POLITICIZATION, CHAOTIC POLICY, AND TRIP WIRES: PROBLEMS WITH *EPILEPSY FOUNDATION*

ISAAC S. WOFFORD

In this note the author thoughtfully explores the issue of whether Weingarten Rights should be extended to nonunion employees. Without settling upon a definitive answer to that question, this note suggests that Epilepsy Foundation, the recent National Labor Relations Board ruling which extended Weingarten Rights to nonunion employees, was decided too hastily and without due regard for precedent. The author's skepticism of the Board's decision to overrule fifteen years of precedent is based on his review of the Weingarten *decision and the numerous Board rulings that refused to extend Weingarten Rights to nonunion employees. In addition, the author takes a fresh look at the text of, the history of, and policy behind the National Labor Relations Act. Partially discounting the claims of some critics that* Epilepsy Foundation *creates a "trip-wire" over which employers will stumble and inadvertently burden the rights of employees, the author cautions that unpredictable Board decisions and an inability to rely with confidence on established precedent are the real threats to the rights of employers and employees. This note suggests that the issues raised by* Epilepsy Foundation *cannot be finally put to rest until these "rights" are codified into rules that are more resistant to political whim than the current practice of case-by-case policy determination.*

I. INTRODUCTION

The National Labor Relations Act[1] (NLRA) is the legislative centerpiece of federal labor-management relations policy.[2] Section 7 of the NLRA, the "basic principal" of the Act,[3] states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[4] Based on the

1. 29 U.S.C. §§ 151–169 (1994).

2. ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 1 (1976).

3. *Id.*

4. 29 U.S.C. § 157.

language and policy of this core, the National Labor Relations Board (NLRB) ruled in *Epilepsy Foundation*[5] that an employer in a nonunion setting commits a section 8(a)(1) [6] unfair labor practice by denying an employee's request that a coworker be present during an interview that the employee reasonably believes will lead to disciplinary action.[7]

Epilepsy Foundation represents a reversal in Board policy, overturning some fifteen years of precedent.[8] As a result, it has been met with both praise and criticism. Labor attorneys and unions hail it as "empowering"[9] for employees making "[t]he playing field . . . much more level [so that] the employer will have to play it straight."[10] Not surprisingly, however, businesses decry it as "a trip wire for nonunion employers"[11] that adds little to an employee's rights while inhibiting the employer's ability "to quickly and efficiently investigate the problem."[12] Similarly, Congressman John A. Boehner is concerned that *Epilepsy Foundation* "expands the NLRA to the 90% of the workforce that is not unionized."[13] While this may be only a "nuisance" for larger employers, former Republican Board member Edward B. Miller worries that it may be a real problem for smaller firms without regular legal counsel.[14]

The following analysis will examine the various arguments for and against the Board's *Epilepsy Foundation* decision. To begin, Part II turns to the background of *Epilepsy Foundation* and traces the development of the right to representation during disciplinary interviews through to its culmination in the seminal Supreme Court decision, *NLRB v. Weingarten, Inc.*,[15] which established the right to coworker assistance in the union setting. After reviewing the Supreme Court decision, it then summarizes the history of the Board's varied application of *Weingarten, Inc.* in nonunion settings. Having laid this foundation, Part III asks whether *Epilepsy Foundation* is based on a permissible interpretation of

5. 331 N.L.R.B. No. 92 (July 10, 2000), 2000 WL 967066, *aff'd in part*, 268 F.3d 1095 (D.C. Cir. 2001) (upholding the Board's extension of Weingarten Rights to nonunion employees but reversing the Board's application of its holding retroactively).

6. 29 U.S.C. § 158(a)(1) ("It shall be an unfair labor practice for an employer—to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . . .").

7. *Epilepsy Found.*, 2000 WL 967066, at *2, *4.

8. In 1985, the Board held that an employee had no right to assistance from a coworker in the nonunion workplace. Sears, Roebuck & Co., 274 N.L.R.B. 230, 232 (1985) (stating that the right to representation in disciplinary interviews "applies only to unionized employees").

9. Susan J. McGolrick, *Attorneys Disagree About Wisdom of NLRB Extending Weingarten Rights*, 152 DAILY LAB. REP. C-1 (2000) (quoting Nancy Schiffer, AFL-CIO Associate General Counsel).

10. *Id.* (quoting the president of the National Workrights Institute, Lewis L. Maltby).

11. *Id.* (quoting Steven M. Moss who was counsel for Epilepsy Foundation of Northeast Ohio).

12. *Id.* (paraphrasing the comments of Marshall B. Babson, a former Democratic Board member).

13. *The National Labor Relations Board: Recent Trends and Their Implications: Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Educ. & the Workforce*, 106th Cong. 3 (2000) [hereinafter *Hearing*] (opening statement of John A. Boehner, Chairman, Subcomm. on Employer-Employee Relations of the House Comm. on Educ. & the Workforce).

14. McGolrick, *supra* note 9, at C-3.

15. 420 U.S. 251 (1975).

section 7 rights and, even if it is a permissible interpretation of the Act, whether the Board's new interpretation is desirable in light of labor policy and NLRB precedent. Part IV resolves that while *Epilepsy Foundation* may be a permissible interpretation of the Act, it represents poor judgment to overturn precedent with only a hasty evaluation of labor and management interests and without careful consideration or explanation for this major shift in rules affecting so many employees and employers. Part V summarizes the findings of the previous sections.

II. BACKGROUND

Many casual observers of employment law associate individual employee rights almost exclusively with acts such as the Americans with Disabilities Act, Employee Retirement Income Security Act, and the Occupational Safety and Health Act and, therefore, are surprised to find that the NLRA and NLRB have established roles in securing individual rights in the nonunion workplace even beyond organizational activities.[16] Although there was little discussion of section 7 when the NLRA was enacted, because it was largely borrowed from the National Industrial Recovery Act[17] and the Norris-LaGuardia Act,[18] the Act clearly was intended to be liberally construed in order to create "industrial democracy" by equalizing the bargaining powers of employers and employees.[19] Indeed, Senator Wagner's legislative assistant, Leon Keyserling, stated that their "approach was to make the worker a free man and give him equality of bargaining power and let him make his contract if he could."[20]

16. *See* 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, 1675–76 (1989). Professor Morris identifies several areas where section 7 rights apply outside the union workplace including, he argues, Weingarten Rights. *See id.* at 1677, 1712–54.

17. Ch. 90, § 7(a)(1), 48 Stat. 195, 198 (1933) (held unconstitutional in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)). The National Industrial Recovery Act provided:

> That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

Id. § 7(a)(1).

18. 29 U.S.C. §§ 101–115 (1994). While not incorporated as a statutory right, but rather included as a policy statement of Congress to guide judicial construction, section 2 of the Norris-LaGuardia Act states in part that:

> [I]t is necessary that [the worker] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

19. *See* Morris, *supra* note 16, at 1680–87 (arguing that Senator Wagner sought "to transform the typically authoritarian employer-employee relationship into an equal partnership").

20. Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 329 (1987).

Thus, it comes as little surprise that Justice Brennan concluded in *NLRB v. City Disposal Systems, Inc.*[21] that:

> [W]hat emerges from the general background of § 7—and what is consistent with the Act's statement of purpose—is a congressional intent to create an equality in bargaining power between the employee and the employer throughout the entire process of labor organizing, collective bargaining, and enforcement of collective-bargaining agreements.[22]

In this context the right to representation during a disciplinary interview was first denied and then granted to unionized workers as a right rooted in section 7 of the Act and subsequently extended, revoked, and reextended to nonunionized workplaces. This section sketches the development of this right, tracing it to its culmination before the Supreme Court in *Weingarten, Inc.*, and then turning to its subsequent treatment by the Board in unorganized workplaces.

A. The Seminal Case of NLRB v. Weingarten, Inc.

Justice Brennan, consistent with his expansive reading of section 7 rights in *City Disposal Systems*,[23] delivered the majority opinion in *Weingarten, Inc.* and concluded that "[t]he action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of section 7 that '[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.'"[24] To fully understand the significance and logic of *Weingarten, Inc.*, one is well served by carefully examining related pre-*Weingarten, Inc.* Board decisions.[25]

*1. Pre-*Weingarten, Inc. *Law*

Although pre-*Weingarten, Inc.* law cannot easily be subdivided into different segments, at the risk of oversimplification, Board treatment of representational rights during a disciplinary interview may be divided into three broad periods. First, the Board flatly rejected the argument that the Act gave a right to representation in an interview, holding instead that it was a matter for private contract or collective bargaining.[26] Then, the Board recognized a limited right to assistance in an interview based on the employer's obligation to bargain in good faith under section

21. 465 U.S. 822 (1984).

22. *Id.* at 835.

23. *See supra* notes 21–22 and accompanying text.

24. 420 U.S. 251, 260 (1975) (quoting Mobil Oil Corp. v. NLRB, 482 F.2d 842, 847 (7th Cir. 1973)).

25. For a detailed study of the decisions leading up to *Weingarten, Inc.*, see David L. Gregory, *The Employee's Right to Representation During Employer Investigatory Interviews: A Critical Analysis of the Evolution of Weingarten Principles*, 28 VILL. L. REV. 572, 572–93 (1983).

26. *See* discussion *infra* Part II.A.1.a.

