EMPLOYMENT LAW AS LABOR LAW

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INTRODUCTION

More than seventy years ago, the United States Congress centralized nearly all of American labor law into a single federal statute. The National Labor Relations Act (NLRA or the Act) was designed to be sweepingly broad, dictating the kinds of employees who could organize, the types of organizations workers could form, and the subjects over which labor and management had to negotiate. The statute was also aggressively exclusive: neither other federal laws, nor state and local enactments were to interfere with the operation of the NLRA or its administrative agency, the National Labor Relations Board (NLRB or Board).1

Seventy years later, most scholars believe that the NLRA is a failed

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1 The Senate Report on the Wagner Act asserted that the new labor law was to be “paramount over other laws that might touch upon similar subject matters” in order to “dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining.” S. REP. NO. 573, at 15 (1935), reprinted in LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 2315 (1949). In testimony before Congress on amendments proposed shortly following passage of the NLRA, moreover, the NLRB argued that “central control of administrative policy is essential to the successful enforcement of any law such as the act.” Proposed Amendments to the National Labor Relations Act: Hearings Before the H. Comm. on Labor, 76th Cong. 540, at SUPPLEMENT: REPORT OF THE NATIONAL LABOR RELATIONS BOARD TO THE H. COMM. ON LABOR UPON H.R. 2761, H.R. 4376, H.R. 4400, H.R. 4594, H.R. 4749, H.R. 4990, AND H.R. 5231, at 43-44 [hereinafter Hearings]. As explained in detail below, by “labor law” I mean here the law governing union organizing and labor management relations. See infra text accompanying notes 14-17.
regime. There are two primary diagnoses. The first is that although Congress intended the law to facilitate worker organizing and collective action—declaring it to be the “policy of the United States” to protect “full freedom of association [and] self-organization” among workers—the statute has proven too weak to fulfill this mission. The second diagnosis is that the regime is too rigid, and that the NLRA’s attempt to govern the organizing process and the labor-management relationship from cradle-to-grave has disabled it from keeping pace with changes in the composition of the U.S. work force and the structure of U.S. production systems.

While these failings have prompted numerous proposals for statutory amendments from both legislators and scholars, there has been no meaningful reform for more than half a century. The Act’s resistance to change has, in turn, given rise to the widely held view that labor law is not simply dysfunctional, but “ossified”: that it is stubbornly and powerfully resistant to the reinvention it so clearly needs.

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3 The statutory language is found at 29 U.S.C. § 151. On the NLRA’s failure to fulfill this statutory mission, the most well-known scholarly account is Weiler, supra note 2. For a review of more recent evidence, see, e.g., H.R. REP. No. 110-23 (2007) (Employee Free Choice Act); see also John Schmitt & Ben Zipperer, Dropping the Ax: Illegal Firings During Union Election Campaigns, www.cepr.net, Jan. 2007, http://www.cepr.net/index.php?option=com_content&task=view&id=775&Itemid=8.

4 See, e.g., STONE, supra note 2, at 87-119.


6 Estlund, supra note 2. Professor Estlund, in writing about the “ossification” of American
The diagnoses regarding the NLRA’s failures are accurate. But, contrary to the prevailing view, neither the statutory scheme nor Congress’s unwillingness to amend the Act has prevented American labor law from beginning the process of transformation. To the contrary, the deep dysfunctionality of the NLRA constitutes a blockage only of the traditional legal channel for collective action and labor-management relations. Because workers, unions, and certain employers continue to demand collective organization and interaction, this blockage has led not to “ossification” but to a hydraulic effect: unable to find an outlet through the NLRA, the pressure from this continuing demand for collective action has forced open alternative legal channels.

This Article explores one of these new channels, which I name “employment law as labor law.” Faced with a traditional labor law regime that has proven ineffectual, workers and their lawyers are turning to employment statutes like the Fair Labor Standards Act (FLSA) and Title VII of the Civil Rights Act of 1964 as the legal guardians of their efforts to organize and act collectively. Workers, that is, are relying on employment statutes, not only for the traditional purpose of securing the substantive rights provided by those laws, but also as the legal architecture that facilitates their organizational and collective activity—a legal architecture we conventionally call labor law.

To describe this new legal channel, I present detailed accounts of two collective workplace campaigns. In the first, garment workers at a
Brooklyn factory organize for FLSA overtime rights and then turn to that employment statute—rather than to the NLRA—to insulate their collective efforts against employer retaliation. In the second example, construction workers in Colorado rely on Title VII as the shield for an organizing campaign directed at remedying viciously discriminatory workplace practices.

These descriptive accounts contribute to, and build upon, a literature that has begun to identify alternative forms of worker organization and mobilization. And while previous work has identified campaigns in which employment law claims, primarily FLSA claims, are part of an overall organizing effort, I offer the accounts here in order to reveal employment law’s capacity to function as a substitute form of labor law; that is, to reveal employment law’s ability to serve as the locus of employees’ collective action and as the legal mechanism that protects that collective activity from employer interference.

The developments described here occur, moreover, as scholars begin to identify ways in which the conventional line between labor law and employment law is in fact quite blurry. The traditional view has been that labor and employment law constitute dichotomous, and in a fundamental respect incompatible, regulatory regimes. According to this view, there are two distinct modes of legal intervention into the workplace. The first is the NLRA regime—often referred to simply as “labor law”—in which substantive workplace rights are defined and enforced through the collective efforts of workers. The other regime—called “employment law”—is an “individual rights” regime in which workplace standards are established by statute and granted to individual workers, regardless of the extent of their collective organization and strength. The dominant view among scholars, moreover, has long

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13 See, e.g., Cynthia Estlund, Rebuilding the Law of the Workplace in an Era of Self-Regulation, 105 Colum. L. Rev. 319, 329 (2005); Fischl, supra note 12; see generally Ashar, supra note 11.

14 For a discussion, see infra text accompanying notes 63-80.

15 Labeling employment laws, particularly Title VII of the Civil Rights Act of 1964, as “individual rights” statutes inadvertently resonates with a debate internal to antidiscrimination scholarship and law. That conversation asks, in essence, whether or to what extent
been that employment law’s “individual rights” regime at best provides no support for—and at worst is imimical to—collective organization and collective action. Employment law is thus charged with “undermin[ing] the concept of group action,”16 and with “foreshadow[ing] the eclipse of the collective bargaining model—indeed, of the centrality of collective action altogether.”17

Some authors have begun to question this dichotomy.18 To date, however, the focus has largely been on ways in which employment law litigation can function as a form of leverage—another arrow in the quiver—available to workers and unions seeking to extract some set of demands from employers. This Article moves a step further by, first, identifying the ways in which employment law can in fact function as a substitute form of labor law—as the locus of workers’ organizational activity and as the legal mechanism that insulates that activity from employer interference—and, second, by offering a theoretical model that explains employment law’s ability to operate in this capacity.

To this end, I argue that the view of employment law as providing no support for collective action—or as being imimical to collective action—is wrong as a matter of theory. The descriptive accounts of the FLSA and Title VII collective campaigns provide some anecdotal support for this claim. But drawing conceptual conclusions from studies of this sort is risky, and the examples serve the more important purpose of encouraging a broader investigation into the compatibility between employment law’s individual rights regime and workers’ collective activity. The article therefore moves beyond these accounts and brings together an array of qualitative and quantitative research in order to build a model of employment law’s ability to foster collective action. The model consists of three parts: I show that employment law can galvanize nascent forms of collective organization, insulate workers’ collective efforts from employer interference, and set in motion dynamics that can generate successive forms of collective activity that go beyond demands for statutory rights.

To demonstrate employment law’s ability to galvanize collective

antidiscrimination law should function according to anticlassification or antisubordination principles. See, e.g., Reva B. Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown, 117 HARV. L. REV. 1470 (2004); Jack M. Balkin & Reva B. Siegel, The American Civil Rights Tradition: Anticlassification or Antisubordination?, 58 U. MIAMI L. REV. 9 (2003). I do not intend to intervene in that debate, and instead adopt the practice—common in labor scholarship—of naming employment law an “individual rights” regime because it provides a useful way to highlight what labor scholars understand to be the distinct sources of authority and distinct projects of labor and employment law. For further discussion of this point, see infra note 58.

16 Brudney, supra note 2, at 1563.
17 Estlund, supra note 13, at 329.
18 See, e.g., id.; Fischl, supra note 12. For a discussion, see infra text accompanying notes 79-88.
organizations of workers, I rely on qualitative accounts of labor organizing campaigns as well as social-psychological research into the related processes of framing and collective identity construction. As I argue, galvanizing a group of workers capable of acting collectively involves two interrelated tasks: workers must develop both a common understanding of a set of shared workplace problems, and a group identity strong enough to sustain a collective response to these problems. I show that employment statutes can function as the frame through which workplace conditions are articulated as collective injuries, and as the locus around which a collective identity coalesces.

Next, I argue that employment law’s ability to insulate workers’ collective activity from coercive interference flows from the strength of the statutes’ anti-retaliation provisions. In place of the NLRA’s notoriously weak remedial regime, statutes like the FLSA and Title VII offer workers robust damages and immediate injunctive relief if they face adverse action for engaging in protected activity. Crucially, moreover, employment laws’ anti-retaliation provisions—unlike the NLRA—are enforceable through private rights of action. Accordingly, workers who rely on employment law to protect their organizing activity are not captive to the NLRB’s glacial pace and inadequate enforcement resources.

Finally, employment law’s generative potential is suggested by burgeoning research into the dynamics of reciprocity and collective efficacy, which indicates that workers’ collective action operates according to self-reinforcing dynamics of success and failure. That is, in the context of workplace organizing, success breeds success and failure breeds failure. By insulating the first phases of collective activity, therefore, employment law increases not only the chances that those nascent efforts will succeed but also the likelihood that workers will engage in and be able to succeed at subsequent and stronger forms of collective action. As discussed in greater detail below, this generative potential suggests that although workers who rely on employment law as labor law must have as their initial organizing goal the vindication of a statutory right, the successful vindication of those rights need not constitute the end of organizational efforts but might rather mark the beginning of a broader endeavor.19

Some caveats are in order. There are very real limitations on the ability of extant employment statutes to function as labor law. First, employment law can function in the ways I suggest only in those instances where workers’ initial goal is the vindication of a statutory right. Should workers’ initial organizing goal be family health

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19 Of course, these same insights offer a new way of understanding why the NLRA’s failure to insulate the nascent stages of collective activity has crippled that regime’s attempt to foster workers’ organizational efforts.
insurance, or a wage above the minimum, or a just-cause dismissal policy, they would find no shelter in the FLSA or Title VII or any other existing employment law. Second, even when collective action is aimed at securing a statutory right, context matters. In the two examples I describe here, the workforces are largely homogenous with respect to the employment right at issue: almost every employee at the Brooklyn garment factory faced overtime violations, and 90% of the construction workforce I examine was Latino and subject to national origin discrimination. In other contexts, where the workforce is more heterogeneous, employment law might function effectively to galvanize one subset of the workforce while excluding other workers from the collective activity. Third, although statutes like the FLSA and Title VII offer significant comparative advantages over the NLRA, these statutes suffer from their own weaknesses, particularly when it comes to enforcement. In both of the examples I discuss below, workers had the assistance of labor organizations from the very outset of their collective campaigns. These groups—in one instance a community-based workers’ center, in the other a union—offered organizing support and free legal representation. With this backing, the workers were able to secure enforcement of the statutes’ anti-retaliation provisions; without such support, successful enforcement would have been more difficult to achieve.22

Limitations of this sort are inherent in the type of hydraulic process I describe here: in response to the failure of the traditional regime, an alternative legal channel has been forced open, but it has not been

20 I say “initial” efforts because, as explained below, if employment law can facilitate success in the initial stages of collective action, it might generate more robust forms of collective activity directed at securing workplace goods not offered by statute. See infra Part III.C.


crafted intentionally to serve its new function and it does so only imperfectly. And yet, the implications of this discussion extend beyond the promises and limits of existing employment statutes and invite future inquiry into a provocative set of questions about the best course for labor law reform. Indeed, the discussion here invites us to imagine the possibility for a “great trade” in labor law reform: a new regime that provides much stronger protection for workers’ collective action while scaling back the type of cradle-to-grave regulation that has defined, and ultimately undermined, the NLRA.

A labor law reordered according to such a “great trade” would function by far more effectively galvanizing and insulating the early stages of collective action in order to set in motion dynamics that can generate subsequent organizational development. As discussed in more detail below, such a labor law could, for example, offer employees the right to organize and act collectively around the substantive work-related issues they deem appropriate and protect that right with employment law remedies: private rights of action, immediate injunctive relief, and robust damages. The regime would also deploy additional measures to engender dynamics of efficacy and reciprocity, including mechanisms to expand communication opportunities among workers. If such a reordered labor law is able to generate the kind of collective and organizational activity that the NLRA fails to produce, it might then retreat from some of the labor-management regulation that has contributed to the NLRA’s obsolescence. Having more effectively fostered collective action, that is, we could ask whether the new regime might then leave to the strengths and interests of the respective parties a large swath of issues currently regulated by statute. These include questions regarding, for example, the manner in which management interacts with employees once they organize, and the form that employee organization takes.\textsuperscript{23}

The article aims to cover a good deal of ground, but there is an important question I do not address in these pages. My arguments reveal the ways in which employment law can facilitate workers’ collective action. I proceed from the assumption—which remains the

\textsuperscript{23} In this sense, such a labor law would share conceptual ground with calls to tailor the U.S. bankruptcy regime. Alan Schwartz, for example, argues that the only mandatory rules in a bankruptcy system should be structural ones, with the remainder left to private contracting. See Alan Schwartz, \textit{A Contract Theory Approach to Business Bankruptcy}, 107 \textit{Yale L.J.} 1807 (1998); cf. Elizabeth Warren & Jay Lawrence Westbrook, \textit{Contracting Out of Bankruptcy: An Empirical Intervention}, 118 \textit{Harv. L. Rev.} 1197 (2005) (raising empirical questions about contract approach to bankruptcy). For another example, see Vicki Schultz, \textit{The Sanitized Workplace}, 112 \textit{Yale L.J.} 2061 (2003) (offering a structural approach to sexual harassment law in which the law guarantees a certain degree of structural sex equality by ensuring that firms are desegregated, and then assumes women will be able to create norms about workplace sexuality that do not disadvantage them on the basis of their sex).
declared policy of the United States—that facilitating workers’ collective action should be one of labor law’s goals, but I do not mount a defense of that norm here. I recognize the centrality of this normative question, and I acknowledge that there are many who will need to be persuaded that collective action is something the law should foster. But I bracket this normative debate because we cannot fully engage it until we first develop a more complete picture of what collective action looks like today. Indeed, as this Article itself reveals, workers’ collective action now takes many forms not described by traditional unionism and collective bargaining and, as such, the long-running debate over “what unions do” no longer offers adequate answers to this normative question.

The article proceeds as follows. In Part I, I outline the NLRA’s failure to protect workers’ collective action, focusing on the statute’s remedial regime and its exclusion from coverage of a large, and growing, segment of the labor force. Part II outlines the conventional view regarding the conflict between individual rights and collective action, and then presents the descriptive account of “employment law as labor law.” Having thus described two contemporary examples of employment law functioning as labor law, I turn in Part III to the theoretical inquiry into the congruity between individual rights and collective action. Here, I model employment law’s galvanizing, insulating, and generative capabilities. I conclude by inviting inquiry into the potential for a “great trade” in labor law reform.

I. THE NLRA’S FAILURE

The NLRA grants workers the right to organize and act collectively in their dealings with management, and prohibits employers from coercively interfering with their employees’ collective activity. Although several factors have contributed to the NLRA’s “woeful failure” to fulfill this statutory project, the two failings with the most profound impact are the statute’s deeply inadequate remedial regime and the Act’s exclusion from labor law’s protection of multiple groupings of workers central to the contemporary labor force.

As to the NLRA’s remedial regime, the statute’s failure to provide adequate remedies for employer interference with employee organizing


28 For example, from the outset of the organizing process, the NLRA leaves employees ill-equipped to communicate with one another about associational and collective rights. So while rules prohibiting employees from discussing organizational activity during work time are presumptively valid, see, e.g., Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); see generally Beth Israel Hosp. v. NLRB, 437 U.S. 483 (1978), the law enables employers to hold mandatory one-on-one or firm-wide captive audience meetings in order to discourage unionization. See, e.g., NLRB v. United Steelworkers of Am., 357 U.S. 357 (1958). Similarly, while the exercise of associational rights often depends on “the ability of employees to learn the advantages of self-organization from others,” NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956), the NLRA grants unionizers no right of access to employer property. See, e.g., Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992). The NLRA also imposes a system of representation elections through which employees are to express their preferences about unionization, but the labyrinthine election machinery administered by the NLRB provides innumerable procedural levers easily manipulated by employers who wish to subvert organizing by delaying the ultimate decision on unionization. See Weiler, supra note 2, at 1778.

