

10 Make Labor Organizing a Civil Right

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The right to organize has been poorly protected for decades in the United States, and the situation is growing even more dire under the current administration, which was supposed to be dedicated to the interests of “forgotten Americans.” For example, in a single week in mid-December 2017, President Trump’s National Labor Relations Board (NLRB) released a series of 3–2 decisions that overturned major precedents of the Obama and Bush II Boards. These included the hard-won changes in standards concerning joint employers, employee handbooks, union discretion in defining bargaining units, and employer rights to make unilateral changes to the contract. Further, it started the process of rescinding the Board’s 2015 rule that shortened election times. The moves were so swift and so extreme that former Board Member Sharon Block asked if it was a “December Massacre.”¹ Sadly, this has become the norm, where labor rights advocates make incremental gains at the NLRB during Democratic administrations, and those gains get wiped away quickly during Republican administrations.

A Looking Beyond the Existing Labor Law

The natural response to the weakness of the current labor law is to strengthen it so that it fulfills its original purpose of protecting workers in organizing and bargaining collectively. But it is an uphill battle to pass any pro-worker legislation, and it is even more unlikely that any significant labor law reform could pass Congress. Four times between 1965 and 2009, Democrats held the White House and majorities in the Senate and House of Representatives, and four times efforts to remedy weaknesses in American labor law failed.

The most recent effort came in 2009, under President Barack Obama. Supporters of the Employee Free Choice Act (EFCA) thought they had a chance to pass important labor law reform given Democratic control of both houses of Congress and the executive branch. EFCA would have allowed employees to certify a bargaining representative if a

Major portions of this chapter are adapted from the authors’ other works, including RICHARD KAHLENBERG & MOSHE MARVIT, *WHY LABOR ORGANIZING SHOULD BE A CIVIL RIGHT* (The Century Foundation Press 2012). A version of this work also previously appeared in the *STANFORD JOURNAL OF CIVIL RIGHTS AND LIBERTIES* at 9 STANFORD J.C.R. & C.L. “Architects of Democracy”: Labor Organizing as a Civil Right 213–246 (2013). When possible and appropriate, please cite to that version.

¹ Sharon Block, *Miscimarra’s Parting Shot: Was It a December Massacre?* OnLabor.org, December 19, 2017.

majority of workers signed on, in a process known as “card check,” voiding the need for a secret-ballot election.² It also would have enhanced penalties for employers who engaged in unfair labor practices, such as wrongfully discharging employees trying to organize a union.³ And the legislation established procedures for reaching an initial collective bargaining agreement – if necessary, through arbitration – once a union was certified or recognized.⁴

The bill had strong support in the House, where, two years earlier, in a March 2007 test vote, EFCA had passed by a margin of 241–185.⁵ In 2009, Democrats had an even larger House majority than in 2007. And in the Senate, for a time, Democrats and those caucusing with them had a sixty-vote filibuster-proof majority, giving labor some hope that a compromise version of EFCA could pass. But the defection of a southern Democratic senator (Blanche Lincoln) in April 2009 was a serious blow, and the death of Massachusetts Senator Edward M. Kennedy and surprise election of a Republican, Scott Brown, to replace him in January 2010, brought hopes of passing EFCA to an end without a formal vote in either the Senate or the House.⁶

Labor law reform has failed for several reasons. Primarily, fierce and unified business opposition helps explain why each of the four efforts at reform went down in defeat. But labor reform was frustrated for two additional reasons over which labor has greater control. First, labor law reform efforts such as EFCA were complicated, giving opponents an opening to distort the bill’s purpose. Second, reform was seen as a special interest fight between labor and business, which did not capture the imagination of the public or other progressive groups. As a result, organized labor had to rely on its own power to pressure individual Senators – but, predictably, unions were weak in some of the states represented by wavering politicians.

Labor law reform presents many technical legal issues poorly understood by the public. The public has minimal understanding of the federal court system, but even less understanding of the complicated set of rules administered by the NLRB. For example, EFCA was described by a Gallup pollster as “a complex piece of legislation with numerous components.”⁷ Perhaps because of its complexity, Gallup found in a 2009 poll that only 12 percent of Americans followed the issue “very closely,” a level that Gallup described as “exceptionally low relative to public attention to other news issues Gallup has measured over the last two decades.”⁸

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

² H.R.1409: *Employee Free Choice Act of 2009*, OPENCONGRESS, www.opencongress.org/bill/111-h-1409 (last visited May 14, 2013).

³ *Id.*

⁴ *Id.*

⁵ Clerk of the House “Employee Free Choice Act” March 1, 2007.