8(a)(5) of the Act, but it did not provide a workable test to determine when the right accrued.[27] Finally, in the cases immediately preceding *Weingarten, Inc.*, the Board shifted its focus to section 7 of the Act and the employee's right to engage in concerted activities as protected by section 8(a)(1) to create what would become modern "Weingarten Rights," at least in the union setting.[28]

a. Representation as a Matter of Private Contract

Dobbs Houses, Inc.[29] was the first case to directly address the question of whether the NLRA gave an employee, in his or her capacity as an employee and not as a union representative,[30] the right to have a coworker present during an investigatory interview reasonably expected to lead to disciplinary action.[31] Knight, a union member and waitress employed by Dobbs Houses, Inc., committed numerous infractions for which she was fired during a meeting with the general manager and three assistant managers.[32] After concluding that Knight was terminated for cause rather than due to union animus,[33] the Board turned to allegations that Dobbs Houses, Inc. violated section 8(a)(1) of the Act by refusing Knight's request that a union representative be present during the meeting.[34] The Board, however, dismissed this argument finding nothing in the NLRA to support the contention that an employee is entitled to representation when he or she is being disciplined for behavior unrelated to "legitimate union or concerted activity."[35] Instead, the Board concluded that "[a]n employer undoubtedly has the right to maintain day-to-day discipline in the plant or on the working premises and it seems . . . that only exceptional circumstances should warrant any interference with this right."[36]

b. The Right to Representation Through the Duty to Bargain

This language stands in sharp contrast, however, to the ruling in *Texaco, Inc., Houston Producing Division*[37] decided just three years later.

27. *See* discussion *infra* Part II.A.1.b.
28. *See* discussion *infra* Part II.A.1.c.
29. 145 N.L.R.B. 1565 (1964).
30. *Ross Gear & Tool Co.*, 63 N.L.R.B. 1012 (1945), *enforcement denied*, 158 F.2d 607 (7th Cir. 1947), preceded *Dobbs Houses, Inc.*, but, although it granted the right to representation, it was based on the employee's status as union committee member rather than her position as an employee. *See id.* at 1033–34 (explaining that while no right to representation may apply "whenever he or she may be called in by management to be admonished," when the employee was called "as a member of a union committee . . . [the employee] was within her statutory rights in refusing to handle the matter alone").
31. Gregory, *supra* note 25, at 575.
32. 145 N.L.R.B. at 1569.
33. *Id.* at 1570.
34. *Id.* at 1570–71.
35. *Id.* at 1571.
36. *Id.*
37. 168 N.L.R.B. 361 (1967), *enforcement denied*, 408 F.2d 142 (5th Cir. 1969).

In this case, Alaniz, a member of a bargaining unit represented by a union and an employee of Texaco for approximately twenty years, was observed attempting to steal a two-gallon can of kerosene.[38] Two weeks later, management invited Alaniz to an interview but refused his request for assistance by a union representative.[39] Based on these facts, but without mentioning *Dobbs Houses, Inc.*, the NLRB concluded that Texaco had committed unfair labor practices under both sections 8(a)(1) and (5) of the NLRA.[40] The Board rested this conclusion on Texaco's intent to "conclud[e] its 'case' against Alaniz . . . to support disciplinary action."[41] In such circumstances, as opposed to instances where the employer was merely investigating and gathering information, the Board argued that the interview affected the employee's terms and conditions of employment and thus obligated the employer to bargain with the employee's representative under section 8(a)(5) of the Act.[42] Therefore, by denying Alaniz's request for representation, Texaco violated its duty to bargain, committing an unfair labor practice under section 8(a)(5) and, consequently, interfering with his section 7 rights leading to an unfair labor practice under section 8(a)(1) as well.[43]

c. Discovering Modern *Weingarten* Rights

While *Texaco-Houston* appeared to be a radical departure from *Dobbs Houses, Inc.*, it had little practical impact because its holding was eviscerated by the distinction between disciplinary interviews, where the right to representation accrued, and investigatory interviews, where the employer could deny the employee's request for representation.[44] Against this background, the final pre-*Weingarten, Inc.* drama played out in *Mobil Oil Corp.*[45] In that case, several employees were suspected of stealing based on evidence obtained through several months of surveillance.[46] Before the company decided to pursue disciplinary actions, several meetings were held with the suspects to confirm the evidence gleaned from surveillance.[47] Despite the denial of employee requests for

38. *Id*. at 361 (also noting that the employee spoke English poorly and had less than a fourth-grade education).

39. *Id*.

40. *Id.* at 362.

41. *Id*.

42. *Id.*

43. *Id.* While the court of appeals subsequently refused to the enforce the Board's order in *Texaco, Inc., Houston Producing Division v. NLRB*, 408 F.2d 142 (5th Cir. 1969), it disagreed, not with the theory of the case, but with the Board's conclusion that the interview was disciplinary rather than merely for the purpose of information gathering. Instead, it held "that, since the interview dealt only with eliciting facts and not with the consequences of the facts revealed, its subject matter was not within the scope of compulsory bargaining." *Id.* at 145.

44. *See* Gregory, *supra* note 25, at 578–83.

45. 196 N.L.R.B. 1052 (1972), *enforcement denied*, 482 F.2d 842 (7th Cir. 1973).

46. Surveillance occurred from late April through July 1, 1969. *Id.* at 1057 (Trial Examiner's Decision).

47. *Id.* at 1057, 1060 (Trial Examiner's Decision).

representation, however, the Administrative Law Judge (A.L.J.) concluded that the employer did not violate the Act because "[i]n all cases since *Texaco-Houston* touching on this question, the Board has distinguished *Texaco-Houston* on the facts and has refused to find a violation."[48] In such cases, the A.L.J. pointed out, the Board "stressed the fact that at the time of the employee meeting with management the Company had not reached any decision to discipline."[49] Therefore, the A.L.J. ruled that the employer neither "violated Section 8(a)(1) or (5) of the Act," because "no decision to discipline . . . had been made . . . prior to conducting the employee interviews."[50]

Though the Board did not dispute the A.L.J.'s findings of fact, by shifting its focus from the duty to bargain under section 8(a)(5) as applied in *Texas-Houston* to section 7, it found the employer had committed a section 8(a)(1) unfair labor practice even though it had not decided to discipline the employees before the meeting. The Board explained this new theory of liability as follows:

> An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for "mutual aid and protection." The denial of this right has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity . . . if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy.[51]

In applying this new standard, the Board further shifted the inquiry from whether the employer intended to discipline to whether the employee had "reasonable ground to fear that the interview will adversely affect his employment status . . . under the circumstances of each case."[52] Thus, in contrast to *Texaco-Houston*, which established the right to representation when the employer intended to discipline the employee and therefore required the employer to bargain under section 8(a)(5) because such a decision would affect the terms and conditions of the individual's employment,[53] *Mobil Oil Corp.* asks whether the employee sought to engage in protected concerted action by requesting aid to protect their employment interests in an interview that they reasonably feared would lead to disciplinary action.

This new theory of protected concerted activity, however, was not immediately accepted. Board Member Kennedy, recalling *Dobbs Houses, Inc.*, wrote a lengthy dissent criticizing the majority's willingness

48. *Id*. at 1059–60 (Trial Examiner's Decision).
49. *Id.* at 1060 (Trial Examiner's Decision).
50. *Id.* (Trial Examiner's Decision).
51. *Id.* at 1052.
52. *Id.* at 1052 n.3.
53. *See* discussion *supra* Part II.A.1.a.

to casually overrule "a long [line] of cases" to create a statutory right outside of the scope of section 7 of the Act in an area of employer-employee relations properly left to contract.[54] Additionally, Member Kennedy argued that the new rule impracticably required the employer to speculate about the employee's fears before deciding whether to grant or deny his request for assistance.[55] The Seventh Circuit agreed with the dissent and refused to enforce the Board's order concluding that, although representation during an interview might be literally protected by section 7, "such parsing of a sentence apart from its historical context and the central purpose of the section is inappropriate."[56] According to the Seventh Circuit, section 7 gave employees the right "to use economic pressure . . . to compel employers to follow acceptable investigatory procedures . . . but economic pressure should not be a component of the fact-finding process itself."[57] As a result, the court held that "[t]he requested Union representation at an investigatory interview is clearly not the kind of 'concerted activity' with which § 7 is primarily concerned."[58]

2. NLRB v. Weingarten, Inc.

Mobil Oil Corp. set the stage for *Weingarten, Inc.*[59] by laying out the issues to be decided. In essence, *Weingarten* required the Supreme Court to determine whether the Board or the Seventh Circuit had a better understanding of section 7 of the NLRA. In a six to three decision,[60] the Court adopted the Board's view concluding that "[t]he Board's holding is a permissible construction of 'concerted activities for . . . mutual aid or protection' . . . and should have been sustained."[61] Herein the facts of *Weingarten, Inc.*, the rules it established, and the analysis employed by the majority in support of those rules are examined.

The employer operated approximately 100 retail stores with lunch counter and lobby food operations for both take-out and on-the-

54. 196 N.L.R.B. at 1053 (Kennedy, Member, dissenting).

55. *Id.* at 1054. Member Kennedy argues:

> The Employer certainly was not in a position at the investigatory stage of the interview to read the employees' minds and determine their mental state. This being so, the conclusion that the Employer is guilty of an unfair labor practice must be based on something other than the Employer's acts and conduct, namely, the state of mind of the employees, a purely subjective consideration.

