



# Labor Law Renewal

## Citation

Benjamin Sachs, Labor Law Renewal, 1 Harvard L. & Pol'y Rev. 375 (2007).

## Published Version

<http://hlpronline.com/vol1no2/sachs.pdf>; [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1001086](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1001086)

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# Labor Law Renewal

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*Benjamin I. Sachs\**

## I. INTRODUCTION

In 1935, the Seventy-third Congress of the United States established a rigorously centralized regime of labor law. With the National Labor Relations Act<sup>1</sup> (NLRA), Congress moved to encompass all of American labor policy within a single federal statute to be interpreted, administered and enforced by a single federal agency. When it came to labor law's core functions—facilitating and regulating the self-organization of workers and the collective interactions between labor and management—there was to be a single legal channel: Neither other federal laws nor state or local legislation was to interfere with the dominance of the NLRA and its administrative agency, the National Labor Relations Board.<sup>2</sup>

Today, however, this centralized regime of labor law is no longer functional. The current diagnosis points to two basic pathologies. First, and most fundamentally, the NLRA fails to protect workers' ability to choose to organize and bargain collectively with their employers.<sup>3</sup> Second, the NLRA is ill-fitted to the contours of the contemporary economy, and increasingly out of step with its demands.<sup>4</sup>

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<sup>1</sup> National Labor Relations Act (Wagner-Connery Labor Relations Act), 29 U.S.C. §§ 151–169 (2000).

<sup>2</sup> As originally enacted, the NLRA provided that the National Labor Relations Board's (NLRB or "the Board") power to develop and enforce labor policy was "exclusive," and "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." Ch. 372, § 10, 49 Stat. 453 (1935) (current version at 29 U.S.C. § 160(a) (2000)).

<sup>3</sup> A study completed earlier this year suggests, for example, that *one in five* employees who takes an active role in organizing campaigns is discharged for doing so. See John Schmitt & Ben Zipperer, *Dropping the Ax: Illegal Firings During Union Election Campaigns* (Jan. 2007), available at [http://www.cepr.net/documents/publications/unions\\_2007\\_01.pdf](http://www.cepr.net/documents/publications/unions_2007_01.pdf).

<sup>4</sup> For example, since the time of the Act's passage, U.S. firms have restructured production systems and rethought human resource models. While the new business models are varied and multi-layered, the NLRA now appears mismatched to nearly all of them. See, e.g., KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004). The statutory regime also has proven remarkably inept in responding to changes in the composition of the U.S. labor force, and now entirely excludes from its coverage contingent workers, "knowledge" workers, and undocumented immigrant

Despite the statute's failings, however, and despite dramatic transformations in the U.S. economy and labor force, the NLRA has remained essentially unchanged for more than half a century.<sup>5</sup> This statutory stagnation has, in turn, produced a scholarly consensus that federal labor law is not simply dysfunctional but also peculiarly resistant to the reinvention it so clearly needs.<sup>6</sup> The explanations for this rigidity, moreover, seem inseparable from the decades-old decision regarding centralization. Thus, according to this now conventional account, by centering American labor law in a single federal statute, giving exclusive enforcement powers to a single federal agency, and depriving individuals and state and local governments of the ability to drive innovation, Congress has insulated labor law from the traditional avenues of rejuvenation and reform.

And yet, while the NLRA has indeed failed at both facilitating collective action and keeping pace with changes in the economy, neither the statutory scheme nor Congress's unwillingness to amend it has prevented a reordering of labor law. To the contrary, the field is beginning the process of reinvention, and the conventional wisdom regarding labor law's dormancy is no longer tenable.<sup>7</sup> In this Essay, I briefly sketch three examples to illustrate labor law's new dynamism. The first concerns the ability of several thousand janitors in the South to secure wage increases and health benefits through a unionization campaign governed entirely by private agreements. The second involves the unionization of several hundred thousand home care and child care workers under a labor law regime developed by state governments. And the third is the story of an immigrant garment worker who, relying on a quintessential employment law statute and without the involvement of a traditional labor union, led a collective effort to secure overtime wages at her Brooklyn garment factory.

As these three stories exemplify, and as I elaborate in a forthcoming article,<sup>8</sup> labor law is being reinvented through a process that I call the "hy-

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workers, precisely those segments of the workforce that increasingly define the labor market.

<sup>5</sup> It is currently a priority of the AFL-CIO and Change to Win labor federations to secure passage of a host of labor law reforms, including the Employee Free Choice Act, H.R. 800, 110th Cong. (2007), which recently was passed by the House of Representatives. See Steven Greenhouse, *House Passes Top Priority of Unions*, N.Y. TIMES, Mar. 2, 2007, at A14; Steven Greenhouse, *Labor Presses for Measure To Ease Unionizing*, N.Y. TIMES, Dec. 8, 2006, at A28. The report of the Committee on Education and Labor is also now available. See H.R. REP. NO. 110-23 (2007).

<sup>6</sup> See, e.g., James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563 (1996); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59 (1993); Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769 (1983).

<sup>7</sup> Professor Estlund, in writing about the "ossification" of American labor law, predicted that ossification would set in motion processes of de-ossification. See Estlund, *supra* note 6, at 1609.

<sup>8</sup> See Benjamin I. Sachs, *Employment Law as Labor Law: A New Paradigm for Collec-*

draulic demand for collective action.” That is, the NLRA’s failings have left the traditional legal channel for collective action blocked, but this blockage has not dissipated the demand for organization.<sup>9</sup> Unable to find expression through the NLRA, the pressure from this continuing demand for collective action has forced its way out through three new legal channels. No longer a regime defined by a single federal statute administered by a single federal agency, American labor law is increasingly constituted by private processes, by state and local regulation, and by multiple federal statutes enforced by multiple actors.

I propose, moreover, that each of these three decentralizing trends constitutes a form of experimentation with the optimal way to restructure American labor law. The first is an inquiry into the appropriate function of private agreement in labor law; the second an investigation of the role that states and localities should play in the design of labor policy; and the third an exploration of whether a legal regime that offers strong protection for the most nascent phases of workers’ organizing activity, but leaves outside of law’s domain further organizational development and labor-management interaction, is an adequate—or even desirable—substitute for the NLRA. In the aggregate, and given a legal architecture capable of capturing the results, these experiments promise both to help us resolve practical quandaries integral to labor law reform and to answer questions at the conceptual core of the field.

## II. OPTING OUT OF THE NLRA

The NLRA statutorily guarantees employees the right to organize and act collectively for their mutual aid and protection and to bargain collectively with employers through representatives of their own choosing.<sup>10</sup> But, as is well rehearsed in the literature, the NLRA rules governing organizing campaigns and the process of union recognition have failed to protect employees’ ability to choose collective representation.<sup>11</sup> NLRA rules also “lock[ ] employers and unions into an unnecessarily adversarial posture before bargaining relationships can begin,”<sup>12</sup> and thus hinder the de-

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*tive Action* (working title), 29 CARDOZO L. REV. (forthcoming 2008).

<sup>9</sup> For example, one survey conducted in 2005 found that 57% of workers would vote for a union if they had the chance to do so. See Jonathan P. Hiatt & Craig Becker, *At Age 70, Should the Wagner Act Be Retired? A Response to Professor Dannin*, 26 BERKELEY J. EMP. & LAB. L. 293, 300–01 (2005) (citing PETER D. HART RESEARCH ASSOCIATES, *THE PUBLIC VIEW OF UNIONS* (2005)). Economists Richard Freeman and Joel Rogers report that 87% of workers want some form of representation in the workplace. RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 147 (1999).

<sup>10</sup> See 29 U.S.C. § 157 (2000).

<sup>11</sup> See, e.g., Weiler, *supra* note 6, at 1778. In its report on the Employee Free Choice Act, the House Committee on Education and Labor reviewed much of this evidence and literature. See H.R. REP. NO. 110-23, at 19–21. As the Committee stated, “many employers insist on NLRB elections because they are a tool for killing an organizing drive.” *Id.* at 20.

<sup>12</sup> Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the*

velopment among employees of the kind of “organizational citizenship behavior” that Professor Stone shows to be integral to contemporary work systems.<sup>13</sup>

In response to these deep flaws in the traditional regime, both unions and employers have begun to abandon the NLRA and the NLRB. According to the NLRB General Counsel’s Office, in the last ten years the number of representation petitions filed with the Board has dropped 41%,<sup>14</sup> and between 1998 and 2003 less than 20% of the three million workers organized by AFL-CIO unions were organized through NLRB procedures.<sup>15</sup> Instead, employers and unions increasingly are relying on privately negotiated processes. Often (inaccurately) grouped together under the moniker of “neutrality and card check agreements,” these private agreements establish varied sets of ground rules governing unions’ and employers’ conduct during organizing campaigns, procedures for registering workers’ preferences on the question of collective representation, and mechanisms for resolving disputes. The recent organizing efforts of low-wage immigrant janitors in Houston are illustrative of this trend. In this Part, I present a summary of that campaign and the private agreement that structured it. I then briefly address the broader move toward private ordering in labor law, highlighting the ways in which these agreements depart from the traditional NLRA model.

#### A. Organizing the Houston Janitors

At a time when national unionization rates have sunk to a post-war low of 12.5%, the unionization rate in Texas, 6.2%, is less than half the national figure.<sup>16</sup> Indeed, *Business Week* commented earlier this year that Houston is a city where “unions are as scarce as caribou.”<sup>17</sup> Until recent developments changed the situation, nonunion janitors who cleaned Houston’s commercial office buildings made \$5.25 per hour, and because most of the cleaners worked part time, a Houston janitor’s average weekly paycheck was just over \$100.<sup>18</sup> These workers had no health coverage, no pension, and no paid days off.<sup>19</sup>

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*Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 835 (1996).