The legal regime itself is also partly to blame for generating the intense employer opposition to workers’ efforts at organization that either blocks organization in the first place, or poisons bargaining relationships should employees choose to organize in the face of this opposition. As Professor Estreicher shows, much employer opposition to unionization, and the significant costs that inhere in such opposition, stems from informational uncertainty regarding the terms that a collective bargaining agreement would impose. See, e.g., Estreicher, supra note 5, at 834-36. The NLRA, however, prohibits unions and employers from discussing even the contours of a prospective collective agreement before the union has been certified as the exclusive bargaining representative of the employer’s employees; that is, before an organizing campaign is completed. See Majestic Weaving Co., 147 N.L.R.B. 859 (1964); see also Report of the NLRB General Counsel on Recent Case Developments 1, 8-12 (2004). The statute thereby effectively mandates uncertainty about the implications—for both workers and management—of unionization. As Professor Estreicher observes, “[m]ost employers respond to th[is] uncertainty by . . . opposing the union during the campaign,” and thus “[t]hese rules . . . lock[] employers and unions into an unnecessarily adversarial posture before bargaining relationships can begin.” See Estreicher, supra note 5, at 835.
activity has rendered protections for collective action ineffectual.\textsuperscript{29} Thus, while the NLRB has authority to order an employer to pay back wages to employees who are discharged in retaliation for engaging in protected collective activity,\textsuperscript{30} all such damages must be exclusively compensatory. No punitive awards of any kind are available,\textsuperscript{31} and, accordingly, damages available under the Act “simply are not effective deterrents to employers” who seek to interfere with workers’ NLRA-protected rights.\textsuperscript{32}

The Act also empowers the NLRB to seek reinstatement of workers discharged for engaging in protected activity,\textsuperscript{33} but the endemic and massive delays that accompany such reinstatement proceedings have similarly rendered this an insufficient mechanism for protecting employees engaged in collective action. For example, in fiscal year 2004 the median length of time from an employee’s filing a charge alleging employer misconduct to the issuance of a final Board decision was 690 days.\textsuperscript{34} An employer, however, can often defeat an organizing drive by discharging union supporters and keeping them out of the workforce for a few weeks or months. Thus, Professor Morris concludes that “[t]he delay of several years between the discriminatory discharge and an order of reinstatement and lost backpay . . . renders such an order, when it is finally issued, virtually meaningless.”\textsuperscript{35}

\textsuperscript{29} See Paul C. Weiler, Governing the Workplace 108-118 (1990); Weiler, supra note 2, at 1769-1803; Charles J. Morris, A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA, 2 EMP. RTS. & EMP. POL’Y J. 317 (1998).

\textsuperscript{30} See 29 U.S.C. § 160(c); see also Pa. Greyhound Lines, 1 N.L.R.B. 51 (1935).

\textsuperscript{31} See, e.g., Consol. Edison v. NLRB, 305 U.S. 197, 236 (1938); Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940); Ex-Cell-O Corp., 185 N.L.R.B. 107, 108 (1990). Employees illegally discharged for union activity, moreover, must mitigate their losses by finding alternative work. See, e.g., Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198-200 (1941).

\textsuperscript{32} Weiler, supra note 2, at 1789. Several commentators have observed that the size of NLRA damages awards often makes union avoidance strategies—most particularly the illegal discharge of union advocates—economically rational. See, e.g., James Gray Pope, How American Workers Lost the Right To Strike, and Other Tales, 103 MICH. L. REV. 518, 534 (2004); Gottesman, supra note 2, at 63. As a result, much academic attention has been paid to enhancing the remedies available to the NLRB, with a particular focus on punitive damages. See, e.g., id. at 75 (“[T]he solution is punitive damages. . . .”); William B. Gould, Agenda for Reform 166 (1993) (“Double or triple back-pay awards would reduce the incentive for employers to engage in unlawful discriminatory dismissals.”); Weiler, supra note 29, at 247-48; Robert M. Worster III, If It’s Hardly Worth Doing, It’s Hardly Worth Doing Right: How the NLRA’s Goals Are Defeated Through Inadequate Remedies, 38 U. RICH. L. REV. 1073, 1092-94 (2004).

\textsuperscript{33} See 29 U.S.C. § 160(c).

\textsuperscript{34} See 69 NLRB ANN. REP. 264 tbl.23 (2004), available at http://www.nlrb.gov/publications/reports/annual reports.aspx. The Board, moreover, has no authority to enforce its own orders—only a federal court of appeals has this power. See 29 U.S.C. § 160(e). Thus, an employee can expect to wait considerably longer than two years for an enforceable order of reinstatement.

\textsuperscript{35} Morris, supra note 29, at 338. Again, academic observers have repeatedly proposed changes to the NLRA regime that would increase the availability and use of preliminary injunctions in order to correct this statutory failing. See, e.g., id. at 358; see also Weiler, supra note 29, at 241. Section 10(j) of the NLRA does grant the Board authority to seek preliminary
Finally, because the statute concentrates all enforcement power in the NLRB and denies workers a private right of action, the Board’s weak remedies and time consuming procedures are the only game in town. In part a product of New Deal lawmakers’ preference for administrative enforcement, and in part a response to the judiciary’s record on labor rights across the 19th and early 20th centuries, the NLRA contains no mechanism by which workers can enforce the statutory provisions guaranteeing them free choice on matters of organization and collective representation.

The limitation on damages and the endemic delays that plague Board proceedings, combined with the absence from the statutory design of a private right of action for workers seeking to enforce the law, have produced results that are predictable and well known. One

injunctive relief in cases of retaliatory discharge, a mechanism that could dramatically speed up this process. See 29 U.S.C. § 160(j); see generally Morris, supra note 29, at 345-47; NLRB GC Memorandum 98-10, Report on Utilization of § 10(j) Injunction Proceedings March 3, 1994 through March 2, 1998. While the Board formally possesses this power, however, it rarely employs it. In fiscal year 2004, for example, the Board authorized the General Counsel to seek § 10(j) injunctions in just thirteen cases. See 69 NLRB ANN. REP. at 260 tbl.20. In fiscal year 2003, the Board authorized such action in seventeen cases, and in 2002 in sixteen. See NLRB, Off. of Inspector General, Inspection Rep. No. OIG-INS-29-04-02: Section 10(j) Findings at 5 (on file with author).


37 See, e.g., William E. Forbath, The Shaping of the American Labor Movement, 102 HARV. L. REV. 1109, 1209 (1989); CHRISTOPHER TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960 (1985); Estlund, supra note 2 at 1552. In his 1939 testimony before the House Labor Committee on amendments that would have added a private right to seek judicial institution of an unfair labor practice proceeding, CIO General Counsel Lee Pressman captured this sentiment, commenting that “[i]n all litigation, and in every situation where labor has attempted to protect its rights in court, it has found that, by and large, the judges were inclined to see things from the point of view of the employers rather than the workers, and to make their decisions in those terms.” Hearings, supra note 1, at 2546.

38 Consol. Edison v. NLRB, 305 U.S. 197 (1938). With the Taft-Hartley amendments to the NLRA in 1947, Congress added a single private right of action to the statutory enforcement scheme. Under 29 U.S.C. § 187, employers may sue in district court for damages sustained as the result of a union’s violation of the statutory ban on secondary boycotts. Senator Taft, the author of the amendment that added this private right of action, explained its necessity by pointing to the weakness of traditional Board remedies and the delay that inhered in Board proceedings. 29 U.S.C. § 187(b). Taft described the Board’s ordinary cease-and-desist order as a “weak and uncertain remedy,” and the Committee Reports on the amendment noted that “the delay involved in setting [the Board’s] processes in motion could work a great hardship on victims of [a secondary] boycott.” On the other hand, Taft explained, “the threat of a suit for damages is a tremendous deterrent to the institution of secondary boycotts.” Private rights of action for workers complaining of employer unfair labor practice, however, remain unavailable under the NLRA. See Int’l Ass’n of Machinists v. Gonzales, 356 U.S. 617, 631 n.19 (1958) (citing 93 Cong. Rec. 4835-4838, 4844, 4847, 4858; Sen. Rep. No. 105 on S. 1126, Supp. Views, 80th Cong. 1st Sess. 54-55). Professors Estlund and Brudney have suggested adding a private right of action for enforcement of employer unfair labor practices. See Estlund, supra note 2, at 1554-58; Brudney, supra note 36, at 233-34.
recent study, for example, concludes that one in five workers who takes an active role in an organizing campaign is illegally discharged for doing so.\textsuperscript{39} And in cases decided in fiscal year 2005, the Board found that more than 30,000 U.S. workers had suffered illegal retaliation for exercising their NLRA-protected rights.\textsuperscript{40} In its report on the Employee Free Choice Act, the House Committee on Education and Labor summarized this way:

The numbers are staggering. Every 23 minutes, a worker is fired or otherwise discriminated against because of his or her union activity. According to NLRB Annual Reports between 1993 and 2003, an average of 22,633 workers per year received back pay from their employers. In 2005, this number hit 31,358. A recent study by the Center for Economic and Policy Research found that, in 2005, workers engaged in pro-union activism “faced almost a 20 percent chance of being fired during a union-election campaign.”\textsuperscript{41}

Kate Bronfenbrenner, moreover, has shown the correlation between employers’ use of illegal tactics and the success rate of organizing campaigns. In one study, when employers used no tactics outlawed by the Act, the success rate of worker organizing efforts was 100\%. When employers deployed up to four tactics made illegal by the NLRA, however, the success-rate of campaigns dropped to 58\%. And when an employer used more than five illegal tactics, organizing efforts succeeded just 36\% of the time.\textsuperscript{42}

In addition to its inability to deter or remedy coercive interference with the organizing efforts of employees who are entitled to the Act’s protection, the NLRA also excludes completely from its coverage multiple groupings of workers who constitute an increasing share of the U.S. labor force. First, no “supervisor” is entitled to labor law protection, and the Board has defined “supervisor” with remarkable

\textsuperscript{39} See Schmitt & Zipperer, supra note 3.

\textsuperscript{40} See 70 NLRB ANN. REP. 115, 116 tbl.4 (2005). The Board reports that it ordered employers to pay backpay to 31,358 workers in FY 2005.


\textsuperscript{42} See Kate Bronfenbrenner, Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing, ILR Collection Research Studies and Reports 4643 (2000), available at http://digitalcommons.ilr.cornell.edu/reports/3. On the other hand, Bronfenbrenner’s research suggests that law may have the ability to affirmatively facilitate workers’ collective action. She reports that in the rare instances when the discharge of a union activist is followed by a rapid reinstatement of the activist, the success rate of organizing campaigns is higher than the success rate in campaigns where no union activists were discharged. See id. at tbls.8, 9 (in this sample, where no union activists were discharged, the win rate was 45\%; where activists were discharged and reinstated before the union election, the win rate was 58\%). This finding, of course, could also be explained by a selection effect: when an employer believes—correctly—that the union is going to win an election, it discharges union supporters in an egregious enough manner to generate an NLRB order of reinstatement. If this is the case—and the data do not allow a determination—then the success rate after reinstatement may reflect the union’s predischarge chances of success more than the impact of the reinstatement order.
breadth. This exclusion has particular relevance in an economy where decision-making responsibility is increasingly dispersed among the workforce. Inherent in almost all of the leading forms of modern work design (including just-in-time production, “Total Quality Management,” high-performance work systems, and competency based systems), for example, is the devolution of managerial and supervisory discretion to employees. Of course, the devolution of managerial discretion to employees poses the distinct threat of converting a wide range of employees into “supervisors,” and thereby pushing these workers outside the scope of the NLRA.

The Act also denies protection to a significant and growing number of workers in the contingent labor force, a rapidly expanding low-wage sector that is constituted in overwhelming numbers by women and people of color. For example, despite the enormous growth of temporary employment relationships, and despite the fact that these “temporary” workers are often employed in long-term positions within a single firm, the NLRB has foreclosed nearly all unionization options to temporary workers. Like temporary employment, home care is one of the fastest growing sectors of the U.S. labor market, and yet many—

43 Under the Act, a supervisor is an individual who has “authority, in the interest of the employer, to hire, transfer, suspend . . . assign, reward, or discipline other employees, or responsibly to direct them . . . if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C. § 152(11). In a recent series of decisions, the NLRB has decided that employees who are involved in “responsible[ly] direct[ing]” other employees (and using “independent judgment” to do so) for as little as 10-15% of their total work time are supervisors and thus excluded from the Act. Oakwood Healthcare, Inc., 348 N.L.R.B. 37 (2006).

44 See, e.g., Barenberg, supra note 5, at 759; STONE, supra note 2 at 105, 108.

45 Indeed, in a different doctrinal context, the NLRB itself made this observation: In 2001, the Board held that when workers are organized into production teams and given responsibility to make decisions on issues including production, quality, training, attendance, safety, maintenance, and discipline, “the authority they exercise is comparable to that of the front-line supervisor.” Crown Cork & Seal, 334 N.L.R.B. 699, 701 (2001).

46 Between January 1995 and December 2004, while total private employment in the United States increased 14.2%, employment in temporary jobs increased from 1.7 million to 2.5 million, or 42.9%. See Patrick Kilcoyne, BUREAU OF LABOR STATISTICS, OCCUPATIONS IN THE TEMPORARY HELP SERVICES INDUSTRY 9 (2004), available at http://www.bls.gov/oes/2004/may/temp.pdf. By February of 2008, the Department of Labor estimates that more than 2.3 million Americans, or 2% of the total workforce, was employed by temporary help agencies. See BUREAU OF LABOR STATISTICS, EMPLOYEES ON NONFARM PAYROLLS BY INDUSTRY SECTOR AND SELECTED INDUSTRY DETAIL tbl.B-1 (2008), available at http://www.bls.gov/news.release/empsit.t14.htm.

47 In Oakwood Care, the Board held that the NLRA prevents temporary workers from joining with permanent workers at their place of employment in order to organize and bargain collectively with the “user” employer (that is, with the employer to whom the temporary workers are assigned by their temporary agency). See Oakwood Care Center, 343 N.L.R.B. 659 (2004). Although the question was not presented in Oakwood Care, the Board’s reasoning strongly suggests that temporary workers may not join with the other workers employed by their temporary agency in order to organize and bargain collectively with that agency.

48 See U.S. Dep’t of Labor, WOMEN’S BUREAU, FACTS ON WORKING WOMEN (2003),
perhaps one-third—of the nearly one and a half million homecare workers in the United States are excluded from NLRA coverage by virtue of the statute’s “domestic service” exemption. The statutory exclusion of “independent contractors” removes from NLRA protection more than 3 million individuals classified as independent contractors who nonetheless perform services “for a single employer on whom they are dependent for work.” Among those excluded from NLRA protection by virtue of the independent contractor rule are most of the nation’s growing contingent of home-based child care workers. Lastly, for all practical purposes the NLRA excludes from its protection undocumented immigrant workers, another large and growing subset of the U.S. labor force. Indeed, at last count, approximately seven million undocumented immigrants were working in the United States, accounting for nearly 5% of the private sector workforce. An employer, however, may now discharge an undocumented employee in retaliation for that employee’s collective activity and the Act requires neither reinstatement nor an award of backpay.

The effects of these exclusions are hard to quantify. One study estimates that the expanding definition of “supervisor” removes eight million workers from the Act’s protection. Taken together with the


49 The Act excludes from its coverage any individual employed “in the domestic service of any family or person at his home.” 29 U.S.C. § 152(3) (2000). Eighty-eight percent of these workers are women, and forty-one percent are African American or Latino. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, 2005 HOUSEHOLD DATA ANNUAL AVERAGES tbl.11, available at http://www.bls.gov/cps/cpsaat11.pdf (“Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity.”)


approximately two and a half million temporary workers, three million independent contractors, half a million home and child care workers, and seven million undocumented immigrant workers, we know that at least twenty and a half million U.S. workers in the labor force’s most robust sectors are currently excluded from the scope of federal labor law.55 The impact of these exclusions on law’s ability to facilitate collective action, however, extends far beyond these twenty and a half million workers. As the Supreme Court has observed, excluding a subset of a given workforce from the purview of labor law makes it more difficult for all of the employees in that workforce to organize and act collectively.56 The NLRA’s exclusions accordingly undermine the possibility for collective action among many millions of workers who, although they are themselves covered by the Act, work alongside the supervisors, temporary employees, and immigrant workers who do not enjoy NLRA protection.

II. EMPLOYMENT LAW AS LABOR LAW

These failures and limitations amount to a significant blockage of the traditional legal channel for collective action. Workers have responded by forcing open alternative legal pathways, and in this Part, I provide accounts of workplace campaigns in which workers rely not on the NLRA but on the FLSA and Title VII to facilitate and protect their efforts to organize and collectively secure workplace rights.57 These practical developments, however, take place in the face of some traditional skepticism regarding employment law’s congruity with workers’ collective action. Accordingly, before turning to the descriptive accounts of employment law as labor law, I first outline the traditional view of the tension between employment law’s “individual rights” regime and labor law’s goal of facilitating worker organizing and collective action.58

55 This figure does not include the approximately 750,000 agricultural workers, 7 million federal, state, and local government employees, and 5.5 million employees of certain small businesses also excluded from NLRA coverage. See Gov’t Accountability Office, Collective Bargaining Rights: Information on the Number of Workers with and without Bargaining Rights 13 (2002), available at http://www.gao.gov/new.items/d02835.pdf.

56 See, e.g., Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892 (1984) (excluding undocumented workers from NLRA protection would “erod[e] the unity of all the employees”).