⁶ Matthew Murray, *Business vs. Unions Now Moves Off the Hill*, ROLL CALL (Dec. 13, 2010), www.rollcall.com/issues/56_58/-201397-1.html.

⁷ Lydia Saad, *Majority Receptive to Law Making Union Organizing Easier*, GALLUP (Mar. 17, 2009), www.gallup.com/poll/116863/Majority-Receptive-Law-Making-Union-Organizing-Easier.aspx.

⁸ *Id.*

the right of employees to secret ballot elections.”⁹ Rather than having to defend employer behavior, including firing employees for trying to join a union, business changed the discussion to collective bargaining elections and promoted stereotypes of union thugs ready to intimidate workers into signing cards certifying a union.

B Recognizing Labor Organizing as a Civil Right

Rather than engage in the likely fruitless fight to enhance the existing labor law, which can be diminished in a variety of ways, we propose writing labor organizing into our civil rights laws. (See appendix for a Model Statute.)¹⁰ In this section, we begin by outlining a four-part affirmative case for making adverse employment actions based on union organizing punishable under civil rights statutes. We then rebut two common critiques of our proposal.

1 *The Affirmative Case for Recognizing Labor Organizing as a Civil Right*

Below, we delineate four central reasons that civil rights laws should be amended to incorporate a right to organize: (a) As a conceptual matter, this plan is appropriate because the rights of assembly and association are already recognized as civil rights; (b) the plan is also a good conceptual fit because the fight for traditionally understood civil rights and the fight for labor rights have been closely intertwined; (c) the reform is necessary because it is common for employers to fire union supporters under the weak penalties provided under the NLRA; and (d) as a tactical matter, the messaging is easier than that associated with other types of labor law reform.

a Conceptually, Labor Rights Are Already Recognized as Civil Rights

In the United States, civil rights are considered core or fundamental rights, often linked to specific protections in the Constitution, such as the political and personal rights of freedom of speech and association, voting, and equality.¹¹ The right to organize is closely related to the Constitutional right to free association and assembly. In a democracy, the right of individuals to band together and pursue their interests with like-minded people is considered an essential element of freedom. Writing about the United States, Alexis de Tocqueville remarked, “[b]etter use has been made of association and this powerful instrument of action has been applied to more varied aims in America than anywhere else in the world.”¹² Although the Constitution does not specifically mention “freedom of association,” the Supreme Court long ago recognized that First Amendment free speech and freedom of assembly provisions necessarily imply a corollary right to freedom of association.

⁹ *Lies & Distortion on the Secret Ballot*, AM. RTS. WORK, www.americanrightsatwork.org/employee-free-choice-act/resource-library/lies-distortion-on-the-secret-ballot-20080730-596-84-84.html.

¹⁰ For our proposed model statute, see RICHARD D. KAHLBERG & MOSHE Z. MARVIT, *WHY LABOR ORGANIZING SHOULD BE A CIVIL RIGHT* 73–74 (2012) (reprinted in the appendix).

¹¹ See U.S. CONST. amends. I, IV, V, VI, XIII, XIV, XV, XIX, XVI.

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

In the landmark 1958 case of *NAACP v. Alabama*, the Supreme Court held that the State of Alabama could not compel the NAACP to disclose its membership rolls, as doing so would chill the right of individuals to join the NAACP and advocate for racial equality.¹³ The Court declared: “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.”¹⁴ This right to association was not limited to those pursuing political activity, the Court found. “Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”¹⁵

Moreover, the Supreme Court has specifically applied the right of association to labor unions, striking down government efforts to quash union-based associational rights. In *Thomas v. Collins*, for example, the Court voided a Texas law requiring union officials to register with the state before engaging in union organizing activities, suggesting that such a requirement interfered with the “rights of assembly and discussion” that “are protected by the First Amendment.”¹⁶ Likewise, in *Smith v. Arkansas State Highway Employees Local 1315*, the Court suggested in dicta that the Constitution forbids a highway commission from “prohibit[ing] its employees from joining together in a union, from persuading others to do so, or from advocating any particular ideas.”¹⁷

Under international law, the right of workers to organize is likewise considered a core democratic value. Article 23 of the Universal Declaration of Human Rights – which the United States took the lead in pushing – provides, “[e]veryone has the right to form and to join trade unions for the protection of his interests.”¹⁸ Likewise, under the International Covenant on Civil and Political Rights, which the United States has signed and ratified with a variety of reservations,¹⁹ labor organizing is explicitly listed as a civil right.²⁰

b The Fight for Civil and Labor Rights Have Historically Been Intertwined

In addition, labor rights belong in the Civil Rights Act because the American movements for civil rights and labor rights have been allied far more often than they have been opposed. Examining the overlapping histories of the labor and civil rights movements demonstrates that each has advanced the interests of the other. Although organized labor has, like many American institutions, been unforgivably marred by a history of racism,

¹³ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

¹⁴ *Id.* at 460.

