

THE RIGHT TO IMPROVISE IN LOW-WAGE WORK

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The resurgence of strikes in the non-union fast food and retail sectors has created unprecedented momentum for increases in state, local, and company-specific minimum wages. The once fantastical demand for a \$15 an hour wage floor has been legislated into life in two states, four major cities, and counting. Early work, drawing from organizational studies, identified “improvisation” as the theoretical engine of the walkouts, and while that strategy remains, the ground has since shifted. Today’s strikes are no longer just about McDonald’s or Walmart but low-wage jobs generally, from child care, to adjunct teaching, to security, and beyond. This Article tracks this ambitious next step and asks the critical question of whether improvised resistance can play a foundational and widespread role in workplace advocacy. The answer is “yes”—but only if the law lets it.

Workers improvise when they trust each other, and they trust each other when they can talk to each other in relaxed settings. At work, and under longstanding labor law, that means break time. But work changed and the law did not. Today’s low-wage service economy is nothing like the post-World War II industrial age when the main law governing workplace relationships was established. A prime consequence is the end of opportunities to informally hang out on the job—that means less talk, less trust, and a diminished potential of improvisation arising organically.

This Article argues that protecting the right to improvise in low-wage work requires reform of the labor law super-principle that “working time is for work” and nothing else. In 2017, working time is often the only time on the job, so employees must be empowered to interact freely right there and then. Two specific changes are proposed. First, workers should be allowed to chit-chat—about any topic—in the midst of assigned tasks. While talking while working might seem like a productivity menace, multitasking research suggests the opposite. Second, labor law should carve

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out space for workers to take “micro-breaks,” short concerted worktime stoppages that impact production only modestly. Both changes are possible through existing precedent and without amendment to the National Labor Relations Act.

TABLE OF CONTENTS

INTRODUCTION	961
I. THE STRATEGIC EVOLUTION OF IMPROVISATIONAL UNIONISM.....	968
A. <i>The Rise, Results, and Ripples of Improvisational Unionism</i>	968
B. <i>Outsourcing Improvisation: Fo(u)r Fifteen and Beyond</i>	971
1. Fight for \$15 and the Unification of Low-Wage Work.....	971
2. Viral Marketing.....	975
3. From Walmart and Fast Food to Anywhere and Everywhere	976
C. <i>Improvisation as the Future of Workplace Activism</i>	980
1. Fight for \$15 and April 14, 2016.....	984
2. Uber	985
3. Social Media	986
4. Going Forward	988
II. THE RIGHT TO IMPROVISE: LEGALLY, NORMATIVELY, AND THE ESSENTIAL ISSUE OF ACCESS	989
A. <i>The Right to Improvise Legally: Labor Law’s Improvisatory Roots</i>	989
B. <i>The Right to Improvise Normatively: In Defense of a Little Chaos</i>	992
C. <i>The Right to Improvise: The Essential Issue of Access</i>	998
1. <i>Republic Aviation</i> and “Working Time Is for Work”	999
a. The Importance of Talk.....	1001
b. Improvisation’s Oxygen: From Hanging Out to Trusting to Yes-Anding	1003
2. Hanging Out at Work: Theory, History, and Practice	1005
a. The World of <i>Republic Aviation</i>	1006
b. Today.....	1008
III. TOWARD AN ACCESSIBLE RIGHT TO IMPROVISE: REVAMPING A LABOR LAW SUPER-PRINCIPLE	1017
A. <i>Working Time Is for Work—And Talk</i>	1017
1. A Slogan Broken in Theory.....	1018
2. A Slogan Broken in Practice.....	1022
3. Preserving the Principle.....	1025
B. <i>Working Time Is for Work—And Breaks</i>	1030
1. Micro-Breaks as Mutual Aid.....	1031

2. The Property Problem	1035
3. Narrower Alternatives.....	1038
C. <i>An Imperfect but Democratizing Fix</i>	1039
CONCLUSION.....	1040

INTRODUCTION

In 2012, the U.S. labor movement took a sharp turn. That fall, workers at Walmart and in the fast food industry suddenly walked away from their jobs in a series of nationwide single day strikes for higher wages and, in some cases, union rights.¹ The events forced a reappraisal of what unions usually do (organize employers one-by-one)² and what workers usually don't (walk-out).³ The strikes also sparked a new and growing line of labor law scholarship that categorizes and considers the implications of the approach.⁴

One of the most recent efforts argued that the speed and experimentalism of the strikes represented an embrace of "improvisation," an everyday term that is also studied empirically in the

¹ See, e.g., Josh Eidelson, *The Great Walmart Walkout*, NATION (Dec. 19, 2012), <https://www.thenation.com/article/great-walmart-walkout> [hereinafter Eidelson, *Walmart Walkout*]; Josh Eidelson, *In Rare Strike, NYC Fast-Food Workers Walk Out*, SALON (Nov. 29, 2012, 6:30 AM), http://www.salon.com/2012/11/29/in_rare_strike_nyc_fast_food_workers_walk_out.

² See Steven Greenhouse, *How to Get Low-Wage Workers into the Middle Class*, ATLANTIC (Aug. 19, 2015), <http://www.theatlantic.com/business/archive/2015/08/fifteen-dollars-minimum-wage/401540> [hereinafter Greenhouse, *Low-Wage Workers*] (describing the varieties of new tactics at play in the attempt to unionize an entire industry of franchised employers); Eidelson, *Walmart Walkout*, supra note 1 ("Labor strife at Walmart is nothing new. But in the retail giant's half-century of existence, it's never looked like this."). For a description of standard union organizing tactics, see Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 313, 348-55 (2012). Some unions have experimented with organizing multiple employers in the same industry through contractual agreements. RICK FANTASIA & KIM VOSS, *HARD WORK: REMAKING THE AMERICAN LABOR MOVEMENT* 134-50 (2004).

³ JAKE ROSENFELD, *WHAT UNIONS NO LONGER DO* 89-90 (2014) (quantifying U.S. strike decline); see also Max Fraser, *Can the One-Day Strike Revive the Labor Movement?*, DISSENT, Winter 2014, <https://www.dissentmagazine.org/article/can-the-one-day-strike-revive-the-labor-movement> (attributing press attention to the "unfamiliarity of the tactic these fry-guys and burger-flippers were using: they were striking! After all, who actually goes on strike anymore?").

⁴ See, e.g., Marion Crain & John Inazu, *Re-Assembling Labor*, 2015 U. ILL. L. REV. 1791, 1838-46; Michael C. Duff, *Alt-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. U. L. REV. 837, 837-39 (2014); Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277, 279-80 (2015); Heather M. Whitney, *Rethinking the Ban on Employer-Labor Organization Cooperation*, 37 CARDOZO L. REV. 1455 (2016).

academic discipline of organizational studies.⁵ Drawing heavily from comedy and jazz, improvisation researchers have shown that unplanned actions and reactions⁶ can facilitate personal and even institutional change.⁷ Something about flash decision-making, it seems, transforms observations, experiences, and intuitions in ways that can creatively cut through hide-bound bureaucracies and path dependencies.⁸

According to scholars, improv's magic traces back to a relational principle known as "yes-and."⁹ To yes-and is to accept whatever comes along ("yes!") and enthusiastically build on it ("and!").¹⁰ The theory behind so-called "Improvisational Unionism," then, is that workers can generate power by saying "yes" to workplace slights and grievances as opportunities to resist in unexpected ways, in the moment.¹¹ Because the research assumes that yes-anding can become intuitive, like a second

⁵ See generally Michael M. Oswalt, *Improvisational Unionism*, 104 CALIF. L. REV. 597 (2016).

⁶ Improvisation's essence is unplanned action. As Stephen and Martha Tyler describe it, improv "is the negation of foresight, of planned-for, of doing provided for by knowing, and of the control of the past over the present and future." Stephen A. Tyler & Martha G. Tyler, *Foreword* to BRADFORD P. KEENEY, *IMPROVISATIONAL THERAPY: A PRACTICAL GUIDE FOR CREATIVE CLINICAL STRATEGIES*, at ix, x (1990). "The word improvisation itself is rooted in the word 'proviso' which means to make a stipulation beforehand, to provide for something in advance, or to do something that is premeditated." Karl E. Weick, *Improvisation as a Mindset for Organizational Analysis*, 9 ORG. SCI. 543, 544 (1998). Adding "im" provides a meaning that is "the opposite of proviso." *Id.*

⁷ See Mary M. Crossan, *Improvisation in Action*, 9 ORG. SCI. 593, 593 (1998) (describing improv as "a technique to enhance the strategic renewal of an organization"); Taryn Luna, *Improv Asylum Offers Lesson for Corporate Clients*, BOS. GLOBE (May 14, 2013), <https://www.bostonglobe.com/business/2013/05/13/improv-asylum-uses-stage-skills-help-businesses-improve-communication/QjdzS2MkpEAMIR9GqazZEJ/story.html>; Seth Stevenson, *Getting to "Yes, And"*, SLATE (Mar. 30, 2014, 9:00 PM), http://www.slate.com/articles/business/crosspollination/2014/03/improv_comedy_and_business_getting_to_yes_and.html.

⁸ This points to one of the more popular definitions for improvisation itself. See Weick, *supra* note 6, at 544 (defining improvisation as "reworking precomposed material . . . in relation to unanticipated ideas conceived, shaped, and transformed under the special conditions of performance"); see also Dusya Vera & Mary Crossan, *Improvisation and Innovative Performance in Teams*, 16 ORG. SCI. 203, 205 (2005) (emphasizing "improvisation as a conscious choice . . . [that] may be an option considered in advance, as when firms have formal or informal norms enabling people to depart from routines at certain times to come up with something new").

⁹ Crossan, *supra* note 7, at 596 ("Improvisers would say that the principle of 'yes-anding' is at the heart of improvisation.").

¹⁰ *Id.* at 596-97 ("[Yes-anding] means that individuals accept the offer made to them and build on it. It is a simple concept, but challenging to implement.").

¹¹ Oswalt, *supra* note 5. Strikes are one example, but snap resistance can also include lesser forms of activism, like a "march on the boss." See Chris Brooks, *Volkswagen Workers Celebrate Election Win, but Question Union's Partnership Strategy*, LABORNOTES (Dec. 5, 2015), <http://labornotes.org/2015/12/volkswagen-workers-celebrate-election-win-question-unions-partnership-strategy> (reacting to an assembly line acceleration by going "as a group to confront the manager in the Human Resources department").

nature,¹² an implication of the approach is that where the improvisational spirit takes hold, strikes and other forms of flash resistance are likely to continue.

And sure enough, from today's vantage, the walkouts have picked up steam and, importantly, victories. As of mid-2016, two large states and four major cities have enacted Walmart and fast food workers' central demand, a \$15 minimum wage.¹³ Tucked within that timeline, however, is a strategic shift that has received almost no attention and that the original research on workplace improvisation did not consider. For over two years, the strikes proceeded with little advance notice, were promoted by geographically specific groups, and focused on one employer and one industry. In 2015, all of that changed. An April strike was announced months in advance and was preceded by dozens of small but showy lead-up actions calling out for others to join in, anytime. The previously disparate groups had coalesced under a single banner, "Fight for \$15." Most prominently, the targets had shifted. What began as two parallel campaigns against Walmart and fast food was now a more unified fight against low-wage work writ large, with the goal, apparently, of spreading or "outsourcing" improvisational resistance to anyone, in any industry, at any job interested in taking a stand by striking for a day—even if "Fight for \$15" had no way of being in touch with them directly. It seemed, in other words, like the improvisational strategy was not just maturing, it was changing the game.

This new, radically expanded field of play is undeniably ambitious, upping the potential and stakes of the strikes considerably. It also raises questions, the most obvious of which goes to viability. Forty-two percent of working America makes less than \$15 an hour. Without tens of thousands of on-the-ground organizers to encourage and assist, is it

¹² Professionals in the creative arts, in particular, refer to a reliance on improvisation in everyday life. See, e.g., RACHEL DRATCH, *GIRL WALKS INTO A BAR* . . . 29 (2012) ("Yes And' would serve me well, not only onstage but offstage too. Without my realizing it, 'Yes And' would contribute to one major life event far down the road . . ."); STEPHEN NACHMANOVITCH, *FREE PLAY: IMPROVISATION IN LIFE AND ART* 186 (1990) ("Improvisational theater does not necessarily take place in a theater and does not necessarily involve people who call themselves actors or artists. The materials of improvisational theater, art, music, dance are all around us all the time."). Organizations and institutions, too, can make improvisational relations a practice. See, e.g., Ted Baker et al., *Improvising Firms: Bricolage, Account Giving and Improvisational Competencies in the Founding Process*, 32 RES. POL'Y 255, 270 (2003) ("[I]mprovisation can lie at the very core of firm strategies.").

¹³ See Greenhouse, *Low-Wage Workers*, *supra* note 2; Alejandro Lazo & Erica Orden, *California, New York Governors Sign Minimum Wage Increase Into Law*, WALL STREET J. (Apr. 4, 2016, 2:20 PM), <http://www.wsj.com/articles/california-new-york-governors-sign-minimum-wage-increase-into-law-1459794036>; see also Editorial, *New Minimum Wages in the New Year*, N.Y. TIMES (Dec. 26, 2016), http://www.nytimes.com/2015/12/27/opinion/sunday/new-minimum-wages-in-the-new-year.html?_r=0 ("In five states and nine cities . . . voters and lawmakers will consider proposals in 2016 to gradually raise minimum wages to \$15 an hour.").

really possible to persuade this vast universe—from *afar*—that improvised pushback is a good idea when a problem comes up at work?

Answering that question might, on one the hand, lead to consideration of social movement theory. In fact, some of that work does suggest that activism can, in certain circumstances, catch on with those who observe or read about a cause but do not have a personal relationship with someone already involved.¹⁴ The improv literature is more direct.¹⁵ Because yes-and reactions can arise organically, without

¹⁴ Much of the research on how people get recruited into and stay active in movements, groups, and even unions has focused on social networks. DONATELLA DELLA PORTA & MARIO DIANI, *SOCIAL MOVEMENTS: AN INTRODUCTION* 116–18 (2d ed. 2006); see also JAMES M. JASPER, *THE ART OF MORAL PROTEST: CULTURE, BIOGRAPHY, AND CREATIVITY IN SOCIAL MOVEMENTS* 172 (1997) (“Most scholars who have examined movement recruitment have focused . . . on social networks . . .”). Unsurprisingly, people are usually drawn into organizations by someone they know personally, like a friend, family member, or colleague. DELLA PORTA & DIANI, *supra* note 14, at 117 (“[O]ne of the first studies to document the importance of personal networks for recruitment processes . . . showed social networks to account for the adhesion of a large share (60 to 90 percent) of members of various religious and political organizations . . .”). Individual fast food strikers, to be sure, have long said that seeing the people they work with strike and return to the job kick-started their involvement in what has become Fight for \$15. See Oswald, *supra* note 5; see also David Moberg, *Workers Say the Fight for 15 Isn't Just About Raises—It's a Fight for Meaning in Their Lives*, IN THESE TIMES (Apr. 1, 2015, 12:17 PM), http://inthesetimes.com/working/entry/17801/workers_say_the_fight_for_15_isnt_just_about_raisesits_a_fight_for_meaning. But research also suggests that close connections are not always essential for mobilization. DELLA PORTA & DIANI, *supra* note 14, at 121–22 (examining research questioning the “role of networks in recruitment processes” on logical, anecdotal, and empirical grounds). One study found only twenty percent of California anti-abortion protestors got active through network effects, *id.* at 122 (citing KRISTIN LUKER, *ABORTION & THE POLITICS OF MOTHERHOOD* (1984)), and that “the really crucial process for mobilization” is the conveyance of a psychologically compelling cultural narrative. *Id.* at 121. This means that more detached mediums, like the media, can do the trick, particularly where the message packs an “emotional” punch potent enough to create what researchers call a “moral shock.” *Id.* (citing James M. Jasper & Jane D. Poulsen, *Recruiting Strangers and Friends: Moral Shocks and Social Networks in Animal Rights and Anti-Nuclear Protests*, 42 SOC. PROBS. 493, 493 (1995)). Javier Auyero’s study of an Argentinian unemployment movement, for example, highlights the “several expressions of outrage” that transformed a bystander into a local leader in just six days. *Id.* at 122 (citing Javier Auyero, *When Everyday Life, Routine Politics, and Protest Meet*, 33 THEORY & SOC’Y 417 (2004)). For an overview of research on the sociological origins of collective and individual workplace resistance, see Vincent J. Roscigno & Randy Hodson, *The Organizational and Social Foundations of Worker Resistance*, 69 AM. SOC. REV. 14 (2004).

¹⁵ For a discussion of the interplay between improv and social movement theory, see Oswald, *supra* note 5, at 604 n.30. For now, it is worth pointing out that social movement scholars have pressed for a deeper consideration of how spontaneous acts contribute to movements. See David A. Snow & Dana M. Moss, *Protest on the Fly: Toward a Theory of Spontaneity in the Dynamics of Protest and Social Movements*, 79 AM. SOC. REV. 1122, 1124–26, 1140 (2014). Daniel Fischlin and co-authors have been even more explicit. See DANIEL FISCHLIN ET AL., *THE FIERCE URGENCY OF NOW: IMPROVISATION, RIGHTS, AND THE ETHICS OF COCREATION*, at xi–xv (2013) (urging academic consideration of improvisation’s role in social movements).

someone like a teacher or campaign organizer on the scene,¹⁶ it is possible for improv to play a widespread, even foundational resistance role when issues arise on the job. But the people on the job have to be able talk to each other. A lot. And not just any type of talk will do. What's needed is hanging out, shooting-the-breeze, even silly talk between coworkers, interactions that some improv theorists call "galumphing." This kind of discourse leads to interpersonal trust, the indispensable catalyst of snap reactions and the life-force of collective improvisation. Just as comedy troupes need to trust that fellow actors will prop up a failing joke that seemed like a good idea at the time, workers need to trust that their colleagues will follow them out the door when the heat fails on a cold morning.¹⁷

Now, if the prevailing workplace default rule required employers to have "cause" to fire employees, workers could chat or even goof around on the clock up until the point when the interactions began to interfere with management's right to get its business done.¹⁸ But that's not the law. Instead, the default rule allows managers to fire workers at will,¹⁹ which means that they can ban all non-task-related talk and dismiss workers the instant conversation veers off course.²⁰ That itself is not necessarily an improvisation roadblock. In theory, workers can get to know each other just as well off the floor, like in the break-room, as the key regime regulating workplace conversations, based on the Supreme Court's 1945 decision in *Republic Aviation Corp. v. NLRB*,²¹ protects talk there. The problem is that for vast swaths of the low-wage world, breaks and other crucial chances for nurturing relationships do not

¹⁶ See Baker et al., *supra* note 12, at 255 ("Organizational researchers have described improvisation . . . performed by firefighters, during product development products, in schools during a strike, and after a ship navigation system failed." (citations omitted)); Edwin Hutchins, *Organizing Work by Adaptation*, 2 ORG. SCI. 14, 14 (1991) (noting that improvisational acts can be "a product of adaptation rather than of design").

¹⁷ Lance Compa has called this the "enduring need for 'somebody to back me up' at work." Lance Compa, *Careful What You Wish for: A Critical Appraisal of Proposals to Rebuild the Labor Movement*, 24 NEW LAB. F. 11, 15 (2015). This scenario, where employees strike or otherwise protest a workplace grievance like temperature, is conduct labor law classically protects. See *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 11-17 (1962).

¹⁸ Even where "cause" or "just cause" is required for dismissal, the standard's meaning is rarely clear. See Wendi J. Delmendo, Comment, *Determining Just Cause: An Equitable Solution for the Workplace*, 66 WASH. L. REV. 831, 831-33 (1991). A good general definition is a "fair and honest cause or reason." *Id.* at 833 (footnote omitted). Common examples would include insubordination or incompetence. *Id.*

¹⁹ Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106-07 (1997).

²⁰ This means, somewhat ironically, that workers receive more protection for angrily walking out the door over pay than for talking about the weather behind the counter. *Cf. infra* note 146 (providing legal protections for protests linked to specific working conditions).

²¹ 324 U.S. 793, 803 n.10 (1945).

exist. Structural changes in the nature of work have squeezed the life out of the opportunities that once existed to lawfully hang out on the job, resulting in shop floors where people hardly relate and know each other only sort of. The upshot is that at the very moment advocates are set to drive improvisation out to the grassroots, labor law is lurking to endanger the project.

It doesn't have to be this way. If workers could freely chit-chat in the middle of completing tasks, and if they could take short breathers together at reasonable times, the spirit of improvisation could be seeded. By this I mean that the recent extraordinary acts by Philadelphia Popeyes workers who walked out on a shift when the air conditioning broke would not be so extraordinary.²² These and other sudden acts of defiance would be a natural and accessible part of a toolkit workers could occasionally take off the shelf, improving life at the low end of the pay scale one confrontation at a time. This imagined universe is not some "next step" in a campaign strategy. It is an existential issue in low-wage work.²³ There are not enough dues, not enough grants, and not enough organizers to handhold a bottom-up fix for the problems inherent in those types of jobs. That means that for real progress to be made, workers will have to initiate the fixes themselves. If they have some time to chat and hangout beforehand, they just might.

My thesis is that the National Labor Relations Board (Board or NLRB) should interpret the law to let workers get to know each other during the prime—sometimes only—interactive window modern employment provides, and it should do so with two steps. First, the Board should establish a right for workers to talk to each other during working time, which would apply to any discussion, on any topic. Although the proposal would maintain the traditional prohibition against "solicitation" during worktime, it would clarify, once and for all, that illegal solicitation is never just talk. Instead, solicitation is an interaction that interrupts an assigned task or causes an employee or a colleague to actually stop working. Exchanges that disrupt, distinguished in this Article as instances of "sequential multitasking," go

²² See *infra* note 84.

²³ This Article's proposals are aimed at the low-wage workforce because that is the universe where improvisational tactics have taken hold and are primed for expansion. However, the proposals would impact the broader set of employees covered by the National Labor Relations Act (NLRA), essentially meaning the non-agricultural private sector workforce of non-supervisors and non-managers. See 29 U.S.C. § 152(3) (2012). Defining "low-wage work" is itself a matter of debate, with standard definitions involving either the lowest quintile of wage distribution or pay below two-thirds the median rate. Jared Bernstein & Maury Gittleman, *Exploring Low-Wage Labor with the National Compensation Survey*, MONTHLY LAB. REV., Nov.–Dec. 2003, at 3, 4. But the most relevant definition here is the standard set by Fight for \$15: any pay below \$15 an hour.

beyond the limits of the new right. The obvious counterargument to this part of the proposal, that it would decimate productivity, is belied by cognitive research showing that people can successfully navigate assignments of varying complexities while chatting and, if they can't, they stop talking.

Second, the Board should classify short concerted breaks that impact production only modestly as protected conduct. Using prior precedent, the agency can categorize these so-called "micro-breaks" as efforts to improve working conditions, and using labor law's already established "no alternative means" analysis, the Board can justify the resulting incursions onto employer property.

It is true that both of the proposed changes would radically transform one of the most entrenched principles in all of labor law: working time is for work. However, the principle is only untouchable because few have tried to touch it. "Working time is for work" is an undeniably catchy slogan, but it is riddled with theoretical and practical problems, including the reality that it cannot be implemented in a nondiscriminatory manner.

Moreover, embedding working time with talk and some short breaks is less about abandoning the famous phrase's theoretical core than about recalibrating its emphasis. Work can be a messy place. No one can follow every rule every time, no one can be supervised perpetually, and unexpected decisions must be made. Given this reality, the law has two paths. It can assume that employees are naturally irresponsible and tend toward damaging their employer's business when they can get away with it, or it can assume that employees are generally responsible and can be trusted to assist, not sabotage, the enterprise when management isn't looking. The first view suggests that employers need personnel policies that facilitate discipline for even the slightest infractions, like talking out of turn. That, in a nutshell, is "working time is for work." The second suggests that employees should be given the benefit of the doubt unless management can prove otherwise. This perspective maintains the essence of working time is for work, but with a bit of humanity—a little breather, maybe some chatter about the grandkids or the price of groceries—thrown in. Employers can prosper under either formulation; only the last preserves the right to improvise.

The Article proceeds as follows. Part I describes the rise of Improvisational Unionism and the 2015 strategic shift that sought to move improvised strikes beyond Walmart and fast food and into low-wage workplaces all over the country. Part II considers the "right" to improvise at work in three senses: whether the law generally protects workers who improvise from discipline; whether legal protection for workplace improvisation is a normative good; and, most importantly, whether the law facilitates or detracts from improvisation's key

relational ingredients given the state and structure of modern employment. Part III argues that improvisation's future hinges on two changes to labor law that would help employees get to know each other at work.

I. THE STRATEGIC EVOLUTION OF IMPROVISATIONAL UNIONISM

A. *The Rise, Results, and Ripples of Improvisational Unionism*

It started on October 4, 2012, with a smattering of modest strikes at some Southern California Walmarts.²⁴ October 9th brought more walkouts, in more states, and an employee "ultimatum": end reprisals against the union-backed advocacy group "OUR Walmart" or face a nationwide strike on Black Friday.²⁵ Unimpressed by the corporation's response, that year's post-turkey bargain hunt was peppered with work stoppages and boisterous rallies spanning 100 U.S. cities.²⁶ Days later, 200 New York City fast food workers got in on the act, striking under the name "Fast Food Forward" for the specific demand of a \$15 hourly wage and union rights.²⁷

From there, on both fronts, things just kept going. The Black Friday strikes became ritualized, repeating in 2013 and 2014, though OUR Walmart's aim has been to help the company's associates agitate for job improvements anywhere and everywhere, so protests great and small have dotted the rest of the calendar.²⁸ Fast Food Forward turned out to be just one piece of a sprawling city-specific network of snappily

²⁴ Josh Eidelson, *Wal-Mart Workers on Strike*, SALON (Oct. 4, 2012, 12:00 PM), http://www.salon.com/2012/10/04/walmart_workers_on_strike.

²⁵ Josh Eidelson, *Walmart's Black Friday Ultimatum*, SALON (Oct. 10, 2012, 3:13 PM), http://www.salon.com/2012/10/10/walmart_strikers_raise_the_stakes_with_black_friday_ultimatum.

²⁶ Josh Eidelson, *Historic Walmart Strikes Hit 100 Cities (Final Update: 9:20 PM)*, NATION (Nov. 23, 2012), <http://www.thenation.com/article/historic-walmart-strikes-hit-100-cities-final-update-920-pm> [hereinafter Eidelson, *Historic Walmart*].

²⁷ Steven Greenhouse, *With Day of Protests, Fast-Food Workers Seek More Pay*, N.Y. TIMES (Nov. 29, 2012), <http://www.nytimes.com/2012/11/30/nyregion/fast-food-workers-in-new-york-city-rally-for-higher-wages.html>.

²⁸ *Mission, OUR WALMART*, <http://forrespect.org/mission-and-vision> [<http://web.archive.org/web/20161013141013/http://forrespect.org/mission-and-vision>] (describing OUR Walmart's "Mission" to "join together to offer strength and support in addressing the challenges that arise in our stores and our company everyday"); see also, e.g., Sarah Jaffe, *Walmart Moms' Walkout Starts Friday*, IN THESE TIMES (May 29, 2014, 5:59 PM), http://inthesetimes.com/working/entry/16759/hundreds_of_walmart_moms_strike_friday ("[H]undreds of mothers who work at Walmart stores throughout the country will begin walking off the job on Friday . . . tired of struggling to support their children on what Walmart pays.").

named activist groups ready to strike McDonald's, Burger King, Pizza Hut, and the like alone or, as they did nearly a dozen times over the next three years, in mass coordination.²⁹

The early returns on all of this activity were, at minimum, intriguing. Amid denials that the strikes were anything other than irritants, in early 2015 Walmart announced raises for its lowest paid employees on the heels of policy concessions on scheduling and hours, issues high on OUR Walmart's list of grievances.³⁰ Around the same time, McDonald's, holding tight to a similar line that the protests were irrelevant despite slumping sales, image problems, and executive upheavals surprised the industry by boosting pay ten percent at its non-franchised restaurants and throwing in a vacation plan.³¹

Much more suggestive were the ripple effects.³² Amidst sagging national wages, a string of big businesses, all outside the immediate ire of protesters and some in unrelated industries, announced higher minimums. This included T.J. Maxx, Gap, Starbucks, Ikea, Aetna, and, notably, Target, which had publicly refused to join the fray before abruptly changing course after three weeks of withering criticism.³³

Simply startling was that a \$15 fever seemed to also take hold.³⁴ Something that twenty-some months earlier had been labeled a "pie-in-

²⁹ Ben Penn, *Fast-Food Strikes Reach 230 Cities, As Fight for \$15 Evolves in 13th Walkout*, 29 LAB. REL. WK. 804 (Apr. 15, 2015).

³⁰ See Paul Ziobro & Eric Morath, *Wal-Mart Raising Wages as Market Gets Tighter*, WALL STREET J. (Feb. 19, 2015, 7:56 PM), <http://www.wsj.com/articles/wal-mart-plans-to-boost-pay-of-u-s-workers-1424353742>; Susan Berfield, *Wal-Mart's Black Friday Strikes: Are the Workers Already Winning?*, BLOOMBERG (Nov. 28, 2014, 10:33 AM), <http://www.bloomberg.com/news/articles/2014-11-28/wal-mart-black-friday-strikes-are-the-workers-already-winning> (asserting that the "walkouts are mere media spectacles involving a few protesters").

³¹ See Annie Gasparro & Eric Morath, *McDonald's Joins Trend in Raising Pay*, WALL STREET J. (Apr. 1, 2015, 7:26 PM), <http://www.wsj.com/articles/mcdonalds-to-raise-hourly-pay-for-90-000-workers-1427916364>; Stephanie Strom, *McDonald's Seeks Its Fast-Food Soul*, N.Y. TIMES (Mar. 7, 2015), <http://www.nytimes.com/2015/03/08/business/mcdonalds-seeks-its-fast-food-soul.html>.

³² See Eliza Gray, *How Walmart's Pay Hike Puts Pressure on McDonald's*, TIME (Feb. 19, 2015), <http://time.com/3715047/walmart-minimum-wage-mcdonalds> (predicting wage effect "ripples").