57 A brief overview of the first account appears in Sachs, supra note 7, at 391-93.

58 Throughout the labor law literature, employment laws—including the FLSA and Title VII—are labeled as “individual rights” or “individual employment rights” statutes. See, e.g., Clyde Summers, Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals, 141 U. Pa. L. Rev. 457 (1992); Brudney, supra note 2, at 1563; James J. Brudney, A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process, 74 N.C. L.
A. Scholarly Skepticism

According to the conventional view, labor law and employment law are dichotomous, and in a fundamental respect incompatible, modes of intervention into workplace governance. In broad terms, labor law is understood as the regime that “governs workers efforts to advance their own shared interests through self-organization and collective protest, pressure, negotiation and agreement with employers.”

Employment law, under the NLRA, such changes are achieved when workers develop sufficient collective strength to demand them through collective bargaining or other economic action. On the other hand, statutes like the FLSA and Title VII intend law itself to compel employers to adopt particular substantive workplace practices by granting rights to employees. Because these employment rights are granted to—and enforceable by—workers irrespective of the extent of their collective organization in the workplace, “individual rights” is a useful heuristic in the context of this discussion of workplace law and scholarship.

59 Estlund, supra note 2, at 1527. Professor Corbett writes that “[l]abor law deals primarily with the National Labor Relations Act . . . which protects the rights of employees to engage in collective bargaining and other forms of collective action.” William R. Corbett, Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again, 23 BERKELEY J. EMP. & LAB. L. 259 (2002). See also, e.g., Estlund, supra note 26, at 789 (“labor law—by which I mean the law of collective labor relations, of unions, concerted activity, and collective bargaining”); Katherine V.W. Stone, The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System, 59 U. CHI. L. REV. 575 (“[T]he New Deal labor laws . . . were intended to create collective rights for workers and to
law, on the other hand, denotes the broad range of federal and state statutes (and case law) that, operating independently of any collectivization in the workplace, protect the rights of workers to minimum standards and fair treatment. As Professor Brudney puts it, employment law offers “rights and protections to employees on an individual—and individually enforceable—basis.” Scholars, moreover, typically understand employment law’s protection of “individual rights” as standing in tension with the NLRA’s project of facilitating collective action. Several strands of argument underlie this view.

The first account is an historical one, and begins in the late 19th and early 20th centuries when courts repeatedly enjoined union activity and struck down union-protective legislation in the name of protecting workers’ (and employers’) right to contract. The liberty of contract principles underlying these decisions were grounded in the view that an individual worker’s ownership of his labor—and the individual’s corresponding freedom to dispose of that labor unhindered by interference from the collective activity of other workers—lay at the heart of the freedoms protected by both the common law and the constitution.

...
jurisprudence a “relentlessly individualistic” one. The end of the Lochner era saw the decline of judicial invalidation of union activity—and union protective legislation—in the name of individual workers’ contract rights. But this heyday of collective action was short lived, and historians correlate more recent judicial and legislative deference to individual rights with a deterioration in the protection available to workers’ collective action. Thus, for example, Nelson Lichtenstein states bluntly that in the 1960s and ’70s the “discourse of ‘rights’” had a “powerfully corrosive impact on the legitimacy of the union idea.”

The second account of the tension between individual employment rights and collective action is essentially a cognitive one, and posits that government provision of substantive rights to workers has either an individuating effect or a pacifying one. That is, by offering rights to employees on an “individual and individually enforceable basis,” employment law encourages workers to view themselves as, first, individuals who are second, dependent upon state intervention to achieve workplace improvements. Professor Estlund, for example, contrasts employment law’s regulatory mode of workplace governance with the NLRA model by writing that employment law “renders
employees the passive beneficiaries of the government’s protection.” 68
Indeed, Estlund concludes that the rise of employment law
“foreshadowed the eclipse of the collective bargaining model—indeed, of the centrality of collective action altogether.” 69

Professor Brudney adds a third account by arguing that increasing
Congressional and judicial protection for individual employment rights
from the 1960s through the 1980s produced a “transformation of the legal culture” in which group action was “devalued.” 70 As he writes,
“since 1963 [Congress] has enacted a series of workplace regulatory
statutes that have effectively subordinated the role of group action by
making individual rights preeminent.” 71 By privileging individual
employment rights, that is, legal institutional actors undermined
workers’ ability to act collectively.

In a fourth account, Professors Katherine Stone and Richard Bales
point to doctrinal conflict between the two regimes that compromises
collective organization and action. In *The Tension Between Individual
Employment Rights and the New Deal Collective Bargaining System*,
Stone concludes that “the emerging regime of employee rights
represents not a complement to or an embellishment of the regime of
collective rights, but rather its replacement.” 72 The problem, Stone
argues, is that federal labor preemption doctrine—which requires
workers to arbitrate rather than litigate any workplace dispute arguably
covered by a collective bargaining agreement—has deprived union
workers of many of the employment rights granted by state law. 73

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68 Estlund, *supra* note 13, at 333. Professor Weiler similarly argues that under an
employment-law regime employees are “[a]t best . . . passive beneficiaries of these governmental
efforts on their behalf.” Weiler, *supra* note 29, at 30. This line of argument derives perhaps
originally from writers associated with the Critical Legal Studies movement. See, e.g., Peter
Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62
69 Estlund, *supra* note 13, at 329.
70 Brudney, *supra* note 2, at 1563-64.
71 Id. at 1564; see also id. at 1571 (“At some point during this legislative barrage, it became
clear that Congress viewed government regulation founded on individual employee rights, rather
than collective bargaining between private entities, as the primary mechanism for ordering
employment relations and redistributing economic resources.”); Brudney, *supra* note 58, at 1026-
27.
72 Stone, *supra* note 59, at 593; see also id. at 584 (“The past decade has witnessed a shift
from a legal system that protects collective employee rights to one that protects individual
employment rights.”).
73 This dynamic results from the interplay between individual employment protections and
labor law, particularly the doctrine of § 301 preemption. Section 301 of the Labor Management
Relations Act gives federal courts jurisdiction to enforce collective bargaining agreements
between unions and employers, 29 U.S.C. § 185(a) (2000), and the Supreme Court has inferred
from this grant of federal jurisdiction a fairly broad preemption doctrine according to which all
claims for breach of the collective bargaining agreement must be decided by the arbitration
provision in the contract, and not by a court. See, e.g., Local 174 Teamsters v. Lucas Flour Co.,
369 U.S. 95 (1962); Aveco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968); Allis Chalmers
Corp. v. Lueck, 471 U.S. 202 (1985). There has been a general exception for discrimination
Writing five years after Stone, Richard Bales expanded on her thesis by arguing that federal labor preemption in combination with the “federal arbitrability doctrine” denies unionized employees not only the state-law protections that Stone discusses, but also the individual workplace rights provided by federal statutes.\textsuperscript{74} For both authors, the result is that broad statutory protection for individual worker rights places unionized employees at a comparative disadvantage.\textsuperscript{75} As Bales writes:

Paradoxically, nonunion employees frequently have more workplace rights than their unionized counterparts. This penalty on union membership has weakened unions and their bargaining power, and has made the two models of workplace governance both practically and theoretically incompatible.\textsuperscript{76}

Recently, some scholars have begun describing ways in which the boundaries between labor and employment law are fluid, and thus calling into question this conventional view. Professor Estlund, for example, offers a sophisticated account of employment law’s potential to contribute indirectly to employee representation within the governance of the firm. Estlund suggests that employment law damage awards might be used to pressure firms to grant workers a right to representation within a system of monitored self-regulation.\textsuperscript{77} For Estlund, that is, employment law remedies might be traded for a form

\textsuperscript{74} See Bales, supra note 58. According to the federal arbitrability doctrine, a pre-dispute arbitration clause is enforceable even as to federal statutory rights, and precludes employees from seeking redress in court. See id. at 691. The doctrine is grounded in the Federal Arbitration Act, codified at 9 U.S.C. §§ 1-16 (2005). Thus, according to Bales, § 301 and the federal arbitrability doctrine “effectively withdraw[] from unionized employees many of the individual employment rights that non-union workers may enforce in court. And, crucially, arbitrators cannot deliver the types of remedies—punitive damages, for example—that state courts can award. Stone concludes her article by presenting two alternative legal regimes in which it would be possible to “harmonize individual and collective rights.” Stone, supra note 59, at 638-44.

\textsuperscript{75} Since the Stone’s and Bales’ articles, the Supreme Court has held that a general arbitration clause in a collective bargaining agreement is not sufficient to allow a union to waive employees’ right to a federal judicial forum for statutory discrimination claims. See Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 82 (1998). But the Court explicitly left open the question of whether a clear and unmistakable waiver of such individual employment rights in a collective agreement would be enforceable. See id. At least one federal court of appeals has held that such a clause in a collective bargaining agreement, waiving claims under the Americans with Disabilities Act and the Family and Medical Leave Act, is enforceable. See Singletary v. Enersys, Inc., 2003 U.S. App. LEXIS 2334 (4th Cir. 2003) (unpublished opinion). The Second Circuit has reached the opposite conclusion. See Rogers v. N.Y. Univ., 220 F.3d 73, 75 (2d Cir. 2000).

\textsuperscript{76} Bales, supra note 58, at 690.

\textsuperscript{77} See Estlund, supra note 13, at 390, 393-94.
of collective representation. Nonetheless, in Estlund’s model, workers’ collective action is not the mechanism through which these workplace reforms are achieved, and as such Estlund does not address employment law’s ability to facilitate such collective action.

Richard Michael Fischl argues more broadly that in contemporary practice, labor and employment law impact work in a variety of intersecting—and boundary crossing—ways. He observes, crucially, that employment statutes can be used to protect some types of workplace protests, a dynamic that is central to the accounts presented here. Fischl also illustrates how unions are using a wide range of tactics as part of multi-faceted and innovative organizing campaigns designed to induce employers to agree to, e.g., card-check recognition procedures. These tactics include publicity efforts, community support, and what Fischl aptly describes as the “strategic deployment of law”—including employment law.

For Fischl, employment law is deployed “strategically” by unions toward two ends. The first is to “generat[e] additional pressures on the employer through publicity and threatened liability.” Second, Fischl shows how employment law claims can be deployed strategically to “demonstrate[] the utility of union representation to the employees in question.” That is, Fischl argues, because of the hurdles involved in filing employment lawsuits (or even NLRB charges), a union that can

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78 She thus writes that “Employment law . . . is in many ways a poor substitute for the system of self-governance envisioned by the labor laws . . . . But the solution to the representation gap may lie partly within employment law rather than solely within the traditional realm of labor law.” Id. at 402


80 See id. at 175-79.

81 In a card-check recognition procedure, a union’s representative status is determined by a showing of authorization cards signed by employees, rather than through a secret ballot election.

82 Fischl, supra note 79, at 210.

83 Id. at 212. Thus, in an effort to convince the University of Miami to agree to a card-check process, for example, the Service Employees International Union conducted a “corporate campaign,” held press conferences, coordinated religious services, and assisted workers in the filing of a range of legal actions (including NLRB charges, OSHA complaints, and charges that the University violated a local living wage ordinance). The legal charges, like the media and community actions, gave the unions added leverage in their efforts to secure a card-check agreement from the University. Id. at 213-14. Fischl also cites other, similar campaigns, including an SEIU janitorial organizing effort in which the union “assisted the workers in bringing [a wage and hour] suit ‘as part of a strategy to pressure contractors to improve wages, to publicize bad working conditions, and to advance its efforts to unionize tens of thousands of janitors.’” Id. at 212 n.168, quoting Steven Greenhouse, Among Janitors, Labor Violations Go with the Job, N.Y. TIMES, July 13, 2005, at A1. For another excellent case study in which unions use FLSA suits in this manner, see Ruth Milkman & Kent Wong, Organizing Immigrant Workers: Case Studies from Southern California 120-21, in REKINDLING THE MOVEMENT: LABOR’S QUEST FOR RELEVANCE IN THE 21ST CENTURY (Lowell Turner, Harry C. Katz & Richard W. Hurd eds., 2001).

84 Fischl, supra note 79, at 212.
assist workers in successfully prosecuting such legal claims will be viewed as more useful by those workers.\textsuperscript{85}

This scholarship makes a major contribution to our understanding of the ways in which the boundaries between employment law and labor law are artificial. In these accounts, however, employment law serves either as another arrow in the quiver available to workers and unions seeking to pressure employers to accept their demands, or as a means for the union to prove its mettle to employees. The accounts, therefore, do not allow us to examine the ways in which employment law can directly foster collective action. In the accounts that follow, employment law plays this role: it functions as the locus of the workers’ collective activity and as the legal mechanism which protects that collective activity from coercive attempts to curtail it.\textsuperscript{86} In the following accounts, that is, employment law is the very legal architecture for workers’ collective action, and in this sense assumes the role conventionally played by labor law.

\textbf{B. Practical Promise}

Despite traditional skepticism regarding the congruity between individual rights and collective action, workers are relying on employment statutes to facilitate and protect their organizing efforts. In this section, I describe two examples of employment law functioning in this way. In the first example, garment workers who had long worked for illegally low wages engage in a collective campaign to secure better pay. The federal statutory entitlement to overtime pay—"el derecho al sobretiempo"—becomes the galvanizing theme for the workers’ organizational efforts. When the leader of the collective campaign is fired for her organizing work, moreover, a federal district judge acting pursuant to the FLSA issues a preliminary injunction ordering her reinstatement. The speed of the injunction—which comes nine days after the discharge and thus nearly two years faster than an NLRB order might have issued—constitutes a significant and potentially dispositive improvement over the NLRA. In the second example, construction workers attempt to remedy viciously discriminatory workplaces practices through collective action. When the employer reduces the wages of, and then discharges, many of those employees active in the

\textsuperscript{85} See id. at 211-12.\textsuperscript{86} The first account illustrates the FLSA’s capacity to play both of these roles. The second account reveals Title VII’s potential to fulfill the second of these roles: to offer a robust remedy for coercive employer interference with workers’ collective activity. While it is also clear that combating national origin discrimination was the locus of organizational activity in the second account, it is less clear from the sources available the extent to which Title VII’s proscriptions on such discrimination were explicitly invoked at the outset of the organizational efforts.
organizing campaign, the NLRB does essentially nothing: the Board’s sole remedial order is one requiring the employer to post a notice informing employees—some of whom have been fired and not reinstated—that they have the right to act collectively. When the workers turn to Title VII as the shield for their collective activity, however, the employer is ordered to pay three-quarters of a million dollars in damages.87

1. Collective Action under the Fair Labor Standards Act

Bushwick, Brooklyn is home to hundreds of garment factories and hundreds of thousands of low-wage immigrant workers. It is also home to a workers’ association named Make the Road by Walking (MRBW), whose organizers and lawyers assist Bushwick workers in their campaigns to collectively secure rights at work.88 While a great majority of garment workers who are members of MRBW earn below minimum wage and close to 100% of these garment workers are not paid overtime, the rate of unionization among garment-worker members of MRBW is approximately 0%.89 Lacking union representation and facing rampant violations of their rights at work, garment workers in Bushwick and their lawyers have been forced to develop alternative models of organizing and, concomitantly, novel legal mechanisms for protecting their organizing efforts.90

MRBW and its members have abandoned the NLRA and rely instead on the FLSA—more particularly, on that statute’s anti-retaliation clause—to facilitate and protect their collective efforts to improve wages and working conditions. The FLSA statutorily guarantees all covered employees the right to a minimum wage,

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87 It is worth stressing at the outset that in order for employment law to function in these ways—to facilitate and protect collective action—it must be deployed consciously for this purpose. Traditional employment law litigation, even litigation involving a class of plaintiffs, will not naturally or of its own accord perform the roles highlighted below. Lawyers, organizers, and workers themselves must intentionally turn to employment law as a substitute form of labor law if employment law is to operate in this capacity.

88 The name derives from a poem by Antonio Machado, which became the title of a book on popular education, see Myles Horton & Paulo Freire, WE MAKE THE ROAD BY WALKING (1990), and later the title of an influential law review article, see Jennifer Gordon, We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change, 30 HARV. C.R.-C.L. L. REV. 407 (1995). The author of this Article worked as an attorney at MRBW from September 1999 through June 2002.

89 Telephone Interview with Andrew Friedman, Co-Director, Make the Road by Walking (Aug. 12, 2005).

currently $5.85 per hour,\textsuperscript{91} and requires that employees receive one and one-half times their regular rate of pay, whatever that regular rate is, when they work more than forty hours in a week.\textsuperscript{92} The Act prohibits retaliation against employees who seek to enforce these rights, provides a range of remedies for workers who suffer such retaliation, and is enforceable by the Department of Labor (DOL) or through private rights of action.\textsuperscript{93}

MRBW is, in many ways, an example of what Professor Stone terms a “citizen union”—a “geographically based organization” that engages workers across a given locale in organizing efforts on behalf of its members, wherever those members work.\textsuperscript{94} In Stone’s model, citizen unions exert pressure on local corporations to comply with demands regarding, e.g., violations of wage and hour laws, “through publicity campaigns, informational picketing, and shaming in the local press.”\textsuperscript{95} Citizen unions also engage in efforts to combat substandard wages by “report[ing] violations of wage and hour laws to the appropriate governmental authorities,”\textsuperscript{96} and by providing legal assistance to individuals bringing lawsuits “to enforce laws regarding minimum wages.”\textsuperscript{97}

MRBW, however, pushes beyond Stone’s model of citizen unionism by using the FLSA, not simply as the legal vehicle for securing unpaid wages, but also as the legal mechanism to facilitate and protect its members’ collective efforts to organize and secure those rights. MRBW’s use of employment law as labor law is illustrated by the campaign for unpaid overtime wages at a Bushwick garment factory named Danmar Finishing.

\begin{enumerate}
\item \textbf{Danmar Finishing}

Maria Elena Arriaga immigrated to the United States from Mexico,\textsuperscript{98} and requires that employees receive one and one-half times their regular rate of pay, whatever that regular rate is, when they work more than forty hours in a week.\textsuperscript{92} The Act prohibits retaliation against employees who seek to enforce these rights, provides a range of remedies for workers who suffer such retaliation, and is enforceable by the Department of Labor (DOL) or through private rights of action.\textsuperscript{93}

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\begin{enumerate}
\item \textbf{Danmar Finishing}

Maria Elena Arriaga immigrated to the United States from Mexico,
and began working as a sewing machine operator at Danmar Finishing in 1992.98 During the entire course of Arriaga’s employment, she and at least 175 of her coworkers worked in excess of forty hours per week but were never paid time-and-one-half their regular rate of pay, as required by the FLSA.99 Prior to the campaign described below, however, the Danmar employees did not protest these conditions.