¹⁵ *Id.* at 460–461.

¹⁶ 323 U.S. 516, 534 (1945).

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

¹⁸ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. XXIII, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

¹⁹ See 138 CONG. REC. 8068 (1992).

²⁰ International Covenant on Civil and Political Rights art. 22.1, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

the civil rights and labor movements share basic values, interests, tactics, and adversaries, all of which make the Civil Rights Act a fitting vehicle for advancing labor rights.

There can be no whitewashing of the history of racial and gender discrimination in the trade union movement. For many years, labor unions were not immune from the vicious racism and sexism that was a part of virtually all American institutions, including religious and governmental entities. Some unions officially barred black workers from joining. For years, A. Philip Randolph, the African American head of the Brotherhood of Sleeping Car Porters, offered resolutions calling on the AFL-CIO to expel segregated unions, prompting an irate George Meany, president of the AFL-CIO, to lash out at Randolph at a 1959 meeting, declaring, “Who appointed you as the guardian of the Negro members in America?”²¹ As late as 1961, Martin Luther King, Jr. chastised the AFL-CIO for continuing to include unions that barred blacks from membership.²² In 1963, under Meany’s leadership, the AFL-CIO refused to endorse the March on Washington, even as many individual unions actively participated.

Even with all those stains of racism, however, King, Randolph, and Bayard Rustin, the organizer of the March on Washington, each argued that labor was an indispensable ally to the civil rights movement in the fight for social justice. At the 1961 annual AFL-CIO convention, King declared, “[t]he two most dynamic and cohesive liberal forces in the country are the labor movement and the Negro freedom movement. Together we can be architects of democracy”²³ Rustin, likewise, argued in 1965, “[t]he labor movement, despite its obvious faults, has been the largest single organized force in this country pushing for progressive social legislation.”²⁴

Fundamentally, the labor movement and the civil rights movement are both concerned about the same principles: the dignity of individuals, who have the right to be respected and valued whatever their job or race; the importance of equality, both racial and economic; the centrality of the right to vote – both for elected representatives in government and for union leadership – to bring about greater political and workplace democracy; and the salience of human solidarity, that is, the need to rise above our atomized existence to join together to improve the larger society. These common values led Randolph both to head a union, the Brotherhood of Sleeping Car Porters, and to propose the original March on Washington in 1941, which prompted President Franklin D. Roosevelt to ban discrimination in the defense industries.²⁵ Shared values led Rustin to head the A. Philip Randolph Institute, where he strengthened the relationship between the labor and the civil rights movements. Mutual principles led King to embrace the Montgomery bus boycott and the Selma voting rights march for racial

²¹ JERVIS ANDERSON, A. PHILIP RANDOLPH: A BIOGRAPHICAL PORTRAIT 302 (1973).

²² MARTIN LUTHER KING, JR., *Address to AFL-CIO Fourth Constitutional Convention, December 11, 1961*, in “ALL LABOR HAS DIGNITY” 33, 39–40 (Michael K. Honey ed., 2011).

²³ *Id.* at 42–43; see also MARTIN LUTHER KING, JR., *Address to Highlander Folk School, September 2, 1957*, in “ALL LABOR HAS DIGNITY,” at 3, 14 (“Organized labor has proved to be one of the most powerful forces in removing the blight of segregation and discrimination from our nation [O]rganized labor is one of the Negro’s strongest allies in the struggle for freedom.”); MARTIN LUTHER KING, JR., *Address to Illinois State AFL-CIO, October 7, 1965*, in “ALL LABOR HAS DIGNITY,” at 111, 119–120 (“The two most dynamic movements that reshaped the nation during the past three decades are the labor and civil rights movements. Our combined strength is potentially enormous.”).

²⁴ Bayard Rustin, *From Protest to Politics: The Future of the Civil Rights Movement*, COMMENTARY, Feb. 1965, at 25.

