The "Necessary and Desirable Counterpart": Implementing a Holmesian Perspective of Labor Rights as Human Rights

Tim Louris†

"In a case like the present, it seems to me that, whatever the true result may be, it will be of advantage to sound thinking to have the less popular view of the law stated . . . ."[1]

Modern labor laws, developed during the bygone era of a predominantly white, male, middle-class workforce, have stood largely unchanged for more than half a century.[2] Meanwhile, globalization, increased capital mobility, technological innovation, and the modern era of free trade policy have transformed a country built on industry and manufacturing to one of contingent workers, service employees, and professionals.[3] In addition, the demographics of the U.S. workforce have undergone radical transformations over the last few decades.[4] Today's labor pool is much more diverse; and more women, immigrants, older workers, and part-time workers in the workforce means that traditional bastions of union organizing (i.e., white men) are the exception to the rule in many industries.[5]

An important aspect of the changing composition of the labor force and concurrent increase in corporate power is that laws

---

†. J.D. expected 2010. The author would like to thank Brendan D. Cummins for his ideas and insights on the history and future prospects of the labor movement. The author would also like to thank the editors and staff of *Law & Inequality: A Journal of Theory and Practice* for their tireless efforts.

1. Vegelahn v. Gunter, 44 N.E. 1077, 1079 (Mass. 1896) (Holmes, J., dissenting).

2. In 1947, Congress amended the National Labor Relations (Wagner Act) with the Labor Management Relations Act (Taft-Hartley Act) which, under the guise of protecting an employer's freedom of speech, was designed to provide management with more tools to oppose unionization. 29 U.S.C. §§ 141–87 (2006). Together, these two Acts compose the National Labor Relations Act (NLRA).

3. *See* William John Bux & Miranda Tolar, *Houston Janitors and the Evolution of Union Organizing*, 70 TEX. B. J. 426, 426 (2007).

4. *See* Marion Crain & Ken Matheny, *"Labor's Divided Ranks": Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1542–44 (1999).

5. *Id.*

intended to level the playing field between employers and their white, male employees—specifically the National Labor Relations Act of 1937 (NLRA)—are reduced to toothless tools of management.[6] Penalties for labor law violations are now considered a cost of doing business,[7] and some argue that "American labor law has failed to make good on its promise to employees that they are free to embrace collective bargaining if they choose."[8]

The labor/management playing field needs to be re-leveled.[9] However, as this Article argues, the current U.S. paradigm of labor relations—where labor/management issues are viewed through an economic lens that ultimately affords capitals' interests a higher value than workers' rights—must first be deconstructed. Towards that end, this Article adopts as a foundational premise the labor/management dialectic posited by then-Massachusetts Supreme Court Justice Oliver Wendell Holmes in his *Vegelahn v. Gunter*[10] dissent. Justice Holmes asserted that collective action necessarily provides workers in a capitalist, free market society with the means to engage in the "free struggle for life."[11] According to Justice Holmes, "if the battle is to be carried on in a fair and equal way," public policy must encourage collective worker action as the "necessary and desirable counterpart" to the universally condoned and encouraged practice of combining sources of capital.[12] This Article argues for meaningful labor law reform that seeks to achieve this Holmesian labor/management relations structure based on the idea that labor rights are fundamental human rights.

---

6. Sen. Edward M. Kennedy, *Leveling the Playing Field for American Workers: The Employee Free Choice Act*, THE MAGAZINE OF THE LERA-ONLINE COMPANION, Fall 2005, http://www.lera.uiuc.edu/Pubs/Perspectives/onlinecompanion/fall05-Kennedy%20Article.htm; *see* Sen. Arlen Specter & Eric S. Nguyen, *Representation Without Intimidation: Securing Workers' Right to Choose Under the National Labor Relations Act*, 45 HARV. J. ON LEGIS. 311, 321 (2008).

7. *See* Kennedy, *supra* note 6.

8. Specter & Nguyen, *supra* note 6, at 311 (citing Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1770 (1983)).

9. *Id.* at 312 ("Union membership has dropped from approximately thirty-three percent of workers in 1955 to only twelve percent in 2007[, and] many scholars have argued that worker organization has been suppressed by employer hostility and by shortcomings in the remedies provided . . . in the face of that hostility.").

10. 44 N.E. 1077 (Mass. 1896) (Holmes, J., dissenting).

11. *Id.* at 1081 (Holmes. J., dissenting).

12. *Id.*

It is well known that union membership has been in sharp decline since the 1970s, and many scholars have discussed at length the reasons for diminished union membership.[13] Whatever the cause of this steady decline, one thing remains clear: U.S. labor law "remains steadfast in the face of these changes, behaving as if class consciousness and class solidarity were the only relevant forms of collective worker protest."[14] To be sure, modern workers remain economically exploited based on class divisions.[15] Yet, issues such as expanding economic inequality and increasing diversity in the workforce have supplied employers with a greater ability to divide and conquer the traditionally "united front" of unionism.[16]

While Justice Holmes advocated free competition between capital and labor, he was sure to point out that the "policy is not limited to struggles between persons of the same class, competing for the same end."[17] As such, U.S. labor law policies should "appl[y] to all conflicts of temporal interests."[18] Fundamentally, Justice Holmes' nineteenth century vision of labor relations—in which the law must regard the rights of capital and labor equally—remains relevant today. Additionally, his vision calls for relaxed regulations on workers' rights to organize and strike, enhanced remedial provisions for workers whose labor rights are violated, and enhanced penalties for employers that violate workers' basic human rights in the workplace.[19]

To meaningfully realize a Holmesian view of labor relations, labor rights must receive the same level of protection and enforcement as other universally recognized human rights in the workplace, such as freedom from sex or race-based discrimination

---

13. Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 362–77 (2002) (positing such factors as globalization, changing workforce composition, rise in contingent workers, employer opposition to unions, deficiencies in enforcement of labor rights, and even "the rugged individualism of the American psyche" as reasons for the decline in union membership). *See generally* Susan L. Dolin, *Lockouts in Evolutionary Perspective: The Changing Balance of Power in American Industrial Relations*, 12 VT. L. REV. 335 (1987) (discussing the evolution of labor relations in the United States).

14. *See* Crain & Matheny, *supra* note 4, at 1542–44.

15. *Id.*

16. *Id.*

17. *Vegelahn*, 44 N.E. at 1081 (Holmes, J., dissenting).

18. *Id.*

19. Justice Holmes' vision called for penalities beyond those contained in legislation that is the subject of this Article. *See* Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009).

and harassment.[20] A law can only be as strong as its enforcement mechanisms; therefore, remedial provisions must sufficiently deter employers from discriminating against employees who assert their right to organize.[21]

Part I of this Article asserts that labor rights are human rights and are recognized as such throughout the globe. The United States, while acknowledging this concept through its support of international treaties, has systematically failed to promote workers' rights within its borders, with the ineffective remedies and commercial agenda of the NLRA largely to blame.

In Part II, this Article outlines the basic history of U.S. labor law in order to point out specific moments that have reduced the statutory framework for protecting collective worker action—previously considered a kind of illegal conspiracy—to a set of rules that does little more than allow production to continue while workers' issues are handled.

Next, Part III argues that U.S. labor law should reflect other successful laws governing human rights in the workplace, specifically Title VII of the Civil Rights Act of 1964 (Title VII),[22] in order to reestablish the labor/management equilibrium that early proponents of labor laws imagined.

Part IV provides a brief analysis of the Employee Free Choice Act (EFCA)[23] and argues that, even though EFCA's provisions are a step in the right direction, its enhanced protections for workers' rights will not adequately protect workers who assert the right to organize and collectively bargain with their employers.

I. Labor Rights Are Human Rights

A. International Recognition of Labor Rights as Human Rights

As noted by Human Rights Watch, "[h]uman rights cannot flourish where workers' rights are not enforced."[24] Reflecting this

20. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to e-17 (2006); *see also* Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71–77, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

21. *See* National Labor Relations (Wagner) Act, 29 U.S.C. § 151 (1938) (outlining policy interests in encouraging collective bargaining between management and labor).

22. 42 U.S.C. § 2000e-2 (2006).

23. H.R. 1409, 111th Cong. (2009).

24. Lance Compa, *Unfair Advantage: Workers' Freedom of Association Under International Human Rights Standards*, HUM. RTS. WATCH, Aug. 2000, at 10. This study also emphasizes the point that, while workers in the United States generally

fundamental correlation of worker and human rights, labor rights are recognized in many international documents, such as the Universal Declaration of Human Rights, which contains a provision expressly upholding the right to form and join trade unions in the workplace.[25] International labor standards can also be found in International Labor Organization (ILO) conventions,[26] the International Covenant on Civil and Political Rights,[27] the International Covenant on Economic, Social and Cultural Rights,[28] and the North American Agreement on Labor Cooperation.[29] Each of these standards recognizes the concept that not only is freedom of association in the workplace central to human standards of dignity, but that workers' rights are an essential component of a healthy democracy.[30]

Indeed, "[f]reedom of association is the bedrock workers' right under international law on which all other labor rights rest."[31] Governments around the globe are afforded the affirmative task of keeping the power of labor and capital balanced in the private sector: "States are . . . obligated [under the International Covenant on Civil and Political Rights, ratified by the United States] to

---

are not subjected to "gross human rights violations where death squads assassinate trade union organizers or collective bargaining and strikes are outlawed," the U.S. government, through a "sustained attack" on workers' rights, has failed to meet its obligation to "deter such attacks and protect workers' rights." *Id.* at 12.

