSR initiatives characterized by the five dimensions outlined above were most likely to see value creation not only in the form of increased customer loyalty, an enhanced ability to attract new customers, and development of new areas of opportunity for products and markets through brand extensions, but they also saw an improved ability to cultivate needed talent by attracting and retaining skilled employees. *See* Agudelo et al., *supra* note 38, at 12 (discussing how the five strategic dimensions create value); *see also* Peter A. Heslin & Jenna D. Ochoa, *Understanding and Developing Strategic Corporate Social Responsibility*, 37 ORGANIZATIONAL DYNAMICS 125, 125–26 (2008) (reporting results of twenty-one exemplary CSR practices that achieved competitive advantage for their firms and noting the elements common to all).

69. *See* Porter & Kramer, *supra* note 18, at 78–79 (discussing how businesses can use CSR as a competitive advantage).

70. *See* William B. Werther Jr. & David Chandler, *Strategic Corporate Social Responsibility as Global Brand Insurance*, 48 BUS. HORIZONS 317, 318 (2005) ("Stakeholders' reactions to CSR are most potent when brands are central to corporate strategy.").

71. PATRICIA ABURDENE, MEGATRENDS 2010: THE RISE OF CONSCIOUS CAPITALISM 30–31 (2005) (discussing conscious capitalism in part as "heal[ing] the excesses of capitalism with transcendent human values"). For an excellent description of the rise of conscious capitalism and illustrations of it, see Matthew T. Bodie, *Labor Relations at the Woke Corporation*, N.Y.U. ANN. SURV. AM. L. (forthcoming 2024) (draft on file with *Minnesota Law Review*). *See generally* MICHAEL STRONG, BE THE SOLUTION: HOW ENTREPRENEURS AND CONSCIOUS CAPITALISTS CAN SOLVE ALL THE WORLD'S PROBLEMS (2009) (arguing that conscious capitalism can make capitalism a force for good by creating jobs; providing investments for infrastructure, education, and training; developing new technologies to meet human needs; and cultivating wealth so that all may flourish).

more generally.[72] Compared with earlier understandings of CSR, conscious capitalism is characterized by the firm's adoption of a higher purpose or mission (profits are seen as the means to an end, rather than the primary goal of business), and both shareholders and society reap the benefits of the value added.[73] Other attributes of conscious capitalism include the integration of ethics and social responsibility or sustainability practices into core business strategies, the promotion of a strong sense of internal community characterized by high levels of employee participation in decision-making, and leaders who utilize the pull of shared values rather than the push of command to inspire engagement from their employees.[74]

Most recently, corporations have expanded their public statements of corporate mission and philosophy to include commitments to support overtly political, identity-based social justice movements such as Black Lives Matter (BLM), the #MeToo movement, and the LGBTQ+ rights movement.[75] The trend to-

72. *See* ABURDENE, *supra* note 71, at 30–32 (describing CSR firms as conscious of how they impact all stakeholders, not just shareholders). *See generally* JOHN MACKEY & RAJ SISODIA, CONSCIOUS CAPITALISM: LIBERATING THE HEROIC SPIRIT OF BUSINESS (2013) (advocating for conscious capitalism as the right thing to do both for the world and for the business).

73. *See* Robert E. Quinn & Anjan V. Thakor, *Creating a Purpose-Driven Organization*, HARV. BUS. REV., July–Aug. 2018, at 78 (discussing businesses inspiring their employees with their higher missions, resulting in employees' increased performance); *see also* Corrie Driebusch, *For Coming IPOs, Greed Is out. Do-Gooding Is in.*, WALL ST. J., Sept. 9, 2021, at B1 (describing new generation of public companies that characterize themselves as "mission-driven"). For example, Chobani proclaims on its website that it is committed to "transforming our food system for the betterment of our planet, our people, and our communities," including "cow comfort" on dairy farms and "responsible manufacturing practices." *Id.*; *see also Impact*, CHOBANI, https://www.chobani.com/impact [https://perma.cc/B5AM-8Q96]. Fashion-startup Rent the Runway touts its small carbon footprint and presses the claim that renting clothes is better for the environment than buying them. *See* Driebusch, *supra*.

74. *See* James O'Toole & David Vogel, *Two and a Half Cheers for Conscious Capitalism*, 53 CAL. MGMT. REV., Spring 2011, at 61, 62 (setting out five characteristics common to all companies associated with conscious capitalism).

75. *See supra* note 2. Even more common are corporate mission-based commitments to diversity, equity, and inclusion agendas (DEI), and commitments to address climate change, typically through measures aimed at environmental sustainability. These types of commitments are referred to as ESG approaches to corporate management. *See supra* note 4.

ward including political commitments within the corporate mission is denounced by some commentators as "woke capitalism."[76] Although conceptually located along a spectrum that began with a commitment to philanthropic investment, evolved to CSR, and morphed into conscious capitalism, woke capitalism deliberately embraces political and social causes as a part of the corporate identity and mission.

Woke capitalism has prompted powerful critiques from both the left and the right. Business leader Vivek Ramaswamy argues that by mixing morality with commercialism, woke capitalism is nothing more than "pretend[ing] like you care about something other than profit and power, precisely to gain more of each."[77] Other voices have since joined the chorus from the left and from the right, critiquing woke capitalism either because politics should have no place in business,[78] because woke capitalism exploits social movements for profit without responding to the underlying structural problems,[79] or because woke capitalism undermines democracy by ceding control over politics to powerful business entities.[80]

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76. *See supra* note 3 and accompanying text; VIVEK RAMASWAMY, WOKE, INC.: INSIDE CORPORATE AMERICA'S SOCIAL JUSTICE SCAM (2021).

77. RAMASWAMY, *supra* note 76, at 3.

78. *See, e.g.*, STEPHEN R. SOUKUP, THE DICTATORSHIP OF WOKE CAPITAL: HOW POLITICAL CORRECTNESS CAPTURED BIG BUSINESS 13–19 (2021) (describing and critiquing the politicization of business).

79. *See, e.g.*, Helen Lewis, *How Capitalism Drives Cancel Culture*, ATLANTIC (July 14, 2020), https://www.theatlantic.com/international/archive/2020/07/cancel-culture-and-problem-woke-capitalism/614086 [https://perma.cc/NGY8-L2QA]; Hrishikesh Athalye, *How Woke Capitalism Is Cashing in on Social Movements*, YOUTH KI AWAAZ (Feb. 7, 2019), https://www.youthkiawaaz.com/2019/02/what-is-woke-capitalism [https://perma.cc/RFG5-7VSP]. Labor scholar Matt Bodie points out that the absence of labor unions as the collective representative of workers in the list of stakeholders with which woke corporations seek to engage is telling, particularly since such firms typically seek to transform workers into "passionate, inspired team members" yet display powerful animosity toward unionization efforts. Bodie, *supra* note 71, at 2 (quoting MACKEY & SISODIA, *supra* note 72, at 54).

80. *See* CARL RHODES, WOKE CAPITALISM: HOW CORPORATE MORALITY IS SABOTAGING DEMOCRACY 11–13 (2022) (suggesting that woke capitalism may extend corporate interests into the public sphere).

B. WORKERS AS CONSUMERS OF THE CORPORATE BRAND

From the beginning, CSR initiatives were motivated by pragmatic concerns as well as humanistic values. In addition to protecting workers and enhancing their quality of life, paternalistic corporate welfare structures were designed to recruit and retain workers.[81] Expanding the consumer base through a positive reputation in the community was another important function of CSR.[82] Nor were the two goals unrelated. The future growth of the firm depended upon an expanding consumer base, which in turn required a well-paid, stable workforce.[83] A powerful illustration of how corporate self-interest aligned with workers' economic security and prosperity was Henry Ford's decision in 1914 to more than double the wages of the workers who produced his cars, paying them five dollars per day.[84] Ford sought to enhance productivity by increasing the loyalty and dependability of his workforce and reducing employee turnover.[85]

81. Agudelo et al., *supra* note 38, at 3 (discussing historical roots of the concept of social responsibility); Carroll, *supra* note 38, at 19–26. Carroll explains that businesses in earlier eras were motivated by a combination of humanitarianism, philanthropy, and business acumen (chiefly thought to be a desire for improved employee or community relations). Carroll, *supra* note 38, at 19–26.

82. *See* Carroll, *supra* note 38, at 19–38 (discussing reputational considerations in businesses' adoption of CSR initiatives).

83. Wells, *supra* note 49, at 92 (noting business leaders' conclusion that they needed a stable workforce to achieve growth). *See generally* SANFORD M. JACOBY, MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL 11–34 (1997) (describing welfare capitalism).

84. *See* Jason E. Taylor, *Did Henry Ford Mean to Pay Efficiency Wages?*, 24 J. LAB. RSCH. 683, 687, 690 (2003) (describing the link between wages and demand for Ford products as "the essence of [Ford's] revolution in business practices," particularly the five dollars per day minimum rate adopted in 1914).

85. HENRY FORD & SAMUEL CROWTHER, TODAY AND TOMORROW 154 (1926). Though most scholars accept Ford's explanation for the institution of the five-dollar day, some have suggested that it may also have been designed as a "preemptive strike against organized labor," intended to counter contemporaneous organizing drives by the Industrial Workers of the World. Taylor, *supra* note 84, at 690–91 (describing arguments in support of the preemptive characterization of the policy). Alternatively, it may have been at least partially prompted by a personal desire for "worldwide fame and reknown [sic]," or altruistic impulses. *See* Daniel M.G. Raff & Lawrence H. Summers, *Did Henry Ford Pay Efficiency Wages?*, J. LAB. ECON., Oct. 1987, at S57, S68. Nevertheless, the magnitude of Ford's expenditure and subsequent increases in wages during the period of the Great Depression suggest that Ford did expect to receive tangible

Though seen as aberrant at the time, the idea proved very influential.[86] Similar wage rates were widely adopted by competitor firms prior to the penetration of the industry by labor unions.[87]

Ford also saw an opportunity to increase the market for his products. Said Ford: "The owner, the employees, and the buying public are all one and the same . . . . One's own employees ought to be one's own best customers."[88] Ford operationalized this insight through vehicle discounts as a part of the company's compensation package.[89] Employee discounts ranging from five to twenty percent off a vehicle's sticker price for employees and their relatives at the "Big Three" American automobile manufacturers were extended to rank-and-file workers in the 1980s in exchange for contract concessions.[90] The discount programs later expanded to friends and family so that workers functioned as "goodwill ambassadors" for the company.[91] The expanded discount programs generated significant profits for Ford.[92] According to one estimate, in a single year, discounted purchases accounted for additional sales demand sufficient to maintain two factories for that year.[93] "Work for Ford, drive a Ford" is a longstanding norm in the auto industry, and the norm became sufficiently powerful that workers were discharged for disloyalty

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gains. *Id.* ("It strains credulity to suggest that an expenditure of this magnitude could be explained wholly without recourse to tangible gains Ford might have expected to derive."); *see* Taylor, *supra* note 84, at 690–91 (noting the importance of workers as consumers).

86. Jeff Nilsson, *Why Did Henry Ford Double His Minimum Wage*, SATURDAY EVENING POST (Jan. 3, 2014), https://www.saturdayeveningpost.com/2014/01/ford-doubles-minimum-wage [https://perma.cc/R3KP-U9QQ].

87. Raff & Summers, *supra* note 85, at S83 ("By 1928, before the United Automobile Workers had become an important factor in the automobile industry, wages were almost 40% greater than in the rest of manufacturing.").

88. Nilsson, *supra* note 86.

89. Rebecca Blumenstein & Andrea Puchalsky, *The Real Reason People in Detroit Drive American Cars*, WALL ST. J., Jan. 29, 1998, at B1.

90. *Id.* Vehicle discounts are also utilized in early retirement and buyout offers to union-represented workers. *See* Poornima Gupta, *Chrysler Extends Buyout Deadline for UAW Workers*, REUTERS (Mar. 6, 2009), https://www.reuters.com/article/idUSTRE52P4P1 [https://perma.cc/A7LL-4JE3].

91. Blumenstein & Puchalsky, *supra* note 89, at B1.

92. *Id.* at B10.

93. *Id.*

to the brand after purchasing cars manufactured by competitors.[94]

In the modern era, the overlapping identities of workers and consumers have become even more pronounced with the evolution of sophisticated marketing and corporate branding efforts.[95] External marketing aimed at consumers informs prospective workers, and workers arrive at the workplace with assumptions and views about the firm and its brand.[96] Indeed, workers may be attracted to employment by employee discount programs like the ones that Henry Ford popularized and become part of the consumer base. Internal marketing of the firm's values and philosophy is critical, however, if the firm is to gain maximum leverage from its CSR and branding initiatives with its employees.[97] Management consultants recommend that firms invest at least as much in marketing the corporate mission, brand, and values *inside* the firm as they do in selling the brand through advertising campaigns directed externally at consumers.[98] Some

94. Swanson, 36 Lab. Arb. Rep. (BL) 305, 309 (1961) (Gochnauer, Arb.) (deciding that Ford did not have just cause to discharge a mechanic in service department for disloyalty after mechanic purchased a new Nash Rambler).

95. Some legal scholars and activists have focused on the overlapping identities of workers and consumers as the foundation for arguments that consumer law might be deployed to address a range of employer practices that target workers simultaneously in their capacities as workers and consumers, such as unfair and deceptive financing and credit instruments used by employers to lock workers into service, such as Training Repayment Agreement Provisions, marketing and operations management services offered to workers through exploitative and deceptive franchise arrangements, and temporary staffing agencies' role in artificially suppressing wages and restricting employment of the temporary workers they employ through collusion with client firms. *See, e.g.*, Jonathan F. Harris, *Consumer Law as Work Law*, 112 CALIF. L. REV. (forthcoming 2024) (manuscript at 6–7), https://ssrn.com/abstract=4172535 [https://perma.cc/2JEL-ANMY] (discussing strategies for turning workers into consumers).

96. Mukesh Biswas & Damodar Suar, *Which Employees' Values Matter Most in the Creation of Employer Branding?*, J. MKTG. DEV. & COMPETITIVENESS, 2013, at 93, 94 (discussing the use of branding as a management tool).

97. Du et al., *supra* note 64, at 38–39 (discussing how the lack of awareness of CSR initiatives within a company can limit their impact).

98. *See, e.g.*, Colin Mitchell, *Selling the Brand Inside*, HARV. BUS. REV., Jan. 2002, at 99, 99–100, 101–03, 105 (advising firms to "bring the brand alive" for workers through a professional internal marketing campaign that runs parallel to consumer marketing and advertising campaigns); LIBBY SARTAIN &

service firms responded by merging their marketing and HR departments and reassigning internal branding and personnel-management functions to marketing.[99] After all, as one scholarly paper described it, internal branding is "nothing but a HR strategy borrowed from marketing to attract and retain talents."[100]

1. Corporate Purpose: "Meaning Is the New Money"

Corporate mission or purpose is closely connected to the corporate brand—in essence, the brand is the corporate identity, its public face. Brands that align with worker values offer significant value to the firm.[101]

First, a purpose-driven brand that aligns with prospective workers' values is effective in recruiting and retaining workers.[102] Firms that are able to appeal to workers' preexisting values with identity-incentive branding can engage workers more deeply in a dialectical relationship that drives both identity formation and brand development: workers simultaneously shape

MARK SCHUMANN, BRAND FROM THE INSIDE: EIGHT ESSENTIALS TO EMOTIONALLY CONNECT YOUR EMPLOYEES TO YOUR BUSINESS 26–28 (2006) (discussing how internal branding can help the business); KLAUS SCHMIDT & CHRIS LUDLOW, INCLUSIVE BRANDING: THE WHY AND HOW OF A HOLISTIC APPROACH TO BRANDS 5–6 (2002) (critiquing superficial corporate branding attempts, internal and external).

99. Khanyapuss Punjaisri & Alan Wilson, *The Role of Internal Branding in the Delivery of Employee Brand Promise*, 15 J. BRAND MGMT. 57, 60 (2007); Julie Anixter, *Transparency, or Not: Brand Inside, Brand Outside™—The Most Obvious yet Overlooked Next Source for the Brand's Authentic Evolution*, *in* BEYOND BRANDING 161, 180 (Nicholas Ind ed., 2003) (suggesting how to improve internal branding by merging HR and marketing departments).

100. Biswas & Suar, *supra* note 96, at 94; *see also* Olivier Herrbach & Karim Mignonac, *How Organisational Image Affects Employee Attitudes*, HUM. RES. MGMT. J., 2004, at 76, 76–79 (detailing relationship between corporate image and issues of concern to human resources professionals, including effective hiring, retention, and better morale).

101. *See, e.g.*, Nader T. Tavassoli et al., *Employee-Based Brand Equity: Why Firms with Strong Brands Pay Their Executives Less*, 51 J. MKTG. RSCH. 676, 682–83 (2014) (discussing how strong branding can allow the firm to save money on executive compensation).

102. *See* George, *supra* note 6 (discussing research that has shown a corroboration between workers' sense of purpose and engagement with their jobs).

the brand and derive identity from it.[103] Firms that seek to recruit and retain youthful workers, such as employers in the tech industry, were among the first to recognize this.[104] The priority accorded to meaningful work is very strong among millennials: three-quarters of millennials say they consider a company's social and environmental commitments when deciding whether to accept a job, and nearly two-thirds consider the firm's CSR practices.[105] An even larger number want to be active participants in determining and improving CSR practices.[106] The same orientation is present in Generation Z, the most recent cohort to enter the workforce: studies show that Gen Z workers are drawn to

103. *See* Nada Endrissat et al., *Incorporating the Creative Subject: Branding Outside-in Through Identity Incentives*, 70 HUM. REL. 488, 489, 491 (2016) (explaining how identity incentives built into a firm's brand can both confirm and strengthen workers' identities while also shaping an emerging brand). "Instead of forcing them to buy into the brand, the brand buys into its employees and their identities and lifestyles. Employees are encouraged to associate their authentic selves with the brand, thereby producing that brand and themselves." *Id.* at 506.

104. Mike Prokopeak, *How to Retain Your Millennial Workers*, WORKFORCE, Sept. 2013, at 14, 14 (noting that a startup culture is what younger workers want).

105. *¾ of Millennials Would Take a Pay Cut to Work for a Socially Responsible Company*, SUSTAINABLE BRANDS (Nov. 2, 2016), https://sustainablebrands.com/read/organizational-change/3-4-of-millennials-would-take-a-pay-cut-to-work-for-a-socially-responsible-company [https://perma.cc/VJ23-W5CJ]. Millennials are defined as individuals born between 1981 and 1995. Michael Dimock, *Defining Generations: Where Millennials End and Generation Z Begins*, PEW RSCH. CTR. (Jan. 17, 2019), https://www.pewresearch.org/short-reads/2019/01/17/where-millennials-end-and-generation-z-begins [https://perma.cc/8QF8-GX8Q]; *see also* Richard Edelman, *The Belief-Driven Employee*, EDELMAN (Aug. 31, 2021), https://www.edelman.com/trust/2021-trust-barometer/belief-driven-employee/new-employee-employer-compact [https://perma.cc/RC5W-EFFN] (reporting that more than 61% of employees choose their employer based on alignment of values); Claire Groden, *Five Things You Can Do to Attract Millennial Talent*, FORTUNE, Mar. 15, 2016, at 182, 183 ("For six in 10 millennials, 'a sense of purpose' was part of their calculation in accepting their current jobs; almost half have declined to perform assignments at work that contradict their values . . . .").

106. *¾ of Millennials Would Take a Pay Cut to Work for a Socially Responsible Company*, *supra* note 105 (noting that 88% of workers surveyed said that work would be more fulfilling if they had an opportunity to make a positive social impact).

firms that strive to make a social impact and prioritize firms with high ethical and moral standards.[107]

Second, a strong brand directly reduces labor costs.[108] Studies demonstrate that the stronger the brand, the weaker the compensation the executives most closely identified with the brand (at the CEO level and below) demand and receive.[109] The brand substitutes for higher compensation because its employees receive an "identity effect" or reputational boost from their association with the firm's brand.[110] Studies show that younger executives are particularly likely to accept lower compensation in exchange for affiliation with a strong brand, which researchers theorize results from the considerable resume value that the association brings them early in their careers.[111] Nor is this benefit limited to executives: studies confirm that many workers are also willing to pay for brand reputation in the form of lower wages.[112] Further, 75% of millennial workers say they would take a pay cut to work for a socially responsible company.[113] One

107. Braedon Leslie et al., *Generation Z Perceptions of a Positive Workplace Environment*, 33 EMP. RESPS. & RTS. J. 171, 174, 184 (2021). Generation Z is defined as those born between 1996 and 2010. *Id.* at 173.

108. *See* Tavassoli et al., *supra* note 101, at 676.

109. *Id.* at 684 (finding that with each standard deviation increase above the mean for brand strength, non-CEO executives earned, on average, about $90,000 less a year, and CEO pay dropped 12% per year for each standard deviation increase).

110. *Id.* at 677 (discussing the relationship between brand strength and compensation). With the post-pandemic rise of inflation and housing prices, the balance between prestige and cash compensation in the eyes of workers may be shifting. So far, the trend has been observed primarily among non-profit organizations and government agencies that seek to attract workers with prestigious career opportunities but offer substandard pay. *But see* Callum Borchers, *On the Clock: Workers Want More Pay, Not Prestige*, WALL ST. J., Nov. 2, 2023, at A12 (describing Teach for America's struggle to attract teachers and the National Institutes of Health's challenges in attracting postdocs).