Id.

56. Mobil Oil Corp. v. NLRB, 482 F.2d 842, 846 (7th Cir. 1973).

57. *Id.* at 847.

58. *Id.*

59. *Weingarten* was decided along with its companion case, *Quality Ladies' Garment Workers' Union v. Quality Manufacturing Co.*, 420 U.S. 276 (1975). However, because the Supreme Court incorporated *Weingarten, Inc.*'s analysis by reference to resolve *Quality Manufacturing Co.*, *id.* at 281, this note will focus solely on *Weingarten, Inc.*

60. Justice Brennan wrote for the six-member majority while Chief Justice Burger, Justice Powell, and Justice Stewart dissented in two separate opinions.

61. NLRB v. Weingarten, Inc., 420 U.S. 251, 260 (1975).

premises service.[62] Employee Collins was represented by Retail Clerks Union, Local 455, and worked for nine years at a lunch counter before being transferred to the lobby operation of a different store.[63] Collins was suspected of stealing about two dollars from her employer by allegedly underpaying for food she purchased.[64] As a result, the store manager and a surveillance specialist interviewed her concerning this matter but denied her repeated requests for assistance by a union representative.[65] Finding nothing to support the allegations, the manager and specialist closed the matter,[66] but, after hearing this good news, Collins began to cry and exclaimed that she had paid for everything but her free lunches.[67] The manager and surveillance specialist were surprised by this news, because, while free lunches were permitted at her previous store where she worked at a lunch counter, the lobby operation where she presently worked did not provide free lunches.[68] Thereafter, the manager and surveillance specialist again interrogated her and, while denying her requests for assistance, asked her to sign a written statement that she owed the store $160 representing the approximate cost of her lunches.[69]

The Board, relying on *Mobil Oil Corp.*, found that the employer had interfered with Collins' section 7 rights and, thus, committed an unfair labor practice under section 8(a)(1) of the Act.[70] The Fifth Circuit, like the Seventh Circuit in *Mobil Oil Corp.*, however, refused to enforce the Board's order as "an overbroad interpretation of section 7."[71] Thus, according to the Fifth Circuit, "[w]hile a basic purpose of section 7 is to allow employees to engage in concerted activities for mutual aid and protection, such a need does not arise in an investigatory interview."[72] The Supreme Court reversed the appellate court, however, and upheld the Board's ruling, holding that a right to representation during an investigatory interview was "a permissible construction of 'concerted activities,'" that "clearly falls within the literal wording of § 7."[73]

To begin its analysis the Court carefully outlined what has become known as "Weingarten Rights." It began by restating the basic rule "that § 7 creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline,"[74] and then went on to lay out five contours of the

62. *Id.* at 254.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 255.
67. *Id.*
68. *Id.*
69. *Id.*
70. Weingarten, Inc., 202 N.L.R.B. 466, 449 (1973).
71. NLRB v. Weingarten, Inc., 485 F.2d 1135, 1138 (5th Cir. 1973).
72. *Id*.
73. *Weingarten, Inc.*, 420 U.S. at 260.
74. *Id.* at 256.

rule. First, the right to representation is based on section 7's protection of concerted activities for mutual aid and protection.[75] Second, the employee must request representation and may choose to forgo this right.[76] Third, the right adheres only in "situations where the employee reasonably believes the investigation will result in disciplinary action."[77] Fourth, although the employer may not interfere with the employee's section 7 right to request assistance, the employer may simply forego the interview if the employee does request assistance.[78] Thus, in such a case, the employee could choose either to submit to the interview without representation or give up any potential benefits to be gained from the interview.[79] Fifth and finally, the employer is not required to bargain with any union representative present at the interview.[80]

Having laid out the precise rule, the Supreme Court gave four principle arguments in support of the Board's ruling. The Supreme Court stated that the employee and union representative engaged in protected concerted activity because the representative's presence can protect not only the immediate employee's rights but also can protect the interests of the entire bargaining unit. The representative can prevent continued abusive practices and assure other employees they could obtain similar aid if necessary.[81] This contrasts with the Seventh Circuit's view of section 7 as protecting the right to use concerted activity to bargain for investigative procedure but not the right to engage in concerted activity during the fact-finding process.[82] Similarly, the Court believed that having union representation at an early stage would help elicit valuable facts an otherwise frightened or inarticulate employee might simply be unable to communicate.[83] Moreover, such early participation, the majority argued, would resolve disputes at an earlier stage when the employee's rights were more likely to be vindicated.[84] Finally, the Court concluded that giving employees the right to representation, by circumscribing employer abuses and developing useful facts during interviews, "effectuates the most fundamental purposes of the Act . . . 'to redress the perceived imbalance of economic power between labor and management.'"[85]

However, the three dissenting Justices, writing two separate opinions, criticized the Board for failing to give any reasoned justification for overruling almost thirty years of precedent.[86] Chief Justice Burger, while

75. *Id.* at 256–57.
76. *Id.* at 257.
77. *Id.*
78. *Id.* at 258.
79. *Id.*
80. *Id.* at 259–60.
81. *Id.* at 260–61.
82. *See supra* notes 56–58 and accompanying text.
83. *Weingarten, Inc.*, 420 U.S. at 262–63.
84. *Id.* at 263.
85. *Id.* at 261–62 (quoting Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965)).
86. *Id.* at 268–69 (Burger, C.J., dissenting); *id.* at 270–73 (Powell, J., dissenting).

not disagreeing with the logic of Weingarten Rights, argued that "the integrity of the administrative process requires" the Board to "'disclose the basis of its order' and 'give a clear indication that it has exercised the discretion with which Congress has empowered it.'"[87] While the majority dismissed this concern emphasizing the judiciary's limited review of administrative agencies, the Board's cumulative experience, and its "evolutional approach" to rule making,[88] Chief Justice Burger, in a compelling criticism, found that the majority merely gave "lip service to the rule that the courts are not 'to . . . rubber stamp' Board determinations."[89] Similarly critical, Justice Powell pointed out that "[t]he convoluted course of litigation from *Dobbs Houses Inc.* to *Quality Manufacturing* hardly suggests that the Board's change of heart resulted from a logical 'evolutional approach.'"[90] Finally, Justices Powell and Stewart further disagreed with the majority's view, arguing that while section 7 grants the right to concerted activity for collective bargaining purposes, it does not give a right to representation in an interview because "it leaves definition of the precise contours of the employment relationship to the collective-bargaining process."[91]

B. Weingarten *as Applied to the Nonunion Workplace*

As Professor Gregory explains, although "Weingarten was a watershed decision," it may have "creat[ed] as many ancillary problems as it resolved."[92] Because all the decisions preceding and including *Weingarten, Inc.* dealt only with unionized work places, one of these problems, and the precise focus of this note, is whether Weingarten Rights are equally available to nonunion employees. Here again, giving credence to the dissenting Justices' complaint in *Weingarten, Inc.* that Board decisions hardly reflected an evolution based on cumulative experience,[93] we see the Board first extend, then retract, and finally reextend Weingarten Rights to nonunion employees without providing a principled base for these dramatic changes.

Immediately following *Weingarten, Inc.*, the Board extended representation rights to nonunionized employees as well as unionized employees, finding no distinction between the two classes of workers. *Anchor-*

87. *Id.* at 269 (Burger, C.J., dissenting) (quoting NLRB v. Metro. Ins. Co., 380 U.S. 438, 443 (1965)).

88. *Id.* at 264–67.

89. *Id.* at 269 (Burger, C.J., dissenting).

90. *Id.* at 271 (Powell, J., dissenting). *Quality Manufacturing Co.*, 195 N.L.R.B. 197 (1972), was one of a series of cases immediately preceding and giving form to Weingarten Rights in *Mobil Oil Corp.*

91. *Weingarten, Inc.*, 420 U.S. at 273 (Powell, J., dissenting).

92. Gregory, *supra* note 25, at 594.

93. *See supra* notes 86–90 and accompanying text.

tank, Inc.[94] first announced this policy with the Board proclaiming that "we are persuaded that, in *Weingarten*, the Court's primary concern was with the right of employees to have some measure of protection . . . . These employee concerns remain whether or not the employees are represented by a union."[95] Five years later, in *Materials Research Corp.*,[96] the Board further clarified that indeed Weingarten Rights were not tied to unionization and elaborated its policy rationale for so extending *Weingarten, Inc.* In doing so, the Board framed the issues that would surround the debate from *Materials Research Corp.* through *Epilepsy Foundation*. These fundamental questions are, first, whether an employee in a nonunion workplace acts in concert for mutual aid or protection when he or she requests assistance, and, second, whether it is a prudent exercise of the Board's discretion to extend the Weingarten Rights to the nonunion workplace given its responsibility to balance labor and management interests.