<sup>13</sup> STONE, *supra* note 4, at 94–99.

<sup>14</sup> A representation petition is the mechanism used to invoke the Board’s election procedures. The number of these petitions dropped from 6179 to 3643. See NLRB OFFICE OF GENERAL COUNSEL, NLRB GENERAL COUNSEL’S REPORT ON FY 2006 OPERATIONS (2007) (cited in *NLRB General Counsel’s Report Shows Large Drop in Election Petitions in FY 2006*, DAILY LAB. REP., Jan. 5, 2007, at A10).

<sup>15</sup> See James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 828–29 (2005).

<sup>16</sup> BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, UNION MEMBERS IN 2006 tbl.5 (2007), available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

<sup>17</sup> Henry Maurer, *A Union Victory*, BUS. WK., Dec. 12, 2005, at 32.

<sup>18</sup> Steven Greenhouse, *Union Claims Texas Victory with Janitors*, N.Y. TIMES, Nov. 28, 2005, at A1. Unionized janitors earn \$11.90 per hour in New Jersey, \$13.30 per hour in

Convinced that a traditional organizing effort based around an NLRB election would be futile, the Service Employees International Union (SEIU) chose instead to structure its efforts to organize Houston's janitors according to a private agreement with the city's five major cleaning contractors.<sup>20</sup> Marking a radical departure from the traditional NLRA campaign, the 2005 agreement obligated each contractor to "take a neutral stance" with respect to the janitors' decision regarding unionization and to recognize SEIU as the exclusive representative of its workers when a majority signed union authorization cards.<sup>21</sup> For its part, the union agreed to refrain from any economic action directed at the contractors during the organizing campaign.<sup>22</sup> Moreover, although the NLRA provides unions with the right to demand collective bargaining as soon as they organize a single employer, SEIU agreed to accept a novel "collective bargaining trigger." Under the trigger, SEIU committed to delay bargaining with any employer until it succeeded in organizing a majority of the entire "Houston Area Market," eliminating the possibility that a single firm's competitiveness would be threatened by contractual gains secured by the union.<sup>23</sup> Finally, in order to allow their approach to take root, all parties agreed explicitly to refrain from invoking any of the NLRB's rules or procedures and from filing any petitions or charges with the Board.<sup>24</sup>

By November 2005, the union had gathered authorization cards from a majority of the janitors at four of the signatory cleaning contractors.<sup>25</sup> Pursuant to the agreement, SEIU was recognized by the contractors as the union for 4700 Houston janitors, "one of the largest organizing successes ever in the private sector in the South."<sup>26</sup> And in accordance with the trigger agreement, collective negotiations then began between SEIU and the contractors for a market-wide contract.<sup>27</sup> Following a strike by the newly organized workers, the parties reached a three-year deal in No-

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Chicago and Philadelphia, and \$20 per hour in New York City. *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> For a discussion of how the parties reached this agreement, see, for example, *id.*; see generally Brudney, *supra* note 15, at 835–40.

<sup>21</sup> Neutrality Procedure Agreement Between SEIU Local 5 and Various Houston Janitorial Contractors [hereinafter Houston Janitors Agreement] ¶¶ 3.0, 3.1, 4.0, 4.1 (on file with Harvard Law & Policy Review).

<sup>22</sup> *Id.* ¶ 10.0.

<sup>23</sup> *Id.* ¶ 5.0. The market was defined by the parties' agreement. See *id.*, app. a. For a discussion of trigger agreements, see generally Fred Feinstein, *Renewing and Maintaining Union Vitality: New Approaches to Union Growth*, 50 N.Y.L. SCH. L. REV. 337, 343–44 (2006).

<sup>24</sup> Houston Janitors Agreement, *supra* note 21, ¶ 6.0.

<sup>25</sup> Steven Greenhouse, *Final Step in Janitor Unionization*, N.Y. TIMES, Dec. 1, 2005, at A31.

<sup>26</sup> *Id.* Eventually, workers at the fifth contractor authorized union representation, bringing the total number of janitors represented by SEIU to 5,300. *Id.*; see also Steven Greenhouse, *Cleaning Companies in Accord with Striking Houston Janitors*, N.Y. TIMES, Nov. 21, 2006, at A18 [hereinafter *Cleaning Companies in Accord*].

<sup>27</sup> *There's Money in Mopping*, ECONOMIST, Dec. 10, 2005, at 87.

vember 2006 through which workers secured a nearly 50% increase in wages, individual and family health insurance (available as of January 2009), and, for the first time, paid vacation days.<sup>28</sup> Because work shifts also will increase from four hours to six, employees' paycheck amounts will double over the next two years.<sup>29</sup>

### *B. Toward Private Ordering*

The Houston campaign illustrates a much larger movement—across unions, industries, and geography—to replace the federal legal regime's rules for organizing and recognizing unions with privately negotiated ones. In 2004, for example, UNITE and HERE—the garment and hotel workers' unions—reported that 85% of their new members were organized through private agreements with employers.<sup>30</sup> Between 1998 and 2002, SEIU organized more than 100,000 private sector members through such compacts (while adding only 82,000 members through NLRB elections),<sup>31</sup> and in 2006 the union relied on private agreements in 100% of its campaigns to organize janitors and security guards.<sup>32</sup> Similarly, the United Auto Workers reports utilizing private agreements for a majority of its recent organizing work.<sup>33</sup> Professors Brudney and Hartley, drawing on the work of Adrienne Eaton and Jill Kriesky, have described some of these developments,<sup>34</sup> and recent Board decisions confirm the continuing trend.<sup>35</sup>

In some agreements, as in the Houston janitors case, the employer consents to exempt itself from the organizing process by remaining neutral on the question of whether employees should choose collective representation. But there is wide variation across these labor-management accords. Many agreements, for example, explicitly preserve the employer's ability to express anti-union sentiments, and instead require only that both

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<sup>28</sup> Brad Hem, *Janitors Say They Are Ready To Walk*, HOUSTON CHRON., Oct. 17, 2006, at 1; L.M. Sixel, *Janitor Strike: "A Foothold Into the South,"* HOUSTON CHRON., Nov. 14, 2006, at 1.

<sup>29</sup> See *Cleaning Companies in Accord*, *supra* note 26.

<sup>30</sup> See Brudney, *supra* note 15, at 830 n.48. This includes, for example, tens of thousands of Las Vegas casino workers organized by HERE through card-check recognition procedures. See Bureau of National Affairs, *Card Check, Neutrality Accords Best Way for Unions To Organize*, UNITE's Raynor Says, 18 LAB. REL. WK. 811 (June 10, 2004) (cited in Brudney, *supra* note 15, at 830 n.48).

<sup>31</sup> Brudney, *supra* note 15, at 830 n.48.

<sup>32</sup> SERVICE EMPLOYEES INTERNATIONAL UNION RESEARCH DEPARTMENT, 2006 CAMPAIGNS (on file with Harvard Law & Policy Review). In this one year, the union added more than 12,000 janitors and security guards to its property services division through these agreements. *Id.*

<sup>33</sup> Brudney, *supra* note 15, at 830 n.48.

<sup>34</sup> *Id.*; 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 (2001).

<sup>35</sup> See, e.g., Dana Corporation (*Dana I*), 341 N.L.R.B. 1283 (2004); Dana Corporation (*Dana II*), 2005 NLRB LEXIS 174 (Apr. 11, 2005); Tenet Healthcare, 2005 NLRB GCM LEXIS 10 (Feb. 23, 2005).

parties speak about unionization with some degree of factual accuracy. Although these agreements do not require neutrality, they also depart from the NLRB's approach, which is to avoid "prob[ing] into the truth or falsity of the parties' campaign statements" and to leave election results undisturbed despite the widespread use of "misleading" speech.<sup>36</sup> Private agreements that do not require neutrality also often (again in contrast to the Board's rule) tailor the conditions under which an employer may communicate anti-union views in order to reduce the economically coercive potential inherent in such communication.<sup>37</sup>

Privately negotiated organizing agreements also incorporate differing approaches to facilitating communication between union organizers and employees. For example, while the NLRA gives unions essentially no right to enter employer property to communicate with workers, many private agreements give union organizers some limited right to gain access to workplaces, during certain times and in certain areas, in order to discuss unionization with workers.<sup>38</sup>

Similarly, unions and employers have developed a range of mechanisms for assessing employee choice on the question of collective representation. The most well known and certainly the most oft-cited private recognition procedure is the "card check" or "majority sign-up" procedure, according to which employees express their choice by signing, or not signing, a union authorization card. But unions and employers also contract to establish private election procedures under which the union's majority status is determined by a secret-ballot election conducted, not by the NLRB, but by a neutral third-party.<sup>39</sup>

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<sup>36</sup> Midland National Life Insurance Co., 263 N.L.R.B. 127, 133 (1982).

<sup>37</sup> The agreement between SEIU and Catholic Healthcare West is one leading example of this type of compact. The parties agreed that the employer could express opposition to unionization, but negotiated the specific message that the employer would convey to employees. The agreement also bound both sides to communicate "only that which is factual" and required the employer to express its views only through literature or group meetings—management was prohibited from delivering anti-union messages during one-on-one meetings with employees. *SEIU v. St. Vincent Med. Ctr.*, 344 F.3d 977, 980 (9th Cir. 2003). Moreover, while the employer was free to deliver its approved anti-union message in group meetings, the agreement forbade the employer from making attendance at such a meeting a condition of employment, something federal labor law entitled it to do. According to the parties' agreement, employees who so desired had the opportunity to hear the employer's opinion on the question of collective representation, but they could not be compelled to listen to employer speech on the subject. *Id.* The full agreement [hereinafter *SEIU/Catholic Healthcare West Agreement*] is on file with the Harvard Law & Policy Review.