³³ See Kavita Kumar, *Target Raises Minimum Wage to \$9 an Hour*, STAR TRIB. (Mar. 19, 2015, 9:55 AM), <http://www.startribune.com/target-raises-minimum-wage-to-9-an-hour/296782781>; Anna Wilde Mathews & Theo Francis, *Aetna Sets Wage Floor: \$16 an Hour*, WALL STREET J. (Jan. 12, 2015, 6:49 PM), <http://www.wsj.com/articles/aetna-to-boost-incomes-of-lowest-paid-workers-1421105445>; Dionne Searcey, *After a Bounce, Wage Growth Slumps to 0.1%*, N.Y. TIMES (Mar. 6, 2015), <http://www.nytimes.com/2015/03/07/business/economy/jobs-report-unemployment-february.html>; Kyle Stock & Kim Bhasin, *Why Retailers Are Suddenly Desperate to Keep Their Least-Valuable Workers*, BLOOMBERG (Mar. 6, 2016, 11:56 AM), <https://www.bloomberg.com/news/articles/2015-03-06/why-retailers-are-suddenly-desperate-to-keep-their-least-valuable-workers>.

³⁴ See Claire Zillman, *Fast Food Workers' \$15 Demand: How Aiming High Launched a Social Movement*, FORTUNE (Dec. 4, 2014, 4:44 PM), <http://fortune.com/2014/12/04/fast-food->

the-sky request” by the mainstream media, called dishonest and irrational by the National Retail Federation, and dismissed as “simply an absurd demand” in the pages of *Forbes* magazine had actually been legislated into life in Seattle, San Francisco, and Los Angeles, and proposed in a number of other locales.³⁵ Though first set almost by accident in 2012, the \$15 figure had become magnetic in the intervening months.³⁶ Facebook set a \$15 minimum for its contracts and vendors;³⁷ Connecticut and Colorado introduced “McWalmart” bills fining companies a dollar for every hour worked by a sub-\$15 employee;³⁸ liberal stars Bill DeBlasio and Elizabeth Warren put a \$15 base wage at the center of a comprehensive anti-inequality plan;³⁹ after the New York Senate signaled displeasure with the Assembly’s passage of a \$15 New York City minimum, the Governor convened a fast food “wage board” that required it for fast food workers unilaterally;⁴⁰ existing unions began folding specifically \$15 demands into their contract negotiations;⁴¹ Massachusetts homecare workers got it;⁴² and so on.⁴³

workers-15-demand-how-aiming-high-launched-a-social-movement (“A wage of \$15 per hour is now the battle cry for low-wage workers nationwide . . .”).

³⁵ See *id.*; Atossa Araxia Abrahamian, *U.S. Fast-Food Workers Protest, Demand a ‘Living Wage’*, REUTERS (Aug. 29, 2013, 5:52 PM), <http://www.reuters.com/article/us-usa-restaurants-strike-idUSBRE97S05320130829>; Lydia DePillis, *Los Angeles Becomes the Biggest City Yet to Approve a \$15 Minimum Wage*, L.A. TIMES (May 19, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/05/19/los-angeles-becomes-the-biggest-city-yet-to-approve-a-15-minimum-wage> [hereinafter DePillis, *Los Angeles Becomes the Biggest City*] (calling \$15 a “target that has gone from almost absurdly ambitious to mainstream in the span of a few years”); Jennifer Medina & Noam Scheiber, *Los Angeles Lifts Its Minimum Wage to \$15 Per Hour*, N.Y. TIMES (May 19, 2015), <http://www.nytimes.com/2015/05/20/us/los-angeles-expected-to-raise-minimum-wage-to-15-an-hour.html>; Tim Worstall, *The Absurdity of a \$15 Minimum Wage*, FORBES (Sept. 1, 2013, 11:00 AM), <http://www.forbes.com/sites/timworstall/2013/09/01/the-absurdity-of-a-15-minimum-wage/#dcd105483ab>; see also Nicholas J.C. Pistor, *Slay Seeks to Raise Minimum Wage in St. Louis to \$15 an Hour*, ST. LOUIS POST-DISPATCH (June 2, 2015), http://www.stltoday.com/news/local/govt-and-politics/slay-seeks-to-raise-minimum-wage-in-st-louis-to/article_b7777557-42e8-5fe6-beb3-565168c8a497.htm.

³⁶ Zillman, *supra* note 34 (describing the process of settling on \$15 an “off-the-cuff calculation”).

³⁷ Meenal Vamburkar, *Facebook Boosts Minimum Wage, Benefits for Its Contract Workers*, DAILY LAB. REP., May 13, 2015, at A-5.

³⁸ Dan Haar, *Fining Low-Wage Employers Can Help Connecticut’s Economy? Really?*, HARTFORD COURANT (May 13, 2015, 12:36 PM), <http://www.courant.com/business/dan-haar/hc-haar-walmart-bill-state-economy-20150512-column.html>; David Kelly, *Minimum-Wage Workers Take to Streets to ‘Fight for 15’*, L.A. TIMES (Apr. 15, 2015, 1:07 PM), <http://www.latimes.com/nation/la-na-minimum-wage-20150415-story.html>.

³⁹ Russell Berman, *DeBlasio’s America?*, ATLANTIC (May 12, 2015), <http://www.theatlantic.com/politics/archive/2015/05/de-blasios-america/392960>.

⁴⁰ Matthew Hamilton, *Governor Orders Up Fast-Food Wage Board*, TIMES UNION (May 7, 2015, 11:33 PM), <http://www.timesunion.com/news/article/Governor-orders-up-fast-food-wage-board-6250218.php>.

⁴¹ Howard Blume, *Union Wins \$15 Minimum Wage for L.A. Schools’ Service Workers*, L.A. TIMES (July 4, 2014, 5:28 PM), <http://www.latimes.com/local/education/la-me-lausd-raises->

It began to feel, in other words, like the campaigns were winning. So, when in early 2015 a website popped up to announce another strike, this time slated for the undeniably savvy date of April 15 (i.e., “fo[u]r” 15), it appeared to be a further example of what had by now become activism as usual.

It was not activism as usual. April 15 would come to mark a basic transformation of what OUR Walmart and the fast food work represented and sought to achieve. What began as one campaign focused on one company and a separate campaign trained on one industry had evolved into something that was at once more diverse and more unified. The fight for fairness at Walmart and the fight for higher wages and negotiation in fast food had charmed the varied impulses of a slew of existing interests and triggered a coalescence. The consolidated battle cry would be “Fight for \$15,” and the theater of operations would be low-wage work as a whole. This was, no doubt, an ambitious mission change. But the beauty was that the chief tactic did not necessarily need adjustment. Improvisation had brought the Walmart and fast food workers this far, and it was time to see if it could carry everybody else. If so, the next step was clear: improv needed outsourcing.

B. *Outsourcing Improvisation: Fo(u)r Fifteen and Beyond*

1. Fight for \$15 and the Unification of Low-Wage Work

Two elements made 4/15 a pivot point in the essential nature of the fast food and Walmart activism. The first involved how the day was presented to the public. Home base for the April 15 rallies was the website fightfor15.org. “Fight for \$15” had long been the name used by the Chicago-based fast food strikers, but now the websites of other city organizations, like New York’s “Fast Food Forward,” were being forwarded to fightfor15.org, and the city-specific twitter accounts had

20140705-story.html; David Moberg, *As CTU and Chuy Garcia Endorse \$15/hr Contract Demand, Fight for 15 Goes Beyond Fast Food*, IN THESE TIMES (Mar. 25, 2015, 4:04 PM), http://inthesetimes.com/working/entry/17788/chicago_teachers_union_fight_for_15_chuy_garcia.

⁴² Katie Johnston, *Mass. Home Health Workers Win Wage Hike to \$15 an Hour*, BOS. GLOBE (June 26, 2015), <https://www.bostonglobe.com/business/2015/06/26/home-health-workers-win-wage-hike-hour/KrsUcC8dPIDdwpnJYjNzRI/story.html>.

⁴³ See Sonia Singh, *Fight for 15 Inspires Bold Demands*, LAB. NOTES (Apr. 14, 2015), <http://www.labornotes.org/2015/04/fight-15-inspires-bold-demands> (“As thousands of low-wage workers . . . demand[] \$15 an hour and a union, their high-profile mobilization has already inspired workers in a range of industries far beyond fast food.”).

been altered to incorporate the slogan.⁴⁴ It appeared, in other words, that the fast food campaign had adopted a universal banner to rhetorically unite the previously independent geographies.

In fact, that was the least of it. While the Walmart campaign maintained a distinct online presence, it was becoming evident that it too was supporting the Fight for \$15 cause.⁴⁵ In late-2014, OUR Walmart had shifted its organizing emphasis from providing generalized worker assistance to a full-throated call for \$15 plus full-time work.⁴⁶ And in March 2015, OUR Walmart workers converged in Atlanta with their fast food counterparts to help plan 4/15 itself.⁴⁷

By then it was clear that the event—and the Fight for \$15 rally cry, for that matter—would be about much more than just the fast food and retail workforce. Organizers had started to conspicuously broaden the spotlight, predicting “the largest low wage worker mobilization in modern history,” opening the door for chatter that, though on paper not obviously dissimilar to the previous walkouts, *this* strike would really be different.⁴⁸ Labor relations experts began to depict “Fight for 15” not necessarily in terms of unions, contracts, industries, or even wages, but philosophically, an emergent tool for political “climate change” and broadly “moving other people up.”⁴⁹ Even headline writers wanted

⁴⁴ Los Angeles fast food workers, for instance, were now tweeting using the handle @Fightfor15LA. See @Fightfor15LA, TWITTER (May 1, 2015, 6:00 PM), <https://twitter.com/Fightfor15LA/status/594275300466237440>.

⁴⁵ See OUR WALMART, *supra* note 28 (describing the mission listed on the website).

⁴⁶ Maya Rhodan, *Labor Group Plans Strike of Walmart Stores on Black Friday*, TIME (Nov. 26, 2014), <http://time.com/3608379/labor-group-strike-our-walmart-stores-shopping-black-friday>; *25 Nov Sign the Petition for \$15 and Full-Time*, OUR WALMART, <http://forrespect.org/sign-the-petition-for-15-and-full-time> [<http://web.archive.org/web/20161127133308/http://changewalmart.org>].

⁴⁷ See Steven Greenhouse, *Movement to Increase McDonald's Minimum Wage Broadens Its Tactics*, N.Y. TIMES (Mar. 30, 2015), <http://www.nytimes.com/2015/03/31/business/movement-to-increase-mcdonalds-minimum-wage-broadens-its-tactics.html> [hereinafter Greenhouse, *Movement to Increase*]; see also @ForRespect, TWITTER (Apr. 15, 2015, 6:39 AM), <https://twitter.com/ForRespect/status/588305566960869376> (“So early. Yet so ready to #FightFor15 2day! #WalmartStrikers”); @chifightfor15, TWITTER (Dec. 25, 2015, 9:01 PM), <https://twitter.com/chifightfor15/status/680584142145347584> (listing Walmart and then McDonalds: “[t]hese companies are the reason we continue to #Fightfor15”).

⁴⁸ Moberg, *supra* note 14. Fight for \$15 would later caption its post-4/15 highlight videos this way: “It wasn’t a normal strike.” LuchaPor Fifteen, *On 4/15 This McDonald's Worker Struck for Her Daughter, and for You*, YOUTUBE (Apr. 15, 2015), https://www.youtube.com/watch?v=w_VRNfqr3N0.

⁴⁹ Steven Greenhouse & Jana Kasperkevic, *Fight for \$15 Swells into Largest Protest by Low-Wage Workers in US History*, GUARDIAN (Apr. 15, 2015, 5:40 PM), <https://www.theguardian.com/us-news/2015/apr/15/fight-for-15-minimum-wage-protests-new-york-los-angeles-atlanta-boston> [hereinafter Greenhouse & Kasperkevic, *Fight for \$15*].

readers to know: “Fast-food strikes widen into social-justice movement.”⁵⁰

That benchmark meant knitting poverty-focused entities and activists into a coalition “that combined the spirit of Depression-era labor organizing with the uplifting power of Dr. King’s civil rights campaign,” a challenge that called for, as a reporter who attended a 4/15 internal organizational meeting suggested, a “strategic alchemy.”⁵¹ If so, a significant move was Fight for \$15’s determination to highlight racial matters in low-wage employment, particularly minorities’ disproportionate presence on the lowest rungs of the service industries.⁵² One campaign leader labeled this “occupational racism,” and in the days leading up to 4/15, the campaign worked to bridge the roiling protests against discriminatory and violent policing with the push to raise wages by partnering with racial-justice groups and planning a moment of silence on the day itself to honor unarmed African-Americans recently killed by law enforcement.⁵³ Soon a subtle

⁵⁰ Bruce Horovitz & Yamiche Alcindor, *Fast-food Strikes Widen into Social-Justice Movement*, USA TODAY (Apr. 15, 2015, 7:32 PM), <http://www.usatoday.com/story/money/2015/04/15/fast-food-strike-fight-for-15-service-employees-international-union/25787045>; see also *Campaign for Higher Minimum Wage Evolving into Social Justice Movement*, DALLAS NEWS (Apr. 15, 2015), <http://www.dallasnews.com/news/news/2015/04/15/campaign-for-higher-minimum-wage-evolving-into-social-justice-movement>.

⁵¹ Greenhouse, *Movement to Increase*, *supra* note 47.

⁵² Eric Garcia, *Looking to the Future, Organized Labor Is Banking on a New Civil Rights Movement*, ATLANTIC (Apr. 15, 2015), <http://www.theatlantic.com/politics/archive/2015/04/looking-to-the-future-organized-labor-is-banking-on-a-new-civil-rights-movement/446379>. African-Americans and Hispanics or Latinos account for nearly forty percent of the workforce in these enormous sectors. See *id.* More generally, over a third of African-Americans and well over forty percent of Latino workers hold poverty-level jobs, compared to just twenty-three percent of whites. *African Americans*, ST. WORKING AM., <http://www.stateofworkingamerica.org/fact-sheets/african-americans> (last visited Oct. 9, 2016); *Latinos*, ST. WORKING AM., <http://www.stateofworkingamerica.org/fact-sheets/latinos> (last visited Oct. 9, 2016); see also Lydia DePillis, *With Victory in L.A., the \$15 Minimum Wage Fight Goes National*, WASH. POST: WONKBLOG (May 22, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/05/22/with-victory-in-l-a-the-15-minimum-wage-fight-goes-national> (calling a “key element[]” of the push for a \$15 minimum wage in L.A. was the decision to “consciously cast itself in the terms of social, racial and economic justice,” including support for “Black Lives Matter”).

⁵³ Garcia, *supra* note 52; Ned Resnikoff, *Fight for \$15 Goes Global: Workers Set to Launch Worldwide Protest*, AL JAZEERA AM. (Apr. 14, 2015, 8:30 AM), <http://america.aljazeera.com/articles/2015/4/13/laborers-set-to-launch-worldwide-protest-for-a-living-wage.html> [hereinafter Resnikoff, *Fight for \$15*] (“[P]olice-reform groups such as Blackout For Human Rights have been working with the fast-food campaign for months . . .”); see also ngoc loan tran (@ntranloan), TWITTER (Apr. 15, 2015, 5:39 AM), <https://twitter.com/ntranloan/status/588290505030664193> (“Moment of silence for #WalterScott #BacksTurnedDontShoot #FightFor15 #BlackLivesMatter”). As a Fight for \$15 leader would later conclude about 4/15: “It’s something different . . . This is much more of an economic and racial justice movement than the fast-food workers strikes of the past two years.” Horovitz & Alcindor, *supra* note 50; see also Amy B. Dean, Opinion, *Is the Fight for \$15 the Next Civil Rights Movement?* AL

but meaningful shift could be spotted on social media as #BlackLivesMatter gradually morphed into #BlackWorkersLivesMatter.⁵⁴

These and other relational efforts helped “Fight for \$15” become the media and popular shorthand for the staggering number of labor, community, student, and social justice activists merging on April 15 for a \$15 minimum wage and broadly equitable workplaces.⁵⁵ The list of 4/15 supporters and strikers was both legion and non-traditional, among them transgender rights activists;⁵⁶ environmental groups like the Sierra Club and 350.org; community organizations like Make the Road New York and New York Communities for Change; civil rights initiatives like Black Lives Matter; college students; yoga instructors; construction, laundry, and airport workers, gas station attendants, dollar store cashiers, home and child care aides, and, of course, Walmart clerks and fast food cashiers and cooks.⁵⁷ That day an adjunct professor, describing his colleagues as the “fast food workers of higher education,” provided a snippet of what the fast food and Walmart strikes—now the Fight for \$15—had become:

“This is part and parcel of environmental, anti-nuclear, anti-war. All of that stuff is all the same fight. The economic part of it, police shootings—it’s all the same thing. And if we don’t have the kind of

JAZEERA AM. (June 22, 2015, 2:00 AM), <http://america.aljazeera.com/opinions/2015/6/is-the-fight-for-15-the-next-civil-rights-movement.html> (quoting Alicia Garza, a Black Lives Matter founder: “In Ferguson I saw leaders from the Fight for \$15 movement really on the front lines moving labor leaders by saying, ‘I’m not just a worker. I’m somebody who lives in this community, who is being targeted by the police all the time—and you have to see that about me’”).

⁵⁴ Moberg, *supra* note 14; *see also* Shydie (@Cocochanel_93), TWITTER (May 20, 2015, 11:09 AM), https://twitter.com/Cocochanel_93/status/601057155727265793 (“Got my woes wit me #fightfor15 #blackworkmatters”).

⁵⁵ Headlines alone tell this tale. *See, e.g.*, Greenhouse & Kasperkevic, *Fight for \$15*, *supra* note 49; Resnikoff, *Fight for \$15*, *supra* note 53.

⁵⁶ *See* @Fightfor15LA, *supra* note 44 (“We’re glad the queer and trans community supports the #FightFor15!”).

⁵⁷ Lydia DePillis, *It’s Not Just Fast Food: The Fight for \$15 is for Everyone Now*, WASH. POST (Dec. 4, 2014), <https://www.washingtonpost.com/news/storyline/wp/2014/12/04/its-not-just-fast-food-the-fight-for-15-is-for-everyone-now>; Horovitz & Alcindor, *supra* note 50; Samantha Brenner, *UB Students Organize Strike with Fight for \$15 to Raise Minimum Wage*, SPECTRUM (Mar. 26, 2015, 11:23 PM), <http://www.ubspectrum.com/article/2015/03/ub-students-organize-strike-with-fight-for-15-to-raise-minimum-wage>; Ned Resnikoff, *The Money We Deserve, or Close Down: Low-Pay Workers Rally for \$15*, AL JAZEERA AM. (Apr. 15, 2015, 9:42 AM), <http://america.aljazeera.com/articles/2015/4/15/underpaid-workers-rally-in-new-york-city-for-a-living-wage.html> [hereinafter Resnikoff, *The Money*]; Transcript, *Fight for \$15: Tens of Thousands Rally as Labor, Civil Rights & Social Justice Movements Join Forces*, DEMOCRACY NOW! (Apr. 16, 2015), http://www.democracynow.org/2015/4/16/fight_for_15_tens_of_thousands.

solidarity where we're willing to join with each other, we're not going to win this fight."⁵⁸

2. Viral Marketing

The other distinguishing feature of 4/15 was its timing. The early actions thrived on the element of surprise. Strikers themselves often did not know precisely when a walkout would be called, and employers usually learned the morning-of, thanks either to a boisterous scrum of early-rising chanters or a hand-delivered letter.⁵⁹ Later strikes experimented with a few days or even a week of notice, but nothing compared to the ten-week build-up that preceded 4/15.⁶⁰ This facilitated Fight for \$15's version of viral marketing: two-and-a-half months of eye-popping lead-up events highlighting a range of low-wage work afflictions. Workers took "freedom ride[s]" to advertise 4/15 on college campuses; they spurred a forty-day religious "Fast from Fast Food"; they rallied against voter suppression in Georgia; and they took to state capitals to protest social service cuts.⁶¹ In between, from Chicago, to Los Angeles, to Seattle, to Durham, to Las Vegas, and dozens of other places

⁵⁸ Resnikoff, *The Money*, *supra* note 57.

⁵⁹ See, e.g., Sarah Jaffe, *For Fast-Food Strikers in New York, It's About 'Moral Values'*, IN THESE TIMES (Jul. 30, 2013, 12:42 PM), http://inthesetimes.com/working/entry/15372/fast_food_strikers_in_nyc_values (depicting workers' attempts to deliver a letter "declaring their strike" while also marching store-to-store to announce walk-outs for the day).

⁶⁰ Organize Now! created a 4/15 "National Day of Action" Facebook group on February 5, 2015. Organize Now!, *Fight for 15 National Day of Action*, FACEBOOK, <https://www.facebook.com/events/325088474357042> (last visited on Feb. 5, 2015). Days later, an anti-union consulting firm warned employers to "prepare[] to deal with workplace disruptions" on April 15. *Fight for 15 National Day of Action Announced for April 15*, LAB. REL. INST., INC. (Feb. 6, 2015), <http://lrionline.com/fight-for-15-national-day-of-action-announced-for-april-15>.

⁶¹ See Greenhouse, *Movement to Increase*, *supra* note 47; Ray Long, *Union-Backed Protesters Hit Capitol over Rauner Budget Cuts*, CHI. TRIB. (Mar. 11, 2015, 8:17 PM), <http://www.chicagotribune.com/chi-unionbacked-protesters-hit-capitol-over-rauner-budget-cuts-20150311-story.html>; Keely Mullen, *Fight for Fifteen on Campus: Northeastern Students to Vote for \$15 Wage for All University Employees*, IN THESE TIMES (Apr. 6, 2015, 11:44 AM), http://inthesetimes.com/working/entry/17811/northeastern_students_vote_on_15_per_hour_minimum_wage_for_all_university; *Forty-Day Fast from Fast Food*, INTERFAITH WORKER JUST., <http://www.iwj.org/fast-food-fast> (last visited Oct. 9, 2015) ("We invite supporters to Fast from Fast Food and commit to pray for fast food workers every day, from Feb. 18 until April 4."); APRIL 15, 2015: FIGHT FOR \$15, http://april15.org/?utm_campaign=FF15&utm_medium=social&utm_source=fb [http://web.archive.org/web/20150307181129/http://april15.org/?utm_campaign=FF15&utm_medium=social&utm_source=fb]; @chifightfor15, TWITTER (Mar. 11, 2015, 12:24 PM), <https://twitter.com/chifightfor15/status/575708841939103744> ("NOW: The People are sitting in w/civil disobedience til Rauner talks to us!").

large and small, Fight for \$15 flooded stores and sidewalks in mini-strikes foreshadowing the main event.⁶²

3. From Walmart and Fast Food to Anywhere and Everywhere

Swelling the message to embrace all comers while scattering spasms of activism into all corners of the country surely heightened the suspense, stakes, and excitement generated by 4/15, all good things for an effort intent on pulling workers in from the margins. But there was a deeper reason for the shift.

As alluded to earlier, a worker's decision to walk out on strike day, to discard the well-worn path of managerial order and accept an invitation to yes-and, was the primary improvisational pillar holding up the Walmart and fast food campaigns. Where this happened, usually the worker had a cursory relationship with a campaign organizer or at least encountered campaign supporters on the way to work or in the store that morning. But there were also instances where a cook or clerk yes-and'ed solo, perhaps having found one of the strike kits that the campaigns put online,⁶³ gotten inspired by social media, or really just because. Previous work has called these instances "autonomous mobilization" because the activism seems to be inspired from afar or from within instead of organized in person.⁶⁴

The whole notion of autonomous mobilization is, on the surface at least, kind of audacious. If anything studies suggest, unsurprisingly, that strike probabilities plummet absent a union physically on the scene.⁶⁵ But studies or not, autonomous mobilization was a documented, if admittedly minor, fact embedded in the broader arc of activity, and the

⁶² Tiffany Hsu, *Protests Hit McDonald's in Los Angeles, Nationwide*, L.A. TIMES (Apr. 2, 2015, 3:15 PM), <http://www.latimes.com/business/la-fi-protests-mcdonalds-minimum-wage-20150402-story.html>; Jim Wise, *Durham Rally Calls for Fast-Food Workers Strike April 15*, NEWS & OBSERVER (Apr. 1, 2015, 4:59 PM), <http://www.newsobserver.com/news/local/counties/durham-county/article17128109.html>; see also Eric Robertson (@erichthetamster), TWITTER (Mar. 21, 2015, 2:31 PM), <https://twitter.com/erichthetamster/status/579364787559219200> ("RT@Show_Me15: Louisiana and Mississippi ready to march. #FiredUp #OrganizeTheSouth #FightFor15"); @LowPayIsNotOK, TWITTER (Mar. 28, 2015, 4:09 PM), <https://twitter.com/LowPayIsNotOK/status/581926089745829888> ("Seattle marchers outside @McDonalds to let workers inside know the \$15 #minwage raises start on April 1. #FightFor15"); @chifightfor15, TWITTER (Mar. 27, 2015, 4:00 PM), <https://twitter.com/chifightfor15/status/581561420510326784> ("BREAKING: McD workers in the south side of Chicago are standing up for respect at work right now! #FightFor15.").

⁶³ See, e.g., Sarah Jaffe, *How Walmart Organizers Turned the Internet into a Shop Floor*, IN THESE TIMES (Jan. 16, 2014), http://inthesetimes.com/article/16116/how_walmart_organizers_turned_the_internet_into_a_shop_floor (describing the strike kit).

⁶⁴ Oswalt, *supra* note 5, at 644–47.

⁶⁵ See, e.g., Marc Dixon et al., *Unions, Solidarity, and Striking*, 83 SOC. FORCES 3, 23 (2004).

overall mix seemed to be working.⁶⁶ This type of negotiating in the streets—with its community and coalition-centric, disruptive complexion—also lines up with recommendations commentators have made about what labor needs to do to survive.⁶⁷

No, what was actually audacious was that, this time, Fight for \$15 seemed poised to galvanize autonomous mobilization on a radically expanded field of play: all of low-wage work. Having obliterated previous narratives about what a realistic wage hike might be and having defied all prognostication⁶⁸ by pushing four cities (and counting) to \$15 with a sole fast food and Walmart focus, Fight for \$15 had sent out a call to get everyone else involved, whoever they were, wherever they worked, and whether they could be identified or not.

To be sure, policy momentum was on their side (“Could LA’s \$15 Minimum Wage Sweep the Nation?” read one headline),⁶⁹ but more importantly, so was worker confidence, which, according to the head of OUR Walmart, was the goal of the first thirty or so months in the first place.⁷⁰ All over the country workers were starting to see that clocking-in could be compatible with speaking up about a range of issues, from

⁶⁶ Staff and observers have both commented that, based on its results, Fight for \$15 is a “de facto union.” Candice Choi, *Fast-Food Workers: Why More Strikes over \$15 Minimum Wage*, CHRISTIAN SCI. MONITOR (Apr. 15, 2015), <http://www.csmonitor.com/Business/2015/0415/Fast-food-workers-Why-more-strikes-over-15-minimum-wage-video> (“[The] organizing director for Fight for \$15[] said McDonald’s . . . recent pay bump shows fast-food workers already have a de facto union.”); Moberg, *supra* note 14 (“[T]he movement is already becoming a de facto union through its organizing of workers into aggressive and effective direct action . . .”).

⁶⁷ Speakers at The American Labor Movement at a Crossroads, a highly-publicized January 2015 conference, repeatedly echoed many of these themes. Rhonda Smith, *Speakers Urge Labor Movement to Expand Traditional Meaning of ‘Collective Bargaining’*, DAILY LAB. REP., Jan. 16, 2015, at A-7. Fight for \$15 was lauded for its embrace of “broader community struggles,” not just parochial “workplace fights.” *Id.* Panelists encouraged labor to not just fight for unions and better wages but to learn about and support “struggles . . . tied to U.S. immigration policy, police brutality, environmental pollution and other issues.” *Id.* American Federation of Teachers president Randi Weingarten said that “[c]ommunity must become the ‘new density’ of American labor movement,” and a Service Employees International Union (SEIU) leader who founded a “Workers Lab” for organizing experiments stressed that “power only really comes from disruption.” David Moberg, *Saving Labor’s Sinking Ship*, IN THESE TIMES (Jan. 21, 2015, 3:00 PM), http://inthesetimes.com/working/entry/17560/saving_labors_sinking_ship.

⁶⁸ See DePillis, *Los Angeles Becomes the Biggest City*, *supra* note 35 (raising the city’s wage “up from the current \$9 an hour, making the city the largest in the country to set a target that has gone from almost absurdly ambitious to mainstream in the span of a few years”).

⁶⁹ Josh Harkinson, *Could LA’s \$15 Minimum Wage Sweep the Nation?*, MOTHER JONES (May 21, 2015, 3:46 PM), <http://www.motherjones.com/mojo/2015/05/how-15-minimum-wage-could-sweep-nation>.

⁷⁰ Moberg, *supra* note 67 (stating that the Walmart and now Fight for \$15 strikes “are less intended to stop production (or sales) than to build the confidence of workers”).

late paychecks to mean managers.⁷¹ Reflecting on “one big change” he had seen since he began covering the strikes in 2012, *New York Times* reporter Steven Greenhouse cited an emotional revolution, from low-wage workers initially “scared to stick their heads above the parapet” to becoming completely “emboldened.”⁷² He explained, “You know, now when I go interview a lot of these workers, they’re happy to give me their names,”⁷³ something certainly true for McDonald’s employee Douglas Hunter, who saw the April strikes as not simply necessary, but urgent: “We can’t wait. Jewel isn’t waiting. People’s Gas isn’t waiting . . . Many people thought we were crazy two years ago when we walked off our jobs and demanded \$15 an hour. They don’t think we’re crazy now.”⁷⁴

Getting workers to trust in direct action but, more to the point, develop a sort of improvisational mentality, has always been a crucial move for the Walmart and fast food campaigns. Fed up with feeling intimidated, in 2012 Oklahoma Walmart associate Christopher Owens found OUR Walmart online, read about striking, and then just did it.⁷⁵ Three fast food workers just did it too when a rally led by former U.S. Labor Secretary Robert Reich unexpectedly converged at their Oakland store on April 15.⁷⁶ Among the 60,000 worker-protestors that day⁷⁷ were fifty Brink’s armored truck drivers and guards in Chicago who also struck out of nowhere.⁷⁸ They improvised because, as a driver explained to a reporter during a march to McDonald’s, “We don’t fuck around.”⁷⁹

The theory of 4/15, then, seemed to be that with worker confidence swelling to a kind of critical mass, a course could be set not simply for an iterative, “largest ever-type” expansion, but an exponential expansion gathering not just Walmart associates or Taco Bell employees, but anyone toiling in poverty-addled work. The bet, in effect, was that the world of low-wage work teemed with people just like Christopher Owens and the Brink’s guards who—maybe not this time, or next time,

⁷¹ Kendall Fells, Opinion, *The Unionization of Workers, From Media to Fast-Food, Indicates Real Change*, N.Y. TIMES: ROOM FOR DEBATE (Feb. 7, 2016, 3:36 PM), <http://www.nytimes.com/roomfordebate/2015/06/09/digital-media-solidarity/the-unionization-of-workers-from-media-to-fast-food-indicates-real-change>.