25. Article 23 states that "[e]veryone has the right to form and join trade unions for the protection of his interests." Universal Declaration of Human Rights, *supra* note 20, art. 23. The objective of this provision stands in notable contrast to the stated goal of the NLRA, which protects employee organization not for the protection of the worker's interest, but because it "safeguards commerce from injury . . . ." *See* 29 U.S.C. § 151 (2006).

26. *See, e.g.*, ILO Declaration on Fundamental Principles and Rights at Work, June 18, 1998, 37 I.L.M. 1233 (1998) (acknowledging the importance of labor rights in the field of human rights).

27. Article 22 states, "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." International Covenant on Civil and Political Rights art. 22, *adopted* Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171.

28. Article 8 ensures "[t]he right of everyone to form trade unions and join the trade union of his choice . . . for the promotion and protection of his economic and social interests." International Covenant on Economic, Social and Cultural Rights art. 8, *adopted* Dec. 16, 1966, S. Exec. Doc. D, 95-2 (1978), 993 U.N.T.S. 3.

29. Enacted as a supplemental agreement to the North American Free Trade Agreement, the Preamble to the North American Agreement on Labor Cooperation (NAALC) asserts that one of its main goals is to "*protect*, enhance and enforce basic workers' rights." North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Sept. 8, 1993, 32 I.L.M. 1499 (1993).

30. James Atleson, *The Voyage of the* Neptune Jade*: The Perils and Promises of Transnational Labor Solidarity*, 52 BUFF. L. REV. 85, 86 (2004).

31. Compa, *supra* note 24, at 19.

protect the formation or activities of association against interference by private parties."[32]

International human rights laws also provide protections against repression of workers' rights to organize,[33] and thus government authorities may not "harass workers, arrest them, imprison them, or physically abuse or kill them for such activities."[34] Furthermore, international law mandates that governments take sufficient steps to ensure that workers' rights to organize are protected by providing adequate remedial provisions for workers whose rights have been violated.[35]

The United States has, at least outwardly, stood behind the principles contained in these documents.[36] For example, the United States has been a strong supporter[37] of the ILO's 1998 Declaration of Fundamental Principles and Rights at Work (Declaration),[38] which states:

> Whereas, in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned, to claim freely and on the basis of equality of opportunity, their fair share of the

---

32. *Id.* at 20 (noting that the United States unsuccessfully proposed a provision which would only protect the freedom of association from governmental interference) (quoting Manfred Nowak, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 387 (1993)); *see also* International Covenant on Civil and Political Rights, *supra* note 27, art. 2 (providing that each signatory State "undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant"). Although it became a signatory in 1977, the United States did not ratify the Covenant on Civil and Political Rights until 1992, and only after President Bush proposed a number of reservations that undermined many of the rights the Covenant sought to protect. John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1288–90 (1993).

33. *See, e.g.*, International Covenant on Economic, Social and Cultural Rights, *supra* note 28 (requiring signatory States to take affirmative steps to ensure protection of labor rights, including the right to strike).

34. Compa, *supra* note 24, at 23.

35. *See, e.g.*, International Covenant on Civil and Political Rights, *supra* note 27, art. 2(3)(a) ("Each State Party to the present Covenant undertakes . . . . [t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an *effective* remedy . . . ." (emphasis added)).

36. *See* Compa, *supra* note 24, at 59.

37. *See* ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN COUNCIL FOR INTEGRAL DEVELOPMENT, STRENGTHENING THE CAPACITIES OF THE MINISTRIES OF LABOR TO RESPOND TO THE CHALLENGES OF PROMOTING DECENT WORK IN THE CONTEXT OF GLOBALIZATION 6–7 (2007) (outlining the U.S. Department of Labor's efforts to promote the rights contained in the Declaration).

38. ILO Declaration on Fundamental Principles and Rights at Work, *supra* note 26.

> wealth which they have helped to generate, and to achieve fully their human potential.[39]

In addition, the ILO Declaration reinforces the affirmative duty of governments to enforce labor rights as human rights:

> [A]ll Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining . . . .[40]

Subsequent to the U.S. ratification of the ILO Declaration, U.S. Department of Labor Secretary Alexis M. Herman commented, "[w]e know that the fundamental rights of workers . . . ought be [sic] implemented by all nations, and certainly by all who would claim to be members in good standing of this organization."[41] Secretary Herman justified this call to action based on ideas of global economic growth, political interests in providing workers a chance to participate in economic globalization, and core values of basic dignity and respect of these rights.[42]

The reality for many U.S. workers however, is that dignity and respect in the workplace are the exception to the rule,[43] as the United States has hesitated to adopt domestically the labor standards that it seeks to impose on other nations.[44] Even while accepting ILO jurisdiction over complaints of workers' rights violations, the United States has largely ignored recommendations to ratchet up enforcement of labor rights within its borders.[45] In 1999, after holding to the proposition that domestic labor practices are "in general conformance" to international standards in prior

---

39. *Id.*

40. *Id.*

41. Alexis M. Herman, U.S. Sec'y of Labor, Statement at the International Labor Conference (June 9, 1998) (transcript *available at* http://www.dol.gov/oasam/programs/history/herman/speeches/980609ah.htm).

42. *Id.*

43. *See, e.g.*, Compa, *supra* note 24, at 9 (quoting Ernest Duval, a worker who was discriminatorily fired in 1994 for union activities: "I know the law gives us rights on paper, but where's the reality?").

44. *Id.* at 60.

45. *See* INTERNATIONAL LABOUR OFFICE, FREEDOM OF ASSOCIATION IN PRACTICE: LESSONS LEARNED 87 (2008) (highlighting the United States' failure to ratify two universally accepted ILO Conventions which protect the right to organize: No. 87—Freedom of Association and Protection of the Right to Organise Convention (1948) and No. 98—Right to Organize and Collective Bargaining Convention (1949)).

years, the United States "acknowledged for the first time that 'there are aspects of [the U.S. labor law] system that fail to fully protect the rights to organize and bargain collectively of all employees in all circumstances.'"[46]

Despite the United States' fine rhetoric about the virtues of labor rights enforcement, economic forces—such as modern free trade policies—have effectively shifted the balance of power from workers to capital interests. Of course, in an era defined by globalization and capital mobility, workers are exceedingly affected by international trade policies.[47] Free trade policies "greatly restrict[] a nation's ability to implement or enforce provisions for worker protection"[48] because setting the bar too high hampers trade and impedes the power of commerce. Thus, in an effort to remain economically viable in an increasingly global market, the United States has declined opportunities to become a signatory to several international labor agreements.[49]

As one commentator noted, "laws that fail to provide minimum labor standards, a decent or even subsistence level minimum wage, or which provide obstacles to union organization create a domestic trade advantage, discriminating against those nations that do set minimum wages or accord association rights consistent with [ILO] standards."[50] Effectively enforcing labor standards may impede a nation's ability to maintain a competitive trade advantage, and therefore, some countries may not adequately enforce international labor standards "due to the pressures of international trade competition."[51]

---

46. Compa, *supra* note 24, at 60–61, (citing UNITED STATES, ANNUAL REPORT TO THE ILO (1999)); *see also* Justin D. Cummins, *Invigorating Labor: A Human Rights Approach in the United States*, 19 EMORY INT'L L. REV. 1, 7–31 (2005) (arguing that domestic labor law can overcome its impotency through enforcement of international labor standards such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights).

47. *See* Atleson, *supra* note 30, at 91.

48. *Id.*

49. *See id.* at 92 ("[T]he United States has been reticent to sign on to the vast majority of [ILO] documents. The United States has approved only seven ILO documents, placing near the bottom of nations affirming international labor rights documents."); INTERNATIONAL LABOR ORGANIZATION, RATIFICATIONS OF THE FUNDAMENTAL HUMAN RIGHTS CONVENTIONS BY COUNTRY 1 (2009), *available at* http://www.ilo.org/ilolex/english/docs/vdeclworld.htm.

50. Atleson, *supra* note 30, at 91.

51. *Id.* at 93. To avoid the feared "race to the bottom" that necessarily occurs in the absence of comprehensive enforcement of international labor standards, some progressive legislators in 1999 drafted a congressional resolution that outlined principles for a sustainable global economy founded on labor rights and environmental protections; however, the Resolution was not enacted. Global Sustainable Development Resolution, H.R. Res. 479, 106th Cong. (2000).