<sup>38</sup> See Brudney, *supra* note 15, at 826. For example, the SEIU/Catholic Healthcare West agreement gave "a reasonable number" of union organizers access to public areas inside the hospital for as long as organizers "conduct[ed] themselves in such a way that does not disturb patients or visitors." *SEIU/Catholic Healthcare West Agreement*, *supra* note 37, ¶ II.E.6.b. The Houston janitors agreement, on the other hand, explicitly required the union to conduct all organizing activity away from the properties where the employees worked. *Houston Janitors Agreement*, *supra* note 21, ¶ 3.4.

<sup>39</sup> See *Tenet Healthcare*, 2005 NLRB GCM LEXIS 10, at \*14–\*15.



In sum, unions and employers are opting out of the NLRA and relying instead on varied systems of self-regulation. As they do so, labor law is evolving from a centralized federal legal regime to one defined increasingly by private ordering.

### III. STATE AND LOCAL LABOR LAW

Part of the centralizing effect of the Wagner Act has been to locate labor policy firmly, and nearly exclusively, within the domain of the federal government. Federal preemption of state and local labor law has been robust. Thus, states and localities may not regulate any activity that is arguably protected or prohibited by the NLRA, nor may they regulate conduct that Congress intended to be left to the “free play of economic forces.”<sup>40</sup>

Federal labor law preemption has severely constrained and contorted state and local attempts to innovate in the field of labor law.<sup>41</sup> But the appropriate heaping of criticism on the preemption doctrine should not obscure the ways in which state and local governments are responding to critiques of the NLRA regime and, within the bounds allowed by the federal law, offering emerging alternatives.

This trend is occurring primarily through two channels. First, by assuming the role of employer and collective bargaining partner for an expanding set of “atypical” workers, states are creating new labor laws for workers excluded from NLRA coverage. Second, for employers who receive public funds, states and localities are constructing, and encouraging unions and employers to construct, alternative rules for the conduct of organizing campaigns and alternative processes for recognition.

#### A. *The Public as Private: Home Care and Home-Based Child Care Workers and the Public Authority Model*

Home care workers assist their elderly and disabled clients with the activities of daily living—dressing, bathing, toileting, and eating—in their clients’ homes. Although precise figures are difficult to obtain, estimates for the total number of home care workers in the United States range from 700,000 to nearly 1.5 million.<sup>42</sup> The Department of Labor, moreover, has

<sup>40</sup> Lodge 76, Int’l Ass’n of Machinists v. Wisconsin Employment Relations Comm’n, 427 U.S. 132, 140 (1976) (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)); see also San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 240 (1959).

<sup>41</sup> See, e.g., Estlund, *supra* note 6, at 1569–77.

<sup>42</sup> The Bureau of Labor Statistics estimates 700,000 home care workers. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, PERSONAL AND HOME CARE AIDES (2006), available at <http://www.bls.gov/oco/pdf/ocos173.pdf>. The Center for Personal Assistance Services at the University of California put the number at 1,001,464 in 2004. UNIV. OF CAL., SAN FRANCISCO, CTR. FOR PERSONAL ASSISTANCE SERVICES, ESTIMATED NUMBER OF PAS WORKERS AND WORKERS PER PERSONS WITH SELF-CARE DIFFICULTY FOR ALL STATES

identified home care work as one of the fastest growing sectors of the labor market.<sup>43</sup> The great majority of home care workers are women and people of color, and most are able to secure only intermittent and part-time employment.<sup>44</sup> Despite being physically and emotionally demanding, the work is poorly compensated: in 2005, the mean annual wage for home care workers was \$17,710, and health insurance, retirement, and related benefits were extremely rare.<sup>45</sup>

Much home care work is performed according to a traditional model in which workers are employed by private agencies, but a substantial and growing segment of the industry—perhaps one-third—consists of so-called “independent providers” of home care services (or “IPs”).<sup>46</sup> While the employment status of IPs can vary according to the particular ways in which services are provided, these workers have been classified either as employees of the individual in whose home they work or as independent contractors. Under either scenario, the ability of these “atypical” workers to unionize under the NLRA is constrained. First, the Act excludes from its coverage any individual employed “in the domestic service of any family or person at his home.”<sup>47</sup> Second, the Act excludes those workers “having the status of an independent contractor.”<sup>48</sup> The NLRA accordingly pro-

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(2004), available at [http://www.pascenter.org/state\\_based\\_stats/acs\\_workforce\\_all\\_2004.php?title=Number+of+Home+and+Personal+Care+Workers+by+State](http://www.pascenter.org/state_based_stats/acs_workforce_all_2004.php?title=Number+of+Home+and+Personal+Care+Workers+by+State). SEIU, one of the U.S. labor unions engaged in organizing these workers, estimates that in 2003 there were 1,408,039 home care workers in the United States. SERVICE EMPLOYEES INTERNATIONAL UNION RESEARCH DEPARTMENT, TOTAL HOME CARE WORKERS LIST (2005) (on file with Harvard Law & Policy Review).

<sup>43</sup> See U.S. DEP’T OF LABOR, WOMEN’S BUREAU, FACTS ON WORKING WOMEN (2003), available at <http://www.dol.gov/wb/factsheets/hotjobs03.htm>; U.S. DEP’T OF LABOR, 2004-2005 OCCUPATIONAL OUTLOOK HANDBOOK, available at [http://www.ocoouha.com/cur/ooh/030508\\_18.htm](http://www.ocoouha.com/cur/ooh/030508_18.htm).

<sup>44</sup> In 2005, BLS estimated that fully 85% of home care workers were women, 24% were African American, and 15% Latino. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, 2005 HOUSEHOLD DATA ANNUAL AVERAGES tbl.11 (“Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity”), available at <http://www.bls.gov/cps/cpsaat11.pdf>. On the part-time nature of home care work, see Rhonda J. V. Montgomery, Lyn Holley, Jerome Deichert & Karl Kosloski, *A Profile of Home Care Workers from the 2000 Census: How It Changes What We Know*, 45 GERONTOLOGIST 593, 599 (2005) (“The proportion of year-round, full-time home care aides from the 2000 Census is only 34%.”). See also Linda Delp & Katie Quan, *Homecare Worker Organizing in California: An Analysis of a Successful Strategy*, 27 LAB. STUD. J. 1, 4 (2002) (“[M]ost [California home care] workers could not even find 40 hours of work per week.”).

<sup>45</sup> See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, MAY 2005 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES (“Personal and Home Care Aides”), available at <http://www.bls.gov/oes/current/oes399021.htm>; Delp & Quan, *supra* note 44, at 3; Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 74 (2000).

<sup>46</sup> Data on the numbers of IPs is scarce, and neither the U.S. Department of Labor nor the Center for Personal Assistance Services offers a specific estimate. SEIU conducted a national survey of states with independent provider programs, and determined that in 2003 there were 478,000 IPs working in the U.S. (data on file with Harvard Law & Policy Review).

<sup>47</sup> 29 U.S.C. § 152(3) (2000).

<sup>48</sup> *Id.*

vides these home care workers with little hope of coverage, leaving this large and growing sector of the labor force without protection from traditional labor law.

The picture for home-based child care providers, who offer child care services in their own or their clients' homes, is much the same. Estimates place the number of home-based child care workers at 1.8 million.<sup>49</sup> According to the Bureau of Labor Statistics, 94% of the child care workforce in the United States is female, more than 30% is African American and Latino,<sup>50</sup> and, again, the work is poorly compensated with benefits essentially nonexistent.<sup>51</sup> As with home care workers, home-based child care providers are without NLRA protection, primarily by virtue of the statute's exclusion of independent contractors.

Federal labor preemption doctrine, however, leaves states free to regulate the union activity and labor relations of workers and employers exempted from NLRA coverage. As such, the statute's failure to provide labor law coverage for these workers leaves open the possibility for development of state labor law to fill the gap.<sup>52</sup> California's In-Home Supportive Services (IHSS) system provides a leading example.

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<sup>49</sup> See DEBORAH CHALFIE, HELEN BLANK & JOAN ENTMACHER, NATIONAL WOMEN'S LAW CENTER, GETTING ORGANIZED: UNIONIZING HOME-BASED CHILD CARE PROVIDERS 6 (2007) (citing CTR. FOR THE CHILD CARE WORKFORCE & HUMAN SERVICES POLICY CTR., ESTIMATING THE SIZE AND COMPONENTS OF THE U.S. CHILD CARE WORKFORCE AND CAREGIVING POPULATION 17 (2002), available at [http://hspc.org/publications/pdf/ccw\\_May\\_2002.pdf](http://hspc.org/publications/pdf/ccw_May_2002.pdf)).

<sup>50</sup> See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 2005 HOUSEHOLD DATA ANNUAL AVERAGES tbl.11 ("Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity"), available at <http://www.bls.gov/cps/cpsaat11.pdf>. Other studies suggest that 99% of the home-based child care workforce is female. See CHALFIE ET AL., *supra* note 49, at 6.

