"ARCHITECTS OF DEMOCRACY"[1]: LABOR ORGANIZING AS A CIVIL RIGHT

Richard D. Kahlenberg & Moshe Z. Marvit†

INTRODUCTION

On August 10, 1952, a group of African American workers gathered at the Wemco Club in East Pittsburgh, Pennsylvania, in order to push for civil rights protections at one of the largest Westinghouse utility plants in the nation. However, they were not meeting with company officials to assert their demands. Instead, there were representatives of the two unions that were

† Richard D. Kahlenberg is a senior fellow at The Century Foundation and author, most recently, of TOUGH LIBERAL: ALBERT SHANKER AND THE BATTLES OVER SCHOOLS, UNIONS, RACE AND DEMOCRACY (2007). He is a graduate of Harvard College and Harvard Law School. Moshe Z. Marvit practices labor and employment discrimination law and is a fellow at The Century Foundation. He received a BA in philosophy at Penn State, an MA in political science from the University of Chicago, an MA in history from Carnegie Mellon University, and a JD from Chicago-Kent College of Law. Portions of this Article are excerpted from RICHARD D. KAHLENBERG & MOSHE Z. MARVIT, WHY LABOR ORGANIZING SHOULD BE A CIVIL RIGHT: REBUILDING A MIDDLE-CLASS DEMOCRACY BY ENHANCING WORKER VOICE (2012).

1. MARTIN LUTHER KING, JR., *Address to AFL-CIO Fourth Constitutional Convention, December 11, 1961*, *in* "ALL LABOR HAS DIGNITY" 35, 43 (Michael K. Honey ed., 2011).

fighting for the workers' votes in the upcoming union election: the United Electrical, Radio and Machine Workers of America (UE) and the International Union of Electrical Workers (IUE). The African American workers voted as a bloc to assert power in the workplace through the union, and they used this moment before a union election to present the rival unions with a list of demands, among which included a demand for a nondiscrimination clause in the contract with Westinghouse.[2] Both unions agreed to this demand, and in his letter to the African American workers, UE President Albert Fitzgerald stated that it would not make sense for the union not to demand equality.[3] "The UE has learned that only by advancing the interest of Negro workers and other minorities can our unity and full fighting strength be maintained."[4] With regards to the antidiscrimination clause, Fitzgerald stated that UE would fight to include in the Westinghouse contract the same clause that UE already had with the New York radio industry, which read: "There shall be no discrimination against any employee either in hiring, promoting, or advancement of assignment, because of such employee's union membership or activity, sex, race, creed, color, or religious affiliation."[5]

This letter from the union president to a group of African American workers points to a truth that was recognized more than sixty years ago: the protection of workers' civil rights in the workplace demands protection from discrimination based on their race, sex, religion, *and* union activity. Each protection is complementary and guards a fundamental right that cannot be easily extricated from the others. Five years later, as the civil rights movement began adopting more of the strategies of organized labor, James Matles, the UE Director of Organization, sent a letter to Martin Luther King, Jr., explaining that "it is the special responsibility of the labor movement to make the fight for equal opportunity for the Negro workers in the shops and to end discrimination at the job."[6] In this letter, Matles showed the ways in which the union was empowering African Americans by enclosing a report on working conditions for African American workers at UE-represented plants and casting the labor

2. Letter from the Wemco Club to the United Elec., Radio, & Mach. Workers of Am. (Aug. 10, 1952) (on file with the United Electrical, Radio, and Machine Workers of America Records, 1936-2006, UE, Archives Service Center, University of Pittsburgh, UE.16.601).

3. Letter from Albert J. Fitzgerald, President, United Elec., Radio, & Mach. Workers of Am., to William H. Peeler (Aug. 12, 1952) (on file with the United Electrical, Radio, and Machine Workers of America Records, 1936-2006, UE, Archives Service Center, University of Pittsburgh, UE.16.601).

4. *Id.*

5. *Id.* (citation omitted) (internal quotation marks omitted).

6. Letter from James Matles, Dir. of Org., United Elec., Radio, & Mach. Workers of Am., to Martin Luther King, Jr. (Nov. 21, 1957) (on file with the United Electrical, Radio, and Machine Workers of America Records, 1936-2006, UE, Archives Service Center, University of Pittsburgh, UE.1, Box 9, Matles Personal Correspondences 1956-1960).

and civil rights struggle in shared terms.[7]

The UE was one of the more socially progressive unions—enshrining equality in their founding constitution in 1936—and represented a strong force in the labor movement for equality. Not every union had as positive a record on civil rights as UE, and the racism of some local unions in their resistance to integration in the workplace has been well documented.[8] However, labor was generally far more progressive on issues of civil rights than society as a whole. A national article, published contemporaneously with the UE events recounted above, described the organizations that promoted civil rights and listed labor unions as organizations "whose general viewpoint inclines them to support the cause of equality even though that is not the primary reason for their existence."[9] It described the important contribution of labor unions as stemming not only from their mobilization of their membership to work for national civil rights campaigns, but also in their carrying "on campaigns for equality among their own memberships and, by eliminating discrimination in their own activities, they have achieved the most effective kind of education in democratic living."[10]

The history of the labor and civil rights movements and the labor movement in America were intertwined in important ways throughout the twentieth century, with both movements' primary concern being the treatment of workers as human beings rather than as commodities. Furthermore, they have had common enemies and tactics, and each movement implicates a fundamental right of the individual. However, in the past several decades the two movements have not served in their potentially mutually reinforcing roles, and the labor movement has contracted while the civil rights movement has made enormous strides. This Article argues that the differing legal structures that govern labor and employment law are partially responsible for these respective failures and successes. In order to remedy some of labor's decline, this Article will make the case that the legal framework that has proven beneficial for the civil rights movement should similarly be applied to labor, and labor organizing should be covered under civil rights legislation. Just as it is illegal to make an adverse employment decision based on race, gender, national origin or religion, it should be illegal under the Civil Rights Act of 1964 (Civil Rights Act) to fire someone for trying to organize or join a union.

7. *Id.*

8. *See, e.g.*, Steven H. Kropp, *Deconstructing Racism in American Society—the Role Labor Law Might Have Played (but Did Not) in Ending Race Discrimination: A Partial Explanation and Historical Commentary*, 23 BERKELEY J. EMP. & LAB. L. 369, 379 (2002).

9. Joseph B. Robison, *Organizations Promoting Civil Rights and Liberties*,ANNALS AM. ACAD. POL. & SOC. SCI., May 1951, at 18, 22.

10. *Id.*

I. WHY A NEW FRAMEWORK IS NECESSARY TO PROTECT LABOR RIGHTS

There are few students of American labor law that would argue that the current law does an adequate job of protecting workers' rights to organize and bargain collectively. This failure has been apparent for decades. In 1984, the House Subcommittee on Labor-Management Relations conducted hearings and released a report entitled *The Failure of Labor Law—A Betrayal of American Workers*, in which it pronounced that the National Labor Relations Act (NLRA or the Act) "has ceased to accomplish its purpose."[11] Similarly, Harvard law professor Paul Weiler stated that "[c]ontemporary American labor law more and more resembles an elegant tombstone for a dying institution."[12] The decline of labor in America has not improved since the 1980s, when these pronouncements were made, and not a year goes by without a labor historian or scholar bemoaning labor's slow death.[13]

Several years ago, the then-chairwoman of the National Labor Relations Board (NLRB or the Board), Wilma B. Liebman, summarized the view held by many, writing:

> Various commentators describe the National Labor Relations Act . . . as dead, dying, or at least "largely irrelevant to the contemporary workplace"—a doomed legal dinosaur. In their view, the Act has failed to protect workers' rights to organize and to promote the institution of collective bargaining. Scholars contend that labor law suffers from "ossification." Some even say that it is "contributing to the demise of the very rights it was enacted to protect." Collective action seems "moribund." Supporters of the Act are "in despair." The National Labor Relations Board, charged with administering the Act, is "isolated and politicized." "What went wrong?" and "Can we fix it?" are the questions of the day.[14]

Even Ellen Dannin, who is one of the few labor law scholars that argues consistently for working within the strictures of labor law, admits that the Board has too often misinterpreted the law or not used its full statutory powers.[15]

Weak labor law alone would not necessarily lead to the sharp decline in

11. STAFF OF H.R. COMM. ON EDUC. & LABOR, 98TH CONG., THE FAILURE OF LABOR LAW—A BETRAYAL OF AMERICAN WORKERS 1 (Comm. Print 1984).

12. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769 (1983).

13. *See, e.g.*, KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1527 (2002).

14. Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 570–71 (2007) (footnotes omitted).

15. ELLEN DANNIN, TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS 5 (2006).

union density that has occurred over the past several decades.[16] However, coupled with extreme employer opposition to workers organizing and a singular forum for relief, weak laws have made organizing risky for too many workers. In 2005, the NLRB awarded back pay to more than 30,000 Americans who were illegally fired or otherwise disciplined for trying to organize a union.[17] Cornell University researcher Kate Bronfenbrenner found that, between 1999 and 2003, employees were illegally dismissed in 34% of private sector union drives for engaging in union organizing.[18] Furthermore, a 2007 study by the Center for Economic and Policy Research estimates that "almost one-in-five union organizers or activists can expect to be fired as a result of their activities in union election campaigns."[19]

In labor's heyday, employers mostly followed the law. But over time, as union strength and political support waned, employers became increasingly aggressive in their stance against organization. Harvard law professor Paul Weiler's groundbreaking 1983 study found that, between 1957 and 1980, the number of employees entitled to reinstatement increased 1000% due to employer unfair labor practices.[20] Weiler found that one in twenty union supporters were fired during election campaigns, while the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) puts the figure at closer to one in eight.[21] These sorts of terminations send a message to other union supporters that they risk their jobs if they exercise their legal right to organize a union.