In March 2000, Arriaga became a member of MRBW and participated in a workers’ rights training with other Bushwick workers. It was during this training that Arriaga first learned that federal law granted her the right to overtime pay, and first recognized that the wages she and her coworkers earned at Danmar were illegally low.100 Arriaga, with MRBW’s assistance, then began a campaign to educate her coworkers about their wage and hour rights and Danmar’s continuing violation of them. Arriaga also encouraged her coworkers to file complaints with the U.S. Department of Labor (DOL) concerning Danmar’s wage and hour practices.101

The Danmar workers initially met with little success, and received no assistance from the DOL. In fact, in August 2001, Arriaga and her coworkers received letters from the DOL stating that they were indeed owed back wages, but that the Department was “not authorized to order or require an employer to pay back wages.”102 In response, the Danmar employees initiated what was in essence a dual organizing effort: they sought not only to force Danmar into compliance with the FLSA but also to induce the DOL to play its part in enforcing the federal law on their behalf. The workers accordingly reached out to local media to publicize the DOL’s lackluster response to their complaints, and convinced Bushwick’s U.S. congressional representative to pressure the

98 Declaration Pursuant to 28 U.S.C. § 1746 of Maria Arriaga at ¶ 1, Chao v. Danmar Finishing Corp, 02-CV-3492 (E.D.N.Y. June 17, 2002) [hereinafter Arriaga Declaration] (on file with the author). See also Complaint at 2-3, Chao v. Danmar Finishing Corp, 02-CV-3492 (E.D.N.Y. June 17, 2002) at 2-3 [hereinafter Overtime Complaint] (on file with the author). The account that follows is drawn primarily from Arriaga’s declaration and other papers filed in the Danmar Finishing case, along with news accounts of the campaign that appeared in English and Spanish language newspapers.

99 See Arriaga Declaration, supra note 98, at ¶ ¶ 2, 4; Complaint at 6, Exhibit 8, Chao v. Danmar Finishing Corp, 02-CV-2586 (E.D.N.Y. May 1, 2002) [hereinafter Overtime Complaint] (on file with the author).

100 See Arriaga Declaration, supra note 98, at ¶ 3; see also Maria Elena Arriaga, $5.15 Is Not Enough (available at www.515isnotenough.net/workerprofiles.pdf).


102 See Steven Greenhouse, U.S. Sues a Sweater Factory After a Pop Singer Assails It, N.Y. TIMES, May 2, 2002, at B1; see also Arriaga Declaration, supra note 98, at ¶ 5 (“In August 2001, I received a letter from the United States Department of Labor (DOL) informing me that the factory had been violating my right to overtime pay. The letter stated that I was owed $4,276.87 in lost wages, but that I had to contact a private attorney if I wanted to recover the wages.”).
DOL to act.\textsuperscript{103}

By January 2002, responding to this escalating pressure, the DOL sent wage and hour investigators to Danmar who interviewed workers about the factory’s wage and hour practices.\textsuperscript{104} Arriaga was interviewed by a DOL investigator for approximately ten minutes while she was working at her sewing machine, with her employer standing close by.\textsuperscript{105} Arriaga told the inspector that she worked more than forty hours per week but did not receive overtime pay.\textsuperscript{106} The week after the DOL inspection took place, Danmar managers asked all employees to sign a form stating that “[a]s of today, I have received all my weekly salary, plus overtime, that I am entitled to because of my job.”\textsuperscript{107} Arriaga, and approximately twelve of her coworkers, refused to sign.\textsuperscript{108}

According to Arriaga, retaliation for participation in the wage and hour campaign began almost immediately: “I noticed that [the] . . . bosses at the . . . factory . . . began treating me worse than they had treated me before . . . by yelling at me, calling me names, acting rude and disrespectful to me . . . .”\textsuperscript{109} Each of the Danmar employees who refused to sign the statement regarding overtime payments had their wages reduced.\textsuperscript{110} Arriaga, for example, was demoted from an hourly employee to a piece-rate employee (paid according to how many garments she was able to sew each hour) resulting in a $50 to $150 per week wage cut. In Arriaga’s words, “The bosses . . . told me that because I did not sign their form I would be switched from my hourly rate . . . to piece rate starting the next week . . . . My weekly paycheck dropped from approximately $320 per week to [between] $170 [and] $270 per week.”\textsuperscript{111}

With the DOL investigation continuing, Arriaga and her coworkers (the group of Danmar employees who refused to sign the statement suggesting they were owed no back wages) began planning collective

\textsuperscript{103} See Arriaga Declaration, supra note 98, at ¶ 6; see also Melissa Grace, Feds Ripped in Wage Case, N.Y. DAILY NEWS, Mar. 22, 2002, at Suburban 1; see also Press Release, News from Congresswoman Nydia M. Velazquez, Velazquez Demands Worker Protection from Sweatshop Abuses (Mar. 22, 2002) (on file with author).

\textsuperscript{104} Arriaga Declaration, supra note 98, at ¶ 8.

\textsuperscript{105} Id. at ¶ 8-9 (“A female DOL investigator came to my machine where I was working, and began asking me questions about my wages and hours. I answered her questions, and spoke to her at length. . . . My boss . . . was standing about ten feet from me . . . .”)

\textsuperscript{106} Id. at ¶ 9.

\textsuperscript{107} Id. at ¶ 12.

\textsuperscript{108} Id. at ¶ 13; Jason Begay, Factory Defies Order To Rehire Worker Fired in Overtime Inquiry, N.Y. TIMES, Aug. 2, 2002, at B3. The list of the employees who refused to sign the statement is available at Consent Judgment at Exhibit B, Chao v. Danmar Finishing Corp, 02-CV-2586 (E.D.N.Y. Dec. 17, 2003).

\textsuperscript{109} Arriaga Declaration, supra note 98, at ¶ 11.


\textsuperscript{111} See Arriaga Declaration, supra note 98, at ¶¶ 14-15.
action to demand payment from their employer. The statutory right to overtime was both the rallying point and the central demand of the workers’ efforts. On March 22, the Danmar workers, along with other members of MRBW, staged a demonstration outside the factory. Workers picketed the factory entrance carrying placards that read, in Spanish, “tienen el derecho a sobretiempo,” or “we have the right to overtime pay.”

Congresswoman Nydia Velazquez joined the workers as they picketed and called on Danmar management to comply with the FLSA’s overtime requirements.

Four days after this first public demonstration by the Danmar workers, a DOL investigator named Maria Rosado telephoned Arriaga and asked whether Rosada could speak with Arriaga’s employers about the retaliatory reduction in pay. Arriaga agreed to have Rosado speak to Danmar management on her behalf. The next day, March 27, Arriaga was fired. As Arriaga stated:

[R]ight before I left work, [manager] Don Carlos angrily yelled at me at the top of his voice. He shouted at me so everyone in the factory could hear him that, “Here in the factory, I am the boss. There is no law that can tell me what I have to do in my factory.” . . . He said that I was “stupid,” and “a piece of trash.” He told me I was fired and that I should go home.

When MRBW apprised the DOL of Arriaga’s discharge, the DOL informally arranged for Arriaga to return to work at Danmar. But when she returned to work, Arriaga was given a sewing machine that didn’t function properly, and—still being paid at piece rate—the result was dramatically diminished wages. On April 13, Arriaga reported for work at 8 a.m. but was given no garments to sew. As Arriaga describes the developments:

I remained sitting at my machine. [Manager] Mika Jankovic came up to me and in a loud and disrespectful voice yelled at me to work. I asked him how could I work if I had no garments to sew. He continued screaming at me. A short while later he returned with some garments for me to sew. I began working on them but the needle on my machine was defective. I requested new needles from

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112 See Denuncian Abusos a Inmigrantes [Denouncing Abuse of Immigrants], EL DIARIO, Mar. 23, 2002, at 1.
113 Id. (“A group of workers from Danmar Finishing protested yesterday against abuses they assert the company committed. . . . A number of Danmar employees allege that they are owed wages by the company. . . . The demonstration took place with the support of Congresswoman Nydia M. Velazquez and members of the organization Make the Road by Walking.”).
114 See Arriaga Declaration, supra note 98, at ¶ 17.
115 See id. at ¶ 18.
116 Id.
117 See id. at ¶ 21.
118 See id. (“Because the bosses did not give me much work to do, and made me work at a broken sewing machine, my piece rate wages were greatly reduced.”).
Mika Jankovic. He told me that if I could not work I should go home. . . . Mika Jankovic yelled at me, “I told you to go home. I am not going to give you more work. Go home.” He told me that I was fired.119

At this point, and again in response to escalating pressure from the Danmar employees, the media, and elected officials, the DOL filed suit under § 207 of the FLSA, seeking to recover unpaid overtime wages for 175 Danmar employees.120 And in response to Arriaga’s second discharge, the Danmar workers continued to organize, holding multiple demonstrations outside of the factory with Arriaga “[leading] the revolt.”121 On May 2, additional workers joined the campaign and picketed Danmar, protesting Arriaga’s firing and demanding compliance with overtime laws.122 On May 10, Arriaga and her coworkers were joined at another demonstration outside the factory by New York Senator Charles Schumer.123

With protests outside the Danmar factory continuing, Arriaga and her coworkers added a new element to their collective campaign. Following Arriaga’s second discharge from the factory, the workers learned that a clothing line sewn at Danmar was promoted by a popular Columbian singer-songwriter, Shakira.124 The Danmar workers thus took their campaign for overtime rights to Shakira’s next public appearance in New York, and staged a rally at Rockefeller Center during Shakira’s performance on a segment of NBC’s “Today” show.125

119 Id. at ¶¶ 23-24.
121 See Port, supra note 101.
122 See Maria Del Carmen Amado, El fenómeno Shakira azota a Delia’s [The Phenomenon Shakira Whips Up on Delia’s], HOY, May 3, 2002, at 3.
125 As described by New York’s El Diario newspaper, “[L]atino workers from Brooklyn were crying out for justice. . . . The workers were . . . demanding support in their struggle against exploitation at the Danmar factory.” Rosa Murphy, Shakira, seguimos con los pies descalzos [Shakira, we follow you with bare feet], EL DIARIO LA PRENSA, June 1, 2002, at 1. El Diario reported that “[m]embers of several community organizations and workers from other companies joined together . . . to protest.” Id. See also Gabriela Remigio, Shakira envuelta en mas protestas
In response to Arriaga’s second discharge, and while the protests mounted, Arriaga and her coworkers—along with their attorneys at MRBW—pressed the DOL to bring suit under the FLSA’s anti-retaliation clause against Danmar and seek Arriaga’s immediate reinstatement. On July 22, 2002, the DOL responded and sought a preliminary injunction that would order Danmar to reinstate Arriaga immediately. Then, on July 31, 2002—nine days after the Department filed its motion (and 681 days sooner than an average NLRB proceeding might have produced this result)—Judge David Trager of the U.S. District Court for the Eastern District of New York issued a TRO compelling Danmar to “offer immediate reinstatement of employment to Maria Arriaga.”

When Arriaga first attempted to enforce Judge Trager’s order, she was turned away from the factory and “told there was no work for her.” Accordingly, the DOL filed a contempt motion seeking a $10,000 daily fine, and on August 8 Judge Trager held a hearing to consider Danmar’s failure to comply with the terms of the TRO. Forty Danmar workers attended the hearing, and heard Judge Trager orally order Danmar to reinstate Arriaga. Danmar also agreed at the hearing to pay Arriaga the wages she would have earned had she been reinstated according to the original TRO. By August 9, Arriaga was back at work at Danmar.

With Arriaga reinstated, and the retaliation remedied, the workers’ efforts to secure their wage and hour rights could move toward completion. In December 2003, Danmar agreed to pay $410,000 to 175

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126 See, e.g., Port, supra note 101. The FLSA provides for a private right of action and also gives the Secretary of Labor authority to institute proceedings. See 29 U.S.C. § 216(b) (2000).
127 See Docket Entries 12-13, Chao v. Danmar Finishing Corp, No. 02-CV-3492 (E.D.N.Y. July 22, 2002); Eugene Scalia, Solicitor, Dep’t of Labor, Address to the American Bar Association (Aug. 12, 2002), in BUREAU OF NAT’L AFFAIRS, DAILY LABOR REPORT, at E-4 (2002) (“[W]e . . . filed a motion that to our knowledge has never been filed before by the Solicitor’s Office—we filed a motion for a preliminary injunction immediately reinstating the wrongfully terminated employee . . . Ms. Arriaga.”). On June 17, the DOL had filed a § 215(a)(3) action for reinstatement. See Retaliation Complaint, supra note 98, at 5; Scott Malone, Second Suit Filed by DOL Against Brooklyn Factory, WOMEN’S WEAR DAILY, June 19, 2002, at 3; Bob Port, Feds Hit B’klyn Sweatshop with New Suit, N.Y. DAILY NEWS, June 20, 2002, at 30.
128 Temporary Restraining Order at 1, Chao v. Danmar Finishing Corp, No. 02-CV-3492 (E.D.N.Y. July 31, 2002); see also Begay, supra note 108, at B3.
129 Begay, supra note 108.
130 See Joanna Ramey, DOL Case Judge Orders Danmar To Rehire Worker, WOMEN’S WEAR DAILY, Aug. 13, 2002, at 7.
131 See id.
132 See id.
133 See id. (“Arriaga worked Friday [August 9] and Saturday [August 10], according to Nieves Padilla, an organizer with Make the Road by Walking . . . . ‘I spoke to [Arriaga] on Saturday, and she said everything’s OK and she’s getting better treatment’ . . . .”)
workers, The Daily News hailed Arriaga’s leadership, writing that “in the Latino area of Bushwick where she lives, Arriaga, a soft-spoken woman who moved here from Mexico a decade ago, became a real-life counterpart to movie heroine Norma Rae.” In the end, the campaign was described as a “historic triumph for a band of immigrant sweatshop laborers who challenged their boss.”

2. Collective Action under Title VII

While Arriaga and her coworkers were using the FLSA to protect their collective campaign to recover unpaid overtime in Brooklyn, a group of immigrant sheetrock workers in Colorado was relying on Title VII to protect their own collective campaign at work. Phase II Company is one of the largest construction companies in Colorado, and was the subcontractor responsible for the drywall and metal frame work in the construction of Colorado University Hospital’s Fitzsimmons Cancer Center. Approximately 90% of the Phase II workforce on the Fitzsimmons project were employees of Mexican national origin and 10% were Caucasian workers, while the supervisors and general foreman on the project were all Caucasian.

According to affidavits filed by Phase II workers, work on the Fitzsimmons project was defined by severe national origin discrimination and harassment. Phase II supervisors routinely referred to Mexican immigrant workers in viciously derogatory terms.


137 Like the FLSA, Title VII prohibits employers from retaliating against workers who seek to enforce their rights under the statute. Indeed, Title VII’s anti-retaliation clause is broader than the FLSA’s, making it unlawful for an employer to discriminate against any of his employees “because the employee has opposed any practice made an unlawful employment practice by [Title VII].” 42 U.S.C. § 2000e-3(a) (2000).


139 See Phase II Complaint, supra note 138, at 4, ¶ 11.

Workers alleged, for example, that daily work meetings were punctuated with remarks including, “Hey... wetbacks,” and that managers would berate workers with the Spanish phrase “muevete mojados,” or “move it, wetbacks.” Mexican workers on the Fitzsimmons project also were compelled to use different, and dirtier, lavatory facilities than their Anglo coworkers. Thus, “when [Phase II] Mexican workers attempted to use the cleaner ground floor restrooms, the foreman would call them ‘flojos’ [lazy], reprimand them for taking too much time, and deny them the key.”

Likewise, Phase II supervisors provided drinking water to Anglo workers but not the Mexican workers. During morning work meetings, “the supervisors told the Mexican workers that the water was not for them, but only for them, pointing to the Anglo workers who stood apart from the Mexican workers.” And, eventually, “the supervisors placed the drinking water in their trailer, where the Anglo workers could enter and drink, but where the Mexican workers were not allowed,” Finally, Phase II supervisors made elevators on the worksite available to Anglo employees but denied Mexican workers access to the elevators, even when Mexican workers were transporting heavy work materials. Indeed, Mexican workers “were reprimanded by foremen when they were seen waiting for [the elevator].”