<sup>51</sup> See, e.g., ANNE MITCHELL & GWEN MORGAN, WHEELLOCK COLLEGE INSTITUTE FOR LEADERSHIP AND CAREER INITIATIVES, NEW PERSPECTIVES ON COMPENSATION STRATEGIES (2000); CAROL J. DE VITA, ERIC C. TWOMBLY & MARIA D. MONTILLA, URBAN INSTITUTE, TOWARD BETTER CHILD CARE WORKER COMPENSATION: ADVOCACY IN THREE STATES 3 (2002), available at <http://www.urban.org/uploadedpdf/410464.pdf>. See also Marcy Whitebook, *Child Care Workers: High Demand, Low Wages*, 563 ANNALS AM. ACAD. POL. & SOC. SCI. 146, 147 (1999). According to the BLS, mean annual income for all child care workers in 2005 was \$18,180. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, MAY 2005 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES ("Child Care Workers"), available at <http://www.bls.gov/oes/current/oes399021.htm>. Estimates for average earnings of home-based child care workers range from \$6,209 per year in New Mexico to \$16,367 per year in Washington. See CHALFIE ET AL., *supra* note 49, at 6.

<sup>52</sup> While the state laws I review here are novel—they offer protection to new kinds of workers (the "atypical" employees who increasingly find themselves excluded by the federal regime) and they involve the state taking on employer and collective bargaining functions for workers not previously classified as "public employees"—this is not the first time that state governments have offered labor law protection for workers excluded by the NLRA. For example, prior to the 1974 amendments to the federal statute—which brought non-profit hospitals within the ambit of the federal law—private hospital workers were included within several state labor law regimes. See, e.g., Hilary Jewett, Note, *Professionals in the Health Care Industry: A Reconsideration of NLRA Coverage of Housestaff*, 19 CARDOZO L. REV. 1125, 1140 (1997). Similarly, some states offer labor law protection for agricultural workers, another group excluded from NLRA coverage. See, e.g., California

Under IHSS, more than 200,000 IP home care workers provide in-home services to nearly 400,000 elderly and disabled California residents.<sup>53</sup> Workers receive their paychecks from the state comptroller, but workers are hired, supervised, and discharged by the individual client.<sup>54</sup> In a 1990 decision, a California court of appeals determined that the individual client—in whose home services are provided—is the IHSS home care worker's only employer.<sup>55</sup> The holding thus implied that these workers would fall within the NLRA's domestic service exclusion. Accordingly, although thousands of low-wage workers in California were paid by the same state agency to perform the same work, the workers had no employer for NLRA purposes and no one with whom they might bargain collectively over wages and working conditions.<sup>56</sup>

The California legislature responded, first by authorizing and then by requiring counties to establish a "public authority" (or other entity) to constitute an employer of the county's IHSS home care workers.<sup>57</sup> Under the California law, IHSS home care workers were authorized to organize, to elect a collective representative, and then to bargain collectively over wages and benefits with the public authority of the county in which they work.<sup>58</sup> The state legislation thus provided a protected right to organize and required counties to create an employer and collective bargaining partner for hundreds of thousands of low-wage workers previously excluded from labor law's coverage.

Similar state action has offered the beginnings of state labor law coverage to publicly financed home care workers in Illinois,<sup>59</sup> Massachusetts,<sup>60</sup> Michigan,<sup>61</sup> Oregon,<sup>62</sup> and Washington,<sup>63</sup> and to home-based child care providers in Illinois,<sup>64</sup> Iowa,<sup>65</sup> Michigan,<sup>66</sup> New Jersey,<sup>67</sup> Oregon,<sup>68</sup> Washing-

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Agricultural Labor Relations Act, CAL. LAB. CODE §§ 1140–1167 (West 2003). And many states, of course, offer labor law protection to public employees, a set of workers also outside the scope of the federal law.

<sup>53</sup> See STATE OF CALIFORNIA, DEPARTMENT OF SOCIAL SERVICES ADMINISTRATION DIVISION, IN-HOME SUPPORTIVE SERVICES TOTAL MONTHLY CASELOADS 2005-2006 AND 2006-2007, at 55 (on file with Harvard Law & Policy Review).

<sup>54</sup> See Delp & Quan, *supra* note 44, at 3–4.

<sup>55</sup> SEIU v. County of Los Angeles, 225 Cal. App. 3d 761 (2d App. Div. 1990).

<sup>56</sup> Because the IHSS workers were classified as employees of private individuals, they were similarly excluded from coverage by California's public employee bargaining laws. See *id.*

<sup>57</sup> CAL. WELF. & INST. CODE §§ 12301.6, 12302.25 (West 2001).

<sup>58</sup> See *id.* § 12302.25 (citing CAL. GOV'T CODE § 3500 (West 1995)).

<sup>59</sup> See 5 ILL. COMP. STAT. ANN. §§ 315/3 and 315/7 (West 2006); 20 ILL. COMP. STAT. ANN. § 2405/3 (West 2006).

<sup>60</sup> See MASS. ANN. LAWS ch. 118G, §§ 28–33 (LexisNexis 2007).

<sup>61</sup> In Michigan, the state Department of Community Health entered into an intergovernmental agreement with a multi-county office on aging and created the Michigan Quality Community Care Council. The agreement is on file with the Harvard Law & Policy Review.

<sup>62</sup> See OR. REV. STAT. §§ 410.600–410.614 (2005).

<sup>63</sup> See WASH. REV. CODE ANN. §§ 74.39A.220–74.39A.300 (West 2002).

<sup>64</sup> See 305 ILL. COMP. STAT. ANN. 5/9A-11 (West 2006).

ton,<sup>69</sup> and Wisconsin.<sup>70</sup> In its most fully developed iterations, the model is consistent: through ballot initiative, executive action, and/or legislation, a public entity is created (or, alternatively, the state or an existing subdivision of the state is assigned this role) and becomes the employer of the workers for collective bargaining purposes.<sup>71</sup> By law, the workers gain the right to organize and bargain collectively with the public authority over those terms and conditions of employment within the authority's control, which primarily (and sometimes exclusively) are wages and benefits.<sup>72</sup>

Reflective of the nature of the services provided by home care workers and home-based child care providers, decisions regarding the hiring, firing, and supervision of workers are often reserved for the consumers of home care services and the families receiving child care services. Thus, such decisions may not be the subject of collective bargaining between workers and the public authorities.<sup>73</sup> Reflecting similar concerns, home care workers and home-based child care providers are prohibited by many of these state laws from striking.<sup>74</sup>

The results of these state efforts to expand labor law coverage into sectors of the workforce excluded from the federal regime have been signifi-

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<sup>65</sup> See Iowa Exec. Order No. 45 (2006), available at [http://publications.iowa.gov/archive/00003765/01/EO\\_45.pdf](http://publications.iowa.gov/archive/00003765/01/EO_45.pdf); Iowa Exec. Order No. 46 (2006), available at [http://publications.iowa.gov/archive/00003761/01/EO\\_46.pdf](http://publications.iowa.gov/archive/00003761/01/EO_46.pdf).

<sup>66</sup> See Interlocal Agreement Between the Department of Human Services and Mott Community College Creating the Michigan Home Based Child Care Council (2006), and Letter from Jennifer Granholm, Governor of Michigan, to Marianne Udow, Director, Department of Human Services, and M. Richard Shaink, President, Mott Community College (Sept. 1, 2006) (cited in *CHALFIE ET AL.*, *supra* note 49, at n.26).

<sup>67</sup> See N.J. Exec. Order No. 23 (2006), available at <http://www.state.nj.us/infobank/circular/eojsc23.htm>.

<sup>68</sup> See Or. Exec. Order No. 06-04 (2006), available at <http://governor.oregon.gov/Gov/pdf/eo0604.pdf>.

<sup>69</sup> See WASH. REV. CODE ANN. § 41.56.028 (West 2007).

<sup>70</sup> See Wis. Exec. Order No. 172 (2006), available at [http://www.wisgov.state.wi.us/journal\\_media\\_detail.asp?locid=19&prid=2359](http://www.wisgov.state.wi.us/journal_media_detail.asp?locid=19&prid=2359).

<sup>71</sup> In some instances, the state has agreed only to "meet and confer" with the workers' authorized representative and has not committed to full collective bargaining. See, e.g., Iowa Exec. Orders Nos. 45 and 46; Or. Exec. Order No. 06-04. In some cases, although the state agrees to negotiate with the workers' representatives, the workers are not deemed employees of the state or the public authority. See, e.g., N.J. Exec. Order No. 23.

<sup>72</sup> The statutes state explicitly that while the public authority is the employer for purposes of labor relations, the authority is not the employer for other purposes, for example, vicarious liability in tort. See, e.g., MASS. ANN. LAWS ch. 118G, § 31(f) (LexisNexis 2007). In light of potential antitrust problems with collective wage bargaining by independent contractors, states have invoked the state action exemption to the federal antitrust laws. See, e.g., 305 ILL. COMP. STAT. ANN. 5/9A-11 (West 2006).

<sup>73</sup> See, e.g., OR. REV. STAT. § 410.608 (2005); WASH. REV. CODE ANN. § 41.56.028 (West 2006).