B. Modern Free Trade and Economic Policies Fail to Recognize that Labor Rights Are Integral to Human Dignity

As one scholar noted, "[t]he current hegemony and acceptance of [prioritizing capital interests] makes it difficult to raise claims based upon what may be seen as 'weak' arguments based on human dignity, democratic values, justice, and worker rights."[52] Some maintain that the free market, left to its own devices, will "necessarily order and allocate rights efficiently,"[53] and inequalities between the haves and the have-nots that stem from competitive free trade are a natural and acceptable result of individual autonomy in the workplace.[54] Individual freedom of contract, therefore, is the preferred model for an efficient and productive labor market.[55] Under this model, unions function as labor cartels,[56] unfairly suppressing market forces to the

---

52. Atleson, *supra* note 30, at 93.

53. *See* Anne Marie Lofaso, *Toward a Foundational Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 MO. L. REV. 1, 50 (2007); *see also* Atleson, *supra* note 30, at 20–26 (discussing and critiquing free market economic theories as applied to the labor market).

54. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 162–63 (1962) (characterizing income inequality as the "equalizing difference[]" that corresponds to market participants' "net advantages" and is the desirable result of properly functioning markets); Ronald H. Coase, The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel, Prize Lecture: The Institutional Structure of Production (Dec. 9, 1991), (transcript *available at* http://nobelprize.org/nobel_prizes/economics/laureates/1991/coase-lecture.html) (upholding the central tenet of economist Adam Smith's "invisible hand" theory of market efficiency). "The economy could be co-ordinated by a system of prices (the 'invisible hand') and, furthermore, with beneficial results." *Id.* However, "to be completely effective, the invisible hand requires perfectly competitive markets," which do not exist in reality. STEPHEN BEFORT & JOHN BUDD, INVISIBLE HANDS, INVISIBLE OBJECTIVES 132 (2009). Furthermore, even Adam Smith understood that the human aspect of the labor market necessitated some level of government regulation in the form of a minimum wage. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 71–72 (C.J. Bullock ed., P.F. Collier & Son 1909) (1836) ("But though in disputes with their workmen, masters must generally have the advantage, there is however a certain rate below which it seems impossible to reduce, for any considerable time, the ordinary wages even of the lowest species of labor.").

55. *See* FRIEDMAN, *supra* note 54, at 123–25 (arguing that union power to raise wages for one sector of the workforce unfairly disadvantages other sectors); George C. Leef, *Workers and Unions—How About Freedom of Contract?*, FREEMAN, Dec. 1992, at 1, *available at* http://www.thefreemanonline.org/columns/workers-and-unions-how-about-freedom-of-contract.

56. *E.g.*, James Sherk, *What Unions Do: How Labor Unions Affect Jobs and the Economy*, BACKGROUNDER, May 21, 2009, *available at* http://www.heritage.org/Research/Labor/ bg2775.cfm (arguing that unions operate as labor cartels, artificially inflating the price of labor in a given market, while simultaneously reducing investments, jobs, and profits to the detriment of society as a whole); United Rentals Highway Techs., Inc. v. Ind. Constructors, Inc., 518

detriment of businesses, and thus communities.[57] In opposition to this viewpoint, proponents of labor rights point out what some see as a "race to the bottom" that results in an unregulated market, which necessarily subjugates workers' autonomy and dignity to the interplay of markets in order to maximize profits.[58] The free trade model views business efficiency and wealth as the only legitimate ends and disregards worker dignity and autonomy as equally valid goals of public policy.[59]

Under freedom of contract and free trade systems, however, "the market fails to (1) treat 'individuals as persons of independent moral worth,' or (2) provide each person with opportunities 'to bring meaning to his or her life through work.'"[60] These conclusions stem from the principle that any adverse employment action taken against a worker will have a direct and substantial effect on the worker's sense of self-worth, even if the adverse action was economically motivated and not based on the worker's personal shortcomings.[61] From this perspective, in an at-will employment setting, the worker's sense of dignity is at the mercy

---

F.3d 526, 531 (7th Cir. 2008) ("[C]ollective bargaining agreements . . . are held not to violate the Sherman Act, to avert too sharp a clash between antitrust and labor policies, even though such agreements affect the prices and output of goods and services, just as sellers' cartels do, by driving wages above competitive levels." (citations omitted)); FRIEDMAN, *supra* note 54, at 124–25 ("[Some unions] are better interpreted as enterprises selling the services of cartellizing an industry than as labor organizations.").

57. *E.g.*, Posting of Richard Posner to The Becker-Posner Blog, *Can the United Auto Workers Survive?*, http://www.becker-posner-blog.com/archives/2008/12/can_the_united.html (Dec. 28, 2008, 16:26 EST) ("I don't think there's much to be said on behalf of unions, at least under current economic conditions."). *But see* United Mine Workers v. Pennington, 381 U.S. 676, 723 (1965) (Goldberg, J., dissenting) ("The very purpose and effect of a labor union is to limit the power of an employer to use competition among workingmen to drive down wage rates and enforce substandard conditions of employment."); RICHARD POSNER & FRANK EASTERBROOK, ANTITRUST 31 (2d ed. 1981) ("The main purpose of labor unions is to raise wages by suppressing competition among workers . . . .").

58. Lofaso, *supra* note 53, at 21–22. As employers lower wages in order to compete in the global market, other countries are more likely to lower labor standards to remain viable economic competitors abroad. *See* Befort, *supra* note 13, at 352.

59. *See* K. WILLIAM KAPP, THE SOCIAL COSTS OF PRIVATE ENTERPRISE 49 (1950) ("[T]he entrepreneur, in his desire to reduce the costs of production as far as possible, will generally be reluctant to consider the impairment of the physical and mental capacities of his laborers as part of the costs of his enterprise."); Lofaso, *supra* note 53, at 22.

60. Lofaso, *supra* note 53, at 30 (citing HUGH COLLINS, JUSTICE IN DISMISSAL 153 (Paul Davies et al. eds., 1992)).

61. *Id.* at 29.

of the employer, and workers as a group are denied meaningful opportunities to participate in their own livelihoods.[62]

Interestingly, Justice Holmes' vision of workers' right to organize and collectively bargain is not totally incompatible with some aspects of freedom of contract and free trade principles.[63] In fact, injecting a Holmesian model of collective labor rights into trade policies would uphold a more genuine freedom of contract for workers who would gain collective power to avoid employment-based adhesion contracts.[64] Justice Holmes' model places labor's interests on the same plane as capitalism's profits: "The right to trade freely is appropriately conditioned on respecting the rights of association,"[65] that is, "if the battle is to be carried on in a fair and equal way."[66] Justice Holmes argued that workers should collectively uphold standard levels of decency and dignity in the workplace, even at the expense of capital's ability to remain competitive:

> The policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business by some means, when the damage is done, not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade.[67]

Thus, in the same manner that capital combines as a means of gaining economic power in the global free trade market—to the detriment of competitor businesses and even nations—labor should combine in order to give workers an opportunity to enter

---

62. *Id.* Lofaso points out that some employers, recognizing the fact that workers are not likely to abide by management's total control over employment decisions, have implemented programs to allow increased employee participation; however, such schemes are usually "designed to persuade workers to accept decisions already made by management." *Id. See also* KAPP, *supra* note 59, at 49–66 (illustrating how the weaker bargaining position of workers in an at-will system requires workers to bear physical and mental depreciation costs, including occupational diseases and injuries).

63. *See* Risa L. Lieberwitz, *Linking Trade and Labor Standards: Prioritizing the Right of Association*, 39 CORNELL INT'L L.J. 641, 644–50 (2006). *But see* Adkins v. Children's Hosp., 261 U.S. 525, 567–68 (1923) (Holmes, J., dissenting) (arguing against the Court's invocation of rigid "liberty of contract" principles in striking down minimum wage laws).

64. Lieberwitz, *supra* note 63, at 650 ("[U]nder no legitimate conception of freedom of contract is it required that employers have an advantageous bargaining position over individual employees.").

65. *Id.*

66. Vegelahn v. Gunter, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting).

67. *Id.*

into fair and free employment-based contracts with powerful corporations.[68]

For that level of equilibrium to occur, however, the law must provide enforcement mechanisms that will effectively deter labor law violations. In essence, the law must recognize, value, and protect the human element of labor.[69] Without adequate protection, labor provided by the working population, especially the low-wage and immigrant sectors, is indeed regarded as a "commodity" to be bought at the lowest possible rate.

---

68. *Id; see also* Brown v. Pro Football, Inc., 518 U.S. 231, 253 (1996) (Stevens, J., dissenting) ("The basic premise underlying our national labor policy is that unregulated competition among employees and applicants for employment produces wage levels that are lower than they should be."); BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE 66–68 (1998) (outlining economist Robert Lee Hale's belief that, because of the prevalence of laws intended to boost corporate power, "it was simply untrue that the so-called unregulated state *was* formally evenhanded in its treatment of citizens.").