111. Tavassoli et al., *supra* note 101, at 679 (discussing how brand signals have been shown to boost resume value).

112. Alan Bergstrom et al., *Why Internal Branding Matters: The Case of Saab*, 5 CORP. REPUTATION REV. 133, 138 (2002) (observing that just as customers who feel an affinity for a brand will pay a price premium for it, workers are willing to substitute brand prestige for benefits and compensation); Achor et al., *supra* note 8 (reporting on a survey of more than 2,000 workers who reported that they would forgo 23% of their entire future lifetime earnings to have a job that was always meaningful).

113. *¾ of Millennials Would Take a Pay Cut to Work for a Socially Responsible Company*, *supra* note 105.

study found that alignment between corporate purpose and employee values was equivalent to a 40% salary increase in terms of its impact on employee retention.[114]

Third, a strong brand increases productivity by generating more investment from workers once hired, which in turn enhances customer service and reduces the need for supervision.[115] This is particularly important in service businesses because front-line workers are the primary point of contact with consumers; they literally embody the brand and are an integral part of the customers' experience.[116] In order to deliver on the brand promise made through advertising, retailers must ensure that workers internalize corporate values.[117] A strong corporate mission/brand also serves as a mechanism of managerial control. The more complete the workers' identification with the firm and its mission, the more committed they will be to advancing it, the more effective they will be in performing their jobs, and the less they will require rigorous management and oversight.[118]

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114. Paul Ingram & Yoonjin Choi, *What Does Your Company Really Stand For?*, HARV. BUS. REV. MAG., Nov./Dec. 2022, https://hbr.org/2022/11/what-does-your-company-really-stand-for [https://perma.cc/3QND-2SK7].

115. *See* Achor et al., *supra* note 8 ("[W]e estimate that highly meaningful work will generate an additional $9,078 per worker, per year.").

116. *See* Carol Wolkowitz, *The Social Relations of Body Work*, 16 WORK, EMP. & SOC'Y 497, 499 (2002) (discussing the centrality of body work in service economies).

117. Punjaisri & Wilson, *supra* note 99, at 59–60 (noting that front-line workers in such firms "transform espoused brand messages into brand reality for customers and other stakeholders"); *see also* Libby Sartain, *Branding from the Inside out at Yahoo!: HR's Role as Brand Builder*, 44 HUM. RES. MGMT. 89, 89 (2005) (describing branding as "more than just selling a product or service; the best companies create a strong emotional connection between the message and the product"); Ken Matheny & Marion Crain, *Disloyal Workers and the "Un-American" Labor Law*, 82 N.C. L. REV. 1705, 1740–50 (2004) (describing how workers' productivity is linked with emotional engagement and explaining that one of the key factors likely to build worker engagement is a feeling of shared destiny).

118. *See* Marion Crain, *Managing Identity: Buying into the Brand at Work*, 95 IOWA L. REV. 1179, 1206–09 (2010) (explaining how internal branding programs engage and constrain workers by manipulating their identities to align with the corporate brand, allowing firms to manage the hopes and aspirations of workers rather than their behaviors, so that workers ultimately manage themselves); *see also* Denise M. Rousseau, *Why Workers Still Identify With Organizations*, 19 J. ORGANIZATIONAL BEHAV. 217, 221–22 (1998) (explaining that

Finally, a strong corporate brand that aligns with worker values increases retention and loyalty.[119] The ideal brand does more than simply influence an individual's decision in a single transaction; it creates a purpose-driven relationship between the firm, its consumers, and its workers.[120] This feeling of connection and community around shared values is a particularly critical asset in the post-pandemic workplace because it offers protection against high turnover rates triggered by the COVID-19 pandemic experience.[121] Workers isolated at home during the pandemic found their work experience stripped down to the work itself as the many small lubricants and enjoyable aspects of work, such as social coffees and lunches, water cooler interactions with colleagues, and other workplace benefits, disappeared.[122] Essential workers on the front lines weighed the benefits of employment against exposure to serious health risks.[123] The so-called "Great Reshuffle" ensued, as workers sought new career paths or retired early on the heels of existential introspection.[124] Workers seeking to change jobs sought not only flexibility

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workers willingly make sacrifices for their employers when they perceive the employment relation as a relationship rather than as an economic transaction, because the boundaries between the interests of the self and of the firm blur and workers identify with the firm).

119. *See* Maureen L. Ambrose et al., *Individual Moral Development and Ethical Climate: The Influence of Person—Organization Fit on Job Attitudes*, 77 J. BUS. ETHICS 323, 323–29 (2008) (finding that fit between personal and organizational ethics correlates with higher job satisfaction, higher commitment, and lower levels of employee turnover).

120. *See* Ron Carucci, *To Retain Employees, Give Them a Sense of Purpose and Community*, HARV. BUS. REV. (Oct. 11, 2021), https://hbr.org/2021/10/to-retain-employees-give-them-a-sense-of-purpose-and-community [https://perma.cc/Z38Y-RYJZ] (advising firms to "build a culture of solidarity" that reinforces a shared sense of purpose across the firm). *See generally* Shmuel I. Becher & Sarah Dadush, *Relationship as Product: Transacting in the Age of Loneliness*, 2021 U. ILL. L. REV. 1547 (explaining how firms utilize branding and marketing to develop a relationship with consumers through the medium of the brand, rather than focusing on a single transactional exchange).

121. George, *supra* note 6 (assessing corporate strategies to retain talent after the COVID-19 pandemic).

122. *See* Lauren Weber, *Workers Wonder: Is My Job Relevant?*, WALL ST. J., June 22, 2020, at A9 (noting existential questions posed to workers by the COVID-19 pandemic).

123. *Id.*

124. Alex Christian, *How the Great Resignation Is Turning into the Great Reshuffle*, BBC (Dec. 14, 2021), https://www.bbc.com/worklife/article/20211214-great-resignation-into-great-reshuffle [https://perma.cc/HCX5-QLWY].

to decide where they work (in the office or remotely), but also to choose what they would work on—what the purpose of their life's work would be.[125] The most important consideration for workers changing jobs post-pandemic is a position that is a better fit with the worker's values, rather than simply a higher wage: as one study put it, "Meaning is the new money."[126]

2. The New Social Contract at Work

American capitalism was premised on labor production.[127] The exploitation of the labor process was the main source of profits, and the labor contract involved an exchange of money for labor.[128] Employers devised command-and-control methods for disciplining and controlling labor.[129] "Taylorism" (or "scientific management" as it came to be known) was the most influential of these workplace organization strategies.[130] Developed by Frederick Winslow Taylor, scientific management was designed to maximize output and simultaneously wrest control of the la-

125. Adam Grant, *The Real Meaning of Freedom at Work*, WALL ST. J. (Oct. 8, 2021), https://www.wsj.com/articles/the-real-meaning-of-freedom-at-work-11633704877 [https://perma.cc/K2P5-E85J]; Jordan Turner, *Employees Seek Personal Value and Purpose at Work. Be Prepared to Deliver*, GARTNER (Mar. 29, 2023), https://www.gartner.com/en/articles/employees-seek-personal-value-and-purpose-at-work-be-prepared-to-deliver [https://perma.cc/LM7W-3Q2V].

126. Tammy Erickson, *Meaning Is the New Money*, HARV. BUS. REV. (Mar. 23, 2011), https://hbr.org/2011/03/challenging-our-deeply-held-as [https://perma.cc/6Y4G-2SVG] (discussing post-pandemic research that shows workers seek value-oriented positions).

127. HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY 52 (1974) ("Capitalist production requires exchange relations, commodities, and money, but its *differentia specifica* is the purchase and sale of labor power.").

128. *Id.* at 52–53.

129. *See id.* at 90 ("It is not the 'best way' to do work 'in general' that Taylor was seeking . . . but an answer to the specific problem of how to control alienated labor—that is to say, labor power that is bought and sold.").

130. *See, e.g.*, DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865–1925, at 251 (1987) ("It is not enough, however, just to plot the points at which the ideology of scientific management intersected with the dominant themes of bourgeois thought at the time. Taylor and his disciples also made a distinctive contribution to situating a cult of the expert and a compelling definition of what constitutes a 'good job' firmly and enduringly in the center of twentieth-century American intellectual life and public policy.").

bor process from workers by reducing work to a series of "scientific" rules that separated execution from conception.[131] Relying on time and motion studies, Taylor was able to break production into its component pieces, specify in detail the way each aspect of production should be performed, and thus enforce the desired pace of work.[132] An easy fit with an assembly-line-styled manufacturing economy, scientific management has proved adaptable to an information and service economy as well.[133]

This fundamentally Marxist vision of employment as an exchange of labor for money was coupled with an assumption that the interests of business owners and workers were antagonistic.[134] If the goal was profit at the workers' expense, and if workers were alienated from their labor in the process, conflict was the inevitable result.[135] As Richard Edwards explained,

> In a situation where workers do not control their own labor process and cannot make their work a creative experience, any exertion beyond the

131. *See* BRAVERMAN, *supra* note 127, at 114 ("This should be called the principle of the *separation of conception from execution* . . . . The first implication of this principle is that Taylor's 'science of work' is never to be developed by the worker, always by management.").

132. *See generally* FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1911) (formulating and justifying principles of scientific management); BRAVERMAN, *supra* note 127, at 85–121 (describing Taylor's principles in practice); MONTGOMERY, *supra* note 130, at 9–57, 214–56 (noting the effects of Taylorism on the American labor movement); DAVID MONTGOMERY, WORKERS' CONTROL IN AMERICA: STUDIES IN THE HISTORY OF WORK, TECHNOLOGY, AND LABOR STRUGGLES 9–10 (1979) (describing the struggle for workers' control over production). For a modern analysis of how Taylorism influenced law, see Marion Crain, *Building Solidarity Through Expansion of NLRA Coverage*, 74 MINN. L. REV. 953, 985–88 (1990).

133. *See, e.g.*, GEORGE RITZER, THE MCDONALDIZATION OF SOCIETY 38–39, 152–60 (1996) (noting Taylorism's application to fast food work); ROBIN LEIDNER, FAST FOOD, FAST TALK 44–46 (1993) (describing routinization of work at McDonald's). For exploration of how Taylorism has structured management practice vis-à-vis various categories of workers, see Marion Crain, *The Transformation of the Professional Workforce*, 79 CHI.-KENT L. REV. 543, 557–58 (2004) (describing Taylorism as applied to professional and skilled workers); Crain, *supra* note 118, at 1198 (describing Taylorism as evident in encounter-styled service workers at fast food restaurants).

134. *See* RICHARD EDWARDS, CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY 12 (1979) ("Workers must provide labor power in order to receive their wages, that is, they must show up for work; but they need not necessarily provide *labor*, much less the amount of labor that the capitalist desires to extract from the labor power they have sold.").

135. *See* BUDD, *supra* note 28, at 118–19.

> minimum needed to avert boredom will not be in the workers' interest. On the other side, for the capitalist it is true *without limit* that the more work he can wring out of the labor power he has purchased, the more goods will be produced; and they will be produced without any increased wage costs.[136]

Thus, employers devised systems to avoid shirking, and workers sought to organize their labor power to resist efforts to strip them of control over their time and level of exertion.[137]

But in the modern labor market, these assumptions no longer hold sway.[138] In a firm characterized by a shared mission, employer and worker interests are aligned, not in conflict.[139] Corporate earnings are correlated with a shared purpose, deeper employee engagement, and employee loyalty.[140] The "new social contract" of employment involves an exchange of labor for both money *and* the opportunity to engage in purposeful work toward a shared mission that aligns with workers' values.[141] The purpose-driven firm is committed to an aspirational mission that offers employees a sense of meaning and a feeling that by working there, they are making a positive difference in the world.[142] Leadership aligns the organization with an authentic higher purpose that intersects with its business interests, relies on the purpose in making major decisions, and markets the purpose to

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136. EDWARDS, *supra* note 134, at 12.

137. *See id.* ("Indeed, today's most important employers, the large corporations, have so many employees that to keep them working diligently is itself a major task, employing a vast workforce of its own.").

138. *See, e.g.*, Andrea Willige, *The Rise of the 'Belief-Driven' Employee*, WORLD ECON. FORUM (Sept. 27, 2021), https://www.weforum.org/agenda/2021/09/corporate-values-employee-motivation-employee-activism [https://perma.cc/QJL7-PCJU] (discussing value created between alignment between worker and employer values).

139. Dipanjan Chatterjee*, Employers Must Navigate Social-Value-Based Branding with Care*, FORRESTER (Jan. 31, 2022), https://www.forrester.com/blogs/employers-must-navigate-social-value-based-branding-with-care [https://perma.cc/4G49-M3W5].

140. George, *supra* note 6 (noting examples of a correlation between employee engagement, loyalty, and profit).

141. *Answering the Call for a New Social Contract*, *supra* note 8.

142. *See* Quinn & Thakor, *supra* note 73 (describing how companies are embracing purpose-based initiatives).

employees internally.[143] Management's job in such an organization is "to connect the people to their purpose."[144] When employees embrace and internalize the purpose, there is less need for managerial control; employees will manage themselves.[145] Finally, by marketing a brand and a mission designed to build solidarity at all levels across the firm, the employer also harnesses a potent anti-union tool.[146]

The flip side of this, however, is that if workers learn that the mission they believed was shared is inauthentic, they will feel betrayed and angry.[147] Alas, the mission statements and CSR codes of some firms have been largely superficial, amounting to nothing more than a public relations campaign.[148] Inauthentic mission statements pose significant risks to the firm.[149]

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143. Businesses demonstrating a thoroughgoing internal commitment to a stated mission by taking active steps toward operationalization within the firm are more likely to reap the benefits of employee engagement, loyalty, and organizational citizenship. *See id.* Examples of firms that have distinguished themselves with an authentic commitment to mission include Ben & Jerry's, Newman's Own, Patagonia, and the Body Shop. Porter & Kramer, *supra* note 18, at 81; *see also* Lewis D. Solomon, *On the Frontier of Capitalism: Implementation of Humanomics by Modern Publicly Held Corporations — A Critical Assessment*, *in* PROGRESSIVE CORPORATE LAW 281, 285–86 (Lawrence E. Mitchell ed., 1995) (identifying Ben & Jerry's and The Body Shop as examples of firms that took seriously their responsibility for the natural environment).

144. Quinn & Thakor, *supra* note 73.

145. *Id.*; Crain, *supra* note 118, at 1206–09 (discussing the positive effects of identity-based brand management).

146. *See* Crain, *supra* note 118, at 1206–07 ("[I]nternal branding reduces the likelihood of unionization, another factor associated with higher labor costs. By deconstructing the antagonistic relationship between the firm and its workers, internal branding functions as an effective union-avoidance device." (footnote omitted)).

147. *See, e.g.*, Chatterjee, *supra* note 139 ("Employees motivated by values such as fair working conditions, empowerment, and poverty alleviation can get a far more accurate assessment of their employer's track record than a consumer can of a brand's. Knowledge empowers employees, and they wield this power to get their way, like at a prominent PR firm that had to drop an immigration detention center client in response to an employee outcry.").

148. *See* VOGEL, *supra* note 60, at 77–82 (critiquing CSR in the context of Nike's public human rights violations).

149. *See, e.g.*, Turner, *supra* note 125 ("Bottom line: People seek purpose in their lives — and that includes work. The more an employer limits those things that create this sense of purpose, the less likely employees will stay at their positions. The era of the employment contract, where a worker provided services purely in exchange for monetary compensation, is over. Now, employees expect deeper relationships, a strong sense of community and purpose-driven work.").

Business consultants warn that employees are well-positioned to detect ambivalence or dissonance between the firm's stated values and how it acts—better-positioned than consumers are.[150] Further, breaches of trust in the area of commitments to social justice are likely to provoke worker activism: 76% of employees stated that they would take some sort of action to persuade their employers to make changes; 40% of the employees within this group would take the action public by undertaking a strike, slow down, social media campaign, or other public protest.[151] Studies suggest that workers who have lost faith in their employers' social justice commitments are more likely to engage in activism than they are to protest for more traditional reasons such as low pay.[152] In that event, worker activism around social justice concerns becomes "a force to be reckoned with."[153]

II. WORKERS' COLLECTIVE RIGHTS AT LAW—THE NLRA

Efforts by workers to hold employers to their statements about the nature of the corporate mission could be framed at law as individual claims for breach of contract, fraudulent inducement, breach of the covenant of good faith and fair dealing, or promissory estoppel.[154] However, the employment context makes recovery challenging on all of these theories. American common law holds that absent an agreement to the contrary, every contract of employment is terminable at will: employees may leave at any time, and employers may discharge without notice and on any ground.[155] The doctrine of employment at will

150. Chatterjee, *supra* note 139 ("Employees don't operate behind the same veil of asymmetry [as consumers]; they are in the belly of the beast. They know or can find out (at very low 'transaction costs') about purchasing agreements, labor practices, and just about anything to do with the entire value chain works.").

151. Edelman, *supra* note 105.

152. Willige, *supra* note 138.

153. *Id.*

154. *See infra* text accompanying notes 245, 248 (describing claims by Google workers).

155. Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 519–20 (1884), *overruled on other grounds by* Hutton v. Watters, 179 S.W. 134 (Tenn. 1915) (finding that employers "may dismiss their employes at will . . . for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong"

reinforces the employer's sovereignty over its employees by authorizing unilateral changes in the terms and conditions of employment; the employee's only recourse is exit.[156] Courts resist implied promises of particular working conditions, relying heavily upon the principle of mutuality of consideration and the employee's freedom to quit.[157] These doctrines remain ensconced despite compelling evidence that employees systematically overestimate their legal rights, believing they have legal protection against unjust discharge.[158]

Further, master-servant law, with its focus on unilateral obligations of loyalty and subservience running from servant to master, defines the backdrop against which work law operates.[159] The employment contract—rarely written or specific in its terms—contains implied terms that reinforce the dominant-

(spelling original)). The doctrine has been significantly undercut by the development of tort claims for wrongful discharge in violation of public policy and implied contract claims derived from oral promises, courses of dealing, and handbooks, as well as a statutory overlay constraining the bases on which discharges may be made. *See generally* CRAIN ET AL., *supra* note 37, at 130–201 (covering contract and tort-based exceptions to employment at will); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (prohibiting discharge of employees on the basis of race, color, religion, sex, or national origin). Nevertheless, the basic common law rule remains essentially intact and constrains recovery on other tort or contract theories in the employment context.

156. Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 68 (2000) ("[Th]e premises of the [at will employment] doctrine are quite clear; the employer has sovereignty except to the extent it has expressly granted its employees rights."); *cf.* Matheny & Crain, *supra* note 117, at 1736–39 (examining how exit, voice, and loyalty structure employment law).

157. *See, e.g.*, Savage v. Spur Distrib. Co., 228 S.W.2d 122, 124 (Tenn. Ct. App. 1949) ("It is a general principle that unless both parties are bound neither is bound."); Pitcher v. United Oil & Gas Syndicate, Inc., 139 So. 760, 761 (La. 1932) (finding that an employment agreement lacks the "mutuality" to restrict the employer's right to discharge an employee unless the employee has provided "a good consideration additional to the services which he contracts to render").

158. *See* Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences of Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 449 (reporting the findings of an empirical study confirming earlier work that showed "workers are systematically mistaken about the protections the law affords against arbitrary and unjust discharge").

159. ATLESON, *supra* note 25, at 13–14 (discussing how traditional notions of status and subordination impliedly limited freedom of contract in the employment context).

subordinate relation.[160] Among these are employers' exclusive rights to control the scope and direction of their businesses.[161] Despite rhetoric that suggests that the employment contract is the product of free bargaining and mutual assent, the reality in the vast run of cases is an inherently unequal work relation.[162] The result is a legal frame in which the labor bargain is struck anew by the employee showing up for work each day and the employer paying her. Accordingly, contract-based misrepresentation claims pertaining to job security or static working conditions are difficult to advance.[163] Some courts have permitted tort recovery where individual employees can show specific damage resulting from employer misrepresentations, particularly those occurring during the hiring process that do not relate to employment security.[164] A few courts have been receptive to promissory

160. *See* Summers, *supra* note 156, at 70 (describing courts' "underlying assumption that the employer should have absolute power over the employees' jobs"); *see, e.g.*, Augat, Inc. v. Aegis, Inc., 565 N.E.2d 415, 417 (Mass. 1991) (discussing the duty of loyalty owed by employee to employer).

161. *See* Summers, *supra* note 156, at 65 (describing an assumption in American labor law that "[t]he employer, as owner of the enterprise, is legally endowed with the sole right to determine all matters concerning the operation of the enterprise").

162. Marion Crain, *Arm's-Length Intimacy: Employment as Relationship*, 35 WASH. U. J.L. & POL'Y 163, 166 & n.12 (2011) (documenting legislative and judicial recognition of unequal bargaining power in employment relationships).

163. *See, e.g.*, Loc. 1330, United Steel Workers of Am. v. U.S. Steel Corp., 631 F.2d 1264, 1277 (1980) (refusing to recognize workers' breach of contract and promissory estoppel claims where employer promised to keep steel mills open if the workers enhanced productivity and the mills became profitable); Upton v. JWP Businessland, 682 N.E.2d 1357, 1358 (Mass. 1997) (finding no claim for wrongful discharge in violation of public policy where single mother's working hours were extended significantly beyond her original schedule at hiring).