In *Materials Research Corp.*, the Board argued that the employee's section 7 right to act in concert for mutual aid or protection is unaltered by the presence or absence of a union with regard to Weingarten Rights.[97] In support of this conclusion, the Board pointed to the Supreme Court's reliance, not on the presence of a union, but on the individual request of the employee,[98] the limited role of the representative to whom the employer owed no duty to bargain,[99] and other Supreme Court precedents recognizing nonunion activity as concerted.[100] Additionally, the Board found that granting Weingarten Rights to nonunion employees would further the Act's policy of equalizing bargaining power because, unlike union employees, unorganized employees lack collective bargaining agreements to limit the employer's power or establish grievance procedures.[101] Further, the Board pointed out that while an employee would not benefit from "'an experienced union representative,' a factor raised by the Supreme Court in Weingarten . . . the presence of a coworker, even if that individual does nothing more than act as a witness,

94. 239 N.L.R.B. 430 (1978), *enforced in part*, 618 F.2d 1153, 1169 (5th Cir. 1980). Though *Anchortank* is an early statement of what would later become clear policy in *Materials Research Corp.*, 262 N.L.R.B. 1010 (1982), it is not precisely on point because, while the employee was presently unrepresented by a union, a union had recently been elected but was not yet certified. *Anchortank, Inc.*, 239 N.L.R.B. at 430; *see also* Gregory, *supra* note 25, at 609–10.

95. *Anchortank, Inc.*, 239 N.L.R.B. at 431.

96. 262 N.L.R.B. 1010 (1982).

97. *Id.* at 1012 ("The decision in *Weingarten, Inc.* . . . is framed in terms of the right to the assistance of a 'union representative' . . . because it accurately depicted the specific fact pattern presented . . . and not because the Court intended to limit the right recognized in *Weingarten* only to unionized employees.").

98. *Id.*

99. *Id.* (noting that the representative's role is limited to assisting the employee by clarifying facts).

100. In particular, the Board pointed to *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), which held that unorganized employees who walked off the job to protest inadequate heat acted in concert and were protected by section 7 of the Act. *Materials Research Corp.*, 262 N.L.R.B. at 1012.

101. *Materials Research Corp.*, 262 N.L.R.B. at 1014.

still effectuates that purpose, just as the presence of a union representative."[102]

Two dissenting members, however, argued that the majority misinterpreted and overextended section 7 rights. Chairman Van de Water argued that the Act, viewed as a whole, balances employee and employer interests often qualifying section 7 rights to act in concert based on the presence or absence of a union.[103] This, he further argued, was another case where the section 7 right to concerted action activities should be qualified because, in the absence of a union, the employer is free to deal with employees on an individual basis and is not obligated to recognize the employee's representatives.[104] Thus, the Chairman concluded, "[t]he majority decision creates nonstatutory rights that can be utilized without regard to the Act's careful scheme of checks and balances."[105] Similarly, Member Hunter argued in a separate dissent[106] that the presence of a union was central to the *Weingarten, Inc.* decision because an ordinary coworker, as opposed to a union representative, would not represent the interests of the whole and, being selected not for expertise but on the basis of emotional attachment, would add little if anything to the interview process.[107]

Three years later, the Board adopted Chairman Van de Water's dissent in *Sears, Roebuck & Co*.[108] The Board explained that applying Weingarten Rights to nonunion employees impermissibly limits the employer's right to deal with his employees on an individual basis[109] and places a coworker in the position of a representative for the entire workforce without the benefit of a duly recognized or certified union, "contrary to the Act's exclusivity principal."[110] Thus, the Board concluded that while *Weingarten, Inc.* "meshes comfortably" in the unionized setting where the employer may not deal directly with employees and is required to bargain with the employees' representative, applying it outside the unionized workplace "wreaks havoc with fundamental provisions of the Act."[111]

However, just as Chairman Van de Water's dissent in *Materials Research Corp.* foreshadowed *Sears, Roebuck & Co.*, Member Hunter anticipated *E. I. DuPont de Nemours*[112] when he wrote that, although he

102. *Id.* at 1014–15.

103. *Id.* at 1016, 1020 (Van de Water, Chairman, dissenting) (highlighting that employees are not free to act in concert to represent themselves when they have elected to be represented by a union and noting that bargaining rights are dependent upon unionization).

104. *Id.* at 1019.

105. *Id.* at 1021.

106. *Id.* (Hunter, Member, dissenting).

107. *Id.*

108. 274 N.L.R.B. 230, 230 (1985).

109. *Id.* at 231.

110. *Id.* at 231–32.

111. *Id.* at 230–31.

112. 289 N.L.R.B. 627 (1988).

concurred in the majority's result, "I consider the extension of the *Weingarten* rights to unrepresented employees as a permissible but not a reasonable construction of the Act . . . ."[113] Taking hold of the Supreme Court's deference to the Board's "difficult task of 'reconciling conflicting interests of labor and management,'"[114] the NLRB in *DuPont* plotted yet another course, concluding that while *Materials Research Corp.* permissibly construed the Act, it was equally permissible and preferable not to extend Weingarten Rights to nonunion employees on policy grounds.[115] To reach this conclusion, the Board argued that the policy justifications present in a unionized workplace as explained in *Weingarten, Inc.*—namely, deterring continued abuses thereby protecting the entire bargaining unit, eliciting facts helpful to both the employee and employer, and avoiding frivolous grievances—were either inapplicable or less persuasive in the nonunion environment.[116] This, the NLRB explained, results from a number of factors. First, the coworker, as opposed to union steward, has neither the incentive nor information to protect the entire workforce.[117] Second, the coworker, probably emotionally tied to the employee, is unlikely to develop facts helpful to either the employee or employer.[118] Third, because no grievance process exists in most nonunion companies, deterrence of frivolous grievances is irrelevant.[119] Finally, by encouraging employees to assert their Weingarten Rights causing the employer to forgo the interview, the Board may actually take away the employee's only opportunity to present his or her story to the employer.[120] Therefore, the Board held that, "[t]aking into account the more questionable value of such a right in the nonunion setting, we find that the interests of both labor and management are better served by declining to extend this right into that forum."[121]

The Board upheld *DuPont* for twelve years before shifting its position again and returning to *Materials Research Corp.* in *Epilepsy Foundation*.[122] The facts of *Epilepsy Foundation* are relatively simple. Borgs and Hasan, employees in a nonunion workplace, wrote a memorandum to their supervisor suggesting that his supervision was no longer necessary in light of his allegedly inappropriate actions.[123] Upon learning that the memo upset their supervisor and executive director, the employees addressed another memo to the executive director further elaborating their

113. *Sears*, 274 N.L.R.B. at 232 (Hunter, Member, concurring).
114. *DuPont*, 289 N.L.R.B. at 628 (quoting NLRB v. Weingarten, Inc., 420 U.S. 251, 267 (1975)).
115. *Id.* at 628, 630–31.
116. *Id.* at 629.
117. *Id.*
118. *Id.* at 629–30.
119. *Id.* at 630.
120. *Id.*
121. *Id.*
122. 331 N.L.R.B. No. 92 (July 10, 2000), 2000 WL 967066, *aff'd in part*, 268 F.3d 1095 (D.C. Cir. 2001).
123. *Id.* at *1.

concerns.[124] Finally, the executive director asked Borgs to meet with her and the supervisor.[125] Having had prior negative meetings with the executive director and supervisor, Borgs refused to attend the meeting alone.[126] For refusing to attend the meeting alone, Borgs was discharged for gross insubordination.[127]

Considering these facts and "after careful consideration," Chairman Truesdale, writing for a three-member majority,[128] overturned *DuPont* holding that "the rule enunciated in *Weingarten* applies to employees not represented by a union as well as to those that are" and, therefore, Epilepsy Foundation had violated Borgs's section 7 rights and committed a section 8(a)(1) unfair labor practice by "terminating Borgs for insisting on having his coworker . . . present at an investigatory interview."[129] The Board reasoned that extending Weingarten Rights to the unorganized work place was permissible because it fell within the literal meaning of concerted activity and did not conflict with the NLRA's exclusivity principals.[130] It then rejected *DuPont*'s concerns that, while such an extension of Weingarten Rights might be permissible, *Materials Research Corp.* represented poor policy.[131] In particular, the Board found *DuPont*'s assumption that representatives in the nonunion workplace would not protect the interests of the entire workplace to be merely "speculative" and insufficient to "warrant foreclosing employees from the opportunity to avail themselves of the protections of the Act."[132] Moreover, because employees are free to avail themselves of Weingarten Rights strategically, the majority found little merit in *DuPont*'s argument that such an extension would actually harm employees by denying them the opportunity to convey their side of the story.[133] Finally, Chairman Truesdale rejected as irrelevant speculation Member Hurtgen's concern that Weingarten Rights in the nonunion workplace would merely create a "trip wire" for employers unaware of the most recent twist in Board rulings.[134] Thus, contrary to the Board's holding in *DuPont*, the Board held that policy, rather than cautioning against extension of Weingarten Rights to the nonunion workplace, encouraged an expansive reading of section 7 to effectuate the Act's purposes.[135]

124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. Chairman Truesdale and Members Fox and Liebman joined the majority while Members Hurtgen and Brame wrote separate dissents.
129. *Epilepsy Found.*, 2000 WL 967066, at *2, *4.
130. *Id.* at *3–4.
131. *Id.* at *4.
132. *Id.* at *5.
133. *Id*. at *4.
134. *Id.* at *6.
135. *Id.* at *3.