Like the Danmar workers in Brooklyn, workers at Phase II in Colorado decided to combat these workplace conditions through collective action. So, on August 14, 2000, a Phase II sheetrock hanger named Ivan Garcia telephoned Gustavo Moldanado, a union organizer with the United Brotherhood of Carpenters, and discussed with him the problems on the Fitzsimmons project. Garcia and Moldanado agreed that the workers should meet with union representatives, and on August 16th, two large group meetings were held at the construction site. During lunchtime on the 16th, Maldonado and two other Carpenters’ organizers met with seventy Phase II workers at the cancer center. Phase II employee Jose Rafael San Miguel spoke during the lunchtime

143 Phase II Complaint, supra note 138, at 5; Rodriguez Affidavit, supra note 141, at ¶ 4.
144 See EEOC Determination Letter, supra note 142, at 3; E.E.O.C. Affidavit of Francisco Javier Valles, at ¶ 8, Oct. 11, 2001 (on file with author); Rodriguez Affidavit, supra note 141, at ¶ 5.
145 Phase II Complaint, supra note 138, at 5-6.
146 Id. at 6.
147 EEOC Determination Letter, supra note 142, at 3; see also Phase II Complaint, supra note 138, at 5; Zuniga Affidavit, supra note 142.
148 Affidavit of Ivan Garcia at 1, NLRB Case 27-CA-17043-1 (Sept. 6, 2000) [hereinafter Garcia Affidavit] (on file with author).
meeting stating that “what we wanted was for the Union to stop the discrimination and the abuses that there were inside the company.”

Another Phase II sheetrock hanger, Mike Rios, explained that: “We talked about all the discrimination against the Mexican workers and how badly we were being treated. I told the union representatives that there was a lot of discrimination against the Mexicans. I said we were being called stupid, wetbacks and good for nothing.”

Later that same day, another group meeting was held in the parking lot of the Fitzsimmons construction site, and approximately ninety Phase II workers joined the Carpenters’ union organizers. At this meeting, San Miguel explained, the workers “complained about how [Phase II supervisors] Bill and John would tell us that if we wanted to leave [we could] because they could just bring more wetbacks to work for the employer.”

As the workers’ collective activity continued, Phase II management began expressing opposition. As Mike Rios explains it:

Our lunch break is generally 30 minutes long. The meeting with the Union . . . lasted that long. About one minute before our lunch break was over, [supervisors Bill Warner and Miguel Resendiz] . . . came to the fourth floor where we were meeting. When Warner got out of the elevator he started screaming in English that the lunch break was over and to get our asses to work and that was what he was paying us for. He told us to stop with our Union shit and that he paid us to work and not to be meeting with the Union. . . . Resendiz told me that if we continued with the Union that we were all going to lose our jobs. He said that the Employer was going to change its name to another and the company was going to keep working without the guys who supported the Union. . . . Warner said that anyone who supported the Union would be told bye-bye by Phase II.

Phase II employee Felipe Rodriguez Gonzalez similarly reports that his supervisor “shouted at us . . . and said that those of us who were with [] the Union should leave and that the doors were open . . . . [He said] that through here entered a wetback and through over there


151 Id. at 3.

152 San Miguel Affidavit, supra note 149, at 3. The next day, August 17th, seventy Phase II’s drywall hangers came to work wearing union T-shirts. Rios Affidavit, supra note 150, at 3. At lunchtime, another union meeting was convened, and again between seventy and ninety employees attended. The organizers distributed union authorization cards to workers, many of whom indicated that they wanted the Carpenters’ to act as their collective bargaining representative. See Rios Affidavit, supra note 150, at 4; Supplemental Affidavit of Felipe Rodriguez Gonzalez at Exhibit 1, NLRB Case 27-CA-17043-1 (Sept. 6, 2000) [hereinafter Supplemental Gonzalez Affidavit] (on file with author).

153 Rios Affidavit, supra note 150, at 4-5.
another one left.”

On August 19th, the most active members of the nascent Phase II organizing campaign met at the Carpenters’ union hall. Following a discussion of the discrimination faced by the workers on the Fitzsimmons project, and the hostility with which management was responding to the workers’ efforts to resolve the situation, the workers agreed to strike. After a subsequent strike planning meeting among seventy workers at the Fitzsimmons worksite, Carpenters’ organizer Eduardo Gomez wrote to Phase II and informed the company that “[t]o protest your illegal acts, the employees of Phase II will temporarily withhold their services, and inform the public of their grievances.” And, indeed, on August 24th, between eighty and ninety Phase II employees walked off the job and picketed the Fitzsimmons worksite. When supervisor Bill Warner told union organizer Eduardo Gomez that all employees should return to work, “Gomez said that the workers did not want to return to work because we wanted the Union to represent us and that we were tired of the way in which we were treated.”

Soon after the strike, Phase II management began retaliating against workers who participated in the collective action. Mike Rios suffered a pay cut six days following the walkout. As Rios explained, he was called to the office of his supervisor John T. on August 31st, where he was told: “[T]here had been a problem with my pay rate. [John T.] said that he had made a mistake and had given me the wrong hourly rate. He said that instead of $13.00 an hour, he was going to start paying me $10.00 an hour.” Armendariz reported that his tools—which he owned, and which were kept in a lock-box at the Fitzsimmons worksite—went missing shortly following the strike. Jose Manuel Nunez, one of the employees chosen by his coworkers to lead the strike, saw his work hours reduced on September 8th.

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154 Rodriguez Affidavit, supra note 141, at 2. Damian Rodriguez Armendariz also reports that his supervisor responded to the workers wearing union t-shirts by calling them “wetbacks.” Armendariz Affidavit, supra note 140, at 3. According to the union, one foreman responded to the workers’ organizing efforts by saying, “If you fucking wetbacks want the union in here, I’ll fire you all and get some new wetbacks.” Press Release, Mountain West Regional Council of Carpenters (Sept. 2000) (on file with author).

155 Rios Affidavit, supra note 150, at 5.

156 Id. at 6.


158 San Miguel Affidavit, supra note 149, at 4.

159 Rios Affidavit, supra note 150, at 7.

160 See, e.g., Armendariz Affidavit, supra note 140, at 5.

161 Rios Affidavit, supra note 150, at 9.

162 Armendariz Affidavit, supra note 140, at 5-6.


164 Affidavit of Jose Manuel Nunez at 3, NLRB Case 27-CA-17043-1 (Sept. 12, 2000)
On September 12th, the union again wrote to Phase II and announced that the workers at the Fitzsimmons worksite planned to “conduct a peaceful demonstration as a means to inform the public of their grievances.” And on September 15th, Phase II workers left their jobs once more to engage in a one-hour silent picket in opposition to the company’s discriminatory employment practices. Immediately following this silent protest, Jose Hector Quinonez and at least five other Phase II workers who had been engaged in the collective actions designed to combat the employer’s discriminatory practices were discharged.

The Phase II workers first attempted to remedy the employer’s retaliatory actions and protect their attempts at collective action by filing unfair labor practice charges with the NLRB. The workers alleged that the reduction in working hours, pay cuts, and discharges that followed their collective activities violated sections 8(a)(1) and (3) of the NLRA. The Board, however, declined to pursue the charges. In its dismissal letter, the Board concluded that the evidence was insufficient to establish that the employer had taken retaliatory action due to the workers’ collective union activities. The union’s administrative appeal was denied on the same ground. Although the Board concluded that “the Employer bore animus toward employees engaging in protected activity,” and found it “suspicious that [Mike Rios’] reduction in hourly pay from $13 to $10 was not implemented until after the employee strike,” it concluded that “it could not be established that the Employer acted for other than legitimate reason[s].”

The NLRB did conclude, however, that Phase II violated the NLRA by surveilling employees involved in collective activities and by threatening employees who engaged in union activities. Based on this finding, the Board proposed a settlement according to which the
employer was ordered to post a notice informing employees of their NLRA rights and announcing, *inter alia*, that “[w]e will not threaten our employees with loss of their jobs because they choose to engage in a protected concerted work stoppage.” No damages award of any kind, nor any other affirmative relief, was ordered by the Board.\footnote{172 See Letter from Michael Cooperman, Att’y, Region 27, NLRB, to Susan M. Schaecher, Esq. (Nov. 27, 2000) (on file with author) (regarding Case 27-CA-17043-1); Letter from Dennis E. Valentine to Michael Cooperman, Region 27, NLRB (Jan. 31, 2001) (on file with author) (regarding Case 27-CA-17043-1); Settlement Agreement in re Phase Two Construction Company, 27 CA-17043-1 (Jan. 30, 2001) (on file with author).}

Unsatisfied with the remedy offered by federal labor law, ten Phase II employees filed Title VII charges with the Equal Employment Opportunity Commission (EEOC) ten days after the NLRB dismissed their complaint.\footnote{173 See Phase II Complaint at ¶1; see also, e.g., E.E.O.C. Charge of Discrimination by Felipe Rodriguez Gonzalez (Nov. 6, 2000) [hereinafter Rodriguez EEOC Charge] (on file with author).} The Title VII charges were based explicitly on the workers’ collective activity. Thus, Felipe Rodriguez charged that:

> I believe I have been discriminated against because[ ] I have been performing the duties of my job in a satisfactory manner since the date I was hired[,] I became involved with the Rocky Mountain Council of Carpenters in August of 2000. The union is addressing discrimination issues. As a result of joining the Union, and engaging in the protected activity of opposing discrimination, I was terminated from my position.\footnote{174 Id. at 2.}

Based on these charges, the EEOC conducted an investigation of the Phase II Fitzsimmons project and found reason to believe that the company had committed numerous violations of the Civil Rights statute.\footnote{175 The Commission found evidence to support the workers’ charges that they were subjected to verbal harassment and disparate terms and conditions of employment—including the allegations concerning unequal access to bathrooms, drinking water, and elevators. See EEOC Determination Letter, *supra* note 142, at 2-3.} In its determination letter, the Commission concluded that the employees’ collective activity was protected by Title VII, and that retaliation for this activity constituted a violation of Title VII. As the Commission wrote:

> Evidence of record suggests that Charging Party and similarly situated Mexican employees engaged in protected opposition to discrimination, of which the Respondent was aware, through their involvement in union activity. Evidence of record indicates that Charging Party’s protected activity was a factor in Respondent’s decision to lay off him and similarly situated Mexican employees from their positions as sheetrock hangers.\footnote{176 Id. at 2.}

Following failed attempts at conciliation, the EEOC brought suit against Phase II alleging, *inter alia*, that the employer violated Title VII...
by retaliating against employees who exercised rights protected by the statute. The complaint again explicitly framed the workers’ collective action as activity protected by the Civil Rights Act. For example, in the complaint section titled “Retaliation for Opposing Employment Discrimination,” the EEOC included the following facts:

Several drywall installers . . . contacted the Rocky Mountain Regional Council of Carpenters for assistance in changing the[ir] work conditions, including the discriminatory and harassing treatment. . . . Beginning August 24, 2000, approximately [one] hundred mostly Mexican born workers began a walkout and “informational” picket that lasted a day and a half. . . . When the owner/President of Phase 2 failed to follow up with investigations of the complaints, a one hour peaceful protest was staged on September 15, 2000.177

The EEOC asserted that Phase II’s adverse actions based on employee participation in this union activity violated Title VII’s anti-retaliation clause.178

While the NLRB proceedings resulted only in the posting of a notice informing employees of their NLRA rights, the Title VII lawsuit resulted in the entry of a consent decree against Phase II. Pursuant to the decree, the company agreed to pay $750,000 in damages: $600,000 to the ten charging parties and an additional $150,000 to other eligible class members. The decree also mandated that Phase II implement an equal employment opportunity training program for all managerial employees. Finally, Phase II was enjoined from future acts of retaliation for employee activity protected by Title VII, thus subjecting the company to contempt sanctions should it again interfere with workers’ collective action designed to combat workplace discrimination.179

III. INDIVIDUAL RIGHTS AND COLLECTIVE ACTION: A THEORETICAL MODEL

These two examples illustrate an important and emergent trend in American labor law: workers are turning to employment law to provide legal protection for their collective activity. The accounts also raise further doubts about the conventional view of employment law’s individual rights regime as offering no support for—or as being inimical to—workers’ collective action. Standing alone, however, these

177 Phase II Complaint, supra note 138, ¶¶ 18-21.
178 See id. ¶¶ 29-32.
examples leave unanswered more systematic questions about employment law’s ability to foster such collective action. Such a systematic account would need to provide theoretical support for employment law’s capacity to perform three core functions. The model would first have to show that employment law can galvanize a group of workers capable of acting collectively. It then would be required to demonstrate employment law’s ability to insulate workers’ nascent collective activity from coercive interference. Finally, the model would have to establish that employment law also can generate successive and more robust forms of organizational and collective activity.

In this Part, working from an array of qualitative and quantitative research on labor organizing specifically and collective action more generally, I build such a theoretical model of employment law’s capacity to galvanize, insulate, and generate collective action.

A. Galvanizing the Collective

As both qualitative accounts of labor organizing efforts and social-psychological research into the related processes of framing and identity construction reveal, the first stage of collective action involves galvanizing a group of workers capable of acting collectively. Such galvanizing work involves two basic functions. First, workers must develop a common understanding of a set of shared workplace problems. Second, workers must build a group identity strong enough to sustain a collective response to these problems. In this section, I offer ways of understanding how employment law can perform these galvanizing functions.180

1. Collective Action Framing

Sociologists and historians of labor have long documented the need for workers engaged in organizing efforts to develop a collective understanding of the problems they face at work and a vision of how those problems can be addressed collectively.181 More recently, and more pertinently, scholars have pointed to the ways in which law can

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180 This is, of course, not a claim that only law can perform these galvanizing functions. It is merely an argument as to how law, and in particular employment law, can do so.

serve as the mechanism through which such problems are identified and through which such solutions are suggested. For example, in describing her experiences directing an immigrant worker center on Long Island, Jennifer Gordon recounts how workers typically viewed abusive workplace practices—including nonpayment of wages and unsafe working conditions—as part and parcel of employment in this low-wage sector of the U.S. economy. But Gordon also describes law’s ability to recast these working conditions. She writes, for example, that when immigrant workers learn that the “pitiful wages” they earn in fact constitute illegal wages, they are more likely to “identify[] what they had lived through as a problem, rather than an inevitable condition of immigrant work.”

Francesca Polletta’s study of southern civil rights organizing in the early-mid 1960s, and Anna-Maria Marshall’s study of sexual harassment, highlight other contexts in which legal rights have been deployed to articulate injustice in this manner.

These authors also describe law’s ability to recast workplace conditions in a manner that calls for collective solutions. Commenting on the workers’ rights class taught as part of her Workplace Project, Gordon writes:

The idea that employers were supposed to be acting differently—that in paying so little and demanding so much they were ignoring a set of established norms, codified as rights—suggested a less individualized, more systemic explanation of the problems immigrant[] workers faced in trying to earn enough money to support themselves and their families . . . . If the problem was systemic, immigrant[] workers would need to respond in kind.

Polletta similarly shows that an injustice diagnosed as the deprivation of an individual legal right can call for a broad menu of responses: “People can widen the scope of rights to encompass new institutional domains, subjects, and enforcement mechanisms.”

These descriptive accounts are clarified by the social-psychological

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182 GORDON, supra note 181, at 171.
184 GORDON, supra note 181, at 171-72 (emphasis omitted).
185 Polletta, supra note 183, at 377. Gordon refers to this as an “opening out” process. GORDON, supra note 181, at 179. The need for organizers to propose a collective solution to workplace problems is certainly not unique to contexts in which the workplace problems are diagnosed according to employment law rights. Indeed, such a need is inherent in nearly all (if not all) forms of worker organizing. See, e.g., RICK FANTASIA & KIM VOSS, HARD WORK: REMAKING THE AMERICAN LABOR MOVEMENT (2004).
literature on “collective action framing.” As David Snow explains, collective action frames are schemata that “assign meaning to and interpret relevant events and conditions in ways that . . . mobilize potential adherents and constituents . . . .”\(^{186}\) Snow accordingly describes collective action frames as performing two core tasks. The first, diagnostic framing, involves identifying a problematic condition as an injustice\(^{187}\) and attributing blame for the injustice to a particular actor.\(^{188}\) The second core framing task, prognostic framing, involves articulating an approach to solving the diagnosed injustice.\(^{189}\) In simple terms, then, frames are a mechanism through which collective diagnoses and prognoses are developed and then disseminated among potential collective action participants.

In the context of workers’ collective action, organizers and activists (and workers themselves) can deploy employment rights statutes as diagnostic frames—that is, as the mechanism through which negative workplace conditions are cast as injustices, and blame for those injustices is attributed to employers. Thus, the FLSA can be used to articulate the low wages paid to an immigrant workforce not as a natural fact of life for garment workers, but as a legal violation and injustice perpetrated by the garment factory’s operators on the workforce. Title VII similarly can recast disparate treatment of Mexican immigrant workers not as an inevitable component of low-wage work in the United States, but as illegal discrimination practiced by the employer on workers. The fact that it is the law—rather than merely the ideology of a union organizer or other activist—that diagnoses these problems as injustice invests the frame with substantially increased power.

As Snow details, moreover, the diagnostic and prognostic


\(^{188}\) See Benford & Snow, Framing Processes and Social Movements, supra note 186, at 616.