69. Both Congress and the Supreme Court have recognized the human value and unique characteristics that render traditional market regulations inapplicable to labor. For example, based on the idea that "[t]he labor of a human being is not a commodity or article of commerce," Congress exempted labor organizations from the Sherman Act's provisions intended to prohibit monopolies in interstate commerce. Clayton Act, 15 U.S.C. § 17 (1914). Labor's exemption from antitrust liability has since been broadly interpreted based, at least partly, on the principle that workers must be allowed to organize against capital's economic interests to further the NLRA's stated policies of promoting workers' rights. *See id.*; *see also* Norris-LaGuardia Act, 29 U.S.C. §§ 104–05 (1932) (limiting courts' power to issue injunctions against collective worker action); *Pro Football*, 518 U.S. at 253 (Stevens, J., dissenting) ("[U]nregulated competition among employees and applicants for employment produces wage levels that are lower than they should be . . . . [The Clayton and Norris-LaGuardia Acts] were enacted to enable collective action by union members to achieve wage levels that are higher than would be available in a free market."); Connell Constr. Co. v. Plumber & Steamfitters Local 100, 421 U.S. 616, 622–23 (1975) (outlining the judicially created "non-statutory" labor exemption from federal antitrust law intended to broaden the scope of the explicit statutory exemption in order to facilitate national labor relations policies). Interestingly, in a dissent, Justice Brandeis echoed Holmes' *Vegelahn* dissent that common law actions for damage to business and antitrust claims are inherently inapplicable to collective, non-violent worker action:

> May not all with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standard of living and the institution which they are convinced supports it? Applying common law principles the answer should, in my opinion, be: Yes, if as a matter of fact those who co-operate have a common interest . . . . It is conceded that, although the strike of the workmen in plaintiff's factory injured its business, the strike was not an actionable wrong; because the obvious self-interest of the strikers constituted a justification.

Duplex Printing Press Co. v. Deering, 254 U.S. 443, 481 (1921) (Brandeis, J., dissenting). Further, Brandeis' dissent in *Duplex Printing* is credited as the foundation for Congress' enactment of early twentieth century labor laws. *See Pro Football*, 518 U.S. at 236 ("As a matter of history, Congress intended the labor statutes . . . in part to adopt the views of dissenting Justices in *Duplex Printing* . . . .").

This situation is where labor law finds itself today. Violations of labor standards run rampant as workers are devalued, and discriminatory threats, intimidation, and firings[70] are the modus operandi of companies that profit from inadequate enforcement of labor laws. The next Part of this Article analyzes the current inadequacies in the NLRA and demonstrates that worker's rights in the United States do not currently meet minimum labor standards.

II. United States Labor Law Cannot Protect Twenty-First Century Workers' Rights

The first step toward meaningfully enforcing workers' rights is recognizing that the law must value collective worker action as a means of promoting a higher standard of living for the working class. The stated policy behind the enactment of the NLRA was not to protect workers' rights in the interest of the workers themselves, but instead to "eliminate the causes of certain substantial obstructions to the free flow of commerce."[71] The NLRA seeks to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives" in order to "safeguard commerce from injury, impairment, or interruption . . . ."[72] Yet it remains silent regarding workers' interests.[73] "With the advent of mass production and the corresponding depersonalization of work, human labor became simply another commodity to be manipulated by the economic dictates and interplays of the marketplace."[74]

Importantly, Justice Holmes equated the term "free competition" with the "free struggle for life."[75] That struggle, in an

70. For fiscal year 2008, of the 16,179 unfair labor practice charges filed with the National Labor Relations Board (Board) against employers, there were 8121 charges for refusing to bargain with a legally certified union, and 6523 charges filed for illegal discharge or other discrimination based on union membership. ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 5 (2008). While there were 6523 total charges filed against unions in the same year, of the Board's cases of merit producing formal complaints, eighty-six percent were against employers and only fourteen percent were against unions. *Id.* at 8.

71. National Labor Relations (Wagner) Act, 29 U.S.C. § 151 (2006).

72. *Id.*

73. Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 224 (2005) ("Those familiar with the NLRA know that it has no section labeled 'values.'").

74. Dolin, *supra* note 13, at 338–39 (noting that initial "[c]oncern with workers needs and wants gave way to a concept of worker fungibility" as unskilled factory jobs outpaced "the art of the industrial craft").

75. Vegelahn v. Gunter, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting).

era of increasing economic disparity between business owners and the workers they depend on[76]—where there exists an "ever-increasing might and scope of combination"[77] in capital—goes beyond mere economic concerns. The struggle affects "the fundamental axioms of society, and even the fundamental conditions of life."[78]

From the turn of the twentieth century, the United States has seen the legal balance of rights between capital and labor pendulate in a constant search for an equitable middle ground that adequately protects both sides.[79] Before Congress passed the Wagner Act in 1937,[80] U.S. employers were able to squelch worker organization through "unbridled use of economic weapons against them,"[81] and capital's oligopolistic market power vastly outweighed labor's ability to assert itself even when workers were able to organize.[82] Recognizing the social and economic ramifications of a laissez-faire approach to labor relations—especially during the Depression, when social unrest was on the rise—Congress passed the Wagner Act, a broad regulatory scheme designed to protect workers' rights and promote organization and collective bargaining.[83] Merely a decade later, however, Congress curtailed the newfound union power—under the guise of employer free speech and increased workplace democracy[84]—through the

76. Globalization and free trade policies have allowed worker productivity to grow dramatically since the 1980s, while wages have remained relatively flat in comparison. *See* Damon Silvers, *How We Got Into This Mess*, AMERICAN PROSPECT, May 2008, at 24.

77. *Vegelahn*, 44 N.E. at 1081 (Holmes, J., dissenting).

78. *Id.*

79. *See* Specter & Nguyen, *supra* note 6, at 313–16; Befort, *supra* note 13, at 352–60. After the Wagner Act passed in 1937, union membership grew steadily, reaching its peak of thirty-five percent of the workforce in 1954. *Id.* at 357. This rapid rise in unionism was so strong that Congress enacted the Taft-Hartley Act in 1947 "in order to curb what was perceived to be excessive union power." *Id.*

80. 29 U.S.C. § 151 (2006).

81. Dolin, *supra* note 13, at 343 ("Tactics included mass discrimination against union activists, resulting in the blacklisting of many workers, as well as blatant refusal to recognize even those unions which enjoyed majority support.").

82. *Id.* at 418–19. Dolin noted:

> Before Congress intervened, government acted through its judicial system to swing the balance of power so much in favor of management that, if a union drive actually survived the organizational stage, any effort to utilize self-help to obtain a collective bargaining agreement was met with the full force of both the employer and court-ordered injunction.

Id.

83. *Id.* at 343.

84. Gerard D. Reilly, *The Legislative History of the Taft-Hartley Act*, 29 GEO. WASH. L. REV. 285, 285–89 (1960) (describing fears over the rapid rise in post-war union membership and the resulting congressional objective of "restor[ing]

passage of the Taft-Hartley Act of 1947.[85] A few years later, union membership peaked at about thirty-five percent of the total workforce, but has been in consistent decline since the 1950s.[86] In 2007, union membership in the private sector was 7.5% of the workforce.[87] Tellingly, union membership today has dropped to almost pre-Wagner Act levels, lending stark credence to the assertion that the NLRA has failed in its effort to promote unionization and equal bargaining power between employers and employees.[88]

That failure can perhaps be traced at least in part to Supreme Court interpretations of the NLRA, which have provided greater latitude to employers seeking to discourage unionization while placing disincentives on workers' willingness to assert their rights in the workplace. Undermining the power of the general strike[89] and lessening restrictions on employer conduct during elections[90] stand as two of the more fundamental derogations of NLRA policy.

In fact, the Supreme Court began chipping away at NLRA-granted worker rights almost immediately. A year after Congress

---

sufficient equilibrium to the field of industrial relations to enable our traditional system of private enterprise to continue"). Interestingly, this same "workplace democracy" argument has been widely propagated in opposition to EFCA, which some claim will undermine democracy in the workplace by stripping workers of the right to secret ballot. James Sherk & Paul Kersey, *How the Employee Free Choice Act Takes Away Workers' Rights*, BACKGROUNDER, Mar. 4, 2009, at 1. The assertion is untrue; as initially written, the bill simply provided workers with the option to forego the secret-ballot election process. *See* Posting by Michael Whitney to SEIU Blog, http://www.seiu.org/2009/03/wall-street-journal-employee-free-choice-act-does-not-remove-the-secret-ballot.php (Mar. 20, 2009, 11:41 EST). EFCA's opponents' campaign proved effective in July 2009 when Senate Democrats stripped the "card check" provision from the bill. Steven Greenhouse, *Democrats Drop Key Part of Bill to Assist Unions*, N.Y. TIMES, July 17, 2009, at A1.