164. *See, e.g.*, Meade v. Cedarapids, Inc., 164 F.3d 1218, 1220–23 (9th Cir. 1999) (permitting fraudulent misrepresentation claims where plant closed shortly after plaintiffs began work, despite employer's representations during hiring process that it was "ramping up," that its future "looked great," and that its growth was a "long term situation"). One study finds that plaintiffs enjoy a fairly high success rate in such cases at the hiring stage, but face relatively more difficulty on claims involving job security, in part due to the at-will doctrine. *See* Richard P. Perna, *Deceitful Employers: Common Law Fraud as a Mechanism to Remedy Intentional Employer Misrepresentation in Hiring*, 41 WILLAMETTE L. REV. 233, 240–49 (2005).

estoppel claims.[165] And a few have allowed claims under a theory of breach of the covenant of good faith and fair dealing, particularly where the representations contain an element of fraud or deceit.[166] Overall, though, recovery for employees asserting fraudulent misrepresentation or deception as to working conditions has been severely circumscribed at common law.[167]

Of course, even absent these difficulties, common-law remedies would still be limited because they are designed primarily to achieve specific relief for individual employees. The employer's brand promise, however, is a form of public good that affects all workers. As such, failed brand promises demand a collective response. When workers band together to protest deviation from the corporate mission and are discharged or disciplined

165. *Compare* Peck v. Imedia, Inc., 679 A.2d 745, 752–54 (N.J. Super. Ct. App. Div. 1996) (allowing a promissory estoppel claim based on detrimental reliance on a promise of at-will employment where plaintiff gave up existing employment and relocated from Boston to New Jersey), *with* Kurtzman v. Applied Analytical Indus., Inc., 493 S.E.2d 420, 423–24 (N.C. 1997) (granting judgment for the defendant where plaintiff relocated from Massachusetts to North Carolina in reliance upon offer of employment, noting that recognizing a "change of residence" exception to the at-will doctrine would "substantially erode the [at will] rule"). For a case not involving a promise of job security, see Peters v. Gilead Scis., Inc., 533 F.3d 594, 595 (7th Cir. 2008) (permitting promissory estoppel claim where employer handbook guaranteed twelve weeks of medical leave and employee was terminated after relying on that promise). Overall, however, promissory estoppel claims have not served plaintiffs well in the employment context. *See* Robert A. Hillman, *The Unfulfilled Promise of Promissory Estoppel in the Employment Setting*, 31 RUTGERS L.J. 1, 21, 25–26 (1999) (concluding from empirical study that employment-based promissory estoppel claims have been "monumentally unsuccessful," primarily due to "judicial veneration for the employment at will rule").

166. *See, e.g.*, Merrill v. Crothall-Am., Inc., 606 A.2d 96, 102 (Del. 1992) (reversing summary judgment for employer who hired plaintiff to temporarily fulfill a staffing contract with a third party, pretextually offering long-term employment but intending to replace plaintiff with a more qualified hire as soon as possible); Charles v. Interior Reg'l Hous. Auth., 55 P.3d 57, 62–63 (Alaska 2002) (finding that the covenant of good faith and fair dealing is implied in all at will contracts and recognizing claim for breach where employee alleged disparate treatment through targeted harassment and uneven enforcement of employer policies).

167. *See* Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 31–39 (2016) (describing the role of the First Amendment in regulatory responses to employer misinformation and correcting the "information and power asymmetries" between employees and employers).

for doing so, we look to the National Labor Relations Act as a source of protection.[168]

A. THE NATIONAL LABOR RELATIONS ACT

The NLRA protects workers' rights to form and join unions and engage in collective protest such as strikes and picketing and imposes an obligation to bargain collectively once a majority of employees in an appropriate bargaining unit have chosen to be represented by a union. There are two ways in which the NLRA's protections may be implicated by workers seeking to hold the firm to its avowed mission. The first is protection under section 7, the core of the Act, for workers who engage in concerted activity for collective bargaining or other mutual aid or protection.[169] This protection is accorded to both unionized and nonunionized workers, and its scope has been a controversial topic with the National Labor Relations Board (NLRB or the Board) since the Act was passed. In general, protection is afforded only to activities that relate to wages, hours, and working conditions, subjects which collective bargaining might eventually address. In a nod to the master-servant regime, section 7 typically does not protect activity aimed at altering the scope and direction of the enterprise because those topics are deemed areas of exclusive managerial prerogative. The second NLRA protection, applicable only to unionized workers but influential in determining the scope of section 7 protection, is the mutual obligation to bargain collectively over "mandatory" subjects as defined by Board doctrine and Supreme Court decisions interpreting section 8(d).[170] Mandatory subjects of bargaining are those that pertain to workers' interests in material conditions of the job—

168. 29 U.S.C. §§ 151–169.

169. *Id.* § 157.

170. *Id.* § 158(d); *see* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348–49 (1958) (reading sections 8(a)(5)–(6) to "establish the obligation of the employer and the representative of its employees to bargain with each other in good faith"). The original version of the NLRA, the Wagner Act, did not limit the subjects of collective bargaining or specify the topics that would constitute mutual aid for purposes of section 7. In the first major amendment to the NLRA, the Taft-Hartley Act of 1947, Congress added qualifying language to the duty to bargain, describing the duty as relating to "wages, hours, and other terms and conditions of employment." Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat.

wages, benefits, hours, workplace safety, and job security.[171] Issues concerning the future scope and direction of the enterprise lie at the core of entrepreneurial control and are categorized as permissive subjects, meaning bargaining is permissible but not required, and workers who use economic pressure to insist on those topics are not protected against employer retaliation.[172]

Although the scope of section 7 protection and the contours of mandatory subjects of bargaining under section 8(d) overlap, the two areas are not completely coextensive. Generally, section 7 protection applies to a broader array of activities than those encompassed within the mandatory bargaining obligation. In *G & W Electric Specialty Co.*, the Board explained that section 7 sweeps more broadly than section 8(d) because it protects conduct undertaken not only "for the purpose of collective bargaining," but also for "other mutual aid or protection," which is why it applies to nonunion workers as well as to those who are unionized.[173] Accordingly, I treat the area of section 7 protection here at considerable length.

1. Section 7 Protection

The analysis of which activity qualifies for protection under section 7 is typically approached by considering first, whether the activity was concerted, next, whether it was for mutual aid or protection, and last, whether it nevertheless lost protection because it was disloyal, illegal, or inconsistent with the employer-employee relation. The three prongs of the analysis often

136, 142 (1947) (codified as amended at 29 U.S.C. § 158(d)); *see* Theodore J. St. Antoine, *Legal Barriers to Worker Participation in Management Decision Making*, 58 TUL. L. REV. 1301, 1304 (1984) (describing initial ambiguity in the NLRA definition of duties and the effect of early amendments to the Act).

171. *See* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring) (noting that job security has "properly been recognized in various circumstances as a condition of employment"); Oil, Chem. & Atomic Workers Loc. Union No. 6-418 v. NLRB, 711 F.2d 348, 360 (D.C. Cir. 1983) ("Employee health and safety indisputably are mandatory subjects of collective bargaining . . . .").

172. *Borg-Warner Corp.*, 356 U.S. at 349 (finding it unlawful for a negotiating party to "insist upon" matters outside mandatory bargaining subjects under the NLRA).

173. 154 N.L.R.B. 1136, 1137–38 (1965) (finding that section 7 protected an employee discharged for soliciting signatures on a petition regarding the credit union, but refusing to adopt the Trial Examiner's suggestion that a credit union involves a term or condition of employment subject to mandatory bargaining).

overlap, and analysis of one may bear on or dictate the outcome of another. For clarity, I discuss them separately here, but it is worth noting that the analysis is inevitably messy and less precise in particular cases.

a. The Concerted Activity Requirement

Congress chose to accord broad protection to the section 7 right to engage in concerted activity as a way of bringing to life the First Amendment freedom of association.[174] Section 1 of the NLRA declared that the national labor policy was to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."[175] Section 8(a)(1) made it an unfair labor practice to "interfere with, restrain or coerce employees in the exercise of the rights guaranteed by [section 7],"[176] thereby ensuring that the freedom of association and the closely related freedom of expression would be protected "against encroachments by employers exercising private power."[177] In this way, Congress sought to support the freedoms that are instrumental preconditions to collective bargaining, which in turn would extend the constitutional values of democratic decision-making and due process into the private sector workplace.[178]

In the nonunion workplace, concerted activity is protected even if it is not directly linked to collective bargaining or unionization. Even activity by a single worker is considered concerted if it involves seeking "to initiate, to induce, or to prepare for group action."[179] Often the impulse to act collectively stems from informal conversations between co-workers about compensation, benefits, hours, or working conditions. The word "union" may never be mentioned. As Charles Morris explains,

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174. Summers, *supra* note 27, at 697 (arguing that national labor policy sought to prevent freedom of association from being "bartered away by private contract" and responded to courts' failure to protect this right).

175. 29 U.S.C. § 151.

176. *Id.* § 158(a)(1).

177. Summers, *supra* note 27, at 697.

178. *Id.* at 698 (noting that collective bargaining was meant to bring "an element of democracy into the government of industry").

179. Meyers Indus., Inc., 281 N.L.R.B. 882, 887 (1986), *aff'd sub nom.* Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

> [C]oncerted conduct in which employees engage for "mutual aid or protection" may not necessarily be intended to achieve union organization, at least not deliberately or initially. In some situations the involved employees will have no present or foreseeable desire to organize into a union; in other cases they may have such a desire; and in some situations such a desire might eventually develop. Such nexus between unstructured concerted activity and more formalized union activity is central to the legislative intent embedded in Section 7. Congress thus intended by the broad language of the provision to encourage a flexible and relatively unstructured process. Hence, it should follow that unrepresented, and usually ill-informed, employees ought not to be required to act at their peril when they begin informal joint discussions, for they may not yet be "looking toward group action." But given the opportunity, group action—be it mild or assertive—might in time evolve from that rudimentary process.[180]

Employers who become aware of such discussions may be inclined to nip them in the bud, precisely to avoid the evolution of informal discussions into more assertive demands and, potentially, walkouts and unionization efforts. In a series of cases, the Board developed a doctrine known as "inherently concerted activity," which it has used to protect informal discussions between workers about certain topics regardless of whether the workers are discussing the possibility of group action or considering unionization.[181] The Board has deployed the doctrine to protect individual workers engaged in speech on vital elements of employment, including sharing information and views about wages and

180. Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1701 (1989) (footnote omitted).

181. *See, e.g.*, Alt. Energy Applications, Inc., 361 N.L.R.B. 1203, 1206 n.10 (2014) (reasoning that discussions related to wages "are 'inherently concerted,' and as such are protected, regardless of whether they are engaged in with the express object of inducing group action"); Automatic Screw Prods. Co., 306 N.L.R.B. 1072, 1072 (1992) (finding that an employer rule prohibiting employees from discussing salaries violated section 8(a)(1) because it was "an inherently concerted activity clearly protected by Section 7 of the Act"), *enforced*, 977 F.2d 582 (6th Cir. 1992).

wage differentials,[182] hours and work schedules,[183] and job security.[184] The Board reasoned that discussions on these topics are likely to occur at the earliest stages of collective consciousness-raising, making them "the grist on which concerted activity feeds."[185] The NLRB's Division of Advice has recommended that the vital elements of employment to which the doctrine applies should be expanded to include workplace health and safety and racial discrimination,[186] and both the Acting General Counsel and the General Counsel of the NLRB endorsed the recommendations in 2021, signaling an intent to press for a broader understanding of protected concerted activity.[187] This would represent a significant expansion of section 7 protection. Where applied, the doctrine protects discussion among workers "even if group

182. *Alt. Energy Applications, Inc.*, 361 N.L.R.B. at 1206 n.10.

183. Aroostook Cnty. Reg'l Ophthalmology Ctr., 317 N.L.R.B. 218, 220 (1995) (finding that work schedules are "vital elements of employment . . . as likely to spawn collective action as the discussion of wages"), *enforcement denied in part on other grounds*, 81 F.3d 209 (D.C. Cir. 1996).

184. Sabo, Inc., 362 N.L.R.B. 690, 690 n.1 (2015) (finding that job security is a "vital term and condition of employment" and therefore discussions on the topic are protected as "inherently concerted").

185. Jeannette Corp. v. NLRB, 532 F.2d 916, 919 (3d Cir. 1976).

186. *See* NLRB Off. of the Gen. Couns., Advice Memorandum on North West Rural Electric Cooperative, Case 18-CA-150605, at 9–12 (Sept. 21, 2015) (concluding that workplace health and safety discussions are analogous to wage-related discussions and should be protected as "inherently concerted"); NLRB Off. of the Gen. Couns., Advice Memorandum on SunBridge Healthcare LLC, d/b/a Milford Center, Case 01-CA-156820, at 9–12 (Jan. 20, 2016) (expressly applying the same reasoning to conclude that discussions of alleged employer discrimination are "inherently concerted").

187. NLRB Off. of the Gen. Couns., Memorandum GC 21-03 on Effectuation of the National Labor Relations Act Through Vigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines at 2, 4–6 (Mar. 31, 2021) [hereinafter GC 21-03] (stating a need for protection of "fundamental precursor actions" as part of concerted activity, disapproving of recent opinions restricting the scope of such protections, and recognizing the particular importance of health and safety issues during the COVID-19 pandemic); Off. of the Gen. Couns., Memorandum GC 21-04 on Mandatory Submissions to Advice (Aug. 12, 2021) (noting recent decisions narrowly interpreting the scope of concerted activity protection and instructing Regional staffs to submit cases on this topic to Regional Advice Branches).

action is nascent or not yet contemplated."[188] Further, protection attaches even if other employees do not agree with the complaint or join in the protest.[189]

The inherently concerted activity doctrine continues to divide the Board, and appellate courts have not necessarily embraced the doctrine either. Republican Board members have criticized the inherently concerted activity doctrine as unnecessary and duplicative.[190] In *Aroostook County Regional Ophthalmology Center v. NLRB*,[191] the D.C. Circuit agreed, refusing to endorse the Board's theory of inherent concerted activity. The court observed that the doctrine is potentially "limitless and nonsensical."[192] The court explained: "Certainly, discussion of employment conditions, such as scheduling, *could* be protected concerted activity; however, adoption of a *per se* rule that any discussion of work conditions is automatically protected as concerted activity finds no good support in the law."[193]

188. GC 21-03, *supra* note 187. The Memorandum responds, in part, to *Alstate Maint., LLC*, decided by the Trump Board, which provided factors implying a required (though unspecified) level of formal organization for employee activity to be "concerted," in tension with the broad doctrine of "inherently concerted" activity. Alstate Maint., LLC, 367 N.L.R.B. No. 68, at 7 (Jan. 11, 2019). Specifically, *Alstate* denied retaliation protection to a skycap who objected to handling a soccer team's luggage based on prior experience of receiving poor tips for similar jobs. The Board found that the presence of other employees at the objection and the objecting employees' use of the pronoun "we," were insufficient to meet the standard for concerted activity. *Id.* at 3. *Alstate* was overturned by the Biden Board. Miller Plastic Prods., Inc., 372 N.L.R.B. No. 134, at 9 n.18 (Aug. 25, 2023) (interpreting *Alstate* to require at least one of the factors listed by the Board, thus creating outer limits for concerted action which are "unduly cramped," justifying a return to the previous totality of the circumstances test).

189. GC 21-03*, supra* note 187, at 5 ("While contemplation of group action may be indicative of concerted activity, it is not a required element.").

190. *See, e.g.*, Fresh & Easy Neighborhood Mkt., Inc., 361 N.L.R.B. 151, 166–67 (Miscimarra, concurring in part and dissenting in part) (arguing that the "inherently concerted" doctrine, as applied to an individual employee acting alone, is inconsistent with section 7's language of "mutual aid" because that phrase requires a showing of intent from multiple parties); Sabo, Inc., 362 N.L.R.B. 690, 692–96 (2015) (Miscimarra, dissenting) (reiterating the intent requirement, here with respect to "induc[ing] or prepar[ing] for group action").

191. 81 F.3d 209 (D.C. Cir. 1996).

192. *Id.* at 214.

193. *Id.*

b. Activity "for Mutual Aid or Protection"

The Board and the courts have struggled with how broadly to interpret the goals of concerted activity, delineated by the statutory phrase "for mutual aid or protection." Although its meaning seems clear enough in cases where traditional subjects of collective bargaining are involved—wages, hours, and working conditions—the "mutual aid" requirement has sometimes raised difficult issues, particularly where the activity's connection to the particular workplace is attenuated or the workers are acting in their capacities as citizens as well as employees. Thus, activity aimed at social justice advocacy, benefits to the community, benefits to consumers, patients, clients, or the public generally, or aimed at political ends is not protected unless there exists some nexus to workers' interests *as employees*, and an objective to improve their workplaces and address issues that lie within the employer's control.[194] For example, nurses who complain about their employers' policies with the goal of protecting patients do not have section 7 protection because the quality of patient care and the welfare of patients are not sufficiently related to their material interests in the workplace as employees.[195] Similarly, bus drivers who express concern about student safety on the school buses they drive are protected only where they also have

194. *See* Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 921–24 (1992) (describing how section 7 protections of employee expression are narrowly limited to "conditions of employment," leading to anomalous results where employee speech on critical moral or social topics is unprotected, while trivial employment matters are fully protected).

195. *See* Summit Healthcare Ass'n, 357 N.L.R.B. 1614, 1623 (2011) ("Although nurses are free to band together for their own mutual aid and protection, that does not mean the Act frees them to band together for the protection of their patients. Section 7 does not speak to employee-patient or employee-customer connections. It speaks of the mutual protection of employees. . . . The word 'mutual' refers to employees, not anyone else."); Orchard Park Health Care Ctr., Inc., 341 N.L.R.B. 642, 643 (2004) ("[E]mployee concerns for the 'quality of care' and the 'welfare' of their patients are not interests 'encompassed by the "mutual aid or protection" clause.'" (quoting Lutheran Soc. Serv. of Minn., 250 N.L.R.B. 35, 42 (1980))). *But cf.* Misericordia Hosp. Med. Ctr., 246 N.L.R.B. 351, 357 (1979) (finding that complaints about staffing levels, patient admissions, and unsanitary conditions were protected under section 7 as matters affecting working conditions, notwithstanding their significant impact on patient welfare and employees), *enforced*, 623 F.2d 808 (2d Cir. 1980).

concern for their own safety and/or wages and benefits.[196] And employee action aimed at obtaining compensation for interns upon whom employees rely at work is not protected when the interns are not "employees."[197]

The key to finding that activity is for mutual aid or protection, then, is establishing a link between workers' efforts and a self-interested motive of material gain relating to the workers' interests as workers. But the link is malleable in the hands of a sympathetic court or Board. In *Eastex, Inc. v. NLRB*, the Court found that distributing a union newsletter advocating for a stance at the polls on broad political issues including minimum wage and right-to-work laws was protected activity under section 7 because of the nexus between the topics covered and "employees' interests as employees."[198] If passed, the Court observed, the right-to-work statute could have impacted workers by weakening unions at the bargaining table, and the minimum wage issue could have enhanced negotiated wages for workers because it would establish a higher floor at the bargaining table.[199] Thus, the Court found worker activism in a union context protected even where it was aimed at securing leverage through legislative channels rather than directly through collective bargaining, and even where it primarily benefited lower-wage workers outside the bargaining unit. To do so, however, the Court had

196. *See* Five Star Transp., Inc., 349 N.L.R.B. 42, 44 (2007) (finding that general complaints about safety are "not sufficiently related to the [employees'] terms and conditions of employment to constitute protected conduct"), *enforced*, 522 F.3d 46 (1st Cir. 2008).

197. Amnesty Int'l, 368 N.L.R.B. No. 112, at 2 (Nov. 12, 2019), *petition for review denied sub nom*. Jarrar v. NLRB, 858 F. App'x 374 (D.C. Cir. 2021). This formalist view of section 7 protection extends to other contexts. *See* Alstate Maint., LLC, 367 N.L.R.B. No. 68, at 9 (Aug. 25, 2023) (finding that tip amounts are not a term or condition of employment because they "are not wages received from, and controlled by" an employer). On a similar rationale, employee refusals to work based upon complaints about a customer's tipping habits did not concern conditions of employment because it related to the relationship between the worker and the customer, rather than to the employer-employee relationship. *Id.*; *see also* Harrah's Lake Tahoe Resort Casino, 307 N.L.R.B. 182, 182 (1992) (finding that, despite promised improvements in management and morale, an employee's advocacy of proposed control through stock purchase of the employer's parent corporation was outside the scope of section 7 because it "[did] not advance the employees' interests as employees," but instead as owners).

198. 437 U.S. 556, 556, 565–67 (1978).

199. *Id.* at 569.

to reframe the issue, converting a "solidaristic appeal on behalf of the principles of the labor movement . . . into a calculated appeal to the pocketbook."[200] And the Court left open the possibility that some advocacy might be "so purely political or so remotely connected to the concerns of employees as to be beyond the protection" of the Act.[201]

It has been easiest for the Board to appreciate activity as aimed at mutual aid or protection where it pertains to economic issues that are traditional concerns of unionization or collective bargaining, such as wages, hours, and job security. Some topics with a strong connection to economic interests have been problematic, however, because they have not historically been a subject of union activism and collective bargaining.[202] For example, discrimination and harassment claims have long given the Board pause under a section 7 analysis when advanced by individual workers, both on the concertedness prong of the analysis and the question of whether such claims are for mutual aid or protection. The basic dilemma is whether the goal of eradicating discrimination is an individual or a collective goal.[203] When advanced in the context of collective bargaining, it clearly appears as a collective goal and a public good. But when a claim is advanced by an individual worker, often before a state tribunal or administrative agency when the union refuses to pursue the

200. Estlund, *supra* note 194, at 928.

201. *Eastex*, 437 U.S. at 570 n.20; *cf. id.* at 568 n.18 (citing Board decisions where distribution of "purely political" materials was unprotected under section 7). Nevertheless, a sympathetic Board or court can still find a connection to workers' material interests. In a recent Board case, participation in "Days Without Immigrants" rallies in response to workplace immigration raids were held protected. The Board concluded that the immigration policies at issue had a "direct nexus" to the employees' prospects for continued employment and conditions of employment. NLRB Off. of the Gen. Couns., Advice Memorandum on EZ Industrial Solutions, LLC, Case 07-CA-193475, at 8 (Aug. 30, 2017); *see also* GC 21-03, *supra* note 187.