Not surprisingly, the majority's decision was met with sharp dissent. Member Hurtgen reprimanded the Board for undermining the stability of the law by overturning precedent without "compelling considerations,"[136] and both Hurtgen and Brame reinforced many of the familiar *DuPont* and *Sears* distinctions between the union and nonunion workplaces that they believe undermine the majority's arguments.[137] In particular, Hurtgen and Brame emphasized the employer's freedom to deal individually with employees in the nonunion setting[138] and argued that in the nonunion setting it would be "speculative" to assume that a likely "unintelligent or unhelpful" representative would "advance the interests of the unit."[139] Thus, they concluded that the majority created an "unknown trip-wire," upsetting the delicate balance between the conflicting interests of labor and management by extending Weingarten Rights to the nonunion workplace.[140] Finally in the most recent chapter to this ongoing saga, the D.C. Circuit affirmed the Board's interpretation of section 7 and *Weingarten, Inc.* as applied to nonunion employees.[141] The D.C. Circuit quickly dismissed the dissenting arguments stating that "[t]he Board's conclusion obviously is debatable (because the Board has 'changed its mind' several times . . .); but the rationale underlying the decision . . . is both clear and reasonable."[142] Thus, finding the legal rationale reasonable, the court concluded it had no authority to challenge what was essentially "an attack on the wisdom of the agency's policy."[143] Somewhat resigned, the D.C. Circuit simply accepted this new rule as the product of the "fact of life . . . that certain substantive provisions of the NLRA invariably fluctuate with the changing composition of the Board."[144]

III. ANALYSIS

One of three conclusions may be reached in analyzing the legality and wisdom of extending Weingarten Rights to the nonunion employee and, presuming that *Weingarten, Inc.* was correctly decided, the resolution of the issue will necessarily turn on whether any principled legal or policy distinctions may be drawn between union and nonunion workplaces. If there are significant legal distinctions, as the Board held in *Sears*,[145] one might conclude that Weingarten Rights cannot be permissi-

136. *Id*. at *12 (Hurtgen, Member, dissenting).
137. *Id*. at *12–15 (Hurtgen, Member, dissenting); *id*. at *16–35 (Brame, Member, dissenting).
138. *Id.* at *13 (Hurtgen, Member, dissenting); *id.* at *29 (Brame, Member, dissenting).
139. *Id.* at *13 (Hurtgen, Member, dissenting); *id.* at *29 (Brame, Member, dissenting).
140. *Id.* at *13 (Hurtgen, Member, dissenting); *id.* at *29 (Brame, Member, dissenting).
141. Epilepsy Found. v. NLRB, 268 F.3d 1095, 1105 (D.C. Cir. 2001) (affirming the Board's legal analysis but reversing the retroactive application).
142. *Id.* at 1102.
143. *Id.*
144. *Id.* at 1097.
145. *See supra* notes 103–11 and accompanying text.

bly extended to the nonunion workplace. Similarly, even if there are no significant legal distinctions but important policy considerations remain, these policy concerns may dictate that the NLRB should not extend Weingarten Rights even though, as explained by *DuPont*,[146] it would be legally permissible. Or finally, one could agree that the Board's recent *Epilepsy Foundation* decision[147] correctly extends Weingarten Rights to nonunion employees because neither significant legal nor policy considerations distinguish the nonunion workplace from the union workplace. To reach the correct conclusion, therefore, one must begin by examining section 7 to determine whether extending Weingarten Rights is legally permissible, and then, depending on the resolution of the first question, one must weigh the various policy concerns to determine whether it is desirable.

A. Can Weingarten, Inc. *Be Extended to the Nonunion Employee?*

To determine whether the Board could permissibly extend Weingarten Rights to nonunion employees, it is logical to begin by examining the relevant language in section 7, which grants employees the right to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection."[148] After examining the plain language of section 7, it is then necessary to turn to the Act's purpose and structure, recognizing the danger of either reading section 7 so narrowly as to exclude from protection employee action within the Act's scope, or, conversely, so broadly as to include activities that may be within the letter of the Act but outside of its spirit.

1. The Plain Language of the Act

To fall within the Act's plain language, an employee's actions must be both "concerted" and "for the purpose of . . . mutual aid or protection,"[149] and a proper analysis of these requirements differentiates between unprotected personal gripes and protected concerted activities.[150] Of these two requirements, the courts and academia have been primarily concerned with the meaning of "concerted" while construing "mutual aid

146. *See supra* notes 112–21 and accompanying text.

147. *See supra* notes 122–40 and accompanying text.

148. 29 U.S.C. § 157 (1994).

149. *Id.*

150. For a comprehensive and insightful study of "concerted" activities as opposed to personal gripes, see Robert A. Gorman & Matthew W. Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286 (1981). Professors Gorman and Finkin summarize unprotected personal gripe cases as those where

> the Board's conclusion rests upon the coincidence of several facts. The employee's action is taken completely alone and without advance planning or discussion with other employees, the employee's motive is simply to advance his or her own personal self-interest, and favorable resolution of the complaint will not likely improve other employees' working conditions.

Id. at 293.

or protection" so broadly that it is generally easily satisfied.[151] Despite the fact that the employee requesting aid initially acts alone in a nonunion workplace, the employee easily fits within the statute's plain language.

In common parlance, the idea of concerted activities typically conjures images of group activities involving two or more persons. Yet, it is well established that the term "concerted" in the context of the NLRA encompasses individual action as well as group action in several circumstances. For example, the *Interboro* Doctrine, recognized and approved of by the Supreme Court in *NLRB v. City Disposal Systems, Inc.*,[152] brings "the employee's statement or action . . . based on a reasonable and honest belief that he is being . . . asked to perform a task that he is not required to perform under his collective-bargaining agreement" within the scope and protection of section 7.[153] This, the Court explained, is because the employee's protest is an "extension of the concerted action that produced the agreement" and because "the assertion of such a right affects the rights of all employees covered by the collective-bargaining agreement."[154] Similarly, as established by *Mushroom Transportation Co. v. NLRB*,[155] individual action with the "object of initiating or inducing or preparing for group action" is protected because all concerted activity must "start with some kind of communication between individuals."[156] A more controversial and unsettled area of the law even suggests that under a theory of "constructive concerted action," an individual's private action may be considered concerted if the action accrues to the benefit of the entire bargaining unit irrespective of whether such benefit was intended.[157]

Just as concerted activity is not limited to group activities, it is similarly not limited to union workplaces. In the seminal case of *NLRB v. Washington Aluminum Co.*,[158] the Supreme Court held that employees who walked off the job because it was too cold to continue work engaged in protected, concerted activity despite the fact that they were neither unionized nor intended to become unionized.[159]

Given that concerted activity does not require either more than one person or a union, it seems a rather simple exercise in logic to conclude that a nonunion employee who requests the aid of a coworker in a disciplinary interview is engaging in concerted activity without even treading in the dangerous waters of whether there is constructive concerted activ-

151. Rita Gail Smith & Richard A. Parr II, Note, *Protection of Individual Action as "Concerted Activity" Under the National Labor Relations Act*, 68 CORNELL L. REV. 369, 374 (1983).
152. 465 U.S. 822 (1984).
153. *Id.* at 837.
154. *Id.* at 829.
155. 330 F.2d 683 (3d Cir. 1964).
156. *Id.* at 685.
157. *See generally* Gorman & Finkin, *supra* note 150.
158. 370 U.S. 9 (1962).
159. *Id.* at 17–18.

ity. The initial request should be protected under *Mushroom Transportation Co.*[160] as individual activity with the "object of . . . preparing for group action."[161] Likewise, during the actual meeting, the employee and requested coworker's joint efforts fall within the plain meaning of "concerted" despite the lack of the union as explained in *Washington Aluminum Co*.[162] Thus, absent qualifications on the meaning of "concerted" by either the structure of the Act or labor policy, a nonunion employee's request for assistance during disciplinary interviews comports with the plain meaning of "concerted."

The mere fact that an individual's activity is concerted, however, does not mean it is protected under section 7. It must also be "for the purpose of mutual aid or protection."[163] *Eastex, Inc. v. NLRB*[164] is the Court's classic discussion of the mutual aid or protection requirement. *Eastex, Inc.* held that section 7 protected the employees' right to distribute union newsletters encouraging union support and urging political action regarding the federal minimum wage law and "right to work" laws.[165] Consistent with this liberal understanding of mutual aid or protection, the Court had little difficulty in *Weingarten, Inc.* concluding the employee acted for the purpose of mutual aid or protection in requesting representation in a disciplinary interview—at least in the unionized setting.[166] It reasoned that "even though the employee alone may have an immediate stake in the outcome," he acts for mutual aid or protection because "the union representative . . . safeguard[s] . . . the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly."[167] The Court further buttressed its position by arguing that the "other workmen," by making "common cause with a fellow workman," assure themselves "in case [their] turn ever comes, of the support of the one whom they are all then helping."[168]

However, if these traits—the representative securing the interests of the whole and the common cause among workers—are not present in the nonunion workplace, and instead the only interest protected is the employee's "immediate stake in the outcome,"[169] the nonunion worker arguably lacks the necessary purpose of mutual aid or protection when he or she requests representation. Indeed, at the same time the Court recognized the broad scope of mutual aid or protection in *Eastex, Inc.*, it acknowledged "some concerted activity bears a less immediate relationship