In addition to discharges, employers also altered benefits or working conditions in 22% of organizing drives and engaged in harassment and

16. *See* Barry T. Hirsch et al., *Estimates of Union Density by State*, MONTHLY LAB. REV., July 2001, at 51, 52; *Union Membership Declines in 2012*, U.S. BUREAU OF LAB. STATS. (Jan. 24, 2013), http://www.bls.gov/opub/ted/2013/ted_20130124.htm.

17. NAT'L LABOR RELATIONS BD., SEVENTIETH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED SEPTEMBER 30 2005, at 109 tbl.4 (2005), *available at* http://www.nlrb.gov/sites/default/files/documents/119/nlrb2005.pdf.

18. KATE BRONFENBRENNER, ECON. POLICY INST., NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING 23 (2009), *available at* http://www.epi.org/publication/bp235.

19. JOHN SCHMITT & BEN ZIPPERER, CTR. FOR ECON. & POLICY RESEARCH, DROPPING THE AX: ILLEGAL FIRINGS DURING UNION ELECTION CAMPAIGNS 1 (2007), *available at* http://www.cepr.net/documents/publications/unions_2007_01.pdf.

20. Weiler, *supra* note 12, at 1780; *see also* THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK 254 (1991).

21. Lewis B. Kaden et al., *Statement of Lewis B. Kaden, Eugene Keilin, Carol O'Clericain, and Bruce Simon*, *in* WHAT'S NEXT FOR ORGANIZED LABOR? REPORT OF THE CENTURY FOUNDATION TASK FORCE ON THE FUTURE OF UNIONS 36, 41 (The Century Found. ed., 2000) (citing the AFL-CIO's estimate); Jay Mazur et al., *Statement of Jay Mazur, David Smith, and Robert Welsh*, *in* WHAT'S NEXT FOR ORGANIZED LABOR? REPORT OF THE CENTURY FOUNDATION TASK FORCE ON THE FUTURE OF UNIONS, *supra*, at 29, 32 (citing Weiler's estimate).

discipline of union activists in 41% of organizing drives.[22] When employers engage in this sort of conduct, the message is unambiguous: union supporters "put their jobs on the line" by exercising their rights.

The increase in the incidents of unfair labor practices on the part of employers has caused steady growth in the number of cases brought before the NLRB. Between 1955 and 1978, the number of NLRB complaints increased from approximately 6000 to 40,000.[23] Though the number of complaints dropped to its current level of 16,000 in 2009, this is largely due to the combined factors of decreasing union density in the past two decades and the unions' strategic decision to bypass the NLRB because it is ineffective.[24] Of these 16,000 complaints, more than one-third were regarding discrimination or termination targeted at pro-union employees.[25] As high as this figure seems, it represents only a portion of the actual number of unfair labor practices, especially with regards to those surrounding organizing campaigns. In Bronfenbrenner's report for the Economic Policy Institute, she estimates that less than half of all unfair labor practices are reported.[26] She notes there are extreme disincentives in almost every situation that might require reporting an unfair labor practice. In instances where the union believes that there is a high probability of winning an election, unions often make a strategic decision to put up with the employer's illegal activity for fear that reporting it will allow the employer to indefinitely delay or block the election.[27] In instances where the union has lost an election due to unfair labor practices, it is difficult—and often impossible—to convince employees to come forward and testify on behalf of improperly fired coworkers because many fear employer reprisals.[28] In addition to the disincentives of reporting illegal employer activity, there is little positive incentive to come forward—even if one is ultimately successful in the charge—because awards are generally paltry.[29]

The increase in private sector employer opposition can also be seen in the

22. BRONFENBRENNER, *supra* note 18, at 14, 23 tbl.9.

23. Kenneth G. Dau-Schmidt, *The Changing Face of Collective Representation: The Future of Collective Bargaining*, 82 CHI.–KENT L. REV. 903, 916 n.59 (2007).

24. NAT'L LABOR RELATIONS BD., SEVENTY-FOURTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED SEPTEMBER 30 2009, at 5 (2009) [hereinafter NAT'L LABOR RELATIONS BD., SEVENTY FOURTH ANNUAL REPORT], *available at* http://www.nlrb.gov/sites/default/files/documents/119/nlrb2009.pdf; Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 371-372 (2001).

25. NAT'L LABOR RELATIONS BD., SEVENTY FOURTH ANNUAL REPORT, *supra* note 24, at 5.

26. BRONFENBRENNER, *supra* note 18, at 8.

27. *Id.* at 7-8.

28. *Id.* at 8.

29. *See infra* Part V.

decrease of consent elections and increase in employers' use of anti-labor consultants. These indicators are useful because the presence of the former usually represents situations where the employer has mounted little or no anti-union campaign, while the presence of the latter usually represents situations where the employer will engage in all legal (and often illegal) activity to defeat the union. In a consent election, the union and employer come to an agreement with regard to the details of the election and the description of the appropriate bargaining unit, thereby allowing an informal election. Consent elections used to be common when many employers accepted that employees had a right to join a union and, if the employees voted for a union, there was little that could be done. In 1960, 42.2% of certification elections resulted from employer consent agreements.[30] By 1978, that number had dropped to 7.9%.[31] Between 1999 and 2004, only 1.13% of elections were governed by consent agreements, rather than a NLRB hearing.[32]

Increasingly, the pre-election issues have become part of the battleground to decrease the likelihood that the unions will succeed in organizing. Professor John Lawler of the University of Illinois has found that all other factors being equal, under consent elections, unions obtain 8% to 10% more of the vote and have a 10% higher victory rate.[33]

Professor William Cooke, director of the Michigan State University School of Human Resources and Labor Relations, has advanced two reasons why workers are more likely to vote for the union in consent elections:

> First, by consenting to an election, employers signal workers that they do not strongly oppose collective bargaining, or even if they do, they believe that there is little reason to fight it in this particular case. One can imagine, for example, that many employers already largely unionized do not find it profitable to oppose the inclusion of one more work unit under their contract. This signal to workers will increase their estimate of the utility of unionization, since the employer presumably does not campaign actively to convince them otherwise. Second, since the unit requested by the union is not modified in a consent election, the unit does not take on new group dynamics by the addition or subtraction of job classifications or plants. In stipulated elections, on the other hand, it is presumed that employers campaign more actively against unionization, and the unit originally requested is frequently modified.[34]

30. Ronald L. Seeber & William N. Cooke, *The Decline in Union Success in NLRB Representation Elections*, 22 INDUS. REL. 34, 42 (1983).

31. *Id.*

32. John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 INDUS. & LAB. REL. REV. 3, 11 n.12 (2008).

33. JOHN J. LAWLER, INST. OF LABOR & INDUS. RELATIONS, TESTIMONY BEFORE THE COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS (1994), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1359&context=key_workplace&sei-redir=1#.

34. William N. Cooke, *Determinants of the Outcomes of Union Certification Elections*,

These reasons show how fragile a budding organizing drive is, even if the employees support the union. This means that subtle changes in the composition of the group or the employer's messaging can have significant impacts on the results.

Anti-union consultants were a minor factor several decades ago, but have now become a $4 billion-a-year industry, often narrowly skirting or overtly violating the law.[35] As of 2004, 76% of employers hired union-busting consultants prior to a certification election.[36] The consultants represent the polar opposite of the consent elections, as the employer has decided to spend significant sums of money to bring in sophisticated outside personnel to ensure that the employees do not organize a union. John Logan writes:

> Consultants not only advise employers on how to conduct an anti-union campaign, but also develop, implement and monitor the campaign. They usually work behind the scenes, and train supervisors on how to interrogate, intimidate and terrify employees. They are effectively running the workplace for the duration of the campaign. Consultants use a variety of methods to convey their aggressive anti-union message—impersonal communication mechanisms, such as anti-union newsletters, and videos, interpersonal mechanisms, such as group "captive audience" meetings (which, in any other walk of life, would be considered a form of unlawful imprisonment), and personal mechanisms, especially one-on-one meetings between supervisors and employees. While consultant campaigns have become significantly more sophisticated in recent years, their fundamental tactics have remained remarkably stable since the 1970s. The most significant innovations in recent years include the greater use of information technology (anti-union videos, DVDs and websites) and the greater diversity of consultant personnel.[37]

The use of anti-union consultants has proliferated because they are effective. Their techniques—whether legal or not—hinder organizing and effectively convey to employees the employer's strong disapproval of the union and the lengths to which the employer may go in expressing that disapproval.

In describing the arc of the NLRA's rise and decline, former Chairwoman Liebman stated: "For several decades, the labor law regime worked, and so it was respected. The law seemed to promise, and to some extent delivered, workplace democracy and equality in bargaining power."[38] Today, however, the NLRA does not work in promoting workplace democracy and equality in bargaining power, so it is not respected and is often simply disregarded.

---

36 INDUS. & LAB. REL. REV. 402, 406 (1983).

35. Int'l Trade Union Confederation, *2008 Annual Survey of Violations of Trade Union Rights—USA*, REFWORLD, (Nov. 20, 2008), http://www.unhcr.org/refworld/docid/4c52 ca6423.html.

36. Kate Bronfenbrenner & Robert Hickey, *Changing to Organize: A National Assessment of Union Organizing Strategies, in* REBUILDING LABOR 17, 39 tbl.1.4 (2004).

37. JOHN LOGAN, U.S. ANTI-UNION CONSULTANTS: A THREAT TO THE RIGHTS OF BRITISH WORKERS 4 (2008), *available at* www.tuc.org.uk/extras/loganreport.pdf.