²⁵ JERVIS ANDERSON, A. PHILIP RANDOLPH: A BIOGRAPHICAL PORTRAIT, 260–61 (1973).

justice on the one hand, and the Memphis sanitation workers strike and the Poor People's Campaign for economic justice on the other. And these common values led all three men to spearhead the legendary 1963 March on Washington, with Randolph as chairman, Rustin as chief organizer, and King as the event's most celebrated speaker. The March, which was heavily supported by the United Auto Workers, merged the goals of both movements – it was a march for “Jobs and Freedom” – and though it is mostly remembered as a landmark in the fight for civil rights, it originated as a labor march.²⁶

Animated by shared values, the two movements aided one another. In the 1950s, several unions supported the Montgomery bus boycott,²⁷ and King's Southern Christian Leadership Conference received 80 percent of its funding during its first year from the United Packinghouse Workers Unions of America.²⁸ In the 1960s, the AFL-CIO provided critical political support to help pass the Civil Rights Act of 1964 and Voting Rights Act of 1965, with some suggesting that the former “never would have passed” without labor.²⁹ The coalition of the labor and civil rights movements, writes historian Michael K. Honey, “ultimately broke the back of Jim Crow.”³⁰

The civil rights movement, meanwhile, supported labor. As King noted, “[i]f the Negro wins, labor wins.” Emancipated and energized black voters in Louisiana, he noted in his 1961 speech to the AFL-CIO, helped repeal an anti-union “right-to-work” law.³¹ To formalize the partnership, Randolph worked with labor and civil rights groups and others to form an umbrella organization, the Leadership Conference on Civil and Human Rights, in 1950.³²

The alliance between the civil rights and labor movements was born not only of similar values, but also of what King called “the kinship of interests.”³³ Even though they haven't always acted accordingly, unions have a powerful interest in reducing racial discrimination and animus because racial hostility inhibits worker solidarity and union organizing, a fact well known to employers who historically sought to divide and conquer workers of different races.³⁴ Black people, meanwhile, have an interest in helping organized labor because blacks are disproportionately working class, they get an even larger wage premium than whites when they join unions, and traditionally they have desired to join unions at higher rates than whites. Meanwhile, both elements of the coalition – labor and civil rights – need one another as allies in the larger fight for social justice.

Racial animus has always been a key impediment to union organizing, which helps explain why the American South has historically been most resistant to unions. In the 1940s, the CIO launched “Operation Dixie” to organize the South, and part of its agenda

²⁶ Michael K. Honey, *Introduction* to MARTIN LUTHER KING, JR., “ALL LABOR HAS DIGNITY,” *supra* note 22, at xiii, xiv–xv.

²⁷ *Id.* at xxvi.

²⁸ *Id.* at 47.

²⁹ TAYLOR E. DARK, *THE UNIONS AND THE DEMOCRATS: AN ENDURING ALLIANCE* 57 (2001).

³⁰ Michael K. Honey, *Introduction* to MARTIN LUTHER KING, JR., “ALL LABOR HAS DIGNITY,” *supra* note 22, at 76.

³¹ KING, *supra* note 22, at 42.

³² See *History of The Leadership Conference on Civil and Human Rights & The Leadership Conference Education Fund*, LEADERSHIP CONF. CIV. & HUM. RTS., www.civilrights.org/about/history.html.

³³ MARTIN LUTHER KING, JR., *Address to United Automobile Workers Union, April 27, 1961*, in “ALL LABOR HAS DIGNITY,” *supra* note 22, at 23, 28.

³⁴ See Honey, *supra* note 22, at 20.

included efforts to reduce discrimination. As historian Tami Friedman notes, the CIO, with a \$1 million war chest and 250 organizers, set out in 1946 to organize at least one million workers by the end of the year. The AFL also made a pledge to organize one million Southern workers. The threat to Southern segregationists was clear as CIO President Philip Murray promised both “political and economic emancipation” for Southern workers and vowed to defeat two major segregationists in Mississippi.³⁵ W.E.B. Du Bois called the CIO the best hope for equal rights in the post–World War II era.³⁶

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

While the measure is often seen as the work of a Republican-dominated Congress, southern Democrats were instrumental in its passage; in both houses, over 80 percent of southern Democrats backed the bill. After President Truman vetoed the legislation, 90 percent of southern Democrats in the House of Representatives and over 77 percent of those in the Senate helped override his action.³⁷

Southern conservatives feared that if unions united working class whites and blacks, it could upend the politics of the South, where Jim Crow laws helped keep white and black workers on opposite sides of the political fence. White Southerners pushed the argument that unions could bring “black domination in the South.”³⁸ For King, the unity of interests of labor and civil rights groups was underlined by segregationist opposition to both. He noted, “the forces that are anti-Negro are by and large anti-labor.”³⁹ He told the AFL-CIO in 1961 that “the labor-hater and labor-baiter is virtually always a twin-headed creature spewing anti-Negro epithets from one mouth and anti-labor propaganda from the other mouth.”⁴⁰

Southern segregationists followed up their support for the anti-labor Taft–Hartley Act of 1947 with an array of state-based “right to work” laws, which weaken unions by allowing employees to be “free riders” – benefiting from union collective bargaining but not contributing dues. To this day, the states most resistant to unions are those in the former Confederacy and Jim Crow South. Of the seventeen states that had legally required segregation prior to *Brown v. Board of Education*, fifteen are today “right to work” states.⁴¹ All five states that ban collective bargaining with public employees – Georgia, North

³⁵ Tami J. Friedman, *Exploiting the North-South Differential: Corporate Power, Southern Politics, and the Decline of Organized Labor After World War II*, 95 J. AM. HIST. 323, 330 (2008) (internal quotation marks omitted).