<sup>74</sup> See, e.g., OR. REV. STAT. § 410.614 (2005) ("Home care workers do not have the right to strike."); MASS. ANN. LAWS ch. 118G, § 31(d) (LexisNexis 2007) ("[N]o personal care attendant shall engage in a strike . . ."); Or. Exec. Order No. 06-04 (2006) ("Nothing in this Executive Order is intended to give to family child care providers, or imply that family child care providers have, any right to engage in a strike or a collective cessation of the delivery of child care services.").

cant. In 1999, in the largest successful organizing drive since 1937, 74,000 home care workers in Los Angeles unionized.<sup>75</sup> And since 1999, more than 300,000 home care workers and 130,000 home-based child care providers nationally have gained union representation through rights granted and procedures established by state law.<sup>76</sup> With unionization, these workers have made impressive gains. In recent years, home care workers in Illinois secured wage increases of 149%, in California 147%, and in Oregon 42%.<sup>77</sup> Illinois child care workers won a 35% wage increase over the first three years of their new collective bargaining agreement.<sup>78</sup>

*B. The Public as Public: State Neutrality Laws and Labor  
Peace Legislation*

By assuming the role of employer and collective bargaining partner for these atypical workers, state governments are stepping into the breach left by the NLRA's exclusion of an expanding segment of the U.S. labor force. A second exception to federal labor preemption doctrine has left room for a second body of emerging state and local labor law. Namely, states and localities are subject to federal labor preemption only when they "regulate." But when state and local governments act in their "proprietary" capacity, they are freed from preemption scrutiny.<sup>79</sup> Thus, through legislation aimed at employers who receive public funds or work on public contracts, states and localities are also attempting to reorder the rules governing employer and union behavior during organizing campaigns. In some instances, these statutes directly define an alternative range of permissible and impermissible conduct. In other instances, the statutes mandate that unions and employers reach a private accord that sets the relevant parameters.<sup>80</sup>

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<sup>75</sup> See, e.g., Steven Greenhouse, *In Biggest Drive Since 1937, Union Gains a Victory*, N.Y. TIMES, Feb. 26, 1999, at A1.

<sup>76</sup> Carol Golubock, Service Employees International Union, Address at the American Rights at Work Conference: Solutions for the Changing Workforce (Dec. 1–2, 2006) (on file with Harvard Law & Policy Review); CHALFIE ET AL., *supra* note 49, app. at 34–35. This growth in unionization among home care and child care workers occurred at a time when the overall rate of unionization continued to shrink. Between 1999 and 2005, the unionization rate for all workers in the United States declined from 13.9% to 12.5%. See ECONOMIC POLICY INSTITUTE, UNION COVERAGE IN THE UNITED STATES 1973–2005 (2005), available at <http://www.epi.org/datazone/06/union.pdf>.

<sup>77</sup> See Golubock, *supra* note 76.

<sup>78</sup> *Id.*

<sup>79</sup> See, e.g., *Bldg. & Constr. Trades Council v. Associated Builders*, 507 U.S. 218 (1993).

<sup>80</sup> As noted below, there is an important doctrinal debate regarding the circumstances in which these state laws are appropriately considered "proprietary" and when they are "regulatory." I use the term "public as public" here not to suggest a general conclusion on the regulatory/proprietary question, but because this set of laws, unlike the legislation described in Part III.A *supra*, does not involve the government assuming an employment or collective bargaining role.

Recent legislation in California and New York exemplifies the former type of state labor law, often characterized as “state neutrality laws.”

<sup>81</sup> California Assembly Bill 1889 (the “Cedillo Act”) prohibits employers who receive state funds from using those funds to “assist, promote, or deter union organizing.”<sup>82</sup> Similarly, under New York Labor Law section 211-a, no employer in the state who receives any state funds may use those funds to hire or pay contractors or employees to encourage or discourage union organization or participation.<sup>83</sup> Although both laws apply only to employers who receive state funds, their impact is quite far reaching.<sup>84</sup>

Through statutes like the Cedillo Act and section 211-a, states encourage—and for employers who receive a significant proportion of their income from state sources, strongly encourage—employer neutrality on the question of union representation. Another emerging body of state and local law does not itself impose rules for organizing, but rather requires covered employers—again the recipients of certain state funds or contracts—to enter into agreements with unions that establish such alternative rules. These laws are generally classified as “labor peace” legislation, although there has been substantial variation in this body of state and local law as well.

In 2000, for example, Milwaukee County enacted an ordinance applicable to employers who contract with the county to provide transportation services for the elderly or persons with disabilities.<sup>85</sup> Under the ordinance, covered employers must enter into a “labor peace agreement” with any labor organization that seeks to represent its employees.<sup>86</sup> The labor agreement must prohibit the union from engaging in an “economic action” (including a strike, picket, or boycott) against the employer.<sup>87</sup> While the ordinance does not require employer neutrality, it does require the labor-management agreement to prohibit the employer from expressing

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<sup>81</sup> John Logan, *Innovations in State and Local Labor Legislation: Neutrality Laws and Labor Peace Agreements in California*, UNIV. OF CAL. INST. FOR LAB. AND EMP. (2003), available at <http://repositories.cdlib.org/scl2003/ch05>.

<sup>82</sup> CAL. GOV'T CODE § 16645.7(a) (West 1995); see generally CAL. GOV'T CODE §§ 16645–16649 (West 1995). The Ninth Circuit, sitting en banc, upheld the Cedillo Act against a preemption challenge in *Chamber of Commerce v. Lockyer*, 463 F.3d 1076, 1088 (9th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3369 (U.S. Jan. 5, 2007) (No. 06-939).

<sup>83</sup> See N.Y. LAB. LAW § 211-a(2) (Gould 2007). As discussed below, the New York law is currently the subject of a preemption challenge. Most recently, the Second Circuit remanded the case to the district court for further factual development. See *Healthcare Ass'n of N.Y. State v. Pataki*, 471 F.3d 87, 109 (2d Cir. 2006).

<sup>84</sup> The *Lockyer* court explained that the California statute “by design sweeps broadly.” *Lockyer*, 463 F.3d at 1084. On the reach of the New York law, see *Healthcare Ass'n*, 471 F.3d at 93.

<sup>85</sup> MILWAUKEE COUNTY GENERAL ORDINANCES § 31.01 (2000). The district court rejected a preemption challenge to the Milwaukee Ordinance. See *Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 359 F. Supp. 2d 749 (E.D.Wisc. 2005). The Seventh Circuit recently reversed, holding the Ordinance preempted by the NLRA. See *Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005).

<sup>86</sup> MILWAUKEE COUNTY GENERAL ORDINANCES § 31.03 (2000).

<sup>87</sup> *Id.* §§ 31.04, 31.02(b).

false or misleading information relevant to the question of unionization and from compelling employees to attend meetings on the question of unionization. The employer must also provide the union with a list of employees and grant the union reasonable access to the workplace.<sup>88</sup>

The scope of the “proprietary” exception to federal labor preemption is disputed among the federal courts of appeals. Thus, a preemption challenge to New York’s section 211-a recently has been remanded to the district court by the Second Circuit,<sup>89</sup> while the Ninth Circuit’s en banc decision upholding the Cedillo Act is now the subject of a petition for certiorari.<sup>90</sup> Similarly, labor peace ordinances have been upheld against preemption challenge by the Third Circuit and one Seventh Circuit panel,<sup>91</sup> while a different Seventh Circuit panel invalidated another such law.<sup>92</sup> It is, accordingly, not unlikely that the Supreme Court will address this debate soon. If it does so, the Court will help determine the continued viability of this form of labor law experimentalism.

Despite the significant, and currently evolving, restraints imposed by federal labor preemption doctrine on neutrality and labor peace legislation, state and local governments are driving labor law innovation through the two sets of laws outlined above. The result is evolution from a field exclusively defined by federal law to one that increasingly incorporates state and local regulation.

#### IV. EMPLOYMENT LAW AS LABOR LAW

Although the National Labor Relations Act promises that workers, should they choose to do so, may organize and interact collectively with their employers, the statute’s deeply inadequate remedial regime has rendered protections for associational and collective activity ineffectual and

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<sup>88</sup> *Id.* § 31.02(f). Other states and localities have enacted less substantively specific labor peace legislation. This legislation requires covered employers to enter into agreements with unions through which the union consents not to engage in economic action. But the laws leave it to the parties to determine the specific content of the agreement, including the nature of the rules that will govern the parties’ behavior during organizing campaigns and the method by which employees will express their decision regarding collective representation. *See, e.g.,* PITTSBURGH (PENN.) ORDINANCE ch. 161.30 (2004) (surviving a preemption challenge in *HERE, Local 57 v. Sage Hospitality Res.*, 390 F.3d 206, 207–08 (3d Cir. 2004)); 20 ILL. COMP. STAT. ANN. 689/15(a)(3), 689/25(a) (West 2003) (also surviving a preemption challenge, in *N. Ill. Chapter of Associated Builders and Contractors, Inc. v. Lavin*, 431 F.3d 1004 (7th Cir. 2005)).

<sup>89</sup> *Healthcare Ass’n*, 471 F.3d 87. A petition for rehearing has been filed, and on February 16, 2007, the Second Circuit directed plaintiffs-appellees to file a response pursuant to Fed. R. App. P. 40(a)(3).

<sup>90</sup> *Chamber of Commerce v. Lockyer*, 463 F.3d 1076 (9th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3369 (U.S. Jan. 5, 2007) (No. 06-939).

<sup>91</sup> *See Lavin*, 431 F.3d 1004; *Sage Hospitality Res.*, 390 F.3d 206.

<sup>92</sup> *See Metro. Milwaukee Ass’n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005).



produced “a culture of near-impunity . . . in much of U.S. labor law and practice.”<sup>93</sup>

For example, while the NLRB has authority to order an employer to pay back wages to employees discharged in retaliation for engaging in protected collective activity, all such damages must be exclusively compensatory: No punitive awards are available.<sup>94</sup> The Act does empower the Board to seek reinstatement of workers discharged for engaging in protected activity,<sup>95</sup> but the endemic and massive delays that accompany such reinstatement proceedings have rendered this a similarly insufficient mechanism for protecting employees engaged in collective action. For example, an employer can defeat an organizing drive by unlawfully discharging union supporters and keeping them out of the work force for a few weeks. But the median length of time from an employee’s filing a charge alleging employer misconduct to the issuance of a final Board decision is nearly two years.<sup>96</sup> Finally, because the statute centralizes all enforcement power in the NLRB and denies workers a private right of action, the Board’s weak remedies and time consuming procedures are the only game in town.