38. Liebman, *supra* note 14, at 573.

Writing recently about Boeing's public threats to move a plant to South Carolina—a "right to work state"—as payback for a strike, labor lawyer Thomas Geoghegan expressed surprise that the CEO of a major corporation would so openly violate the NLRA:

> The Boeing case may show that labor is so out of mind that CEOs have forgotten what they can or cannot say. It would have been easy enough for Boeing to move the production line to South Carolina and let the workers in Seattle draw the conclusion. There is little bar to a runaway shop if the CEO is careful with his public statements.[39]

Minor changes to the NLRA cannot restore the Act, and in its current state, the former Chairwoman of the Board is left in the position of having to argue that the Board "can play a modest but meaningful role in preserving the values of this Act and in furthering its aims" rather than conceding to the alternative of "operat[ing] on the legal margins of a failed statute."[40] This range of alternatives falls far short of Roosevelt's lofty words upon signing the NLRA announcing his desire to create legislation that insured "common justice and economic advance."[41]

II. LOOKING BEYOND THE EXISTING LABOR LAW

The natural response to the weakness of the current labor law is to strengthen it so that it fulfills its original purpose of protecting workers in organizing and bargaining collectively. However there are various reasons why attempts to strengthen the existing law, without additional legal protections, may still fail to protect workers. First, though it is an uphill battle to pass any pro-worker legislation, it is even more unlikely that any significant labor law reform could pass Congress. Four times between 1965 and 2009, Democrats held the White House and majorities in the Senate and House of Representatives, and four times efforts to remedy inequities in American labor law failed to prevail. The first attempt came under President Lyndon Johnson, when Democrats, on the heels of the 1964 landslide, sought to repeal section 14(b) of the Taft-Hartley Act, which gives states the ability to adopt anti-labor "right to work" laws.[42] The legislation passed the House by a vote of 221 to 203, but in 1966 secured only fifty-one votes in the Senate (with forty-eight against), far short of the supermajority necessary to break a filibuster.[43]

39. Thomas Geoghegan, *Boeing's Threat to American Enterprise*, WALL ST. J. (June 20, 2011), http://online.wsj.com/article/SB10001424052702304186404576388062830875084.html.

40. Liebman, *supra* note 14, at 572.

41. 79 CONG. REC. 10,720 (1935) (statement of President Franklin D. Roosevelt).

42. Taylor E. Dark III, *Prospects for Labor Law Reform*, PERSP. ON WORK, Summer 2008/ Winter 2009, at 23, 24, *available at* http://www.lera.uiuc.edu/pubs/perspectives/CompArticles/TDexcerpt.pdf.

43. *Id.*

In 1977, during the Carter presidency, labor law reform legislation was introduced to stiffen penalties for employers who broke the law by firing workers engaged in organizing, expedite hearings, and deny federal contracts to repeat violators. The legislation passed the House by an overwhelming 257 to 163 margin.[44] With Democrats holding sixty-one seats in the Senate, one opponent of the legislation later recalled, there "didn't seem to be any way to stop it." At President Carter's urging, however, the Senate squandered momentum on a fight over the Panama Canal Treaty.[45] After an eventual five-week fight over labor law reform in 1978, the bill died in the Senate by a vote of fifty-eight to forty-one, just two short of cloture to end a filibuster.[46]

Organized labor came back in 1993, under President Bill Clinton, with the Workplace Fairness Act, which sought to outlaw the permanent replacement of strikers. Once again, the legislation easily passed the House with a vote of 239 to 190, but fell short in a Democratic Senate, with a vote of fifty-three to forty-six, short of the necessary sixty-vote supermajority needed to break a filibuster.[47]

Finally, in 2009, under President Barack Obama, supporters of the Employee Free Choice Act (EFCA) thought they had a chance to pass important labor law reform given Democratic control of both houses of Congress and the executive branch. The EFCA, also known as "card check," would have allowed employees to certify a bargaining representative if a majority of workers signed on, voiding the need for a secret-ballot election.[48] It also would have enhanced penalties for employers who engaged in unfair labor practices, such as wrongfully discharging employees trying to organize a union.[49] And the legislation set forth procedures for reaching an initial collective bargaining agreement—if necessary, through arbitration—once a union was certified or recognized.[50]

The bill had strong support in the House, where, two years earlier, in a March 2007 test vote, the EFCA had passed by a margin of 241 to 185.[51] In 2009, Democrats had an even larger House majority than in 2007. And in the Senate, for a time, Democrats and those caucusing with them had a sixty-vote filibuster-proof majority, giving labor some hope that a compromise version of

44. RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 202-04 (1984).

45. JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 129 (2010) (internal quotation marks omitted).

46. *Id.* at 130-31; Dark, *supra* note 42, at 24.

47. Dark, *supra* note 42, at 24.

48. *H.R.1409: Employee Free Choice Act of 2009*, OPENCONGRESS, http://www.opencongress.org/bill/111-h1409 (last visited May 14, 2013).

49. *Id.*

50. *Id.*

51. Dark, *supra* note 42, at 24.

the EFCA could pass. But the defection of a Southern Democratic senator in April 2009 was a serious blow; and the death of Massachusetts Senator Edward M. Kennedy and surprise election of a Republican, Scott Brown, to replace him in January 2010 brought hopes of the passage of the EFCA to an end without a formal vote in either the Senate or the House.[52] The EFCA, write political scientists Jacob Hacker and Paul Pierson, was "one of the few initiatives that might have had broader political significance by shifting the balance of organized power in Washington," but it "never got started."[53]

Labor law reform has failed for several reasons. Primarily, fierce and unified business opposition to labor law reform helps explain why each of the four efforts at reform went down in defeat. But labor reform was frustrated for two additional reasons over which labor has greater control for the future. First, labor law reform was seen as a highly complicated matter, which gave opponents an opening to distort labor's intentions. Second, reform was seen as a special interest fight between labor and business, which did not capture the imagination of the public or other progressive groups. As a result, organized labor had to rely on its own power, which is unevenly dispersed across the country, leaving it vulnerable in states with low rates of union density.

Labor law reform presents a number of technical legal issues that are poorly understood by the public. The public has minimal understanding of the federal court system, but even less of an understanding of the complicated set of rules administered by the NLRB. The most recent iteration of labor law reform, the EFCA, was described by a Gallup pollster as "a complex piece of legislation with numerous components."[54] Perhaps because of its complexity, Gallup found in a 2009 poll that only 12% of Americans followed the issue "very closely," a level that Gallup described as "exceptionally low relative to public attention to other news issues Gallup has measured over the last two decades."[55]

The complexity of labor law reform efforts such as the EFCA, in turn, made them vulnerable to mischaracterization by opponents, just as the complex nature of health care reform gave an opening to opponents to fuel rumors about "death panels" or coverage for illegal immigrants. In particular, the inclusion of card check provisions gave business opposition a chance to characterize the EFCA as an effort to "end the right of employees to secret ballot elections."[56]

52. Matthew Murray, *Business vs. Unions Now Moves Off the Hill*, ROLL CALL (Dec. 13, 2010, 12:00 AM), http://www.rollcall.com/issues/56_58/-201397-1.html.

53. Hacker & Pierson, *supra* note 45, at 279.

54. Lydia Saad, *Majority Receptive to Law Making Union Organizing Easier*, GALLUP (Mar. 17, 2009), http://www.gallup.com/poll/116863/Majority-Receptive-Law-Making-Union-Organizing-Easier.aspx.

55. *Id.*

56. *Lies & Distortion on the Secret Ballot*, AM. RTS. WORK, www.americanrightsatwork.org/employee-free-choice-act/resource-library/lies--distortion-

Rather than having to defend employer behavior, including the termination of employees for trying to join a union, business changed the discussion to collective bargaining elections and promoted stereotypes of union thugs ready to intimidate workers into signing cards certifying a union.

In addition, over the years, labor law reform has been seen largely as a special interest battle between labor and business and has not galvanized a broad coalition of progressives to come to labor's aid in pushing reform. Labor lawyer Thomas Geoghegan notes, "[y]ou meet other activists, go to their meetings. They understand each other's causes but have no sense of yours."[57] Many see labor as a "historical" movement, something from the past that is no longer central to today's fights.[58] As a result, in political battles over its future, labor has often been largely on its own.[59]

In a detailed analysis of the 1978 Senate vote on labor law reform, for example, Harvard economist Richard Freeman found that it was not political party membership, but a state's union density that best predicted support or opposition to reform. Out of the twenty senators from the ten states with the lowest unionization rates (bottom quintile), only one voted in favor of the bill; out of the twenty senators from the next lowest quintile, only six voted in favor of the legislation.[60] Meanwhile, senators from the ten states with the highest unionization rates (top quintile) voted eighteen to two in favor of the bill and senators from the next highest quintile voted seventeen to three in favor of the legislation.[61] Democratic Senator Dale Bumpers of Arkansas, a low union-density state, cast the decisive vote in killing the 1978 reform. And in a cruel repeat of history, in 2009, Senator Blanche Lincoln, also a Democrat from Arkansas, came out in opposition to the EFCA, dealing the bill a devastating setback.[62]

The fact that labor law reform is not seen as a basic litmus test issue for Democrats—and that other progressives have not adequately rallied behind unions in their hours of need—means that labor stands alone, and reform rises or falls on labor's own strength or weakness. As a result, the current approach to labor law reform puts unions in a political catch-22: organized labor cannot get reform of labor laws until it has greater political clout, but it cannot grow

on-the-secret-ballot-20080730-596-84-84.html (last visited May 13, 2013)

57. GEOGHEGAN, *supra* note 20, at 7.

58. *Id.* at 277.

59. *See id.*

60. FREEMAN & MEDOFF, *supra* note 45, at 204 tbl.13-4.

61. *Id.*

62. *Senate Filibuster Foes Fail Again, By 2 Votes*, N.Y. TIMES, June 14, 1978, at B7 ("The supporters of the bill lost the . . . vote by failing to sway three senators once considered likely to vote for cloture: . . . [one was] Dale Bumpers, Democrat of Arkansas . . . ."); Alec MacGillis, *Drifting Right, Lincoln Comes Out Against EFCA*, WASH. POST (Apr. 6, 2009), http://voices.washingtonpost.com/44/2009/04/06/report_lincoln_comes_out_again.html.

stronger and gain clout until it achieves labor law reform.

Unlike more comprehensive and complex reforms of labor law, amending the Civil Rights Act to prohibit discrimination against labor organizers presents an easily understandable idea that is much less susceptible to distortion by opponents. The simple message: people should not be fired for trying to organize a union and join the middle class.