202. *See* Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767, 1783–84 (2001) (discussing the divergence between unionism and modern social movements, despite the strong economic and workplace implications of movements based on, for example, race and gender).

203. *See* Marion Crain, *Sex Discrimination as Collective Harm*, *in* THE SEX OF CLASS: WOMEN TRANSFORMING AMERICAN LABOR 99 (Dorothy Sue Cobble ed., 2007) (reviewing the history of union indifference to sex discrimination claims and arguing that sexual harassment and sex discrimination should be conceptualized as a collective harm by labor unions and for purposes of labor law).

claim, the Board has had more difficulty seeing that the claim advances workers' rights collectively, particularly where other workers do not join voluntarily.[204]

Finally, activity aimed at usurping an area deemed a traditional prerogative of management, such as decisions affecting the ultimate direction and managerial policies of the business entity, is generally unprotected. Cases decided under section 7 frequently borrow from case law addressing the interpretation of section 8(d), which imposes a duty to bargain over mandatory subjects, understood as those pertaining to workers' material interests.[205] For example, newspaper reporters were not protected against discharge where they sought to limit the publisher's interference with news content and undertook a campaign including rallies, demonstrations, and appeals to readers.[206] Their goal was to persuade readers to cancel their newspaper subscriptions in support of their quest for journalistic integrity and autonomy in reporting.[207] Although the Board found their activity protected both because it related to their day-to-day interests as professional employees and because it also included a demand for union recognition and bargaining,[208] the D.C. Circuit disagreed. In *Ampersand Publishing*, the D.C. Circuit vacated the NLRB's ruling, holding that the editorial policies of the newspaper were not a term or condition of employment in which the workers had a legitimate, protectible interest.[209] First, because newspapers have First Amendment rights, including the discretion to determine the contents of the newspaper, the publisher

204. *See, e.g.*, Holling Press, Inc., 343 N.L.R.B. 301, 302 (2004) (finding no section 7 protection where worker was fired for attempting to coerce coworkers to support her sexual harassment complaint with a state agency—although her effort to solicit help from coworkers rendered her activity concerted, it was not for "mutual aid or protection" because "[h]er goal was a purely individual one"). *But see* Fresh & Easy Neighborhood Mkt., Inc., 361 N.L.R.B. 151, 155–56 (2014) (overturning *Holling Press* and finding that section 7 protects workers who make common cause with one another over a grievance even if only one worker has an immediate stake in the outcome, because "next time it could be one of them that is the victim").

205. *See infra* notes 380–91 and accompanying text (discussing the broad interpretation of "wages").

206. *See* Ampersand Publ'g, LLC v. NLRB, 702 F.3d 51, 51, 53 (D.C. Cir. 2012).

207. *Id.* at 53–54.

208. Ampersand Publ'g, LLC, 357 N.L.R.B. 452, 456–59 (2011).

209. *Ampersand Publ'g, LLC*, 702 F.3d at 57–59.

has "absolute authority" to determine the newspaper's content.[210] Second, under what it dubbed "conventional labor-law principles," the court held that "a publisher's editorial policies do not constitute a 'term or condition of employment' in which employees have a legitimate § 7 interest."[211] The court cited Board cases finding that the quality of an employer's product is an aspect of the employer's managerial prerogatives rather than a term or condition of employment.[212]

c. Activity That Is Disloyal, Illegal, or Fundamentally Undermines the Employer's Interests

Union organizing itself is often adverse to the employer's economic interests and frequently disrupts the workplace. From that perspective, one might say that all union organizing is disloyal. But the Act explicitly protects employee self-organization. How, then, to distinguish activity that is so disloyal or adverse to the employer's interests that it loses its protection under section 7? As Jim Atleson has explained, the distinction rests on assumptions about the employment relationship that have survived the enactment of the NLRA.[213] Specifically, courts assume that employees owe a duty of loyalty to employers and to the common productive enterprise, and that employees should defer to the employer's decisions regarding the management and future of the enterprise.[214] Thus, worker actions that violate these obligations of loyalty and deference, either because they are so disloyal that they undermine the future reputation and productivity of the firm, because they involve language or behavior that is fundamentally disrespectful toward management, or because they seek a voice on matters that lie at the core of managerial control, lose protection under the Act.

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210. *Id.* at 56.

211. *Id.* at 57.

212. *Id.* (defining the quality of a business's product as a managerial policy, such that workers' efforts to influence it are not protected by section 7); *see also* Orchard Park Health Care Ctr., Inc., 341 N.L.R.B. 642, 645–46 (2004) (Meisburg, concurring) ("Although employee interest in [an employer's] product is desirable, it is not thereby converted into a working condition. Factory workers . . . may manifest a strong interest in the goods they produce, but the nature of those goods is not a condition of employment.").

213. *See* ATLESON, *supra* note 25, at 84–96.

214. *See id.* at 15–16, 94–96, 111–35.

The Supreme Court endorsed these assumptions in *NLRB v. International Brotherhood of Electrical Workers Local 1229* (*Jefferson Standard*), where the Court upheld the discharge of television technicians who distributed handbills criticizing their TV station employer for refusing to purchase equipment needed to put on live programs and suggesting that the station was treating the city as "second class."[215] The Court found that the workers were engaged in a "sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income," an act so disloyal that their activity lost protection.[216] Critical to the Court's reasoning was that the workers' attack on the company's product was divorced from complaints about wages or working conditions; the handbill made no reference to a labor dispute and did not disclose that the workers were seeking public support to extract a concession from the employer at the bargaining table.[217] The Court found that the workers' disparagement of the employer's product was so disloyal that their otherwise protected concerted activities fell outside section 7's protection.[218]

The Board has also concluded that section 7 activities lose their protection in cases where the workers' conduct or speech is abusive, opprobrious, obscene, or flagrantly disrespectful. As one court described the rule, "communications occurring during the course of otherwise protected activity remain likewise protected unless found to be 'so violent or of such serious character as to render the employee unfit for further service.'"[219] Alas, the cases are devoid of any consistent rationale, and instead simply turn on the assumption that the employer has the right to expect deference to authority and civility in the workplace. Consequently, the outcomes are unpredictable and depend more on the predispositions of the particular decision-makers than on anything

215. 346 U.S. 464, 468 (1953).

216. *Id.* at 471.

217. *Id.* at 475–77.

218. *Id.* at 477–78.

219. Dreis & Krump Mfg. Co. v. NLRB, 544 F.2d 320, 329 (7th Cir. 1976) (quoting NLRB v. Ill. Tool Works, 153 F.2d 811, 816 (7th Cir. 1946)).

else. For example, employees who directed vulgarities at management when it withdrew a benefit lost protection,[220] while employees who crossed their arms, rolled their eyes, used profanity, and engaged in other forms of disrespectful, rude, and violent behavior towards a management representative did not lose protection.[221]

These assumptions of loyalty and deference lead inexorably to rulings that reflect the idea that workers owe an obligation to defer to management in its decision-making about the future management of the business. This assumption also influences the content of legitimate objectives in the mutual aid or protection analysis under section 7. Nevertheless, the assumption that workers owe an obligation to defer to management in this area is most pronounced in cases addressing the categorization of mandatory and permissive subjects of bargaining. In *First National Maintenance Corp. v. NLRB*,[222] the Court defended the employer's exclusive prerogative to control matters that affect the scope and ultimate direction of the enterprise, such as the volume and type of advertising, product design, the manner of financing and sales, decisions to invest in labor-saving machinery, and the decision to liquidate assets and go out of business, categorizing them as topics not subject to bargaining.[223] The Court's assumption was that such issues fall within an inherent body of exclusively managerial functions, an area of "retained freedom to manage [the company's] affairs unrelated to employment."[224]

The notion of a zone of managerial control in which it is inappropriate for workers to have influence was eventually extended to cases addressing section 7 protection, functioning as an additional way in which workers' activity might lose protection. As discussed above, this has sometimes been expressed as

220. Sullair P.T.O., Inc., v. NLRB, 641 F.2d 500, 501–02 (7th Cir. 1981).

221. *See, e.g.*, Health Care & Ret. Corp. of Am., 306 N.L.R.B. 63 (1992); Severance Tool Indus., 301 N.L.R.B. 1166 (1991).

222. 452 U.S. 666 (1981).

223. *Id.* at 676–77; *see also* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring) (describing decisions that lie at the "core of entrepreneurial control" and are thus not within the scope of mandatory bargaining).

224. *First Nat'l Maint. Corp.*, 452 U.S. at 677; *see also* ATLESON, *supra* note 25, at 133 (arguing that *First National Maintenance Corp.* recognized "an inherent body of exclusively managerial functions").

rendering the activity outside the scope of traditional bargaining subjects and therefore not "for mutual aid or protection," but the analysis in section 7 cases is not always clear, especially where the worker's efforts are also deemed unprotected because they are not concerted, or are disloyal or insubordinate. Cases involving criticisms of the employer's product or service illustrate this most clearly. The *Jefferson Standard* case, for example, involved a determination that activity criticizing the employer's product was disloyal, and therefore unprotected.[225] Absent a connection to a labor dispute, so that the public can assess the validity of the criticism in light of that material interest, "unselfish" worker criticism of an employer's product or practices—that is, criticism that does not advance the workers' leverage at the bargaining table but goes to the core of managerial control and direction of the business and its products—is unprotected.[226]

Thus, in *National Dance Institute—New Mexico, Inc.*,[227] a dance instructor was punished for complaining about the artistic choices made in the employer's outreach program targeting families living in poverty because they were not tailored to the interests of the Hispanic community that the organization served. Because the dance instructor raised those criticisms at a staff meeting where workers were preparing for implementation of the choreography and performance of the program, the Board General Counsel argued that the criticism was both appropriate and affected the working conditions of workers who were preparing to perform.[228] Although the NLRB's ruling characterized the worker's action as "admirable," it did not qualify as protected activity under the Act. First, there was insufficient evidence that others shared the worker's concern so that the activity was concerted.[229] Second, her complaint addressed the needs and desires of the Hispanic community that the employer served, not the conditions under which work was performed. Hence, it related to the mission and direction of the business rather than to working

225. NLRB v. Loc. Union No. 1228, Int'l Bhd. of Elec. Workers (*Jefferson Standard*), 346 U.S. 464, 472 (1953).

226. Estlund, *supra* note 194, at 938–39.

227. 364 N.L.R.B. 342 (2016).

228. *Id.* at 349.

229. *Id.*

conditions.[230] The Board reasoned that the year-end dance performance was a product, and the worker's interest in the quality or suitability of the product was not a condition of employment relevant to section 7 protection.[231] "In general," the Board concluded, "'employee efforts to affect the ultimate direction and managerial policies of the business are beyond the scope' of Section 7."[232]

2. Mandatory Subjects of Bargaining

The second source of protection under the NLRA is available only to unionized workers who seek to negotiate over a subject that the Board has characterized as mandatory. In such cases, the union can require the employer to bargain about the topic and can press to impasse in support of its demands, including calling a strike, picketing, or boycotting the company.[233]

The Court initially seemed receptive to the idea that the union should have a role in negotiating with the employer over managerial decisions that impact job security. In *Fibreboard Paper Products Corp. v. NLRB*, the Court held that a firm's decision to subcontract out work previously performed by unionized workers was a mandatory subject of bargaining because it imperiled job security of the unionized workers.[234] The *Fibreboard* majority reasoned that the company's decision to contract out the maintenance work did not alter the company's basic operation or significantly abridge its freedom to manage its business, and thus did not lie at the core of entrepreneurial control.[235] More importantly for our purposes, however, Justice Stewart's concurring opinion shed light on the sorts of employer decisions that would be categorized as permissive rather than mandatory subjects, specifically those that lie "at the core of entrepreneurial

230. *Id.*

231. *Id.*

232. *Id.* at 349–50 (quoting Riverbay Corp., 341 N.L.R.B. 255, 257 (2004)); *accord* Lutheran Soc. Serv. of Minn., 250 N.L.R.B. 35, 41 (1980).

233. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348–50 (1958); *see also* NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 409 (1952).

234. 379 U.S. 203, 213–15 (1964).

235. *Id.* at 213; *id.* at 224 (Stewart, J., concurring) (construing the majority opinion as not imposing a duty to bargain collectively over core managerial functions).

control," including advertising, product design, and decisions relating to the future direction of the business.[236]

Soon thereafter, the Court significantly limited the scope of mandatory subjects in the context of decisions relating to the future direction of the business. The Court held in *First National Maintenance Corp. v. NLRB* that an employer had no duty to bargain over a decision to shut down a part of its business for economic reasons, even though the result was a loss of employment for thirty-five workers.[237] Writing against the backdrop of a severe economic recession and determined to protect employers' rights to make unencumbered decisions about how best to salvage troubled businesses, the Court found the decision central to the firm's future business direction and thus on the permissive side of the bargaining dichotomy.[238] Citing Justice Stewart's concurrence in *Fibreboard* with approval, the majority intoned, "in establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."[239]

B. WORKER ACTIVITY SEEKING TO HOLD EMPLOYER TO ITS MISSION—THE GOOGLE PROTESTS

Given the centrality of work to our psychological, economic, and social selves, it should not surprise us to see protests by workers who have obtained a level of economic security in the modern era articulating higher-order interests in purpose and meaning at work.[240] Although the employer has contracted for the workers' labor and therefore owns the product produced, the workers clearly have an interest in the products of their own labor and the quality of what they themselves produce. That interest is simultaneously economic (the quality of the product or service determines the success of the enterprise that sells it, and

236. *Id.* at 223.

237. 452 U.S. 666, 686 (1981).

238. *Id.* at 681.

239. *Id.* at 676–77.

240. Estlund, *supra* note 194, at 959 & n.164 (describing individuals' hierarchy of needs and reasoning that when lower level physiological and safety needs are satisfied, higher level need for moral fulfillment will assume center stage (citing ABRAHAM H. MASLOW, MOTIVATION AND PERSONALITY 98–101 (1954))).

therefore influences worker job security and compensation) and personal (the ability to take pride in one's work and the identity associated with affiliation with a firm that produces quality products and services).[241]

The wave of protests at Google reflects this dual set of interests. The mass walkouts and subsequent pressure brought by the workers challenging Google's departure from its commitment to the ethical uses of technology were triggered by workers' personal identification with the fruits of their labor and their frustration with Google's bait-and-switch recruitment strategy.[242] The pressure was initially successful, as Google responded by abandoning Project Dragonfly, the search engine developed for China.[243] But then, workers expanded their demands, asking that Google refrain from providing U.S. government agencies with engineering resources until the agencies ceased engaging in human rights abuses, and that Google refrain from bidding on government contracts that contribute to human rights violations (such as contracts with ICE to develop software that would facilitate deportation of immigrants and separation of children from their parents).[244]

Google retaliated by firing four of the protesting workers, allegedly for violating data security policies.[245] Google workers, convinced that the terminations were retaliation for their contemporary union organizing efforts,[246] filed a complaint with the

241. *Id.* at 949–53.

242. *See supra* notes 13–16 and accompanying text.

243. Jeb Su, *Confirmed: Google Terminated Project Dragonfly, Its Censored Chinese Search Engine*, FORBES (Jul. 19, 2019), https://www.forbes.com/sites/jeanbaptiste/2019/07/19/confirmed-google-terminated-project-dragonfly-its-censored-chinese-search-engine/?sh=7829edfa7e84 [https://perma.cc/7DSR-2YVU].

244. Shirin Ghaffary, *Google Employees Are Demanding an End to the Company's Work with Agencies Like CBP and ICE*, VOX (Aug. 14, 2019), https://www.vox.com/2019/8/14/20805562/human-rights-concerns-google-employees-petition-cbp-ice [https://perma.cc/SVJ2-XFLX].

245. The four were dubbed the "Thanksgiving Four" in media reports because they were fired immediately before Thanksgiving. *See, e.g.*, Coulter, *supra* note 16.

246. *See* Kate Conger, *Hundreds of Google Employees Unionize, Culminating Years of Activism*, N.Y. TIMES (Jan. 4, 2021), https://www.nytimes.com/2021/01/04/technology/google-employees-union.html [https://perma.cc/WK5X

NLRB, seeking to invoke the protection of the labor laws.[247] Workers filed a separate suit in California state court. The state court complaint alleged common law claims for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, slander, and wrongful discharge in violation of public policy.[248] The basis of these claims was that the company had breached its contract with the workers by failing to follow Google's espoused "don't be evil" policy.[249] The case ultimately settled.[250] In the case before the NLRB, Google argued that even if it had terminated the workers for their protest activities, the protests themselves were not protected because they were purely political, lacking connection to terms and conditions of employment.[251] Google settled this case to avoid turning over documents relating to its anti-union organizing plan.[252]

-LEN7]. Conger's reporting describes the formation of the Alphabet Workers Union, a minority union designed to sustain pressure on management over time by providing structure and longevity to long-running bursts of union activism at Google; the union was organized in secret for about a year prior to the election of leadership in December 2020, and is affiliated with the Communication Workers of America. *Id.*

247. The Board's General Counsel pursued the claim, having concluded that their terminations were likely unlawful retaliation for union organizing activities. Kate Conger & Noam Scheiber, *Federal Labor Agency Says Google Wrongly Fired 2 Employees*, N.Y. TIMES (Dec. 2, 2020), https://www.nytimes.com/2020/12/02/technology/google-nlrb-fired-workers.html [https://perma.cc/87UJ-CP6S].

248. *See* Complaint & Jury Demand ¶¶ 31–52, Rivers v. Google, Inc., No. 21CV391644 (Cal. Super. Ct. Nov. 29, 2021).

249. Sean Captain, *Fired Employees Invoke Google's 'Don't be Evil' Motto in Their Workplace Complaint*, FAST CO. (Dec. 6, 2019), https://www.fastcompany.com/90440298/fired-employees-invoke-googles-dont-be-evil-motto-in-their-workplace-complaint [https://perma.cc/6QBC-96MF]; Emma Roth, *Google Engineers Claim They Were Fired for Following Its 'Don't Be Evil' Policy*, VERGE (Nov. 30, 2021), https://www.theverge.com/2021/11/30/22809577/google-employees-sue-dont-be-evil-policy [https://perma.cc/NN2C-TDYQ].

250. Emma Roth, *Google Settles with Engineers Who Said They Were Fired for Trying to Organize*, VERGE (Mar. 21, 2022), https://www.theverge.com/2022/3/21/22989683/google-fired-engineers-union-settlement-lawsuit-project-vivian [https://perma.cc/JJ53-Q2ZN].

251. Coulter, *supra* note 16.

252. As part of its case, the Board sought documents that allegedly contained the details of "Project Vivian," Google's anti-union organizing plan. Roth, *supra* note 250. The settlement included an agreement that the workers would drop the separate California state court lawsuit. *Id.*; *see also* Daisuke Wakabayashi, *Google Settles with Six Employees Who Worked on Unionization Efforts.*, N.Y. TIMES (Mar. 21, 2022), https://www.nytimes.com/2022/03/21/technology/google-workers-settlement.html [https://perma.cc/WT7V-2E2U].

Save for the fact that the Google workers were engaged in a union organizing drive, Google would undoubtedly have prevailed in the case before the NLRB. Worker protests directed at the authenticity of corporate mission like the ones at Google are beyond the scope of section 7 protection under current law. First, the Google workers would have struggled to identify their material self-interest for section 7 protection purposes, particularly in the face of the employer's strong argument that their activities sought to intrude upon its entrepreneurial zone of control. The Google workers sought to use the employer's mission statement to control its choice of clients and contractors so that the company did not undertake projects incompatible with its stated mission. Such demands clearly trespass on the zone of management's exclusive control over the direction of the business and thus are not for mutual aid or protection. Yet it is apparent that the workers cared deeply about the purposes for which their labor was deployed and that Google not only catered to their strong desire for purpose in shaping its mission statement to recruit and retain them, but was initially willing to make concessions to appease the workers. Only when the nascent organizing crystallized into a unionization drive did Google push back. This is exactly the role that section 7 protection for concerted activity was intended to play for unorganized workers—to shield the earliest collective worker efforts from employer retaliation designed to nip them in the bud.[253] Second, the Google protests would lose section 7 protection for disloyalty, since they challenged management's fundamental right to determine the direction of the business. The irony is that the Google workers actually didn't seek to challenge Google's stated mission—instead, they sought to uphold it.

Finally, the Google workers' protests and demands would not be recognized as mandatory subjects over which the Alphabet Union, if recognized, could insist at the bargaining table.[254]

253. *See supra* note 180 and accompanying text.

254. *See* Jacki Silbermann, *A New Voice in the Labor Movement? Organizing for Social Responsibility in the Tech Sector*, 25 EMP. RTS. & EMP. POL'Y J. 197, 198 (2021) (observing that the current understanding of the scope of section 7 protection and the mandatory/permissive bargaining subjects regime would not encompass the concerns of tech workers who object to the political ends to which their labor is put).

The use of economic pressure to advance bargaining on this permissive subject would thus expose the union to an unfair labor practice charge of failure to bargain in good faith over mandatory subjects,[255] and the workers to the risk of discharge.

A related series of Board cases addresses the scope of NLRA protection for front-line workers' protest that takes the form of speech. These cases first arose in the context of workers wearing union insignia—buttons, shirts, and hats—while on the clock. They soon expanded to address worker speech involving other issues of material concern to workers where the insignia do not convey explicit messages about unionization, but instead involve social justice-oriented messaging seeking to hold the corporation accountable for deviations from its avowed corporate purposes.