⁷² DEMOCRACYNOW!, *supra* note 57.

⁷³ *Id.*

⁷⁴ Moberg, *supra* note 14.

⁷⁵ Eidelson, *Historic Walmart*, *supra* note 26.

⁷⁶ Horovitz & Alcindor, *supra* note 50.

⁷⁷ Greenhouse & Kasperkevik, *Fight for \$15*, *supra* note 49.

⁷⁸ Arielle Zions & Micah Uetrict, *During Yesterday’s Fight for 15 Protests, Nearly 50 Chicago Armored Guards Decided to Go on Strike*, IN THESE TIMES (Apr. 16, 2015, 1:22 PM), http://inthesetimes.com/working/entry/17852/brinks_strike_fight_for_15.

⁷⁹ *Id.*

but sometime soon—would resist. They just needed the right invitation to improvise.

What the “right invitation” might be for a universe of millions, the vast majority of whom Fight for \$15 could not realistically get in touch with, was unknown.⁸⁰ Leadership admitted that much.⁸¹ But at least one idea was obvious and, better yet, had a bit of a track record: lead by example. Yet instead of modeling improvisation every four to five months or so with 24-hour splashes, improv could be spread around every which way all the time, though particularly in what came to be nearly ninety days of pre-4/15 skirmishes. There, through talk, TV, social media, and all the rest, yes-and could be paraded in front of workers with a simple message: this is what improvising can do for you. And because of the coalition, workers with any number of concerns, from hours to cops to pay to school funding, would see those issues reflected back at them on the Fight for \$15 homepage, with basic instructions: if you too are concerned, enter your zip code into the “BE THERE. FIND AN EVENT NEAR YOU” search box, and improvise with us on 4/15.⁸² Beside that box was a digital clock, driving home the exigency by ticking down the days, hours, minutes, and seconds to zero-hour.⁸³

This was the power of advanced notice, the insight behind opening acts who amp up the crowd for the headliner, convincing more and more stressed, overworked, underpaid workers that things could get better if they would, together, shut down the machines in front of them and walk. And it was spreading improvisation to anyone with an urge to resist on April 15—or beyond.⁸⁴

⁸⁰ One “top labor official” has put this differently, in terms of anger, not confidence: “There’s a lot of frustration among American workers, . . . a lot of anger and alienation. The question is how can that anger, upset, dismay be converted into an effort to create a fairer America?” Jake Blumgart, *The U.S. Labor Movement: At a ‘Crossroads,’ or the Gallows?*, IN THESE TIMES (Jan. 21, 2015, 4:06 PM), http://inthesetimes.com/working/entry/17557/the_u.s._labor_movement_at_a_crossroads_or_the_gallows.

⁸¹ The SEIU’s support of Fight for \$15 makes this especially clear. Referring to Fight for \$15’s endgame, SEIU President Mary Kay Henry stated: “We’re throwing as much resources, time, talent, and energy as we can to getting behind these incredibly inspiring movements of workers . . . They don’t exactly have a plan up on the wall.” Jessica Leber, *How a Traditional Union Is Adapting to a New Labor Era: By Helping All Low-Wage Workers*, FAST COMPANY (May 26, 2015, 9:14 AM), <https://www.fastcoexist.com/3046026/most-creative-people/how-a-traditional-union-is-adapting-to-a-new-labor-era-by-helping-all-l>; see also Greenhouse, *Movement to Increase*, *supra* note 47 (referring to a McDonald’s raise to \$15 an hour, Henry stated, “I have no idea how this breakthrough will occur”).

⁸² APRIL 15, 2015: FIGHT FOR \$15, *supra* note 61.

⁸³ *Id.*

⁸⁴ In late May 2015, Destiny Willis-Myrick and Kiera Coleman walked out on a Popeyes shift in Philadelphia, but not before leaving a note in all-block letters, uploaded to Facebook: “We demand a safe workplace. It is 90° in here and we cannot work like this. We

C. *Improvisation as the Future of Workplace Activism*

So, about four years in, Fight for \$15 and the effort to diffuse improvisation might be on to something. More important, however, is that even if Fight for \$15 folds, improvising at work is not going anywhere. It is the present, and the future, of American workplace mobilization.

The reason why is straightforward: given the scope of ills to be organized against, labor has few options but to encourage workers—in-person or not—to take matters into their own hands. The statistical picture is nothing new to those who follow such things, but likely staggering to those who do not. For starters, the \$15 movement isn't really targeted to some slim slice of the wage-earning world. It is targeted to the astonishing forty-two percent of the U.S. workforce making less than that, including a majority of African-Americans and sixty percent of Latinos.⁸⁵ Absent some countervailing force, those figures will not change. The jobs where sub-\$15 work mostly lives, retail and food service, yes, but also nursing assistants, laborers, janitors, and more, are the occupations predicted to get bigger,⁸⁶ just as annual raises go extinct.⁸⁷ It is not as if people are not working hard enough. Since 1973 productivity has jumped almost seventy-five percent, wages only nine percent.⁸⁸ Families made more money fifteen years ago.⁸⁹ U.S.

unconditionally promise to return to work when the air conditioning is fixed. We are your employees and we deserve more." *Fight for \$15*, FACEBOOK (May 27, 2015). The caption for the photo was as direct as it was reflective of the big tent Fight for \$15 had become—"Join the movement for respect on the job: fightfor15.org." *Id.*

⁸⁵ IRENE TUNG ET AL., THE GROWING MOVEMENT FOR \$15, NAT'L EMP. L. PROJECT 1, 4 (Nov. 2015), <http://nelp.org/content/uploads/Growing-Movement-for-15-Dollars.pdf>; see also Claire Zillman, *Who Makes Less than \$15 Per Hour? An Explainer in 3 Charts*, FORTUNE (Apr. 13, 2015, 11:49 AM), <http://fortune.com/2015/04/13/who-makes-15-per-hour>.

⁸⁶ Tung et al., *supra* note 85, at 2, 4.

⁸⁷ Patricia Cohen, *One-Time Bonuses and Perks Muscle Out Pay Raises for Workers*, N.Y. TIMES (May 25, 2015), http://www.nytimes.com/2015/05/26/business/one-time-bonuses-and-perks-muscle-out-pay-raises-for-workers.html?_r=0 (calling the "increasing[] turn to one-off bonuses and nonmonetary rewards" instead of raises "a quiet revolution in compensation" and a "drastic shift"); see also Ben Leubsdorf & Jon Hilsenrath, *U.S. Workers Ask: Where's My Raise?*, WALL STREET J. (June 3, 2015, 10:30 PM), <http://www.wsj.com/articles/u-s-workers-ask-where-my-raise-1433385001>.

⁸⁸ David Cooper & Lawrence Mishel, *The Erosion of Collective Bargaining Has Widened the Gap Between Productivity and Pay*, ECON. POL'Y INST. (Jan. 6, 2015), <http://www.epi.org/publication/collective-bargainings-erosion-expanded-the-productivity-pay-gap>. Wages grew just a little over nine percent during this period. *Id.*

⁸⁹ Patricia Cohen, *Middle Class, but Feeling Economically Insecure*, N.Y. TIMES (Apr. 10, 2015), <http://www.nytimes.com/2015/04/11/business/economy/middle-class-but-feeling-economically-insecure.html>.

inequality, the worst of any industrialized democracy,⁹⁰ gets attention, but tidbits like the fact that you could add up everything owned by the bottom forty-one percent and still have a lighter wallet than six descendants of Sam Walton provide good color.⁹¹ Most Americans will retire with a bank account at zero.⁹²

The reality is that the currently constituted array of labor and allied groups dedicated to raising living standards cannot put a meaningful dent in these figures. History has shown collective bargaining to be one of the most powerful income-leveling mechanisms available.⁹³ The NLRB-prescribed system for unionization, however, is broken and might impact density by, at best, a blip,⁹⁴ while non-NLRB organizing—which is better and has worked in geographically-limited and industry-limited contexts—is too slow.⁹⁵ So-called “alternative-labor” efforts,⁹⁶ which advocate for workers excluded from labor law and can include legal and policy clinics known as worker centers,⁹⁷ have done much for many, but primarily in narrow sectors and not by bargaining.⁹⁸

The real issue, though, is resources. Alt-labor, worker centers, and the like rely almost entirely on the capacity and goodwill of third-party

⁹⁰ Erik Sherman, *America Is the Richest, and Most Unequal, Country*, FORTUNE (Sept. 30, 2015, 4:28 PM), <http://fortune.com/2015/09/30/america-wealth-inequality>.

⁹¹ Josh Bivens, *Inequality, Exhibit A: Walmart and the Wealth of American Families*, ECON. POL'Y INST.: WORKING ECON. BLOG (July 17, 2012, 10:25 AM), <http://www.epi.org/blog/inequality-exhibit-wal-mart-wealth-american>.

⁹² See JOELLE SAAD-LESSLER ET AL., ARE U.S. WORKERS READY FOR RETIREMENT?, SCHWARTZ CTR. FOR ECON. POLICY ANALYSIS (2015), http://www.economicpolicyresearch.org/images/docs/research/retirement_security/Are_US_Workers_Ready_for_Retirement.pdf. “In the private sector, nearly 44% of prime-age workers don’t have access to a retirement plan at work.” David Harrison, *States to Help Workers Save for Retirement*, WALL STREET J. (Sep. 7, 2015, 6:07 PM), <http://www.wsj.com/articles/states-to-help-workers-save-for-retirement-1441322951>.

⁹³ See Cooper & Mishel, *supra* note 88; Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 513 (2011) (attributing one third of U.S. wage inequality to union decline).

⁹⁴ Had unions won all 1425 NLRB elections conducted in 2014, they would have gained 93,084 potential members out of a total U.S. workforce of over 140 million. See Michael Rose, *Number of NLRB Elections Held in 2014 Up Slightly Over Previous Year, Data Show*, DAILY LAB. REP., May 12, 2015, at C-1.

⁹⁵ See Rich Yeselson, *Fortress Unionism*, 29 DEMOCRACY J. 68, 76–79 (2013).

⁹⁶ See Josh Eidelson, *Alt-Labor*, AM. PROSPECT (Jan. 29, 2013), <http://prospect.org/article/alt-labor>.

⁹⁷ *Id.*; Ann C. Hodges, *Avoiding Legal Seduction: Reinvigorating the Labor Movement to Balance Corporate Power*, 94 MARQ. L. REV. 889, 907–08 (2011).

⁹⁸ See Compa, *supra* note 17, at 11; Steven Greenhouse, *Workers Organize, but Don’t Unionize, to Get Protection Under Labor Law*, N.Y. TIMES (Sept. 6, 2015), http://www.nytimes.com/2015/09/07/business/economy/nonunion-employees-turn-to-work-site-committees-for-protection.html?_r=0.

grant-makers.⁹⁹ Unions are self-sustaining but confront a chicken-and-egg problem: funding jumps only when membership increases, but membership jumps only with increased funding.¹⁰⁰ Making matters worse are state legislatures and Supreme Court decisions that keep freeing workers from paying dues in any event.¹⁰¹ As confirmed by recent research, even with strategic will and historic financial commitments, labor's sapped state means that there are just not enough dollars or organizers around to move the needle much.¹⁰²

The problem can be concretized. An inspiring 2014 uprising at the retailer Wet Seal had aggression, momentum, and the awe of online activists, but with no union or like-group available to “tap, direct, and sustain the unrest,” it fizzled.¹⁰³ The world of adjunct teaching has become a veritable tinderbox of unionizing fervor but, as Lance Compa has written, labor cannot “get[] enough organizers into the field to meet demand.”¹⁰⁴ To run a union today is to engage in constant organizing triage, slicing and dicing segments of the economy to determine where staff can be deployed most effectively.¹⁰⁵ That means that there are

⁹⁹ See Janice Fine, *Worker Centers: Entering a New Stage of Growth and Development*, 20 NEW LAB. F. 45, 46 (2011).

¹⁰⁰ “[F]inancial allocation is a significant predictor of union wins; the odds of a union win are 119% greater when the union allocates adequate and appropriate resources than when it does not.” Rachel Aleks, *Estimating the Effect of “Change to Win” on Union Organizing*, 68 INDUS. & LAB. REL. REV. 584, 588 (2015). Thus to be more specific, the funding that is needed is funding for organizing, which must compete with equally costly contract, grievance, and political demands. Indeed, a high-profile 2005 split in the labor movement involved disagreements over the proper allocations of dues for organizing, political, and other traditional union functions. See *id.* at 585–86.

¹⁰¹ See *Harris v. Quinn*, 134 S. Ct. 2618 (2014); Dan Kaufman, *Scott Walker and the Fate of the Union*, N.Y. TIMES MAG. (June 12, 2015), <http://www.nytimes.com/2015/06/14/magazine/scott-walker-and-the-fate-of-the-union.html>.

¹⁰² A 2015 analysis found that even a historic effort by seven major unions to put unprecedented levels of funding, staff, and coordination into organizing was not enough, leading only to a marginal increase in the percentage of workers organized over a ten-year period. See Aleks, *supra* note 100, at 584, 602. I have previously made this argument in greater detail. See Michael M. Oswald, *Automatic Elections*, 4 U.C. IRVINE L. REV. 801, 824–29 (2014).

¹⁰³ Sejal Parikh, *Labor at a Crossroads: How We Know We Haven't Yet Found the Right Model for the Worker Organizations*, AM. PROSPECT (Jan. 13, 2015), <http://prospect.org/article/labor-crossroads-how-we-know-we-havent-yet-found-right-model-worker-organizations>.

¹⁰⁴ Lance Compa, *Labor at a Crossroads: How Unions Can Thrive in the 21st Century*, AM. PROSPECT (Jan. 27, 2015), <http://prospect.org/article/labor-crossroads-how-unions-can-thrive-21st-century>. That stated, this is obviously an excellent problem to have.

¹⁰⁵ For this reason, unions often reach “jurisdictional” agreements with each other so that campaigns do not overlap and unions can focus on where they have the most experience, know-how, and power. See Stephen Lerner, *An Immodest Proposal: A New Architecture for the House of Labor*, 12 NEW LAB. F. 9, 10–13 (2003) (describing the logic and practice of union jurisdictional agreements); see also Yeselson, *supra* note 95, at 79–80.

workers like Charles Gladden, who want a union, and are ready to fight for a union, but have to wait for help to arrive.¹⁰⁶

Until, perhaps, now. If there is a moral to be had from OUR Walmart and the fast food campaigns, it is that “waiting” went out of fashion in fall 2012 and that on April 15, 2015 improv moved from the runways to the hottest racks. And why not? With a “middle-class” prognosis so dismal that politicians have given up the phrase,¹⁰⁷ advocates too small to reverse the trend, and fear that unions have become a non-renewable resource, why not throw an improv party and invite the whole city? As Harold Meyerson so aptly put it: “In America today, it is becoming easier to win a law raising wages for 100,000 workers than to unionize 4,000.”¹⁰⁸

Of equal or greater salience, though, is that there are reasons to think that while labor keeps the music going, a whole bunch of other people are game not just to RSVP, but to throw parties on their own. That is, not only is the 4/15 approach continuing, there are hints that the improv style so purposely cultivated first at Walmart and in fast food, and then by Fight for \$15 in low-wage work generally, is, in varying forms, out there already and likely to continue. Underscoring this forecast are Fight for \$15’s continued activities in 2016, nascent activism associated with the ride-sharing app “Uber,” and an amazing array of improvisational efforts and available hooks on social media platforms.

¹⁰⁶ Lydia DePillis, *Why House Cafeteria Workers Are Paid Better than Senate Cafeteria Workers*, WASH. POST: WONKBLOG (May 5, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/05/05/why-house-cafeteria-workers-are-paid-better-than-senate-cafeteria-workers> (regarding Gladden’s pleas, a union official stated, “It’s on our radar. We just haven’t gotten there yet”). This is really nothing new. In 1999, the oft-cited Freeman and Rogers report on worker preferences first identified the much-studied “representation gap” between what employees want (formalized influence on the job) and what they have (a profound lack of voice). See Matthew W. Finkin, *Bridging the “Representation Gap”*, 3 U. PA. J. LAB. & EMP. L. 391, 391 (2001).

¹⁰⁷ See Amy Chozick, *Middle Class Is Disappearing, at Least from Vocabulary of Possible 2016 Contenders*, N.Y. TIMES (May 11, 2015), <http://www.nytimes.com/2015/05/12/us/politics/as-middle-class-fades-so-does-use-of-term-on-campaign-trail.html> (“The phrase, long synonymous with the American dream, now evokes anxiety, an uncertain future and a lifestyle that is increasingly out of reach.”).

¹⁰⁸ Harold Meyerson, *Opinion, Labor’s New Reality—It’s Easier to Raise Wages for 100,000 than to Unionize 4,000*, L.A. TIMES (Dec. 7, 2014, 4:00 PM), <http://www.latimes.com/opinion/op-ed/la-oe-meyerson-labor-organizing-20141208-story.html>.

1. Fight for \$15 and April 14, 2016

Post 4/15, Fight for \$15 convened a national low-wage worker convention;¹⁰⁹ demonstrated around the Presidential debates;¹¹⁰ successfully pressured Brazilian and European Union prosecutors to investigate McDonald's for tax dodging, unpaid wages, and child labor;¹¹¹ and celebrated its biggest victories to date: deals to enact \$15 minimums in the enormous states of California and New York.¹¹²

All of it, though, was prelude to the events of April 14, 2016, which largely replicated the 4/15 blueprint and therefore served to confirm the strategy's success. Once again, the strikes were announced weeks in advance,¹¹³ and while the ostensible focus of the day was on McDonald's,¹¹⁴ it was in the symbolic sense of combatting so-called "McJobs" generally, which "cost us all" and "hold[] everyone back, not just fast-food workers."¹¹⁵ The move from April 15 to April 14—tax day—allowed the campaign to highlight how corporate tax schemes "around the globe hurt[] governments, workers, taxpayers and consumers."¹¹⁶

But the crucial similarity between April 15, 2015 and April 14, 2016, is that Fight for \$15 continued to rely on improvised resistance by

¹⁰⁹ See Lydia DePillis, *Why Labor Groups Genuinely Believe They Can Unionize McDonald's One Day*, WASH. POST: WONKBLOG (June 8, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/06/08/why-labor-groups-genuinely-believe-they-can-unionize-mcdonalds-one-day>.

¹¹⁰ See Teresa Tritch, *The Fight for \$15 Comes to the Republican Debate*, N.Y. TIMES: TAKING NOTE (Nov. 10, 2015, 6:34 PM), http://takingnote.blogs.nytimes.com/2015/11/10/the-fight-for-15-comes-to-the-republican-debate/?_r=0.

¹¹¹ See Steven Greenhouse, *Fight for \$15: The Strategist Going to War to Make McDonald's Pay*, GUARDIAN (Aug. 30, 2015, 10:42 AM), <https://www.theguardian.com/us-news/2015/aug/30/fight-for-15-strategist-mcdonalds-unions>.

¹¹² See Steven Greenhouse, *How the \$15 Minimum Wage Went from Laughable to Viable*, N.Y. TIMES (Apr. 1, 2016), <http://www.nytimes.com/2016/04/03/sunday-review/how-the-15-minimum-wage-went-from-laughable-to-viable.html>.

¹¹³ @fightfor15, TWITTER (Mar. 30, 2016, 7:37 PM), <https://twitter.com/fightfor15/status/715337308703043584> ("April 14th will be the biggest #FightFor15 #FastFoodGlobal action in history. Let's win this.").

¹¹⁴ Tribune News Services, *'Fight for 15' Campaign to Target McDonald's Stores April 14*, CHI. TRIB. (Mar. 30, 2016, 11:25 AM), <http://www.chicagotribune.com/business/ct-fight-for-15-campaign-mcdonalds-20160330-story.html>.

¹¹⁵ *On Eve of Tax Day, Underpaid Workers to Wage Biggest-Ever Global Strikes, Protests as Fight for \$15 Turns Up Heat*, NH LAB. NEWS (Apr. 2, 2016), <http://nhlabornews.com/2016/04/worldwide-protests-and-strikes-in-fightfor15-scheduled-for-april-14th>; see also

@15andaUnion, TWITTER (Apr. 16, 2016, 7:13 AM), <https://twitter.com/15andaUnion/status/721310652342644736> ("Thursday was a historic day for building worker power. The world gets it: McJobs cost us all #FightFor15.").

¹¹⁶ *April 14: Our Biggest-Ever Global Strikes and Protests*, FIGHT FOR \$15, <http://fightfor15.org/april-14-our-biggest-ever-global-strikes-and-protests> (last visited Oct. 7, 2016) [hereinafter *April 14*].

those who merely happened upon the campaign's message and became inspired. That morning, Fight for \$15's National Organizing Director anticipated that, "You're going to see a domino effect happening across the country." This sentiment was echoed by fast-food worker Naquasia LeGrand who said, "Every day, more people like me, living in poverty, are realizing they need to stand up."¹¹⁷ Like the previous year, Twitter provided some inspiring confirmation of those predictions,¹¹⁸ as did reporting on the protests themselves, which ultimately spanned forty countries and included telecom, nursing home,¹¹⁹ and warehouse workers, alongside public school teachers, home care aides, university adjuncts, and others.¹²⁰

2. Uber

Outside of Fight for \$15, today's most creative and sustained use of improvised resistance involves activists working for Uber, the well-known smartphone app that "connects drivers offering rides and passengers seeking them."¹²¹ Given the incredible number of copy-cat applications that have sprung up in its wake—the "Uber for X"¹²² phenomenon—the company is rightly considered the "foremost symbol of the on-demand economy."¹²³

While much press has concentrated on lawsuits to clarify drivers' employment status and Seattle's attempt to facilitate Uber unionization,¹²⁴ drivers themselves have been using direct action to improve working conditions, much of it steeped in on-the-fly, improvisational decision-making. Abrupt fare cuts have been a particular source of concern, leading workers to form informal

¹¹⁷ Jim Tankersley & Brian Fung, *Why Tens of Thousands of Workers, from Verizon to McDonald's, Are Walking Off the Job Thursday*, WASH. POST: WONKBLOG (Apr. 13, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/04/13/why-tens-of-thousands-of-workers-from-verizon-to-mcdonalds-are-walking-off-the-job-thursday>.

¹¹⁸ Daniel Massey (@masseydaniel), TWITTER (Feb. 13, 2016, 1:48 PM), <https://twitter.com/masseydaniel/status/698594556372242432> ("Five Church's workers just walked off their job in Greenville to join #FightFor15 strike. Manager locked store up.").

¹¹⁹ See Tankersley & Fung, *supra* note 117; *April 14*, *supra* note 116.

¹²⁰ See David Moberg, *Chicago Fast Food Workers Join International Protests for \$15 an Hour and a Union*, IN THESE TIMES (Apr. 14, 2016, 6:21 PM), http://inthesetimes.com/working/entry/19061/moberg_mjobs_fight_for_15.

¹²¹ Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 86 (2015).

¹²² See Adam Grant, *Why So Many Ideas Are Pitched as 'Uber for X'*, ATLANTIC (Feb. 4, 2016), <http://www.theatlantic.com/business/archive/2016/02/adam-grant-originals-uber-for-x/459321>.

¹²³ Steven Greenhouse, *Uber: On the Road to Nowhere*, AM. PROSPECT (Dec. 7, 2015), <http://prospect.org/article/road-nowhere-3>.

¹²⁴ See *id.*

associations and call strikes not simply through old-fashioned word-of-mouth planning and persuasion, but by collectively hailing Uber rides and then surprising fellow drivers by urging them to show instant solidarity by quitting for the day.¹²⁵ In select cities drivers use a walkie-talkie-like app service that allows them to announce sudden and unplanned strikes to up to 700 drivers at a time, usually during peak periods.¹²⁶ An app shut-down on Super Bowl Sunday led to reports of seventy-two minute passenger wait times, prompting a leader of the action to shout to a crowd of defiantly idled drivers: “This is the formula!”¹²⁷ Similarly, public protests by those working for Uber’s high-end service, UberBlack, have led the company to reverse reviled changes to passenger pick-up policies and rehire drivers who had been “deactivated for pressuring” other drivers to participate “as the showdown[s] escalated.”¹²⁸ As one commentator recently concluded, “Uber’s indomitable rise has been clouded by an insurgency from a small but vocal portion of its own drivers who say they feel neglected, even used.”¹²⁹

So although the pay-offs from litigation and legislatively-based strategies to assist workers in the on-demand economy remain uncertain,¹³⁰ improvisation has already delivered some dividends.

3. Social Media

Finally, so much of today’s cutting-edge activism is both online and catered to in the moment reactions. A prominent workplace example is Coworker.org, which offers a turn-key platform for mistreated or frustrated workers to set up and instantly publicize a virtual petition drive. The site’s features include signature goals, time stamps, ways for organizers to keep in touch with supporters, and space for signers to describe justifications for joining the campaign.¹³¹ “Alice C.,” for

¹²⁵ Alan Feuer, *Uber Drivers Up Against the App*, N.Y. TIMES (Feb. 19, 2016), <http://www.nytimes.com/2016/02/21/nyregion/uber-drivers-up-against-the-app.html>.

¹²⁶ Noam Scheiber, *Uber Drivers and Others in the Gig Economy Take a Stand*, N.Y. TIMES (Feb. 2, 2016), <http://www.nytimes.com/2016/02/03/business/uber-drivers-and-others-in-the-gig-economy-take-a-stand.html>.

¹²⁷ Feuer, *supra* note 125.

¹²⁸ Scheiber, *supra* note 126.

¹²⁹ Feuer, *supra* note 125.

¹³⁰ See, e.g., *id.* (describing attempts to organize Uber drivers into unions as “chaotic”); Mike Isaac & Noam Scheiber, *Uber Settles Cases with Concessions, but Drivers Stay Freelancers*, N.Y. TIMES (Apr. 21, 2016), <http://www.nytimes.com/2016/04/22/technology/uber-settles-cases-with-concessions-but-drivers-stay-freelancers.html>.

¹³¹ See COWORKER.ORG, <http://www.coworker.org> (last visited Oct. 30, 2016); see also Paul M. Secunda, *The Wagner Model of Labour Law Is Dead—Long Live Labour Law!*, 38 QUEEN’S

example, signed a petition urging Uber to add a tip option “[b]ecause I strive to give my customers friendly conversation and a smooth ride.”¹³² Critical to Coworker.org’s success is that the press has been paying attention. Media have caught on to several campaigns, including an effort to “Let Us Have Beards” at Publix Super Markets, which generated four national news stories in nine days.¹³³

The popular application Twitter, which allows users to instantly broadcast short messages to a mass audience, can serve a somewhat similar role,¹³⁴ but its “hashtag” function is even more powerful.¹³⁵ Placing a “#” character in front of any phrase tags it in a way that lets millions of other users share and search for tweets with the same wording.¹³⁶ The function has facilitated so-called “hashtag activism,” which has been credited with branding (and to a certain extent sparking) the Black Lives Matter movement,¹³⁷ helping to restore cuts to Planned Parenthood, and generating major press over an effort to have *The Colbert Report* cancelled for racial insensitivity.¹³⁸

Older early-Millennial technologies can have improvisational functions too. Though Occupy Wall Street is gone,¹³⁹ its yes-and spirit

L.J. 545, 575 (2013) (“[Co-worker.org] . . . provid[es] ordinary people with online tools and training to organize their co-workers and advocate for changes on the job.” (footnote omitted)).

¹³² *Uber: Give Consumers the Option of Adding a Tip to All Uber Fares*, COWORKER.ORG, <https://www.coworker.org/petitions/uber-allow-customers-to-tip-drivers> (last visited Oct. 30, 2016).

¹³³ *Let Us Have Beards!*, COWORKER.ORG, <https://www.coworker.org/petitions/let-us-have-beards> (last visited Oct. 30, 2016); see also Janet I. Tu, *Barista’s Petition to Starbucks About Work Cuts Catches on with Thousands*, SEATTLE TIMES (July 5, 2016, 7:41 PM), <http://www.seattletimes.com/business/starbucks/baristas-petition-to-starbucks-catches-on-with-thousands> (“9,000 of the signers are identified on Coworker.org as Starbucks workers.”).

¹³⁴ See Farhad Manjoo, *The End of 140*, SLATE (July 20, 2011, 4:52 PM), http://www.slate.com/articles/technology/technology/2011/07/the_end_of_140.html.

¹³⁵ Twitter Help Center, *Using Hashtags on Twitter*, TWITTER, <https://support.twitter.com/articles/49309> (last visited Oct. 30, 2016).

¹³⁶ *Id.*

¹³⁷ Jessica Guynn, *Meet the Woman Who Coined #BlackLivesMatter*, USA TODAY (Mar. 4, 2015, 4:16 PM), <http://www.usatoday.com/story/tech/2015/03/04/alicia-garza-black-lives-matter/24341593> (“The hashtag leaped from social media to the streets, mobilizing a new wave of civil rights protests in the U.S.”).

¹³⁸ See Caitlin Dewey, *#Bringbackourgirls, #Kony2012, and the Complete, Divisive History of ‘Hashtag Activism’*, WASH. POST (May 8, 2014), https://www.washingtonpost.com/news/the-intersect/wp/2014/05/08/bringbackourgirls-kony2012-and-the-complete-divisive-history-of-hashtag-activism/?utm_term=.cc8b3674d25c (describing the rise and success of hashtag activism, including an effort to have the Susan G. Komen Foundation restore cuts to Planned Parenthood); Jay Caspian Kang, *The Campaign to “Cancel” Colbert*, NEW YORKER (Mar. 30, 2014), <http://www.newyorker.com/news/news-desk/the-campaign-to-cancel-colbert> (“On Twitter . . . the unaccompanied punch line sparked a firestorm of outrage, which quickly escalated into a campaign demanding the show’s cancellation.”).