³⁶ Honey, *supra* note 22, at xxii (citing Du Bois’s 1944 statement).

³⁷ Friedman, *supra* note 35, at 331.

³⁸ See, e.g., Michael Honey, *Operation Dixie: Labor and Civil Rights in the Postwar South*, 45 MISS. Q. 439, 443–450 (1992); Michael O’Brien, *W. J. Cash, Hegel, and the South*, 44 J. S. HIST. 379, 379–398 (1978); Elizabeth Tandy Shermer, *Counter-Organizing the Sunbelt: Right-to-Work Campaigns and Anti-Union Conservatism, 1943–1958*, 78 PAC. HIST. REV. 81, 85 (2009).

³⁹ KING, *Address to the United Packinghouse Workers of America, October 2, 1957* in “ALL LABOR HAS DIGNITY,” *supra* note 22, at 19, 19 (internal quotation marks omitted).

⁴⁰ KING, *supra* note 22, at 38.

⁴¹ See JEFFREY A. RAFFAEL, *HISTORICAL DICTIONARY OF SCHOOL SEGREGATION AND DESEGREGATION* (Greenwood Publishing, 1998): 242; *Right to Work States*, NAT’L RIGHT WORK LEGAL DEF. FOUNDATION, www.nrtw.org/rtws.htm.

Carolina, South Carolina, Texas, and Virginia – are from the Jim Crow South.⁴² And, according to the Bureau of Labor Statistics, the eleven states with the lowest rates of unionization are North Carolina, Arkansas, Georgia, Louisiana, Mississippi, South Carolina, Virginia, Tennessee, Texas, Oklahoma, and Florida. All of these states were formerly segregated.⁴³

Meanwhile, just as labor has an interest in reducing racial animus to promote organizing, black Americans have always had an interest in a stronger labor movement. As King noted, “Negroes are almost entirely a working people,” far more likely to be employees than employers.⁴⁴ While unions for many years practiced racial discrimination, the stereotype of the typical union member as an aging white, male, blue-collar worker today is outdated. According to the Bureau of Labor Statistics, in 2012, 62 percent of workers represented by unions were female, African American, Asian, and/or Latino.⁴⁵

Nonwhites also benefit disproportionately from joining a union. According to a 2018 report from the Center for American Progress, all union members have more wealth than nonunion members do, but the benefit for nonwhite families is particularly pronounced. From 2010–2016, white families who were union members had 139 percent more wealth than nonunion members, but the premium in wealth for nonwhite families who were union members was a whopping 485 percent. The report also found that the union wage premium associated with union membership was higher for nonwhites (41.5 percent) than for whites (26.3 percent).⁴⁶ Likewise, a 2017 report from the Economic Policy Institute found that the gender wage gap is narrower for union members than nonunion members. Women’s hourly wages were just 78 percent those of men in the nonunion sector, but they were 94 percent of male workers in the union sector.⁴⁷ Minority and female workers appear to have a higher wage premium in part because unions negotiate uniform wages and benefits (reducing chances for discrimination) and because women and minorities are overrepresented in low wage fields, where the union premium tends to be higher.⁴⁸

Not surprisingly, African Americans are substantially more likely to desire to join a union – and are therefore especially hurt by current laws that impose weak penalties on firms that engage in unfair labor practices. According to Harvard University economist Richard B. Freeman and Joel Rogers of the University of Wisconsin, 59 percent of black workers (compared with 28 percent of nonblack workers) support organizing their workplace. Women are also more likely than men to support organizing (35 percent to 27 percent).⁴⁹

Finally, many in the labor and civil rights movements agree that a partnership makes them each stronger than they would be individually. As Bayard Rustin argued in his

⁴² See *State Bargaining Rules Interactive Map*, NAT’L COUNCIL TEACHER QUALITY, www.nctq.org/tr3/scope/#interactiveMap.

⁴³ Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Union Members – 2016 (Jan. 2, 2018) [hereinafter BLS Press Release], available at www.bls.gov/news.release/union2.t05.htm.