III. SPEECH AND THE PUBLIC IMAGE CASES

The clash between workers' interests in voice on social justice issues and the employer's control over the products produced and services marketed is sharpest in contexts where employers market the corporate brand through the medium of frontline workers' bodies. In these cases, the employer typically seeks to enforce a dress code or policy that prohibits the display of buttons, insignia, or other communicative speech or symbols, asserting that the badges or buttons are incompatible with the brand image that the employer wishes to project.[256] The employer's position is that any symbolic messages worn on workers' bodies become intertwined with its brand. Essentially, workers serve as walking billboards for the employer, so that their speech becomes the employer's speech.[257]

The corporate image that the employer wishes to project can be considerably broader than an unadorned uniform or dress code. Where front-line workers are the primary point of contact with consumers, such as in branded services (hotel and restau-

255. *See* National Labor Relations Act § 8(b)(3), 29 U.S.C. § 158(b)(3).

256. *See infra* cases described in Part III.A.

257. This is an extension of the public sector employment doctrine that employee speech in the workplace context is effectively the employer's speech. *See, e.g.*, Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2474 (2018) ("When an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer. The employee is effectively the employer's spokesperson.").

rant chains, airlines, fitness centers, etc.), workers literally embody the brand and are an integral part of the customers' experience.[258] Service work is distinctive because it is embodied in the worker—service firms thus appropriate and mobilize the worker's physical and psychological attributes, which then become part of the labor value that she provides for the firm. These embodied attributes and capacities that the worker brings into the employment relationship with her when she is hired are known in sociological literature of work as "aesthetic labor."[259] Thus, from the firm's perspective, the frontline workers' bodies—including their race, ethnicity, and gender—become critical aspects of the brand.[260]

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258. Wolkowitz, *supra* note 116, at 499; *see* Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13 (2007) (discussing Darlene Jespersen's challenge to Harrah's Casino's appearance and grooming code).

259. Chris Warhurst & Dennis Nickson, *Employee Experience of Aesthetic Labour in Retail and Hospitality*, 21 WORK, EMP. & SOC'Y 103, 107 (2007) ("Aesthetic labour is the employment of workers with desired corporeal dispositions. With this labour, employers intentionally use the embodied attributes and capacities of employees as a source of competitive advantage."). Aesthetic labor is very important in the retail fashion industry, for example, where employees market the fashion brand by physically wearing the clothes as well as selling them. *See* Lynne Pettinger, *Brand Culture and Branded Workers: Service Work and Aesthetic Labour in Fashion Retail*, 7 CONSUMPTION, MKTS. & CULTURE 165, 177 (2004).

260. Sociological studies of the aesthetic labor of flight attendants are particularly well developed because of feminist interest in the gendered nature of the embodiments. *See, e.g.*, Melissa Tyler & Philip Hancock, *Flight Attendants and the Management of Gendered 'Organizational Bodies,' in* CONSTRUCTING GENDERED BODIES 25 (Kathryn Backett-Milburn & Linda McKie eds., 2001) (examining highly gender-differentiated management of flight attendants' bodies); KATHLEEN M. BARRY, FEMININITY IN FLIGHT: A HISTORY OF FLIGHT ATTENDANTS 37 (2007) (analyzing "wages of glamour" received by flight attendants for the privileges of feminine appeal). As Tyler and Hancock explain, airlines used the essentialized female body to signify an organizational ethos and commitment to service, relying upon caring skills and emotional attributes (empathy) stereotypically associated with femaleness and effectively naturalizing (and therefore not paying for) this part of the flight attendants' work. Tyler & Hancock, *supra*, at 27, 29. Most of this aesthetic labor is buried in the fact of the employees' gender; it is thus invisible and "beyond contract." Melissa Tyler & Steve Taylor, *The Exchange of Aesthetics: Women's Work and 'The Gift*,*'* 5 GENDER, WORK & ORG. 165, 165–66 (1998).

A. BALANCING SECTION 7 RIGHTS AGAINST MANAGERIAL PREROGATIVE TO CONTROL THE FIRM'S BRAND

The Court early established that section 7 protects workers' right to distribute union literature in the workplace or to wear union insignia or buttons in support of union activism, unless the employer can show special circumstances that justify the restriction, such as disruption of operations or interference with discipline, production, or safety.[261] The Board construes the "special circumstances" exception narrowly, and the employer has the burden of proof to establish it and to demonstrate that the button or insignia restriction is therefore justified and is narrowly tailored to serve its purpose.[262] The special circumstances exception is available only where the buttons or insignia could "jeopardize worker safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees."[263] The mere requirement that employees wear a uniform is not a

261. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 801–03 (1945) (explaining no-solicitation rules are not enforceable during non-working time unless employer can show special circumstances that make rules necessary to maintain production or discipline).

262. Tesla, Inc., 370 N.L.R.B. No. 88 (Feb. 12, 2021) (finding a section 8(a)(1) violation where the employer policy required employees to wear a plain black T-shirt or one imprinted with the employer's logo and prohibited employees from substituting a shirt bearing union insignia). In a subsequent proceeding, the Board reviewed both *Republic Aviation* and its precedents and concluded that "when an employer interferes *in any way* with its employees' right to display union insignia, the employer must prove special circumstances that justify its interference," and thus Tesla's dress code was unlawful. *See* Tesla, Inc., 371 N.L.R.B. No. 131, at 1 (Aug. 29, 2022). The Board's approach is currently in question as a result of the Fifth Circuit's ruling that the Board misconstrued *Republic Aviation* and failed to properly balance the competing interests of workers in self-organization and employers' right to maintain discipline. Tesla, Inc. v. NLRB, 86 F.4th 640, 644 (5th Cir. 2023). Nevertheless, because the Board follows a policy of administrative nonacquiescence, it will likely continue to apply its presumption that uniforms and dress codes that prohibit the wearing of union insignia are unlawful unless justified by special circumstances in other circuits unless and until the Supreme Court rules on the question. *See* Ross E. Davies, *Remedial Nonacquiescence*, 89 IOWA L. REV. 65, 67, 98 (2003) (explaining that the NLRB's tradition of nonacquiescence is derived from its charge as an expert agency to interpret and implement the NLRA).

263. P.S.K. Supermarkets, Inc., 349 N.L.R.B. 34, 35 (2007) (quoting Bell-Atl.-Pa., Inc., 339 N.L.R.B. 1084, 1086 (2003), *enforced sub nom.* Commc'ns Workers of Am., Loc. 13000 v. NLRB, 99 F. App'x 233 (D.C. Cir. 2004)).

special circumstance justifying button prohibition.[264] Only where uniforms are unique and designed to convey an image specific to the brand will there be a strong argument that the buttons undermine the employer's brand presentation by interfering with the uniform itself.[265]

The outcomes in these cases have been quite variable over time. The interpretation of what constitutes "special circumstances" varies with the Board's political predilections[266] and with the value judgments courts make as to how managerial prerogatives should be balanced against workers' section 7 rights. For example, in *Burger King Corp. v. NLRB*, the Sixth Circuit concluded that special circumstances existed and the employer could lawfully ban workers who had regular contact with the public from wearing union buttons on employer-supplied uniforms.[267] The court reasoned that the employer had the right to "project a clean, professional image to the public," and refused to enforce the Board's unfair labor practice finding.[268] On the other hand, in *In-N-Out Burger, Inc. v. NLRB*, the Fifth Circuit enforced the Board's ruling and upheld the workers' right to wear "Fight for $15" buttons supporting a campaign to increase the minimum wage, support the right to unionize without intimidation from the employer, and improve working conditions for low-

264. Stabilus, Inc., 355 N.L.R.B. 836, 838 (2010) ("An employer cannot avoid the 'special circumstances' test simply by requiring its employees to wear uniforms . . . thereby precluding the wearing of clothing bearing union insignia.").

265. *See, e.g.*, Starwood Hotels & Resorts Worldwide, Inc., 348 N.L.R.B. 372, 372 (2006) (finding that uniforms met special circumstances test because they were meant to convey an image unique to the W hotel brand). In *Starwood Hotels*, the hotel dressed its room service employees in black shirts, slacks, and apron, and sought to transmit an alternate hotel experience which it called "Wonderland," where guests could fulfill their fantasies and desires. *Id.*

266. *See* Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 711–12 (2006) (arguing that the ideology of a Board member frequently serves as a predictive indicator of his or her vote, particularly in less-settled areas of law).

267. 725 F.2d 1053, 1055 (6th Cir. 1984).

268. *Id.*; *see also* United Parcel Serv. v. NLRB, 41 F.3d 1068, 1073 (6th Cir. 1994) (refusing to enforce the Board's ruling and finding no unfair labor practice where employer prohibited workers from wearing union pins on drivers' uniforms where employer had made a consistent effort to project a public image of "cleanliness, uniformity and efficiency").

wage workers.[269] Given the purposes of the Fight for $15 movement, the court assumed that the activity was for mutual aid or protection and went on to conclude that the employer had not established that the buttons negatively affected the firm's public image or undermined food safety.[270] In assessing the employer's arguments, the Administrative Law Judge (ALJ) had looked to the company's mission statement and found no conflict between the buttons and the firm's mission statement to "[p]rovid[e] the freshest, highest quality foods and services . . . and a spotless, sparkling environment whereby the customer is our most important asset."[271] The Board agreed, and the court held that the record supported these conclusions.[272]

Courts are more likely to find the existence of special circumstances justifying employer bans where the message is potentially disparaging to the employer's product or policies. For example, in *Medco Health Solutions of Las Vegas, Inc. v. NLRB*, the D.C. Circuit found that the employer could enforce a rule prohibiting clothing or buttons containing phrases that are "degrading, confrontational, slanderous, insulting or provocative" against a worker who wore a T-shirt mocking the firm's employee achievement recognition program.[273] Similarly, in *Southern New England Telephone Co. v. NLRB*, the D.C. Circuit held that the employer could prohibit unionized workers who made home service calls from wearing white T-shirts in support of the union's bargaining position which stated "Inmate #" on the front and "Prisoner of AT$T" on the back, since the message could harm customer relationships.[274] In both cases, the court refused

269. 894 F.3d 707, 719 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1259 (2019).

270. *Id.* at 711 & n.1 (describing goals of the movement).

271. In-N-Out Burger, Inc., 365 N.L.R.B. No. 39, at *12-13 (Mar. 21, 2017).

272. *Id.* at 1; *In-N-Out Burger, Inc.*, 894 F.3d at 711.

273. 701 F.3d 710, 710 (D.C. Cir. 2012). The court disagreed with the Board's conclusion that the employer's ban was overbroad, finding the Board's resolution inconsistent with its own prior precedents involving product disparagement. *Id.* at 717 (first citing Pathmark Stores, Inc., 342 N.L.R.B. 378, 379 (2004) (deciding an employer could ban retail workers from wearing T-shirts saying "Don't Cheat About the Meat," advancing complaints concerning the sale of prepackaged meat, since customers might be confused and believe there was something wrong with the meats sold); and then citing Noah's New York Bagels, Inc., 324 N.L.R.B. 266, 275 (1997) (ruling an employer could ban workers from wearing T-shirts reading, "If its not Union, its not Kosher")).

274. 793 F.3d 93, 94 (D.C. Cir. 2015) (refusing to enforce the Board's ruling).

to defer to the Board's conclusions because the issue pertained to employer-customer relations, where "the Board's 'expertise is surely not at its peak,'" rather than to employer-employee relations, where it was more willing to acknowledge and defer to the Board's expertise.[275]

By contrast, the Board and courts are less likely to find that special circumstances exist and button-wearing is protected where the messages do not directly undermine the employer's reputation or are displayed by workers less likely to have public contact. In *USF Red Star, Inc.*,[276] the Board found protected button-wearing by employees who supported their union's efforts at the bargaining table, where the buttons stated "Overnite Contract in '99 Shut Overnite Management Down or 100,000 Teamsters will."[277] The Board observed that the employees did not interact sufficiently with the public, so the buttons were less likely to undermine customer confidence in the brand.[278] Similarly, in *Washington State v. NLRB*, the Ninth Circuit concluded that nurses who wore buttons stating "RNs Demand Safe Staffing" in areas where they might encounter patients or patient families were engaged in protected concerted activity and no special circumstances existed to justify a button ban.[279] Although the Board had accepted the hospital's argument that the buttons' "inherently 'disturb[ing] message'" disparaged the hospital by suggesting that the hospital's decision to maintain unsafe staffing levels would impact patient care, the Ninth Circuit refused to enforce the Board's order, finding the Board's conclusion inconsistent with its own precedent and contrary to "the basic adjudicatory principle that conjecture is no substitute for evidence."[280]

The most difficult cases involve buttons or insignia that do not promote unionism per se, but instead relay a more overtly political or social justice message. In these cases, the Board's

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275. *Id.* at 96–97 (quoting *Medco Health*, 701 F.3d at 717).

276. 339 N.L.R.B. 389, 391 (2003) (finding that button-wearing at the trucking terminal was unlikely to undermine customer confidence since truckers rarely interacted with customers at the terminal).

277. *Id.* at 389.

278. *Id.* at 393.

279. Wash. State Nurses Ass'n v. NLRB, 526 F.3d 577, 581 (9th Cir. 2008).

280. *Id.* (alteration in original) (quoting Sacred Heart Med. Ctr., 347 N.L.R.B. 531, 532 (2006)).

General Counsel must first establish that the wearing of such buttons or insignia satisfies the concertedness and "for mutual aid" aspects of the standard for section 7 protected concerted activity, something that is more difficult when the button or insignia is worn by a nonunionized worker, does not mention unions, and references a movement or cause not directly linked to wages, hours, or unionism. For example, in *Home Depot USA, Inc.*, Home Depot threatened and punished a worker who engaged in activism against racial discrimination that included displaying the lettering "BLM" on his employee apron, writing emails, and engaging in conversations with coworkers, supervisors, and managers about ongoing discrimination and harassment.[281] Home Depot, like Whole Foods and many other firms, had made a general statement about its adherence to the values of racial justice in the wake of George Floyd's murder.[282] Nevertheless, Home Depot asserted that the worker's display of BLM violated its dress code prohibition against "displaying causes or political messages unrelated to workplace matters."[283] An ALJ heard the case, determined that the conduct was not protected concerted activity, and upheld the employer's enforcement of its dress code prohibition, which stated that the apron "is not an appropriate place to promote or display religious beliefs, causes or political messages unrelated to workplace matters."[284]

In support of its argument that the BLM message was not protected concerted activity, Home Depot offered the testimony of its Chief Diversity Officer, who stated that as a Black man he understood BLM to be a "political message, a political statement, a political movement" that was "unrelated to the workplace" and which instead focused on raising awareness of police violence toward African American men.[285] The NLRB's General Counsel

281. No. 18-CA-273796, 2022 NLRB LEXIS 239 (2022).

282. On June 1, 2020, Home Depot's CEO Craig Menear posted a message acknowledging the pattern of racism evidenced by the murders of George Floyd and Ahmaud Arbery and promising to "stand with all who are committed to change that will bring us closer to realizing an end to discrimination and hatred." Craig Menear, *Message from Craig Menear — Racial Equality & Justice for All*, HOME DEPOT (June 1, 2020), https://corporate.homedepot.com/news/diversity-equity-inclusion/message-craig-menear-racial-equality-justice-all [https://perma.cc/D7E2-6ANQ].

283. *Home Depot USA, Inc.*, 2022 NLRB LEXIS 239, at *2.

284. *Id.* at *5.

285. *Id.* at *7.

countered that BLM messages have led to workplace conflict and are concerned with the systemic problem of racism in America, including workplace discrimination.[286] Even though only a single worker had donned the message, the General Counsel argued that the subject of race discrimination should be treated as "inherently concerted" and thus for mutual aid or protection.[287] The ALJ took judicial notice of the BLM website, which states that the mission of the BLM Global Network was to "eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes."[288] Noting that the store where the conduct occurred was just 6.5 miles from the site of George Floyd's murder and that the incident there occurred in February 2021, less than a year after George Floyd's murder and in the midst of a period involving civil unrest surrounding the trial of one of the officers charged in his murder, the ALJ observed that management's concern about the potential for workplace disruption was justified.[289] The ALJ concluded that since race discrimination did not fall into the category of wages, hours, or job security, it did not amount to "inherently concerted activity," and thus proof of concerted action was required—namely that the BLM message was displayed and engaged in "with or on the authority of other employees," which the General Counsel was unable to establish.[290] Further, the ALJ explained,

> Even if the General Counsel had shown that [the] BLM display was concerted, this claim would still fail because the BLM message had, at best, an extremely attenuated and indirect relationship to any workplace issue at the New Brighton store. As discussed earlier, the BLM messaging originated, and is primarily used, to address the unjustified killings of black individuals by law enforcement and vigilantes. To the extent the message is being used for reasons beyond that, it operates as a political umbrella for societal concerns and relates to the workplace only in the sense that workplaces are part of society.[291]

Ultimately, the lack of connection to a labor dispute or workplace issue persuaded the ALJ that the BLM message was not

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286. *Id.* at *8.

287. *Id.* at *40.

288. *Id.* at *10 n.4.

289. *Id.* at *12–13.

290. *Id.* at *40–41 (quoting Healthy Minds, Inc., 371 N.L.R.B. No. 6, at 2 (July 15, 2021)).

291. *Id.* at *59.

for mutual aid or protection. In the ALJ's view, the BLM messaging was directed at issues in society at large, representing an effort to forge alliances with customers rather than a group protest by workers. This was so even though the disciplined worker had also engaged in what the ALJ categorized as protected concerted activities by discussing racial harassment with co-workers and with supervisors, including the vandalization of Black History Month displays in the employee break room, suggesting a potential connection to race discrimination in that particular workplace.[292]

The NLRB reversed the ALJ, finding that the history of racially targeted incidents at the store's location and prior group complaints about racial discrimination brought the worker's conduct within the scope of section 7 protection because it was a "logical outgrowth" of the earlier protests.[293] The Board noted that other workers had previously displayed the BLM message and that the managers' demand that the worker remove the message first arose immediately following his complaints about race discrimination.[294] Thus, it was not relevant whether BLM is a slogan referencing a broader social justice movement, because in this specific context it was clear that the purpose of donning the slogan was to address race discrimination at the store.[295] Nor was Home Depot able to demonstrate special circumstances justifying its ban on BLM messaging, since it had previously permitted workers to personalize their orange aprons with designs including LGBTQ+ symbols, Pan-African flag colors, and symbols associated with holidays or college and professional sports teams, suggesting that unadorned uniforms were not critical to its public image.[296] And the fact that customers might react to the BLM message because it was controversial was also not per-

292. *Id.*
293. Home Depot USA, Inc., 373 N.L.R.B. No. 25, at 7–8 (2024).
294. *Id.* at 8.
295. *Id.* at 10 & n. 26.
296. *Id.* at 11–12.

suasive: section 7 protects union button-wearing even where customers may be offended.[297] The Board also rejected arguments that the BLM messaging posed a safety risk,[298] or that it would engender dissension in the workplace.[299] The Board declined to reach the question whether protests regarding race discrimination are inherently concerted such that they would be protected whether or not workers were acting together.[300]

Outside the race discrimination area, the Board has been inclined to find political messages protected as long as there is some connection to unionism, wages, or hours. For example, in *AT&T*, the Board found protected the wearing of "No on Prop 32" buttons, which signaled opposition to a ballot proposition that would have prohibited unions from using dues collected through payroll deductions for political purposes.[301] And in *American Medical Response West*, the Board adopted the ALJ's decision finding that employees who provided ambulance and wheelchair van transportation services were protected when they wore buttons bearing the message "No on Prop 11," which referenced a state ballot proposition that would require private sector ambulance employees to remain on call during work breaks.[302] The ALJ rejected the employer's argument that the buttons contained a "'partisan, political message' aimed at the general public."[303] Nor was the ALJ convinced that the buttons would raise concerns about patient safety that could jeopardize the employer's public image, since the ban extended to prohibit workers

297. *Id.* at 12. The Board observed that although an employer's desire to remain neutral on a controversial political issue could establish special circumstances, customers in this context were more likely to assume that messages on workers' aprons reflected the individual views of the worker wearing the apron rather than the company's views. *Id.*

298. *Id.* at 12. Home Depot had failed to cite any evidence of nonspeculative, imminent safety risks stemming from confrontations between customers and workers resulting from BLM messaging displays, even though several other workers had been displaying them for months.

299. *Id.* at 13. Although some employees disagreed with the BLM markings, this simple fact without evidence of violent or disruptive acts was insufficient to establish the special circumstances exception because, as the Board explained, "[f]ew, if any, messages would be protected by the Act if that were the case."

300. *Id.* at 9 n.23.

301. Pac. Bell Tel. Co., 362 N.L.R.B. 885, 889 (2015).

302. 370 N.L.R.B. No. 58 (Dec. 10, 2020).

303. *Id.* at 6 (quoting Respondent's brief).

from wearing the button even in situations where they were not interacting with patients or the public.[304] Further, the ALJ explained, the question is not whether the message was "political" in nature, but instead whether the message has a reasonable and direct nexus to the advancement of mutual aid and protection in the workplace.[305]

Finally, an overt connection to unionism can salvage protection even where the activism references a social movement committed to anti-racism. In *Constellation Brands, U.S. Operations, Inc. v. NLRB*,[306] a pro-union advocate who worked in the cellar department of Woodbridge Winery sought to support the union during a collective bargaining impasse by wearing a safety vest on which he wrote the message "Cellar Lives Matter." The worker explained that he meant to draw upon the message of the BLM movement without suggesting any racial motivation and without any intent to denigrate the BLM movement, but simply to support the workers who produced the wine in Woodbridge's cellars and the union's position at the bargaining table.[307] Since none of his non-management coworkers complained about the message, there was no evidence that it disrupted Woodbridge's operations. Moreover, since the employee worked in the grape processing center where he had no customer contact or public-facing role of any kind, there was substantial support in the record for the Board's conclusion that the activity was protected and that no special circumstances existed to justify banning the messaging.[308]

Thus, workers who seek to hold their employers to a commitment to social justice causes—even the eradication of race discrimination, an issue that should be viewed as squarely within the realm of working conditions—will only be protected under section 7 if they can establish group action and a link to a specific labor dispute within that particular workplace. This is likely to be easiest for already-unionized workers and workers engaged in a union organizing drive, and most challenging for unorganized workers at the earliest stages of engaging in group action, who need the protection most. Further, the message and

304. *Id.* at 1–2.
305. *Id.* at 7.
306. 992 F.3d 642, 644–45 (7th Cir. 2021).
307. *Id.* at 644, 647.
308. *Id.*

activity/context in which it is presented must not be unduly threatening to the employer's public image, lest it fall within the special circumstances exception to protected activity.