\(^{189}\) See id. A third task, derivative of the second, is “motivational framing,” which provides a “‘call to arms’ or rationale for engaging in . . . collective action,” generally relying on contentions of severity, urgency, efficacy, and propriety. Id. at 617.
components of framing work are intimately related, and by diagnosing the workplace problem in need of remedy as a collective injustice, employment law can invite a collective solution. Because the injustices articulated by employment law are generally experienced by a subset of a given workforce (and not by a single employee), the formally individual nature of the statutory rights protected can yield to the experientially collective nature of the injustice diagnosed. That is, while the FLSA and Title VII may offer rights and protections to employees “on an individual and individually enforceable basis,” minimum wage violations and discriminatory employment practices are most often suffered by groups of workers, and so violations of individual employment rights are amenable to a diagnostic frame that articulates these deprivations as collective injustice.

2. Collective Identity Formation

Just as the development of a common diagnosis and prognosis of injustice is prefatory to participation in collective activity, in order for individuals to act collectively they must possess or develop what social psychologists label a “collective identity.” In simplest terms, a collective identity captures “how individuals’ sense of who they are becomes engaged with a definition shared by co-participants in some effort at social change.” Employment rights can serve as the locus around which a workers’ collective identity coalesces.

Gordon, for example, explains how a discourse of workplace rights was instrumental in building a collective identity among the members of her immigrant worker center. According to Gordon’s account, “[r]ights were powerful in crafting a shared identity . . . because they began with the shared conditions under which all members labored.” Polletta’s work similarly suggests that, in the context of Southern civil
rights organizing, the possession and exercise of civil rights, particularly voting rights, became the basis of a collective identity based on rights holding.196 Elizabeth Schneider has shown how individual rights discourse and claimmaking contributed to the development of collective identities within the women’s movement. As she puts it, “[r]ights discourse” provided a mechanism “for individuals to develop a sense of self and for [the] group to develop a collective identity.”197

Bernd Simon’s work provides a useful theoretical framework for examining this dynamic.198 Simon begins from the premise that the self is composed of plural individual and collective identities, and then posits that each of these identities is a composite of “self-aspects”: cognitive categories or concepts including psychological characteristics, physical features, roles, abilities, tastes, attitudes, and category memberships.199 Simon’s primary insight, however, is that any self-aspect that is shared with other people has the potential to define a group membership and thus, ultimately, to constitute the basis for a collective identity.200 So, for example, while being a father may be one component of an individual identity, all those individuals who share this individual self-aspect can come to develop and share the collective identity of “fathers.” Thus, Simon writes, “the same self-aspect . . . can provide the basis for a collective [identity] at one time . . . , whereas at another time it may be construed as simply one component, among others, of the individual [identity].”201

Crucially for our purposes here, the possession of a right can be a self-aspect. That is, an individual identity can be constituted in part by the rights one possesses. So, for example, one can be a person entitled to vote, to speak freely, and to be hired and promoted without regard to his or her religious views. Moreover, because every self-aspect can constitute the “shared attribute around which group members coalesce,”202 rights possession, even “individual” rights possession, can be the basis for a collective identity. We might be collectively, for example, citizens entitled to vote, women entitled to reproductive choice, and workers entitled to minimum wages and equal treatment.

196 See Polletta, supra note 183, at 377, 389-91.
199 See id. at 260. Similarly, Klandermans writes that an individual identity consists of “[a]ll the[] different roles and positions a person occupies.” Klandermans, supra note 192, at 364.
200 See Simon, supra note 198, at 260-61; see also Klandermans, supra note 192, at 364.
201 Simon, supra note 198, at 262.
But when, and under what conditions, will a given self-aspect in fact serve as the basis for such a collective identity? When, in our context, will rights possession become the locus of a collective identity sufficient to galvanize collective action? Sheldon Stryker’s theory of identity salience provides a way of answering these questions. According to Stryker and his colleagues, the identities—both individual and collective—that comprise the self “exist in a hierarchy of salience, such that other things being equal one can expect behavioral products to the degree that a given identity ranks high in this hierarchy.”203 It is contextual factors, moreover, that determine which collective identities are high enough on our salience hierarchies at any given moment, in any given setting, to galvanize action.204 Most relevant here, a shared experience of unjust treatment will increase the salience of the collective identity which is the basis for such treatment.205 Thus, racial, religious, and gender-based oppression have served historically to activate collective identities based around racial, religious, and gender group membership.206 And Simon’s research provides experimental support for the proposition that consciousness of a shared experience of discriminatory treatment increases the salience of the identity that is the target of that discrimination.207

Here, finally, the intersection of identity construction and framing processes becomes apparent: that is, the identification by group members of an experience as a shared injustice often requires framing

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204 For example, all those individuals who reside in a neighborhood share the collective identity of “neighborhood resident.” But, Klandermans observes, the salience of this identity—its relevance to the lived experiences of the individual residents—will generally remain too low to form the basis for collective action. If, however, the local government decides to locate a waste disposal facility on the outskirts of the neighborhood, “chances are that within a very short time the collective identity of the people living in that neighborhood becomes salient.” Klandermans, * supra* note 192, at 364; see also Simon, * supra* note 198, at 270-72; Scott A. Hunt & Robert D. Benford, *Collective Identity, Solidarity, and Commitment*, in *The Blackwell Companion to Social Movements*, * supra* note 186, at 446.


207 See Simon, * supra* note 198, at 264. In Simon’s study, gay men were more likely to identify collectively (and to deemphasize individual intragroup differences) the more directly they experienced differential treatment from heterosexuals on the basis of sexual orientation. See id. at 271.
work. In our context, then, an employer’s violation of employment rights can increase the salience of a workers’ collective identity based around possession of those rights if the statutory violation is experienced collectively as unjust treatment. By diagnosing an employer’s payment of low wages, or her differential treatment of employees based on race, as an injustice practiced on workers collectively, therefore, employment laws can be instrumental to constructing for workers a shared experience of unjust treatment. As such, the successful use of employment law to frame oppressive working conditions as collective injustices can increase the salience of a collective identity based around possession of employment rights.

Before moving on, it is important to observe that reliance on employment law to perform these framing and identity functions creates its own risks for the organizational process. The most significant of these is that law will function to galvanize one particular subgrouping of workers while excluding other groups. So, if a workplace condition is diagnosed as an injustice by virtue of the fact that it constitutes a statutory violation, and that violation affects only certain workers within the workplace, the collective action frame built around the legal violation may function only for those workers who suffer the statutory violation. Similarly, a collective identity built around rights possession and violation may be available only to those workers whose rights are in fact violated.

This risk is only a potential one, however, because we should not assume that workers faced with discriminatory work practices will exhibit only “intragroup solidarity,” or cohesiveness along lines of race, national origin, or gender. Rather, as Noah Zatz argues, workers in

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208 Simon asserts that it is “the experience or construction of common fate (e.g., shared experience of unjust treatment)” that increases the salience of a collective identity. Id. at 264; see also id. at 272 (noting that “highlighting or construing a common fate for its constituency may be one important step each social movement . . . has to undertake to promote collective self-interpretation . . . and thus ultimately participation in collective action”). The “construction” at work in such a process is the framing of the experience—for group members by other participants or activists—as both shared and unjust. Indeed, as Snow and McAdam write, “[f]raming processes that occur within the context of social movements constitute perhaps the most important mechanism facilitating identity construction processes, largely because identity constructions are an inherent feature of framing activities.” See David A. Snow & Doug McAdam, Identity Work Processes in the Context of Social Movements: Clarifying the Identity/Movement Nexus, in SELF, IDENTITY AND SOCIAL MOVEMENTS, supra note 192, at 41, 63.


210 Noah D. Zatz, Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity, 77 IND. L.J. 63, 69 (2002); see generally Mia Giunta, Working-Class People Have a Very Deep Culture Based on Solidarity and Trust, in THE NEW RANK AND FILE 35-36 (Staughton Lynd & Alice Lynd eds., 2000); see also Schultz, supra note 58 (emphasizing the use of law as a
discriminatory work settings can also act according to principles of “intergroup solidarity,” taking steps to combat discriminatory workplace practices aimed at workers of different races, national origins and genders. Moreover, the risk extends only to a particular kind of workplace organizing—namely, organizing based around workers’ status as workers. Organizing based around racial or national or gender identities, or around the deprivation of statutory rights—including minimum and overtime wages—is not threatened by this limitation on employment law’s galvanizing capabilities. Indeed, the campaigns at both Danmar and Phase II featured precisely these latter types of organizational activity.

This observation points to another potential risk inherent in an employment law-based organizing approach. The risk is that the rights provided by employment law will serve to constrain workers’ collective goals—that while a frame offered by employment law might galvanize collective action aimed at securing statutory rights, the same frame will place broader aspirations beyond reach. To be sure, forms of rights-based organizing have been critiqued for precisely this reason, and the risk is, again, a real one. But many traditional workplace-based organizing efforts, including traditional union organizing drives, begin with a discrete—even narrow—goal. At the outset of a union organizing campaign, workers might be focused entirely on better wages, or a safer workplace, or a health insurance policy, or even the removal of a single, particularly abusive manager. Yet successful achievement of these initial, “narrow” goals need not mark the end of the collective efforts or of organizational development. To the contrary, achieving narrow victories can be—as I discuss at greater length in Part C below—the first step in a broader endeavor.

B. Insulating Nascent Organizational Activity

Once workers decide to combat a perceived workplace injustice by

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211 See id. For a recent example from the case law, see Moore v. City of Philadelphia, 461 F.3d 331 (3d Cir. 2006).

212 The success of such organizing—i.e., the ability of workers to secure their collective goals—may vary according to the heterogeneity of the workforce.

213 It is perhaps worth noting here, as Alan Hyde does, that much recent union organizing has “involved workers linked by, and organizing around, a shared ethnic or other group identity.” Hyde, supra note 11, at 411 n.107.

214 See, e.g., Gordon, supra note 88, at 437-40. For an overview, see Ashar, supra note 11, at 1904-11.

215 Or on some combination of such discrete issues. For some examples, see STEVEN HENRY LOPEZ, REORGANIZING THE RUST BELT 40-47 (2004); FANTASIA, supra note 181, at 121-80.
acting collectively, they often must contend with coercive actions
designed to interfere with their efforts. One rough indicator of the
extent of this interference is found in the NLRB’s annual reports on
unfair labor practices. Again, in 2005, the Board found that more than
30,000 U.S. workers faced illegal retaliation for engaging in collective
activity. A similar indicator is Schmitt and Zipperer’s conclusion that
nearly one in five workers who takes an active role in organizing
activity is discharged for doing so.

As noted at the outset of this Article, the NLRA intends but fails to
insulate workers’ collective action from employer interference. The
lack of remedies adequate to deter economic retaliation for organizing
activity, the delays that plague NLRB procedures, the exclusions of
wide sectors of the labor force from NLRA coverage, and the lack of a
private right of action to enforce statutory rights all have contributed to
the NLRA’s inability to protect workers’ efforts to act collectively.

By virtue of their very different remedies, enforcement mechanisms,
and scope of coverage, employment statutes like the FLSA and Title VII
offer distinct comparative advantages over the NLRA when it comes to
insulating workers’ collective action.

With respect to remedies, in place of the NLRA’s “woefully
inadequate” compensatory regime, the FLSA offers workers double
damages for wages lost as a result of retaliation, and several courts have
held that the statute entitles victims of retaliation to punitive
damages. Workers who face retaliation for exercising their Title VII

216 See supra note 34 and accompanying text.
217 See supra note 3 and accompanying text.
218 See generally Weiler, supra note 2, at 1787-95.
rights are entitled to seek not only backpay but also additional amounts as punitive damages, up to certain (per plaintiff) statutory limits.\textsuperscript{220} Further, both statutes provide workers with a private right of action to challenge retaliatory conduct and both make preliminary injunctive relief available.\textsuperscript{221} Finally, although these employment law statutes contain their own exclusions and limitations, their coverage is broader than the NLRA’s in important respects. Thus, while the NLRA generally excludes contingent workers and “knowledge” workers, both the FLSA and Title VII offer protection from retaliation to many workers in these sectors of the labor force.\textsuperscript{222} And while undocumented workers are now effectively excluded from the NLRA, employment laws still offer the hope of protection to these employees.\textsuperscript{223}

The Danmar and Phase II histories demonstrate some of these virtues. In the Danmar example, the FLSA succeeded where the NLRA fails: it provided Arriaga a quick remedy for illegal discharge, thereby saving the campaign to secure overtime pay. And at Phase II, Title VII succeeded where the NLRA never can: the employer paid a heavy financial penalty for interfering with the workers’ collective campaign to secure compliance with their statutory rights.

Recent recoveries in other FLSA and Title VII retaliation cases provide further evidence of the power of these remedial regimes. In \textit{Lambert v. Ackerley}, for example, a group of ticket sales agents collectively opposed their employer’s overtime pay practices.\textsuperscript{224} When the six employees involved in the FLSA demand were discharged, they brought an action under the FLSA anti-retaliation clause and won $4.1 million in punitive damages.\textsuperscript{225} Similarly, the Fourth Circuit recently upheld a half-million dollar award to a single plaintiff discharged for filing an EEOC complaint,\textsuperscript{226} and the plaintiff in \textit{Luu v. Seagate}\textsuperscript{227}
Technology, Inc. recovered $2 million when she was discharged for reporting sexual harassment to her manager.\(^{227}\)

To be sure, there are doctrinal questions that stand as potential limitations to employment law’s ability to insulate workers’ collective action. First, the range of protest activity protected by both statutes is a matter of some dispute. From the time of Title VII’s passage until today, both the EEOC and federal courts have read the statute as extending protection to workers who engage in a wide range of protest activities—including work stoppages—directed at discriminatory workplace practices.\(^{228}\) But, as Jennifer Hunter observes, other courts have adopted a narrower reading of Title VII’s anti-retaliation provision, finding employee behavior unprotected in cases where the employee’s actions are deemed unduly disruptive of the “work of the enterprise.”\(^{229}\) There is also debate among the federal courts of appeals

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228 Title VII’s anti-retaliation clause makes it unlawful for an employer to discriminate against any of his employees “because [the employee] has opposed any practice made an unlawful employment practice by [Title VII].” 42 U.S.C. § 2000e-3(a) (2000). Early decisions by the EEOC construed the anti-retaliation clause as protecting employees who opposed discriminatory work assignments by refusing to perform them—that is, by engaging in a work stoppage to protest discrimination. See, e.g., EEOC Decision No. 74-56, 10 Fair Empl. Prac. Cas. (BNA) 280 (Nov. 16, 1973); EEOC Decision No. 73-519, 1973 EEOC Lexis 5 (June 1, 1973). In EEOC v. Crown Zellerbach, the Ninth Circuit found that Title VII protected a group of African-American employees who formed an employee organization called “The Concerned Black Zellerbach Employees,” picketed the warehouse where they worked along with the campaign headquarters of the Mayor of Los Angeles, sent letters to the board chairman of Crown Zellerbach and to local, state, and federal elected officials, and complained to their employer’s largest customer of “the bigoted position of racism at Zellerbach Paper Company.” 720 F.2d 1005, 1010-13 (9th Cir. 1983). In more recent years, the Seventh Circuit, for example, held that employees who missed work in order to participate in a series of public protests against their employer’s allegedly discriminatory practices were protected from discharge. See Mozee v. Am. Commercial Marine Serv. Co., 940 F.2d 1036, 1040, 1052-54 (7th Cir. 1991). Recent decisions also construe the clause as protecting employees who picket their employer’s business, see Parker v. Philadelphia Newspapers, Inc., 322 F. Supp. 2d 624, 630 (E.D. Pa. 2004); Kipkirwa v. Santa Clara County Probation Dept., No. 96-15393, 1997 U.S. App. LEXIS 9062 (9th Cir. Apr. 21, 1997), communicate with their employer’s customers regarding the employer’s discriminatory practices, see Sumner v. United States Postal Servs., 899 F.2d 203, 209 (2d Cir. 1990), and communicate such complaints to elected officials, see, e.g., Robinson v. S.E. Pa. Transp. Auth., Red Arrow, 982 F.2d 892, 896-97 (3d Cir. 1993).

229 See Jennifer Hunter, Retaliation Protection Under Title VII: From Grassroots Interpretation and Enforcement to Employer Sovereignty 87-92 (2003) (unpublished manuscript, on file with author). These cases do not involve collective action (and none hold that the types of activity engaged in by Phase II workers are unprotected by Title VII). Rather, they generally involve the disclosure of confidential personnel information, see, e.g., Haught v. The Louis Berkman LLC, No. 5:03 CV109, 2006 U.S. Dist. LEXIS 8738, at *1 (N.D. W. Va Feb. 16, 2006); Shoaf v. Kimberly-Clark Corp., 294 F. Supp. 2d 746 (M.D.N.C. 2003); employee dishonesty, see Campbell v. Abercrombie & Fitch, Co., Civ. No. 03-3159, 2005 U.S. Dist. LEXIS 11507, at *1 (D.N.J. June 9, 2005); or what the reviewing court construes as abusive interpersonal behavior, see Matima v. Celli, 228 F.3d 68 (2d Cir. 2000). In Cruz v. Coach Stores, the Second Circuit likewise held that physical violence, ostensibly designed to protest discriminatory practices, finds no protection from Title VII. See Cruz v. Coach Stores Inc., 202 F.3d 560, 566 (2d Cir. 2000). In other instances courts have found that repeated complaints to an employer’s customer about the
regarding the reach of the FLSA’s anti-retaliation clause, and in *Lambert v. Genesee Hospital*, the Second Circuit read the clause as extending protection only to employees who file formal complaints with the Department of Labor or in federal court. Nonetheless, six other federal circuit courts have given the clause a vastly broader reading with four circuits holding that employees’ “assertion of statutory rights” to, e.g., minimum wage or overtime pay, triggers anti-retaliation protection.