85. Between 1937 and 1947, union membership grew apace, giving rise to the belief that the Wagner Act afforded unions too many rights while unfairly restricting the role of the employer in the organizing process. *See* Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 358 (1995). Notable changes brought under the Taft-Hartley Act were the outright ban on the use of the secondary strike and lessened restrictions on employer speech during an organizing campaign. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–44, 151–67, 171–87, 557 (2006)).

86. Befort, *supra* note 13, at 361–62.

87. This figure actually represents a slight increase in union membership from 2006 to 2007. *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, UNION MEMBERS SUMMARY (2007), *available at* http://www.bls.gov/news.release/archives/union2_01252008.pdf.

88. Hoover Institution, Facts on Policy: Union Membership Rates (Jan. 16, 2007), http://www.hoover.org/research/factsonpolicy/facts/5166532.html.

89. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

90. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

passed the Wagner Act, the Supreme Court held in *NLRB v. Mackay Radio & Telegraph Co.*[91] that workers could be permanently replaced during economic strikes.[92] In effect, *Mackay Radio* stripped unions of a primary economic weapon normally utilized during labor disputes that arise out of contract negotiations.[93] The Court based its reasoning on the idea that business interests outweighed the strikers' interests in gaining bargaining power through the threat of strike.[94] Interestingly, the Court emphasized balancing employers' economic interests against the workers' rights to strike without either party having raised the issue.[95] In fact, since the enactment of the NLRA, the National Labor Relations Board (Board)[96] and courts have been "determining the balance of bargaining power, and without any explicit direction from Congress, indeed, contrary to the bare words of the statute guaranteeing employees the right to engage in concerted activity for mutual aid and protection."[97]

Another noteworthy example of judicial derogation of employee freedom of association can be found in *NLRB v. Gissel Packing Co.*[98] In *Gissel*, the Court held that the First Amendment allowed employers to openly express their disdain for unionism in the presence of workers, provided that it did not amount to coercion or threats against unionization.[99] As one scholar noted, "[e]mployer speech has become the primary instrument used by employers to discourage unionization and collective bargaining," and placing limits on an employer's ability to indirectly coerce and intimidate employees would better effectuate the policies of the

91. 304 U.S. 333 (1938).

92. *Id.* at 345 (holding that it is not an unfair labor practice to replace striking employees in order to allow normal business operations to continue).

93. *Id.*

94. *Id.*; *see* Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 407 (1992).

95. Craver, *supra* note 94, at 407 (citing NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938)) (noting that notwithstanding the Act's prohibition against interfering with the right to strike, "it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers.").

96. The Board was established by Congress in 1935 to administer the provisions of the NLRA. National Labor Relations Board Homepage, http://www.nlrb.gov/about_us/index.aspx (last visited Nov. 16, 2009). The Board is a quasi-judicial body comprised of a five-member governing board that adjudicates labor disputes falling within the ambit of the NLRA, such as unfair labor practice hearings and workplace representation elections. *Id.*

97. Clyde W. Summers, *Questioning the Unquestioned in Collective Labor Law*, 47 CATH. U. L. REV. 791, 815 (1998).

98. 395 U.S. 575 (1969).

99. *Id.* at 616–20.

Wagner Act.[100] After all, it is important to recognize that anti-union speech directed by an employer toward its employees will always conjure up images of "an iron fist inside a velvet glove."[101]

While Justice Holmes recognized the economic interests at work in the dynamic between labor and capital,[102] he hinted at a more fundamental goal by characterizing the struggle between labor and capital as a "free struggle for life."[103] Justice Holmes noted that labor "when combined . . . [has] the same liberty that combined capital has, *to support their interests* by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control."[104] From this perspective, labor and capital can be viewed as alternate means to the same end, and arbitrary legal distinctions between types of pooled resources begin to fall apart.

Scholars generally agree, however, that labor laws have operated in favor of business since the Taft-Hartley Act amended the NLRA; the effects are manifest at least in part by the fact that union membership has been in steady decline since about the time that Taft-Hartley amended the Wagner Act, while charges of unfair labor practices against employers have increased dramatically.[105] According to a 2005 study by the Economic Policy Institute, fifty-three percent of the nonunion workforce desired union representation yet were unable to attain union recognition.[106] The existing problem is that workers, despite their desires to organize, remain cognizant of the fact that management's reaction to unionization would most likely be

100. Summers, *supra* note 97, at 806.

101. *Id.* at 805. The phrase "an iron fist inside a velvet glove" originated from NLRB v. Exchange Parts Co., 375 U.S. 405, 460 (1964).

102. Vegelahn v. Gunter, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting) ("One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return.").

103. *Id.*

104. *Id.* (emphasis added).

105. AM. ANTHROPOLOGICAL ASS'N., AAA POLICY BRIEF #1 (2007), *available at* http://www.aaanet.org/pdf/AAAPolicyBrief_092707.pdf.

106. RICHARD B. FREEMAN, DO WORKERS STILL WANT UNIONS? MORE THAN EVER, ECONOMIC POLICY INSTITUTE BRIEFING PAPER #182 2 (2007), *available at* http://www.sharedprosperity.org/bp182/bp182.pdf. Additionally, the main finding of this study showed that around eighty-five to ninety percent of workers wanted greater collective workplace input in some form, whether or not they supported union representation. *Id.* at 1.

hostile to their interests.[107] Clearly, labor law cannot function properly under this structure.

Indeed, "the NLRA was drafted to be far more than a technocratic exercise."[108] Drafted during the Depression, Congress intended the law to "restructur[e] and transform[] this society" by promoting "social democracy, solidarity, social and economic justice, fair wages and working conditions, equality, and industrial and social peace."[109]

Yet, "NLRA values have too often been ignored."[110] The reality is that the United States currently fails to adequately promote labor rights. Millions of workers are excluded from NLRA protection,[111] and many covered employees find that the current labor law regime provides inadequate disincentives for corporations and business owners to abide by the law, thereby allowing unfair restraint on organizing.[112] The Board requires elaborate election procedures before a union can be certified as a bargaining representative of employees. At the same time, employees in support of unionization are particularly susceptible to unlawful discrimination, intimidation, and retaliation—especially low-wage workers who are economically dependent on their employers (or, in the case of undocumented immigrant workers, dependent on their work for their literal place in the community).[113]

In fact, today's worker has an almost one in five chance of being illegally discriminated against for union activity—in 2005, 31,000 employees were awarded back pay because of discrimination for activity protected by the NLRA, a 500% increase since the late 1960s.[114] Furthermore, because back pay and reinstatement are the only penalties that an employer faces for unlawful discrimination—while the employee has a duty to mitigate damages by seeking work elsewhere—it is not surprising that cases of discrimination are on the rise while union membership continues to fall.[115]

---

107. *Id.* at 2.

108. Dannin, *supra* note 73, at 225.

109. *Id.*

110. *Id.* at 223.

111. *See* Compa, *supra* note 24, at 23; Befort, *supra* note 13, at 370.

112. *See* Specter & Nguyen, *supra* note 6, at 318–26.

113. *See* Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 892–98 (2008).

114. Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2694 (2008); AM. ANTHROPOLOGICAL ASS'N, *supra* note 105, at 1.

115. *See* AM. ANTHROPOLOGICAL ASS'N, *supra* note 105, at 1.

In many ways, the legal landscape of labor relations today bears a great resemblance to the pre-Wagner Act era when capital held a comfortable bargaining advantage over workers. The "ossification" of the NLRA—i.e., the law's inability to adapt to developments in shifting workplace dynamics—has resulted in a legal framework that is incapable of protecting a workforce that could not have been envisioned in the early twentieth century.[116] Today's workforce is interracial, mixed-gender, and white-collar; this is in stark contrast to the white, male, blue-collar worker of the 1930s and 1940s.[117] And because unions have historically had greater success organizing workers with similar interests and backgrounds,[118] the new and highly stratified workforce presents problems that necessitate a dramatic overhaul of U.S. labor law and jurisprudence.

A. Inadequate Remedies for Unfair Labor Practices Thwart Labor Rights Protections for Low-Wage Workers

Due to the inadequacies of current labor laws, low-wage workers in the United States are particularly susceptible to unlawful discrimination and retaliation for asserting rights to collectively bargain with employers.[119] Currently, the NLRA requires unions to provide evidence that a majority of workers support unionization before recognition, and the employer then has the power to insist on a secret ballot election.[120] The Wagner Act did not expressly require the secret ballot election;[121] however, Taft-Hartley modified the law such that where a union presents an employer with a showing of majority support, the employer can

116. *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002); *see also* Sachs, *supra* note 114, at 2687 (noting that the rise in employment statutes like the Fair Labor Standards Act are due, at least in part, to the NLRA's inability to adequately protect a worker's legal rights).

117. *See* Befort, *supra* note 13, at 364–66.

118. *Id.*

119. Christopher Ho & Jennifer C. Chang, *Drawing the Line After* Hoffman Plastic Compounds, Inc. v. NLRB*: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 492–96 (2005).