B. THE WHOLE FOODS PROTESTS

During the pandemic, Whole Foods, like many other employers, required workers to wear a facemask while working. The firm's dress code banned any non-Whole Food slogans. Although it isn't clear how consistently the dress code policy was enforced prior to the summer of 2020,[309] Whole Foods managers were instructed to and began to rigorously enforce the policy that summer.[310] When Whole Foods workers donned BLM masks in the wake of George Floyd's murder, managers insisted that they remove them or be sent home.[311] If workers refused to remove them, they sustained attendance violations, which subsequently escalated to termination as attendance violations accumulated.[312] Collectively, workers mounted demonstrations and called on customers to boycott the chain for failing to live up to its stated values, citing the anti-racism messaging on Whole Foods' website, the company's commitment to the community, and Jeff Bezos's statements in support of the BLM movement.[313] Workers alleged that they donned the masks not only to support the BLM movement and the Black community in which the store was located, but also to protest racist incidents that had occurred at work, demonstrating the disparity between the company's stated values and its actual practices.[314]

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309. Workers claimed that they had previously worn items with LGBTQ+ messaging, National Rifle Association messaging, a SpongeBob SquarePants mask, and other non-Whole Foods messages. Frith v. Whole Foods Mkt., Inc., 517 F. Supp. 3d 60, 66 (D. Mass. 2021), *aff'd*, 38 F.4th 263 (1st Cir. 2022).

310. Memorandum and Order Granting Motion for Summary Judgment at 4, Kinzer v. Whole Foods Mkt., Inc., No. 20-cv-11358-ADB (D. Mass. Jan. 23, 2023).

311. *Id.* at 5.

312. Id. at 3.

313. Josh Eidelson, Whole Foods' Battle Against Black Lives Matter Masks Has Much Higher Stakes, Bloomberg (Aug. 15, 2022), https://www.bloomberg.com/news/features/2022-08-15/biden-lawyer-battles-whole-foods-over-black-lives-matter-masks [https://perma.cc/3S8U-BJZ4].

314. Memorandum and Order Granting Motion for Summary Judgment, *supra* note 310, at 5–6.

Whole Foods workers in at least ten states filed charges with the NLRB, seeking the protection of the labor laws, and the cases were consolidated and assigned to an ALJ who issued an opinion in December 2023.[315] The ALJ ruled that the workers were not engaged in protected activity under section 7, and accordingly disciplinary actions by Whole Foods arising out of their mask-wearing or protests did not violate the NLRA.[316] The ALJ found "no objective evidence supporting the allegation that [Whole Foods] had racially discriminatory motives for its stance on BLM messaging," and no "objective evidence that the employees' goal in displaying [the BLM] message was to counter the employer's purposed racial discrimination."[317] Citing the ALJ opinion in the *Home Depot* case with approval, the ALJ reasoned that BLM messaging did not relate to workplace concerns, but instead related more broadly to the political goals of the movement: expressing opposition to systemic racism that exists in every aspect of society.[318]

The workers also brought Title VII class action claims in federal district court, alleging that Whole Foods had engaged in associational discrimination by selectively disciplining workers who expressed support for Black workers (regardless of the individual workers' race) by wearing the BLM masks at work.[319] The district court dismissed the workers' claims, reasoning that selective enforcement of a dress code to suppress political speech was not cognizable under Title VII.[320] The First Circuit agreed,

315. *See* Whole Foods Mkt., Inc., 01-CA-263079 (N.L.R.B. Dec. 20, 2023).

316. *Id.* at 62.

317. *Id.* at 59.

318. *Id.* at 59–62.

319. *See* Frith v. Whole Foods Mkt., Inc., 517 F. Supp. 3d 60, 65 (D. Mass. 2021). A related case granting summary judgment for Whole Foods is still pending before the First Circuit. *See* Kinzer v. Whole Foods Market, Inc., No. 20-cv-11358-ADB, (D. Mass. Jan. 23, 2023), *appeal filed*, No. 23-1100 (1st Cir.); Daniel Wiessner, *US Court Could Revive Whole Foods Workers' Lawsuit over 'Black Lives Matter' Facemasks*, REUTERS (Dec. 5, 2023), https://www.reuters.com/legal/litigation/us-court-could-revive-whole-foods-workers-lawsuit-over-black-lives-matter-2023-12-05 [https://perma.cc/QDJ9-KXZP] (describing oral argument before a panel of the First Circuit Court of Appeals).

320. The court justified its decision by pointing to the workers' right to exit employment if they were unhappy. *Id.* at 75 ("Whole Foods employees that are not happy with the Policy can find someplace else to work, express themselves

finding the selective enforcement of the prohibition on mask-wearing insufficient to demonstrate racial discrimination.[321] Further, the coordinated and widespread protests by workers wearing BLM masks supported an "obvious alternative explanation" to the plaintiffs' allegation of race discrimination: namely, that Whole Foods desired "to prohibit the mass display of a controversial message in its stores by its employees."[322] Not only was the BLM mask-wearing more disruptive in terms of the number of workers wearing the masks, but in its context it was "a controversial message associated with a political movement advancing an array of policy proposals."[323]

Of course, the very basis on which the First Circuit denied the workers' Title VII claims—that the protest was a coordinated mass action, clearly concerted, and potentially disruptive—is exactly the reason why the conduct should be protected under the NLRA. In the consolidated cases before the NLRB, however, the ALJ concluded that the unprecedented social and political unrest during the spring and summer of 2020—unrest that became "intimately connected to the BLM movement and the phrase itself"—supported Whole Foods' argument that it prohibited BLM messaging because the use of the term in the workplace would be "controversial and provocative, and perhaps even incendiary," rather than banning it for a racially discriminatory purpose.[324] In other words, the more effective the protest and the movement with which it was associated, the less protections it receives at law. The ALJ also rejected the General Counsel's argument that

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outside the workplace, work with Whole Foods to change the Policy, and/or publicize the Policy in an effort to get consumers to spend their dollars elsewhere . . . ."). The court did allow the workers' claim for retaliation based on filing claims under Title VII with the EEOC to proceed, however. *See id.* at 76.

321. *Frith*, 38 F.4th at 274.

322. *Id.* at 275–76. The First Circuit also dismissed the workers' retaliation claims, finding no plausible allegations differentiating the employer's discipline of the protesting employees from its earlier discipline of employees for violating the dress code. Continuing discipline of employees for repeated violations of the dress code was insufficient to establish a retaliatory motive. *Id.* at 274–75. A similar claim before another district court was dismissed on the employer's motion for summary judgment. *See* Memorandum and Order Granting Motion for Summary Judgment, *supra* note 310, at 27–28 (dismissing Title VII retaliation claims and accepting Whole Foods' legitimate business explanation for the strict enforcement of its dress code policy against the wearing of BLM masks).

323. *Frith*, 38 F.4th at 275.

324. *Id.* at 58–59.

BLM activity and messaging is inherently protected activity because the civil rights movement's concern with economic inequality for people of color has been historically intertwined with discriminatory practices in the workplace.[325] The ALJ found that such a nexus was "too attenuated, too indirect, too intangible and aspirational" to support the unfair labor practice charges brought by the General Counsel.[326]

The Whole Foods case is likely to be resolved by the full Board.[327] The Board's recent ruling in *Home Depot USA, Inc.* suggests that it may well reverse the *Whole Foods* ALJ, although it is possible that the *Home Depot* Board's emphasis on specific workplace context could render the two cases factually distinguishable. Regardless, the *Home Depot* case is likely to be appealed, so the Board's ruling will be evaluated by a federal court.[328] As the discussion of the public image cases above suggests, the issue could be come out either way depending upon the political leanings of the courts that are asked to enforce the Board's rulings.[329] Even where mask-wearing can be tied to specific episodes of racial discrimination in the workplace, some courts may be reluctant to include within the purview of NLRA protection conduct and speech advocating for racial justice that expands beyond the workplace. Further, even if the courts accept the argument that the subject is encompassed by section 7, they might well conclude that the employer had special circumstances justifying the ban, such as the potential disruptive impact of the messaging on the employer's operations, employee dissension, or safety concerns. The fact that the employer itself has made a public commitment to the same cause and provoked the protest through the discrepancy between its public commitment and its

325. Whole Foods Market, Inc., N.L.R.B. 01-CA-263079, at 59 & nn.205–06 (Dec. 20, 2023).

326. *Id.*

327. The Board granted an extension of time in which to file exceptions until April 5, 2024. Whole Foods Markets, Inc., Cases 01-CA-263079 (N.L.R.B. Feb. 22, 2024).

328. *See* Home Depot USA, Inc. v. NLRB, No. 24-1406 (8th Cir. 2024) (granting Home Depot's motion for an extension of time to file a brief until May 22, 2024).

329. *Whole Foods Mkt., Inc.*, 01-CA-265183.

own practices could be dismissed as irrelevant, since the contours of the corporate brand lie within the zone of exclusive entrepreneurial control.

Whole Foods also argued that (since the workers are the frontline representatives of its brand) permitting them to wear BLM masks would amount to corporate speech.[330] Thus, any remedial order by the NLRB requiring Whole Foods to tolerate BLM insignia on workers' masks would compel that speech in violation of Whole Foods' First Amendment rights.[331] Home Depot raised this argument to the Board as well, and the Board rejected it, finding that the company is not speaking when workers personalize their aprons.[332]

Nevertheless, three recent decisions from the Supreme Court suggest that these First Amendment arguments may gain traction in the workplace context. In *Citizens United v. Federal Election Commission*, the Court significantly expanded the understanding of corporate First Amendment rights, ruling that corporate spending on elections, including donations to campaign fundraising, enjoy First Amendment protection that cannot be restricted by government.[333] In *Janus v. AFSCME*, the Court struck down an Illinois law requiring public sector workers who did not desire membership in the union representing their bargaining unit to pay agency fees for the union to engage in collective bargaining and related activities, reasoning that the law amounted to an unconstitutional compulsion of speech in violation of the First Amendment.[334] And just this past term, the Court ruled in *303 Creative LLC v. Elenis* that the State of Colorado could not compel a website designer to create expressive

330. *See* Elizabeth Nolan Brown, *Whole Foods Fight over Black Lives Matter Masks Pits National Labor Relations Board Against Free Speech*, REASON (Jan. 27, 2022), https://reason.com/2022/01/27/whole-foods-fight-over-black-lives-matter-masks-pits-national-labor-relations-board-against-free-speech [https://perma.cc/8VKT-LCNH].

331. *Id.*; *see* Post-Hearing Brief to ALJ, Whole Foods Market, Inc., N.L.R.B. 01-CA-263079, at 2–3, 6–7 (citing and discussing as precedential support the Court's decision in *303 Creativ, LLC v. Elenis*, 143 S. Ct. 2298 (2023)); Respondent Whole Foods Market's Post Hearing Brief to the Administrative Law Judge at 203–09, Whole Foods Mkt., 01-CA-263079 (N.L.R.B. Nov. 16, 2022).

332. Home Depot USA, Inc., 373 N.L.R.B. No. 25, at 13–14 (2024).

333. 558 U.S. 310, 371–72 (2010).

334. Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018).

designs communicating messages and ideas with which she disagrees.[335]

Prior to *303 Creative LLC v. Elenis*, an employer raised the First Amendment directly to the Court in an NLRA context, citing *Janus* and arguing that an NLRB ruling striking down its button ban as applied to Fight for $15 buttons would violate its First Amendment rights because it would be tantamount to the government forcing it to endorse a pro-union stance through the medium of buttons on its frontline workers' bodies.[336] Although the Court denied certiorari and did not resolve the question, this argument will appear with increasing frequency in NLRA cases before the Board and the circuit courts until it is resolved by the Supreme Court.[337] If the First Amendment argument prevails, employers like Whole Foods will be free to deploy Black workers' bodies and labor to signify a brand commitment to anti-racism, while simultaneously preventing the workers from communicating their personal support for anti-racism and silencing their complaints that the firm is not living up to its brand commitment.

C. WORKER ACTIVISM OVER CORPORATE COMMITMENTS TO DIVERSITY, EQUITY, AND INCLUSION

Many employers have made public commitments to enhance diversity, equity, and inclusion in the hopes of attracting and retaining a diverse workforce.[338] An overwhelming majority of cor-

335. 143 S. Ct. 2298 (2023). The Board distinguished *303 Creative* in its decision in *Home Depot USA, Inc.*, finding that uniform customizations were the workers' own speech rather than that of the employer. 373 N.L.R.B. No. 25, at 14 n.30.

336. *See* In-N-Out Burger, Inc. v. NLRB, 894 F.3d 707 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1259 (2019) (discussed above in connection with the public image cases); Petition for Writ of Certiorari, *In-N-Out Burger, Inc.*, 894 F.3d 707 (No. 18-340); *see also* Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioner at 6, *In-N-Out Burger, Inc.*, 894 F.3d 707 (No. 18-340) ("[E]mployees' statutory speech right must stop where their employer's constitutional [commercial] speech right begins.").

337. Indeed, the ALJ in Whole Foods ordered the parties to file supplemental briefs addressing the question of Whole Foods' First Amendment rights in light of *303 Creative LLC*. *See* Order Directing the Parties to File Supplemental Briefs, Whole Foods Mkt., Inc., 01-CA-263079 (N.L.R.B. Aug. 7, 2023).

338. *See supra* notes 2, 75 (discussing DEI initiatives in ESG statements).

porate mission statements currently include such a commitment. Several high-profile companies have felt the ire of their workers when corporate practices and statements by corporate leaders—or in some cases, the failure to make a public statement—were incompatible with the firm's stated commitment to diversity, equity, and inclusion.

For example, Disney workers walked off the job and protested the company's failure to support LGBTQ+ workers when Disney failed to take a public stance in opposition to the Parental Rights in Education bill before it passed the Florida Senate (dubbed by its opponents the "Don't Say Gay" bill).[339] The bill prohibits classroom instruction on gender identity or sexual orientation for children below the fourth grade and limits instruction for older students.[340] Workers argued that the bill was premised on values fundamentally inconsistent with the values that Disney advanced in its diversity and inclusion policy.[341] Some Disney workers sought to connect Disney's silence to their own material interests, arguing that Disney had required thousands of employees to move from southern California to Florida to centralize park operations and take advantage of lucrative state tax credits,[342] and telling Disney, "[p]eople shouldn't be forced to live in a place that they're fearful of,"[343] namely a state that "does not promote equality or support basic human rights."[344] Responding to the protest, Disney's CEO apologized, took a position against the bill after it had passed, and explained that the company had worked against the legislation behind the

339. Robbie Whelan et al., *Discontent Drags on Disney's CEO*, WALL ST. J., Mar. 19, 2022, at A1.

340. Robbie Whelan & Katherine Sayre, *Disney Staff Protest LGBT Stand*, WALL ST. J., Mar. 23, 2022, at B3.

341. *Id.* (describing one Disney employee's critique of Disney's response as "shortsighted," "tone deaf," and not appropriate given the values the company espoused in its diversity-and-inclusion philosophy).

342. *See* Whelan et al., *supra* note 339 (transferring about 2,000 employees from California to Florida ,where before COVID-19 Disney employed more than 75,000 workers at its Disney World resort and other offices). By moving the California employees to Florida, Disney could obtain an estimated $570 million in tax credit over twenty years. *Id.*

343. Whelan & Sayre, *supra* note 340.

344. Whelan et al., *supra* note 339.

scenes.[345] Disney also promised to take a public stand in the future and to work against similar legislation in other states, and it paused corporate donations to elected officials who had supported the bill.[346]

The stakes were high for Disney and for its CEO. Incensed by Disney's stance, Florida Governor Ron DeSantis accused Disney of being a "woke corporation" and refused to bow to its pressure.[347] DeSantis revoked Disney's favored tax status, which since 1967 had allowed it to self-govern its 25,000 acre resort.[348] The punishment was severe: the "Reedy Creek Improvement District," as Disney's special zone was known, had saved Disney millions of dollars annually in fees and taxes.[349] Soon thereafter, Disney's board ousted its CEO, and an investor subsequently

345. *Id.* In his statement, Chapek remarked that Disney had "preferred to work 'behind the scenes' rather than allow the company to become a 'political football' by making a public statement opposing the [bill]."). *Id.*

346. *See* Wheelan & Sayre, *supra* note 340, at B3 (noting that Chapek's statement indicates a pause, not an altogether stop, and that protesters are calling on Disney to indefinitely stop political contributions to officials involved in the Don't Say Gay legislation).

347. *See* Wheelan et al., *supra* note 339. *See generally* Brooks Barnes, *After a Political Storm, Gay Days Return to Disney*, N.Y. TIMES (June 10, 2022), https://www.nytimes.com/2022/06/10/style/disney-gay-days.html [https://perma.cc/XE45-6TFP] (describing Governor DeSantis's subsequent actions against Disney).

348. Barnes, *supra* note 347.

349. Brooks Barnes, *Disney to Lose Special Tax Status in Florida Amid 'Don't Say Gay' Clash*, N.Y. TIMES (Apr. 21, 2022), https://www.nytimes.com/2022/04/21/business/disney-florida-special-tax-status.html [https://perma.cc/7R38-XERH] (explaining how the Reedy Creek Improvement District was created to entice Disney to build its theme park twenty miles south of Orlando, replete with tax savings and other benefits such as financing options and considerable sway over construction on the property); *see also* Katie Glueck & Frances Robles, *Punishing Disney, DeSantis Signals a Lasting G.O.P. Brawl with Business*, N.Y. TIMES (Apr. 22, 2022), https://www.nytimes.com/2022/04/22/us/politics/desantis-disney-florida.html [https://perma.cc/2N52-7YE7] (describing the history of this special tax district and the potential financial ramifications for Orange and Osceola Counties to the tune of some $163 million in annual taxes).

sued Disney for the financial repercussions suffered by the company and its shareholders as a result of its decision to oppose the "Don't Say Gay" bill.[350]

Similarly, the video game developer Electronic Arts (EA) found itself facing a threatened walkout by its employees after it proposed using a rainbow version of its company logo as a marketing device during gay pride month.[351] EA workers, frustrated by the company's lack of substantive LGBTQ+ support and its refusal to take a public stand on topics such as trans rights and abortion rights, accused the firm of "rainbow-washing."[352] Corporate hypocrisy, rather than simply the lack of the firm's support for gay and trans rights, seems to have triggered the walkout threat.[353] EA narrowly avoided the walkout.[354]

Under current interpretations of section 7, these cases—like Whole Foods[355]—would give scant, if any, consideration to the employer's mission statement, its role in attracting workers to the firm, or its efficacy in retaining them. They would instead require the Board to determine whether the workers' goals and the goals of the social movement that they invoke relate to un-

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350. *See* Alexandra Steigrad, *Disney Investor Sues over Company's Response to 'Don't Say Gay' Bill*, N.Y. POST (Dec. 13, 2022), https://nypost.com/2022/12/13/disney-investor-sues-over-companys-response-to-dont-say-gay-bill [https://perma.cc/3B6L-RPMT].

351. *See* Danielle Partis, *EA Staff Threaten Walkout over Lack of Statements During Pride Month*, GAMES INDUS. (June 1, 2022), https://www.gamesindustry.biz/articles/2022-06-01-ea-staff-threaten-walkout-over-lack-of-statements-during-pride-month [https://perma.cc/2VFX-RRST] (explaining how the company rainbow-washed its logo without making any substantive statement in favor of the LGBTQ+ community).

352. *Id.*

353. *See* Jason Collins, *EA Staff Threatens Walkout over Company's Pride Month Response*, GIANT FREAKIN ROBOT (June 2022), https://www.giantfreakinrobot.com/games/ea-logo-staff-walkout-pride-month.html [https://perma.cc/QL3E-GZS8] (explaining how EA's decision to use rainbow Pride colors in its logo after openly refusing to issue a statement of LGBTQ+ support was perceived by employees to be a hypocritical marketing ploy).

354. *See* Ryan Pearson, *EA Staff Call Off Walkout After Company Promises to Not Use Rainbow Versions of Company Logo During Pride Month*, BOUNDING INTO COMICS (June 7, 2022), https://boundingintocomics.com/2022/06/07/ea-staff-call-off-walkout-after-company-promises-to-not-use-rainbow-versions-of-company-logo-during-pride-month [https://perma.cc/FCT2-KDNY].

355. See *supra* Part III.B, for a discussion on the Whole Foods employee protests.

ionization, wages, hours, job security, or specific instances of discrimination at work.[356] Further, the Board would have to wrestle with whether the workers' protests intruded on the zone of entrepreneurial control or were too disloyal to receive protection.[357] Nor would unionization significantly improve the workers' position (for example, Disney is unionized[358]), since the subjects of their protests would likely be characterized as permissive.[359]

IV. PROTECTING WORKER SPEECH CHALLENGING DEVIATION FROM THE EMPLOYER'S MISSION: A MODEST PROPOSAL

Evidence shows that workers care deeply about the purposes to which their labor is dedicated and the nature of the services and products their firms produce.[360] Several decades ago, Cynthia Estlund argued that section 7's "mutual aid or protection" language should be understood to include workers' shared concerns over the effect their employer's product or service has on customers, consumers, patients, clients, and the public at large.[361] She pointed out that when workers risk their jobs by engaging in concerted activity over concerns about the employer's product or service that reach beyond the workplace, they demonstrate how central those concerns are to them.[362]

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356. See *supra* Part II.A.1, for an explanation of the NLRA's section 7 scope of protection for employees engaging in concerted activity.