⁴⁴ KING, *supra* note 22, at 38.

⁴⁵ BLS Press Release, *supra* note 43.

⁴⁶ Christian E. Weller and David Madland, “Union Membership Narrows the Racial Wealth Gap for Families of Color,” Center for American Progress, September 4, 2018.

⁴⁷ Elise Gold and Celine McNichols, “Unions Help Narrow the Gender Wage Gap,” Economic Policy Institute, April 3, 2017.

⁴⁸ *Id.*

⁴⁹ RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 99 exhibit 4.2. (2d ed. 2006).

famous article, *From Protest to Politics*: “[n]either [the labor] movement nor the country’s twenty million black people can win political power alone. We need allies.”⁵⁰

Finally, it is fitting to include protections for labor organizing under the Civil Rights Act because the existence of a union in a workplace can discourage discrimination based on factors such as race and gender. In this way, adding civil rights protections for labor organizing can advance the original underlying goals of the Act itself.

First, unions decrease employers’ discretion to make arbitrary and abusive decisions to fire workers or to pay some workers more than others – which can reduce opportunities for discrimination. Many Americans do not realize that most employees work “at will,” meaning they can be fired for any reason or no reason at all. Unions, by contrast, usually bargain for the right to be fired only for “just cause.” This higher standard for termination helps minority or female employees who are discriminated against because it is much easier to prove that a termination was unjust or arbitrary rather than having to go further and prove that it was also motivated by race or sex discrimination.⁵¹

Likewise, because unions tend to bargain for uniform wages, they reduce employer discretion to pay minority and female employees less than white and male employees. Researchers find that the greater use of “objective pay setting criteria such as job classification and tenure” helps explain why the wage differentials between men and women and blacks and whites tend to be lower in unionized firms than in nonunionized firms.⁵² As the Leadership Conference notes, “[c]ollective bargaining agreements set terms and conditions of employment in unionized workplaces, making employment practices more transparent and, hence, less likely to be arbitrary and discriminatory.”⁵³

Often, negotiated contracts explicitly ban discrimination, which can, according to the Leadership Conference, add “another layer of protection” for employees.⁵⁴ Unions also educate workers about their rights, so union members are more likely to recognize when wrongdoing or discrimination has occurred. Because unions provide a counterbalance to management’s authority, the mere presence of the union can often deter abusive employer practices, including discrimination.

In addition to reducing management’s discretion to discriminate and leveling the playing field, unions usually bargain for contracts creating procedures to address grievances including those having to do with race or sex discrimination – that can address problems more efficiently and cheaply than litigation. As Julius Getman of the University

⁵⁰ Rustin, *supra* note 24.

⁵¹ Above and beyond this, the “just cause” standard usually puts the burden on the employer to prove just cause, rather than on the employee to prove a lack of just cause. See Martin H. Malin, *The Evolving Schizophrenic Nature of Labor Arbitration*, 2010 J. Disp. Resol. 57, 78 (stating that “the typical CBA [collective bargaining agreement] requires just cause for discipline and discharge, provisions that arbitrators have uniformly interpreted place on the employer the burden to prove its justification for the adverse action, whereas antidiscrimination and other statutes merely prohibit basing such adverse action on the employee’s protected status or conduct and place the burden on the employee to prove the employer’s improper motive.”).

⁵² DAVID METCALF ET AL., UNIONS AND THE SWORD OF JUSTICE: UNIONS AND PAY SYSTEMS, PAY INEQUALITY, PAY DISCRIMINATION AND LOW PAY 16 (2000), available at http://eprints.lse.ac.uk/20195/1/Unions_and_the_Sword_of_Justice_Unions_and_Pay_Systems%2C_Pay_Inequality%2C_Pay_Discrimination_and_Low_Pay.pdf.

⁵³ *Union Representation: A Bride to Economic Security and Equal Opportunity for All Workers*, LEADERSHIP CONF. CIV. & HUM. RTS., www.civilrights.org/publications/voices-2009/representation.html (last visited May 14, 2013).