120. Linden Lumber Div. v. NLRB, 419 U.S. 301, 304 (1974); Specter & Nguyen, *supra* note 6, at 316 (stating that the Board must direct an election by secret ballot and certify its results if an employer declines to recognize majority support for unionization).

121. Under the Wagner Act, when a "question" of representation exists, the Board "may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives." National Labor Relations (Wagner) Act, ch. 372 § 9(c), 49 Stat. 449 (1935) (codified as 29 U.S.C. § 159(c) (2006)); *see* Specter & Nguyen, *supra* note 6, at 315–16.

petition for an "election by secret ballot" and require the union to undergo an election campaign.[122] It is during an election campaign that workers are most likely to face discrimination and retaliation for union support.[123]

Workers who are particularly dependent on their employers for their livelihood are easy targets for employers who wish to resist unionism.[124] Over the last century, the at-will employment system has indoctrinated workers with the belief that they, as subjects of the employer, must abide by the ideologies of capital, lest they lose their sources of income.[125] As some scholars point out, "the micromanaging, condescension, arbitrary decisions, and pervasive control of the employer wield great power upon the self-perception of the worker."[126] In effect, employers who express disdain toward unions take away employees' sense of autonomy; the workers are robbed of the opportunity to freely choose whether or not to unionize.[127]

Low-wage earners in this situation are under-protected by domestic labor laws and are highly likely to acquiesce to an employer's direct or indirect demands for allegiance. The usual justification for NLRA remedial mechanisms is that Congress did not design the Act to be punitive, although the Board's remedial authority under the Act is quite broad.[128] Since the standard remedies for discriminatory discharges are reinstatement and back pay[129]—subject to the employee's duty to mitigate by seeking work elsewhere—monetary damages are usually slight.[130]

---

122. 29 U.S.C. § 159(c)(1).

123. Joel Dillard & Jennifer Dillard, *Fetishizing the Electoral Process: The National Labor Relations Board's Problematic Embrace of Electoral Formalism*, 6 SEATTLE J. FOR SOC. JUST. 819, 848 (2008) (noting that during organizing, "the employer's total control of the workplace is a felt experience.").

124. *Id.*

125. *Id.* at 858. The authors state:

> In modern society, employers are among the most powerful of the institutions responsible for creating and perpetuating social ideology . . . . The ideology of the employer interpellates the employees' identity, saying that workers should not collaborate to take more control of directing their work because they are just workers—it's not their job; it's none of their business.

Id.

126. *Id.* at 859.

127. Dillard and Dillard raise an interesting point: "If true freedom of contract is an objective of [the NLRA], and true freedom of contract is only possible within collective representation, then protection of rights not to bargain makes little sense." *Id.* at 860.

128. Dolin, *supra* note 13, at 427; *see also* 29 U.S.C. § 160 (2006) (outlining the Board's power to prevent unfair labor practices).

129. Republic Steel Corp. v. NLRB, 311 U.S. 7, 10–13 (1940) (ruling that the

The Board has sometimes utilized its broad remedial powers to grant "extraordinary" remedies,[131] such as public reading of notices[132] and granting the union access to employer property for organizing.[133] Clearly, however, these "extraordinary" remedies are not likely to be of any consolation to an employee who has been subjected to intimidation, harassment, threats, or discharge. As previously discussed, a worker's job provides more than a source of monetary gain, and when a worker faces discharge for exercising a fundamental workplace right, the worker loses much more than his or her daily wages. A sense of identity, community, and citizenship are all tied to the workplace.

Because job security for workers implicates much more than industrial peace,[134] the standard remedies of reinstatement and back pay fail to accomplish even their remedial objectives. First, remedial mechanisms are procedurally too slow. Filing a discrimination charge with the Board is time consuming—often taking years to come to resolution—and many workers cannot afford to miss work during Board investigations.[135] But perhaps the widely held concern that remedies for unfair labor practices are substantively insufficient is more important for this analysis.[136]

Back pay awards are lessened by the worker's duty to mitigate damages by seeking gainful employment elsewhere.[137] For low-wage and unskilled workers, mitigation is often difficult, and for many undocumented immigrant workers, mitigation can be impossible.[138] Therefore, actual damages awarded are typically insufficient to provide incentives for workers to report discrimination. Furthermore, sophisticated employers facing costs associated with unionization realize that meager remedial

---

remedial objectives of the NLRA limit damages to those which is needed to make employees whole).

130. Specter & Nguyen, *supra* note 6, at 325.

131. Dolin, *supra* note 13, at 427.

132. Teamsters Local 115 v. NLRB, 640 F.2d 392, 404 (D.C. Cir. 1981).

133. United Steelworkers v. NLRB, 646 F.2d 616, 617 (D.C. Cir. 1981).

134. Ellen Dannin invokes Senator Wagner to reinforce the notion that "tranquil labor relations were not the sole consideration [of the NLRA]: 'It all depends on the basis of tranquility. The slave system of the old South was as tranquil as a summer's day, but that is no reason for perpetuating in modern industry any of the aspects of a master-servant relationship.'" Dannin, *supra* note 73, at 245–46.

135. *See* Specter & Nguyen, *supra* note 6, at 318.

136. *Id.*

137. *See* Befort, *supra* note 13, at 373.

138. Matthew S. Panach, *Two Wrongs Don't Make a Right . . . To Receive Backpay?: The Post-*Hoffman *Polarity of* Escobar *and* Rivera, 60 ARK. L. REV. 907, 909 (2008).

damages under the NLRA often make labor violations economically efficient.[139] During the last few decades, after all, the economy has continued to grow while workers' wages have remained relatively fixed.[140] Anti-union consulting firms have become a multi-million dollar industry since the 1990s,[141] and "two-thirds of employers faced with organizing campaigns hired such consultants" to coach them on both legal and illegal means of influencing workers' attitudes toward unionization.[142]

The alternative remedy of reinstatement is unlikely to appeal to workers who may be subject to similar harassment once back on the job. In fact, "a significant percentage of employees entitled to reinstatement under the NLRA decline to accept it."[143] Moreover, for employers seeking to chill union support, a reinstated employee in the workplace serves as a reminder to other employees that filing unfair labor practice charges will not further the goals of attaining higher wages and benefits. After an arduous and uncertain process, the employee, under the best of circumstances, is right back where he or she started, and usually without a union.[144]

Clearly, the NLRA's toothless remedial provisions are insufficient. The Supreme Court's ruling in *Republic Steel Corp. v. NLRB*[145] established that the NLRA's remedies are limited to back pay and reinstatement because "[the Act] does not carry a penal program describing the unfair labor practices to be crimes."[146] *Republic Steel* effectively made enforcing labor rights impossible, and under this regime, the "battle" cannot be "carried on in a fair and equal way."[147] Indeed, the human right to organize and

---

139. Jane P. Mallor, *Punitive Damages for Wrongful Discharge of At Will Employees*, 26 WM. & MARY L. REV. 449, 490–91 (1985) ("If compensatory damages in a wrongful discharge case are relatively small, an employer has little to lose by committing a wrongful discharge.").

140. Summers, *supra* note 97, at 793 ("Collective bargaining is necessary if workers, particularly low-wage workers, are to share in the country's general prosperity.").

141. AM. ANTHROPOLOGICAL ASS'N, *supra* note 105, at 1.

142. *Id.*

143. Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1, 29 (1988).

144. A worker who goes through the process of reporting an unfair labor practice only to be reinstated may never be made "whole." Besides the denial of protection of workplace rights, a worker will also be subjected to a potential loss of professional reputation, loss of status, and humiliation. *See* Mallor, *supra* note 139, at 490–91.

145. 311 U.S. 7 (1940).

146. *Id.* at 10.

147. Vegelahn v. Gunter, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J.,

collectively bargain "stems unbroken from the principal of freedom of association,"[148] and the concept of bargaining refers to the "relative ability of parties in a conflict situation to achieve their respective goals."[149] Because workers organize as a means of securing increases in wages and benefits with their employers—who view collective bargaining as a detriment to business[150]—successful bargaining for employees only becomes possible when the law adequately deters labor rights violations.

For the modern workforce, especially for low-wage and immigrant workers, this means that the NLRA cannot live up to even its economic objectives of promoting organizing and commercial tranquility, let alone the more fundamental objective of protecting workers' interests. Ironically, laws such as Title VII, have succeeded where the NLRA has failed. The next part of this Article examines the remedial provisions for violations of workplace rights under Title VII and argues that the NLRA should incorporate similar statutory measures.

III. The NLRA Should Reflect Remedies for Discrimination Under Title VII

Congress enacted Title VII with a goal of protecting what are widely considered human rights: equal treatment regardless of race, color, religion, sex, or national origin.[151] Towards this end, courts have interpreted Title VII as "a measure aimed squarely at deterring employment discrimination," and its remedies reflect this interest by imposing noneconomic and punitive damages on employers that intentionally discriminate.[152] Title VII is widely

---

dissenting).