357. *See supra* Part II.A.1.c (discussing activity that is disloyal or fundamentally undermines the employer's interests).

358. *See generally* Chris Isidore & Vanessa Yurkevich, *Unions at Disney World Win 37% Pay Hikes in Tentative Labor Deal*, CNN BUS. (Mar. 23, 2023), https://www.cnn.com/2023/03/23/business/disney-world-labor-deal/index.html [https://perma.cc/2343-3M6M] (mentioning that Service Trades Council Union, a collection of unions that negotiate with Disney, represents tens of thousands of Walt Disney World employees).

359. *See supra* text accompanying note 172.

360. *See* Estlund, *supra* note 194, at 952–53 (citing studies). *See generally* STUDS TERKEL, WORKING: PEOPLE TALK ABOUT WHAT THEY DO ALL DAY AND HOW THEY FEEL ABOUT WHAT THEY DO (1974) (describing the satisfaction workers receive from their various occupations).

361. Estlund, *supra* note 194, at 925.

362. *Id.*; *see also* Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*,

Many scholars have leveled parallel criticisms at the mandatory-permissive bargaining subject dichotomy because it unduly cabins bargainable subjects rather than allowing the parties to determine the significance of an issue.[363] After all, if the NLRA's goal is to further labor peace by channeling disputes into collective bargaining, and if the issues most important to the workers are likely to lead to workplace disruption, it makes sense to require bargaining over all such issues. The simplest and most radical proposal is to eliminate the dichotomy, allowing the parties to determine the subjects of bargaining and to use economic leverage as they feel appropriate to press their position at the bargaining table. Under this unified regime, no unilateral changes could be made to any subject covered by the collective

89 COLUM. L. REV. 789, 793, 854–58 (1989) (observing that the Court's interpretation of "mutual aid or protection" for purposes of section 7 protection assumes an implied promise of a reciprocal benefit to oneself, suggesting an opposition between the self and others that is fundamentally incompatible with the labor movement's understanding of solidarity, and unfairly deprives relatively selfless or altruistic protests of statutory protection).

363. *See, e.g.*, Michael C. Harper, *Leveling the Road from* Borg-Warner *to* First National Maintenance*: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447, 1448–49 (1982) (critiquing the mandatory/permissive distinction and arguing for an interpretation of Supreme Court jurisprudence that would only minimally restrict the scope of mandatory bargaining); Archibald Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057, 1083 (1958) ("The administrative and judicial processes are ill-suited to drawing a line between proper subjects for collective bargaining and management functions."); Archibald Cox & John T. Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 427–29 (1950) (arguing that the boundaries of collective bargaining are industry-specific and that circumscribing the subjects of bargaining or protected concerted activity undermines the flexibility necessary from industry to industry); *see also* Marion Crain, *Images of Power in Labor Law: A Feminist Deconstruction*, 33 B.C. L. REV. 481, 534–35 (1992) (arguing for rejection of the mandatory/permissive subject dichotomy because it removes important decisions from collective bargaining, reinforces prevailing patterns of power, and limits innovation in workplace governance); Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1218–19 (1991) (proposing elimination of the mandatory/permissive subject dichotomy because it reinforces gendered understandings of workplace benefits).

bargaining agreement, and the parties would be free to use economic leverage in support of any lawful subject.[364] In addition to the virtue of simplicity, such a regime would align with the NLRA's original intent, which was to foster industrial peace under a labor contract freely negotiated by the parties.[365]

The logic of arguments like those described above to expand section 7 protection and to abolish the mandatory-permissive dichotomy is compelling. Any of these proposals would require statutory amendment or overruling Supreme Court precedent, however, and neither course seems feasible at this juncture.[366] Here I advance a more modest proposal that could serve as an entering wedge to broaden section 7 protection and expand workers' rights within the existing mandatory-permissive subject dichotomy: *when the employer proclaims its social justice commitments in a mission statement, CSR code,*[367] *brand marketing campaign, or public affirmation, the subject should be treated as a form of compensation or a working condition.* If the employer reneges on commitments it has publicly announced as part of its corporate mission and identity and used to attract consumers

364. Most recently, Sharon Block and Benjamin Sachs proposed the rejection of the mandatory-permissive regime in order to foster collective bargaining over decisions affecting workers' terms and conditions of employment even where the decisions are fundamental to the basic direction of the corporate enterprise, such as major shifts in investment strategy, major advertising campaigns, and decisions with significant environmental impact. *See* Sharon Block & Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy*, LAB. & WORKLIFE PROGRAM, HARV. L. SCH. 66–68 (2020), https://clje.law.harvard.edu/app/uploads/2020/01/Clean-Slate-for-Worker-Power.pdf [https://perma.cc/927T-TB86]. This proposal would significantly expand the areas over which employers would be required to bargain, encompassing subjects over which workers have strong feelings and relevant views, including environmental effects, patient safety, customer experience, and social justice issues, and would open pathways for collaboration between the labor movement and other social justice movements. *Id.* at 12–13.

365. *See* Thomas T. Crouch, *The Viability of Distinguishing Between Mandatory and Permissive Subjects of Bargaining in a Cooperative Setting: In Search of Industrial Peace*, 41 VAND. L. REV. 577, 594 (1988) (suggesting that collective bargaining that is unrestricted in subject matter is more likely to produce an optimal result, without the need for litigation to obtain concessions).

366. *See generally* Harper, *supra* note 363, at 1447–50 (outlining the entrenched legal landscape favoring the mandatory-permissive bargaining subject dichotomy).

367. *See supra* Part I.A (introducing voluntary corporate social responsibility (CSR) practices).

and workers, the employer's action is tantamount to cutting compensation, canceling an employee benefit, or altering a working condition. Thus, if workers mount a protest in response, their activity should be characterized as for mutual aid or protection. Further, since compensation and employee benefits are mandatory subjects of bargaining and "meaning is the new money,"[368] deviation from the employer's stated mission affects a mandatory subject of bargaining.

This approach would simplify the analysis for determining whether a topic lies within the realm of activity for mutual aid or protection, i.e., has a nexus to compensation or working conditions: the Board need only look at the record to determine what the firm has announced as its mission and review representations made on its website, in its CSR code, or as part of its marketing campaign as of the date of the arguably protected activity. The Board need not substitute its own view of the nature of the social justice movement to which protests relate or determine whether there is sufficient connection between the movement's goals and a particular firm's working conditions. The employer's own mission and marketing have established its commitment to make that goal either a part of the workers' compensation or a working condition.

Nor should such activity by workers fall within the special circumstances exception to section 7 for being too disloyal, or for undermining the employer's brand and reputation in the eyes of the public. Because the activism is congruent with the firm's brand advertising and mission statements, it is hard to see how it could be deceptive or misleading to consumers. Further, speech and activism that reinforce the brand do not undermine it. Indeed, such speech supports the brand promise and protects the firm's reputation. Ultimately, it can help the firm avoid charges of "woke-washing" and the concomitant consumer anger and backlash that could significantly damage the brand.[369] Only where the employer has deviated from its mission statement would the speech arguably damage the employer's reputation. But the nonunion employer can easily control this damage

368. *See supra* Part I.B.1.

369. Abas Mirzaei et al., *Woke Brand Activism Authenticity or the Lack of It*, 139 J. BUS. RES. 1, 8–10 (2022) (noting that woke activism tends to generate passionate responses and can easily backfire if consumers sense a lack of authenticity).

simply by ensuring that its actions are consistent with its mission statement, by embracing the workers' concerns as its own, or by changing its mission statement and brand—something over which it retains control under this admittedly modest proposal.[370]

Finally, speech by workers that *affirms* the stated corporate mission does not encroach upon the zone of managerial prerogative relating to the future and direction of the business. I put to one side situations where a nonunion employer opts to change the direction of the business and alters its public statements and commitments. In most cases, firms will have carefully considered CSR codes and mission statements before promulgating them and will have determined that the commitments benefit the firm in attracting consumers and workers. If the firm is willing to renounce those commitments and give up those benefits, then it is entitled to do so. In some cases, the firm may choose to do so in response to pressure from other stakeholders—for example, the dilemma Disney faced over its commitment to support LGBTQ+ rights.[371] Accordingly, the firm's freedom to chart its business course and its commercial and political speech rights in accord with that choice remain unfettered. Only in situations where the employer's public commitments conflict with its behavior vis-à-vis its workers, so that the employer is benefitting from woke-ism but workers are subjected to a different reality, would workers seeking collectively to speak out about inauthenticity and enforce the firm's public commitments receive section 7 protection.

A. MISSION AND MEANING AS COMPENSATION

At first blush, the corporate brand, the corporate mission, the firm's commitment to social justice principles in its CSR, and

370. For example, when Starbucks workers sought to wear BLM shirts and pins, Starbucks initially refused to allow the action, but then reversed policy following calls to boycott and social media messages accusing it of hypocrisy. Management provided Starbucks-branded BLM shirts for its baristas and other workers to wear, emphasizing again its stance "in solidarity with our Black partners, community and customers." *See* Heather Murphy, *Starbucks Will Allow Employees to Wear Black Lives Matter Apparel*, N.Y. TIMES (Oct. 18, 2021), https://www.nytimes.com/2020/06/12/business/starbucks-blm-ban-reversed.html [https://perma.cc/6CDP-KV2Y].

371. *See supra* notes 339–50 and accompanying text.

public statements signaling woke-ism would appear to fall outside section 7's purview and within the permissive category of bargaining subjects because they lie at the core of entrepreneurial control. But where the employer has converted its brand promise into a part of the compensation and benefits package and used it to attract and retain workers, the brand promise itself becomes both a part of compensation and a working condition. As discussed in Part I, the employer's mission and its brand reputation exert a powerful influence over workers' decision to labor for a particular firm.[372] If workers are indeed willing to accept lower wages in exchange for working at a firm whose values they share, then meaning really is the new money and worker protest regarding an inauthentic mission is for mutual aid or protection because it is connected to material self-interest. Moreover, if the employer avoids unionization by substituting its own version of solidarity for that which a union might have offered and then conducts itself inconsistently with its announced mission, it seems only fair that workers be entitled to protest without suffering retaliation for doing so.[373] Finally, unionized employers should not be free unilaterally to alter their missions without first bargaining with the union representing their employees, and group action seeking to retain that benefit should not be an unfair labor practice.

Business scholarship readily supports this claim. A number of business, marketing, and personnel-management scholars define as employee benefits an array of economic, functional, and

372. *See supra* notes 101–26 and accompanying text*; see also* Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 356, 370 (2011) (observing that when employees are deciding whether to accept or to remain in a job, they are analogous to consumers of the job and its reputational benefits); Biswas & Suar, *supra* note 96, at 94 (reviewing literature on person-organization fit and concluding that workers compare the employer brand image they have as consumers with their values, and are more likely to be attracted to an employer if there exists a match between their values and the values of the firm).

373. *See* Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1265–66 (N.J. 1985) (permitting an implied contract claim arising out of an employee handbook that the court characterized as an effort not only to reap the benefits of a handbook, but to avoid unionization and collective bargaining, and noting the substantial injustice that would result if it were not enforced).

psychological benefits.[374] Economic benefits include pay, pensions, stock options, and other similar financial assets.[375] Functional benefits include training, skills-development, and other job-related activities that enhance workers' capacity beyond the job at hand.[376] Psychological benefits include identity, recognition, and belonging.[377] These scholars have demonstrated that firms with strong brands and attractive mission statements are able to pay workers less and retain them longer.[378] Hence, from the workers' perspective, the corporate brand/mission in fact *is* a part of their compensation.[379]

Labor law also supports this interpretation. The Board has indicated that it broadly construes the term "wages" in section 8(d) to include "emoluments of value . . . which may accrue to employees out of their employment relationship."[380] Accordingly, a wide variety of benefits have been held to fall within section 8(d)'s mandatory subjects of "wages," or "other terms and conditions of employment."[381] Merit wages,[382] severance pay,[383] sales commissions,[384] pensions,[385] bonus plans tied to performance,[386]

374. Biswas & Suar, *supra* note 96, at 93.

375. *See id.*

376. *See id.*

377. *See id.*

378. *See supra* Part I.B.1.

379. *See id.*

380. U.S. Postal Serv., 302 N.L.R.B. 767, 776 (1991) (quoting Cent. Ill. Pub. Serv. Co., 139 N.L.R.B. 1407, 1415 (1962)).

381. *See* National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (covering the "[o]bligation to bargain collectively").

382. *See, e.g.*, United Rentals, Inc., 349 N.L.R.B. 853, 854–55 (2007) ("A merit wage-increase program constitutes a term or condition of employment 'when it is an "established practice . . . regularly expected by the employees."'" (quoting Lasalle Ambulance, Inc., 327 N.L.R.B. 49, 51 (1998))).

383. *See, e.g.*, Champion Int'l Corp., 339 N.L.R.B. 672, 672–73 (2003) (finding that defendant violated the NLRA when it failed to engage in meaningful bargaining for issue of severance pay).

384. Guard Publ'g Co., 339 N.L.R.B. 353, 354 (2003) (finding that the company violated the NLRA by unilaterally implementing a new sales commission scheme).

385. *See* Inland Steel Co. v. NLRB, 170 F.2d 247, 255 (7th Cir. 1948) (holding that companies must bargain with the union on pensions and other retirement matters), *cert. denied*, 336 U.S. 960 (1949).

386. *See, e.g.*, NLRB v. Mining Specialists, Inc., 326 F.3d 602 (4th Cir. 2003) ("A bonus plan that is established as compensation for services rendered is a mandatory subject of bargaining.").

and employee discounts[387] all fall within the category of mandatory subjects. Other benefits intended as inducements to attract or retain workers are also mandatory subjects of bargaining, including rental fees in company-owned housing provided for employees, at least under some circumstances,[388] below-cost or free meals furnished at company facilities,[389] food samples, snacks, and coffee,[390] and recreation funds.[391]

Many employers also offer discounted products or services that the worker desires precisely because they are imbued with the reputational cachet of the firm's mission and brand. Recall that Henry Ford viewed his workers as potential consumers of the product produced, and employee auto discounts became a key component of Ford's marketing program, enabling full deployment of workers as consumers and brand representatives.[392] Offering wage packages that included discounts for branded products became even more popular during World War II, when

387. Cent. Ill. Pub. Serv. Co., 139 N.L.R.B. 1407, 1415 (1962), *enforced*, 324 F.2d 916 (7th Cir. 1963) (finding that an established employee benefit (a discount on heating gas) fell within the meaning of "wages" and "conditions of employment").

388. *Compare* Am. Smelting & Refin. Co. v. NLRB, 406 F.2d 552, 553–55 (9th Cir. 1969) (holding that rental fees in company-owned housing provided to employees is mandatory topic of bargaining depending upon distance to and availability of other accommodations), *cert. denied*, 395 U.S. 935 (1969), *with* Success Vill. Apartments., Inc., 350 N.L.R.B. 908, 910–11 (2007) (featuring an apartment cooperative that unilaterally altered past practice of permitting employees to purchase apartments in the complex and did not violate section 8(a)(5) where employees paid market rates for the apartments and enjoyed no advantage in purchasing them vis-à-vis the general public, since housing policy did not affect employees' terms and conditions of employment).

389. *See, e.g.*, Weyerhaeuser Timber Co., 87 N.L.R.B. 672 (1949) (finding that meals provided by the company below cost clearly fall within the term "wages" and an "emolument of value").

390. *See, e.g.*, S.M.C. Rest. Corp., 261 N.L.R.B. 313, 317 n.16 (1982) (determining that "the unilateral elimination of the benefit of free desserts" constitutes a violation of section 8(a)(5)); S. Fla. Hotel & Motel Ass'n, 245 N.L.R.B. 561, 569 (1979) (finding that employer discontinuance of free beer, soft drinks, and snacks to employees constituted a unilateral termination of a condition of employment); Beverly Cal. Corp., 310 N.L.R.B. 222, 239 (1993) (holding that a practice of an employer offering free coffee is an employee benefit that cannot be unilaterally discontinued).

391. Getty Refin. & Mktg. Co., 279 N.L.R.B. 924, 925–26 (1986) (finding that a recreation fund, established by the employer for almost thirty years, was an employee benefit and a wage enhancement feature).

392. *See supra* Part I.B.

wage and price controls precluded firms from paying higher wages.[393] Whole Foods is one of many employers that offer an employee discount as part of its compensation package. Whole Foods' website touts a 20% in-store discount on its products, with the potential for the discounted amount to increase to 30% after six months' employment.[394] The employee discount appears under the same website tab as competitive pay, 401k accounts, health savings accounts, and other traditional fringe benefits.[395] All of these benefits, in turn, are listed under a tab entitled "Culture and Benefits," which includes "Our Core Values & Mission."[396] Clearly, branded discounts are a form of compensation. If the employer undermines the value of the brand and its branded products through actions that are inconsistent with its mission, the value of the discounts declines as well.

B. CORPORATE MISSION AS A WORKING CONDITION

Alternatively, worker protests challenging brand inauthenticity might be framed as protests implicating worker health and safety, a well-established mandatory subject of bargaining.[397]

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393. The Wage Stabilization Act of 1942 froze pay levels "to control inflation and boost production of war materials." George T. Milkovich & Jennifer Stevens, *Back to the Future: A Century of Compensation* 15 (Ctr. for Advanced Hum. Res. Stud., Working Paper No. 99-08, 1999). These restrictions prompted the development of a range of fringe benefits designed to attract and retain labor. *See* Richard E. Schumann, *Compensation from World War II Through the Great Society*, U.S. BUREAU OF LAB. STATS. 1 (Jan. 30, 2003), https://www.bls.gov/opub/mlr/cwc/compensation-from-world-war-ii-through-the-great-society.pdf [https://perma.cc/52CA-RVPL]. Congress added to the allure of employee discounts by excluding them from income for taxation purposes. *See* H.R. REP. NO. 98-432, at 1590–92 (1984). It reasoned that employers had valid business reasons for encouraging employees to consume their products beyond simply offering additional compensation, such as utilizing workers as living advertisements for the brand. *Id.*

394. *See Whole Benefits*, WHOLE FOODS MKT., https://careers.wholefoodsmarket.com/global/en/benefits [https://perma.cc/84WT-CVNF].

395. *Id.*

396. *See Our Core Values & Mission*, WHOLE FOODS MKT., https://careers.wholefoodsmarket.com/global/en/culture [https://perma.cc/TE5V-GU6T].

397. *See, e.g.*, NLRB v. Gulf Power Co., 384 F.2d 822, 824 (5th Cir. 1967) (requiring the employer to bargain with union over its "safe work practices" handbook, stating "[i]t is inescapable that . . . the workers, through their chosen representative, should have the right to bargain with the Company in reference

Workers sustain a kind of moral injury when their labor is co-opted toward an end that conflicts with their deeply held values—values to which the firm has publicly committed. "Moral injury" refers to the damage that is done by being required to engage in acts that violate one's morals and deeply held values, pursuant to direction by one's employer or other authority figure.[398]

Moral injury was first described and recognized in war veterans required to kill, participate in killing, or witness killing during wartime, acts that would be punishable under criminal law outside the wartime context.[399] Other studies showed that health care workers also experienced cognitive dissonance between their desire to help patients and the constraints built into systems of health care, which increasingly make it impossible to uphold the professional standards and oaths that medical caregivers take to put patients first.[400] Factors such as low staff-to-patient ratios, scheduling controls, the reliance on data and metrics to determine treatment options, and turning much of the decision-making in health care over to insurance companies have

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to safe work practices"); *see also* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 222 (1964) (Stewart, J., concurring) (noting that conditions of employment over which the parties must bargain include "what safety practices are observed"); Armour Oil Co., 253 N.L.R.B. 1104, 1123–25 (1981) (requiring employer to bargain over replacement of trucks lacking up-to-date safety equipment because its action affected health and safety, a working condition).

398. *See generally* Yonit Schorr et al., *Sources of Moral Injury Among War Veterans: A Qualitative Evaluation*, 74 J. CLINICAL PSYCH. 2203, 2215 (2018) (describing how war veteran research participants struggled with feeling justified in their actions, and yet were simultaneously troubled by their role in those times when they were directed to follow a superior's directives).

399. *See* Brett T. Litz et al., *Moral Injury and Moral Repair in War Veterans: A Preliminary Model and Intervention Strategy*, 29 CLINICAL PSYCH. REV. 695, 696–97 (2009) (positing a theory of guilt born out of behaviors required for survival that generate moral and ethical conflicts). *See generally* Brandon J. Griffin et al., *Moral Injury: An Integrative Review*, 32 J. TRAUMATIC STRESS 350 (2019) (reviewing moral injury literature).