Because the legislation would not address the various issues of elections and arbitration and the inner workings of the NLRB, the bill would avoid questions about secret ballot elections and union behavior, instead isolating the straightforward issue of employer behavior. And by focusing on the ability of *individuals* to protect themselves from wrongful termination, the legislation underlines the David and Goliath nature of the conflict between large employers and individual employees. The contest between a few individuals and the firm may paint a more sympathetic picture for some than the battle between an employer and a union. And the legislation would remind people that it is individual workers choosing to exercise their right to organize in pursuit of better conditions who pay the price when employers unfairly use their economic power to stop unions.

Likewise, emphasizing the simple issue of employer discrimination is likely to be appealing to many Americans, whether or not they like labor unions. Americans believe quite strongly that employment discrimination is wrong, even when they are not particularly sympathetic to the group of individuals who are the victims of discrimination. For example, in 2000, only 28.8% of Americans approved of sexual relations between adults of the same sex, yet in the same year, 75.3% supported laws protecting gays and lesbians from employment discrimination.[63] So iconic is the idea of nondiscrimination that when Rand Paul, a then U.S. Senate candidate from Kentucky, raised questions about the Civil Rights Act from a libertarian perspective in the 2010 election, suggesting the law interfered too heavily with private enterprise, he was forced to hastily recant.[64]

Even if significant labor law reform could make it through the political process, the Board may still prove unable to protect workers. The Board's structure and process place it in a perpetually vulnerable position. Because the NLRB has exclusive jurisdiction over violations of workers' labor rights, it stands as a large target for those that seek to limit these rights. Unlike other forms of discrimination, where opponents must try to amend the law in order to limit rights, labor law can be limited in myriad other ways. In 2011 alone, there

63. 1 PUBLIC OPINION AND POLLING AROUND THE WORLD: A HISTORICAL ENCYCLOPEDIA 244-46 (John Gray Geer ed., 2004).

64. Krissah Thompson & Dan Balz, *Rand Paul Comments About Civil Rights Stir Controversy*, WASH. POST, May 21, 2010, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/05/20/AR2010052003500.html.

were a variety of approaches that conservatives took to limit the Board's power, including Republican senators' refusal to confirm President Obama's appointments to the Board,[65] threats by Republican members of the Board to resign in order to strip the Board of a quorum and therefore its ability to adjudicate allegations of unfair labor practices,[66] the introduction of legislation designed to partially or fully defund the Board,[67] and the introduction of legislation to abolish the Board and transfer its functions to the Department of Justice.[68] With regard to these tactics, especially the attempts to rob the Board of a quorum, a Stanford Law professor and former Chairman of the NLRB wrote that the effect on workers would be dramatic:

> Workers illegally fired for union organizing won't be reinstated with back pay. Employers will be able to get away with interfering with union elections. Perhaps most important, employers won't have to recognize unions despite a majority vote by workers. Without the board to enforce labor law, most companies will not voluntarily deal with unions.[69]

However, that was precisely the point of the attacks. Writing for the *National Review*, conservative commentator Robert VerBruggen has stated that Republicans should employ all legislative and other means to diminish the NLRB: "[T]he ideal way would be to amend the NLRA so that it gives less power to the unelected NLRB, or, better yet, to repeal the NLRA entirely. But given the political reality, leaving the NLRA in place while crippling the NLRB may be the best option."[70] Under these circumstances, the chairman of the Senate committee with oversight jurisdiction over the Board, Senator Tom Harkin, has bemoaned the fact that the Board has become "a political football."[71] As a political football, the Board must function under the constant threat of defunding, elimination, or wild political swings, making it too

65. Ezra Klein, *Wonkbook: The Radical Republican Tactic Behind Obama's Controversial Nominations*, WONKBLOG (Jan. 1, 2012, 7:56 AM), http://www.washingtonpost.com/blogs/wonkblog/post/wonkbook-the-radical-republican-tactic-behind-obamas-controversial-nominations/2012/01/05/gIQAeKLTcP_blog.html.

66. Mike Elk, *Will GOP NLRB Member Resign to Shut Down Labor Agency?* IN THESE TIMES (Nov. 21, 2011), http://inthesetimes.com/working/entry/12319/will_gop_nlrb_member_resign_to_shut_down_labor_agency.

67. House Bill 1 called for an 18% cut in the NLRB's budget. H.R. 1, 112th Cong. (2011). House Amendment 64 to H.R. 1 sought to eliminate all of the funding for the NLRB. Bill Summary and Status for H.R. 1: House Amendment 64, LIBR. CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/D?d112:54:./temp/~bdB47m:: (last visited May 13, 2013). It was defeated on a roll call in the House 250-176. *Id*.

68. H.R. 2926, 112th Cong. (2011).

69. William B. Gould IV, *Crippling the Right to Organize*, N.Y. TIMES (Dec. 16, 2011), http://www.nytimes.com/2011/12/17/opinion/crippling-the-right-to-organize.html

70. Robert VerBruggen, *Hobbling the NLRB*, NAT'L REV. ONLINE (Nov. 23, 2011, 2:23 PM), http://www.nationalreview.com/content/hobbling-nlrb.

71. Daniel Strauss, *White House Threatens Veto to Protect NLRB's Union Election Rule*, THE HILL (Mar. 23, 2012, 3:11 PM), http://thehill.com/blogs/floor-action/senate/223113-obama-threatens-veto-to-protect-union-election-rule.

precarious to ensure consistent protections for workers in exercising their labor rights.

III. RECOGNIZING LABOR ORGANIZING AS A CIVIL RIGHT

Rather than engage in the likely fruitless fight to enhance the existing labor law, which can be diminished in a variety of ways, we propose writing labor organizing into our civil rights laws.[72] Though some may argue that civil rights and labor rights are incompatible, there are theoretical, historical, and tactical reasons for them to exist side by side in the law. Civil rights are those rights that belong to the free individual in society. In the United States, civil rights are considered core or fundamental rights, often linked to specific protections in the Constitution, such as the political and personal rights of freedom of speech and association, voting, and equality.[73] The right to organize is closely related to the Constitution's right to "freedom of association." In a democracy, the right of individuals to band together and pursue their interests with like-minded people is considered an essential element of freedom, and in the United States, this right has been especially well regarded. As Alexis de Tocqueville remarked, "Better use has been made of association and this powerful instrument of action has been applied to more varied aims in America than anywhere else in the world."[74] Although the Constitution does not specifically mention "freedom of association," the Supreme Court long ago recognized that First Amendment free speech and freedom of assembly provisions necessarily imply a corollary right to freedom of association.

In the landmark 1958 case of *NAACP v. Alabama*, the Supreme Court held that the State of Alabama could not compel the NAACP to disclose its membership rolls, as doing so would produce a chilling effect on the right of individuals to join the NAACP and advocate for racial equality.[75] The Court declared: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."[76] This right to association was not limited to pursuing political activity, the Court found. "Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest

72. For our proposed model statute, see RICHARD D. KAHLENBERG & MOSHE Z. MARVIT, WHY LABOR ORGANIZING SHOULD BE A CIVIL RIGHT 73-74 (2012).

73. *See* U.S. CONST. amends. I, IV, V, VI, XIII, XIV, XV, XIX, XVI.

74. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 189 (J.P. Mayer ed., George Lawrence trans., Harper & Row 1988) (1835).

75. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

76. *Id.* at 460.

scrutiny."[77]

Moreover, the Supreme Court has specifically applied the right of association to labor unions, striking down government efforts to quash union-based associational rights. In *Thomas v. Collins*, for example, the Court voided a Texas law that required union officials to register with the state before engaging in union organizing activities, suggesting that such a requirement interfered with the "rights of assembly and discussion" that "are protected by the First Amendment."[78] Likewise, in *Smith v. Arkansas State Highway Employees Local 1315*, the Court suggested in dicta that the Constitution forbids a highway commission from "prohibit[ing] its employees from joining together in a union, from persuading others to do so, or from advocating any particular ideas."[79]

Under international law, the right of workers to organize is likewise considered a core democratic value. Article 23 of the Universal Declaration of Human Rights—which the United States took the lead in pushing—provides, "Everyone has the right to form and to join trade unions for the protection of his interests."[80]

Some may argue that civil rights protections are reserved for discrimination based on identity rather than activity, or who we are rather than what we do.[81] However the range of civil rights protections in the United States has been expanding for the last few decades to encompass a variety of characteristics and activities. In the context of employment, federal protections include Title VII, which prohibits employers from terminating, disciplining, or taking employment actions "because of such individual's race, color, religion, sex, or national origin."[82] Subsequently, additional federal statutes have been passed that have supplemented the original protected categories. These include, but are not limited to: the Age Discrimination in Employment Act of 1967 (ADEA), which prohibits employment discrimination against persons forty years of age or older;[83] the Pregnancy Discrimination Act of 1978, which prohibits discrimination based on pregnancy, childbirth, or related conditions;[84] Titles I

77. *Id.* at 460-61.

78. 323 U.S. 516, 534 (1945).

79. 441 U.S. 463, 465 (1979). In the case itself, the Supreme Court upheld the constitutionality of the Arkansas State Highway Commission's refusal to listen to grievances filed by a union on behalf of its employees. *Id.* at 466. However, the Court nonetheless reaffirmed that the government cannot interfere with the right of association, including the right of employees to join a union. *Id.* at 464.

80. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. XXIII, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

81. *See, e.g.*, Theodore M. Shaw, *Commentaries on the Kahlenberg-Marvit Article*, POVERTY & RACE, Jan.-Feb. 2013, at 13, 14 (2013).

82. 42 U.S.C. § 2000e-2 (2011).

83. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2011).

84. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2011).

and V of the Americans with Disabilities Act of 1990 (ADA), which prohibits employment discrimination against qualified individuals based upon disability or perceived disability;[85] the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), which prohibits discrimination based on "membership, application for membership, performance of service, application for service, or obligation" with a "uniformed service";[86] Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits employment discrimination based on genetic information about the individual,[87] and laws prohibiting discrimination based upon indebtedness or bankruptcy.[88]

Many state and local statutes mirror the federal regulations, but several have added additional categories of protections. These include laws prohibiting employment discrimination based upon prior criminal conviction,[89] sexual orientation,[90] "use or nonuse of lawful products off the employer's premises during nonworking hours,"[91] "honorably discharged veteran or military status,"[92] on the basis of an individual's unemployment,[93] and on the basis of an employee declining to attend or participate in employer-sponsored meeting about religious or political matters.[94]

In sum, civil rights protections have never been limited to immutable characteristics; and the list of protected categories has not been static or frozen so as to protect only those criteria that were part of the original Civil Rights Act. Civil rights groups generally recognize that enlarging the circle of groups and actions protected by civil rights statutes is a positive development that has in no way diminished the core rights of women and people of color. In 2004, for example, Julian Bond, then chairman of the NAACP, suggested that the gay rights movement does not in any way detract from the civil rights movement for African Americans. He declared,

> The right not to be discriminated against is a commonplace claim we all expect to enjoy under our laws and our founding document, the Constitution. That many had to struggle to gain these rights makes them precious—it does not make them special and it does not reserve them only for me or restrict them from others.[95]

85. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2011).

86. Uniform Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4311 (2011).

87. Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff (2008).

88. 11 U.S.C. § 525 (2006).

89. *See, e.g.*, N.Y. EXEC. LAW § 296 (McKinney 2013).

90. *See, e.g.*, CAL. GOV'T CODE § 12940 (West 2013).

91. *See, e.g.*, WIS. STAT. § 111.31 (2013).

92. *See, e.g.*, WASH. REV. CODE § 49.60.180 (2012).

93. *See, e.g.*, N.J. STAT. ANN. § 34:8B-1 (West 2013).

94. *See, e.g.*, OR. REV. STAT. § 659.785 (2011).

95. Julian Bond, *Is Gay Rights a Civil Rights Issue? A Symposium*, EBONY, July 2004,

He continued, "[W]e ought to be flattered that our movement has provided so much inspiration for others, that it has been so widely imitated, and that our tactics, methods, heroines and heroes, even our songs, have been appropriated by or served as models for others."[96]

The right to organize a union is already theoretically guaranteed under the NLRA, so including it in civil rights legislation does not create an additional right or break any new legal ground. However, it is currently articulated as a collective right that can only be vindicated by government intervention. Under the International Covenant on Civil and Political Rights, which the United States has signed and ratified with a variety of reservations,[97] labor organizing is explicitly listed as a civil right.[98]

Some may argue that labor rights are by their nature collective, and that the individual rights approach would destroy solidarity. They are correct, in part, that this proposal would effectively shift the basic right of an employee to join or organize a union from what has long been conceived of as a collective right to an individual right. However, this reconception does not transform all labor rights into individual rights. Rather, it recognizes the reality that when an employee takes action in joining or organizing a union, there is often not yet a collective framework that can protect her. Solidarity and organization are being constructed in this initial phase, and if the individual employee is targeted, her individual rights are infringed. Employers are aware of this, which is why they often fire a few select individuals rather than the bulk of the workforce. The proposed amendment recognizes the individual nature of early-stage union organizing, and provides prohibitions and protections for the individual so that she can proceed to assert collective demands and enforce those through the collective mechanisms.

IV. STRENGTHENING LABOR ADVANCES THE LARGER GOALS OF THE CIVIL RIGHTS ACT

Some might worry that adding protections for workers trying to organize a union to civil rights legislation would weigh Title VII down with a right that does not have broad appeal, thus diminishing other protected rights. But an examination of the overlapping histories of the labor and civil rights movements demonstrates that each has advanced the interests of the other. Although organized labor has, like many American institutions, been unforgivably marred by a history of racism, many have recognized that the civil rights and labor movements share basic values, interests, tactics, and

at 142.

96. *Id.* at 144.

97. *See* 138 CONG. REC. 8068 (1992).

98. International Covenant on Civil and Political Rights art. 22.1, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

adversaries, all of which make the Civil Rights Act a fitting vehicle for advancing labor rights.

There can be no whitewashing of the history of racial and gender discrimination in the trade union movement. For many years, labor unions were not immune from the vicious racism and sexism that was a part of virtually all American institutions, including religious and governmental entities. Some unions officially barred black workers from joining. For years, A. Philip Randolph, the African American head of the Brotherhood of Sleeping Car Porters, offered resolutions calling on the AFL-CIO to expel segregated unions, prompting an irate George Meany, president of the AFL-CIO, to lash out at Randolph at a 1959 meeting, declaring, "Who appointed you as the guardian of the Negros members in America?"[99] As late as 1961, Martin Luther King, Jr. chastised the AFL-CIO for continuing to include unions that barred blacks from membership.[100] In 1963, under Meany's leadership, the AFL-CIO refused to endorse the March on Washington, even as many individual unions did actively participate.

Even with all those stains of racism, however, King, Randolph, and Bayard Rustin, the organizer of the March on Washington, each argued that labor was an indispensable ally to the civil rights movement in the fight for social justice. At the 1961 annual AFL-CIO convention, King declared, "The two most dynamic and cohesive liberal forces in the country are the labor movement and the Negro freedom movement. Together we can be architects of democracy . . . ."[101] Rustin, likewise, argued in 1965, "The labor movement, despite its obvious faults, has been the largest single organized force in this country pushing for progressive social legislation."[102]

A. Shared Values

Fundamentally, the labor movement and the civil rights movement are both concerned about the same principles: the dignity of individuals, who have the

99. JERVIS ANDERSON, A. PHILIP RANDOLPH: A BIOGRAPHICAL PORTRAIT 302 (1973).

100. Michael K. Honey, *Introduction* to KING, *supra* note 1, at 33; KING, *supra* note 1, at 39-40.

101. KING, *supra* note 1, at 42-43; *see also* MARTIN LUTHER KING, JR., *Address to Highlander Folk School*, *September 2, 1957*, *in* "ALL LABOR HAS DIGNITY," *supra* note 1, at 3, 14 ("Organized labor has proved to be one of the most powerful forces in removing the blight of segregation and discrimination from our nation. . . . [O]rganized labor is one of the Negro's strongest allies in the struggle for freedom."); MARTIN LUTHER KING, JR., *Address to Illinois State AFL-CIO, October 7, 1965*, *in* "ALL LABOR HAS DIGNITY," *supra* note 1, at 111, 119-20 ("The two most dynamic movements that reshaped the nation during the past three decades are the labor and civil rights movements. Our combined strength is potentially enormous.").

102. Bayard Rustin, *From Protest to Politics: The Future of the Civil Rights Movement*, COMMENTARY, Feb. 1965, at 25.

right to be respected and valued whatever their job or race; the importance of equality, both racial and economic; the centrality of the right to vote—both for elected representatives in government and for union leadership—to bring about greater political and workplace democracy; and the salience of human solidarity, that is the need to rise above our atomized existence to join together to improve the larger society. These common values led Randolph both to head a union, the Brotherhood of Sleeping Car Porters, and to threaten the original March on Washington in 1941, which prompted President Franklin D. Roosevelt to ban discrimination in the defense industries.[103] Shared values led Rustin to head the A. Philip Randolph Institute, where he strengthened the relationship between the labor and the civil rights movements. Mutual principles led King to embrace the Montgomery bus boycott and the Selma voting rights march for racial justice on the one hand, and the Memphis sanitation workers strike and the Poor People's Campaign for economic justice on the other. And these common values led all three men to spearhead the legendary 1963 March on Washington, with Randolph as chairman, Rustin as chief organizer, and King as the event's most celebrated speaker. The march merged the goals of both movements—it was a march for "Jobs and Freedom"—and though it is mostly remembered as a landmark in the fight for civil rights, it originated as a labor march.[104]

Animated by shared values, the two movements aided one another. In the 1950s, several unions supported the Montgomery bus boycott,[105] and King's Southern Christian Leadership Conference received 80% of its funding during its first year from the United Packinghouse Workers Unions of America.[106] In the 1960s, the AFL-CIO provided critical political support to help pass the Civil Rights Act of 1964 and Voting Rights Act of 1965, with some suggesting that the former "never would have passed" without labor.[107] The coalition of the labor and civil rights movements, writes historian Michael K. Honey, "ultimately broke the back of Jim Crow."[108]

The civil rights movement, meanwhile, supported labor. As King noted, "If the Negro wins, labor wins." Emancipated and energized black voters in Louisiana, he noted in his 1961 speech to the AFL-CIO, helped repeal an anti-union "right-to-work" law.[109] To formalize the partnership, Randolph worked with labor and civil rights groups and others to form an umbrella organization,

103. ANDERSON, *supra* note 99, at 260-61.

104. Michael K. Honey, *Introduction* to MARTIN LUTHER KING, JR., "ALL LABOR HAS DIGNITY," *supra* note 1, at xiii, xiv-xv.

105. *Id.* at xxvi.

106. *Id.* at 47.

107. TAYLOR E. DARK, THE UNIONS AND THE DEMOCRATS: AN ENDURING ALLIANCE 57 (2001).

108. Honey, *supra* note 104, at 76.

109. KING, *supra* note 1, at 42.

the Leadership Conference on Civil and Human Rights, in 1950.[110]

B. Shared Interests, Shared Enemies

The alliance between the civil rights and labor movements was born not only of similar values, but also of what King called "the kinship of interests."[111] Unions have a powerful interest in reducing racial discrimination and animus because racial hostility inhibits worker solidarity and union organizing, a fact well known to employers who historically sought to divide and conquer workers of different races.[112] Black people, meanwhile, have an interest in helping organized labor because blacks are disproportionately working class, they get an even larger wage premium than whites when they join unions, and traditionally they have desired to join unions at higher rates than whites. Meanwhile, both elements of the coalition—labor and civil rights—need one another as allies in the larger fight for social justice.