Moreover, unlike the FLSA, Title VII has an administrative exhaustion requirement. While courts have allowed private plaintiffs in retaliation cases to seek preliminary injunctive relief—including reinstatement—prior to exhausting administrative procedures, this allowance is a judicially-crafted one and thus subject to doctrinal debate. There are also unsettled questions regarding the remedies available under the FLSA; the range of employees entitled to the employer’s discriminatory practices are unprotected, see *McNair v. Computer Data Systems, Inc.*, No. 98-1110, 1999 U.S. App. LEXIS 1017, at *1 (4th Cir. 1999), and that conducting an internal survey about discrimination is not protected activity, see *Harper v. Metro. Dist. Comm.*, 134 F. Supp. 2d 470, 487 (D. Conn. 2001).

230 The clause makes it unlawful for any person to retaliate against any employee “because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act . . . .” 29 U.S.C. § 215(a)(3).

231 See 10 F.3d 46, 55 (2d Cir. 1993). The *Genesee Hospital* court offered no explanation as to why the statutory language of filing “any complaint” is unambiguously equivalent to filing “formal complaints,” as the court held. Rather, the Second Circuit’s reasoning was based on the contrast between the FLSA language and the language in Title VII’s anti-retaliation clause. The Second Circuit held that the broader “opposed any practice” language in the Title VII clause, which it found to clearly “encompass[] an individual’s complaints to supervisors,” implies that the narrower FLSA language excludes complaints made directly to employers. *Id.*

232 The Eighth Circuit, for example, has held that “Where the immediate cause or motivating factor is the employee’s assertion of statutory rights, the discharge is discriminatory under § 215(a)(3).” *Brennan v. Maxey’s Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975); *see also EEOC v. Romeo Cmty. Sch.*, 976 F.2d 985, 989 (6th Cir. 1992); EEOC v. White & Son Enters., 881 F.2d 1006, 1011 (11th Cir. 1989) (despite the fact that the plaintiffs “did not perform an act that is explicitly listed in the FLSA’s anti-retaliation provision,” the plaintiffs’ “assertion of rights” was protected under the clause); *Brock v. Richardson*, 812 F.2d 121, 123-24 (3d Cir. 1987) (where an employee’s activities are “necessary to the effective assertion of employees’ rights under the Fair Labor Standards Act, [he or she is] entitled to protection”); *Love v. Re/Max of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984) (“assertion of statutory rights” protected).


235 The statute explicitly allows the EEOC to seek immediate injunctive relief in federal court when “prompt judicial action is necessary to carry out the purposes of this Act.” See 42 U.S.C. § 2000e-5(f)(2).

236 See *supra* note 219 and accompanying text.
FLSA’s overtime protections is the subject of dispute; and the statute’s definitions of “employer” have significant but largely untested relevance for the ways in which workers employed in subcontracting arrangements can seek protection from employment laws for their organizational activity.238

As courts resolve these doctrinal issues, they will define the parameters of employment law’s protection for collective action.239 But irrespective of the resolution of these questions, the FLSA and Title VII statutory regimes hold distinct comparative advantages over the NLRA when it comes to insulating workers’ nascent collective activity from employer interference. The provision of private rights of action and the availability of injunctive relief allows workers and their lawyers much greater control over the shape and pacing of procedures to remedy retaliation. And enhanced damages—whether double or punitive—invests employment law with far greater deterrent power than the NLRA possesses. The fact that employment law extends to workers excluded from NLRA coverage implies, of course, that the regime’s insulating capabilities are available to precisely those workers who need them the most.

C. Generating Collective Action

On the account given so far, employment law may appear to be a powerful but truncated version of labor law. That is, statutes like the FLSA and Title VII may be able to galvanize and insulate collective action, but only collective action aimed at achieving the single immediate goal of securing rights granted by statute. Again, for example, the FLSA galvanized and insulated the Danmar workers’ efforts to collectively secure overtime pay. However, should those workers wish to demand wages above the minimum, or a health insurance plan, or a just-cause dismissal policy, they would find no legal shelter in any employment statute.

In this section, I argue that worker organizing and collective action campaigns operate according to self-reinforcing dynamics of success
and failure. That is, in the context of workplace organizing, success breeds success and failure breeds failure. As such, the type of legal protection for the first stages of organizational activity, which the NLRA has proven incapable of offering but which employment law provides, is critical to the success of collective action in the workplace. Moreover, these self-reinforcing dynamics of success and failure imply that by galvanizing and insulating nascent collective activity, law can perform what I will call a *generative* function. That is, a legal regime that facilitates success in the first stages of collective activity can be expected to increase the likelihood that workers will engage in, and succeed at, subsequent and more robust forms of collective action. By the same token, a regime that fails to insulate these nascent stages can be expected to generate a cycle of failure.

Here, again, I draw together a range of literatures—both qualitative and quantitative—to make this argument. I present two bodies of research, one regarding the psychological mechanism of collective efficacy and the other regarding the dynamics of reciprocity, in partial support of these claims. It is important to note at the outset the limitations inherent in relying on research of this sort—particularly experimental social-psychological research—to draw conclusions about workplace organizing. Some of the results I report are derived from game-theoretic experiments, conducted not with workers on the shopfloor but with volunteers in a laboratory. While such experiments suggest important conclusions about how efficacy and reciprocity affect social interaction, they do not tell us definitively whether these dynamics will manifest themselves at work.\(^{240}\) Nonetheless, taken in conjunction with the qualitative studies cited below—and with the appropriate cautions in mind—the dynamics illuminated by these experiments help develop a model of the relationship between individual rights and collective action.

1. Collective Efficacy

Qualitative studies of labor organizing efforts bear out the intuition that workers are likely to undertake collective actions only when they have reason to believe that they can succeed. Accordingly, the studies suggest that successful experiences with small-scale forms of collective activity increase the likelihood that workers will undertake successive, and more difficult forms of collective action. Rick Fantasia’s study of

\(^{240}\) For example, the reciprocity experiments I cite do not reveal how employer interference might (or might not) impact worker behavior. It is possible, for example, that workers otherwise inclined to reciprocate contributions to a collective endeavor might be dissuaded by employer generosity, just as they might be dissuaded by employer retaliation.
the union campaign at Springfield Hospital, for example, reveals that workers’ involvement in small-scale and successful collective acts—what Fantasia calls “mini-insurrections”—increased their willingness to participate actively in full-scale union organizing activities. Fantasia thus concludes that participation in incremental forms of successful collective action gave the hospital workers “a courageousness” that can be “a crucial component of union formation, especially in the face of sharp employer resistance.”

More recently, Mark Steven Freyberg studied unionization at the Dodge Main facility and found that the ultimate success of the campaign was predicated on workers’ participation in incremental collective acts which increased workers’ perceptions of collective efficacy. Similarly, in her study of two contemporary labor movement mobilizations, Rachel Meyer observes that it is necessary for organizers to “make it possible for people to first succeed at small collective actions so that they become aware of their power to make change.”

These accounts are elucidated by theoretical research into the social-psychological mechanism of efficacy. According to Albert Bandura’s seminal work, individuals choose what types of endeavors to undertake, how much effort to put into these endeavors, and how long to persevere “in the face of obstacles or aversive experiences” based on perceptions of their efficacy. Bandura also showed that people learn to assess their efficacy according to their own past accomplishments and by observing the performances of “similar others” engaged in similar activity. Both types of efficacy learning, moreover, operate

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242 Fantasia, supra note 181, at 121, 146.

243 Freyberg concludes that “[a]s collective efficacy fuels successful action, it reinforces feelings of efficacy in actors and encourages the spread of such feelings to non-participants. This in turn, encourages further, more widespread and intense collective acts. Thus collective efficacy and collective action often form a mutually-reinforcing cycle.” Freyberg, supra note 181, at 223.

244 Rachel Meyer, The Irony of Power: Efficacy and Collective Action in Working-Class Struggle 4 (2006) (unpublished manuscript, on file with author). Robert Penney reaches this same conclusion in his study of union campaigns at four hospitals in the late 1990s, reporting the view of the lead organizer on one of the campaigns, that “[w]orkers don’t organize unless they believe they can win.” Robert A. Penney, Organizing the Unorganized: The Construction of Consciousness and Action in Worker Mobilization 96 (unpublished Ph.D. dissertation, University of Michigan, 2002) (on file with author). Thus, Penney finds that “collective action is dependent on the perceived capacity of groups to act and their belief in the possibility of achieving their goals.” Id. at 106-07.


246 Thus, “[e]nactive attainments provide the most influential source of efficacy information because [they] can be based on authentic mastery experiences; [s]uccesses heighten perceived self-efficacy[,] repeated failures lower it.” Id. at 126.

247 Bandura concludes that “[s]eeing similar others perform successfully can raise efficacy
progressively: we develop a belief in our ability to complete increasingly difficult tasks based on our ability—and by observing others’ ability—to complete similar but less difficult tasks. As Bandura puts it, “partial mastery experiences” predict “subsequent performance of threatening tasks that [an individual has] never done before.”248 And, just as perceived self-efficacy influences what people choose to do individually, Bandura also showed that perceptions of collective efficacy influence the range of projects that people undertake collectively.249 As in the context of self-efficacy, moreover, perceptions of collective efficacy are shaped both by an individual’s experience with, and his observations of others’ experience with, similar collective acts.250

Laboratory and field experiments lend support to Bandura’s work.251 Most relevant here, Norbert Kerr has found—applying game-theoretic techniques—that a group’s previous success at solving a collective action problem increases participants’ perception of the group’s collective efficacy, and that these increased levels of perceived efficacy increase the likelihood that participants will contribute to subsequent and more difficult collective endeavors.252 Kerr’s experiment involved a basic investment game,253 in which each participant was told that he or she was replacing a single member of an intact group that had played the game previously. Kerr found that participants who joined groups that had succeeded in reaching the

expectations in observers who then judge that they too possess the capabilities to master comparable activities.” Id. at 126-27.

248 Id. at 128.

249 “Perceived collective efficacy,” Bandura observed, “will influence what people choose to do as a group, how much effort they put into it, and their staying power when group efforts fail to produce results.” Id. at 143; see also ALBERT BANDURA, SELF-EFFICACY 477 (1997).

250 Thus, Bandura concludes that “[p]eople do not take upon themselves what they firmly believe is not within their power to do, [and t]hey weigh heavily their perceived collective efficacy to overcome opposing forces in judging the benefits they are likely to gain and the costs they may incur by their actions.” BANDURA, supra note 249, at 484.


253 In such games, each participant in an n-person group is allotted an endowment of dollars. Each member of the group must decide whether to keep the endowment or invest it. If the participant invests the funds she surrenders them to the experimenter, but if the number of investors exceeds a certain number (the “provision point”) then every group member, including those who invested and those who did not, receives an investment payoff in the form of a financial return. If the provision point is not met, all investments are surrendered and no return is paid.
investment goal in previous rounds reported substantially higher perceptions of their group’s ability to resolve a more difficult round of the investment game than did participants who joined formerly unsuccessful groups. Kerr also found that with increased perceptions of efficacy came a parallel and significant increase in the likelihood that participants would invest in the new and more difficult round of the game.

2. Reciprocity

Scholarly work on collective efficacy and its suggestion that workplace organizing will follow self-reinforcing dynamics of success and failure is supported by recent research into social cooperation and reciprocity. To understand these developments, it is useful to begin with Mancur Olson’s *The Logic of Collective Action*, which, until recently, was the dominant theoretical analysis of individual behavior in collective action settings. According to Olson, because individuals act according to their self-interest in wealth maximization, they will not make the costly contributions necessary to secure public goods, absent externally imposed selective incentives to do so. Rather, individuals will choose to free ride on the contributions made by others. Because other group members are also wealth-maximizers, they also choose not to contribute, and the result, Olson postulated, would be the severe underproduction of collective goods absent external incentives for participation.

Olson’s primary case study was the labor union, and union organizing and participation long have been understood as presenting classic collective action problems. If workers succeed in organizing a union, all covered employees reap the benefits of whatever improvements in wages, benefits, and working conditions come with

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254 Kerr, *supra* note 252, at 220. All participants were told that in the first round of play, six of the ten members of the group to which they had been assigned had decided to invest. Half of the participants were then told that in the first round of play the provision point was five, and thus, that their group had succeeded in earning the investment payoff in the previous round. The other half of the participants were told that in the first round of play the provision point was seven, and thus, that their group had failed to earn the payoff. The participants then played three different versions of the investment game in which the provision point was set at four, eight, and an undisclosed number. In simulations where the second round provision point was set at eight, 96% of participants from the previously successful groups contributed, while only 58% of participants from the previously unsuccessful groups did so. Id. at 221 fig. 7.5; see also Scott T. Allison & Norbert L. Kerr, *Group Correspondence Biases and the Provision of Public Goods*, 66 J. PERSONALITY & SOC. PSYCHOL. 688, 696 tbl.6 (1994).

255 See *supra* note 252, at 220.


257 See id.
organization. But there are substantial costs involved in supporting unionization (most obviously the high risk of employer retaliation), particularly in the early phases of an organizing campaign. As such, Olson’s *Logic* predicts that individual workers will choose not to participate in union efforts and instead to avoid the costs of participation by free riding on the efforts of others, hoping to reap the benefits that accrue to all regardless of their participation in the organizational work.

Recent social science data, however, suggests potential flaws in Olson’s logic. In collective action settings, this data suggests, individuals do not act purely as self-interested wealth-maximizers. Rather, people act according to what Dan Kahan has named the “logic of reciprocity.” That is, individuals base the decision about participating in collective action for the production of public goods on the decisions that other group members make. People reward participation by their fellows by participating themselves; people punish

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258 The basic failure of Olson’s *Logic* is suggested by laboratory experiments based on the Prisoner’s Dilemma (or PD). In these experiments, two participants—A and B—are both allotted $10. Each participant can either keep the $10 or transfer the money to the other participant. If either A or B transfers her money, the experimenter triples the transferred amount such that the recipient receives $30 from the transfer. In the experiment, A and B must decide simultaneously what to do: if they both transfer their money to the other person, they will both end up with $30; if they both keep their initial allotment of $10, they will both end up with $10. Crucially, whatever the other subject does, it is always in each subject’s material self-interest to keep her $10. Accordingly, Olson’s hypothesis would predict that A and B would keep their own $10, even though both would be better off if both transferred their money. This is not, in fact, what happens. As Ernst Fehr and Urs Fischbacher report, in one-shot PD experiments, cooperation rates are often between 40 and 60%. That is, A or B transfers her $10 to the other subject, despite the lack of materially self-interested reasons for doing so, between four and six times out of ten. See Ernst Fehr & Urs Fischbacher, *The Economics of Strong Reciprocity*, in *Moral Sentiments and Material Interests: The Foundations of Cooperation in Economic Life* 165 (Herbert Gintis, Samuel Bowles, Robert Boyd & Ernst Fehr eds., 2005).

259 Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71 (2003). In his earlier, pathbreaking book, Robert Axelrod showed that a “tit for tat” strategy was the most successful approach to repeat plays of the prisoner’s dilemma game. See ROBERT AXELROD, *The Evolution of Cooperation* (1984). A tit-for-tat strategy is a form of reciprocity: it involves cooperating in the first round of the PD game, and then doing whatever the other player does on each subsequent move. See *id.* at 20. Axelrod’s contribution is establishing that this form of reciprocal behavior is the optimal wealth-maximizing approach to indefinitely-repeating rounds of PD-type interactions. See *id.*; cf. Kahan, supra, at 73 (“If a rational wealth maximizer anticipates that she will be engaged in repeat transactions with another identifiable agent . . . then her best strategy is to reward cooperation with cooperation and defection with a ‘tit for tat’ pattern.”). More recent research, like that cited here, reveals reciprocal behavior even in one-shot or finitely-repeated interactions, and even when no “economic” gains can be expected from the reciprocal acts. See *infra* text accompanying notes 262 through 268; see also Herbert Gintis, Samuel Bowles, Robert Boyd & Ernst Fehr, *Moral Sentiments and Material Interests: The Foundations of Cooperation in Economic Life*, supra note 258, at 3-9; Fehr & Fischbacher, *supra* note 258, at 153. Some further insight into this distinction can be found in the literature on altruistic behavior in primates. See Marc D. Hauser, M. Keith Chen, Frances Chen & Emmeline Chuang, *Give Unto Others: Genetically Unrelated Cotton-Top Tamarin Monkeys Preferentially Give Food To Those Who Altruistically Give Food Back*, 270 PROC. ROYAL SOC. LONDON 2363 (2003).
the failure to contribute by withholding their own contributions. As Kahan writes, “Under the reciprocity theory . . . [i]ndividuals prefer to contribute if they believe others are inclined to contribute, but to free ride if they believe others are inclined to free ride.” The logic of reciprocity accordingly suggests that the success of collective action depends heavily on group members’ observations and perceptions regarding the willingness of other group members to participate in collective acts.