160. 330 F.2d 683 (3d Cir. 1964).
161. *Id.* at 685.
162. *See supra* notes 158–59 and accompanying text.
163. 29 U.S.C. § 157 (1994); *see supra* notes 149–51 and accompanying text.
164. 437 U.S. 556 (1978).
165. *Id.* at 558, 570.
166. NLRB v. Weingarten, Inc., 420 U.S. 251, 260 (1975).
167. *Id.* at 260–61.
168. *Id.* at 261.
169. *Id.* at 260.

to employees' interests as employees . . . [and] that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause."[170]

Is this a case where the interest the employee seeks to advance is so attenuated from the employees' interests as a whole that the action is no longer for mutual aid or protection? This is a difficult question,[171] and Toni Blackwood cautions, "[t]he *Weingarten* decision simply does not settle this question . . . . [I]t can be, and obviously often is, interpreted to support both sides of the argument."[172] In truth, however, the point is moot because issues such as these, where there are multiple reasonable views, are precisely the issues the Supreme Court has repeatedly given the Board wide latitude in resolving.[173] If compelled to rule on this issue today, doubtless the Court would again reply as it did in *Weingarten, Inc.*:

> [T]he Board's construction here, while it may not be required by the Act, is at least permissible under it, and insofar as the Board's application of that meaning engages in the "difficult and delicate responsibility" of reconciling conflicting interests of labor and management, the balance struck by the Board is "subject to limited judicial review."[174]

Thus, the nonunion employee's request for representation in a disciplinary interview comports not only with the plain meaning "concerted,"[175] but also with a reasonable interpretation of "for the purpose of mutual aid or protection." Therefore, if *Epilepsy Foundation* is to be challenged as a statutorily impermissible interpretation of section 7, grounds for such an argument must be found either in the structure or the purpose of the Act. Before proceeding to questions of statutory structure and policy, however, a word of assurance is due to the reader: though we are presently able to sidestep the troubling questions surrounding the nonunion representative's capacity to secure the interests of the whole and create a common cause among workers, these issues will force themselves into the forefront and demand a more thorough examination when we turn to labor and management relations policy.[176]

170. 437 U.S. at 567–68.

171. Numerous authors have addressed this issue. *See, e.g.*, Morris, *supra* note 16; Steve Carlin, Note, *Extending Weingarten Rights to Nonunion Employees*, 86 COLUM. L. REV. 618 (1986); Jill D. Flack, Note, *Limiting the Weingarten Right in the Nonunion Setting: The Implications of* Sears, Roebuck and Co., 35 CATH. U. L. REV. 1033 (1986); Kenneth L. Judd, Note, *The Weingarten Right in a Nonunion Setting: A Permissible and Desirable Construction of the National Labor Relations Act*, 19 MEM. ST. U. L. REV. 207 (1989).

172. Toni Blackwood, Comment, *Individual Concerted Activity: Contradiction in Terms or Preferred Statutory Construction?*, 54 UMKC L. REV. 55, 71 (1985).

173. *See, e.g.*, *Eastex*, 437 U.S. at 569 (concluding "that the Board acted within the range of its discretion" in holding that distribution of political newsletters was protected by section 7); *Weingarten, Inc.*, 420 U.S. at 266–67 (upholding the Board's interpretation of section 7 to grant representation rights in the union workplace as within the Board's discretion).

174. 420 U.S. at 266–67 (quoting NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957)).

175. *See supra* notes 152–62 and accompanying text.

176. *See* discussion *infra* Part III.B.1.

2. The Act's Structure: Section 9 Exclusivity

Given the liberal construction of concerted activities for mutual aid or protection,[177] it should come as little surprise that the most forceful attacks against *Epilepsy Foundation* are rooted not in the plain language of section 7, but in the structure of the Act. For example, to reject Weingarten Rights in the nonunion setting, the Board in *Sears* relied principally on the argument that so extending *Weingarten, Inc.* impermissibly interfered with the employer's right to deal with employees individually in the nonunion setting and, likewise, violated the Act's exclusivity principles.[178] Careful scrutiny, however, reveals substantial weaknesses in these arguments.

Although *Sears* boldly asserts, "when no union is present, an employer is entirely free to deal with its employees on an individual, group, or wholesale basis,"[179] to reach its conclusion that "to place a *Weingarten* representative in a nonunion setting is to require the employer to recognize and deal with the equivalent of a union representative contrary to the Act's exclusivity principle,"[180] as we have already seen, this is not an absolute right. Even in a nonunion setting, employees retain section 7 rights to act in concert for mutual aid or protection.[181] Recognizing this limitation, Member Hurtgen, dissenting in *Epilepsy Foundation*, suggests that while section 7 "protects nonunion employees in their *seeking* assistance . . . the employer has a right to decline the request,"[182] because requiring the employer to accede would interfere with the right to deal individually with the employee.[183]

Not only does Member Hurtgen's argument contort section 7 by suggesting that the Act is so impotent that it only grants the right to request aid while denying the right to pursue such aid,[184] it also directly contradicts *Weingarten, Inc.* *Weingarten, Inc.* was necessarily premised on the fact that representation in such interviews did not require the employer to "deal with" the employees collectively within the meaning of the Act. Because section 9 of the Act establishes a system of exclusive

177. *See* discussion *supra* Part III.A.1.

178. *See supra* notes 103–11 and accompanying text.

179. Sears, Roebuck & Co., 274 N.L.R.B. at 231 (1985).

180. *See supra* notes 158–59 and accompanying text.

181. Epilepsy Found., 331 N.L.R.B. No. 92 (July 10, 2000), 2000 WL 967066, *12 (Hurtgen, Member, dissenting), *aff'd in part*, 268 F.3d 1095 (D.C. Cir. 2001).

182. *Id*. at *9 (Hurtgen, Member, dissenting) (emphasis added).

183. 274 N.L.R.B. at 232.

184. Carlin, *supra* note 171, at 630 (arguing that giving the right to request a representative but denying actual representation would give the employer "the power to force individual dealing despite the employee's right to act concertedly, a result inconsistent with the Act"); *see also* Flack, *supra* note 171, at 1053–54 (arguing that "section 9 only qualifies the portion of section 7 that assures workers the right to bargain collectively; it does not, however, impede . . . an employee's section 7 right to participate in concerted activity").

representation,[185] after employees choose a bargaining agent, they cannot circumvent that agent, even for as critical an issue as racial discrimination.[186] Therefore, if an employee and her representative were to "deal with" their employer within the meaning of the Act while another labor organization properly represented them, they would violate section 9 of the Act. Finding no such violation, *Weingarten, Inc.* stands for the proposition, if only implicitly, that having a representative present at a disciplinary interview does not require an employer to deal with a labor organization. Thus, presuming *Weingarten, Inc.* is correct, *Sears* and Member Hurtgen's dissent in *Epilepsy Foundation* must be wrong, as such a right neither impermissibly encroaches on the right to deal individually with employees nor contravenes exclusivity principles.[187]

In summary, neither the plain language of section 7 nor the Act's structure clearly reject *Epilepsy Foundation*. Put differently, reasonable minds can and have found arguments both supporting and undermining the extension of *Weingarten, Inc.* rights to nonunion employees. Of these arguments, the suggestion that it is not for mutual aid or protection may be the most persuasive, but ultimately that is irrelevant because when the Act is ambiguous, the Board is entitled to deference in its reasonable interpretation of the Act. However reasonable it may be, the Board's decision still warrants scrutiny to determine whether it exemplifies sound policy.

B. Should Weingarten, Inc. *Be Extended to the Nonunion Workplace?*

Having established that the Act does not plainly reject the application of *Weingarten, Inc.* in the nonunion workplace, but not yet addressing the policy implications of such an extension, our analysis is but half complete. There are two levels of policy that must be examined. The first policy consideration is the impact of Weingarten Rights on the labor market. Equally important but somewhat less obvious, the second policy consideration is the manner of the extension of these rights, because, as is argued below,[188] the manner of the extension may affect the labor mar-

185. Section 9 provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit." 29 U.S.C. § 159(a) (1994).

186. *See, e.g.*, Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 69 (1975) (denying minority employees the right to separately bargain with their employer to remedy Title VII abuses because such interests "cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA").

187. This point is further buttressed by observing that *Weingarten, Inc.* and its progeny are entirely unrelated to and contain no element of unions or labor organizations dealing with the employer. Indeed, the pre-*Weingarten, Inc.* law discarded the argument that the representation was required by the employer's duty to bargain with the employee's representative over the terms and conditions of employment and instead shifted its theoretical underpinnings to the employee's right, irrespective of the duty to bargain, to act in concert for mutual aid or protection under section 7. *See supra* notes 37–58 and accompanying text.

188. *See* discussion *infra* Part III.B.2.

ket with equal impact as the substance of the extension. It will be seen that, while the substantive impact of Weingarten Rights in the nonunion labor sector is subject to debate, they were extended in an unreasonable manner.

1. Substantive Policy Concerns

Weingarten, Inc. recognized four principal policy justifications for recognizing the employee's right to representation during an interview, namely: (1) insuring against continued employer abuses; (2) aiding in the development of useful facts; (3) resolving disputes quickly and at a more helpful time for the employer and employee; and (4) effectuating the policy of balancing labor and management economic power.[189] Whether these policy rationales justify the extension of Weingarten Rights to nonunion employees is the principle point of disagreement between the *DuPont* Board and the *Epilepsy Foundation* Board,[190] and they are subject to considerable debate. Therefore, it is wise to take a lesson from both the majority and the minority in *Epilepsy Foundation*, each of which accused the other of merely speculating concerning these matters,[191] that, at best, we can only speculate as well. Nevertheless, for the fullest understanding of the debate surrounding *Epilepsy Foundation*, it remains important to review these substantive policy concerns.