¹³⁹ Chris Tilly & Marie Kennedy, *Latin America’s “Third Left” Meets the U.S. Workplace: A Promising Direction for Worker Protection?*, 4 U.C. IRVINE L. REV. 539, 544 (2014).

survives though “99 Pickets,” a band of roving protestors who will show up to a demonstration based solely on a text alert sent by activists in need of a participatory boost.¹⁴⁰ Though 99 Pickets is not exactly mainstream, one can still imagine more institutionalized efforts like community organizing networks or worker centers—both of which are ultimately founded on the principle of collaborative self-advocacy—creating and encouraging a similar model of flash resistance backed up by group support catalyzed through online notifications.¹⁴¹

4. Going Forward

In sum, what has been called “Improvisational Unionism” is now the tip of something else. What started as a tactic for two of the most innovative union-backed campaigns in memory has gotten a red carpet rollout for everyone with a job. Whether the expansion will be “successful” in the sense that it will help rebuild labor is not known. For Fight for \$15 to be sustainable, something tangible probably needs to come of the “union” part of the fast food campaign’s original dual-demands. But the bigger picture is this: the cat’s already out of the bag. The genius of OUR Walmart, of the city-centered fast food groups, and of Fight for \$15 is in modeling the power of workplace improvisation by showing—and publicizing—how it’s done. Fighting back when inspiration hits is not new, it just hadn’t been front-page news in years. But now it’s back. Improvised defiance is coalescing and scattering. It has dazzled the media and put multi-billion dollar corporations on their heels. It is *working*. So never mind what happens to Fight for \$15: labor, alt-labor, advocates—people—are not going to just forget.

¹⁴⁰ See *Get Involved*, 99 PICKETS, <http://99pickets.org/get-involved> (last visited Oct. 30, 2016).

¹⁴¹ The “iron rule” of community organizing is to “never do for someone else what they can do for themselves,” MARK R. WARREN, *DRY BONES RATTLING: COMMUNITY BUILDING TO REVITALIZE AMERICAN DEMOCRACY* 119 (2001), a mantra echoed by professionals: “Our job in organizing is not to try to convince people, but try to help people convince themselves. And helping people convince themselves means people taking it upon themselves to act, to change conditions in whatever space they might be.” Ben Shapiro, *Organizing Immigrant Supermarket Workers in Brooklyn: A Union-Community Partnership*, in *NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT* 49, 63 (Ruth Milkman & Ed Ott eds., 2014). Workers centers, which are like legal clinics with an organizing wing, generally lack the capacity to combat the scale of workplace problems in a given area and therefore generally train workers to take matters into their own hands, often successfully. JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 6–9, 70, 122, 169–70 (2005); see also Kris Maher, *Nonunion Worker Advocacy Groups Under Scrutiny*, WALL STREET J. (July 24, 2013, 6:26 PM), <http://www.wsj.com/articles/SB10001424127887323971204578626283846775530> (describing this dual function).

II. THE RIGHT TO IMPROVISE: LEGALLY, NORMATIVELY, AND THE ESSENTIAL ISSUE OF ACCESS

In the meantime, the foundational question needs asking: Do they have the right to improvise? I mean “right” in three senses. The first is legal, and the answer is generally yes. Workers who yes-and in the workplace—who act with or in front of colleagues and protest in-the-moment—are usually protected from discipline. In fact, sometimes the law actually preferences improvised acts over planned ones. The second sense is normative. Is it desirable for workers to take immediate action when an opportunity presents itself? Here again the answer is yes, and the benefits, perhaps surprisingly, are multi-directional, including up the corporate hierarchy. The third sense is the most important. It asks whether the law preserves access to in-the-moment resistance by safeguarding improvisation’s prerequisite: relationships of trust. The answer to that question is “no,” but only because the key doctrine is based on assumptions about the nature of work that have not been updated since the 1940s. The three senses are examined below.

A. *The Right to Improvise Legally: Labor Law’s Improvisatory Roots*

Labor law’s improvisatory character goes back to the National Labor Relations Act’s (NLRA or Act)¹⁴² central provision, section 7.¹⁴³ Under it, workers have the right to organize unions and act in concert for “mutual aid or protection,” a phrase shown to have been included in the 1935 legislation to reflect labor’s broadly solidaristic impulses at the time, which often translated into a willingness to shift from work to protest on a dime.¹⁴⁴ Though its scope was gradually whittled down in later rulings,¹⁴⁵ today section 7 remains the workplace improviser’s best friend, with sudden walkouts, outbursts, marches, complaints, and most other badges of boldness labeled “protected conduct” if about work and

¹⁴² 29 U.S.C. §§ 151–169 (2012).

¹⁴³ 29 U.S.C. § 157.

¹⁴⁴ This is the conclusion of Richard Michael Fischl’s comprehensive recounting of the phrase’s historical meaning in *Self, Other, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789 (1989). There he shows how the Act’s framers tried to incorporate instantaneous challenges to management provocations into section 7’s protective cloak. *Id.* at 850–53, 853 n.277. As he and others have shown, resistance in this vein was near-constant at the time. See *id.*; JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 51 (1983); JEREMY BRECHER, STRIKE! 150–216 (1972) (describing vast rank-and-file militancy prior to the Act’s passage).

¹⁴⁵ For a critical accounting of these decisions, see ATLESON, *supra* note 144, at 44–66.

done with a group of employees, or alone but with an eye toward getting the group together later.¹⁴⁶ In practice, this means that what might look like a cut-and-dry case of insubordination can, from a labor lawyer's vantage, be right in section 7's wheelhouse.

The Supreme Court's reversal of seven firings after an impromptu strike over freezing temperatures in *NLRB v. Washington Aluminum Co.* is the best-known example of the provision's modern power in action.¹⁴⁷ There, the furnace had broken and though repairs were on the way, the workers were in no mood to wait around.¹⁴⁸ So they walked out, got fired, and then got their jobs back when the Court said the NLRA protects on-the-spot protests, even strikes, even non-union strikes, and even if the boss never had a chance to fix the problem in the first place.¹⁴⁹ "[T]he men took the most direct course to let the company know that they wanted a warmer place in which to work," and that was that.¹⁵⁰

Washington Aluminum remains the classic defense against discipline that arises out of worker advocacy. The Board even has a plain language website devoted to the underlying concept.¹⁵¹ But in the narrow context of on-the-fly resistance, the decision's true gift springs from its dismantling of a Fourth Circuit analysis that, if affirmed, would have outlawed all but the most fastidiously planned walkouts. In particular, the lower court judges were astonished by the machinists' failure to follow what seemed like obvious pre-steps. Figuring out the cause of the cold, connecting the cause to a concrete and clearly expressed demand, and dotting the "i's" and crossing the "t's" on "critical" in-progress tasks seemed like the least the workers could have

146

To be protected under Section 7 of the Act, employee conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." . . . [W]hether an employee's activity is "concerted" depends on the manner in which the employee's actions may be linked to those of his coworkers. . . . The concept of "mutual aid or protection" focuses on the *goal* of the concerted activity; chiefly, whether the employee or employees involved are seeking to "improve terms and conditions of employment or otherwise improve their lot as employees."

Fresh & Easy Neighborhood Mkt., Inc., 361 N.L.R.B. No. 12, 2014 N.L.R.B. LEXIS 627, at *3-4 (Aug. 11, 2014) (citations omitted).

¹⁴⁷ 370 U.S. 9 (1962).

¹⁴⁸ *Id.* at 11-12.

¹⁴⁹ *Id.* at 14-17.

¹⁵⁰ *Id.* at 15.

¹⁵¹ *Protected Concerted Activity*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/rights-we-protect/protected-concerted-activity> (last visited Oct. 4, 2016).

done before leaving.¹⁵² Skipping those steps entirely led the court to class the conduct as insubordination and depict the workers as having acted “precipitously, impatiently and unreasonably.”¹⁵³ The Supreme Court’s response to this characterization was, in effect, *precisely*. There is no requirement that workers get demands, triggers, tasks, or any other ducks in a row before acting out,¹⁵⁴ making the Fourth Circuit’s claim that section 7’s purpose “was not to guarantee to the employees the right to do as they please under any given set of circumstances and in total disregard of the obligations of their employment”¹⁵⁵ almost exactly wrong in protest situations.¹⁵⁶ Labor law assumes not that angry employees will be “reasonable,” it assumes that they’ll be improvisational.¹⁵⁷

Indeed, decisions citing *Washington Aluminum* frequently read as tributes to yes-anding at work. The cases include reversals of firings where pipefitters shut off electrical tools during a downpour,¹⁵⁸ where retail workers told to put “sales pressures on customers” instead walked straight to the Board to complain,¹⁵⁹ and where fitness instructors struck when management forced them to pick up their paychecks fourteen miles from the gym.¹⁶⁰

In certain situations, Board doctrine appears to actually preference impromptu acts over planned ones. Stoppages at so-called

¹⁵² NLRB v. Wash. Aluminum Co., 291 F.2d 869, 872, 874, 875, 878 (4th Cir. 1961), *rev’d*, 370 U.S. 9; *see also id.* at 875 (“An important and necessary qualification of the right to exert pressure on an employer through work stoppages is that such pressure be exerted in support of a demand or request made to the employer.”).

¹⁵³ Cynthia Estlund, *The Story of NLRB v. Washington Aluminum: Labor Law as Employment Law*, in *EMPLOYMENT LAW STORIES* 175, 191 (2007) [hereinafter Estlund, *The Story of NLRB v. Washington*]. The court was particularly appalled that after the employees left they “did not know [the furnace] had been effectively repaired *by the time they were to have started work.*” *Wash. Aluminum Co.*, 291 F.2d at 876 (emphasis added).

¹⁵⁴ *See Wash. Aluminum Co.*, 370 U.S. at 14 (“We cannot agree that employees necessarily lose their right to engage in concerted activities under s 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. . . . [S]uch an interpretation of s 7 might . . . effectively nullify the right . . .”).

¹⁵⁵ *Wash. Aluminum Co.*, 291 F.2d at 877.

¹⁵⁶ There are notable exceptions. Post-1935, the Board and courts have said that certain conduct, though clearly concerted and for “mutual aid,” *see supra* note 146, can lose protection. That means some improvisational acts that seem like they should be protected by *Washington Aluminum Co.* and section 7 are not. This could include a snap decision to work more slowly than normal, *see Elk Lumber Co.*, 91 N.L.R.B. 333, 336–37 (1950), to do only part, but not all, of the job, *see Valley City Furniture Co.*, 110 N.L.R.B. 1589, 1594–95 (1954), and to use profane, violent, or so-called “disloyal” speech that publicly disparages “the employer’s product” or tarnishes “its reputation.” *See Endicott Interconnect Techs., Inc.*, 345 N.L.R.B. 448, 450 (2005); *Marico Enters.*, 283 N.L.R.B. 726, 731–32 (1987).

¹⁵⁷ *Wash. Aluminum Co.*, 370 U.S. at 16.

¹⁵⁸ *Brown & Root, Inc. v. NLRB*, 634 F.2d 816, 817 (5th Cir. 1981).

¹⁵⁹ *Gen. Nutrition Ctr., Inc.*, 221 N.L.R.B. 850, 850, 855 (1975).

¹⁶⁰ *Vic Tanny Int’l, Inc. v. NLRB*, 622 F.2d 237, 238–40 (6th Cir. 1980).

“intermittent” intervals become legal if workers can prove that each strike was suddenly spurred.¹⁶¹ You are more likely to get your job back after calling your boss a “motherfucking liar” if the outburst was “spontaneous and impulsive” rather than planned.¹⁶² The analysis holds if you wrote it on Facebook instead.¹⁶³ And though today the most storied historical example of workplace yes-anding, the sit-down strike,¹⁶⁴ is often written off as an unprotected tactic, in truth the Board sometimes saves angry workers who unexpectedly sit-down and stay there for as long as five hours,¹⁶⁵ acknowledging that because unplanned rebellions are just that, they deserve a little legal wiggle-room.¹⁶⁶

B. *The Right to Improvise Normatively: In Defense of a Little Chaos*

Protecting all of this activity, of course, preserves the potential for a rather chaotic place of work, something Congress probably recognized. Employees wanted things that employers wanted to keep, and the policy question at the time was not how to eliminate the tug-of-war but really “to what extent employers should be denied the ability to bring their private power to bear in the struggle.”¹⁶⁷ Sparks, in other words, were

¹⁶¹ See Craig Becker, “Better than a Strike”: Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act, 61 U. CHI. L. REV. 351, 413–14 (1994).

¹⁶² Caterpillar, Inc., 322 N.L.R.B. 674, 676–77 (1996) (finding that the employee “simply lost his temper”); see also Piper Realty Co., 313 N.L.R.B. 1289, 1290 (1994) (“[E]mployees are permitted some leeway for impulsive behavior when engaging in concerted activity”); cf. Media Gen. Operations, Inc. v. NLRB, 560 F.3d 181, 188 (4th Cir. 2009) (denying protection for conduct that was “not a spontaneous outburst in response to an illegal threat but an ad hominem attack made in the context of a discussion [the employee] initiated with two supervisors”); Trus Joist MacMillan, 341 N.L.R.B. 369, 370–72 (2004) (deeming an outburst unprotected where it “was not a spontaneous or reflexive reaction to the news about [a co-worker’s] termination” but premeditated to embarrass a superior).

¹⁶³ See Pier Sixty, L.L.C., 362 N.L.R.B. No. 59, 2015 WL 1457688, at *2–4 (Mar. 31, 2015) (deeming obscene Facebook comments protected after weighing whether they were made “impulsive[ly] or deliberate[ly]” and concluding the former).

¹⁶⁴ Using the sit-down tactic, unions accumulated a stunning 2.5 million members during just a five-month span in 1937. NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 50, 52 (2002); see also ATLESON, *supra* note 144, at 46.

¹⁶⁵ See Fortuna Enter. L.P., 360 N.L.R.B. No. 128, 2014 WL 2448880, at *5 n.16 (2014) (collecting cases, including a protected five-and-a-half-hour sit-down strike).

¹⁶⁶ *Id.* at 4 (“The Board has long held . . . that [section 7] protection includes the right to remain on an employer’s property for a reasonable period of time in a sincere effort to meet with management over workplace grievances.”). The legal “wiggle-room” is provided by a ten-factor test to determine “whether the organizational rights of employees engaged in a work stoppage outweigh[] the property rights of the employer.” Fortuna Enterps., L.P. v. NLRB, 789 F.3d 154, 157 (D.C. Cir. 2015) (citation omitted).

¹⁶⁷ Matthew W. Finkin, Commentary, *Labor Law by Boz—A Theory of Meyers Industries, Inc., Sears, Roebuck and Co., and Bird Engineering*, 71 IOWA L. REV. 155, 195 (1985)

presumptively inevitable and with the NLRA, Congress settled on a regime that merely minimized the resulting fires.¹⁶⁸ In Matthew Finkin's words, the law was conceived to "flow from the sometimes spontaneous action of unsophisticated employees acting without [the] benefit of legal counsel . . . necessarily . . . draw[ing] its sustenance from a sympathetic appreciation of the often harsh realities of industrial life."¹⁶⁹

There was wisdom in this original position. It is here—amid the little conflicts and the flash fights and lightning strikes arising out of any number of grievances—where labor law's protective cloak should be thickest. The most accessible justification why is the same reason why any kind of resistance might be protected in the workplace: it empowers employees and, by extension, certain organizing campaigns and styles. While true, more inclusive and thus perhaps more broadly persuasive reasoning exists.

Most basically, defiant yes-anding personifies an emotional component of work that is simply worth protecting. Scholars refer to improv's particular resonance as an escape hatch from life's "tight places," situations where one is warily forced to balance two seemingly opposite pressures.¹⁷⁰ A relevant example might be maintaining the famous McDonald's mandate of service with a smile, even as the end of an eight-hour shift of heat, tattered feet, and barked orders approaches.¹⁷¹ A legal right to improvise in that setting, to stop and speak up after, say, the fourth splatter burn that, like the first three, could have been prevented with proper equipment,¹⁷² is uniquely

("Congress was aware that working people were engaging in all manner of conduct to better their working lives; Congress was equally aware that employers were engaging in all manner of conduct to blunt or eradicate those efforts.")

¹⁶⁸ Indeed, ultimately labor and capital must battle out the terms of collective bargaining with strikes, lockouts, and other weapons of economic pain. See Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47, 56–59 (2009). The duty to bargain itself rarely arises without open hostilities on both sides. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1536–37 (2002).

¹⁶⁹ Finkin, *supra* note 167, at 196.

¹⁷⁰ DANIELLE GOLDMAN, I WANT TO BE READY: IMPROVISED DANCE AS A PRACTICE OF FREEDOM 6–7 (2010) (citing HOUSTON BAKER, TURNING SOUTH AGAIN 69 (2001)) ("[[Baker] describe[s] tight places as 'the always ambivalent cultural compromises of occupancy and vacancy, differentially affected by contexts of situations.'"); see also FISCHLIN ET AL., *supra* note 15, at 19 ("Improvisation may entail the conjunction of irreconcilables, like purposelessness and intention . . .").

¹⁷¹ See JENNIFER PARKER TALWAR, FAST FOOD, FAST TRACK: IMMIGRANTS, BIG BUSINESS, AND THE AMERICAN DREAM 102, 97 (2003) (describing the "selling of self" in accordance with fast food organizational goals, including being "constantly encouraged by . . . managers to smile").

¹⁷² This is not a hypothetical example. Jana Kasperkevic, *McDonald's Workers Told to Treat Burns with Condiments, Survey Shows*, GUARDIAN (Mar. 16, 2015, 1:58 PM), <https://>

freeing.¹⁷³ It is, as scholars have also said, a form of “insurgent knowledge production” where workers come to learn their own strength, an understanding Fight for \$15’s activists have linked, over and over again, to hope.¹⁷⁴ At a photo exhibit on low-wage work, a Taco Bell worker, Krystal McLemore, stopped at an image of an empty chair lit by a slit of sunlight in an otherwise dark room and reflected in this vein: “That’s a really powerful picture to me. . . . The lighting in the picture, it’s light but then it’s also dark; it’s a searching-for-your-way-out kind of picture. We’re trying to climb through a dark tunnel to get to the light. That’s what this campaign is about.”¹⁷⁵

The value in this process lies not just in the transformative impact it has on people like Krystal, but how people like Krystal act for those who, because they are too scared, too busy, or too weary, won’t.¹⁷⁶ The shared space of the workplace means that yes-anding on-the-clock, even alone, necessarily entails a dose of other-advocacy.¹⁷⁷ Lacking all bureaucratic pretense, this is mobilization stripped to its core. It is the lowest common denominator of workplace pushback, critical to keep alive not because without it there would be no unions (which is true), but because it is so basic that without it there would be no activism.¹⁷⁸

While there are probably some who would respond, “good riddance,” that result, ironically, would be bad for business. As the Walmart and fast food campaigns were picking up speed, some conservatives lauded the initiatives for their frenzied come-one-come-all approach to interest promotion, and they were on to something.¹⁷⁹

www.theguardian.com/business/2015/mar/16/mcdonalds-workers-treat-burns-condiments-osha-complaints.

¹⁷³ Linkages between improvisation and notions of freedom have a long lineage, from the arts to civil rights and political struggles. See GOLDMAN, *supra* note 170, at 1–2, 94–111; see also FISCHLIN ET AL., *supra* note 15, at 17–18.

¹⁷⁴ *Campaign for Higher Minimum Wage Evolving into Social Justice Movement*, *supra* note 50 (describing Fight for \$15 as having “defied a sense of hopelessness”).

¹⁷⁵ Melena Ryzik, ‘I, Too, Am America’ Shares Snapshots from Workers Living on the Edge, N.Y. TIMES (May 1, 2015), <http://www.nytimes.com/2015/05/02/arts/design/i-too-am-america-shares-snapshots-from-workers-living-on-the-edge.html>.

¹⁷⁶ Houston Baker describes the “crucial question” that improvisation analyses must answer as “Who moves? Who doesn’t?” GOLDMAN, *supra* note 170, at 6–7.

¹⁷⁷ For this reason, labor law accepts that even individual acts can be “concerted” where they seek to “induce” others to join in. See *Martin Marietta Corp.*, 293 N.L.R.B. 719, 724 (1989).

¹⁷⁸ Unionization as an end-point relies on earlier, individual acts of defiance “[b]ecause union sentiment does not always spring full-blown from the workforce; it often originates in more inchoate . . . reactions to shared grievances.” Estlund, *The Story of NLRB v. Washington*, *supra* note 153, at 201. Activism itself, obviously, requires at least one person to step forward at some point on behalf of others. See Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417, 1428 (1984) (“[T]he solidarity of workers articulated in the right to engage in concerted activity can and must be individually exercised.”).

¹⁷⁹ See, e.g., Robert VerBruggen, *Why Conservatives Should Love ‘Alt-Labor’*, REALCLEARPOLICY (Oct. 16, 2013), http://www.realclearpolicy.com/articles/2013/10/16/why_

What Michael Duff has called “a beautiful incivility”¹⁸⁰ is a public good.¹⁸¹

The reason why is that improvisational conflicts provide employers with important information, what Albert Hirschman coined and what Harvard economists Richard Freeman and James Medoff applied to the workplace as “voice,” defined simply as “discussing with an employer conditions that ought to be changed, rather than quitting the job.”¹⁸² Freeman and Medoff say “discussions” because they were referring to unionized settings with official avenues for that sort of thing, but voice can encompass informal or inchoate mechanisms too,¹⁸³ including improvisation. As James Atleson’s seminal study of unofficial “wildcat” strikes notes: “Employee protests, complaints, grievances and pressure tactics are all efforts to communicate upward in the organization.”¹⁸⁴

conservatives_should_love_alt-labor.html (describing the OUR Walmart and the fast food strikes as “merely an example of people exercising their rights to promote their interests” and “a terrific development for the freedom of contract”).

¹⁸⁰ Michael C. Duff, *The Cowboy Code Meets the Smash Mouth Truth: Meditations on Worker Incivility*, 117 W. VA. L. REV. 961, 981 (2015).

¹⁸¹ Public goods can be defined this way: “Goods which will affect the well-being . . . of every employee in such a way that one individual’s partaking of the good does not preclude someone else from doing so.” RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 8 (1984). Applied to the workplace they include, for example, “[s]afety conditions, lighting, heating, the speed of the production line, the firm’s formal grievance procedure, [and] pension plan,” etc. *Id.* at 8–9.

¹⁸² *Id.* at 7–8 (citing ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970)). Workplace “voice” was the subject of a 2011 symposium at Marquette Law School. Paul M. Secunda, *Promoting Employee Voice in the New American Economy*, 94 MARQ. L. REV. 757 (2011).

¹⁸³ See Laura J. Cooper, *Letting the Puppets Speak: Employee Voice in the Legislative History of the Wagner Act*, 94 MARQ. L. REV. 837, 845–55 (2011) (describing employee associations as historical examples of voice); Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765, 805 (2011) (describing “employee committees” as a vehicle for voice).

¹⁸⁴ James B. Atleson, *Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience*, 34 OHIO ST. L.J. 751, 769 (1973); see also Dau-Schmidt, *supra* note 183, at 804 (“Any effective form of employee voice in labor relations will facilitate the exchange of information between management and the employees . . .”). “Wildcat” is an imprecise, largely colloquial term that usually refers to an unexpected strike by a narrow set of unionized employees against the wishes of union leadership and often in violation of the terms of a collective bargaining agreement. Atleson, *supra*, at 754–55. Its small, isolated, surprise, and unsanctioned nature makes Atleson’s study of the phenomenon uniquely applicable to workplace improvisation, particularly as wildcat and improvisational demands are generally the same: “[F]orcing someone to consider and respond promptly to problems employees perceive as important.” *Id.* at 774. In a sense the prime difference between the two is just that strikers defy an added party in the former case (i.e., an entrenched union). Moreover, since strikes by unrepresented workers were unheard of prior to 2012, there is unsurprisingly little work from that arena to go on. See Jake Rosenfeld, *Desperate Measures: Strikes and Wages in Post-Accord America*, 85 SOC. FORCES 235 (2006). Journalists, for what it is worth, frequently refer to the fast food and Walmart strikes as “wildcat” actions. See, e.g., William Finnegan, *Dignity*, NEW YORKER (Sept. 15, 2014), <http://www.newyorker.com/magazine/2014/09/15/dignity-4> (describing “one-day wildcat strikes” in fast food).

A key that Atleson points out is that managers frequently believe existing information channels are better than they are, make bad judgments about employee sentiment, or just never listen.¹⁸⁵ More recent accounts find companies promoting “open door” policies that employees actually fear¹⁸⁶ or making bold statements about approachability that exist solely as bullets in glossy pamphlets.¹⁸⁷ In such settings, the sole dialogue that remains is conflict-bubbled-up—energetic, disruptive statements that cannot be ignored, or can be only for so long. The basic substance of the statements is real, unvarnished data on two levels: pay or scheduling or safety, yes, but also, stitched within those demands, clues about productivity, efficiency, and product quality, the very things employers have long said they want employees to provide.¹⁸⁸

Indeed, social scientists who study workplace conflict have traditionally cast it as a net positive for firms.¹⁸⁹ Atleson’s strike-specific research shows that as a fundamentally “social process,” unexpected stoppages can both mend and build more constructive relations over the long term.¹⁹⁰ A main finding, for example, is that while employees are prone to take workplace changes, slights, and frictions personally and cumulatively, management’s perspective is detached and filtered through an institutional lens.¹⁹¹ This generates an underlying, perhaps inevitable, tension between each side’s “normative” system of

¹⁸⁵ Atleson, *supra* note 184, at 767–68.

¹⁸⁶ LIZA FEATHERSTON, SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKERS’ RIGHTS AT WAL-MART 69 (2004).

¹⁸⁷ *Id.* at 54, 59, 64; CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION 11–14 (2010) [hereinafter ESTLUND, REGOVERNING].

¹⁸⁸ See Charles B. Craver, *Mandatory Worker Participation Is Required in a Declining Union Environment to Provide Employees with Meaningful Industrial Democracy*, 66 GEO. WASH. L. REV. 135, 141–43 (1997).

¹⁸⁹ See Carsten K.W. De Dreu, *The Virtue and Vice of Workplace Conflict: Food for (Pessimistic) Thought*, 29 J. ORG. BEHAV. 5, 5–6 (2008) (“For several decades now, scholars in psychology and organizational behavior have explored the positive functions of workplace conflict.”).

¹⁹⁰ Atleson, *supra* note 184, at 753 n.4; see also *id.* at 793. While Atleson’s study can be critiqued as outdated, given that strikes of all stripes—wildcat and union-authorized alike—largely vanished from the landscape in recent years (and the government does not even keep figures on strikes by unrepresented workers), see *supra* note 3, his work is one of the precious few to consider the causes and especially *consequences* of impromptu, unofficial uprisings. Cf. RICK FANTASIA, CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS 99–101 (1988) (tracing the rise and consequences of unplanned strikes in a factory setting); see also FISCHLIN ET AL., *supra* note 15, at xi–xii (“Improvisation is an important social . . . practice . . . generating the potential forms of cocreation—deeply relational, profoundly contingent—without which our collective relation to each other and to all things would be unthinkable.”).

¹⁹¹ Atleson, *supra* note 184, at 793–94, 797.

interpreting the other side's behavior and values.¹⁹² From there, there are basically two paths forward. Workers can sublimate internalized frustration and anger (frequently leading to absenteeism, complacency, and an overall drain on productivity),¹⁹³ or they can release it, which, it turns out, has both “cathartic” and tangible benefits for workers and employers alike. “Psychological[ly],” the “freer behavioral expression” that comes with release has been found to be relationship-maintaining because it removes much of the existing “accumulation of frustration” once workers have “made their point.”¹⁹⁴ More concretely, snap disorder sometimes works.¹⁹⁵ Management may accede to the immediate demand, a scenario quite familiar to fast food and retail workers both.¹⁹⁶ However, the most relevant point is that once conflict subsides, everyone benefits. Workers report less tension, more internal cohesion, and greater job satisfaction, a constellation of effects studies suggest leads to ancillary gains for employers in the form of fewer absences, longer tenures, and more productivity overall.¹⁹⁷ Recent work links conflict resolution to firm innovation.¹⁹⁸

¹⁹² *Id.* at 793, 795–96.

¹⁹³ *Id.* at 807. Indeed, as Atleson points out, where the workforce is upset, some degree of shirking nearly inevitable and, frankly, built into the deal: “Tensions arise when the employer attempts to transform labor power into labor, since no precise bargain has been reached concerning the actual amount of work to be done. Questions arise as to how much of this ability shall be put into effect. How hard shall he work?” *Id.* at 805.

¹⁹⁴ *Id.* at 795, 806. Social scientists have used the well-known colloquialism “clearing the air” to describe this process. *Id.* at 806; see also Evert van de Vliert & Carsten K. W. De Dreu, *Optimizing Performance by Conflict Stimulation*, 5 INT’L J. CONFLICT MGMT. 211, 211 (1994) (“In . . . protest-repressive situations . . . intensification rather than prevention and mitigation of conflict may often be recommended.”).

¹⁹⁵ See Atleson, *supra* note 184, at 806–07.

¹⁹⁶ See, e.g., Fells, *supra* note 71 (“In Los Angeles, workers at a McDonald’s who faced delays receiving paychecks, marched on management, and demanded their checks immediately. Within an hour, they received payment, and an apology.”); Hiroko Tabuchi, *Walmart Adjusts the Thermostat to Warm Worker Relations*, N.Y. TIMES (June 3, 2015), <http://www.nytimes.com/2015/06/04/business/new-walmart-store-policies-aim-at-appeasing-workers.html>.

¹⁹⁷ Atleson, *supra* note 184, at 808–09; see also Dau-Schmidt, *supra* note 183, at 805. The productivity gains appear to be linked particularly to the group cohesion that can result from workers’ successful assertion of desires. Atleson writes:

Management’s willingness to make changes that improve the working conditions is often interpreted as a favorable sign by the workers and may be responsible for their increased efforts. Of equal importance in encouraging productivity may be the fact of experiencing group solidarity and success in attaining economic satisfaction. One of the few consistent correlates of high productivity is “pride in work group.”