⁵⁴ *Id.*

of Texas notes, the grievance process established under collective bargaining agreements usually provides that “employer decisions may be challenged before a neutral third-party arbitrator with broad powers to review and set aside.”⁵⁵ These grievance procedures provide an important supplement to civil rights protections. The Leadership Conference notes:

While not a substitute for the right to go to court, access to the grievance process is important to women and people of color, because it is less expensive, time-consuming and contentious than litigation; it engages the union directly in representing aggrieved workers; and it promotes faster resolution of disputes.⁵⁶

Research by Ann Hodges of the University of Richmond found that on the question of sexual harassment, union grievance procedures are “generally quicker and less expensive than litigation” yet still provide access to “a neutral arbitrator.”⁵⁷

Moreover, in instances where employees wish to file discrimination suits in federal court, unions can provide legal counsel to discrimination victims, as well as financial benefits to help compensate for wages lost during a suit. Says the Leadership Conference: “[t]he added heft unions bring in challenging discrimination is critical: fair employment laws ban a panoply of practices that have the intention or effect of discriminating, but equal opportunity is not a self-enforcing promise.”⁵⁸

Unions offer other protections against discrimination. In cases of sexual harassment, for example, managers often retaliate against employees who dare to complain, which can effectively intimidate victims. Hodges found that unions often protect against such retaliation. Likewise, because unions represent all members, they can build up institutional memory of discrimination and identify larger patterns by employers that an individual victim might miss.⁵⁹

The protections that unions provide against discrimination are especially important in low-wage jobs, where employers are more likely to act arbitrarily where women and employees of color are more likely to be concentrated,⁶⁰ and where the low value of lost wages makes it difficult to attract an attorney for litigation on a contingency-fee basis. Overall, researchers find that plaintiffs in unionized firms are more likely to be successful with their employment discrimination suits; and they are “less likely to be dismissed or to settle early.”⁶¹ In total, scholars conclude that, for a variety of reasons – including more uniform pay scales and the availability of grievance procedures – there appears to be “less discrimination among union workers.”⁶²

⁵⁵ Julius G. Getman, *The Changing Role of Courts and the Potential Role of Unions in Overcoming Employment Discrimination*, 64 TUL. L. REV. 1477, 1482 (1990).

⁵⁶ *Union Representation*, *supra* note 53.

⁵⁷ Ann C. Hodges, *Strategies for Combating Sexual Harassment: The Role of Labor Unions*, 15 TEX. J. WOMEN & L., 183, 213–214 (2006). To be clear, the union-sponsored grievance procedure is markedly different than the much-reviled individual arbitration proceedings sometimes required by employers as a substitute for court proceedings.

⁵⁸ *Union Representation*, *supra* note 53.

⁵⁹ Hodges, *supra* note 57, at 214–215.

⁶⁰ *Union Representation: A Bride to Economic Security and Equal Opportunity for All Workers*, *supra* note 53.

⁶¹ Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 190 (2010).

⁶² John S. Heywood, *Race Discrimination and Union Voice*, 31 INDUS. REL. 500, 507 (1992).

c Making Labor Organizing a Civil Right Enhances Penalties for Violating Organizing Rights

While there are important conceptual reasons to protect labor organizing as a civil right – as a cherished part of free association, and given the intersecting interests and values of the labor and civil rights movements – there are also practical reasons to place organizing rights within civil rights law. More than seventy-five years of experience with the NLRA and a half century years of experience with Title VII of the Civil Rights Act of 1964 suggest that the former has proven largely ineffectual in protecting workers, while the latter has been quite successful in diminishing discrimination and changing social attitudes.

The 1964 Civil Rights Act, which was subsequently amended in 1991, provides powerful penalties for employers who discriminate on the basis of race, sex, national origin, or religion. Under the 1991 amendments, employment discrimination remedies have been expanded to include not only back pay but compensatory and punitive damages up to \$300,000. Civil rights laws also provide plaintiffs with the opportunity to pursue legal discovery, something that employers assiduously seek to avoid. Furthermore, plaintiffs are given access to jury trials; and when plaintiffs prevail, defendants are liable for up to double the hourly rate for plaintiffs' attorneys' fees.⁶³

Under the NLRA, it is likewise illegal to discriminate against employees for trying to organize a union, because lawmakers recognized that firms should not be allowed to use their disproportionate power to intimidate workers. But the penalties and processes under the NLRA are far weaker. If employers are found to have violated the law, they must reinstate any terminated employees and provide them with back pay, normally after a lengthy and arduous process of enforcement. And under the NLRA, there is extremely limited opportunity for discovery and no jury trial. Faced with the prospect of having to negotiate substantial wage and benefit increases with a union, businesses have a strong financial incentive to fire organizing employees and risk paying the penalties as a cost of doing business. Labor lawyer Thomas Geoghegan writes: "An employer who didn't break the law would have to be what economists call an 'irrational firm.'"⁶⁴ As Kate Bronfenbrenner has meticulously documented, employers routinely fire those trying to organize unions.⁶⁵

d Framing Labor Organizing as a Civil Right Is Good Tactics and Messaging

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

Because the legislation would not address the various issues of elections and arbitration and the inner workings of the NLRB, grouping labor rights with other civil rights at work would avoid questions about secret ballot elections and union behavior, instead isolating

⁶³ See David Segal, *Lawyers Take a Claim on Bias Lawsuits*, WASHINGTON POST, January 27, 1997, A1.