Proponents of applying *Weingarten, Inc.* in the nonunion workplace typically downplay the burden of having the representative at the meeting while emphasizing the representative's ability to bring forward useful facts and subsequently act as a witness in later proceedings, thereby furthering the Act's purpose of achieving greater employer-employee equality.[192] Similarly, although nonunion workplaces may not have an established grievance procedure, in many large nonunion workplaces grievance procedures do exist, and, therefore, just as in the union workplace, extending *Weingarten, Inc.* to the nonunion workplace may further the desire to quickly resolve disputes and avoid unnecessary grievances.[193] Moreover, advocates of *Epilepsy Foundation* opine that the critics' argument that the representative will ignore the interests of the workforce pursuing only immediate personal goals is both "speculative" and contrary to the general employee's "sense of camaraderie and com-

189. *See supra* notes 81–85 and accompanying text.

190. *See supra* notes 112–40 and accompanying text.

191. *See supra* notes 134–39 and accompanying text.

192. Two attorneys, quoted in the *Daily Labor Report*, suggested that *Epilepsy Foundation* would help develop facts and allow more employees to survive summary judgment motions with the aid of a witness. McGolrick, *supra* note 9, at C-1 to C-2; *see also* Judd, *supra* note 171, at 225–26 (arguing that the representative will check arbitrary action, develop facts, further the interests of the employees as a group, and prevent the overpowering of the intimidated individual employee).

193. Morris, *supra* note 16, at 1749–50.

monality of interests."[194] Finally, to the extent that such a desire to aid the whole is lacking in the nonunion setting, at least one commentator has suggested that the right to representation yields the desirable benefit of fostering the development of organizational skills among workers.[195]

Of course, critics of *Epilepsy Foundation* sharply disagree with these policy arguments. Reacting to the decision, one attorney explained that the coworker adds little if anything to the investigation while inhibiting the employer's ability to effectively investigate critical matters.[196] Emphasizing the representative's probable inexperience in the disciplinary process as well the lack of incentive to represent the entire workforce, Member Hurtgen argued *Epilepsy Foundation* "altered the delicate balance achieved in *Weingarten* . . . between the individual and the employer's interest in having an unfettered investigation of allegations of misconduct."[197] Indeed, the fact that employees may often request the aid of a coworker because of their friendship and common interest in the matter rather on the basis of the representative's skill in disciplinary interviews, as illustrated by *Epilepsy Foundation*,[198] gives credence to the *DuPont* Board's concern that employers will be compelled to interact with an emotionally involved coworker substantially reducing any chance of his or her constructive participation.[199]

Who carries the upper hand—the proponent or critic? If a politically neutral observer were able to give a definitive answer, it would be enlightening, but presently there seems to be no principled ground to grant either view the victory. On the one hand, the aid of witnesses and the possibility of averting unnecessary litigation or grievances is compelling. But, equally compelling is the fact that the representative, likely emotionally tied to the matter, may add little while substantially handicapping the employer's ability to get at critical facts in a timely manner. When these interests are balanced in the legal scales, the Board is the final arbiter, and as in matters of statutory construction, the Board's reasonable view should prevail.[200]

194. Epilepsy Found., 331 N.L.R.B. No. 92 (July 10, 2000), 2000 WL 967066, at *4, *aff'd in part*, 268 F.3d 1095 (D.C. Cir. 2001) ("The notion that employees . . . would not be motivated to act in the interest of their fellow workers, or that employees might lack the abilities to offer constructive assistance . . . is wholly speculative."); Judd, *supra* note 171, at 226 ("The sense of camaraderie and commonality of interests that generally exists among employees, when coupled with a call to ensure fair treatment of another employee, assures that a co-employee would feel obliged to protect the interests of his colleagues.").

195. Morris, *supra* note 16, at 1749 (noting that the nonunion representative's lesser representative skill, ability to elicit facts, and protect the interests of the entire workforce create all the more need for such a right as it will "provide an excellent training opportunity for nonunion employees to acquire and improve their organizational skills.").

196. McGolrick, *supra* note 9, at C-2.

197. *Epilepsy Found.*, 331 N.L.R.B. No. 92, at *13 (Hurtgen, Member, dissenting).

198. *See supra* notes 122–27 and accompanying text.

199. E. I. DuPont De Nemours, 289 N.L.R.B. 627, 629–30 (1988).

200. *See supra* notes 174–75 and accompanying text.

2. Procedural Policy Concerns

Thus far, considering the Act's language and structure and the substantive policy considerations, it is difficult to fault *Epilepsy Foundation*. Though individuals will no doubt continue to debate the Board's balancing of interests and statutory construction, its legal and policy conclusions seem reasonable. However, when placed in the context of Board precedent, in pre-*Weingarten, Inc.* law denying and then granting the right to representation[201] and then in post-*Weingarten, Inc.* cases first granting then denying and then restoring the right to representation in the nonunion workplace,[202] it becomes clear that the Board has created a trip-wire for both labor and management, thereby has substantially undermined the act by acting as a "'Talmudist' court, parsing precedent, divining the true meaning of some Supreme Court ruling, and balancing in some mysterious fashion competing, yet absolute-sounding values."[203] Thus, on appeal *Epilepsy Foundation* demands further explanation and justification of its casual, indeed perfunctory dismissal of precedent. Absent a reasonable explanation for the Board's abrupt about-face, the *Epilepsy Foundation* Board, like its predecessors, might reasonably be criticized as "manipulat[ing] . . . the case-by-case approach to achieve partisan ends."[204]

The trip-wire herein described, while having a similar impact as that alleged by the dissenters in *Epilepsy Foundation*, is caused not by the rule itself, but rather by the confused history of *Weingarten, Inc.* as applied in the nonunion workplace. Member Hurtgen argued in opposing *Epilepsy Foundation* that the Board was creating an "unknown trip-wire" that employers would be "completely unaware of."[205] It was, he analogized, like "adding another cause of action to flower . . . hid[den] in the weeds" of the present garden of workplace litigation.[206] The Board

201. *See* discussion *supra* Part II.A.1.

202. *See* discussion *supra* Part II.B.

203. Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 172 (1985). Though Professor Estreicher penned these words over fifteen years ago, they are equally descriptive of the present Board.

204. The reality of this point is driven home when one realizes that in the final months of the Clinton administration the Board overturned major precedents in at least six cases beside *Epilepsy Foundation*. *See Hearing*, *supra* note 13, at 81–125 (written statement of G. Roger King on behalf of The Society for Human Resource Management criticizing the Board's recent disregard for precedent). Mr. King cites several examples of major precedent reversals, including: Family Serv. Agency, 331 N.L.R.B. No. 103 (2000) (overturning forty-three years of precedent); M.B. Sturgis, Inc., 331 N.L.R.B. No. 173 (2000) (overturning twenty-seven years of precedent); Office of Prof'l Employees Int'l Union Local 251, 331 N.L.R.B. No. 193 (2000) (overturning twenty-eight years of precedent); Atl. Limousine, Inc., 331 N.L.R.B. No. 134 (1999) (overturning thirty-seven years of precedent); Boston Med. Ctr., 330 N.L.R.B. No. 30 (1999) (overturning twenty years of precedent). *See generally* Robert Douglas Brownstone, Note, *The National Labor Relations Board at 50: Politicization Creates Crisis*, 52 BROOK. L. REV. 229, 248 (1986) (criticizing the Reagan Labor Board's partisan decisions).

205. Epilepsy Found., 331 N.L.R.B. No. 92 (July 10, 2000), 2000 WL 967066, at *14 (Hurtgen, Member, dissenting), *aff'd in part*, 268 F.3d 1095 (D.C. Cir. 2001).

206. *Id.* (Hurtgen, Member, dissenting).

rejected this concern as irrelevant, "fail[ing] to understand how an employer's ignorance of employee rights provides a justification for denying those rights to employees."[207]

The Board was correct to reject this line of trip-wire argument for many reasons. First, the Board rightly observed that if the Act actually grants an affirmative right to an employee, the employer's ignorance of such right is hardly a reason to deny the employee the exercise of that right. Second, even though this new-found right was initially "hidden in the weeds" to trip the employer, it is difficult to imagine that it would long remain hidden given its publicity.[208] Third, if it were consistently applied so as to provide notice, American businesses would doubtless quickly adapt to this relatively simple new rule just as they have to the more complex rules found in statutes such as the Americans with Disabilities Act. Finally, Representative John A. Boehner's concern that this "expands the NLRA to the 90% of the workforce that is not unionized" [209] is equally unfounded, because the scope of the NLRA is substantially limited by the Act itself[210] and even further limited by self-imposed Board restrictions[211] so that millions of employees are not covered by the Act.

The Board has created a very real and even more important trip-wire, however, by its consistent disregard of precedent, and, unlike the trip-wire contemplated by Member Hurtgen, this trip-wire snares not simply small businesses but all labor and management alike by leaving everyone in doubt of their rights. Just as *Epilepsy Foundation* and *Mate-*

207. *Id.* at *6.