Atleson, *supra* note 184, at 809 (footnote omitted). Additionally, much psychology research attests to the beneficial impact a person’s sense of being able to control or impact the unexpected hurdles, stressors, and changes that arise in everyday life can have on health, anxiety, well-being, and motivation. See, e.g., ALBERT BANDURA, SELF-EFFICACY: THE EXERCISE OF CONTROL 3 (1997) (“People’s beliefs in their efficacy have diverse effects. Such beliefs

Studies or not, companies may know this and even admit it in unguarded moments. In June 2015, faced with the option of brushing off yet another rally or acceding to a laundry list of seemingly idiosyncratic worker appeals, from the right to wear jeans in the stockroom to the return of an in-house D.J., Walmart went casual and fired up the turn-tables.¹⁹⁹ Why capitulate to disruption? According to the V.P. of Human Resources, to keep workers from leaving for competitors.²⁰⁰ But wouldn't that incentivize more complaints? According to what Walmart's U.S. Chief told protestors, that's the idea: "I love to listen to you, I love hearing what's working, what isn't. I want to hear your ideas. I even like to hear your frustrations. Our job, my job, is to make your life easier."²⁰¹ And, all things considered, would both sides really be better off in the end? According to OUR Walmart activist and \$13.20-an-hour fitting room clerk Cindy Murray, absolutely: "Anything Walmart does to make[] life better for workers is awesome. But these changes are also basic things we need to do our jobs better and sell more."²⁰²

C. *The Right to Improvise: The Essential Issue of Access*

That labor law accepts improvisation as a generally protected activity and has historically—if not, as revealed over time, consistently²⁰³—assumed that its benefits can flow all over the employment hierarchy, is great. Both are improv-enhancing turns. But

influence . . . how much effort they put forth in given endeavors, how long they will persevere in the face of obstacles and failures, their resilience to adversity, . . . how much stress and depression they experience in coping with taxing environmental demands, and the level of accomplishments they realize."); ROGER BROWN, *SOCIAL PSYCHOLOGY* 644–56 (2d ed. 1986).

¹⁹⁸ See, e.g., Carsten K. W. De Dreu, *When Too Little or Too Much Hurts: Evidence for a Curvilinear Relationship Between Task Conflict and Innovation in Teams*, 32 *J. MGMT.* 83, 83 (2006).

¹⁹⁹ Tabuchi, *supra* note 196.

²⁰⁰ Executive V.P. Kristin Oliver told the *New York Times* that "the company hoped that the combination of higher wages and friendlier policies would make its work force less transitory, and more likely to build careers with the retailer." *Id.* She explained specifically that: "What we've seen in the last few years is people jumping for small wage increases. . . . What we hope is going to happen with the investments we've made is to slow that down." *Id.*

²⁰¹ *Id.*

²⁰² *Id.* Overall this narrative resonates with Cynthia Estlund's advocacy of "co-regulated" workplaces, where the steady drumbeat of employee voice turns shiny but otherwise illusory corporate claims of empathetic, shared governance into a lived reality. ESTLUND, *REGOVERNING*, *supra* note 187, at 7–8, 19. Estlund touts, for example, the work of the Restaurant Opportunities Committee of New York, which uses a steady stream of stop and street agitation to push high-end restaurants to live up to commitments of good corporate citizenship. *Id.* at 7–8.

²⁰³ See *supra* note 146.

it all falls to pieces if workers can't access improvisation in the first place because the notion of resisting in the moment feels foreign, unrealistic, or even bizarre.

That scenario is not so far-fetched. The choice to improvise is intimately linked to the quality of connections with those nearby. The chance that improvisational acts will happen is therefore intensely contingent. And, as it turns out, the connective quality that matters most is trust, specifically a special sort of trust—the kind built up over time through repeated, relaxed, informal interactions. On paper, and to its credit, labor law honors and even carves out space for these sorts of encounters to arise on the job. But the “job” changed, the law remained static, and, as explained below, the relational prerequisites are becoming badly warped.

1. *Republic Aviation* and “Working Time Is for Work”

In 1943 the Board coined perhaps its most famous turn of phrase. “Working time is for work,”²⁰⁴ it pronounced, on the way to establishing one of the bedrock principles of labor law, that employers may generally ban workers from soliciting co-workers—about any issues, including unions—during working time.²⁰⁵ Employers are not limited to just that, however. The principle is robust enough to allow management to make even talking while working a fireable offense.²⁰⁶ If inventing and enforcing such a rule seems bizarre to the point of unrealistic,²⁰⁷ Walmart does it.²⁰⁸

²⁰⁴ See *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943).

²⁰⁵ *Id.* The rule holds except where it was issued “in response to . . . union organizing,” see *Waste Mgmt. of Palm Beach*, 329 N.L.R.B. 198, 200 (1999), or where non-union solicitations are routinely allowed, see *Cooper Health Sys.*, 327 N.L.R.B. 1159, 1164 (1999). It should be noted that the word “time” is significant here. The Board has said that working “time” implies all situations where an employee is required to be actively engaged in job duties, as distinguished from working “hours,” which might include paid breaks where an employer could not bar an employee from soliciting in a nonwork area. See *Essex Int'l*, 211 N.L.R.B. 749, 750 (1974); *Our Way, Inc.*, 268 N.L.R.B. 394, 394–95 (1983).

²⁰⁶ *Jensen Enterprises*, 339 N.L.R.B. 877, 878 (2003) (“It is settled law that an employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with their work tasks.”); see also *ConAgra Foods, Inc. v. NLRB*, 813 F.3d 1079, 1088 (8th Cir. 2016) (“[A]n employer may censure *any* discussion—about unions, the weather, or anything else—that is sufficiently disruptive.”).

²⁰⁷ It is difficult, if not impossible, to estimate the percentage of employers that ban chit-chat. That Walmart, the world's largest private employer, *TIMOTHY NOAH, THE GREAT DIVERGENCE: AMERICA'S GROWING INEQUALITY CRISIS AND WHAT WE CAN DO ABOUT IT* 125 (2012), and numerous other companies cited in NLRB decisions do so suggests that it is a relatively significant phenomenon. See, e.g., *Burndy, L.L.C.*, No. 34-CA-65746, 2013 WL 3964785 (N.L.R.B. Div. of Judges July 31, 2013) (stating that management “enforced a ‘no-talk’

No matter what one thinks of those basic discourse limits, it is difficult to object to the basic legal architecture that makes the restrictions possible, a framework that goes back to the seminal “working time is for work” pronouncement but is more commonly associated with the Supreme Court case that blessed the principle, *Republic Aviation*.²⁰⁹ This is not because of consensus preferences for managerial rights or quiet aisles, but because of *Republic Aviation*’s flip side. It is virtually assured that the conversational limits would be unlawful if applied off-the-clock and just off the main floor, like in a breakroom, bathroom, parking lot, or some other non-work area. From *Republic Aviation*’s perspective, those places are like activist staging grounds, and limiting chatter or persuasion, even in a neutral way, is illegal absent some “special” need “to maintain production or discipline” there.²¹⁰

rule”); *Mold Masters Co.*, No. 7-CA-48506, 2006 WL 448806 (N.L.R.B. Div. of Judges Feb. 21, 2006) (“[A] no-talking rule . . . allowed conversation only . . . ‘about the machine’ if you were working a two-person machine; however, you could not talk to anyone operating a machine on either side of your machine.”); *Saginaw Control & Eng’g, Inc.*, 339 N.L.R.B. 541, 543 (2003) (disciplining employees “for talking” during worktime). That management scholarship urges employers to consider limiting worktime chatter suggests the same and that—consistent with the rise of hyper-vigilant employee monitoring—companies will continue to adopt such rules in the future. William Atkinson, *Stealing Time*, 53 RISK MGMT. 48, 48–49 (2006); see *infra* notes 259–69, 287–97. But implemented or not, no-talking rules represent the most basic instantiation of the core labor principle that “working time is for work.” Talk is thus not only central to improvisation, but it is also a good in-road to critique that rarely-analyzed slogan, which is this article’s primary theoretical project. See *infra* Section III.A.1–2.

²⁰⁸ Barbara Ehrenreich’s guerilla journalism on low-wage work revealed Walmart’s near obsessive focus on making sure workers do not talk to each other while working, which the company categorizes as illegal “time theft.” BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 146, 158, 180–81 (2001); see also Wade Rathke, *A Wal-Mart Workers Association? An Organizing Plan*, in WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM 261, 271 (Nelson Lichtenstein ed., 2006) (talking as “time-theft”).

²⁰⁹ *Peyton Packing* declared working time for work and set out the initial solicitation framework. See *supra* notes 204–05. *Republic Aviation Corp.*, 51 N.L.R.B. 1186, 1187 (1943) dealt with identical issues, *id.* at 1187 & n.1, and became the vehicle for Supreme Court review of the overall regime. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). A leading treatise states that the clarity provided by the *Republic Aviation* framework is “of obvious benefit to all.” ROBERT A. GORMAN & MATTHEW W. FINKIN, LABOR LAW ANALYSIS AND ADVOCACY 286 (2013); see also Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 349–53 (1994) [hereinafter Estlund, *After Lechmere*] (praising the framework and suggesting it be extended to other circumstances); Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. DAVIS L. REV. 1091, 1114 (2011) (“*Republic Aviation* has proved so workable that it should serve as the basis for other communication analyses.”).

²¹⁰ *Republic Aviation Corp.*, 324 U.S. at 803 n.10 (“It is . . . not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.” (citation omitted)); see also Estlund, *After Lechmere*, *supra* note 209, at 348–49.

Different considerations are at play when documents, buttons, or other written communications enter the picture,²¹¹ and the analyses get stickier when the mix involves non-worktime solicitations in work areas or in places used only sometimes for work.²¹² Nonetheless, it is undeniable that the way *Republic Aviation* embedded and balanced “working time is for work” has a commonsense appeal: a time-for-work, a time-for-talk, and everybody wins.

a. The Importance of Talk

Of course, like any balance, the relative weights on each edge are crucial, and safeguarding the “time-for-talk”-side has been called section 7’s “central concern” for a very basic reason: without it, section 7 collapses.²¹³ Talk is the “prerequisite,”²¹⁴ the “necessary condition,”²¹⁵ and the “foundation” for group action in ways that the Board has said

²¹¹ Early on the Board distinguished distributing papers from oral appeals “because [distribution] carries the potential of littering the employer’s premises [and] raises a hazard to production whether it occurs on working time or nonworking time.” *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 619 (1962). Distribution can thus be prohibited in working areas even on non-working time. *Id.* at 621. Board law generally allows workers to wear pro-union buttons, tee-shirts, and other insignia at work without the work area/worktime distinctions that apply to solicitation and distribution. *Eckert Fire Prot., Inc.*, 332 N.L.R.B. 198, 202 (2000). Employers may, however, rebut that presumption by showing “special circumstances,” including “maintenance of production and discipline, safety, preventing alienation of customers, preventing discord and violence between competing groups of employees, and promoting health and welfare of patients in a health care setting.” *Id.* (footnotes omitted). Employers may also object to the size or character of particular insignia. *See, e.g., Fabri-Tek, Inc. v. NLRB*, 352 F.2d 577, 583–84 (8th Cir. 1965) (objecting to large buttons and “out-size letters” on a tee-shirt).

²¹² Workers on break may presumptively solicit in non-work areas. *See Republic Aviation Corp.*, 324 U.S. at 801 n.6, 803 n.10, 804; *Cooper Health Sys.*, 327 N.L.R.B. 1159, 1163 (1999) (“[P]rohibitions of lawful non-worktime solicitation . . . are invalid, absent a showing . . . that such a ban is necessary to avoid a disruption.”); *May Dept. Stores Co.*, 59 N.L.R.B. 976, 980–81 (1944) (“[I]n the absence of special circumstances, a prohibition against union solicitation on the employer’s premises outside of working time, such as ‘before and after work and during the luncheon and rest periods,’ does not bear reasonable relation to the efficient operation of the employer’s business, and therefore constitutes an unwarranted interference with the employees’ rights.”). That right is place-limited, however, in many industries, including the retail, restaurant, and health care sectors. *See, e.g., Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 495 (1978) (permitting a solicitation ban “even on nonworking time in strictly patient care areas, such as the patients’ rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas”); *Bankers Club, Inc.*, 218 N.L.R.B. 22, 27 (1975) (“The Board has long approved employer rules prohibiting all solicitation, even during employees’ nonworking time, in the selling areas of stores and other establishments, such as restaurants, on the theory that such activity might tend to drive away customers.” (footnote omitted)). Different rules apply to off-duty, *Tri-County Medical Ctr.*, 222 N.L.R.B. 1089 (1976), and contracted workers, *New York New York, L.L.C.*, 356 N.L.R.B. 907 (2011).

²¹³ Estlund, *After Lechmere*, *supra* note 209, at 348.

²¹⁴ *Id.*

²¹⁵ Hirsch, *supra* note 209, at 1093.

“can hardly be overstated.”²¹⁶ Richard Michael Fischl and others have explored why in-depth.²¹⁷ Much of the work focuses on talk’s slow but steady role in forging shared perceptions of workplace experiences and issues.²¹⁸ Mutual understanding of these realities builds bonds, which leads to ad hoc networks and eventually a group identity.²¹⁹ It is this shared identity that leads to action, the subtle shift from “I hate this,” to “We hate this” that would prompt a worker to think about starting a petition drive before barging into a supervisor’s office alone.²²⁰

The line between workplace collective action and workplace improvisation is quite thin, the hallmark distinction being the absence of pre-planning and the presence of in-the-moment thinking that occurs in the latter context. For this reason, it is not surprising that talk is as important to improvisation as it is to group action. The reason why it is important, however, is subtly different. While finding a group voice doesn’t hurt,²²¹ talk’s centrality to snap behavior has more to do with its

²¹⁶ Purple Commc’ns, Inc., 361 N.L.R.B. No. 126, 2014 N.L.R.B. LEXIS 952, at *21 (Dec. 11, 2014); *see also* Cent. Hardware Co. v. NLRB, 407 U.S. 539, 542–43 (1972) (“[Section 7] organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others.”).

²¹⁷ Fischl’s elegant accounting points to the “common vulnerability,” dependence, but also inevitable friendships shared by workers in relation to management. Fischl, *supra* note 144, at 858–61. In the process, Fischl compiles an impressive compendium of anecdotal and theoretical sources attesting to “the social cohesion that is fostered by workplace life.” *Id.* at 858 n.300.

²¹⁸ *See, e.g.*, CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 37 (2003) [hereinafter ESTLUND, WORKING TOGETHER] (“Coworkers define and redefine who they are as a group in part by sharing and monitoring reactions to events at work, news of the outside world, weather, the behavior of bosses and subordinates and the thousands of other subjects that form the currency of daily communications. They solidify and redefine group membership, strengthening connections in hundreds of small ways.” (citing DON COHEN & LAURENCE PRUSAK, IN GOOD COMPANY: HOW SOCIAL CAPITAL MAKES ORGANIZATIONS WORK 170 (2001))); Hirsch, *supra* note 209, at 1095–101. Social theorist Claus Offe provides some more context to the process of collective interest formation, noting:

[A]ny interest that is thought of by the individual worker as a ‘true’ one, but about which he/she does not find any consensus among fellow workers, is most likely to be experienced as having been an ‘erroneous’ concept of their interest. Therefore, a ‘dialogical’ process of definition of interest is required . . .

CLAUS OFFE, DISORGANIZED CAPITALISM: CONTEMPORARY TRANSFORMATIONS OF WORK AND POLITICS 198 (1985).

²¹⁹ *See, e.g.*, ESTLUND, WORKING TOGETHER, *supra* note 218, at 25–29; Rogers, *supra* note 2, at 354 (describing “collective action frames” that develop from “ongoing efforts at ‘negotiating shared meaning’” leading to identity connections and group action (footnotes omitted)); OFFE, *supra* note 218, at 179, 183 (discussing the importance of “collective deliberation” and collective identity formation for powerless groups).

²²⁰ *See* Rogers, *supra* note 2, at 354 (describing the centrality of constructing a “salient collective identity” in collective action).

²²¹ *See* Vera & Crossan, *supra* note 8, at 206–07.

role in building trust, which is like the net to improvisation's tight-rope. Accounts of stage improvisation reference the "unique terror of standing in front of three hundred people and not knowing what you [are] going to say next," but also how trusting fellow performers to swoop-in if disaster strikes makes pulling through possible.²²² When Caron, the "work leader" at Washington Aluminum Corporation, walked out the front door he did so alone, but he surely knew that his co-workers would have his back. There were only six, the shop floor was small, and all their conversations over many years added up to that. Scholarship bears this all out.²²³

b. Improvisation's Oxygen: From Hanging Out to Trusting to Yes-Anding

The key though, is that trust relationships of the type most formative to improvisation are forged not simply with talk,²²⁴ but easy, breezy, monkeying-around talk. This type of playful chatter, sometimes referred to by improv theorists as "galumphing," is like conversational play.²²⁵ Through it, we "experiment with all sorts of combinations and permutations of body forms, social forms, thought forms, images, and rules," learning about ourselves but, more importantly, about each other.²²⁶ Screenwriters who compose in groups exemplify this transformation, the "unfettered" exchange of silly, "bizarre and potentially offensive ideas" over time creating "intimacy" and "an

²²² DRATCH, *supra* note 12, at 65 ("Improvisers who perform together for a long time develop a comfort and a trust that if one is foundering, the others will come in and save the moment."); AMY POEHLER, YES PLEASE 112 (2014) ("Improvisation is like the military. You leave no man behind. It's your job to make your partner look good.").

²²³ Collecting studies, Miguel Pina e Cunha and co-authors underscore the obvious point that improvisation's "absence of structure" and "pressure to deliver [in] 'real time'" creates "a considerable level of anxiety among those performing it." Miguel Pina e Cunha et al., *Organizational Improvisation: What, When, How and Why*, in ORGANIZATIONAL IMPROVISATION 93, 118, 125 (Ken N. Kamoche et al. eds., 2002). They note, however, "the existence of close and trusting relationships . . . builds a 'safety net' for risk taking" that makes successful improvisation ultimately possible. *Id.* at 119 (citation omitted); *see also* Vera & Crossan, *supra* note 8, at 206 (describing "trust among players" and the need for participants to "look after one another and take the pressure off of each other" as keys to successful improvisation).

²²⁴ This is not to say that "regular" talk, like small talk or the type anyone might have with a co-worker on the job does not engender trust; it certainly does. ESTLUND, WORKING TOGETHER, *supra* note 218, at 24–25. It is just that maximally-relaxed interactions are more facilitative of improvisation.

²²⁵ NACHMANOVITCH, *supra* note 12, at 43–44.

²²⁶ *Id.* at 44–45; *see also id.* at 50 (connecting the freedom to engage in childlike play with self-discovery); POEHLER, *supra* note 222, at 117 ("We were young and foolish and didn't know what we were up against. . . . In three short years Chicago had taught me that I could decide who I was."); *id.* at 230 (describing an improv partner as the "one other person in the world who understands the very specific thing I am dealing with").

atmosphere of complete trust” within the room.²²⁷ Post-show, the best improv troupes don’t go home, they go to the bar and goof-off.²²⁸ This blows off steam, certainly, but it also builds the camaraderie and cross-confidence needed to mix the right relational alchemy the next night.²²⁹ So important is developing an “empathic competence [and] a mutual orientation to one another[]” to jazz artists that “hanging out” in clubs, cafes, and studios is basically part of the job description.²³⁰ Only through informal mixing are these improvisers able to develop the reciprocal faith needed to “guide each other” through the “norms and conventions” of the community that make the performances authentically in the moment.²³¹ The effect is on display in Dorothy Sue Cobble’s meticulous accounting of the “richness of waitress work culture” in the 1940s, where regular pre-shift gatherings for coffee or a smoke forged not just a loyal “sisterhood” but an associated arsenal of “group-devised work rules” that “countered the arbitrary, informal reward system practiced by bosses in which favored employees would be offered . . . perks.”²³² Management’s decision to free a preferred worker from vacuum duty, for instance, might instantly trigger the larger group’s “right” to take food from the kitchen.²³³

Packed into galumphing’s trust-building elixir is also a secondary effect that, in practical terms, is equally important. Over time, relaxed, casual chatter primes one’s capacity to “adapt[] to changing contexts and conditions.”²³⁴ That is, hanging out not only builds trust, it sets the table for yes-anding. The ideas, thoughts, modes, and speech expressed during what would seem to be a bunch of people messing-around is the raw material for later improvising.²³⁵ For example, in its infancy, members of the revered comedic troupe Upright Citizen’s Brigade spent their days “wearing giant cat heads or dinosaur masks, harassing people with bullhorns in Washington Square Park” because they knew that

²²⁷ *Lyle v. Warner Bros. Television Prods.*, 132 P.3d 211, 233 (Cal. 2006).

²²⁸ See DRATCH, *supra* note 12, at 37.

²²⁹ See POEHLER, *supra* note 222, at 196–97 (describing stories of galumphing as an improviser’s way to find “my tribe” and “a home”); *id.* at 138 (describing free-time hijinks on the set of Saturday Night Live).

²³⁰ Frank J. Barrett, *Coda: Creativity and Improvisation in Jazz and Organizations: Implications for Organizational Learning*, 9 ORG. SCI. 605, 613, 616 (1998).

²³¹ *Id.* at 616; see also Pina e Cunha et al., *supra* note 223, at 124 (noting research showing that in-the-moment action can itself “foster the building of strong bonds among participants”).

²³² DOROTHY SUE COBBLE, *DISHING IT OUT: WAITRESSES AND THEIR UNIONS IN THE TWENTIETH CENTURY* 54–56 (1991) (footnote omitted).

²³³ *Id.* at 55–56.

²³⁴ NACHMANOVITCH, *supra* note 12, at 44–45.

²³⁵ For this reason, hanging out or “galumphing” is nearly constant in professional circles. POEHLER, *supra* note 222, at 187 (“We spent the nights performing and writing and dreaming and scheming. It was sketch and improv 24/7.”).

what cracked a smile under the famous Manhattan arches on somebody's lunch-hour might do the same that night.²³⁶ This is also true for jazz, where informal jam sessions spark bits of material that reappear once the audience arrives for the main event.²³⁷ And easily lost in *Washington Aluminum's* record is that there had been grumblings about the cold before.²³⁸ The famous strike had been in rhetorical rehearsal long before the curtain rose on that especially frigid February morning. It is the hanging out, in other words, that both inspires improvisation and gives it its funny, creative, or, in the case of Caron and his co-workers, courageous kicks.

2. Hanging Out at Work: Theory, History, and Practice

The crucial, even existential question for workplace improvisation thus boils down to this: how much hanging out at work does the law allow? Actually, quite a bit. In fact, a credible case can be made that the *Republic Aviation* talk rubric is, if anything, improv-enhancing.²³⁹ That is because sociologists find that a good deal of goofing goes on during lunch and coffee breaks.²⁴⁰ Even in areas and at times where small talk is prohibited, in practice the “distinction between work-related communications and ‘shooting the breeze’” can sometimes “become[] blurred” nonetheless.²⁴¹ The result is that, in a vacuum, *Republic Aviation's* regulatory scheme allows for a workforce imbued with a bit of trust and a dash of improvisatory spirit, the very combination that provides for the possibility that the cutting joke said to laughs at lunch may translate into snap defiance when the superior at the center of the sarcasm finally goes over the line later in the week.

Unfortunately, time unplugged the vacuum. Even with proper enforcement the rubric doesn't work that way today. The rarely mentioned reality is that the *Republic Aviation* framework is responsive

²³⁶ *Id.*

²³⁷ Christine Moorman & Anne S. Miner, *Organizational Improvisation and Organizational Memory*, 23 ACAD. MGMT. REV. 698, 713 (1998).

²³⁸ *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 15–16 (1962).

²³⁹ See, e.g., ESTLUND, *WORKING TOGETHER*, *supra* note 218, at 163 (suggesting that full enforcement of *Republic Aviation* would mean “time and space for informal sociability”).

²⁴⁰ And of course, walling off parts of the workplace for legal goofing-off was a big part of the Supreme Court's point. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945) (“It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property.” (citation omitted)).

²⁴¹ RAY OLDENBURG, *THE GREAT GOOD PLACE: CAFES, COFFEE SHOPS, BOOKSTORES, BARS, HAIR SALONS AND OTHER HANGOUTS AT THE HEART OF A COMMUNITY* 12–13 (1999); see also GORMAN & FINKIN, *supra* note 209, at 286.

to a fairly narrow window of America's industrial and economic past, a time when jobs were stable, schedules were steady, and breaks were standard. But that window turned out to be a historical anomaly. Everything splintered, and now very little about work is stable, steady, or standard. So while the rules that sit on each pole of the see-saw are still there, the fulcrum has decisively shifted. Non-worktime exists only in theory, so the "flip-side" of *Republic Aviation* that makes it such a popular doctrine just doesn't come up. That means no hanging out, not much trust, and the withering of improvisation's promise.

a. The World of *Republic Aviation*

The world of *Republic Aviation* was the world of big factories, elaborate gates, and handheld lunchpails streaming in-and-out to the rhythms of start and quitting-time whistles.²⁴² And the rules the Board came up with about work and non-worktime, work and non-work areas, talking and no-talking were, as the Supreme Court has said with a fine point, expressly intended to reflect this world.²⁴³

Critically, the world of *Republic Aviation* was also the era of ascendant breaks. In the previous decades industrialists had been buffeted by a range of management theories that eventually convinced most that the "prisonlike" employment conditions of the late 1800s were, if nothing else, bad for productivity.²⁴⁴ By the 1930s scientific management, fatigue science, and the human relations school had all come to counsel that short breaks made for more and better products in less time.²⁴⁵ A leading business text from 1934 surveyed the current research to conclude that "no sane management would think of

²⁴² To take an accessible example, in the late 1930s over a fifth of the nation's total auto workforce was employed at just two Michigan plants. See Yeselson, *supra* note 95, at 77-78; see also Charley Richardson, *Working Alone: The Erosion of Solidarity in Today's Workplace*, 17 NEW LAB. F. 69, 72 (2008) ("The Ford River Rouge plant in Dearborn, Michigan, employed 100,000 people in the mid 1930s.").

²⁴³ *Republic Aviation Corp.*, 324 U.S. at 804 (soliciting rules the "product of the Board's appraisal of normal conditions about industrial establishments" at the time (footnote omitted)).

²⁴⁴ MARC LINDER & INGRID NYGAARD, VOID WHERE PROHIBITED 20-38, 13-18 (1998). One important reference point was employers' experiences in World War I munitions plants, where "a rest period . . . counteracted production-line fatigue and actually resulted in a higher volume" of production. *Id.* at 28.

²⁴⁵ *Id.* at 20-38 (describing all three theories and their findings). While Frederick Taylor, the father of "scientific management," is rightly mocked and criticized for his mechanistic, belittling, inhumane, and, ironically, unscientific approach to labor efficiencies, his advocacy of "compulsory periods of rest" greatly influenced industrial psychologists and researchers. *Id.* at 22-24. The later rise of human relations theory, for its part, "was sometimes called 'the happy worker model'" because its core insight was that a productive workforce required contented employees, and that required rest breaks. STEVEN GREENHOUSE, THE BIG SQUEEZE 77 (2008) [hereinafter GREENHOUSE, THE BIG SQUEEZE]; see also LINDER & NYGAARD, *supra* note 244, at 33-35.

forbidding its employees to take an occasional ‘breather.’”²⁴⁶ By the forties that view had achieved something of a consensus among major employers, the U.S. Department of Labor, and standard management handbooks.²⁴⁷ This, combined with the rise of unionization—abolishing infamous exhaustion symbols like the “Ford stomach”—and the National War Labor Board, with its power to mandate paid rest “when the shifts were excessively long,” popularized and formalized breaks to such an extent that a 1954 survey found that nearly seventy percent of all large employers (union and non-union shops included) provided employees with breaks even beyond lunch.²⁴⁸

Thus, when the Board set out the *Republic Aviation* rules in 1943, and when the Supreme Court sanctioned them in 1945, each institution could reasonably assume that most employees had some measure of non-working free time to balance out employer control of worktime. They could have also assumed that workers would use that free time to talk. An early description of employee behavior during rest breaks would seem to be the stuff of over-the-top stage direction if not for the fact it was published in a tri-agency federal study that included the Defense Department:

As the machinery stops, or as hand tools are laid down, the whole room appears to take a deep breath; talk and laughter break out; there is general movement, running to get drinks of water, reading of newspapers by the older women, sometimes dancing by the younger; there is, in a word, genuine relaxation.²⁴⁹

This, of course, was hanging out at its finest, and since the *Republic Aviation* era was also the heyday of employment longevity, it made sense to make friends. In both union and non-union settings “[i]mplicit promises of job security” were the norm.²⁵⁰ Layoffs happened but were

²⁴⁶ MORRIS S. VITELES, *THE SCIENCE OF WORK* 297 (1934).

²⁴⁷ *Id.* at 38 (describing the growing consensus).

²⁴⁸ LINDER & NYGAARD, *supra* note 244, at 16–17 (describing insufficient lunch “breaks” at Ford in the 1910s). Though not always spelled out in collective bargaining agreements, breaks are a norm in unionized facilities, including today at Ford. *Id.* at 128, 136–37; *see also id.* at 18 (describing the advent of breaks at Kellogg, a company known for unrelenting production, following unionization in 1937); *id.* at 36–37 (describing the functions and power of the National War Labor Board); *id.* at 131 (describing break survey results); *id.* at 128 (noting that breaks gained through unionization often spread to nonunion competitors “to forestall unionization or because they accept the finding that periodic rest enhances productivity”).

²⁴⁹ *Id.* at 27–28 (footnote omitted); *see also id.* at 35. The authors note that employers understood employees’ “startling metamorphosis” from “dull, quiet, sedate working creatures” to “gay, unrestrained social creatures” all too well and may have resisted break times because of it. *Id.* at 28.

²⁵⁰ KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* 59, 47 (2004).

usually styled as furloughs and limited in time at that.²⁵¹ In 1948, a textile company tried to permanently lay-off 3500 employees in New Hampshire, making national news and sparking a U.S. Senate investigation that reversed most of it.²⁵² Management theorist Peter Drucker wrote in 1956 that only by building “aggressive *esprit de corps*” could companies prosper, and that required nearly ironclad job security.²⁵³ The same year a bestseller by William Whyte countered that job stability was already so extreme that employees had become “captives of the organizations that employed them, losing their individuality” in the process.²⁵⁴ Companies sided with Drucker and responded with more promises of pensions, more training, and more internal promotion opportunities.²⁵⁵ This was the “golden age of employee protections”²⁵⁶ and, not unrelatedly, the “ideal . . . foundation for the development of long-term ties among increasingly diverse groups of co-workers.”²⁵⁷

b. Today

Employment is nothing like this today. The generative environment crucial for creating the trust necessary for workplace improvisation is, if not impoverished in many places, gone in others because informal time is such a scarce resource.²⁵⁸ The broader economy may swirl with the glitz of ever-evolving wireless, app, emoji, and other communicative options, but at work it’s punch-card era regulation all the way down.

Let’s start with breaks. The U.S. Bureau of Labor Statistics stopped collecting rest period data in 1993, but even by that point the downward trend was clear.²⁵⁹ Ninety percent of non-agricultural workers reported no paid lunchtime and forty-three percent lacked any paid rest time.²⁶⁰ Of course, those old figures did not capture unpaid breaks, and while federal law does not mandate any rest, twenty states do, with varying

²⁵¹ LOUIS UCHITELLE, *THE DISPOSABLE AMERICAN: LAYOFFS AND THEIR CONSEQUENCES* 8 (2006).