Racial animus has always been a key impediment to union organizing, which helps explain why the American South has historically been most resistant to unions. In the 1940s, the CIO launched "Operation Dixie" to organize the South, and part of its agenda included efforts to reduce discrimination. As historian Tami Friedman notes, the CIO, with a $1 million war chest and 250 organizers, set out in 1946 to organize at least one million workers by the end of the year. The AFL also made a pledge to organize one million Southern workers. The threat to Southern segregationists was clear as CIO President Philip Murray promised both "political and economic emancipation" for Southern workers and vowed to defeat two major segregationists in Mississippi.[113] W.E.B. Du Bois called the CIO the best hope for equal rights in the post-World War II era.[114]

With President Truman also beginning to move forward on civil rights, Southern segregationists ramped up their antiunion efforts. As the CIO began Operation Dixie, Southern Democrats joined Northern Republicans in voting for the Taft-Hartley legislation to cripple union organizing. Friedman writes,

> While the measure is often seen as the work of a Republican-dominated Congress, southern Democrats were instrumental in its passage; in both houses, over 80 percent of southern Democrats backed the bill. After President

110. *See History of The Leadership Conference on Civil and Human Rights & The Leadership Conference Education Fund*, LEADERSHIP CONF. CIV. & HUM. RTS., http://www.civilrights.org/about/history.html (last visited May 14, 2013).

111. MARTIN LUTHER KING, JR., *Address to United Automobile Workers Union*, *April 27, 1961*, *in* "ALL LABOR HAS DIGNITY," *supra* note 1, at 23, 28.

112. *See* Honey, *supra* note 104, at 20.

113. Tami J. Friedman, *Exploiting the North-South Differential: Corporate Power, Southern Politics, and the Decline of Organized Labor After World War II*, 95 J. AM. HIST. 323, 330 (2008) (internal quotation marks omitted).

114. Honey, *supra* note 108, at xxii (citing Du Bois's 1944 statement).

> Truman vetoed the legislation, 90 percent of southern Democrats in the House of Representatives and over 77 percent of those in the Senate helped override his action.[115]

Southern conservatives feared that if unions united working class whites and blacks, it could upend the politics of the South, where Jim Crow laws helped keep white and black workers on opposite sides of the political fence. White Southerners pushed the argument that unions could bring "black domination in the South."[116] For King, the unity of interests of labor and civil rights groups was underlined by segregationist opposition to both. He noted, "[T]he forces that are anti-Negro are by and large anti-labor."[117] He told the AFL-CIO in 1961 that "the labor-hater and labor-baiter is virtually always a twin-headed creature spewing anti-Negro epithets from one mouth and anti-labor propaganda from the other mouth."[118]

Southern segregationists followed up their support for the anti-labor Taft-Hartley Act of 1947 with an array of state-based "right to work" laws, which weaken unions by allowing employees to be "free riders"—benefiting from union collective bargaining but not contributing dues. To this day, the states most resistant to unions are those in the former Confederacy and Jim Crow South. Of the seventeen states that had legally required segregation prior to *Brown v. Board of Education*, twelve are today "right to work" states.[119] All five states that ban collective bargaining with public employees—Georgia, North Carolina, South Carolina, Texas, and Virginia—are from the Jim Crow South.[120] And, according to the Bureau of Labor Statistics, the eleven states with the lowest rates of unionization are North Carolina, Arkansas, Georgia, Louisiana, Mississippi, South Carolina, Virginia, Tennessee, Texas, Oklahoma, and Florida. All of these states were formerly segregated.[121]

115. Friedman, *supra* note 113, at 331.

116. *See, e.g.*, Michael Honey, *Operation Dixie: Labor and Civil Rights in the Postwar South*, 45 MISS. Q. 439, 443-50 (1992); Michael O'Brien, *W. J. Cash, Hegel, and the South*, 44 J. S. HIST. 379, 379-98 (1978); Elizabeth Tandy Shermer, *Counter-Organizing the Sunbelt: Right-to-Work Campaigns and Anti-Union Conservatism, 1943–1958*, 78 PAC. HIST. REV. 81, 85 (2009).

117. KING, *Address to the United Packinghouse Workers of America, October 2, 1957 in* "ALL LABOR HAS DIGNITY," *supra* note 1, at 19, 19 (internal quotation marks omitted).

118. KING, *supra* note 1, at 38.

119. *See African-American Education*, ENCYCLOPEDIA AM. EDUC., http://american-education.org/48-african-american-education.html (last visited May 14, 2013); *Right to Work States*, NAT'L RIGHT WORK LEGAL DEF. FOUNDATION, http://www.nrtw.org/rtws.htm (last visited May 14, 2013) (stating that there are twenty-four states in all that have "right to work" laws).

120. *See State Bargaining Rules Interactive Map*, NAT'L COUNCIL TEACHER QUALITY, http://www.nctq.org/tr3/scope/#interactiveMap (last visited May 14, 2013).

121. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members — 2012 (Jan. 23, 2013) [hereinafter BLS Press Release], *available at* http://www.bls.gov/news.release/pdf/union2.pdf.

Meanwhile, just as labor has an interest in reducing racial animus to promote organizing, black Americans have always had an interest in promoting a stronger labor movement. As King noted, "Negroes are almost entirely a working people," far more likely to be employees than employers.[122] While unions for many years did practice racial discrimination, the stereotype of the typical union member as an aging white, male, blue-collar worker today is outdated. According to the Bureau of Labor Statistics, in 2012, 62% of workers represented by unions were female, African American, Asian, and/or Latino.[123]

Blacks also benefit disproportionately from joining a union. In 2006, according to the Leadership Conference on Civil and Human Rights, the umbrella group for labor, civil rights, and religious groups, the wage premium was 30% for the typical union worker, but 36% for unionized African Americans as compared with their nonunion counterparts, and 46% for unionized Hispanic workers as compared with nonunionized Hispanics. The Leadership Conference noted: "Even after taking into account factors that affect wages (experience, education, region, industry, occupation and marital status), union wage premiums for women and people of color remain sizable—10.5 percent for women, 20.3 percent for African Americans, 21.9 percent for Hispanics and 16.7 percent for Asian Americans."[124] Minority and female workers appear to have a higher wage premium in part because unions negotiate uniform wages and benefits (reducing chances for discrimination) and because women and minorities are overrepresented in low wage fields, where the union premium tends to be higher.[125]

Not surprisingly, African Americans are substantially more likely to desire to join a union—and are therefore especially hurt by current laws that impose weak penalties on firms that engage in unfair labor practices. According to Harvard University economist Richard B. Freeman and Joel Rogers of the University of Wisconsin, 59% of black workers (compared with 28% of nonblack workers) support organizing their workplace. Women are also more likely than men to support organizing (35% to 27%).[126]

Finally, both the labor and civil rights movements know that a partnership makes them each stronger than they would be individually. As Bayard Rustin argued in his famous article, *From Protest to Politics*: "Neither [the labor] movement nor the country's twenty million black people can win political

122. KING, *supra* note 1, at 38.

123. BLS Press Release, *supra* note 121, at 5.

125. *Union Representation: A Bride to Economic Security and Equal Opportunity for All Workers*, LEADERSHIP CONF. CIV. & HUM. RTS., http://www.civilrights.org/publications/voices-2009/representation.html (last visited May 14, 2013).

125. *Id.*

126. RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 99 exhibit 4.2. (2d ed. 2006).

power alone. We need allies."[127]

C. Shared Tactics

Bound by common values, interests, and enemies, the labor movement and the civil rights movement also share common tactics. As King noted in his 1961 address to the AFL-CIO, the civil rights movement learned from the labor movement that it cannot rely on the charity of those in charge, and that power had to be seized because, as Victor Hugo noted, "there was always more misery in the lower classes than there was humanity in the upper classes." King told the audience: "Negroes in the United States read this history of labor and find that it mirrors their own experience."[128] He drew parallels between the 1936 sit-down strike of autoworkers and the 1960s lunch counter sit-ins of black youth. In a 1961 speech to the United Auto Workers, King said that in the 1930s, "you creatively stood up for your rights by sitting down at your machines, just as our courageous students are sitting down at lunch counters across the South." The civil rights movement's use of "sit-ins, civil disobedience and protests" mimicked the labor movement's use of "strikes," and "demonstrations."[129]

Interestingly, Southern segregationists also used the same tactic against civil rights supporters as firms use today against workers trying to join a union: economic intimidation. In the 1950s, a number of Southern states passed legislation banning teachers from being members of "subversive" organizations, including the NAACP, thus forcing teachers to choose between resigning their NAACP membership and losing their jobs.[130] Likewise, employers who were part of the White Citizens' Councils in Southern states used economic pressure and intimidation to coerce blacks to withdraw from petitions supportive of racial integration.[131] Civil rights groups see echoes from the Jim Crow past in today's efforts by corporations to fire employees for exercising their rights to join a union.

V. LABOR ENHANCES THE PROTECTIONS OF THE CIVIL RIGHTS ACT

Finally, it is fitting to include protections for labor organizing under the

127. Rustin, *supra* note 102.

128. KING, *supra* note 1, at 36–37.

129. *Id.*; *see also* MARTIN LUTHER KING, JR., *Address to National Maritime Union, October 23, 1962*, *in* "ALL LABOR HAS DIGNITY," *supra* note 1, at 65, 70 ("Emulating the labor movement, we in the South have embraced mass actions—boycotts, sit-ins and, more recently, a widespread utilization of the ballot.").

130. Bruce Hartford, *History and Timeline of the Southern Freedom Movement 1951-1968: 1956*, CIV. RTS. MOVEMENT VETERANS, http://www.crmvet.org/tim/timhis56.htm (last visited May 14, 2013).

131. *Anti-Integration*, 63 CRISIS 347.

Civil Rights Act because the existence of a union in a workplace can, for a variety of reasons, discourage discrimination based on factors such as race and gender. In this way, adding labor organizing can advance the original underlying goals of the act itself.