In response to these failures, academic observers repeatedly have proposed changes to the NLRA regime that would enhance the remedies available to the NLRB, increase the availability and use of preliminary injunctions, and add a private right of action.<sup>97</sup> Indeed, enhancing the remedies available under the NLRA is a central component of the Employee Free Choice Act, currently pending in the U.S. Congress.<sup>98</sup>

Recognizing these flaws in the NLRA regime, but unwilling to continue waiting for Congress to heed calls for statutory reform, workers, unions, and new forms of worker-organizations are turning to other federal statutes to protect their efforts at collective action. These actors are driving a disaggregation of labor law’s core function from the NLRA to other

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<sup>93</sup> HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 14 (2000), available at <http://www.hrw.org/reports/pdfs/u/us/uslbr008.pdf>.

<sup>94</sup> See, e.g., *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940); *Consol. Edison v. NLRB*, 305 U.S. 197, 236 (1938); *Ex-Cell-O Corp.*, 185 N.L.R.B. 107, 108 (1970).

<sup>95</sup> 29 U.S.C. § 160(c) (2000).

<sup>96</sup> The median length of time is 690 days. See 69 NLRB ANN. REP. 264 tbl.23 (2005), available at [http://www.nlr.gov/publications/publications/annual\\_reports.aspx](http://www.nlr.gov/publications/publications/annual_reports.aspx). While the Board formally possesses the power to seek preliminary injunctive relief, 29 U.S.C. § 160(j) (2000), it rarely employs its power to do so. In fiscal year 2004, for example, the Board authorized the General Counsel to seek so-called § 10(j) injunctions in just thirteen cases. See 69 NLRB ANN. REP. 260 tbl.20.

<sup>97</sup> On enhanced remedies, see, for example, Gottesman, *supra* note 6, at 75 (“[T]he solution is punitive damages . . .”). On preliminary injunction relief, see, for example, Charles J. Morris, *A Tale of Two Statutes: Discrimination or Union Activity Under the NLRA and RLA*, 2 EMPL. RTS. & EMPLOY. POL’Y J. 317, 358 (1998). On a private right of action, see James J. Brudney, *The National Labor Relations Board in Comparative Context—Isolated and Politicized: The NLRB’s Uncertain Future*, 26 COMP. LAB. L. & POL’Y J. 221, 231–34 (2005); Estlund, *supra* note 6, at 1551–58.

<sup>98</sup> See Employee Free Choice Act, H.R. 800, 110th Cong. (2007).

statutory regimes, primarily employment laws like the Fair Labor Standards Act (FLSA) and Title VII, whose anti-retaliation provisions have the potential to offer vigorous protection for the nascent phases of organizational activity.<sup>99</sup>

The center of much of this disaggregating work has been New York City, home to hundreds of thousands of low-wage immigrant workers and to a number of nontraditional labor organizations known as “worker centers.”<sup>100</sup> Bushwick, Brooklyn is home to one such center, Make the Road by Walking (MRBW),<sup>101</sup> a membership organization dedicated to facilitating Bushwick workers’ efforts to collectively secure rights at work.<sup>102</sup> While a great majority of garment workers who are members of MRBW earn below minimum wage and close to 100% of these garment workers are not paid overtime wages, the rate of unionization among garment worker members of MRBW is approximately zero.<sup>103</sup> Lacking union representation and facing rampant violations of their rights at work, garment workers in Bushwick along with MRBW have been forced to develop alternative models of organizing and, concomitantly, novel legal mechanisms for protecting their organizing efforts. The 2001 campaign for unpaid overtime wages at one Bushwick garment factory illustrates this development.

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Danmar Finishing employs several hundred employees in the work of preparing garments for sale by New York’s clothing retailers. Although Danmar employees regularly worked more than forty hours per week sewing garments, they were never paid time-and-one-half their regular rate of pay, as required by the FLSA.<sup>104</sup> In order to recover the overtime they were owed, and to compel Danmar to begin complying with the FLSA’s over-

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<sup>99</sup> Below, I provide an example of a collective campaign in which workers relied on the Fair Labor Standards Act. See *infra* text accompanying notes 104–109. In *Employment Law as Labor Law*, *supra* note 8, I offer a more detailed account of this campaign as well as one in which Title VII offered workers protection for their collective activities.

<sup>100</sup> See, e.g., JANICE FINE, *WORKERS CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* (2006); JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005).

<sup>101</sup> The name derives from a poem by Antonio Machado. ANTONIO MACHADO, *SELECTED POEMS* 143 (Alan S. Trueblood trans., 1982). The poem became the title of a book on popular education. See MYLES HORTON & PAULO FREIRE, *WE MAKE THE ROAD BY WALKING: CONVERSATIONS ON EDUCATION AND SOCIAL CHANGE* (1990). It later became the title of an influential law review article. See Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995). The author of this Essay worked as an attorney at Make the Road by Walking from September 1999 through June 2002.

<sup>102</sup> See, e.g., Scott L. Cummings & Ingrid V. Eagley, *A Critical Reflection on Law and Organizing*, 48 U.C.L.A. L. REV. 443, 448, 496 (2001); Chisun Lee, *Sewing Up Bushwick*, VILLAGE VOICE, Mar. 7–13, 2001, at 24.

<sup>103</sup> Telephone Interview with Andrew Friedman, Co-Director, Make the Road by Walking (Aug. 12, 2005).

<sup>104</sup> 29 U.S.C. § 207 (2000).

time requirements, Danmar employees initiated an organizing campaign through MRBW. The workers staged multiple pickets outside the factory, along with public demonstrations across New York City. The workers also engaged in a successful effort to publicize their campaign in New York's Spanish and English language media. As the collective actions escalated and attracted increasing attention, the Danmar workers enlisted the support of local political leaders, including Congresswoman Nydia Velazquez and Senator Charles Schumer, who joined them on the picket line outside the Danmar factory gates.<sup>105</sup>

Danmar responded to the workers' collective campaign by retaliating against the lead organizer of the effort, a sewing machine operator named Maria Arriaga. Shortly after the workers' organizing campaign began, Arriaga's weekly wages were cut and then, five days after the first public demonstration by the Danmar workers, Arriaga was fired. As she tells it:

[R]ight before I left work, [manager] Don Carlos angrily yelled at me at the top of his voice. He shouted at me so everyone in the factory could hear him that, "Here in the factory, I am the boss. There is no law that can tell me what I have to do in my factory." . . . He said that I was "stupid," and "a piece of trash." He told me that I was fired and that I should go home.<sup>106</sup>

Arriaga's discharge threatened the continued efforts of the workers' collective campaign. Although the NLRA makes retaliation for participation in collective action of this sort illegal, MRBW did not turn to the NLRB for relief. Rather, MRBW attorneys provided the U.S. Department of Labor (DOL) with a draft motion for a temporary restraining order based on the FLSA's anti-retaliation clause. The motion argued that the Danmar workers' organizing campaign was protected by the FLSA, and thus that the discharge of a worker who participated in collective action to secure overtime was retaliation made illegal by that statute. The motion sought Arriaga's immediate reinstatement.

Nine days after the DOL filed the motion, Judge David Trager of the U.S. District Court for the Eastern District of New York ordered Danmar to "offer immediate reinstatement of employment" to Arriaga.<sup>107</sup> And with Arriaga back at work—nearly two years sooner than she would have been had she pursued relief under the NLRA—the Danmar employees' efforts

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<sup>105</sup> See Rosemary Feitelberg, *N.Y. Senator Criticizes Dept. of Labor Efforts*, WOMEN'S WEAR DAILY, May 13, 2002, at 23; Bob Port, *Schumer Rips Sweatshops: B'klyn Case Sparks Call for Fed Probe of City Factories*, N.Y. DAILY NEWS, May 10, 2002, at 10.

<sup>106</sup> Declaration Pursuant to 28 U.S.C. § 1746 of Maria Arriaga, *Chao v. Danmar Finishing Corp.*, 02-CV-3492, at ¶ 18 (E.D.N.Y. June 7, 2002) [hereinafter *Arriaga Declaration*] (on file with the Harvard Law & Policy Review).

<sup>107</sup> Temporary Restraining Order, *Chao v. Danmar Finishing Corp.*, 02-CV-3492, ¶ 1 (E.D.N.Y. July 31, 2002).

to secure their wage and hour rights continued toward completion. Indeed, in December 2003, Danmar agreed to pay more than \$400,000 to workers whose overtime rights had been violated. In the end, the campaign was described as an “historic triumph for a band of immigrant sweatshop laborers who challenged their boss.” The *New York Daily News* called Arriaga a “real-life counterpart to movie heroine Norma Rae,”<sup>108</sup> and Eugene Scalia, Solicitor of Labor at the time, touted the “quick action” in the Arriaga retaliation in his address to the ABA.<sup>109</sup>

Of the three trends identified here, the turn to “employment law as labor law” is the most emergent and interstitial. It nonetheless constitutes an important iteration of the hydraulic effect: Unable to find protection for their collective action in the NLRA, workers have begun to rely on alternative statutory regimes like the FLSA and Title VII.

#### V. HYDRAULICS, DECENTRALIZATION, AND LABOR LAW EXPERIMENTALISM

The three examples outlined here belie the conventional wisdom that labor law has reached a dead end. To the contrary, they highlight a process of labor law reinvention driven by the “hydraulic demand for collective action.” That is, the legal channel for collective action designed by Congress in 1935 is, indeed, blocked. But the blockage of this traditional pathway has not, in any sense, ended the demand for organization and collective interaction.<sup>110</sup> Unable to find an outlet through the NLRA, the pressure from this continuing demand has forced open the three legal channels described in this Essay.