148. Compa, *supra* note 24, at 20.

149. Dolin, *supra* note 13, at 340.

150. *Cf.* Summers, *supra* note 97, at 793 (noting studies that have shown that employee participation in workplace decisions actually increases production).

151. *Id.* Interestingly, the Inter-American Court of Human Rights has ruled that "the principle of nondiscrimination against noncitizens in the workplace [has] risen to the status of jus cogens" based on three principals that arguably apply to labor rights: 1) nondiscrimination is a norm of international law, 2) states have a duty to respect human rights that "stem from human dignity," and 3) states have a duty to guarantee nondiscrimination against any "exclusion, restriction or privilege that is not objective and reasonable, and which adversely affects human rights." David Weissbrodt, *Remedies for Undocumented Noncitizens in the Workplace: Using International Law to Narrow the Holding of* Hoffman Plastic Compounds, Inc. v. NLRB, 92 MINN. L. REV. 1424, 1435–36 (2008); *see also* Cummins, *supra* note 46, at 40 ("Consequently, U.S. courts have per se jurisdiction in connection with the doctrine of *jus cogens* if the conduct violates a norm of universal concern.").

152. *See* Michael Weiner, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52

heralded for its success in achieving its deterrence objective, due in large part to the availability of punitive damages[153]—which are substantial enough to force employers to internalize the harms workplace discrimination causes.[154] U.S. labor law has not yet figured out how to mimic the internalizing effects of Title VII. One result is that labor cases have increasingly invoked Title VII in order to accomplish what the NLRA is seemingly incapable of: adequately protecting workers from unlawful discrimination.[155]

Title VII has succeeded where labor law has failed because of its ability to evolve with the changing face of the workplace. Prior to the Civil Rights Act of 1991—which added the punitive damages provision to Title VII—a plaintiff was only entitled to back pay, reinstatement, and front pay.[156] Initially, the Supreme Court believed back pay would serve as a sufficient deterrent to unlawful discrimination.[157] Congress eventually realized, however, that "Title VII's limited equitable relief had 'not served as an effective deterrent' . . . and had 'allowed employers who discriminate to avoid any meaningful liability.'"[158]

Commentators of the NLRA have echoed the critiques that led Congress to strengthen Title VII's damages provision; however, labor law has been notoriously resistant to change.[159] In analyzing

---

UCLA L. REV. 1579, 1622–23 (2005) (suggesting that the Board would be better able to deter unfair labor practices with similar punitive options to those available under Title VII).

153. *See* Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call For Change*, 50 WM. & MARY L. REV. 735, 740 (2008) ("Punitive damages are . . . widely regarded as one of the single greatest motivators in preventing employers from discriminating against their workers.").

154. *Id.*

155. Sachs, *supra* note 114, at 2708–19 (illustrating situations in which unions and individual employees have enforced traditional labor rights through employment statutes). "In place of the NLRA's notoriously weak remedial regime, statutes like the Fair Labor Standards Act and Title VII offer workers robust damages and immediate injunctive relief if they face adverse action for engaging in protected activity." *Id.* at 2690.

156. Craig Robert Senn, *Proposing a Uniform Remedial Approach for Undocumented Workers Under Federal Employment Discrimination Law*, 77 FORDHAM L. REV. 113, 136 (2008).

157. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975) ("It is the reasonably certain prospect of a back pay award that 'provide(s) the spur or catalyst which causes the employers and unions to self-examine and self-evaluate their employment practices . . . .'" (quoting United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir.1973))).

158. Senn, *supra* note 156, at 140 (quoting H.R. REP. NO. 102-40, pt. 1, at 14, 69, *as reprinted in* 1991 U.S.C.C.A.N. 549, 552).

159. *See* Estlund, *supra* note 116, at 1530 (suggesting that the process of "ossification" has limited democratic revision and renewal in contemporary labor law's statutory language).

this phenomenon, it is particularly noteworthy that Title VII's original remedial provisions were modeled after section 10(c) of the NLRA.[160] However, unlike the NLRA, which has always been interpreted as a remedial statute, Title VII's goal is deterrence.[161] In limiting remedies to back pay and reinstatement, *Republic Steel* prevents the NLRA from effectively deterring labor rights abuses in the workforce.[162] Not surprisingly, the *Republic Steel* majority neglected to cite any legislative history for its ban on punitive damages; in fact, the House and Senate committee reports expressly emphasized the statute's deterrent goal.[163]

The purpose of Title VII's equitable remedies, modeled after the NLRA, "was—and still is—to 'make persons whole for injuries suffered on account of unlawful employment discrimination.'"[164] But the 1991 amendments to Title VII addressed the realization that back pay and reinstatement could not actually make an employee whole without compensation for "humiliation, pain and suffering."[165] No one could doubt that discrimination, whether it falls under Title VII or the NLRA, causes humiliation, pain, and suffering. Yet it is unclear why courts have not similarly interpreted the NLRA's remedial provisions to account for this very real harm caused by labor rights abuses. Indeed, "because Congress explicitly modeled Title VII's original remedial provision on . . . the NLRA, it makes little sense to interpret the former as a command to order remedies that deter violations of the law and the latter as precluding such deterrence without additional justification."[166]

Furthermore, employees can enforce Title VII through private rights of action, and successful plaintiffs can collect attorney fees, expert witness fees, and court costs[167] without being subjected to the Board's "glacial pace and inadequate enforcement resources."[168] Thus, remedial provisions under the NLRA should reflect remedies provided by Title VII. These remedies would

160. *See* Weiner, *supra* note 152, at 1622–23.

161. *Id.* at 1623.

162. Republic Steel Corp. v. NLRB, 311 U.S. 7, 12 (1940).

163. Weiner, *supra* note 152, at 1620.

164. Senn, *supra* note 156, at 136 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 418–19 (1975)).

165. H.R. REP. NO. 102-40, pt. 2, at 25, *as reprinted in* 1991 U.S.C.C.A.N. 549, 552 (1991) ("The limitation . . . to equitable remedies often means that victims of intentional discrimination may not recover for the very real effects of discrimination.").

166. Weiner, *supra* note 152, at 1623–24.

167. These remedies are available under Title VII. 42 U.S.C. § 2000e-5 (2006).

168. Sachs, *supra* note 114, at 2690.

provide adequate incentives for workers to report instances of retaliation or discrimination for union activity, while simultaneously providing an economic incentive for capital to internalize the effects of labor rights violations.

Moreover, parallels exist between employment rights recognized under Title VII and the collective labor rights originally recognized under the Wagner Act. For instance, the evolving demographics of the workplace have created an opportunity for Title VII and NLRA violations to occur simultaneously. However, workers cannot always rely on Title VII to provide a remedy for labor law violations, thus necessitating amendments to the NLRA itself.

The Supreme Court's decision in *Emporium Capwell Co. v. Western Addition Community Org.*[169] is illustrative. The Court held that a minority of black workers in a bargaining unit were required to protest racial discrimination through traditional NLRA channels of collective bargaining.[170] In essence, the Court's ruling acknowledged that the workers had been discriminated against in violation of Title VII, but did not allow Title VII remedies to be awarded.[171] The lower court in *Emporium Capwell* found that the NLRA and Title VII were meant to be interpreted in reference to each other, such that workers and unions could seek remedies for discrimination "to the fullest extent possible."[172] The Supreme Court reversed, finding that the substantive rights created by Title VII could not be enforced through the NLRA, because it would ultimately undermine the union's united front by "set[ting] one group against the other . . . dividing them along racial or other lines."[173]

Under both Title VII and NLRA policies, victims of workplace discrimination should be made whole, whether the discrimination is based on race, gender, national origin, or union affiliation. Indeed, a Holmesian perception of labor relations policy would not distinguish between types of workplace discrimination, since "[labor] policy is not limited to struggles between persons of the

169. 420 U.S. 50 (1975).

170. *Id.* at 69.

171. *Id.*

172. Emporium Capwell Co. v. W. Addition Cmty. Org., 485 F.2d 917, 931 (D.C. Cir. 1973); *see also* Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395, 420–21 (1993) ("[T]he Board . . . must also act so that its interpretations of the NLRA are not inconsistent with the policies underlying other major federal legislation, specifically Title VII.").

173. *Emporium Capwell*, 420 U.S. at 67.

same class, competing for the same end."[174] Incorporating a punitive damages provision into the NLRA would ensure that employers internalize the effects of discrimination based on union affiliation in the same way Title VII successfully deters discrimination, and workers are made whole when violations occur.

Currently proposed legislation, the Employee Free Choice Act (EFCA),[175] endeavors to strengthen the NLRA through enhanced remedial provisions. While EFCA is a step in the right direction, its upgraded remedies are not likely to effectively deter labor rights violations.