A. Unions Decrease Employer Discretion to Discriminate

For one thing, unions decrease the discretion of employers to make arbitrary and abusive decisions to fire workers or to pay some workers more than others—which can reduce the opportunity for discrimination. Many Americans do not realize that most employees work "at will," meaning they can be fired for any reason or no reason at all. Unions, by contrast, usually bargain for the right to be fired only for "just cause." This higher standard for termination helps minority or female employees who are discriminated against because it is much easier to prove that a termination was unjust or arbitrary rather than having to go further and prove that it was also motivated by race or sex discrimination.

Likewise, because unions tend to bargain for uniform wages, they reduce employer discretion to pay minority and female employees less than white and male employees. Researchers find that the greater use of "objective pay setting criteria such as job classification and tenure" helps explain why the wage differentials between men and women and blacks and whites tend to be lower in unionized firms than in nonunionized firms.[132] As the Leadership Conference on Civil Rights (Leadership Conference) notes, "Collective bargaining agreements set terms and conditions of employment in unionized workplaces, making employment practices more transparent and, hence, less likely to be arbitrary and discriminatory."[133]

Sometimes, negotiated contracts provide bans on discrimination, which can, according to the Leadership Conference, add "another layer of protection" for employees.[134] Unions also educate workers about their rights, so union members are more likely to recognize when wrongdoing or discrimination has occurred. Because unions provide a counterbalance to management's authority, the mere presence of the union can often deter abusive employer practices, including discrimination.

132. DAVID METCALF ET AL., UNIONS AND THE SWORD OF JUSTICE: UNIONS AND PAY SYSTEMS, PAY INEQUALITY, PAY DISCRIMINATION AND LOW PAY 16 (2000), *available at* http://eprints.lse.ac.uk/20195/1/Unions_and_the_Sword_of_Justice_Unions_and_Pay_Systems%2C_Pay_Inequality%2C_Pay_Discrimination_and_Low_Pay.pdf.

133. *Union Representation: A Bride to Economic Security and Equal Opportunity for All Workers*, *supra* note 124.

134. *Id*.

B. Union Procedures and Support

In addition to reducing management's discretion to discriminate and leveling the playing field, unions usually bargain for contracts that put into place procedures to address grievances—including those having to do with race or sex discrimination—that can address problems more efficiently and cheaply than litigation. As Julius Getman of the University of Texas notes, the grievance process established under collective bargaining agreements usually provides that "employer decisions may be challenged before a neutral third-party arbitrator with broad powers to review and set aside."[135] These grievance procedures provide an important supplement to civil rights protections. The Leadership Conference notes:

> While not a substitute for the right to go to court, access to the grievance process is important to women and people of color, because it is less expensive, time-consuming and contentious than litigation; it engages the union directly in representing aggrieved workers; and it promotes faster resolution of disputes.[136]

Research by Ann Hodges of the University of Richmond found that on the question of sexual harassment, union grievance procedures are "generally quicker and less expensive than litigation" yet still provide access to "a neutral arbitrator."[137]

Moreover, in instances where employees do wish to bring discrimination suits all the way to federal court, unions can provide legal counsel to discrimination victims, as well as financial benefits to help compensate for wages lost during a suit. Says the Leadership Conference: "The added heft unions bring in challenging discrimination is critical: fair employment laws ban a panoply of practices that have the intention or effect of discriminating, but equal opportunity is not a self-enforcing promise."[138]

Unions offer other protections against discrimination. In cases of sexual harassment, for example, managers often retaliate against employees who dare to complain, which can effectively intimidate victims. Hodges found that unions often protect against such retaliation. Likewise, because unions represent all members, they can build up institutional memory of discrimination and identify larger patterns by employers that an individual victim might miss.[139]

The protections that unions provide against discrimination are especially

135. Julius G. Getman, *The Changing Role of Courts and the Potential Role of Unions in Overcoming Employment Discrimination*, 64 TUL. L. REV. 1477, 1482 (1990).

136. *Union Representation*, *supra* note 124.

137. Ann C. Hodges, *Strategies for Combating Sexual Harassment: The Role of Labor Unions*, 15 TEX. J. WOMEN & L., 183, 213-14 (2006).

139. *Union Representation*, *supra* note 124.

139. Hodges, *supra* note 137, at 214-15.

important in low-wage jobs, where employers are both more likely to act arbitrarily and where women and employees of color are more likely to be concentrated.[140] Overall, researchers find that plaintiffs in unionized firms are more likely to be successful with their employment discrimination suits; and they are "less likely to be dismissed or to settle early."[141] In total, scholars conclude that, for a variety of reasons—including more uniform pay scales and the availability of grievance procedures—there appears to be "less discrimination among union workers."[142]

VI. PROCEDURES AND REMEDIES

Currently, if an employee suffers an adverse employment action, such as termination, suspension, demotion, harassment, reduction in pay or hours, or the like, and she feels it is due to her membership in a protected class *or* due to her attempt to organize or join a union or engage in other protected activities, she must file a charge with a federal agency. If the discriminatory reason is due to her membership in a protected class of race, color, religion, sex, national origin, age, or disability, then she must file her charge with the Equal Employment Opportunity Commission (EEOC), with limited exceptions for Equal Pay Act claims and 42 U.S.C. § 1981 claims based upon contractual relationships.[143] If the discriminatory reason stems from her union or concerted activity, then she must file her charge with the NLRB.[144]

Under the current NLRB model, if an employee or union (or employer) suffers from an unfair labor practice (ULP), that party must file a charge with the regional director of the NLRB.[145] The local office of the NLRB conducts an investigation, and if it concludes that there is merit to the claim, it files a complaint against the party allegedly committing the ULP (usually the employer).[146] The NLRB may also refuse to issue a complaint if it finds that there is not enough evidence to sustain a complaint. If the NLRB chooses not to file a complaint, the aggrieved party may appeal to the general counsel, but has no private remedies.[147] The decision of the general counsel is final, and no matter the wrongs suffered by the employee, the agency is often the only route

140. *Union Representation: A Bride to Economic Security and Equal Opportunity for All Workers*, *supra* note 124.

141. Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 190 (2010).

142. John S. Heywood, *Race Discrimination and Union Voice*, 31 INDUS. REL. 500, 507 (1992).

143. *See* 29 C.F.R. § 1601.1 et seq.

144. *See* 29 C.F.R. § 101.1 et seq.

145. *See* 29 C.F.R. § 101.2-.16 (2012).

146. *Id.* § 101.8.

147. *Id.* § 101.6.

to relief.[148]

If the regional director files a complaint, then a hearing is conducted before an administrative law judge (ALJ), where the NLRB (not the employee or union) is the prosecuting party.[149] The aggrieved party may have counsel at the hearing and supplement the NLRB's prosecution, but the matter is in the hands of the NLRB. A hearing at the NLRB does not allow most forms of pretrial discovery, which has the effect of limiting the scope of the case that can be made against the employer.[150] Without broad discovery, the hearing consists almost entirely of witnesses, public information, and information and documents that the employer volunteers. This restriction not only weakens any possible case against the employer, but it also factors into the employer's calculus when choosing whether to commit an unfair labor practice. Parties fear litigation not only because of the ultimate remedies that they may have to pay, but also because of the burdensome process of litigation. Discovery is a lengthy process consisting of document production, answering interrogatories, submitting to depositions, and having to admit or deny broad categories of inquiry. The standard for discovery is quite liberal. "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[151] In effect, the discovery process is an enormous burden on the defendant in a lawsuit because it permits the plaintiff to have broad access to an employer's files, employees, and evidence, with the goal of bringing transparency and fairness to the process.

The ALJ's order is not self-enforcing, and the parties may accept the order and choose to comply, or either party may file exceptions to the five-member, presidentially appointed Board, which will issue a final order.[152] These five members—three from the President's political party and two from the opposing party—sitting as a body in Washington, D.C., are tasked with issuing final orders for almost every category of private sector labor dispute in the county that is excepted by one of the parties involved. The Board order is also not self-enforcing; rather, the prevailing party must seek enforcement from a federal court of appeals. Some have found a growing unfamiliarity with the highly technical area of labor law among court of appeals judges, which is leading to problems at the enforcement stage.[153]

148. See San Diego Bldg. Trades Council v. Garmon, 353 U.S. 26 (1957), for the Supreme Court's original statement on NLRA preemption of state law. See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2687 (2008), for alternate routes to relief not based on the NLRA or state law.

149. 29 C.F.R. § 101.10.

150. NLRB, CASEHANDLING MANUAL, PART 1: UNFAIR LABOR PRACTICE PROCEEDINGS § 10292.4 (2011), *available at* http://www.nlrb.gov/sites/default/files/documents/44/master-2011-ulp.pdf; *see also* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978).

151. FED. R. CIV. P. 26(b)(1).

152. 29 C.F.R. § 101.11(b).

153. *See* James J. Brudney, *A Famous Victory: Collective Bargaining Protections and*

On the surface, the administrative process at the EEOC is in many respects similar to the NLRB administrative process. Indeed, the EEOC was partly modeled off the NLRB, and all hearings and investigations conducted by the EEOC are governed by section 161 of the NLRA, which governs the NLRB process.[154]

Strictly speaking, there is nothing inherently superior about the EEOC administrative process, as compared to the NLRB administrative process. Few who deal with the agency laud it as a model of efficiency or as the paradigm of a strong agency. The EEOC is infamous for its ongoing backlog of cases, which often hinders the agency in effectively handling new charges. According to the 2010 EEOC annual report, the agency had an intake of 93,277 new private-sector discrimination charges, and completed 2010 with a backlog of 86,338 charges.[155]

Having said that, there are several important differences between the administrative process under Title VII and the administrative process under the NLRA. The first is that under Title VII, the employee may opt out. Though Title VII requires an employee to file a charge with the EEOC, the employee may request a notice of right to sue from the agency anytime after 180 days have passed.[156] This right to sue letter provides the employee a private right of action in federal court for ninety days after its issuance.