208. In addition to being the focus of recent house hearings, *see Hearing*, *supra* note 13, *Epilepsy Foundation* has been widely publicized in the general media. *See, e.g.*, *Selected Labor & Employment Law Updates*, 3 U. PA. J. LAB. & EMP. L. 159 (2000); *Human Resource Department News*, HUM. RESOURCE DEP'T MGMT. REP., Nov. 2000, at 8; Del Jones, *Ruling Expands Workers' Rights: Employee Can Bring Witness to Meeting with Boss*, USA TODAY, July 14, 2000, at 1B; Carol Kleiman, *Bearing Witness Is Workers' Right*, CHI. TRIB., Oct. 1, 2000, at 1; McGolrick, *supra* note 9; Susan Linden McGreevy, *NLRB Expands Rights of Non-Union Employees*, CONTRACTOR, Dec. 1, 2000, at 43; Nancy Montwieler, *Weingarten Rights Cover Nonunion Setting, NLRB Rules in Reversing 12-Year Precedent*, 134 DAILY LAB. REP. AA-1 (2000); Carlos Tejada, *Nonunion Employees Win Right to Bring Co-Workers Along to Discipline Meetings*, WALL. ST. J., July 13, 2000, at A2. Moreover, to the extent that it did "trip" *Epilepsy Foundation*, the D.C. Circuit corrected such concerns by refusing to apply the rule retroactively. Epilepsy Found., 268 F.3d 1095, 1102–03 (D.C. Cir. 2001).

209. *See Hearing*, *supra* note 13.

210. Section 2(3) excludes agricultural workers, domestic service persons, independent contractors, supervisors, and employees subject to the Railway Labor Act. 29 U.S.C. § 152(a)(3) (1994).

211. The Board has repeatedly redefined it jurisdiction on a case-by-case basis and, occasionally, through its rule-making powers. *See, e.g.*, Imperial House Condo., Inc., 279 N.L.R.B. 1225 (1986), *aff'd*, 831 F.2d 999 (11th Cir. 1987) (reaffirming $500,000 standard for condominiums and cooperatives); Siemons Mailing Serv., 122 N.L.R.B. 81 (1958) ($50,000 outflow-inflow minimum for nonretail enterprises); 29 C.F.R. § 103.1 (2000) (asserting jurisdiction over private nonprofit colleges and universities with gross annual revenues not less than $1 million); *id.* § 103.2 (asserting jurisdiction over symphony orchestras with gross annual revenues not less than $1 million); *id.* § 103.3 (refusing to assert jurisdiction over horseracing and dog racing irrespective of gross annual revenues). *See generally* GORMAN, *supra* note 2, at 22–26 (describing the Board's piecemeal, case-by-case discretionary limits on its jurisdiction).

rials Research Corp. caught management by surprise, *Sears* delivered an unexpected setback to labor. Certainly these concerns must be equally great as all the substantive policy concerns raised in *Weingarten, Inc.* and the subsequent Board decisions because irrespective of the right granted, this confusion may well render the right meaningless for lack of certainty. Indeed, the only difference one can discern between *DuPont* and *Materials Research Corp.* is that the Board membership had changed with the political climate and presidency. This is not a new phenomenon. As one observer has noted, "[m]ore often than not . . . reversals of the NLRB have correlated directly with changes in Board composition that resulted from shifts in the political climate."[212] Similarly, on appeal the D.C. Circuit conceded that "[i]t is a fact of life . . . that . . . substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board."[213] Given this observation and the recent change in administration, an employee can hardly rely on the supposed rights granted in *Epilepsy Foundation*. Thus, rather than effectuating any of the policies of the Act, *Epilepsy Foundation*, *DuPont*, *Sears*, and *Materials Research Corp.*, when viewed as a whole rather then individually, merely muddy the waters making compliance extremely difficult "at a substantial cost to the effective administration of the NLRA."[214] In light of these concerns, *Epilepsy Foundation* was incorrectly decided.

IV. RESOLUTION

As with most difficulties in life and law, recognizing the problem is easier than finding the solution. How can the murky, uncertain waters left in the wake of *Materials Research Corp.*, *Sears*, *DuPont*, and *Epilepsy Foundation* be purified to effectuate the purpose of the Act by granting affirmative rights that labor and management can rely on? I consider both short-term and long-term solutions.

In the short term, the Court of Appeals, taking care not to meddle with policy issues reserved for the Board, should have denied enforcement of the Board's order and remanded for a clearer articulation of the policies compelling its holding and an explanation of how these policies coordinate with the related provisions in the Act. This proposal is not original and is borrowed from the scholarship of Joan Flynn who suggests that such judicial oversight will "go a long way toward curing the current deficiencies in NLRB policymaking. Requiring policy coherence should result in the gradual elimination of . . . pockets of irrationality [and] improve the administration of the Act . . . ."[215] Moreover, while the D.C. Circuit correctly recognized that they should generally defer to the

212. Brownstone, *supra* note 204, at 243 (citations omitted).

213. *Epilepsy Found.*, 268 F.3d at 1097.

214. Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 423 (1995).

215. *Id.* at 431.

Board in its reasonable interpretation of the Act,[216] the D.C. Circuit, without overreaching its authority, could have remanded in light of the substantial inconsistencies in Board precedent.[217]

In the long term, the Board should diverge from its traditional "Talmudic" decision-making process[218] and ground its decision in concrete concepts better representing its supposed expertise through its rule-making authority.[219] As a practical matter, however, such well-grounded rules may not be possible absent a substantial change in Board policy-making practices. It may come as some surprise to those unfamiliar with Board practices to learn that, though its decisions impact the whole of the economy much like those of the Securities and Exchange Commission, the Board has developed its policy almost exclusively through case-by-case adjudication.[220] This proposal and criticism is not at all original, as numerous commentators have argued this point for nearly fifty years.[221] Although it is beyond the scope of this note to adequately review this body of work in such short space, I simply emphasize that in the context of Weingarten Rights in the nonunion workplace, the Board could collect real data so that it could do more than merely speculate about policy concerns and finally promulgate a rule that, unlike the fiction of section 7 rights under *Epilepsy Foundation*, could be relied upon by both labor and management.

V. CONCLUSION

Epilepsy Foundation, hailed the most significant Board decision in several years,[222] was variously greeted as a godsend by labor and con-

216. *Epilepsy Found.*, 268 F.3d at 1102.

217. The case of *International Union of Operating Engineers, Local 49 v. NLRB (Strukness Construction Co.)*, 353 F.2d 852 (D.C. Cir. 1965), is particularly illustrative on this point. After noting that the Board had completely disregarded contrary precedent, *id.* at 855, the D.C. Circuit remanded the case stating that "[w]e think the Board should come to grips with this constantly recurring problem for the protection of employees as to their section 7 rights . . . . It would seem that the Board could, in exercise of its expertise, develop appropriate policy considerations." *Id.* at 856. The D.C. Circuit finally concluded that "[r]ule-making in this area, it would seem, might have obviated the difficulty here as in many of the cases with which the Board says it has been 'continually confronted.'" *Id.*; *see also* Ursula M. McDonnell, Comment, *Deference to NLRB Adjudicatory Decision Making: Has Judicial Review Become Meaningless?*, 58 U. CIN. L. REV. 653, 659–67 (1989) (arguing that consistency should be considered when determining the amount of deference given to Board decisions).

218. *See supra* notes 203–04 and accompanying text.

219. Section 6 of the Act grants the Board the "authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156 (1994).

220. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 819 (1990) (Scalia, J., dissenting).

221. *See, e.g.*, Estreicher, *supra* note 203; McDonnell, *supra* note 217; Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961); Cornelius J. Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 245 (1968); Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93 (1954). *But cf.* Flynn, *supra* note 214 (concluding that the Board has wisely avoided the rule-making process to avoid improper federal court domination of labor policy).

222. Tejada, *supra* note 208, at A2.

demned as an unjustified trip-wire by management. Viewed in isolation, *Epilepsy Foundation* certainly does appear momentous. Extending Weingarten Rights to nonunion employees greatly expands the NLRA's scope by creating a new right for millions of employees, and, to the extent that these rights are provided for by the Act, management concern over trip-wires seem irrelevant. When placed in the context of other Board decisions concerning Weingarten Rights in the nonunion workplace, however, it is clear that *Epilepsy Foundation*, for better or worse, is likely not a godsend but simply a mirage, because though it purports to give substantial new aid to employees, no employee can reasonably rely on that right. This is the result of constantly fluctuating Board positions that seem to be governed less by a principled analysis of law or capable use of expertise than by political whim. Therefore, in light of President Bush's recent election, it is doubtful that the rights granted by *Epilepsy Foundation* will prove to be anything more than a fiction.

This uncertainty of the law benefits no one; labor and management are left unable to plan for the future and the administration of the Act is effectively undermined. Thus, irrespective of the lofty policy discussions of *Materials Research Corp.*, *DuPont*, and *Epilepsy Foundation*, perhaps the only thing achieved by these decisions is the destruction of the thing the Board is charged to protect, the NLRA. In light of this troubling conclusion, *Epilepsy Foundation* demands further explanation and the Board should adopt rules creating substantive rights and obligations upon which labor and management can build for the future. Until the Board can do more than speculate about policy as it has in this line of cases, decisions like *Epilepsy Foundation* merely create trip-wires for labor and management, not rights.