Two laboratory experiments illustrate the operation of the logic of reciprocity in ways pertinent here. First, Armin Falk, Ernst Fehr, and Urs Fischbacher conducted an experiment based on the “moonlighting game,” a two-player, two-stage game that functions as follows. At the outset of the experiment, players A and B are given tokens. In the first stage of the game, player A can choose to do nothing, to take tokens away from B, or to give tokens to B. In the second stage, after B is aware of what A has chosen to do in the first stage, B chooses an action of her own: B can do nothing, take tokens from A, or give tokens to A. If B chooses to sanction A by taking tokens from her, the sanction costs B the same number of tokens she takes from A.

If Olson’s logic is correct, we would predict that A will not give tokens to B in the first stage of the game, because A only incurs costs by doing so. More important, according to Olson’s logic we would predict that in the second stage of the game B will neither reward nor punish A for A’s actions in the first stage, because any other choice would be costly to B. The logic of reciprocity, on the other hand, predicts that when A gives to B in the first stage of the game, B will give to A in the second stage despite the personal costs B incurs for such a move.

Falk, Fehr, and Fischbacher found that, consistent with the logic of reciprocity, when A gave B tokens in the first stage of the game, B reciprocated by awarding A tokens in the second stage. In fact, average and median rewards from B to A were increasing in the level of transfer from A to B: the more that A gave to B in the first stage of the game, B reciprocated by awarding A tokens in the second stage.

260 Kahan, supra note 259, at 74. As Kahan puts it: “Individuals who have faith in the willingness of others to contribute their fair share will voluntarily respond in kind. And spontaneous cooperation of this sort breeds more of the same, as individuals observe others contributing to public goods and are moved to reciprocate.” Id. at 72. The result is a “self-sustaining atmosphere of trust.” Id.

261 Thus, “[i]f people believe that others cooperate to a large extent, cooperation will be higher compared to a situation where they believe that others rarely cooperate.” Fehr & Fischbacher, supra note 258, at 167.


263 Falk, Fehr, and Fischbacher ran 112 rounds of the game in two treatments. In the first treatment, A chose her course of action, and B was aware that A’s choice was intentional. In the second treatment, A’s choices were assigned by chance, and B was aware that A’s choice was not intentional. See id. at 19 (tbl.A1).
game, the more that B rewarded A in the second stage, even though each token that B gives to A results in B’s loss of that token. Similarly, the more tokens that A took from B in the first stage, the more B was willing to sanction A in the second stage, even though each token that B takes from A results in B forfeiting one of her own tokens.264

The second pertinent experiment was conducted by Fischbacher, Fehr, and Simon Gächter and can be called the “contribution table” experiment.265 This experiment involved a standard public goods game. In such games, each of four individuals decides how to spend, for example, $5. They are told by the experimenter that they can keep the money or invest it in a collective project. The experimenter then collects contributions from each player (without any player knowing what the others have contributed), doubles the contributions, and then divides the total equally among all four participants. Standard assumptions of wealth-maximizing behavior predict complete free riding by all subjects.266

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264 In the second treatment, where A’s choices are assigned by chance, B’s rewards and sanctions of A were much weaker. In fact, in this treatment, median behavior did not “show any reciprocal pattern but completely coincides with the prediction of the self-interest model.” See id. at 12. That is, when A did not intend to give tokens to B, B did not reciprocate by rewarding A; and where A did not intend to take from B, B did not sanction A. Both sets of results are captured graphically below. Here, the “I-treatment” indicates the first, or “intentional” treatment; the “NI-treatment” indicates the second, “non-intentional” treatment:

**Figure 1:** Rewards and sanctions of players B dependent on decisions of players A

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266 The group as a whole is best off if everyone contributes his or her full $5—in which case the total investment yield is $40 and each participant ends up with $10. But while each $1 contributed results in $2 for the group, each $1 investment results in a $0.50 loss for the
In the Fischbacher, Fehr, and Gächter experiment, each of four individuals was given twenty tokens, and told that he or she could keep them or invest them in the collective project. The participants were asked to make two kinds of contribution decisions. The first was the “unconditional contribution”: the standard decision about how many tokens to invest without knowledge of other participants’ investment decisions. The second decision was the “contribution table” decision: here, participants filled out a table in which they indicated how much they would contribute to the collective project based on each of the twenty-one possible average contribution levels of the other group members. After eleven iterations, the researchers found that in the “contribution table” game the mean contribution was clearly increasing in the average contribution of other group members: the greater the postulated investment level of other participants, the more each participant would choose to invest in the collective project even though such investments had a negative economic return for the investing participant.

Laboratory experiments of this sort provide only limited insight into the operation of real-world collective action dilemmas, but the results here are suggestive of a basic but important dynamic. In these studies, and others like them, cooperation and participation in the first round of a collective interaction or endeavor increases the likelihood of cooperation and participation in the next round. Similarly, defection and lack of participation in the initial round results in a decrease in the likelihood of participation in subsequent rounds.

If these experimental results are correct, and if the dynamics they describe are operant in the context of workplace organizing, we can contributor no matter what the other participants do. Thus, according to standard assumptions, each individual would prefer to keep her $5, allow the others to invest their money, and reap whatever public benefits flow from the contributions of others. See, e.g., John O. Ledyard, Public Goods: A Survey of Experimental Research, in JOHN H. KAGEL & ALVIN E. ROTH, THE HANDBOOK OF EXPERIMENTAL ECONOMICS 111, 112 (1995).

The game was played only once with each set of participants to ensure that the contribution tables reflected pure preferences and were not impacted by considerations of reputation formation.

Field experiments reflect similar findings. As Kahan reports, reciprocal behavior has been found in the decisions whether or not to give to charity, to litter, and to wait in line. See Kahan, supra note 259, at 74 & nn.5-7.

One recent study shows workers exhibiting social preferences in the workplace. In determining their own productivity levels, workers took into account the impact of their performance on other workers’ pay. This study did not, however, specifically test the prevalence of reciprocity dynamics among workers. See Oriana Bandiera, Iwan Barankay & Imran Rasul, Social Preferences and the Response to Incentives: Evidence from Personnel Data, 120 Q.J.
expect participation by workers in early phases of collective action to increase the likelihood that other workers will participate in subsequent phases of organizational effort. This is particularly true where the early stages of collective action result in benefits that accrue to workers who did not participate in those stages. In that setting, the logic of reciprocity suggests that non-participating workers will be inclined to reciprocate their participating coworkers’ efforts by contributing to subsequent organizational and collective activity. Together, then, the efficacy and reciprocity literatures suggest tentative but important conclusions about employment law as labor law. First, the nascent phases of workplace organizing are critical. Success in these first stages of collective action sets in motion social-psychological dynamics that can lead to further success, while failure at these initial moments can lead to opposite dynamics and the end of organizational efforts. Thus, and second, if law is able to galvanize the first stages of collective activity and insulate that activity from coercive employer interference, law, by allowing the logics of reciprocity and collective efficacy to take root, may be capable of generating subsequent and more robust forms of collective action even absent additional legal guarantees. In this light, employment law’s ability to galvanize and insulate nascent organizational activity implies that the regime is not as truncated a form of labor law as first appears.

ECON. 917 (2005). Fehr, Gächter, and Kirchsteiger report reciprocal behavior, including evidence of strong reciprocity, in experiments on wage setting by employers and effort determinations by employees. See Ernst Fehr, Simon Gächter & G. Kirchsteiger, Reciprocity as a Contract Enforcement Device: Experimental Evidence, 65 ECONOMETRICA 833 (1997).

This outcome, of course, is precisely what occurred at Danmar and Phase II: in both campaigns, the collective efforts of a relatively small number of workers resulted in substantial financial recoveries for a much greater number of employees, many of whom did not participate in the first round of collective action.

The focus of this Article is employment law’s ability to facilitate—to galvanize, insulate, and generate—workers’ collective action. By revealing these capabilities, however, the discussion here also provides a surprising insight into a potential course for improving enforcement of employment law’s own substantive mandates. Namely, a burgeoning literature reveals that by lowering information costs, aggregating preferences across workers, and reducing the marginal costs of claiming statutory protection, a collective agent can increase the likelihood of statutory enforcement. See generally Weil, Individual Rights and Collective Agents, supra note 22; cf. Morantz, supra note 22. Accordingly, to the extent that it can be deployed to facilitate collective action, employment law offers a means to close its own “enforcement gap,” as the Danmar and Phase II campaigns illustrate. A full discussion is beyond the scope of this Article but warrants further exploration.

Also important to note is the dynamic nature of a hydraulic development of this sort. If workers and their lawyers continue to rely on employment law as a substitute form of labor law, we should expect to see increasing, and increasingly sophisticated, resistance to such a strategy by employers. It is too early to predict how these dynamics will unfold, but it is certainly plausible that as workers, for example, press to expand the scope of the FLSA and Title VII anti-retaliation provisions, employers will argue for a more restrictive reading of those clauses. See supra text accompanying notes 216-227.
CONCLUSION: TOWARD A “GREAT TRADE” IN LABOR LAW REFORM?

The National Labor Relations Act’s failures have left the traditional legal channel for workers’ collective action blocked. Unable to find an outlet through the NLRA, workers and their lawyers have begun turning to employment law as an alternative pathway for their organizational efforts. In the shadow of a dysfunctional NLRA, existing employment laws like the FLSA and Title VII have the potential to facilitate collective action among that segment of the workforce, and for that range of workplace issues, encompassed by the substantive rights employment law grants. Taking just the two statutes I have used as examples in this Article, moreover, the remarkable breadth and depth of statutory violations suggest that employment law holds this promise for a substantial proportion of the nation’s employees.273 DOL surveys, for example, report that 60% of nursing homes and 100% of poultry processing facilities nationally are out of compliance with the FLSA,274 and recent litigation involving overtime violations paints a similar picture. In January of 2007, for example, Wal-Mart agreed to pay more than $33 million to resolve FLSA overtime violations involving 86,680 workers.275 With respect to Title VII, the EEOC received more than 30,000 race-based charges and more than 24,000 sex-based complaints in 2004,276 and research suggests that the number of complaints filed

273 The FLSA protects workers who assert that their employer has violated the Act, and there is no requirement that an actual violation occur before the anti-retaliation clause takes effect. See, e.g., Sapperstein v. Hager, 188 F.3d 852, 857 (7th Cir. 1999). Similarly, Title VII’s opposition clause requires that employees demonstrate a “reasonable belief” that the opposed practice was unlawful, not that the employer actually violated the statute. See, e.g., Benoit v. Tech Mfg. Corp., 331 F.3d 166, 174-75 (1st Cir. 2003); Trent v. Valley Elec. Ass’n, Inc., 41 F.3d 524, 526 (9th Cir. 1994). However, some decisions suggest a trend toward narrowing the range of beliefs considered reasonable for purposes of this test. See, e.g., Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001); see generally Hunter, supra note 229, at 87-92.


dramatically under-represents the extent of statutory violation.\textsuperscript{277} It is also relevant that existing employment laws extend protection to many workers whom the NLRA has failed most completely, and whom traditional unions have been almost completely unable to reach. For example, one researcher estimates that American labor unions represent only 0.2\% of all sub-minimum wage workers.\textsuperscript{278}

But the key to employment law’s ability to function as labor law—its provision of and robust protection for substantive workplace rights—also signals a substantial limitation. Because existing employment laws can perform their galvanizing, insulating, and generative functions only in contexts where employees’ initial goal is the vindication of a statutory right, all those workplace issues not specifically dealt with by statute are outside the law’s reach. Again, extant employment law offers no protection, for example, to workers whose initial organizing efforts are directed toward securing a wage above the minimum, health insurance, or a just-cause dismissal policy.

Nonetheless, the implications of this discussion extend beyond the promises and limitations of existing employment statutes and invite an inquiry into the best course for labor law reform. Primarily, employment law’s capabilities suggest a means to foster collective action more effectively, and they raise the question of how labor law might be reordered to harness the generative capacities identified here.


More broadly, employment law’s capabilities raise the possibility for, and encourage future research into, what I will call the “great trade in labor law reform.”

The conceptual premise for this “great trade” is that the NLRA commits labor law to two projects. The first project—which has been the focus of this Article—is a constitutive one, designed to foster the collective organization of workers. The second project is relational, regulating the interactions between workers and management. So, not only does the NLRA intend to foster worker organizing, it mandates that employers bargain with labor organizations once they form.279 The statute also defines the forms of worker organizations entitled to (and excluded from) this bargaining mandate, delineates the range of subjects over which employers and workers must bargain, establishes the moments at which such negotiations can and cannot take place, and dictates the ways in which employers can involve themselves in organizations of their own employees.280

This degree of regulatory intervention has injected a series of rigidities into U.S. labor relations. Perhaps most obviously, the NLRA is now mismatched to the production systems and human resource models that U.S. firms have developed in response to the globalization of product and labor markets.281 For example, the NLRA’s prohibition on non-union forms of labor-management committees—drafted to ban the company unions prevalent in the mid-1930s—now makes illegal many of the work systems employers have adopted in order to achieve productive flexibility.282

In the great trade, federal labor law would be redesigned to fulfill labor law’s first, constitutive project far more effectively. Following the model of employment law as labor law, this new regime would operate by galvanizing and insulating the early stages of collective action in order to set in motion dynamics of efficacy and reciprocity that can generate subsequent organizational development. Such a new labor law might, like the NLRA, offer workers a broad statutory right to act collectively to improve their work lives. Or the new regime might

280 See, e.g., Dick’s Sporting Goods, NLRB Advice Memorandum, Case 6-CA-34821 (2006) (construing statute as mandating bargaining only with majority unions); Majestic Weaving Co., 147 N.L.R.B. 859 (1964) (prohibiting pre-recognition bargaining); 29 U.S.C. § 158(a)(2) (proscribing certain forms of employer “interfer[ence]” with labor organizations); Electromation, Inc., 309 N.L.R.B. 990 (1992) (construing statutory proscription on managerial involvement in labor-management committees); Stone, supra note 2, at 119-22, 124-26, 206-16; see generally Barenberg, supra note 5.
282 See, e.g., Barenberg, supra note 5, at 879-93; Stone, supra note 2, at 87-119.
expand the range of substantive, enumerated rights around which workers have a protected right to organize.\textsuperscript{283} In either case, the new regime would protect the right to collective action with employment law remedies: private rights of action coupled with the availability of preliminary injunctive relief and robust damages. The regime would also deploy other mechanisms to engender reciprocity and efficacy, including expanded opportunities for communication among workers.\textsuperscript{284}

If this new approach improves labor law’s ability to generate collective and organizational activity, the question is whether the regime might then scale back the type of regulation that has defined labor law’s second project for the last seventy years. By more successfully fostering workers’ collective action, that is, might the new labor law leave to the strengths and interests of the respective parties a large swath of issues currently regulated by statute? Broadly, might we place outside of labor law’s reach, for example, many of the ways in which labor and management interact once workers have organized? Or the permissible content and timing of labor-management negotiations? Or the structures through which non-union employers and employees can deal with one another? Or the form that such worker organizations must take?

Substantively, such a trade has the potential to restore flexibility to labor-management relations while reviving protection for workers’ efforts at self organization. And, pragmatically, the trade would offer something to both “sides”: workers would get a law that more effectively fosters collective action, while management would get a more tailored labor law regime.

But the work of developing and assessing this new model remains to be done. We do not yet know enough to predict, for example,

\textsuperscript{283} As I note below, many questions remain to be answered. One fundamental design issue is whether, in such a great trade, workers would be granted a general right to organize, \textit{a la} § 7 of the NLRA, or an expanded—but nonetheless limited—set of substantive employment standards around which they had the right to act collectively. If the new regime follows the NLRA model and offers workers a protected right to engage in collective action around whatever issues \textit{they} deem appropriate (subject to a reasonableness requirement of some sort), the regime would be far more expansive than one that limits protection to issues identified by statute. But it is also possible that the galvanizing role played by law—which I describe above—depends in large part on the provision of a \textit{substantive} right, and thus reliance on a general right to organize would leave this regime less capable of galvanizing collective action. On the other hand, expanding the range of substantive employment issues protected by statute may be neither politically feasible nor desirable. Either choice would involve costs and benefits, and resolution depends on further investigation.

\textsuperscript{284} Although reciprocal behavior depends—at bottom—on the opportunity for interaction between individuals engaged in a collective endeavor, see Kahan, \textit{supra} note 259, the NLRA provides employees only limited opportunities to communicate with one another. See, e.g., Barenberg, \textit{supra} note 5, at 879-93; \textit{Stone, supra} note 2, at 87-119. By expanding communication opportunities, therefore, generative labor law could increase the possibilities for reciprocity among workers.
whether the generative capabilities that I have identified would in fact lead to the development of “cohesive worker organization[s] capable of effective representation of employee interests.” 285 The statutory mechanisms necessary to build such a regime require investigation, and questions concerning the law’s reach are also unresolved: this Article has stressed the importance of the early stages of collective activity, but I have not yet addressed the specific level of organizational development that workers should achieve before the law can stand down. And there remain questions of institutional design, including what role the NLRB would play in such a labor law, and what place state and local law should have in the new regime. 286

These unresolved questions—inherent in a legal reordering of this kind—should not dissuade us from the endeavor. To the contrary, given the clear pathologies of the National Labor Relations Act and the promise of the regime I have outlined here, resolution of such questions deserves to be the focus of future scholarship.

285 Weiler, supra note 35, at 34.
286 As I have suggested elsewhere, one promising approach is an experimentalist one in which the NLRA is replaced with a federal generative labor law, while state and local governments along with private parties are authorized to experiment with other components of labor policy. See Sachs, supra note 7, at 394-97.