Title VII not only provides the right to sue the employer, it also provides the means and the incentive. First, based upon the plaintiff's financial ability to retain counsel, her failed efforts to retain counsel, and whether the plaintiff presents a meritorious claim, the court may appoint counsel.[157] At the district court's discretion, any one of these factors may be determinative.[158] In addition to providing employees the opportunity to obtain court-appointed counsel,[159] Title VII provides that a prevailing party is entitled to attorneys' fees and costs.[160] This provision recognizes the fact that many employees who suffer employment discrimination are economically unable to finance the necessary litigation to vindicate their rights, and that society's interest in ending discriminatory practices weighs in favor of this exception to the so-called

the Statutory Aging Process, 74 N.C. L. REV. 939 (1996); Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 578 (2007).

154. 42 U.S.C. § 2000e-9 (2011).

155. EEOC, FISCAL YEAR 2010: PERFORMANCE & ACCOUNTABILITY REPORT 32 (2010), *available at* http://www.eeoc.gov/eeoc/plan/upload/REVISED-FINAL-PAR-EEOC-121010.pdf.

156. 42 U.S.C. § 2000e-5(f)(1) (2011).

157. *See, e.g.*, Weber v. Holiday Inn, 42 F. Supp. 2d 693, 698 (E.D. Tex. 1999).

158. Weir v. Potter, 214 F. Supp. 2d 53, 55 (D. Mass. 2002).

159. 42 U.S.C. § 2000e-5(f)(1).

160. *Id.* § 2000e-5(k).

"American rule" that each litigant, win or lose, pays her own way.[161] Furthermore, the availability of attorneys' fees and costs has created a strong bar of employment attorneys willing and able to take employment discrimination suits on a contingency basis, often with no upfront costs or retainers.

The availability of attorneys' fees has created the possibility for many employees to bring suit, but the difficulties of litigation extend beyond the costs involved. Litigating an employment suit may involve a multi-year process of making public the private areas of one's life, involving one's friends and former coworkers, expending a great deal of time and emotional energy in preparation, and going up against an adversary who is invariably larger, richer, and has more resources. One's credibility is questioned at every turn, and there is an abiding fear that the litigation will lead to the plaintiff being labeled an overly sensitive "problem" employee that no future employer will want to hire. Therefore, even with attorneys' fees accounted for, many aggrieved employees would forego the process of litigation if the remedies did not go a long way toward making them whole.

The Supreme Court has stated that "[Title VII] is intended to make victims of employment discrimination whole, and . . . the attainment of this objective . . . requires that the persons aggrieved . . . be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination."[162] To this end, a successful plaintiff may be awarded a variety of remedies, including back pay (with interest), reinstatement or front pay, equitable relief, compensatory damages, and punitive damages.[163]

Back pay includes not only salary loss, but also lost overtime, shift differentials, health and pension benefits, and fringe benefits, with the total amount of back pay presumptively calculated with prejudgment interest.[164] The back pay award is mitigated by "interim earnings" that the plaintiff earns between being terminated and final disposition of the case,[165] but these interim earnings do not include government benefits, such as unemployment compensation, Social Security benefits, welfare, or the like.[166] An employer may limit its liability with regard to back pay by unconditionally offering the

161. For a discussion of the "American rule," see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-51 (1975).

162. Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976) (first and second alterations in original) (quoting 118 CONG. REC. 7166, 7168 (1972)) (internal quotation mark omitted).

163. 42 U.S.C. § 1981a; *id.* § 2000e-5(g)(1).

164. Back pay awards under the NLRA and Title VII are significantly similar. *See* NLRB, CASEHANDLING MANUAL, PART THREE: COMPLIANCE PROCEEDINGS §§ 10540.1, 10544, 10566.6 (2011), *available at* http://www.nlrb.gov/sites/default/files/documents/44/chm-iii.pdf.

165. 42 U.S.C. § 2000e-5(g)(1).

166. Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104, 1114 (8th Cir. 1994).

plaintiff the job she was terminated from or denied.[167] Unless there is "excessive hostility" between the parties, a plaintiff may not be awarded front pay going forward from the moment she has received such an unconditional offer for reinstatement, regardless of whether she accepts the offer.[168]

A successful plaintiff is also entitled to reinstatement at her previous position or, if that is impossible or inappropriate because of the nature of the discrimination, she will be awarded front pay in an amount equal to what she would have earned if not for the unlawful discrimination.[169] Front pay consists of continuing future economic losses resulting from the unlawful discrimination, as opposed to the back pay awards that seek to make the plaintiff whole as of the date of judgment. Significant awards of front pay are usually awarded to plaintiffs in age discrimination suits because one of the main factors that the court considers in calculating such awards is the comparable employment opportunities for an individual in the plaintiff's position. With older plaintiffs closer to retirement age, there are fewer comparable employment opportunities, and less time to pursue those opportunities prior to retirement.

In addition to providing lost wages and benefits, Title VII recognizes the toll that losing one's job has on an individual, and seeks to restore the individual fully while also punishing employers that engage in intentional discrimination. For this reason, Title VII permits a court to award compensatory and punitive damages.[170] Compensatory damages includes future pecuniary losses and money damages to cover emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, loss of health, and other non-pecuniary losses.[171] This is necessary because losing one's job substantially affects every other part of the individual's life, and these effects often cascade and become worse with time.

Furthermore, if the employer is not a government or political subdivision, the plaintiff may be entitled to punitive damages if she can demonstrate that "the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[172] The combined total compensatory and punitive damages that an employee may receive follows a step scale based on the number of employees employed, and has been capped at $300,000.[173]

Along with the remedies and private right of action available under Title

167. Ford Motor Co. v. EEOC, 458 U.S. 219, 241 (1982).
168. Thorne v. City of El Segundo, 802 F.2d 1131, 1137 (9th Cir. 1986).
169. Bruso v. United Airlines, Inc., 239 F.3d 848, 861-62 (7th Cir. 2001).
170. 42 U.S.C. § 1981a(a)(1).
171. *Id.* § 1981a(b)(3); 2 EEOC Compl. Man. (CCH) ¶ 2062.
172. 42 U.S.C. § 1981a(b)(1).
173. *Id.* §1981a(b)(3).

VII, plaintiffs have two procedural rights that seem unextraordinary in litigation, but are unavailable to the employee bringing a charge under the NLRA: the right to a jury trial and the right to full discovery. The right to a jury trial stems from the availability of compensatory and punitive damages, which only a jury can award.[174] Defendants in employment discrimination suits fear the jury trial, viewing it as a "negative lottery," where "when they lose, they can lose big."[175] Employers view juries as unpredictable in their assignment of liability (and the value of such liability), and juries often relate more to the aggrieved employee over the economically motivated employer.[176] Therefore, many employers try hard to have the matter disposed of on summary judgment or are amenable to pretrial settlements.

The other procedural right available to the parties is discovery. Because employment discrimination suits are brought in federal court, the Federal Rules of Civil Procedure govern. Under these rules, parties are entitled to a range of pretrial discovery, including depositions, interrogatories, requests for production of documents, and requests for admissions.[177] Courts recognize that a plaintiff's case under Title VII will usually involve a great deal of circumstantial evidence, so as a general rule, courts will allow a broad scope of discovery. This will often require the employer to reveal information regarding its past employment practices, its financials, lists of possible witnesses, and other internal data. Though discovery is available to both parties, it is a facet of litigation that bears a much heavier burden on the defendant in employment cases. On principled grounds, some employers hate the idea of employees being able to have access to so many aspects of their business. Beyond this, there are the internal and legal costs associated with being on the receiving end of discovery requests. Each answer and each document is usually collected using internal resources, and then scrutinized and reconstructed by legal counsel, placing several layers of costs on an employer.

These procedures and remedies seek to make the plaintiff whole after suffering discriminatory treatment, but they also have a secondary effect of serving as a significant deterrent to employers. Whereas firms hire union busting consultants to subvert labor law, American employers spend significant time and money training management and employees to comply with the rules under Title VII, so as not to be the subject of litigation precisely because such litigation is highly disruptive. As a result, there is far less overt discrimination in the American workplace as a matter of policy. Though employers and managers still engage in discriminatory practices, Title VII has greatly reduced

174. *Id.* § 1981a(c)(1).

175. Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1423 (2004).

176. *See ADR Vision Roundtable: Challenges for the 21st Century*, DISP. RESOL. J., Aug./Oct. 2001, at 8, 10, 19.

177. FED. R. CIV. P. 26.

the severity and scope of such practices.[178] Title VII serves as one of the few instances where legislation has changed culture. The conferral of legal rights has created norms in America that would have been unimaginable in America fifty years ago. This shift, however incomplete it is, is a positive development that would not have been possible without legislation. Discrimination has been greatly reduced in the workplace; social attitudes towards diversity in the workplace have gone through a sea change; the law is considered legitimate in the eyes of the public; and employers who violate it are stigmatized. As Thomas Geoghegan notes, "The Jim Crow law creates one kind of culture, and the Civil Rights Act over time creates another."[179]

CONCLUSION

In proposing that one area of law subsume a portion of another, there will be a host of details and issues that will have to be worked out in the legislative and judicial processes. These include issues such as: whether the proposed amendments should be made to the Civil Rights Act or through a stand-alone statute that parallels its protections; how federal courts would handle what is certain to be a host of new legislation in a legal area that most judges are not familiar with; how unions would adjust their organizing and litigation strategies to meet these new regulations; how the courts would handle permanent replacements of strikers and other practices under this new regime; and whether this new legislative framework would regain for labor the legitimacy and numbers that it enjoyed for nearly half a century. These issues would have to be worked out in time, and could require years to sort out. However, labor issues have always turned on power, with legislation forming one major area of power. The NLRA sought to balance the power between the unions and employers, but through subsequent adjustments and increased employer hostility, the field has become quite imbalanced. Making labor organizing a civil right would do a great deal in rebalancing the power disparity towards employees, while also making the public case for the fundamental right to bargain collectively.

178. *See* John R. Dunne, *Civil Rights in the 1990's*, 9 HOFSTRA LAB. L.J. 289, 293, 296-97 (1992).

179. GEOGHEGAN, *supra* note 20, at 267.