This reconceptualization of the current state of labor law suggests a research agenda focused on these new channels for collective action, and on others that may be emerging. Although a full account is beyond the scope here, some preliminary observations are in order. In Section A below, I briefly review what these trends reveal about the current state of U.S. labor law, in particular its decentralization along the three axes I have noted above. I also propose that we treat these trends as experiments, and as pointing the way to an experimentalist approach to labor law reform. By doing so, we will be positioned to resolve the practical and structural questions that are at the core of the field. In Section B, I highlight some of the broader conceptual and theoretical implications of these develop-

<sup>108</sup> See Bob Port, *Sweatshop Backs Down, Return to Work Is Victory for a B'klyn Norma Rae*, N.Y. DAILY NEWS, Aug. 26, 2002, at 22. Arriaga was also named one of the “Women of the Year” by *Latina* magazine in 2002. See *Mujeres of the Year*, LATINA, Dec. 2002/Jan. 2003, at 90.

<sup>109</sup> Eugene Scalia, Solicitor of Labor, U.S. Dep’t of Labor, Address to the American Bar Association (Aug. 12, 2007), reprinted in BUREAU OF NAT’L AFFAIRS, DAILY LAB. REP., Aug. 14, 2002, at E-5.

<sup>110</sup> See, e.g., sources cited at *supra* note 9.

ments, noting what we might learn from this discussion about democratic experimentalism, the private role in public governance, and the relationship between individual rights and collective action.

*A. A Decentralized and Experimentalist Approach: Practical and Structural Implications*

The opening of each of the three new legal channels I have described here constitutes a process of decentralization and disaggregation. Thus, as unions and employers replace the NLRA's and NLRB's procedures with privately negotiated processes better tailored to the demands of the contemporary economic order, labor law is evolving from a centralized legal regime to a dispersed system defined increasingly by private agreement. As state and local governments attempt—in the face of the NLRA's aggressive preemption doctrine—to correct the failings of the federal statute, labor law is decentralizing from a regime defined exclusively by federal law to one constituted by federal, state, and local regulation. And as workers turn to alternative federal statutes, including employment laws like the FLSA and Title VII, to protect their efforts at self-organization and collective action, labor law is disaggregating from a legal regime defined by a single federal law enforced by a single federal agency to a regime constituted by multiple statutes enforced by multiple actors.

I propose, moreover, that each of these three decentralized channels constitutes a distinct form of experimentation into the ways to restructure American labor law. Self-consciously embracing the experimental potential in these decentralizing trends promises enormous returns. To start, the experiments provide data on pressing practical questions about labor law that have long demanded new answers: how best to define the rules that govern behavior during organizing campaigns, determine the range of employees covered by labor law's protections, resolve disputes between labor and management, and structure an effective remedial regime.

The experimental developments outlined here also promise to allow us to resolve structural questions fundamental to labor law reform. As to these broader questions, an examination of state and local intervention into what has been an almost exclusively federal regime for seventy years allows us to grapple again with questions of federalism in the labor law context, particularly the extent to which and the ways in which state (and local) government should be involved in the development of labor law.<sup>111</sup> Simi-

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<sup>111</sup> Among the critical questions raised by a regime that incorporates state legislation is the likelihood of a "race to the bottom" in which states compete for business on the basis of labor laws that are unfriendly to workers and unions. Scholars have addressed this issue in the contexts of federal environmental regulation and corporate governance. See Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998). We are now in a position to

larly, labor-management experimentation with privately negotiated organizing and recognition agreements will reveal a great deal about the extent to which it is desirable to structure labor policy exclusively around law and regulation and the extent to which private process and private agreement provide viable mechanisms for constructing that policy.

We have, unfortunately, come to conceive of these two choices as binary ones; that is, as choices *between* federal and state or local law and *between* law and private orderings. In the federalism arena, the heavy hand of federal labor preemption doctrine inclines us to such a view. With respect to private process, because employers and unions have turned to contractual agreements out of a desire to avoid the NLRB's regulations, these agreements are largely understood as a replacement for, and thus in conflict with, the regulatory regime. And because the current Board itself views private organizing and recognition agreements as a substitute for its own procedures and governance, it opposes their use and development.<sup>112</sup> Thus, the Board has indicated a desire to limit the ability of unions and employers to privately agree to any recognition process other than a Board-conducted election<sup>113</sup> and to limit the efficacy of unions organized through such alternative processes.<sup>114</sup> The Board has also begun to attack labor and management's ability to reach agreement on organizing and recognition procedures by limiting what unions and employers may discuss prior to recognition.<sup>115</sup>

But we are not limited to these binary choices, and this posture of conflict obscures more nuanced possibilities. Indeed, rather than treating the

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reengage that debate in labor law, and indeed, economists Richard Freeman and Joel Rogers have begun the discussion. See Richard B. Freeman & Joel Rogers, *The Promise of Progressive Federalism*, in REMAKING AMERICA: DEMOCRACY AND PUBLIC POLICY IN AN AGE OF INEQUALITY (J. Soss, J. S. Hacker & S. Mettler eds.) (forthcoming 2007) (manuscript on file with Harvard Law & Policy Review). Another important area of inquiry relates to the ability of state and local law to adequately address an economic order that is increasingly global.

<sup>112</sup> A former member of the NLRB has cautioned that the Board risks sanctioning its own "obsolescence" by allowing such private alternatives to flourish. See Charles I. Cohen, *Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?*, 16 LAB. LAW. 201 (2000).

<sup>113</sup> See *Shaw's Supermarkets*, 343 N.L.R.B. 963, 964 (2004) (raising "policy concerns" with an employer's ability through private agreement to waive his employees' "right" to vote in a Board-conducted election).

<sup>114</sup> See *Dana I*, 341 N.L.R.B. 1283 (2004) (questioning longstanding rule that a union recognized pursuant to a private recognition agreement is entitled to same protection against decertification as a union recognized pursuant to a Board-conducted election).

<sup>115</sup> See ARTHUR ROSENFELD, NLRB, REPORT OF THE GENERAL COUNSEL, 8-12 (2004), available at [http://www.nlr.gov/shared\\_files/Press%20Releases/2004/r2544.pdf](http://www.nlr.gov/shared_files/Press%20Releases/2004/r2544.pdf); *Dana II*, 2005 NLRB LEXIS 174; Counsel for the General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge in *Dana Corporation*, No. 7-CA-46945 (2006) (on file with Harvard Law & Policy Review). This current line of attack is ostensibly grounded in a 1964 Board decision. See *Majestic Weaving*, 147 N.L.R.B. 859 (1964). The Board is also undermining the ability of unions and employers to resolve disputes implicating recognition issues through private processes, suggesting instead that only the Board can adjudicate such matters. *United States Postal Service*, 348 N.L.R.B. 3 (2006).

emerging body of state and local labor legislation as impermissibly in conflict with federal law, and rather than treating privately negotiated processes for organizing and recognizing unions as hostile to the federal regulatory regime, labor law could more productively facilitate and channel decentralization's experimental potential.

One approach to constructing a legal architecture capable of performing this role is a variant of what Michael Dorf and Charles Sabel term "democratic experimentalism." Such a regime would call on the federal government to abandon the highly specified rules it imposes on unions and employers and instead to restate the goals of labor law "with sufficient generality to accommodate refinement through pursuit of effective solutions."<sup>116</sup> Having stated the ends that labor law seeks to achieve, Congress would then authorize local actors—both public and private—to experiment with the means to achieve them. Within this experimentalist mode of labor law, the NLRB would retain an important but fundamentally transformed role. Rather than developing and implementing an essentially unitary set of rules for the entire U.S. labor market, the agency would be tasked with "creating the infrastructure of decentralized learning" and establishing "rolling best practices" that would constitute a floor below which states and private parties could not fall.<sup>117</sup>

The third trend identified here—the disaggregation of labor law's primary function from the NLRA to employment law statutes—constitutes a distinct form of experimentation and offers insight into another question at the structural core of labor law: whether a legal regime that offers strong protection for the nascent phases of workers' organizational activity, but leaves outside of law's domain organizational development and labor-management interaction, is a suitable replacement for the NLRA. In the Danmar example, the FLSA succeeded where the NLRA failed: It

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<sup>116</sup> Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 342 (1998); see generally Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987).

<sup>117</sup> Dorf & Sabel, *supra* note 116, at 345. That is, the Board would survey state and local experiments, provide state and local actors with ready access to information about what their neighbors are doing, and define performance measures by which regimes can be evaluated. Based on its analysis of extant experiments, the Board would promulgate rolling best-practice rules that require regulated entities to "use processes that are at least as effective in achieving the regulatory objective as the best practice identified by the agency at any given time." *Id.* at 345, 350. The continuing federal role in a democratic experimentalist approach to labor law—and particularly the requirement that state and local experiments adhere to (broad) federally established goals—would mitigate though not eliminate the potential "race to the bottom" dynamic identified above. See *supra* note 111. Such a federal role also would be broadly consistent with provisions in federal employment statutes that allow states and localities to offer employees greater—but not lesser—protections and remedies than are offered by the federal law. See, e.g., Americans with Disabilities Act, 42 U.S.C. § 12201(b) (2000) ("Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any . . . law of any State or political subdivision . . . that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.").

provided Arriaga with a quick remedy for illegal discharge, thereby saving the organizing campaign. But once the first phase of organizing is complete—once the workers have collectively secured minimum wage and overtime pay—the FLSA (and other employment statutes like it) offers no legal protection at all. Nonetheless, recent research into the dynamics of reciprocity and collective efficacy provides reason to believe that if initial attempts at collective action in the workplace are insulated from coercive employer interference, subsequent organizational development and stronger forms of collective action may be possible even absent additional legal guarantees.<sup>118</sup> Accordingly, and given the NLRA's multiple pathologies,<sup>119</sup> a federal labor law tailored along these lines has significant potential that merits investigation.<sup>120</sup>

### B. Conceptual Promise

Exploration of the developments I have identified here also promises major conceptual payoffs. First, a successful model of labor law experimentalism may shed new light on democratic experimentalism itself. Rather than a single mode of experimentation, my model of labor law experimentalism anticipates plural and concurrent forms of experimentation, carried out by multiple actors and assessed by multiple decision makers. Thus, states, local governments, and private parties are all experimenting, at the same time, with how best to structure union organizing and recognition processes. Concurrently, workers are looking outside of “labor law” for protection for their nascent efforts at organization, and are raising another set of structural questions and possibilities about labor law's future. Reconstructing labor law along experimentalist lines will require attention to whether and how such experimental diversity can be incorporated into a single experimentalist framework and whether a friendly amendment to Dorf and Sabel will be in order.