²⁵² *Id.* at 44.

²⁵³ *Id.* at 26.

²⁵⁴ *Id.* at 34.

²⁵⁵ *Id.* at 32–34; see also ESTLUND, *WORKING TOGETHER*, *supra* note 218, at 43–44; Peter Cappelli, *The New Deal at Work*, 76 CHI.-KENT L. REV. 1169, 1174–75 (2000).

²⁵⁶ Cappelli, *supra* note 255, at 1173.

²⁵⁷ ESTLUND, *WORKING TOGETHER*, *supra* note 218, at 42, 44.

²⁵⁸ For a complimentary discussion of this point with a somewhat different emphasis, see generally Richardson, *supra* note 242.

²⁵⁹ LINDER & NYGAARD, *supra* note 244, at 132.

²⁶⁰ *Id.* at 133; Hilery Simpson, *Paid Lunch and Paid Rest Time Benefits: Highlights from the Employee Benefits Survey, 1979–93*, COMPENSATION & WORKING CONDITIONS, Dec. 1996, at 18.

pay requirements.²⁶¹ The more relevant point is that even where breaks are provided or mandated, workers frequently don't get them. The lunching landscape in white collar settings is perhaps best summed up by a recent headline in the satirical newspaper, *The Onion: Coworkers Pull Off Daring One-Hour Lunch Break*.²⁶² Overall, eighty percent of office workers report eating lunch at their desks, usually in less than thirty minutes and in the midst of other computer-related tasks.²⁶³ As for the low-wage service industry, forget about it. In 2011, Walmart lost a \$187 million verdict over skipped breaks in Pennsylvania, and in 2008, it paid \$640 million to settle over sixty similar suits nationwide.²⁶⁴ Ethnographies, interviews, and reports paint a consistent picture of breaks skipped entirely or whittled down to frenetic pit-stops.²⁶⁵

Restroom trips are a good object lesson. Employers are able to rely on porous health and safety standards to prohibit relief during production or force workers to just ignore the need altogether, leading to macabre plights like that of California Nabisco workers, who were reduced to stuffing toilet paper in their pants and urinating on the assembly line.²⁶⁶ Walmart workers have been known to carry extra

²⁶¹ For a detailed chart of state break regulations, see Wage and Hour Div., *Minimum Paid Rest Period Requirements Under State Law for Adult Employees in Private Sector*, U.S. DEP'T. OF LAB. (Jan. 1, 2016), <https://www.dol.gov/whd/state/rest2016.htm>.

²⁶² News in Brief, *Coworkers Pull Off Daring One-Hour Lunch Break*, ONION (June 18, 2015), <http://www.theonion.com/article/coworkers-pull-daring-one-hour-lunch-break-50694>.

²⁶³ *We're Not Taking Enough Lunch Breaks. Why That's Bad for Business*, NPR: THE SALT (Mar. 5, 2015, 10:47 AM), <http://www.npr.org/sections/thesalt/2015/03/05/390726886/were-not-taking-enough-lunch-breaks-why-thats-bad-for-business>; Eve Tahmincioglu, *Why the Lunch Break Is Going Extinct*, NBC NEWS (Aug. 20, 2007, 8:43 AM), <http://www.nbcnews.com/id/20265063/ns/business-careers/t/why-lunch-break-going-extinct/#.VaZq1GD4tFI>.

²⁶⁴ Sophia Pearson, *Wal-Mart Loses Appeal of \$187 Million Verdict in Worker Lawsuit*, BLOOMBERG (June 13, 2011, 1:58 PM), <https://www.bloomberg.com/news/articles/2011-06-13/wal-mart-loses-appeal-of-187-million-verdict-in-worker-lawsuit>. Walmart workers have also reported skipping lunch breaks voluntarily to save money. Jana Kasperkevic, *'Poverty Pay' Leads Walmart Employees to Skip Lunch—or Steal It from Coworkers*, GUARDIAN (Nov. 12, 2015, 4:40 PM), <https://www.theguardian.com/business/2015/nov/12/walmart-workers-protest-wages-fast-for-15-stolen-lunches>.

²⁶⁵ See EHRENREICH, *supra* note 208, at 30 (missing breaks in a restaurant, causing “hypoglycemic shakes”); *id.* at 77 (missing breaks at a maid service and being limited to a “five-minute pit stop at a convenience store” between jobs); *id.* at 164 (missing much of break time attempting to navigate away from customers on the sales floor); GREENHOUSE, *THE BIG SQUEEZE*, *supra* note 245, at 111 (missing breaks at a call center); *id.* at 121 (“virtually never stop[ping] for lunch” as a delivery driver); *id.* at 143 (missing breaks at Walmart and secretly eating lunch in a changing room); *id.* at 185 (“pressuring [maids] to work through their lunch breaks and coffee breaks”); Jake Blumgart, *How a Win for Unions Can Be a Win for Everyone*, NEXT CITY (Apr. 13, 2015), <https://nextcity.org/features/view/are-labor-unions-still-powerful-cities-new-union-strategies> (missing breaks in a hospital); LONNIE GOLDEN, *ECON. POLICY INST. IRREGULAR WORK SCHEDULING AND ITS CONSEQUENCES* 13–14, 14 nn.28–29 (2015), <http://s2.epi.org/files/pdf/82524.pdf>.

²⁶⁶ LINDER & NYGAARD, *supra* note 244, at 49, 66. The current Occupational Safety & Health Administration (OSHA) standard allows for “reasonable” limits on bathroom breaks,

underwear for this purpose, and at slaughterhouses urination rights are a repeated organizing theme.²⁶⁷

Yet even if breaks materialize, it is far from clear in the low-wage settings where improvisation is targeted that trusting relationships can take root, for the simple reason that hanging out with the same people is surprisingly difficult.²⁶⁸ For one thing, employers, not workers, generally decide when it is time to start, stop, and end work, so cultivating a friendship over regularly-scheduled coffee breaks is nearly impossible.²⁶⁹ McDonald's has even traded posted schedules for narrow strips of paper with individualized hours, making the complexion of every shift a surprise and requiring advance investigatory work for even informal meet-ups.²⁷⁰ More to the point, gone are the nine-to-five days and Monday to Friday shifts that might naturally nurture repeated encounters.²⁷¹ Considerable schedule variability is the new normal, with employers telling workers "week by week, how many hours, and when and where, they are expected to work" with the kicker that they may also "be on-call to work, on short notice, virtually on demand."²⁷² The seemingly extreme tales of workers forced to wait at home before being yanked into service have grabbed headlines, but the run-of-the-mill practices are almost as bad, with just a few days of scheduling notice, little opportunity for input,²⁷³ and shifts that repeat effectively never²⁷⁴

Memorandum from John B. Miles, Jr., Dir., Directorate of Compliance Programs to Reg'l Adm'rs State Designees (Apr. 6, 1998), but employers often refuse to pay for the lost time, *Perez v. Am. Future Sys., Inc.*, No. 12-6171, 2015 WL 8973055 (E.D. Pa. Dec. 16, 2015), fire workers for taking them, *Zwiebel v. Plastipak Packaging, Inc.*, No. 17-12-20, 2013 WL 4768768 (Ohio Ct. App. Sept. 3, 2013), and "frequently" contest unemployment benefits on excessive bathroom trips theories, LINDER & NYGAARD, *supra* note 244, at 49.

²⁶⁷ See GREENHOUSE, *THE BIG SQUEEZE*, *supra* note 245, at 152; LINDER & NYGAARD, *supra* note 244, at 48; see also GORDON, *supra* note 141, at 186 (describing female factory workers told to "put a plug in it" after requesting a bathroom break); OXFAM AM., *NO RELIEF: DENIAL OF BATHROOM BREAKS IN THE POULTRY INDUSTRY* 5 (2016), https://www.oxfamamerica.org/static/media/files/No_Relief_Embargo.pdf ("Although they are reluctant to talk about it, workers from across the country report that they and their coworkers have made the uncomfortable decision to wear adult diapers to work."); Elizabeth Weise, *Intel Cafeteria Workers Say Bathroom Visits Restricted*, USA TODAY (May 23, 2016, 5:02 PM), <http://www.usatoday.com/story/tech/2016/05/23/intel-cafeteria-workers-say-bathroom-visits-restricted/84806066>.

²⁶⁸ For a discussion of what constitutes "low-wage work," see Liz Watson & Jennifer E. Swanberg, *Flexible Workplace Solutions for Low-Wage Hourly Workers: A Framework for a National Conversation*, 3 LAB. & EMP. L.F. 380, 392-93 (2013).

²⁶⁹ See *id.* at 403-05; GOLDEN, *supra* note 265, at 9, 2.

²⁷⁰ Finnegan, *supra* note 184.

²⁷¹ Harriet B. Presser, *Employment in a 24/7 Economy: Challenges for the Family*, in *WORK-FAMILY CHALLENGES FOR LOW-INCOME PARENTS AND THEIR CHILDREN* 83, 83, 86 (Ann C. Crouter & Alan Booth eds., 2004).

²⁷² Vicki Schultz, *Feminism and Workplace Flexibility*, 42 CONN. L. REV. 1203, 1218 (2010) (footnote omitted); see also GOLDEN, *supra* note 265, at 5, 7.

²⁷³ Surveys of twenty-six- to thirty-two-year-old workers paid by the hour show that seventy-five percent are scheduled for different hours each week, with fifty percent reporting no

low-wage industry standards. Seventy-five percent of twenty- and thirty-somethings told University of Chicago researchers that their work hours changed monthly.²⁷⁵ In urban retail it is around eighty-three percent.²⁷⁶

The rise of advanced scheduling software, moreover, has allowed companies not only to whisk employees into and out of tiny work windows, it has enabled “a human resource strategy of hiring a cadre of part-time employees” who may only be scheduled one or two random days a week.²⁷⁷ That is a major financial problem for the already poorly paid, but it’s also a disaster for workplace relationships, which do not have time or consistency to develop.²⁷⁸ Recent accounts have even uncovered instances of employers offering good schedules as “prizes” for winning head-to-head sales battles, a set-up that could itself get a medal for most relationally-ruinous H.R. strategy.²⁷⁹ Comparing the overall pictures that emerge from non-worktime in 1945 or 1950 to non-worktime today is like moving between Norman Rockwell and Jackson Pollack exhibits at a museum.

opportunity to request particular shifts. Alexia Elejalde-Ruiz, *How Erratic Schedules Hurt Low-Wage Workers*, CHI. TRIB. (Sept. 6, 2015, 12:32 PM), <http://www.chicagotribune.com/business/ct-volatile-schedules-0907-biz-20150904-story.html>. Sixty-eight percent of eighteen- to twenty-two-year-olds receive schedules with less than seven days notice. *Id.*

²⁷⁴ See Steven Greenhouse, *A Push to Give Steadier Shifts to Part-Timers*, N.Y. TIMES, July 16, 2014, at A1; Hiroko Tabuchi, *Retailers Scrutinized for Schedules and Staffing*, N.Y. TIMES (Apr. 13, 2015), http://www.nytimes.com/2015/04/13/business/retailers-scrutinized-for-schedules-and-staffing.html?_r=0; GOLDEN, *supra* note 265, at 7 (reporting that eighty-three percent of part-time workers have “unstable work schedules”); Watson & Swanberg *supra* note 268, at 404–07 (surveying research on “[l]ast minute posting of schedules,” no-notice mandatory overtime, and “[f]luctuating schedules,” noting that “59% of employees” in one study had “their shifts and the days that they [work] changed weekly” (footnote omitted)).

²⁷⁵ Stephanie Luce, *Time Is Political*, JACOBIN (July 20, 2015), <https://www.jacobinmag.com/2015/07/luce-eight-hour-day-obama-overtime>.

²⁷⁶ *Id.*

²⁷⁷ GOLDEN, *supra* note 265, at 4. Today a full seventy percent of retail jobs are part-time. See Luce, *supra* note 275.

²⁷⁸ See Kathleen Christensen & Barbara Schneider, *Evidence of the Worker and Workplace Mismatch*, in WORKPLACE FLEXIBILITY: REALIGNING 20TH-CENTURY JOBS FOR A 21ST-CENTURY WORKFORCE 1, 6 (Kathleen Christensen & Barbara Schneider eds., 2010) (“When individuals are in the workplace for only two or three days a week, it may be difficult to establish strong network ties and the meaningful relationships that help to create group camaraderie.”); Michelle Chen, *‘Flexible’ Scheduling Is Stretching Retail Workers to the Breaking Point*, NATION (Mar. 11, 2015), <https://www.thenation.com/article/flexible-scheduling-stretching-retail-workers-breaking-point> (describing the “involuntary part-time” labor force and the consequences of the lack of available hours); GOLDEN, *supra* note 265, at 5–6 (describing the phenomenon of “underemployment”).

²⁷⁹ Luce, *supra* note 275; see also Lydia DePillis, *The Under-the-Radar Profit-Maximizing Scheduling Practice that Can Put Workers in a “Downward Spiral”*, WASH. POST: WONKBLOG (Jan. 8, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/01/08/the-under-the-radar-profit-maximizing-scheduling-practice-that-can-put-workers-in-a-downward-spiral>.

But what about working time? Though employers can ban chitchat while employees are on-task, that seems like a rather tall order, and surely somehow workers are interacting all the time in various capacities.²⁸⁰ Moreover, while it is true that job tenure is not what it used to be, some scholars have pointed out that conventional wisdom about the precariousness of modern employment is somewhat overstated,²⁸¹ so perhaps over time all those on-the-job interactions eventually add up to real relationships, even in the concededly “toxic” setting of low-wage work.²⁸²

Probably not. The issue is that the management wisdom of the mid-twentieth century that equated employee contentment with productivity was replaced with what Peter Cappelli has called the “frightened worker” model, a belief that the best employee is an anxious employee.²⁸³ While hanging out can mean a lot of things, it never means talk suffused with dread.

Highlighting this shift is the reality that in today’s economy, layoff announcements often make investors smile, prompting share-jumps and burnished reputations for the executives who pull the trigger.²⁸⁴ Celebrity CEO “Neutron” Jack Welch didn’t just declare loyalty “nonsense,” he invented new-fangled management philosophies to fit the theme that became standard corporate practice.²⁸⁵ His infamous “Rank and Yank” evaluative scheme counsels firing ten percent of the workforce each year and is still followed by a hefty majority of Fortune 500 companies.²⁸⁶

²⁸⁰ ESTLUND, *WORKING TOGETHER*, *supra* note 218, at 4–7.

²⁸¹ For an excellent discussion of trends in job tenure suggesting an “unequivocal[]” and “significant” decline in employment stability for many key demographics, see STONE, *supra* note 250, at 75–83. For context suggesting that the overall picture is not so dire, see ESTLUND, *WORKING TOGETHER*, *supra* note 218, at 48–50 and Lance Compa, *Not Dead Yet: Preserving Labor Law Strengths While Exploring New Labor Law Strategies*, 4 U.C. IRVINE L. REV. 609, 613 (2014).

²⁸² ESTLUND, *WORKING TOGETHER*, *supra* note 218, at 56–57.

²⁸³ PETER CAPPELLI, *THE NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORKFORCE* 131 (1999); GREENHOUSE, *THE BIG SQUEEZE*, *supra* note 245, at 92; *see also* Chris Brooks, “My Boss Would Yell at Me Every Day Until I Cried”: *Lean Production at Volkswagen’s Tennessee Plant*, IN *THESE TIMES* (Mar. 19, 2015), http://inthesetimes.com/working/entry/17777/my_boss_would_yell_at_me_every_day_until_i_cried_lean_production_at_tennes (“Workers are routinely pushed to their physical and emotional breaking points. From management’s point of view, this maximizes productivity.”).

²⁸⁴ GREENHOUSE, *THE BIG SQUEEZE*, *supra* note 245, at 83–91; UCHITELLE, *supra* note 251, at 4–8.

²⁸⁵ GREENHOUSE, *THE BIG SQUEEZE*, *supra* note 245, at 86–87, 186; UCHITELLE, *supra* note 251, at 5.

²⁸⁶ Leslie Kwoh, “Rank and Yank” Retains Vocal Fans, *WALL STREET J.* (Jan 31, 2012), <http://www.wsj.com/articles/SB10001424052970203363504577186970064375222>.

Everyone not fired, of course, was, and is, terrified.²⁸⁷ Forty percent of workers describe their jobs as “very or extremely stressful,” and no one can blame them.²⁸⁸ The long-implied “psychological contract” of continuous employment for a job done competently expired just as employers were waging a “campaign to gain complete control of work” for the still employed.²⁸⁹ In low-wage settings, “control” translates to a style of employee relations that is unpleasant at best and brutal at worst. In 2006, a business professor spent a year working undercover at seven fast food restaurants and described the prevailing management technique as “the bullying model,” which largely consisted of motivating people by “intimidating” them.²⁹⁰ The go-to human relations tactic at Walmart is “shaming,” under the theory that embarrassed workers—those called out in front of co-workers or the butt of jokes—are easiest “for managers to ‘order . . . around.’”²⁹¹ At Amazon, warehouse workers start the day with company-required reading describing colleagues recently fired for theft and whose “black silhouette[s] stamped with the word ‘terminated’” are projected onto flatscreen TVs throughout the day.²⁹² Authors of an oft-cited study of employee perceptions were struck by the sense of despair that emerged in focus groups with the lowliest-paid.²⁹³ Contributing to that was perhaps what scholars have called the “affective” expectations that prevail in much of low-wage work, the cognitively dissonant mandate that people not only work hard for their insufficient wages but have “fun” doing it.²⁹⁴ Pret A Manger’s CEO offers a candid assessment of how this plays into his evaluation of a shop’s labor force: “The first thing I look at is whether the staff are

²⁸⁷ GREENHOUSE, THE BIG SQUEEZE, *supra* note 245, at 86 (“According to former employees . . . Welch conducts meetings so aggressively that people tremble.”); *see also* UCHITELLE, *supra* note 251, at 5.

²⁸⁸ GREENHOUSE, THE BIG SQUEEZE, *supra* note 245, at 186.

²⁸⁹ STONE, *supra* note 250, at 88–92; David Bensman, *The Battle over Working Time: A Countermovement Against Neoliberalism*, AM. PROSPECT (Nov. 23, 2014), <http://prospect.org/article/fair-work-schedules-next-new-human-right>. Some have suggested that the disintegration of employment longevity has fundamentally damaged the quality of and potential for relationships in the workplace. *See* Adam Grant, *Friends at Work? Not So Much*, N.Y. TIMES (Sept. 4, 2015), http://www.nytimes.com/2015/09/06/opinion/sunday/adam-grant-friends-at-work-not-so-much.html?_r=1 (“Since we don’t plan to stick around, we don’t invest in the same way. We view co-workers as transitory ties, greeting them with arms-length civility while reserving real camaraderie for outside work.”).

²⁹⁰ GREENHOUSE, THE BIG SQUEEZE, *supra* note 245, at 106–07.

²⁹¹ Ellen Israel Rosen, *How to Squeeze More Out of a Penny*, in WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM 243, 257–58 (Nelson Lichtenstein ed., 2006).

²⁹² Josh Eidelson & Spencer Soper, *How Amazon Shames Warehouse Workers for Alleged Theft*, BLOOMBERG (Mar. 7, 2016, 11:26 AM), <https://www.bloomberg.com/news/articles/2016-03-07/amazon-s-story-time-is-kind-of-a-bummer>.

²⁹³ RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 22 (1999).

²⁹⁴ Paul Myerscough, *Short Cuts*, 35 LONDON REV. BOOKS 25, 25 (2013).

touching each other. Are they smiling . . . happy, engaged? . . . I can almost predict sales on body language alone.”²⁹⁵

The other issue with work-time talk is that if it isn’t filled with anxiety, it’s too harried to be worthwhile for trust-building. The close cousin of scheduling “flexibility” is “lean production,” which at its most benign can mean forced efficiency through understaffing or more work in less time, and at its most insidious can mean meticulous tracking of tasks to the point of physical or emotional breakdown.²⁹⁶ Technology, in particular, has allowed low-wage employers to significantly up-the-ante on the famous (and telling) McDonald’s motto, “[i]f you’ve got time to lean, you’ve got time to clean.”²⁹⁷ These days digital stopwatches make Amazon’s warehouse workers scan merchandize before the clock hits zero.²⁹⁸ One wrong turn in the twenty-mile daily shelf chase means falling behind and discipline.²⁹⁹ “There’s nothing to describe the misery, physically,” said one worker.³⁰⁰ UPS trucks are equipped with sensors to track when the seatbelt clicks, when the bulkhead opens, and when the brakes are applied.³⁰¹ Deviations from company standards—like clicking the ignition before the seatbelt, wasting gas—are considered “stealing time.”³⁰² Call centers track keystrokes and conversations for speed and workers react in ways that are seemingly fantastical and yet wholly logical: pray for fast-talking customers.³⁰³ The stress causes some to become physically ill.³⁰⁴

Settings like these are emblematic of the “intensification of work,” the abolition of the natural pauses that would otherwise allow workers

²⁹⁵ *Id.*; see also Sarah Jaffe, *Grin and Abhor It: The Truth Behind ‘Service with a Smile’*, IN THESE TIMES (Feb. 4, 2013, 5:45 PM), http://inthesetimes.com/working/entry/14535/grin_and_abhor_it_the_truth_behind_service_with_a_smile (“Pretending to love one’s work, to be overjoyed by the ability to serve you coffee or pizza or dance for your tips, is an integral part of the job for service workers.”).

²⁹⁶ Brooks, *supra* note 283 (describing “lean production” and its human toll). Steven Greenhouse describes the first version with, for example, a hotel that “ordered housekeepers to clean sixteen rooms each eight-hour shift, up from fourteen . . .” GREENHOUSE, THE BIG SQUEEZE, *supra* note 245, at 185–86; see also EHRENREICH, *supra* note 208, at 46–48 (quitting a server job on the first day because of speed pressures); Rosen, *supra* note 291, at 253, 258 (understaffing intentionally for efficiency at Walmart).

²⁹⁷ KEVIN D. HENSON, JUST A TEMP 135 (1996); see also Ifeoma Ajunwa et al., *Limitless Worker Surveillance*, 105 CALIF. L. REV. (forthcoming 2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2746211.

²⁹⁸ Jessica Bruder, *These Workers Have a New Demand: Stop Watching Us*, NATION (May 27, 2015), <https://www.thenation.com/article/these-workers-have-new-demand-stop-watching-us>.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

to share a quick story, quip, or even subversive roll-of-the-eye.³⁰⁵ Exhaustion alone makes those types of slight but nevertheless trust-building interactions emotionally superfluous to the point of undesirable, and as others have noted, the fear of discipline leads to a “self-censorship” that cuts talk off at the pass generally.³⁰⁶

Finally, much has been made about the rise of employment “fissuring,” where businesses trade their own workforce for contracted employees who do identical tasks on someone else’s liability line.³⁰⁷ The organizing and bargaining implications of this phenomenon are bad, and the impact on improvisation is even worse. That’s because fissuring can set up some truly strange relational scenarios, including instances where contracted or temporary employees work “side-by-side with” a company’s “core” or direct employees doing the same assignments, with the same uniforms, for less money and fewer privileges.³⁰⁸ This has two effects. First, it creates a subset of workers who are especially scared and especially anxious because they are, by definition, marginal.³⁰⁹ Some are actually given badges emblazoned with the word, “Temporary.”³¹⁰ At Microsoft temps are like helpful ghosts, contributing to regular work but barred from parties celebrating successes and ineligible for the in-

³⁰⁵ Richardson, *supra* note 242, at 72–73.

³⁰⁶ As Barbara Ehrenreich discovered, “[i]f you can’t stand being around suffering people, then you have no business in the low-wage work world” EHRENRICH, *supra* note 208, at 101; see also David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 11–13 (1998).

³⁰⁷ For the most comprehensive account of this phenomenon, see DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 3–4 (2014). The workers involved in fissuring are often referred to as “contingent” workers because their jobs are precarious and usually marginal to the primary contracting firm. ESTLUND, *WORKING TOGETHER*, *supra* note 218, at 45. The precise definition of this group is contested, but it at least includes temps, outside contractors, and independent contractors. *Id.*

³⁰⁸ ESTLUND, *WORKING TOGETHER*, *supra* note 218, at 45; GREENHOUSE, *THE BIG SQUEEZE*, *supra* note 245, at 119. In some cases, it is an “ever-changing cast of third-party” subcontracted workers all the way down. Michael Grabell, *The Expendables: How the Temps Who Power Corporate Giants Are Getting Crushed*, PROPUBLICA (June 27, 2013, 8:00 AM), <https://www.propublica.org/article/the-expendables-how-the-temps-who-power-corporate-giants-are-getting-crushed>.

³⁰⁹ Indeed, as explained by Steven Greenhouse, “for corporate America they’re essentially a disposable workforce.” GREENHOUSE, *THE BIG SQUEEZE*, *supra* note 245, at 117. As described by one temp: “[Y]ou don’t have a real life. And what goes along with the territory is this low-level depression. . . . An erosion of self-esteem.” HENSON, *supra* note 297, at 1 (citation omitted); see also ROBERT E. PARKER, *FLESH PEDDLERS AND WARM BODIES: THE TEMPORARY HELP INDUSTRY AND ITS WORKERS* 93 (1994) (“Uncertainty . . . is the most salient and pervasive characteristic of temporary work.”).

³¹⁰ GREENHOUSE, *THE BIG SQUEEZE*, *supra* note 245, at 119.

house basketball league.³¹¹ Second, an especially potent talk vacuum arises, as core employees have little incentive to get to know their contingent counterparts and may actively resent them as facilitators of a race to the bottom in their own company.³¹² Fissured workers, for their part, may actually be told by their agencies or contracted entities not to socialize with the permanent employees.³¹³ While relative to the total universe, the proportion of fissured workers remains small (a 2015 federal study pegged it at less than eight percent), the sliver is growing and a keystone in many segments of the low-wage economy.³¹⁴

The overall truth is this: if improvisation has a future as a broad-based, accessible, and reliable mechanism for change by people who have never, and will never, hear of Fight for \$15—or even just as righteous one-time pushback on a random Tuesday in Des Moines—employees need more freedom to talk at work. The standard *Republic Aviation* framework is adequate in theory but outmatched in modern practice. But the Board can bring the workplace up to speed in two steps, guided by the principle that all workers, no matter management’s policies or practices, should have the freedom to get to know the person working next to them. First, workers should be able to talk to each other during worktime. Second, they should be able to take short, unannounced breaks at reasonable times.

³¹¹ *Id.* Often temps are used specifically to cover for permanent employees while they attend office parties. HENSON, *supra* note 297, at 148–49; *id.* at 1 (describing temping as being “this ghost”).

³¹² As Cynthia Estlund notes: “The rising use of temporary and contract workers means that the workplace community is less stable and less cohesive. Its members lack a common identification with a particular firm or its objectives, and they lack common terms and conditions of employment. Their workplace connection is more tenuous and temporary, and their motivation to get along and overcome differences is bound to be less compelling.” ESTLUND, *WORKING TOGETHER*, *supra* note 218, at 45. In studies, workers “relay[] stories of permanent workers who were threatened by the presence of temporaries” who seem to “pose a latent threat of replacement” JACKIE KRASAS ROGERS, *TEMPS: THE MANY FACES OF THE CHANGING WORKPLACE* 89–90 (2000).

³¹³ PARKER, *supra* note 309, at 107.

³¹⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-168R, *CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS* 12 (2015); Grabell, *supra* note 308 (describing the rise of “temp towns” that “teem[] with temp agencies. . . . where it has become nearly impossible . . . to find factory and warehouse work without first being directed to a temp firm”).

III. TOWARD AN ACCESSIBLE RIGHT TO IMPROVISE: REVAMPING A LABOR LAW SUPER-PRINCIPLE

A. *Working Time Is for Work—And Talk*

The freedom to talk during worktime means just that: it would be legal for workers to talk about any topic on-the-clock, in the midst of assigned tasks, and it would be illegal for employers to restrict it. That means an end to blanket no-talking rules and the end to inquiries into whether an employer is prohibiting section 7-related speech but not other subjects. All talk, from last night's game to the kids to the weather to the weekend to the union, would be lawful talk at all times so long as the back-and-forth did not cause progress on an assignment to become impaired.

The nuts-and-bolts move here is the overturning of a long line of precedent permitting bans on all non-task oriented talk during worktime.³¹⁵ The Board overturns precedent all the time.³¹⁶ The flashier shift, arguably, would be plunging a figurative dagger into the heart of the labor law super-principle, "working time is for work."³¹⁷

Like a lot of good "slogans," "working time is for work" is rarely analyzed yet frequently invoked.³¹⁸ Perhaps for that reason—or perhaps because it is so attractively pithy—the phrase has accumulated an analytical weight that would seem to outstrip its intended meaning as a rhetorical aside in a case from the 1940s.³¹⁹ Because aside or not, it has

³¹⁵ See *supra* note 206 and accompanying text; see also, e.g., *Orval Kent Food Co.*, 278 N.L.R.B. 402, 407 (1986).

³¹⁶ In late 2007, the Board issued sixty-one decisions overturning key precedents in what came to be known by labor advocates as the "September Massacre." Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199, 201–02 (2010). The Board has also overturned longstanding precedents during the Obama Administration. See, e.g., *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186, 2015 N.L.R.B. LEXIS 672, at *1–2 (Aug. 27, 2015) (overturning a 1984 precedent on joint-employer status); *Am. Baptist Homes of the West*, 362 N.L.R.B. No. 139, 2015 N.L.R.B. LEXIS 500 (June 26, 2015) (overturning a 1978 precedent on investigatory witness statements).

³¹⁷ *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943).

³¹⁸ Gary Minda, *Decoding Labor Law Values and Assumptions in American Labor Law* by James B. Atleson, 52 GEO. WASH. L. REV. 474, 483 (1985) (book review) (describing "unquestioning acceptance of the view that 'working time is for work'"). An exception is Member Johnson's recent dissent in *Purple Communications*, which mounts a stirring defense of the principle. *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, 2014 N.L.R.B. LEXIS 952, at *204–06 (2014) (Johnson, M., dissenting).