400. *See, e.g.*, Simon G. Talbot & Wendy Dean, *Physicians Aren't 'Burning Out.' They're Suffering from Moral Injury*, STAT (July 26, 2018), https://statnews.com/2018/07/26/physicians-not-burning-out-they-are-suffering-moral-injury [https://perma.cc/SWA8-J6LG] ("The moral injury of health care is . . . . being unable to provide high-quality care and healing in the context of health care.").

been identified as causing moral injury.[401] During the COVID-19 pandemic, moral injury rose dramatically in health care workers, occurring where employees were required to risk their lives to treat patients in a situation where the fiscal necessities created suboptimal preparedness.[402] Finally, moral injury has been documented in teachers and education administrators, who are obligated both to enact justice (punishing bad behavior, such as drug use) and to advance the welfare of students, all while operating in a context of fiscal austerity that results in short staffing.[403]

The moral injury concept has been extended to other workplace contexts and studied in marketing, public relations, and retail. In these cases, moral injury is created by the disconnect between unethical organizational behavior that conflicts with workers' perceptions of the corporate mission and their own deeply held values.[404] For example, Wells Fargo workers mobilized in response to the bank setting unrealistic sales quotas that pressured workers to engage in fraudulent and predatory behav-

401. *Id.*; *see* Linda Thorne, *The Association Between Ethical Conflict and Adverse Outcomes*, 92 J. BUS. ETHICS 269, 273–74 (2010) (reporting empirical evidence of adverse employment outcomes (retention, stress, turnover, absenteeism) associated with ethical value incongruence and a mismatch between employer and employee ethical priorities).

402. *See* Ron Carucci & Ludmila N. Praslova, *Employees Are Sick of Being Asked to Make Moral Compromises*, HARV. BUS. REV. (Feb. 21, 2022), https://hbr.org/2022/02/employees-are-sick-of-being-asked-to-make-moral-compromises [https://perma.cc/8K9E-WJWW] (explaining the relevance of moral injury in the context of the pandemic and workplace restructuring, framing it generally as stemming from an innate desire for justice).

403. *See* Meira Levinson, *Moral Injury and the Ethics of Educational Injustice*, 85 HARV. EDUC. REV. 203, 221–23 (2015) (responding to the issue of moral injury in education). *See generally* ALAN R. TOM, TEACHING AS A MORAL CRAFT (1984) (advocating for a moral-focused model of teaching rather than the "teaching-as-an-applied-science" model); THE MORAL WORK OF TEACHING AND TEACHER EDUCATION (Matthew N. Sanger & Richard D. Osguthorpe eds., 2013) (bridging pedagogical work and teacher beliefs regarding the moral aspect of their work, pointing to its tension with high-stakes standardized testing and accountability).

404. *See* Na Yang et al., *When Moral Tension Begets Cognitive Dissonance: An Investigation of Responses to Unethical Pro-Organizational Behavior and the Contingent Effect of Construal Level*, 180 J. BUS. ETHICS 339, 340 (2022) (explaining that employees generally react to the cognitive dissonance they experience by lowering their own moral awareness and expectations).

iors such as "cross-selling" (selling multiple products with multiple fees to a single customer) to meet the quotas in order to avoid discharge.[405] The story is documented in an episode of *Dirty Money* on Netflix, in which a former Wells Fargo employee tells about how he pushed a customer dying of AIDS and barely subsisting on social security disability payments to open an additional account and arranged an automatic transfer from one account to the other so as to waive fees so that the customer could afford to live.[406] When the next of kin came in to close out his accounts, she found that both accounts had been overdrawn because of compounding fees once his social security disability payments ceased.[407] The guilt and shame from his involvement in this nearly drove the worker to suicide.[408] Wells Fargo workers in Minneapolis joined together in a group protest and petitioned management to change its fraudulent and predatory policies.[409]

The potential for moral injury is most severe when the workers' expectations for the job include deeply held personal values, such as the goal to improve the world or to enhance social equity, but the mission turns out to be at odds with the work they actually do. The story of the Google workers' protests illustrates this well.[410] Tech companies rely heavily on millennials; millennials are particularly likely to have a desire to influence workplace values and to have a positive impact on society that aligns with their values.[411] Further, because hiring and retention in the tech

405. *See* Andris A. Zoltners et al., *Wells Fargo and the Slippery Slope of Sales Incentives*, HARV. BUS. REV. (Sept. 20, 2016), https://hbr.org/2016/09/wells-fargo-and-the-slippery-slope-of-sales-incentives [https://perma.cc/DNA7-JD9Q] (reporting on the alleged two million bank and credit card accounts opened without customer permission); Mina Itabashi, *How Working People Blew the Whistle on Wells Fargo*, JOBS WITH JUST. (Sept. 19, 2016), https://www.jwj.org/how-working-people-blew-the-whistle-on-wells-fargo [https://perma.cc/H68E-KW48] (commenting on banking predatory tactics involved in the Wells Fargo fraudulent operations).

406. *Dirty Money: "The Wagon Wheel,"* at 26:11–27:23 (Netflix 2020).

407. *Id.* at 27:24–28:02.

408. *Id.* at 28:03–29:00.

409. *Id.* at 29:29–30:35.

410. *See supra* Part II.B.

411. Prokopeak, *supra* note 104, at 14; *see also* Anastasia Valentine, *4 Things Your Company Can Do to Attract Millennial IT Talent*, LINKEDIN (Oct.

field is so competitive, and prospective workers search for employment "the same way they would any other purchasing decision," "employer branding is . . . critical to the recruitment of the best talents."[412] Accordingly, firms seeking to employ tech-savvy millennials deliberately design inspiring missions, highlighting aspects of their corporate culture that they believe will appeal to millennials' identities and values.[413]

22, 2014), https://www.linkedin.com/pulse/20141022192048-4537545-4-things-your-company-can-do-to-attract-millennial-it-talent [https://perma.cc/DR5M-2KRP] (observing that millennials value corporate social responsibility and noting that "71% of Millennials want to work for a company that encourages some form of global or community social responsibility"); Larry Alton, *How Millennials Are Reshaping What's Important in Corporate Culture*, FORBES (June 20, 2017), https://www.forbes.com/sites/larryalton/2017/06/20/how-millennials-are-reshaping-whats-important-in-corporate-culture/?sh=c6648182dfb8 [https://perma.cc/77N8-YR2J] (reporting that millennials crave a sense of purpose and are eager to align themselves with brands that support causes they care about); J. Alex Greenwood, *GenX Vs. Millennial: Bridging the Generational Gap in the Workplace*, LINKEDIN (May 16, 2023), https://www.linkedin.com/pulse/gen-x-vs-millennial-bridging-generational-gap-alex-greenwood [https://perma.cc/R93K-FUML] (observing that millennials "are driven by . . . a desire for work that aligns with their values"); Joy Henry, *4 Strategies to Hire and Recruit Millennials in the Tech Industry in 2023*, STERLING (Mar. 8, 2023), https://www.sterlingcheck.com/blog/2023/03/4-strategies-to-hire-and-recruit-millennials-in-the-tech-industry-in-2023 [https://perma.cc/Q5XQ-4CN6] (observing that younger workers not only prioritize but expect social and environmental responsibility from the companies for which they work).

412. Ahmad Alashmawy & Rashad Yazdanifard, *A Review of the Role of Marketing in Recruitment and Talent Acquisition*, 6 INT'L J. MGMT., ACCT. & ECON. 569, 577 (2019).

413. Kate Peters, *What's Your Workplace Language? How Millennials Are Reshaping Office Culture*, FORBES (Aug. 3, 2021), https://www.forbes.com/sites/forbescoachescouncil/2021/08/03/whats-your-workplace-language-how-millennials-are-reshaping-office-culture/?sh=41607b676452 [https://perma.cc/HLZ7-NUJT] ("The Millennial demographic is the first demographic of employees to put effort and time into working toward their personal beliefs and values versus external drivers, such as money and wealth . . . ."); Rob Asghar, *What Millennials Want in the Workplace (and Why You Should Start Giving It to Them)*, FORBES (Jan. 13, 2014), https://www.forbes.com/sites/robasghar/2014/01/13/what-millennials-want-in-the-workplace-and-why-you-should-start-giving-it-to-them/?sh=7858aed74c40 [https://perma.cc/LB6B-2GMN] (reporting that Intelligence Group studies have found that 64% of millennials prioritize "mak[ing] the world a better place" and are seeking "opportunities to invest in a place where they can make a difference, preferably a place that itself makes

The more deeply workers believe in the corporate brand and corporate mission, the more likely they are to invest emotionally in the company and thus to suffer moral injury if they discover that the firm's commitment to those values is inauthentic. For example, Google workers who believed that Google's corporate mission was "don't be evil" and "do the right thing"[414] experienced significant moral injury when they discovered that their labor was being appropriated to create products anathematic to their own values: facial recognition software that would be used by governments to perpetuate racism in immigration enforcement, to target drone attacks in wartime, or to create a search engine that would be used by the Chinese government to censor content.[415] And Whole Foods workers committed to anti-racism chafed under the cognitive dissonance of serving as the face for an employer who had publicly committed to anti-racism but privately continued to discriminate.[416] The injury was particularly deep for Black workers whose racial identity was deployed as aesthetic labor in service of the Whole Foods brand commitment to anti-racism.[417]

In some respects, the damage done by moral injury is analogous to the damage done by sexual or racial harassment on the job. Both harm workers' sense of dignity, autonomy, and identity. Like sexual harassment, the damage done by moral injury

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a difference"); *see also* Gaye Özçelik, *Engagement and Retention of the Millennial Generation in the Workplace Through Internal Branding,* 10 INT'L J. BUS. MGMT. 99, 102–04 (2015) (listing implications and recommendations for firms when it comes to directing internal branding to millennials).

414. Kate Conger, *Google Removes 'Don't Be Evil' Clause from Its Code of Conduct*, GIZMODO (May 18, 2018), https://gizmodo.com/google-removes-nearly-all-mentions-of-dont-be-evil-from-1826153393 [https://perma.cc/5XHQ-8559] (noting that the "Don't be evil" motto was altered in 2015 to "do the right thing," and then officially removed from its code of conduct in 2018).

415. *See* Kate Conger & Cade Metz, *Tech Workers Now Want to Know: What Are We Building This for?*, N.Y. TIMES (Oct. 7, 2018), https://www.nytimes.com/2018/10/07/technology/tech-workers-ask-censorship-surveillance.html [https://perma.cc/2VK6-UT6G] (explaining Google's censorship work in China and its AI technology for drone usage); Ghaffary, *supra* note 15 (recounting Google's work with ICE and CBP).

416. *See supra* Part III.B (describing the Whole Foods protests).

417. *See* RHODES, *supra* note 80, at 136–37 (describing how "woke capitalism" exploits Black bodies).

often manifests itself in the form of increased absenteeism, reduced commitment to the employer, and generalized stress.[418] These issues impair work performance, which in turn threatens workers' job security. Further, where the employer requires workers to embody the brand as part of its internal branding and external image presentation to the public, workers are more likely to experience significant cognitive dissonance and moral injury as their identities—including their racial, gender, and ethnic identities—are converted to the employer's ends. Where the employer relies upon the workers to serve as front-line brand ambassadors, exploiting their physical personas and demographic characteristics to advance the brand and its stated values to strangers as well as to their friends and families, it is easy to see why workers would feel especially betrayed if those brand commitments turn out to be inauthentic.[419] Thus, the firm's failure to live up to its stated mission and values, a mission that was used to recruit and retain workers, should be understood to relate to the material conditions of employment, which include safety and health on the job.

C. FACILITATING WORKER VOICE AND POWER

Protecting workers' protests challenging employers' deviation from mission statements would also further worker voice and power, two of the most important goals of the NLRA.[420] Most fundamentally, it would facilitate alliances between workers and consumers, potentially enhancing workers' leverage. Citizens in-

418. *Compare* Thorne, *supra* note 401 (documenting effects of moral injury on nurses), *with* Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 27–29 (1995) (documenting effects of sexual harassment on women workers in multiple fields).

419. *See generally* Khanyapuss Punjaisri et al., *Exploring the Influences of Internal Branding on Employees' Brand Promise Delivery: Implications for Strengthening Customer-Brand Relationships*, 7 J. RELATIONSHIP MKTG. 407 (2008) (drawing a connection between positive attitudes towards a brand and brand loyalty).

420. *See* National Labor Relations Act § 1, 29 U.S.C. § 151 (addressing the need for worker protection stemming from the inequality of bargaining power between employers and employees); Wagner, *supra* note 27, at 23 (describing the importance of protecting worker voice and its role in supporting the larger political democracy).

creasingly express their political views and express moral preferences through acts of consumption.[421] Those acts of citizen-consumption, however, are intrinsically individualistic and may not always be well-informed.[422] By protecting workers' rights to express concerns about the authenticity of the employer's brand promise, law could facilitate collective political action through the medium of the market. It could also support transparency and information flow to consumers from workers and unions, the market participants most likely to have information about the authenticity of brand promises.

Consumer organizing and action at a collective level is comparatively rare. As one scholar of consumer boycotts put it, "one of the great enigmas of economic behavior is the reluctance of Americans to form organizations for advancing their interests as consumers."[423] Although national organizations exist that represent consumer interests, they generally focus their activity toward conducting and disseminating research on consumer issues and exerting influence directly on legislators and politicians in the consumer interest.[424] Labor unions and civil rights organizations, by contrast, have deployed the boycott weapon quite effectively to bring direct pressure to bear on firms.[425] Two of the best-known examples of very effective boycotts organized by, respectively, labor unions and civil rights activists, are the United Farm Worker-led boycotts of grapes and lettuce during the 1960s

421. Kevin Kolben, *The Consumer Imaginary: Labor Rights, Human Rights, and Citizen-Consumers in the Global Supply Chain*, 52 VAND. J. TRANSNAT'L L. 839, 841–42, 865 (2019) (pointing to the 1996 Nike consumer boycott after its factory's working conditions in Indonesia came to light, and how the idea of "consumer citizenship" factors heavily in consumption).

422. *See id.* at 867 (articulating a critique of consumer citizenship, that because of its individualistic nature it "might displace or crowd out collective political action, . . . arguably a more effective means of effecting political change").

423. MONROE FRIEDMAN, CONSUMER BOYCOTTS: EFFECTING CHANGE THROUGH THE MARKETPLACE AND THE MEDIA 63 (1999).

424. *Id.* at 64 (conceding that there do exist organizations such as the Consumer Federation of America, but that they have rarely, if ever, initiated or supported a consumer economic boycott).

425. *See id.* at 3 (highlighting the boycott's important social justice role in American history).

through 1990s and the bus boycott led by Reverend Martin Luther King, Jr., in the 1950s.[426]

The most effective boycotts appeal to conscience, addressing the interests of consumers and those beyond the members of the group organizing the action.[427] But section 7's requirement that labor action be self-interested—that is, that the activity pertain to workers' interests as workers in order to be deemed for "mutual aid or protection"[428]—has been a significant limiting force in the efficacy of labor-organized actions, strikes, and boycotts, encouraging labor unions to narrowly conceptualize and publicize the goals of the actions. Understandably, consumers don't respond as well to "beneficiary" boycotts, those which are seen as benefitting only the special interest group calling for the boycott.[429] The United Farm Workers' boycott was exceptionally effective precisely because the union framed the boycott's objectives broadly, arguing for pesticide-free crops that would ensure healthier food for consumers as well as safer working conditions for workers.[430]

In the modern economy, workers need consumer support for strikes and boycott actions to be effective. Picket lines and boycott requests no longer carry the sway they once did with other workers, and organized labor is considerably weaker than it was in its heyday. But where workers and consumers join in a conscience-oriented appeal to bring pressure on a firm to change its practices, the potential for leverage against the firm is dramatically improved.[431] Indeed, as discussed in Part II, CSR codes

426. *Id.* at 3, 45, 97–107 (explaining the impact of the boycott led by Cesar Chavez on migrant workers' conditions, and on American consumers in the form of healthier, pesticide-free produce; as well as the impact of the bus boycott on African American civil rights).

427. *Id.* at 16 (emphasizing that these "conscience boycotts[s]" consist of the sponsor and perceived victim being from different constituencies).

428. 29 U.S.C. § 157.

429. FRIEDMAN, *supra* note 423, at 45–46 (explaining that beneficiary campaigns are often carried out to advance affected blue-collar or white-collar workers, not the welfare of the community at large, and the consumer public likely will not support disruptions to their consumption).

430. *See id.* at 45. Because agricultural workers are not covered by the NLRA, 29 U.S.C. § 152(3), the "mutual aid or protection" requirement did not apply to the UFW's action; farmworkers organized outside the law. For purposes of the boycott action, the fact that they were excluded from coverage actually helped, since the secondary boycott provisions did not apply to them.

431. FRIEDMAN, *supra* note 423, at 16.

were in part a response to collective pressure by consumers in protests organized by labor unions. The labor-led consumer boycott of Nike, for example, resulted not only in litigation but in the implementation of CSR codes at Nike and elsewhere that were designed to support the brand through an authentic commitment to a particular set of moral principles.

There is another reason that conscience boycotts are critical to the efficacy of labor actions. The NLRA prohibits secondary boycotts conducted by labor unions.[432] A secondary boycott is pressure aimed at a business entity other than the primary employer, with whom the union has a dispute over wages, hours, or working conditions—typically, the secondary is a downstream retailer who sells the products produced by the workers.[433] The goal of the worker action is to pressure the so-called secondary business to cease doing business with the primary (the employer).[434] It can be a very effective strategy if consumers respond to the message.[435] Equally important, the First Amendment protects political boycotts and similar actions by social justice organizations, while the NLRA constrains labor boycotts and worker actions aimed at strictly economic ends.[436] Accordingly, labor actions that can be framed broadly with benefits for

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432. *See* National Labor Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4) ("It shall be an unfair labor practice for a labor organization . . . 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 . . . ."); *see also* FRIEDMAN, *supra* note 423, at 43 (outlining the series of early twentieth century judicial and legislative actions that barred secondary boycotts).

433. FRIEDMAN, *supra* note 423, at 15–16.

434. *Id.*

435. *See, e.g.*, James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889, 894–98 (1991) (describing how union leaders have forged alliances with social justice movements to conduct more effective worker actions, and arguing that these alliances have blurred the lines between political movements and labor movements to the benefit of workers and the communities with which they identify).

436. *See id.* at 896–97; *see also* James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189, 190 (1984) ("[W]hile secondary boycott picketing by a civil rights organization demanding economic justice for blacks has been protected under the First Amendment, secondary boycott picketing by unions demanding economic justice for workers and protesting the Soviet invasion of Afghanistan has not." (footnotes omitted)).

the community and are co-sponsored with other non-worker organizations, such as consumer groups or social justice organizations, are more likely to receive First Amendment protection and escape the restrictions imposed by the secondary boycott provisions of the NLRA.

CONCLUSION

As Studs Terkel observed long ago, work is "a search . . . for daily meaning as well as daily bread."[437] For many workers, the moral mission of the firm—encapsulated in its brand and reinforced through affirmations and public announcements by the CEO—becomes a central part of their relationship with the firm through employment. When the firm's commitment to the values it publicly espouses is found wanting, it should not surprise us that workers would respond by seeking to hold the firm to its promises.

Workers who use collective action to challenge deviation from the proclaimed corporate mission and to hold firms to their brand promises should be protected at law. Not only is protection in workers' interest and in service of the goals of the NLRA, but it also furthers the public interest. Workers are best positioned to observe inauthenticity vis-à-vis the brand promise and to call it out. The Google workers, for example, were able to discern and publicize the uses to which their labor was dedicated by an employer so influential that it rivals the state. Yet the First Amendment does not protect worker voice vis-à-vis private employers, regardless of their size and power.[438]

As philosopher Elizabeth Anderson has observed, modern workplaces function as private governments, controlling their subjects' lives completely.[439] In a world where employers lawfully wield the capital punishment of the workplace—termination—against workers who challenge the authenticity of political commitments made by their employers, workers' political voice is effectively silenced while employers' voice is amplified. Even

437. TERKEL, *supra* note 360, at xi.

438. *See* Pope, *supra* note 436, at 190.

439. *See* ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 41–52 (2017). The single freedom that workers have is to quit. *Id.* at 55.

our most conservative Justices have acknowledged that the concentration of economic and political power in the hands of private parties, including large firms, means that those entities increasingly control the speech of *others*.[440] If the state accepts and reinforces this state of affairs through the law regulating work, then it is the state that has authorized an authoritarian form of private government, ceding to firms the complete control of workers' lives—including their political voice.[441]

Finally, if firms are free to engage in woke-washing under cover of the First Amendment, publicly proclaiming one set of values but privately visiting another on their workforce, they may ultimately deradicalize important social movements in which economic and political disenfranchisement are intertwined. Black Lives Matter, for example, encompasses a struggle for both racial and economic justice, since in a capitalist economy inequality is necessarily rooted in both racism and classism.[442] If corporations like Whole Foods are free to make inauthentic statements about their commitments to eradicating racism and to trumpet their alignment with Black Lives Matter, only to do the opposite in their own economic interactions with Black workers, they effectively leverage Black activism to increase corporate wealth while simultaneously blocking real change. Carl Rhodes explains: "[W]oke capitalism is just another form of exploitation of Black and working-class people. Not limited to the laboring power of their bodies, the exploitation is extended to their struggle, politics, ideas and spirit."[443]

While this type of exploitation has been especially egregious in the context of BLM, Rhodes's observation is equally applicable

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440. *See* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring) (noting how modern digital platforms such as Twitter "provide avenues for historically unprecedented amounts of speech, including speech by government actors," and raising concern about the unprecedented "concentrated control of so much speech in the hands of a few private parties" like Twitter).

441. *See* ANDERSON, *supra* note 439, at 60 (contending that under the employment-at-will framework, workers cede *all* their rights to their employers, except for those that are retained by law).

442. *See* BARBARA RANSBY, MAKING ALL BLACK LIVES MATTER: REIMAGINING FREEDOM IN THE TWENTY-FIRST CENTURY 97–100 (2018) (rejecting the idea of "Black poor").

443. RHODES, *supra* note 80, at 137.

to disingenuous brand messages that focus on other sociopolitical issues, like those raised by the Google workers. Because work engages our minds and spirits as well as our bodies, deployment of our labor toward goals fundamentally at odds with deeply held values and an announced corporate mission is a breach of trust, and the harm suffered is the same.