Moreover, the experience of the Houston janitors, and the proliferation of privately negotiated agreements that govern union organizing and recognition, are highly relevant to the study of “the private role in public governance,” and particularly to the theory of responsive regulation.<sup>121</sup> Ian Ayres and John Braithwaite, for example, argue that an administrative agency can rely on self-regulation and grant regulated entities “the dis-

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<sup>118</sup> On reciprocity, see, for example, Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71 (2003); Armin Falk, Ernst Fehr & Urs Fischbacher, *Testing Theories of Fairness—Intentions Matter* 6–12 (University of Zurich, Working Paper No. 63, 2000). On collective efficacy, see, for example, ALBERT BANDURA, SELF EFFICACY 477–84 (1997); Norbert L. Kerr, “Does My Contribution Really Matter?": Efficacy in Social Dilemmas, 7 EUR. REV. SOC. PSYCH. 209 (1996).

<sup>119</sup> See, e.g., *supra* note 4.

<sup>120</sup> I examine this potential in *Employment Law as Labor Law*, *supra* note 8.

<sup>121</sup> See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); see also IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* (1992).



cretion and responsibility . . . to achieve [regulatory] goal[s]" only when the government agency possesses a "big gun" of enforcement power—that is, when the agency has access to extremely powerful sanctions.<sup>122</sup> And yet, while the NLRA stands as the leading example of an agency lacking anything approaching a big gun, successful self-regulation by unions and employers is increasingly (and with much apparent success) coming to define the regime.

Finally, the Danmar campaign and workers' use of employment statutes as the legal guardian of their collective action offer insight into a perhaps even more fundamental query; namely, the compatibility of individual rights and collective action.<sup>123</sup> Proponents of collective action and unionism have long looked askance at statutory and judicial protection for the individual rights of workers. This skepticism traces back to the nineteenth and early twentieth centuries, when courts routinely enjoined union activity and invalidated legislation designed to secure workers' collective rights in the name of protecting workers' individual right to contract.<sup>124</sup> In the modern era, Nelson Lichtenstein, for example, sees the "discourse of 'rights'" as having a "powerfully corrosive impact on the legitimacy of the union idea."<sup>125</sup>

The campaign at Danmar and others like it provide a contemporary window into the relationship between individual rights and collective action and allow us to reexamine whether statutory and judicial protection for individual employee rights is in fact inconsistent with the union idea. The success of these campaigns gives us some preliminary empirical reasons to reject the traditional skepticism.

More than this, though, the campaigns invite new conceptual inquiry into *how* the protection of individual workplace rights and individual rights claimsmaking by workers can facilitate collective action.<sup>126</sup> Recent socio-

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<sup>122</sup> AYRES & BRAITHWAITE, *supra* note 121, at 38–45.

<sup>123</sup> For purposes of this cursory discussion, I accept the convention, common among labor scholars, of referring to employment law rights as individual rights. This categorization is not without its own problems, but a discussion is beyond the scope here. *See generally* Leighton McDonald, *Can Collective and Individual Rights Coexist?*, 22 MELB. U. L. REV. 310 (1998); Robert Post, *The Structure of Academic Freedom*, in ACADEMIC FREEDOM AFTER SEPTEMBER 11 61, 63–64 (Beshara Doumani ed., 2006); Robert C. Post, *Democratic Constitutionalism and Cultural Heterogeneity*, 25 AUSTL. J. LEGAL PHIL. 185, 191–201 (2000).

<sup>124</sup> *See, e.g.*, *Adair v. United States*, 208 U.S. 161, 174–75 (1908); *Plant v. Woods*, 57 N.E. 1011 (Mass. 1900); *Vegelahn v. Gunter*, 44 N.E. 1077 (Mass. 1896); *State ex rel. Zillmer v. Kreutzberg*, 90 N.W. 1098, 1104 (Wis. 1902). *See generally* William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Guilded Age*, 1985 WIS. L. REV. 767; William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1111 (1989).

<sup>125</sup> NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 141 (2002); *see also* Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Law, Liberalism and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1 (1999); *but see* GORDON, *supra* note 100, at 148–85.

<sup>126</sup> For a related discussion, *see* GORDON, *supra* note 100, at 148–85.

logical and social-psychological work on collective action framing<sup>127</sup> and collective identity formation<sup>128</sup> provide important tools to guide this inquiry.

## VI. CONCLUSION

There have been numerous calls to reimagine labor law, but we have yet to recognize that the raw materials for reinventing the field are available to us already. The three trends outlined in this Essay provide a rich and underutilized source of material for this project. In a series of forthcoming articles, I intend to explore more fully each of these trends along with the structural and theoretical issues they raise about the future of labor law. I will also propose an experimentalist model of labor law reform that provides a way to involve federal, state, and local governments and private actors in a cooperative venture to improve the regime.

In anticipating this broader project, it is important to observe here that although many commentators—and even some labor law scholars—have given up on workers' collective action, a pragmatic assessment of the state of the field reveals that the desire for organization and collective interaction is alive and well. Certainly, the particular forms employee organization takes, the ways in which workers interact with their employers, and the legal channels through which organizing and labor-management negotiation occur, must all undergo continuing reinvention. But the trends outlined in this Essay reveal that even a deeply dysfunctional labor law has not suppressed the demand for organization.

It is my view, moreover, that workers' collective action, broadly defined, has multiple virtues that legitimate reinvigorated legal protection.<sup>129</sup>

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<sup>127</sup> See, e.g., Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611, 615 (2000); Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s*, 111 AM. J. SOC. 1718, 1719 (2006); David A. Snow, et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464 (1986).

<sup>128</sup> See, e.g., Bert Klandermans & Marga de Weerd, *Group Identification and Political Protest*, in SELF, IDENTITY AND SOCIAL MOVEMENTS 68 (Sheldon Stryker, Timothy J. Owens & Robert W. White, eds., 2000); Bernd Simon, *Individuals, Groups, and Social Change: On the Relationship Between Individual and Collective Self-Interpretations and Collective Action*, in INTERGROUP COGNITION AND INTERGROUP BEHAVIOR 257 (Constantine Sedikides, John Schopler & Chester A. Insko eds., 1998).

<sup>129</sup> Such a definition of workers' collective action encompasses collaborative endeavors intended to achieve workplace "goods" (improvements in wages, benefits, and working conditions, as well as increased voice in the life and governance of the firm) that would not be achievable through the efforts of individual workers acting alone. As evidenced particularly by my account of the Danmar Finishing campaign, I do not equate workers' collective action with traditional forms of unionism. To the contrary, the term includes collective acts far more nascent: pickets, demonstrations, collective protests, and even group demands made on an employer. The term, of course, also includes more fully developed organizational activity, but is broad enough to encompass multiple forms of organization, or what Dorothy Sue Cobble calls "unionisms." See Dorothy Sue Cobble, *Lost Ways of Unionism: Historical Perspectives on Reinventing the Labor Movement*, in REKINDLING THE MOVE-

Although nothing approaching a full discussion is possible here, when workers bargain collectively with their employers, they can achieve wage and benefit gains that have critical redistributive effects.<sup>130</sup> In certain settings, organization and collective bargaining also can correct market failures that inhere in individual employment contracting.<sup>131</sup> Developed forms of worker organization also have important implications for democracy: Successful unions can serve as schools for democratic participation, and can give electoral voice to segments of the citizenry that might otherwise remain silent.<sup>132</sup>

For these reasons, among others, it would be a profound mistake for labor law and labor law scholarship to abandon collective action. To the contrary, workers' collective action, in its highly variable incarnations, is labor law's central project and one that merits the work of reinvention proposed herein.

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MENT: LABOR'S QUEST FOR RELEVANCE IN THE TWENTY-FIRST CENTURY 83 (Lowell Turner, Harry C. Katz & Richard W. Hurd eds., 2001).

<sup>130</sup> See, e.g., RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 43–61 (1984); Michael H. Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 100 YALE L.J. 2767, 2790–91 (1991) (reviewing PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990)). Redistribution achieved through workplace organization and action, moreover, has different social and political valences than does redistribution achieved through taxes and transfers. See, e.g., Gottesman, *supra*, at 2790–93.

<sup>131</sup> For an excellent discussion, see Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 U. PA. L. REV. 1953 (1996).

<sup>132</sup> See generally HERBERT B. ASHER, ERIC S. HEBERLIG, RANDALL B. RIPLEY & KAREN SNYDER, AMERICAN LABOR UNIONS IN THE ELECTORAL ARENA (2001).