³¹⁹ The phrase first appeared as an isolated bit of rhetorical padding that—without analysis—connected the bald statement that "[t]he Act, of course, does not prevent" employers from restricting conduct on the job with the conclusion that "[i]t is therefore within the province of an employer to" enforce rules during that time. *Peyton Packing Co.*, 49 N.L.R.B. at 843.

come to “legitimate[] the employer’s domination and control over working time by implying that it is only natural, rational, or appropriate for employers to determine the proper work level of employees.”³²⁰

Behind this presumption is a profound judicial preference for managerial or sometimes property rights over organizing interests during worktime, though “profound” probably understates the situation since, as noted, it is a balance where conversations never win.³²¹ Equally easy to understate is the phrase’s cultural authority, which, as Gary Minda, reviewing James Atleson’s remarkable book on labor law’s hidden judgments wrote long ago, “restricts the possibility of realizing alternative workplace relations by denying the contingencies of present arrangements.”³²²

Today the legal preference and cultural aura remain, but by now we should know better. As detailed below, the slogan gives employers theoretical power they don’t need—because the evidence shows talk doesn’t hurt production—and practical control that doesn’t make sense—because so much else other than “work” already goes on with impunity.

1. A Slogan Broken in Theory

Dismantling “working time is for work’s” theoretical dominance should start with the acknowledgement that, at least with respect to talking while working, the emperor has no clothes. The entire no-talking during worktime caseline hides the not-so-little secret that chatting while working doesn’t usually interfere with managerial interests and particularly not productivity.

To begin, some companies must recognize the lack of impact because they do not bother restricting non-job discussions on the floor.³²³ And some business innovations, like the drive-thru window,

³²⁰ Minda, *supra* note 318, at 484.

³²¹ Decisions rarely make the difference between interests clear. *Peyton Packing* said that “working time is for work” for “the sake of efficiency, discipline, or production.” *Peyton Packing Co.*, 49 N.L.R.B. at 843–44. But James Atleson, persuasively citing Supreme Court concurrences and dissents that lobby for property interests where majorities have cited managerial interests, has questioned the relevance of the distinction. ATLESON, *supra* note 144, at 62 n.76; see also *Purple Commc’ns Inc.*, 361 N.L.R.B. No. 126 at *205 (Johnson, M., dissenting) (suggesting it is both by stating that “the courts and Board have held that the employer’s interests in production and discipline required some bright line to show where Section 7 rights to the employer’s property normally stopped, and [the working time is for work] principle was it”).

³²² Minda, *supra* note 318, at 484.

³²³ Indeed, the reason why the corollary to no-talking rules—that employers may not ban section 7-related talk if they allow talk generally—comes up in case law at all is that some

where workers type and talk or even type, talk, and deliver all at once, are founded on the conclusion that banter is not fundamentally paralyzing.³²⁴ Lurking behind those examples and others is an underappreciated but frankly obvious reality: people can do a lot of sophisticated stuff while talking. Doctors suture wounds as they talk to patients to calm them down; college guides navigate—backwards—through crowded courtyards as they spout facts, make small talk, and answer questions; basketball players dribble, drive, and shoot as they talk creative, even incendiary, trash; rappers freestyle as they bop with abandon; celebrity chefs slice, dice, and splash as they narrate ingredients and techniques to excitable audiences; Lavern and Shirley’s chumminess caused hijinks on the fictional “Shotz Brewery” assembly line,³²⁵ but the antics are memorable precisely because the consequences were unexpected, not obvious.

This is not to discount a spate of doomsday multitasking studies with headline-grabbing claims like attention-splicing drains \$650 billion from the economy or that trying to do a task while reading emails or making calls is the IQ-equivalent of working while stoned.³²⁶ It’s just that those studies are not generally concerned with the effects of vanilla small talk amidst some other well-practiced task, like walking, cooking, cleaning, rearranging, or any of the other innumerable rote activities that suffuse low-wage service work.³²⁷ Those types of dualities are known as “concurrent multitasking” because scientists find that people can do each simultaneously or imperceptibly close to simultaneously “with little to no interference.”³²⁸ Studies that get summarized in the

percentage of employers do, in fact, allow random discourse on-the-job. *See supra* notes 197–98. Presumably these employers have determined that small talk does not automatically result in massive productivity drop-offs.

³²⁴ It almost goes without saying that modern service work is absolutely suffused with mandatory multitasking. *See, e.g.,* Lin Lin, *Multiple Dimensions of Multitasking Phenomenon*, 9 INT’L J. TECH. & HUM. INTERACTION 37, 43 (2013) (providing first-person accounts of multitasking in secretarial and restaurant work).

³²⁵ *See, e.g.,* Ilovetvintros, *Laverne and Shirley (Season 1) Intro*, YOUTUBE (Feb. 24, 2015), https://www.youtube.com/watch?v=Tvm6gdAwF_g.

³²⁶ Christine Rosen, *The Myth of Multitasking*, 20 NEW ATLANTIS 105, 106 (2008); *see also* Douglas Merrill, *Why Multitasking Doesn’t Work*, FORBES (Aug. 17, 2012, 1:21 PM), <http://www.forbes.com/sites/douglasmerrill/2012/08/17/why-multitasking-doesnt-work/#6e21e67c7b2f>.

³²⁷ Rosen, *supra* note 326, at 106 (describing studies involving “extreme multitasking” and “hyperkinetic environment[s]”); Merrill, *supra* note 326 (setting aside the impact of talking while performing rote tasks as not relevant to the thesis); *see also* DARIO D. SALVUCCI & NIELS A. TAATGEN, *THE MULTITASKING MIND* 10 (2011) (noting the empirical distinction between simple and complex multitasking).

³²⁸ SALVUCCI & TAATGEN, *supra* note 327, at 8–9, 111–12; *see also* Lin, *supra* note 324, at 44 (noting that “tasks familiar and automatic such as cooking and driving may require low cognitive loads,” thereby “let[ting] us do one thing while focusing on something else”).

New York Times, in contrast, usually involve what's called "sequential multitasking," where attention requirements force switching between tasks in ways that interfere with performance and productivity.³²⁹ So while everyone agrees that a sequential mix like driving and texting is a terrible idea (studies say it averages five seconds worth of complete distraction), most people accept that the concurrent or near concurrent tasks of driving while talking to someone in the front seat is not particularly intrusive.³³⁰ That's in part because, from a lab perspective, it's not,³³¹ and in part because whatever incremental level of distraction talking adds to driving, in the real world people adapt to limit the interference by, for instance, shutting up if traffic gets heavy.³³²

The key is that people do the same thing at work. By now decades of multi-tasking data show that in an amazing diversity of contexts workers "coordinate talk and activities to complete predetermined goals."³³³ That is to say, people do not just barrel through personal conversations, production or customer service be damned; they "align[]" talk and non-talk activities so that things get done right and on time.³³⁴ Like doctors and nurses during surgery, as task complexities rise so do "hitches and intraturn silences."³³⁵ Researchers note that such "liminal points" seem to arise automatically and vary depending on the

³²⁹ SALVUCCI & TAATGEN, *supra* note 327, at 9–10, 111–13; Lin, *supra* note 324, at 38 ("Scholars believe that switching between tasks wastes precious time because the brain is compelled to restart and refocus. . . . [so] it takes longer to finish any one chore, and that one doesn't do it nearly as well as one would, if one had given it one's full attention."); *see also, e.g.*, Matt Richtel, *In Study, Texting Lifts Crash Risk by Large Margin*, N.Y. TIMES (July 27, 2009), <http://www.nytimes.com/2009/07/28/technology/28texting.html> (reporting a multi-tasking study involving the sequential task of texting and driving).

³³⁰ Richtel, *supra* note 329.

³³¹ SALVUCCI & TAATGEN, *supra* note 327, at 8–9 fig.1.1; *see also* Lin, *supra* note 324, at 44 (stating that over time "[d]riving becomes automatic" and "lets us do one thing while focusing on something else").

³³² Jill U. Adams, *Talking on a Cellphone While Driving Is Risky. But Simpler Distractions Can Also Cause Harm*, WASH. POST (Feb. 10, 2014), https://www.washingtonpost.com/national/health-science/talking-on-a-cellphone-while-driving-is-risky-but-simpler-distractions-can-also-cause-harm/2014/02/07/49675ce8-8cf2-11e3-95dd-36ff657a4dae_story.html ("[H]aving another person in the car generally results in safer driving [compared to even a "hands-free phone"] because . . . passengers tend to stop talking when the demands of driving increase . . .").

³³³ Mike Levy & Rod Gardner, *Liminality in Multitasking: Where Talk and Task Collide in Computer Collaborations*, 41 LANGUAGE SOC'Y 557, 558 (2012) (describing the phenomenon on ships, subways, cockpits, and in marine research).

³³⁴ *Id.*

³³⁵ *Id.* at 583, 557. Though this particular study involved students performing computer tasks, the authors note that the "work is located in relation to research in the wider world of the workplace . . . where multitasking involving talk and the operation of artifacts is known to occur." *Id.* at 557.

skill levels and experiences of those involved.³³⁶ Some new work even suggests that when we are made to expect short interruptions during an assignment—as we might in a workplace where talk is prevalent—we “marshal[] extra brain power to steel” ourselves for future multitasking and better overall focus.³³⁷

It is also worth noting that a lot of the more unsettling findings related to workplace multitasking involve technology-based distractions like email, chats, apps, phones, and other devices associated mostly with white-collar work.³³⁸ Fast food and retail workers do not get iPhones and would surely be fired for regularly whipping out even a flip-phone. They are overwhelmed instead with sore feet, repetitive motions, and often brutally boring tasks. These, however, are exactly the kind of things that have “low cognitive loads,” become automated or routinized over time, and therefore are the perfect companions for talk.³³⁹ Some recent research demonstrates that where assignments are monotonous, multitasking may actually *improve* performance by forcing greater alertness and concentration on the primary task.³⁴⁰ To take a simple example, no one seriously argues that schools should outlaw note-taking during lectures (especially boring lectures) to combat the scourge of multi-tasking.³⁴¹ There, doing two things at once (listening and writing) quite clearly improves attention and recall, and it is not hard to imagine the effect improving concentration amidst other tasks common in low-wage industries, like listening and unpacking boxes or chatting while folding clothes.

³³⁶ *Id.* at 583 (“What is routine for one may be complex for another.”); *see also* Lin, *supra* note 324, at 42 (“Not only may one’s task priorities and familiarities influence one’s ability or decision to multitask, but one’s learning style and natural intelligences may also have impacts.” (emphasis added)).

³³⁷ Bob Sullivan & Hugh Thompson, *Brain, Interrupted*, N.Y. TIMES (May 3, 2013), <http://www.nytimes.com/2013/05/05/opinion/sunday/a-focus-on-distraction.html>.

³³⁸ *See, e.g.*, N. Lamar Reinsch, Jr. et al., *Multicommunicating: A Practice Whose Time Has Come?*, 33 ACAD. MGMT. REV. 391, 391 (2008); Rosen, *supra* note 326, at 106 (citing workplace productivity studies concerned with “infomania” and “continuous partial attention” due to “mobile computing power and the Internet”). Though, the anti-multitasking set has sparked a backlash of sorts with scholars recently investigating the possibility that technology-based distractions actually increase focus and overall productivity. *See* Lin, *supra* note 324, at 38–39; Clive Thompson, *How Working on Multiple Screens Can Actually Help You Focus*, WIRED (July 7, 2014, 6:44 AM), <https://www.wired.com/2014/07/multi-screen-life>.

³³⁹ Lin, *supra* note 324, at 44; SALVUCCI & TAATGEN, *supra* note 327, at 6; Levy & Gardner, *supra* note 333, at 582.

³⁴⁰ *See, e.g.*, Jackie Andrade, *What Does Doodling Do?*, 24 APPLIED COGNITIVE PSYCHOL. 100, 100, 103 (2009) (adding doodling to a boring task results in increased performance and overall concentration).

³⁴¹ Lin, *supra* note 324, at 43 (citing Devin Zimmerman, *BackTalk: Metatasking vs. Multitasking*, LIBR. J. (Apr. 15, 2007)).

2. A Slogan Broken in Practice

“Working time is for work” functions no better in practice. The unfortunate truth is that a catchy phrase has evolved the law of talking while working—an issue critical to the future of organizing—into reasoning-by-old-saw. The slogan is like a legal “gotcha,” a form of proof-texting that allows decision-makers to bypass what would otherwise require analysis to apply a “bright line rule”³⁴² steeped in paternalism yet absent the real world arrangements that would have to exist for the rule to be justified.

For starters, appending legal authority to a quip pretty much guarantees contradictory, nonsensical, or, especially here, discriminatory results in practice. To cite the most obvious example, management is welcome to break its own worktime rules by soliciting, distributing, and, yes, talking about the union or anything else anytime it wants.³⁴³ More to the point, *plainly* things other than “work” go on in “working time.” Even management theorists concede this.³⁴⁴ Simply to retain a stable workforce employers must routinely turn blind eyes to innumerable productivity drains, from coughing or sneezing fits, to hugs, to passing condolence cards, to ambling instead of speed-walking. What the slogan really does, then, is enable employers to prohibit the sole activity most relevant to resisting authority, which ironically, is probably a productivity wash.

More urgently, time has struck two equally fatal legal blows to the World War II-era doctrine. First, a structural evolution at work has undermined its prerequisites. There’s no doubt that labor law must protect productivity during working time. As a dissenting Board Member recently scoffed, “no employer would last long in business if its only output was . . . a never-ending conversation . . . among its employees.”³⁴⁵ That’s true. But “working time is for work” was never

³⁴² *Purple Commc’ns, Inc.*, 361 N.L.R.B. No. 126, 2014 N.L.R.B. LEXIS 952, at *205 (2014) (Johnson, M., dissenting).

³⁴³ In *NLRB v. United Steelworkers*, 357 U.S. 357, 364 (1958) the Supreme Court hinted that “enforcement of a valid no-solicitation rule by an employer who is at the same time engaging in anti-union solicitation” could be an unfair labor practice, but the Board has not pressed the issue. *See, e.g.*, *Summitville Tiles, Inc.*, 300 N.L.R.B. 64, 66 (1990); *St. Francis Hosp.*, 263 N.L.R.B. 834, 835 (1982) (“[N]o-solicitation . . . rules are not binding upon employers.” (citation omitted)). Indeed, even in the face of talk restrictions, the Board allows employers to mandate that employees attend anti-union gatherings and individual meetings during worktime, subject only to limits that the interactions be non-coercive and not within twenty-four hours of a representation election. *See, e.g.*, *Flex Products, Inc.*, 280 N.L.R.B. 1117, 1117–19 (1986) (describing the applicable standards and common employer practices).

³⁴⁴ Atkinson, *supra* note 207, at 49 (calculating “that the average employee steals four hours and 15 per minutes per week” *not* working during worktime).

³⁴⁵ *Purple Commc’ns, Inc.*, 361 N.L.R.B. No. 126, at *204–05 (Johnson, M., dissenting).

intended, alone, to be a managerial wand that poofs talk away. As one Board Member put it, the slogan was “a principle inextricably woven into the Act’s integral balance . . . allow[ing] Section 7 activity to go on at the workplace . . . in the first place.”³⁴⁶ The panel that announced the slogan honored that equilibrium by hitching “working time is for work” to an express rider that non-working time is for non-work.³⁴⁷ But that express rider was itself hooked to a condition that at the time was so obvious it surely did not need to be stated: non-working time has to actually exist. In 1943 working time and non-working time went hand-in-hand. They were partners, a tag-team, inseparable buddy cops that kept labor law’s rules for workplace discourse on the straight-and-narrow. But where one exists without the other, the regime fails. We know this because that was the Board’s diagnosis of life at Republic Aviation, where workers theoretically had a lunch break, but “working long hours in a plant engaged entirely in war production and expanding with extreme rapidity” combined with a no-solicitation policy made it conversationally useless.³⁴⁸ The result was a workforce “entirely deprived of their normal right to ‘full freedom of association’ in the plant on their own time . . . in clear derogation of the rights . . . guaranteed by the Act.”³⁴⁹

Second, in 1992 “working time is for work” became irreconcilable with the Supreme Court’s broader jurisprudence on workplace access.³⁵⁰ In *Lechmere v. NLRB*, the Court reinforced a “distinction of substance” between workers and outsiders that is pretty simple: employees have more rights to communicate on management’s property than nonemployees.³⁵¹ In fact, *Lechmere*’s prime takeaway is that except in extraordinary circumstances, nonemployees have no rights.³⁵² Yet, when it comes to worktime—in many modern settings the only “time” at

³⁴⁶ *Id.* at *133.

³⁴⁷ The concepts are juxtaposed in the original opinion, though the non-work counterpoint lacks an equivalent catchphrase. *Peyton Packing Co., Inc.*, 49 N.L.R.B. 828, 843–44 (1943) (“It is no less true that time outside working hours . . . is an employee’s time to use as he wishes . . .”).

³⁴⁸ *Republic Aviation Corp.*, 51 N.L.R.B. 1186, 1195 (1943).

³⁴⁹ *Id.* The Supreme Court’s decision in *Beth Israel Hospital v. NLRB* is also instructive. 437 U.S. 483 (1978). There, management allowed solicitation in workers’ changing rooms, but “only a fraction” had access to the rooms, *id.* at 489, so “the only areas in which organizational rights [were] permitted [were] not conducive to their exercise.” *Id.* at 505. The Supreme Court thus agreed with the Board that in the absence of patient interference it was reasonable to open up solicitation in the cafeteria. *Id.* at 502–03.

³⁵⁰ I thank Andrew Strom for helpful discussion on this point.

³⁵¹ 502 U.S. 527, 537 (1992). This is because of the “critical distinction between the organizing activities of employees (to whom section 7 guarantees the right of self-organization) and nonemployees (to whom section 7 applies only derivatively).” *Id.* at 533.

³⁵² *See id.* at 537.

issue—the slogan treats everybody the same. Nonemployees have no right to talk to employees during worktime, and neither do the actual workers. But if workers’ rights are really greater than outsiders’ rights (and, as noted, that is black letter law) the two equally restrictive bright line rules cannot co-exist. As *Lechmere* makes crystal clear, nonemployees get the bright line—employees get something better.³⁵³ Purely to comport with the Supreme Court’s assurances of enhanced rights on management property, bona fide employees’ freedom to talk on working time must be greater than zero at all times.

And, if nothing else, part of the Board’s job is to stay “with it.” The state of “normal conditions”³⁵⁴ matter, especially “natural gathering area[s]”³⁵⁵ or what scholars, with the Board’s approving nods, have taken to calling the “water cooler.”³⁵⁶ That’s why the agency, citing email’s contemporary explosion as “the most pervasive form of communication in the business world,” recently moved from a rule denying workers any right to use it for their own devices to a presumption allowing it.³⁵⁷ The Board did this even though the workers before them had copious access to breaks and fully acknowledging, amid the dissent’s howls, that because email “does not respect the ‘working time’/‘break time’ boundary”³⁵⁸ the decision would lead to a “blurring of the line” where working time might not always, definitively, *for sure*, be for “work” and only “work.”³⁵⁹

While that’s great for office workers or tech-centric workplaces, in low-wage work the metaphorical “water cooler” has floor tiles, not keys, and there probably are no breaks. That the majority recognized this discrepancy underscores the need to broaden the crack in the “working time is for work” edifice that the email decision created.³⁶⁰

³⁵³ See *id.* (“In cases involving *employee* activities, we noted with approval, the Board ‘balanced the conflicting interests of employees to receive information on self-organization on the company’s property from fellow employees . . . with the employer’s right to control the use of his property.’ In cases involving *nonemployee* activities . . . , however, the Board was not permitted to engage in that same balancing . . . §7 simply does not protect nonemployee[s]” (citation omitted)).

³⁵⁴ *Republic Aviation Corp.*, 324 U.S. at 804.

³⁵⁵ *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 505 (1978).

³⁵⁶ Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1, 18 (2000). The term later appeared in *The Guard Publ’g Co.*, 351 N.L.R.B. 1110, 1125 (2007) (Liebman, M., dissenting), and eventually throughout *Purple Commc’ns, Inc.*, 361 N.L.R.B. No. 126, 2014 N.L.R.B. LEXIS 952 (Dec. 11, 2014).

³⁵⁷ *Purple Commc’ns, Inc.*, 361 N.L.R.B. No. 126, at *28, 206–07.

³⁵⁸ *Id.* at *206.

³⁵⁹ *Id.* at *208.

³⁶⁰ *Id.* at *26 n.21 (“[M]ost grocery and retail employees do not have access to their employers’ email systems.”).

And indeed, the real beauty of the opinion is its tacit acknowledgment that doctrine need not reflexively categorize employees as closet saboteurs. The Board's approach to workplace policies can recognize the temptations of *not* working without also assuming that the workforce is naturally disloyal. Simply put, the default assumption of working time is for work—that the absence of maximum disciplinary powers courts shirking—does not give employees enough credit.

3. Preserving the Principle

A final point merits mention. The legal implications of “working time is for work” are manifold, and completely obliterating the principle would probably spark a series of second-order effects beyond the scope of this Article.³⁶¹ What is proposed in this Section, though, is really a carve-out that would repurpose the slogan to include talk.³⁶² The justification for this narrow focus is simply that the improvisational style comes down to talk. Talk is the engine of hanging out, of trust-building, and of snap decision-making. It is thus the most relevant element to liberate.

Yet, even if the Board were to green-light a worktime talk default, the project could be endangered by the agency's historically slippery approach to what has been called “solicitation.” For even where worktime discourse is allowed (either under current law because the employer welcomes it, or under my proposal because the Board would mandate it), the instant “talk” transforms into “solicitation,” it becomes presumptively illegal and a fireable offense.³⁶³ This is bread-and-butter *Republic Aviation* doctrine, and it means that a great deal rides on how the Board defines solicitation. For example, if solicitation is defined so broadly as to encompass asking a colleague about the weekend or to hang out, the right to worktime chatter would be illusory. While that example may sound not just absurd but detached from the literal meaning of solicitation, as recently as 2004 the Board applied the term

³⁶¹ For an overview of some likely consequences, see ATLESON, *supra* note 144, at 44–66.

³⁶² That is, “working time is for work—and talk.” In *infra* Section III.B, I propose a second carve-out for on-the-job breaks.

³⁶³ See, e.g., Wash. Fruit and Produce Co., 343 N.L.R.B. 1215, 1219–20 (2004) (allowing an employer to “permit[] employees to talk among themselves while working . . . so long as their personal discussions do not rise to the level of solicitation”). Use of the word “instant” is not hyperbole. “There is . . . no requirement that actual interference be shown to justify [a no-solicitation] rule.” *Id.* at 1219.

to workers urging colleagues to attend a meeting and those doing nothing more than discussing working conditions.³⁶⁴

The Board's tendency to head down these and other overly inclusive paths rests on the agency's assumption that certain utterances or even written phrases compel an "immediate response . . . and therefore present[] a greater potential for interference" than other statements.³⁶⁵ Naturally, as Boards change so do conclusions about the kinds of phrases workers will find too tempting to ignore.³⁶⁶

The "immediate response" metric is a lemon. If a Walmart worker talks to a colleague while folding a shirt, it is highly unlikely that the statement—no matter its substance—is rhetorical. Outside of perhaps a philosophy class, that's not how human interactions work. That the point of chatter is chatter should not raise a factfinder's eyebrow. It is also illogical on its own terms. The classic, archetypical example of disorderly "solicitation" is "asking someone to join the union by signing his name to an authorization card in the same way that solicitation for a charity would mean asking an employee to contribute to a charitable organization."³⁶⁷ But how is asking someone to join or contribute to something more conversationally provocative than the millions of other questions or comments that might come up at work?³⁶⁸ Is it a talk tinderbox relative to say, expressing support for a Presidential candidate, the Second Amendment, or the new Star Wars? If someone tells an unfunny joke, isn't it standard practice to at least pretend-laugh so that the incompetent comedian doesn't feel badly? Wouldn't asking a

³⁶⁴ *Id.* (lawfully disciplining workers under a no-solicitation policy for pressuring co-workers "to attend meetings and to support the Union"); *Double Eagle Hotel & Casino*, 341 N.L.R.B. 112, 113 (2004) (noting that a "rule . . . which prohibits employees from discussing working conditions, is viewed by the Board as analogous to a no-solicitation rule" and thus lawfully applied in working areas); *see also Uniflite, Inc.*, 233 N.L.R.B. 1108, 1109, 1111 (1977) (asking a colleague "if she was new and if she had knowledge of the unionization effort" found to be solicitation).

³⁶⁵ *ConAgra Foods, Inc.*, 361 N.L.R.B. No. 113, 2014 NLRB LEXIS 902, at *9 (Nov. 21, 2014) (quoting *Wal-Mart Stores, Inc.*, 340 N.L.R.B. 637, 639 (2003)); *see also Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093, 1097–98 (8th Cir. 2003) (finding that a tee-shirt with the phrase "Sign a card . . . Ask me how!" is not a solicitation because it doesn't necessitate "interaction, like[] a direct yes or no answer"); *Enloe Med. Ctr.*, 345 N.L.R.B. 874, 880 (2005) ("Ask me how" language [on a lanyard] did not constitute solicitation and was not tantamount to a verbal solicitation because the language did not call for an immediate response.").

³⁶⁶ *See, e.g., infra* note 370. For a defense of a broad definition of solicitation, *see ConAgra Foods, Inc.*, 361 N.L.R.B. No. 113, at *37–52 (Miscimarra, M., dissenting).

³⁶⁷ *W.W. Grainger, Inc.*, 229 N.L.R.B. 161, 166 (1977); *see also ConAgra Foods, Inc. v. NLRB*, 813 F.3d 1079, 1089 (8th Cir. 2016) ("The Board's definition of solicitation was laid out thoroughly in *W.W. Grainger, Inc.*").

³⁶⁸ Andrew Strom has made a similar point on this and other issues related to the Board's definition of "solicitation." Andrew Strom, *Guest Post: Is There Really a Meaningful Difference Between Soliciting and Talking?*, ON LABOR (Dec. 2, 2014), <https://onlabor.org/2014/12/02/guest-post-is-there-really-a-meaningful-difference-between-soliciting-and-talking>.

hypothetical colleague named Bob if he would be interested in scoring some tickets to take his kids to see Taylor Swift prompt an immediate response? Assuming Bob is reasonably polite, wouldn't he actually feel *more* pressure to respond to that than to an organizing-related query if he knows the boss is anti-union and lurking or if the campaign is particularly contentious and he'd rather just stay out of it? In fact, when an unwelcome solicitor comes calling, don't most people groan and try to extricate themselves from the interaction as quickly as possible (or even turn off the lights and hide)?

The point is, it's all just talk. That's what solicitation "is." And because it's all just talk, it's all just concurrent multitasking. That means the entire "immediate response" enterprise is beside the point. Talking while working—about the union, about joining the union, about signing a card, about the weather, about whatever—is normally not a productivity menace. So what the doctrine really does, then, is free managers to crow about the union-related "ask" and ignore every other quip, not because collective bargaining is such a dangerously appealing conversation starter, but because managers don't like unions while their kids love "Shake It Off." Since forever, the Board has simply been looking the wrong way.³⁶⁹

The right direction requires a return to first principles. If the *Republic Aviation* framework was concerned with things that interfere with work, "solicitation" needs to be defined in a way that captures things that interfere with work. That means moving away from ferreting out magically evocative words and concentrating on situations that involve or would prompt sequential multitasking. That would include pulling a colleague away from a task to speak, asking someone to stop and watch a smartphone video, or requesting that a co-worker sign something right then and there.³⁷⁰ It would never include talking or even asking a question while working, whether it's about a union or some other cause, why an organization is so great, or how awesome it would be to get involved.

³⁶⁹ An interesting footnote to this history is a since-discarded 1972 case, *Daylin Inc.*, where the Board flatly acknowledged that "solicitation" does not necessarily interfere with work. *Daylin Inc.*, 198 N.L.R.B. 281, 281 n.2 (1972) ("Where it could be shown from the characteristics of the work that union solicitation during worktime would in no way interfere with performance of the work . . . a no-solicitation rule of any kind would be invalid."). Today the interference is presumed. See *supra* text accompanying note 205.

³⁷⁰ Andrew Strom has argued that "show[ing] a co-worker a union authorization card" is not necessarily more disruptive than merely talking about a union. Strom, *supra* note 368. That conclusion is somewhat hard to square with the increased attention demand inherent in a sequential multitasking task like clearing a table while picking up a pen or even reading a card, but the distraction is, in any event, minimal, and the point is well-taken.

As it happens, the current Board seems to have come around to a version of this view, as in 2014 the agency refined the term's textbook definition to include a requirement that a physical card be pulled out "at that time."³⁷¹ While the conclusion was not based on any new insight about the nature of talk, and the Board continued to validate the idea that solicitation's core characteristic is the dreaded "immediate response,"³⁷² a rule that is both bright and incorporates sequential multi-tasking is a substantial analytical improvement.

Unfortunately, the Eighth Circuit did not agree. Calling the Board's clarified approach "absurd" and "patently unreasonable,"³⁷³ the court deemed the words, "hey, I put those cards in your locker" illegal solicitation on the shop floor.³⁷⁴ Key for the court was that even though the statement was made in passing—literally, as the speaker "walked by" a co-worker—the words harkened back to an earlier conversation about unionization that had taken place in a bathroom.³⁷⁵ That, in turn, made the abstract reference to cards actually "a component part" of an "extended effort to obtain signatures" and therefore an immediate "request for a signature."³⁷⁶

Setting aside the Rube Goldberg-esque quality of the analysis, in a narrow sense the decision is no worse than any number of other NLRB cases concluding that a string of syllables having something to do with unions or working conditions constitute illegal worktime solicitation.³⁷⁷ Indeed the court made sure to highlight the many other instances where solicitation had been found even though the employee did not "utter an express question or command."³⁷⁸

In a broader sense the Eighth Circuit's perspective is a serious step backwards, because the court expressly rejected any black letter solicitation rule premised on "the presence or absence of a disruption."³⁷⁹ Adopted broadly, not only would this move destroy the approach to solicitation advocated here, it presents basic theoretical problems.

Primarily, as noted and as the Eighth Circuit itself acknowledged, the reason the law makes a distinction between "talking about a union" and soliciting for a union³⁸⁰ is that the latter "presents a greater potential

³⁷¹ *ConAgra Foods, Inc.*, 361 N.L.R.B. No. 113, at *7–9 (2014).

³⁷² *Id.* at *9.

³⁷³ *ConAgra Foods, Inc. v. NLRB*, 813 F.3d 1079, 1088 (8th Cir. 2016).

³⁷⁴ *Id.* at 1082.

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 1091.

³⁷⁷ See *supra* note 364 and accompanying text.

³⁷⁸ *ConAgra Foods, Inc.*, 813 F.3d at 1089.