IV. Proposed Amendments to the NLRA's Remedial Structure Will Not Adequately Deter Violations of Labor Rights

EFCA, originally introduced in Congress in February 2007 and reintroduced in 2009, represents an opportunity for the legislature to reevaluate the balance of labor's and capitals' competing interests. Many commentators believe the bill stands a good chance of becoming law in some form under the Obama administration.[176] EFCA primarily seeks to streamline union certification and bargaining processes, while also ramping up enforcement mechanisms in order to more effectively deter labor violations.[177] Although EFCA's card check certifications procedure has received the most media attention, this Article focuses primarily on EFCA's increased remedial provisions.

Section 4 of EFCA, titled "Strengthening Enforcement," would enhance the remedial scope of the NLRA in two ways: (1) employers who discriminate against employees in violation of section 8(a)(3) of the NLRA will be liable for back pay plus double that amount in liquidated damages, and (2) employers who willfully or repeatedly commit unfair labor practices will be liable for up to $20,000 in civil penalties for each violation.[178] The late

174. Vegelahn v. Gunter, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting).

175. H.R. 1409, 111th Cong. (2009).

176. *See, e.g.*, Sam Stein & Ryan Grim, *How Labor Can Get 60 Votes on EFCA Without Getting 60 Votes*, HUFFINGTON POST, Mar. 10, 2009, http://www.huffingtonpost.com/2009/03/10/how-labor-can-get-60-vote_n_173637.html (expressing belief in the Democratic Party's ability to win sixty votes for cloture on the bill, thereby reducing the number necessary for passage to fifty, with the Vice President serving as the tie-breaking vote).

177. H.R. 1409.

178. *Id.*

Senator Edward Kennedy, one of EFCA's sponsors, stated, "[w]e . . . need stronger and stiffer penalties for employers who refuse to play by the rules . . . . The Employee Free Choice Act puts real teeth in the law . . . . Current penalties are so minimal that employers treat them as a minor cost of doing business . . . ."[179]

EFCA's enhanced remedies, however, will likely not provide much deterrence. Whatever form the final version of the bill takes, EFCA will presumably make union organizing more effective, especially for low-wage workers who are highly susceptible to coercion during election campaigns. In turn, this creates an added incentive for employers who oppose unionization to establish practices that will coerce, threaten, or otherwise chill union support among workers who are capable of organizing.

For example, employers who favor "merit shop" principles over unionization may engage in a cost/benefit analysis, weighing the benefits of maintaining a non-union workplace against the costs of unfair labor practices.[180] If they determine that the benefits of unlawfully chilling union support outweigh the costs of a unionized workforce, employers may choose to violate their workers' rights to organize.[181] From a human rights perspective, labor laws should prevent employers from engaging in this type of cost/benefit analysis. Strong punitive damages for labor violations are thus a crucial component to preventing labor rights abuses in the workplace.

In many circumstances, the proposed EFCA remedies of treble back pay and civil penalties will not likely meet this threshold. The major problem with the treble back pay provision is that victims of discrimination still must mitigate damages by seeking work elsewhere if they have been discharged. In effect, unless the law abrogates the employee duty to mitigate damages, back pay awards to discriminatorily discharged employees are unlikely to deter unlawful employer conduct.

Indeed, employers are likely aware of the fact that unionized workers almost always make more than their nonunion counterparts: between 1973 and 2001, one report found the difference to be eighteen percent.[182] For large employers,

179. Kennedy, *supra* note 6, at 1.

180. Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1282 (1998) (noting the effects of the "law-as-price" theory of corporate non-compliance).

181. *Id.* at 1282 n.57.

182. Ruben J. Garcia, *Labor's Fragile Freedom of Association Post-9/11*, 8 U. PA.

unionization could amount to an enormous increase in labor costs. However, if union support can be chilled through a few acts of intimidation or the discharge of key union supporters—with the only real risk a few thousand dollars in back pay awards—profit-maximizing employers may continue to commit unfair labor practices. Thus, if EFCA seeks to impose punitive back pay awards, the duty to mitigate must be eliminated for discriminatory discharge.

Second, while EFCA's civil penalties provision may deter some labor rights violations by smaller employers, for large corporations with huge financial stakes in low labor costs, $20,000 may not be a sufficient deterrent for unfair labor practices. EFCA should instead contain a Title VII-like sliding scale punitive damages provision[183] to ensure that large employers cannot write off the costs of labor rights abuses. Title VII provides compensatory and punitive damages awards that are proportionate to the size of the business, and employers with more than 300 employees may be liable for up to $300,000 per violation.[184]

In sum, EFCA is a step in the right direction and will likely create real organizational opportunities for the fifty-three percent[185] of non-union workers that wish to unionize. However, EFCA's remedies for discrimination and other unfair labor practices may not sufficiently protect workers' human rights in the workplace. Requiring an employee to mitigate damages after an unlawful discharge devalues and under-protects the employee's interests in a stable and dignified work life. It is inherently unjust for a worker whose rights have been intentionally violated to be forced to make efforts towards reducing the punishment his or her oppressor faces. Also, a flat rate—and arguably low—punitive damages provision will not deter abuses in large corporations, which is perhaps where protections are most needed. Under EFCA, it is likely that union membership will once again begin to rise. However, a law is only as strong as its enforcement mechanisms, and EFCA must provide strong punitive damages in order to sufficiently protect the workers whose rights it seeks to promote.

J. LAB. & EMP. L. 284, 339 n.270 (2006).

183. 42 U.S.C. § 1981a(b)(3) (2006).

184. *Id.*

185. FREEMAN, *supra* note 106, at 2.

Conclusion

Over time, courts and Congress have stripped the National Labor Relations Act of its ability to deter workers' rights violations. As a result, U.S. workers are systematically denied fundamental human rights. The National Labor Relations Board has no enforcement power, and employers facing unfair labor practice allegations can effectively ignore its orders without penalty.[186] Under this framework, equality of bargaining power between employers and employees cannot be realized, and the goals of the NLRA are frustrated. Both Justice Holmes and Senator Wagner believed labor rights should be protected by statute and that "'true freedom of contract' is only possible within a unionized workplace."[187] Ironically, amendments and interpretations of the Wagner Act over the last half-century have removed any chance for workers to exercise meaningful freedom of contract or further their own interests outside the union context.

One way to level the playing field is to return to Justice Holmes' view of labor unions as the "necessary and desirable counterpart" to corporate power, where capital and labor have inherent equal worth. Prior to the turn of the twentieth century, Justice Holmes laid out a rationale for providing workers with the power to support their interests as employers became increasingly wealthy.[188] Justice Holmes recognized that capital was in a position to grow exponentially, and that workers without legal protections would cease to be "persons of the same class."[189]

Indeed, labor law today does not recognize workers as "persons of the same class." Capital subjugates labor, and the changing face of the modern workforce has posed problems that U.S. labor law was not designed to handle. Most fundamentally, the law must encourage unionization and collective action of workers. For this to happen, labor law must protect labor rights in the same way that it protects other human rights. Supreme Court decisions illustrate the fact that labor rights are not valued in a

186. The Board can seek enforcement through the federal appeals courts, but this process can add years to the enforcement of rulings against employers. Compa, *supra* note 24, at 88.

187. Dillard & Dillard, *supra* note 123, at 860; *see also* Adkins v. Children's Hosp., 261 U.S. 525, 571 (1923) (Holmes, J., dissenting) (arguing in favor of minimum wage laws based in part on the belief "that 'freedom of contract is a misnomer as applied to a contract between an employer and an ordinary individual employee'" (quoting Henry Bournes Higgins, *A New Province for Law and Order*, 29 HARV. L. REV. 13, 25 (1915))).

188. Vegelahn v. Gunter, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting).

189. *Id.*

way that protects the dignity and autonomy of the worker outside of an economic system.[190] Holmes stated:

> [I]t is not necessary to cite cases. It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever-increasing might and scope of combination.[191]

To bring balance to this system, labor law must provide strong economic penalties for employers who violate workplace rights. Fortunately, legislators already have an effective model in Title VII. Adopting Title VII-like penalty provisions would be an effective way to protect workers' rights to organize while eliminating discriminatory retaliation. These provisions would be effective because damages would create an adequate incentive for workers to bring suits against unlawful practices, and employers would internalize the injuries that workers sustain. The United States' adherence to increased labor standards would enhance the validity of labor rights documents and conventions abroad, and inroads toward undoing the global "race to the bottom" could lead to higher international standards. Indeed, "to the extent that improved labor standards go hand in hand with higher quality, greater agility, and ultimately productivity, the same competitive imperatives [as higher costs] can help generate a race to the top."[192]

190. *See, e.g.*, Republic Steel Corp. v. NLRB 311 U.S. 7, 10–13 (1940) (limiting remedies to back pay and reinstatement); Hoffman Plastic Compounds Inc., v. NLRB 535 U.S. 137 (2002) (eliminating back pay and reinstatement remedies for illegal immigrants).

191. *Vegelahn*, 44 N.E. at 1081 (Holmes, J., dissenting).

192. Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 368 (2002).