³⁷⁹ *Id.* at 1088.

³⁸⁰ *Id.* at 1089 (citing *W.W. Grainger, Inc.*, 229 N.L.R.B. 161, 166 (1977)).

for interference with employer productivity.”³⁸¹ That is to say, it is assumed to create a “disruption.” Divorcing solicitation from disruption therefore makes it very difficult to distinguish soliciting from talking, at least under longstanding labor law principles.

Perhaps sensing this tension, the court alternatively suggests that non-disruptive talk about unions can be distinguished from non-disruptive talk about other things on the basis of “employers’ property rights.”³⁸² However, the court fails to account for how concededly non-disruptive union discussions inherently risk greater property infringements than other discussions. Absent such a theory, it is hard to see how management’s sanctioning of its property for all non-task worktime conversations *except for* section 7-related conversations does not amount to naked discrimination against unions.³⁸³

Though the court makes some attempts to pull back,³⁸⁴ its eventual holding is that solicitation means “a statement that is intended and understood as an effort to obtain a signed card . . . [where] that effort is part of a concerted series of interactions calculated to acquire support for union organization.”³⁸⁵ But what is the point of every pro-unionization conversation if not precisely that? A truly “one-off” exchange about union affinity completely unconnected to an interest in future representation is surely exceedingly rare. And amidst an active campaign, what worker does not recognize that when organizers discuss the union cause they really want—if not right now, rather soon—a scribble on the dotted line? Ultimately, the Eighth Circuit seems to be gesturing toward a notion of “working time is work” so robust that even

³⁸¹ Wal-Mart Stores, Inc., 340 N.L.R.B. 637, 639 (2003).

³⁸² The court states:

Under the Board’s application of the Act in this instance, de facto solicitation that is sufficiently brief and nondisruptive is protected conduct that may not be censured under a valid no-solicitation policy. This understanding disturbs the balance of employees’ right to organize and employers’ right to exercise control over their business. Employees’ right to organization would wax to include de facto solicitation that the employer could not show to be sufficiently disruptive, which would result in the waning of employers’ property rights.

ConAgra Foods, Inc., 813 F.3d at 1088–89.

³⁸³ See *supra* note 205; see also 29 U.S.C. § 158(a)(3) (2012) (prohibiting “discrimination in regard to . . . any term or condition of employment to encourage or discourage membership in any labor organization”).

³⁸⁴ While the court states that its “holding should not be read to indicate that merely mentioning union authorization cards or providing information, without more, constitutes solicitation,” noting later that talking about cards as “part of a concerted series of interactions” to garner union support *is* solicitation would suggest that simply “mentioning union authorization cards” more than once places employees in a solicitation danger zone. *ConAgra Foods, Inc.*, 813 F.3d at 1090.

³⁸⁵ *Id.*

where an employer allows talk about Beyoncé and the Bears, union talk tarnishes something like an overarching institutional dignitary interest.³⁸⁶ Yet if such a thing ever existed, the Wagner Act extinguished it in 1935 by providing workers with an affirmative federal right to usher conversations about unionization through the factory gates. Other circuits should take note.

While the freedom to work and talk at the same time is a good first step to improve settings that do no favors for improvisation, more should be done. Hanging out could do without the “work” part and, for that matter, the encompassing anxieties that pervade contemporary low-wage employment. To get further down that road, employees also need a bit of walled-off time for their own devices, and especially the ability to choose for themselves when they will take it. So working time should be for work and talk—but breaks too. The next Section explains.

B. *Working Time Is for Work—And Breaks*

The demise of formalized breaks in modern employment is consequential enough, but the full impact is probably masked by a parallel loss of informal time-outs during the workday, what Charley Richardson calls “micro-breaks.”³⁸⁷ These are the pauses, the gaps, the little breathers that employees traditionally snuck in during short periods of downtime, task transitions, or simply when the boss wasn’t looking.³⁸⁸ Obsessive employer control and flexibility that flows only to management’s benefit has snuffed out these moments of informal rest that workers might otherwise rely on, even unintentionally, to cultivate casual in-house networks.³⁸⁹

Here again the Board can bring improvisation back from the brink by classifying short, unilateral breaks—the “micro-break” term is a good one in this context—as protected conduct. What’s envisioned are not set respite periods of the kind that might be legislated, only be required for certain shifts, and are under-enforced. I am proposing a right, grounded in section 7, for at least two employees to spontaneously stop working for a reasonable period and leave the active floor together, probably for no more than four or five minutes. Though there would not be a hard

³⁸⁶ A sense of shock for the employer’s plight almost leaps off the page when the court criticizes the Board’s bright line solicitation rule for “providing a road map to organizers on how to garner support for union membership on working time and in work areas.” *Id.* at 1087.

³⁸⁷ See Richardson *supra* note 242, at 73, 76.

³⁸⁸ See *id.* at 69–76.

³⁸⁹ *Id.*

cap on the number of breaks that could be taken during a shift, to be protected the cumulative impact on production would need to be “modest,” meaning something like perceptible but not substantial.

The concept is best explained through examples. Under the right, a Walmart greeter, noticing the flow of shoppers had slowed to an intermittent trickle, could invite a customer-less cashier to grab a soda at the in-house restaurant. If they returned to their posts within a handful of minutes the time-off would be protected, even if, for example, a few people streamed in without being greeted or had only three, not four, check-out lines to choose from. If two tourist buses showed up as they were ordering, they might need to cut the break short. Here’s another: a hospital orderly asked to clean something up would have the right to stop in the stairwell or hallway on the way over to commiserate with a colleague having a bad day. If told the spill was urgent, the right might dissolve. At McDonald’s the new expectation would be, “If there’s time to lean, there’s time to go get some fresh air,” even if a customer has to wait an extra sixty seconds in the process.

Micro-breaks like these would play two workplace roles. The primary role would be relational, a quick burst of hanging out amid the pressures and expectations of low-wage work. A secondary effect would be to shove sequential multitasking into a corner. Though short, contingent, and far from the ideal of a formalized break in an actual break room, this would be genuine non-working time with all of the attendant *Republic Aviation* rights, from solicitation to distribution to showing off a video gone viral on a smartphone.

1. Micro-Breaks as Mutual Aid

Of course, this would be a gigantic legal lift. Law is the elephant in the room, and it’s been well-fed. But that does not mean it cannot be led somewhere else. The argument might start with a recent invitation in *Purple Communications* to reconsider the Board’s historical working time/non-working time divide on the condition that “some proof” exists “that this baseline set of freedoms . . . is now not functioning as intended.”³⁹⁰ Perhaps this Article starts that conversation, but even if not, advocates before the Board and the agency itself should have little trouble blowing a hole through one Member’s attempt to preemptively rescind that offer with the statement that “there is no data that people at work have lost their ability to communicate effectively over the last few

³⁹⁰ *Purple Commc’ns Inc.*, 361 N.L.R.B. No. 126, 2014 N.L.R.B. LEXIS 952, at *167 (Dec. 11, 2014) (Johnson, M., dissenting).

decades by the simple means of talking to each other.”³⁹¹ That is simply wrong.

If the Board acknowledges that truth, if it sees non-working time on management’s premises as the endangered resource that it is, the indispensable I-beam of discourse and therefore the statute itself, it should look for ways to supply it. The old cliché about drastic times calling for drastic measures probably overstates the situation, but it gestures toward the Board’s own guidance, which is perfectly apt: “As ‘normal conditions’ have evolved and changed, the Board . . . adjust[s] its analysis under *Republic Aviation* as needed to accommodate the rights at issue in particular factual variations.”³⁹²

The Board, of course, cannot legislate breaks, but it can maybe bootstrap them through section 7. To start it would need to accept that spontaneous mini-meetings are, as the provision requires, for “mutual aid and protection.”³⁹³ Taking the agency’s narrowest definition, that means that the “goal” of the huddles is to “improve terms and conditions of employment or otherwise improve [workers’] lot.”³⁹⁴ Now, perhaps the Board could presume this (low-wage workers could probably caucus about workplace indignities from here to eternity) but realistically not every short excursion is going to revolve around what to do about broken heat or a jerk manager. Small talk is just that—small—and under normal circumstances stepping away from mandatory tasks to discuss the playoffs would be insubordination. But there are other ways of looking at that scenario. One is to say that if group grumbling about a particular condition is like the first step in a long walk to more overt action to combat it—and, labor law says that and protects it³⁹⁵—then workplace small talk is like “step zero,” getting to know your companions while everybody laces up.³⁹⁶ That the “talk” is about the

³⁹¹ *Id.*

³⁹² *Id.* at *51 (footnote omitted).

³⁹³ See *Fresh & Easy Neighborhood Mkt., Inc.*, 361 N.L.R.B. No. 12, 2014 N.L.R.B. LEXIS 627, at *10 (Aug. 11, 2014).

³⁹⁴ *Id.* at 11 (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)). As Ariana Levinson has pointed out, inconsistent definitions—all agency-approved—abound. *Solidarity on Social Media*, 2016 COLUM. BUS. L. REV. 303, 321–25. Two of the more capacious ones require only “a link between the activity and matters concerning the workplace or employees’ interests as employees,” *id.* at 322, or merely “proof that an employee action inures to the benefit of all.” *Fresh & Easy Neighborhood Mkt., Inc.*, 361 N.L.R.B. No. 12, at *20 (citing *Meyers Indus., Inc.*, 281 N.L.R.B. 882, 887 (1986)).

³⁹⁵ See *Hispanics United of Buffalo*, 359 N.L.R.B. No. 37, 2012 N.L.R.B. LEXIS 852, at *11 (Dec. 14, 2012) (discussing workplace “concerns” are for “the purpose of mutual aid and protection” as an “indispensable initial step[] along the way to possible group action” even if employees “never talk specifically about working together to address their concerns” (citation omitted)).

³⁹⁶ And, in fact, it is. See *supra* notes 190–95 and accompanying text. Jeffrey Hirsch makes a strong argument on this point:

Warriors and not wages is beside the point. People don't just start talking about paychecks. They come around to it after building a base with discussions about Steph Curry's jumpshot, furniture shopping, and weekend traffic. Another way is to say that all spontaneous gatherings are reactions to working conditions because they are inherently provoked by those conditions. Tim and Maria only stop to go get water every hour or so because the grill is so darn hot. Jordan and Jess take a seat by the wall whenever they can sneak it, not because they love sitting, but because lifting boxes and running around the warehouse is so exhausting.

This, however, would only begin the analysis, because other barriers remain. For instance, while it may make conceptual sense to categorize off-the-floor talking as mutual aid, and micro-breaks do have a strike-ish, *Washington Aluminum*-esque "feel"—they are, after all, stoppages—caselaw has been particularly cool to even work-related walkoffs where the underlying "dispute" is unarticulated or nowhere to be found.³⁹⁷ Granting protected status to unilateral chit-chat breaks would likely mean distinguishing a decisional line where management lawfully disciplines employees who "absent themselves from work to . . . seek information" about an issue broadly relevant to employment but not strictly related "to an ongoing" disagreement, like an impending merger.³⁹⁸

However, that is a worthwhile project and one that should be successful. The "information" in this context would be relational data, like what someone was up to over the weekend. While that is not, alone, a "dispute," it is the indispensable prior. Without it, there is not only no concerted dispute, there are no concerted *disputes*. This is material that goes to the "self-organization" that the Act has always protected, just at

One of the major determinants of whether a shared reality [necessary for collective action] develops is discourse. Communication is required for individuals to share their views on subjects, which in turn is a necessary aspect of forming relationships. However, this process takes time because the formation of interpersonal relationships usually requires frequent interactions to build trust and establish commonalities among individuals. Without a significant level of communication, it is unlikely that the interpersonal bonds necessary for group formation will develop. Accordingly, substantive communication—discourse—is the linchpin to group formation and collective action.

Hirsch, *supra* note 209, at 1097–98.

³⁹⁷ Generally, protected strikes rest on "labor dispute[s]," which the Act defines as a "controversy concerning terms, tenure or conditions of employment." *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 15 (1962); *see also Vemco, Inc. v. NLRB*, 79 F.3d 526, 530–31 (6th Cir. 1996); *NLRB v. Robertson Indus.*, 560 F.2d 396, 398 (9th Cir. 1976) (stating that for a finding of protected concerted activity "there must be a work-related complaint or grievance" (citing *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974))).

³⁹⁸ *See Ne. Beverage Co. v. NLRB*, 554 F.3d 133, 139 (D.C. Cir. 2009) (listing cases).

the earliest possible stage.³⁹⁹ And it would not be novel to say that “mutual aid” is satisfied in settings where the “dispute” is incipient or about topics unrelated to the job at hand. The Supreme Court has said conduct can be for mutual aid even if it has nothing to do with “the immediate employee-employer relationship” or settling some kind of complaint “within the immediate employer context.”⁴⁰⁰ The key question has long been whether the activity “could improve their lot as employees.”⁴⁰¹ That’s talk.⁴⁰²

Further, employees traditionally lose the “information” cases because the Board determines that they are engaged in “the very kind of activity which can and should take place on employees’ own time.”⁴⁰³ But the analysis should change where there is no “own time.” Indeed, most recently the Board protected a three-hour walkout to get information about an upcoming factory shutdown because the workers had tried and failed to get their questions answered during non-working time.⁴⁰⁴ The takeaway is that where non-worktime opportunities for interactions don’t cut it, employees should have the right to compensate during worktime, even if their object has nothing to do with an active “dispute.” The fact that micro-breaks occur on-site and are limited by a productivity-monitoring requirement should make that analysis even easier.

³⁹⁹ *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978); see also *Wash. Aluminum, Co.*, 370 U.S. at 14 (“We cannot agree that employees necessarily lose their right to engage in concerted activities under § 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made.”).

⁴⁰⁰ *Eastex, Inc.*, 437 U.S. at 565; see also *id.* at 563, 566–67 (rejecting claims that activity “is not within the ‘mutual aid or protection’ language because it [did] not relate to a ‘specific dispute’ between employees and their own employer ‘over an issue which the employer has the right or power to affect’” (quoting portions of the employer’s brief)).

⁴⁰¹ *Id.* at 567.

⁴⁰² See *infra* Section II.C.1.a. In 2006, the Board’s General Counsel published a memorandum suggesting that activity in support of issues that the employer cannot control is not protected. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Robert W. Chester, Reg’l Dir., Region 18, NLRB (Oct. 31, 2006) (regarding *Reliable Maintenance*, Case 18-CA-18119). Michael Duff has persuasively discredited this logic, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies Under the National Labor Relations Act*, 85 DENV. U. L. REV. 93, 102–06 (2007), but even on the memo’s own terms it should not impact the case for micro-breaks. For one, the GC’s conclusion was based on concerted activity aimed at exerting economic pressure on the employer. *Id.* at 103. Here micro-breaks are tailored to limit economic coercion. For another, employers do, in fact, control the freedom to talk at work, so a micro-break can be seen as conduct in support of a change in immediate corporate policy.

⁴⁰³ *GK Trucking Corp.*, 262 N.L.R.B. 570, 573 (1982); see also *Ne. Beverage, Co.*, 554 F.3d at 140 (“The employees simply used working time to engage in . . . activity customarily reserved for non-working time.”).

⁴⁰⁴ *Ne. Beverage Corp.*, 349 N.L.R.B. 1166, 1167 (2007).

2. The Property Problem

None of the above, however, gets at the main problem. What the micro-break proposal says is that disciplining small groups for taking short breathers that have a cumulatively modest but not substantial impact on production violates section 8(a)(1).⁴⁰⁵ So far the discussion has tried to show that the breaks themselves implicate section 7, but that analysis only checks off one side the equation. Business interests loom. The obvious one is a company's right to manage the workforce as it sees fit, the privilege most commonly invoked where employees have been invited in to work.⁴⁰⁶ Acknowledging this, the micro-break proposal is tailored to minimize clashes with managerial interests to the extent possible. The Board would be tasked with coming up with parameters for breaks that would have a lawfully "modest" impact on production, an analysis that is meant to comport not necessarily with sales algorithms and spreadsheets, but with common sense. Two micro-breaks during a Saturday afternoon shift is likely to mean something different than three micro-breaks taken after midnight on a Monday. The "working time is for work" critique may also lessen the heft of purported management interests, as should the widely—and judicially—acknowledged reality that taking a quick break once in a while improves efficiency overall.⁴⁰⁷ But in a context where workers are admittedly interrupting work, the proposal unabashedly pushes a sensibility that, "hey, we're all adults here"—employees can be trusted not to actively push profits over a cliff, and if they can't, managers have the chance to prove it.⁴⁰⁸

Property interests are harder.⁴⁰⁹ There is no getting around the fact that micro-breaks let workers commandeer real property during worktime. While property is a historically strong interest,⁴¹⁰ it would be particularly potent in a situation where the Board would be asking

⁴⁰⁵ See 29 U.S.C. § 158(a)(1) (2012) (stating that it is a violation to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157").

⁴⁰⁶ *Hudgens v. NLRB*, 424 U.S. 507, 521 n.10 (1976).

⁴⁰⁷ *Perez v. Am. Future Sys., Inc.*, No. 12-6171, 2015 WL 8973055, at *7 (E.D. Pa. Dec. 16, 2015) (citing a Department of Labor study). See generally FRANCESCO CIRILLO, *THE POMODORO TECHNIQUE* (2013) (improving worktime efficiency with short breaks).

⁴⁰⁸ Absent contrary evidence, the assumption of maturity on all sides would also insulate workers from a claim that micro-breaks constitute unprotected intermittent strikes, which generally require a "plan or strategy" of stoppages in an effort to "harass the company into a state of confusion." NLRB Advice Memorandum, *WestFarm Foods*, No. 19-CA-29147, at 8-9 (July 22, 2004); *Pac. Tel. & Tel. Co.*, 107 N.L.R.B. 1547, 1548 (1954).

⁴⁰⁹ *Hudgens*, 424 U.S. at 521 ("Under the Act the task of the Board . . . is to resolve conflicts between § 7 rights and private property rights, and to seek a proper accommodation between the two." (citation omitted)).

⁴¹⁰ *Malin & Perritt*, *supra* note 356, at 54-55.

employers to give it up generally and prospectively. For example, although the organizational interest in gaining possession of an employer's list of workers is "substantial" (it is "difficult if not impossible" for unions to get names and addresses otherwise),⁴¹¹ "[u]nder existing case law, an employer has no obligation to provide" what is in its "possession."⁴¹² Even in one of the only factual scenarios where the Board says employers have to hand it over (once the union has already organized at least thirty percent of the workforce), the agency traditionally refuses to pursue unfair labor practice charges if the employer says "no," straight up.⁴¹³

Nonetheless the sporadic property incursions spurred by micro-breaks are justified. For starters, management's choice to ask workers to show up on its property at appointed times weakens the baseline property right.⁴¹⁴ They are "licensees," not "trespassers."⁴¹⁵ The breaks themselves are supposed to overtake only small pieces of more or less non-productive property, like a stairwell, empty aisle, or hallway. Moreover, as the property interest weakens, the organizational interest strengthens.⁴¹⁶ Space turned over to employees is the "place uniquely appropriate" for speaking with colleagues,⁴¹⁷ and the Board does not assume that when the shift is over anybody has the time, ability, or insight to go hang out downtown instead.⁴¹⁸ They've got to get to know

⁴¹¹ *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236, 1245, 1241–42 (1966).

⁴¹² *Tech. Serv. Sols.*, 332 N.L.R.B. 1096, 1098 (2000). There is some disagreement over whether the employee list constitutes employer "property." The seminal case simply stated that the list triggered "no substantial infringement" of any employer interest. *Excelsior Underwear Inc.*, 156 N.L.R.B. at 1243. That argument was also made by a dissenting Member in 2000, *Tech. Serv. Solutions*, 332 N.L.R.B. at 1102–03 (Fox, M., dissenting). There, the majority claimed it was not resting its analysis on a property right, but it applied the test applicable where a union seeks property access, *id.* at 1096–99, and one Member stated expressly that employers have a property interest in the list, *id.* at 1099 n.15. The D.C., Sixth, and Second Circuits all agree it is property. *United Steelworkers of Am. v. NLRB*, 646 F.2d 616, 628 (D.C. Cir. 1981); *Decaturville Sportswear Co. v. NLRB*, 406 F.2d 886 (6th Cir. 1969); *Prudential Ins. Co. v. NLRB*, 412 F.2d 77, 86 (2d Cir. 1969) (Friendly, J., dissenting).

⁴¹³ *Tech Serv. Sols.*, 332 N.L.R.B. at 1098; see also *Excelsior Underwear Inc.*, 156 N.L.R.B. at 1245–46; Comment, *Enforcement of the Excelsior Rule in District Courts*, 116 U. PA. L. REV. 1434, 1442 (1968). Instead the Board just orders another election and hopes the employer will relent a second time around. *Excelsior Underwear Inc.*, 156 N.L.R.B. at 1239. The situation changes only in the exceptional circumstance that the employer is found responsible for especially egregious breaches of other NLRA provisions. *Tech Serv. Sols.*, 332 N.L.R.B. at 1099 (listing examples).

⁴¹⁴ *Malin & Perritt*, *supra* note 356, at 42–43.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*; *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945).

⁴¹⁷ *NLRB v. Magnavox Co. of Tenn.*, 415 U.S. 322, 325 (1974).

⁴¹⁸ *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, 2014 N.L.R.B. LEXIS 952, at *6 n.18 (Dec. 11, 2014).

each there. And, according to labor law, it's got to happen during non-working time.

Needless to say, it is not workers' fault that their organizational interests have been stuffed into unused or non-existent break rooms. But that fact may turn out to provide the strongest justification for a micro-break-style property breach. For when it comes to property incursions the Board's biggest stick is a finding that would-be entrants have no "reasonable alternative means of access."⁴¹⁹ From there, all bets are off. If the facts fit, the Board will go so far as to require a company to fly-out union organizers and host them.⁴²⁰

Using low-wage workers' lack of alternative communicative means to justify short breaks on property the employer has not authorized for breaks would be an unconventional argument. Though some have called for its expansion, to this point the test has only been applied to outsiders like paid organizers, not a company's own employees.⁴²¹ And arguing that property rights must cede to organizational rights because of a lack of alternatives is difficult, succeeding only where, "by virtue of their employment" workers "are isolated from the ordinary flow of information that characterizes our society."⁴²² That usually means they're stuck in a forest, on top of a mountain, or underground.⁴²³

Yet the test is so tough because, again, outsiders are trespassers. They have no rights.⁴²⁴ If the Board is going to give them a boost, of course it is going to be a high bar. The key turn is that low-wage workers also need a boost, not because they are on an island or a mountaintop, but because the communication safe-house the Board built for them burned down. The "usual channels" are not there.⁴²⁵ They are like outsiders, only outsiders invited in to work on the condition that they stay in separate rooms. If the Board needs to use the most powerful property-dividing tool it has to break down the interior walls, it should.⁴²⁶

⁴¹⁹ *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992).

⁴²⁰ *Husky Oil, N.P.R. Operations, Inc. v. NLRB*, 669 F.2d 643, 647–48 (10th Cir. 1982); *cf.* *Nabors Alaska Drilling, Inc. v. NLRB*, 190 F.3d 1008, 1014 (9th Cir. 1999) ("Nabors asserts that the Supreme Court's *Lechmere* decision rendered *Husky Oil* invalid. We disagree.").

⁴²¹ *Lechmere, Inc.*, 502 U.S. at 537; *see also Purple Commc'ns Inc.*, 361 N.L.R.B. No. 126, at *56–57 nn.61–62 (rebutting the application of a no alternative means analysis to employees).

⁴²² *Lechmere*, 502 U.S. at 539–40.

⁴²³ *Id.* at 539.

⁴²⁴ *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

⁴²⁵ *Lechmere*, 502 U.S. at 537.

⁴²⁶ Where management actively campaigns against unionization, both the Supreme Court and Board have suggested that if workplace rules on discourse "truly diminish[]" the viability of organizational messages, property should cede, even to nonemployee outsiders. *NLRB v. United Steelworkers (NuTone, Inc.)*, 357 U.S. 357, 363–64 (1958); *see also Livingston Shirt Corp.*, 107 N.L.R.B. 400, 408–09 (1953) (suggesting that an especially "broad, but not unlawful"

However, because employees are not really outsiders, because they have been invited-in and therefore have rights, the analysis should have a modified name and a modified bar, like “No Reasonable Alternative Means for Employees.” For example, the prevailing test views nonemployees’ ability to take out newspaper ads, lease billboards, send mailings, or picket on highways as reasonable organizational alternatives to encroaching upon an employer’s property right.⁴²⁷ But those people are paid organizers. That’s their job. Ads, mailings, and the like are not reasonable organizational alternatives for employees, particularly low-wage employees who do not have extra time or money. They also shouldn’t have to put up a billboard to ask co-workers over for a picnic. So in this context the “reasonable alternative” analysis might instead take account of things like second or third jobs, child or elder-care commitments, commuting times, sporadic scheduling—anything, basically, that practically prevents employees from interacting meaningfully with colleagues outside of management-dominated worktime.⁴²⁸ For workers without breaks, these are the “unique obstacles” that “frustrate[] access” and inhibit relationships.⁴²⁹

3. Narrower Alternatives

If sociological evidence persuades the Board that a lack of reasonable communicative alternatives is endemic to low-wage work as a whole, it might protect micro-breaks broadly. But more limited options also exist. The agency could, for example, cabin the rule to industries with a track record of irregular scheduling, restricted or nonexistent free time during work hours, and a vulnerable workforce. Retail, for one, fits that bill.⁴³⁰ Even more narrowly, micro-breaks might

rule barring worktime—and, in a retail setting, non-worktime—solicitation could trigger a requirement that management allow pro-union messaging on its property).

⁴²⁷ *Lechmere*, 502 U.S. at 540, 530.

⁴²⁸ If the recent spate of low-wage worker profiles has a theme outside of financial insecurity, it is a lack of free time. See, e.g., Rachel L. Swarns, *For a Worker with Little Time Between 3 Jobs, a Nap Has Fatal Consequences*, N.Y. TIMES (Sept. 28, 2014), https://www.nytimes.com/2014/09/29/nyregion/3-jobs-plenty-of-dreams-and-the-fatal-consequences-of-one-dangerous-decision.html?_r=0; Lewis Wallace, *Being a Breadwinner on \$8.25 an Hour*, WBEZ91.5 CHI. (May 21, 2013), <https://www.wbez.org/shows/curious-city/being-a-breadwinner-on-825-an-hour/d25ca7f6-8b01-426e-baf4-79825fe276d2>.

⁴²⁹ *Lechmere*, 502 U.S. at 541.

⁴³⁰ See Dante Ramos, *On-Call Shifts String Retail Workers Along*, BOS. GLOBE (Apr. 19, 2015), <https://www.bostonglobe.com/opinion/editorials/2015/04/18/dante-ramos-call-shifts-string-workers-along/admOznKJNCM4YFuUced1QI/story.html>; *Erratic Scheduling*, RETAIL ACTION PROJECT, <http://retailactionproject.org/advocacy/policy/erratic-scheduling> (last visited Oct. 30, 2016).

be considered as a new “special” remedy applied only to a particularly recalcitrant employer.⁴³¹ In either case, it would not be unprecedented for the agency to “level the uneven playing field of access” based on particularized evidence of work and home-life realities,⁴³² and the alternatives point to some of the flexibility the Board has in implementing an admittedly ambitious idea.

C. *An Imperfect but Democratizing Fix*

Retrofitting worktime to include talk-time and break-time is an imperfect solution to the loss of informal time in modern employment. Chatting while doing other things or during a short, employee-initiated break is not really hanging out. The pressures of work, time, and supervisory presence do not allow for that kind of relaxed interaction. The scheduling problems, though a focus of reform, remain.⁴³³ So does the fear. And on the legal side of things, tasking the Board to define and determine what a “modest” but not “substantial” impact on production looks like is a big hole. So is the reality that a micro-break is protected only if a co-worker joins in.

Nevertheless, a right to talk and break while working would loosen the pressure cooker of low-wage employment by okaying a range of relational experiments that, at the very least, can’t hurt. Jokes told across registers, stories traded bussing tables, and idle conversation cleaning floors—all followed up with a short break here and there—amount to genuine trust-building stuff. Enforcement is a perennial problem in

⁴³¹ See, e.g., *Monfort*, 298 N.L.R.B. 73, 86 (1990) (ordering “special access remedies,” including the union’s right to give a speech to employees “on working time” because of the employer’s “numerous, pervasive, and outrageous” unfair labor practices).

⁴³² *Malin & Perritt*, *supra* note 356, at 47. For example, though the NLRB bars employers from soliciting workers “at their homes,” “to offset their lack of access to employees at the workplace, the Board has refused to prohibit unions from” doing so. *Id.* The Board also accounts for the daily chaos low-wage workers face in balancing work and family when analyzing polling site accessibility. See, e.g., *London’s Farm Dairy, Inc.*, 323 N.L.R.B. 1057, 1057 (1997) (ordering a mail ballot election after considering workers’ schedules, “family responsibilities or other plans for what would normally be their off-work time”); *Shepard Convention Servs., Inc.*, 314 N.L.R.B. 689, 689–90 (1994) (same after considering workers’ second or third jobs “which may restrict their ability to reach the polls”).

⁴³³ Congress and ten states have introduced bills to regulate some of the worst scheduling practices by requiring minimum notice, stable schedules, and an end to on-call shifts. Katie Johnston, *Bills Seek More Stable Hours for Low-paid Workers*, BOS. GLOBE (July 20, 2015), <https://www.bostonglobe.com/business/2015/07/19/growing-movement-stabilize-work-schedules/VdXNFH3AQQID40xaHuzaIN/story.html>; see also Luce, *supra* note 275 (describing San Francisco’s “Retail Workers Bill of Rights,” which regulates scheduling and break practices in the city’s retail industry).

labor law,⁴³⁴ but creating a communication culture in low-wage work has to start somewhere, and providing a broad legal backstop for conversation is a solid place to begin. After all, even now, with talk furtive and breaks rare, some workers—brave workers—do improvise. The proposals advanced here would bring talk out from the shadows, sprinkle in some occasional free time, and democratize the possibility.

CONCLUSION

It's time to acknowledge that although the law says that working time is for work, it's really not, and employers don't need it to be anyway. From there, the workday can open up, at least to talk, maybe to breaks, but definitely to the relational prerequisites that improvisation needs to become a durable mechanism for change at work.

⁴³⁴ See Richard B. Freeman, *What We Can Learn from the NLRA*, 26 A.B.A. J. LAB. & EMP. L. 327, 335–37 (2011) (describing empirical work on the inadequacies of NLRA remedies).