⁶⁴ THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK (New York: Farrar, Straus and Giroux, 1991) 255.

⁶⁵ Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, ECONOMIC POLICY INSTITUTE, May 20, 2009.

the straightforward issue of employer behavior. By focusing on the ability of *individuals* to protect themselves from wrongful termination, the legislation underlines the David and Goliath nature of the conflict between large employers and individual employees. The contest between a few individuals and their firms may paint a more sympathetic picture for some than the battle between an employer and a union. And the legislation would remind people that it is individual workers choosing to exercise their right to organize in pursuit of better conditions who pay the price when employers unfairly use their economic power to stop unions.

Of course, in proposing that organizing be put into civil rights law, there will be a host of details and issues that must be worked out in the legislative and judicial processes. These include issues such as: whether the proposed amendments should be made to the Civil Rights Act or through a stand-alone statute that parallels its protections, how federal courts would handle what is certain to be a host of new litigation in an area with which most judges are not familiar, how unions would adjust their organizing and litigation strategies to meet these new regulations, how the courts would handle permanent replacements of strikers and other practices under this new regime, and whether this new legislative framework would regain for labor the legitimacy and numbers that it enjoyed for nearly half a century.⁶⁶ These issues would have to be worked out in time, and could require years to sort out. However, labor issues have always turned on power, with legislation forming one major area of power.

2 *Rebutting Common Critiques of Making Labor Organizing a Civil Right*

In our discussions, critics raise two major concerns about the idea of writing labor organizing into civil rights laws: (a) that civil rights laws are about identity, not behavior; and (b) that civil rights laws are about individual rights, whereas labor rights are collective rights. We address each in turn.

a Critique: Civil Rights Are About Identity, Not Behavior

Some may argue that civil rights protections are reserved for discrimination based on identity rather than activity, or who we are rather than what we do.⁶⁷ However the range of civil rights protections in the United States has been expanding for the last few decades to encompass a variety of characteristics and activities. In the context of employment, federal protections include Title VII, which prohibits employers from terminating, disciplining, or taking employment actions “because of such individual’s race, color, religion, sex, or national origin.”⁶⁸ Subsequently, additional federal statutes have been passed that have supplemented the original protected categories. These include, but are not limited to: the Age Discrimination in Employment Act of 1967 (ADEA), which prohibits employment discrimination against persons forty years of age or older;⁶⁹

⁶⁶ Because the NLRB has more experience handling labor claims than the Equal Employment Opportunity Commission, we believe the NLRB should continue to handle claims of discrimination – even though the enforcement mechanisms would mimic the civil rights laws.

⁶⁷ See, e.g., Theodore M. Shaw, *Commentaries on the Kahlenberg-Marvit Article*, POVERTY & RACE, Jan.–Feb. 2013, at 13, 14 (2013).

⁶⁸ 42 U.S.C. § 2000e-2 (2011).

⁶⁹ Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2011).

the Pregnancy Discrimination Act of 1978, which prohibits discrimination based on pregnancy, childbirth, or related conditions;⁷⁰ Titles I and V of the Americans with Disabilities Act of 1990 (ADA), which prohibits employment discrimination against qualified individuals based upon disability or perceived disability;⁷¹ the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), which prohibits discrimination based on “membership, application for membership, performance of service, application for service, or obligation” with a “uniformed service”;⁷² Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits employment discrimination based on genetic information about the individual,⁷³ and laws prohibiting discrimination based upon indebtedness or bankruptcy.⁷⁴

Many state and local statutes mirror the federal regulations, but several have added additional categories of protections. These include laws prohibiting employment discrimination based upon prior criminal conviction,⁷⁵ sexual orientation,⁷⁶ “use or nonuse of lawful products off the employer’s premises during nonworking hours”⁷⁷; “honorably discharged veteran or military status”;⁷⁸ an individual’s unemployment,⁷⁹ and an employee declining to attend or participate in employer-sponsored meeting about religious or political matters.⁸⁰ In sum, civil rights protections have never been limited to immutable characteristics, and the list of protected categories has not been static or frozen so as to protect only those criteria that were part of the original Civil Rights Act.

b Critique: Civil Rights Are Individual Rights and Labor Rights Are Collective Rights

Some may argue that labor rights are by their nature collective, and that the individual rights approach would destroy solidarity. This proposal *would* reframe joining a union in part as an individual right. However, this fact does not transform all labor rights into individual rights. Rather, it recognizes the reality that when an employee acts to join or organize a union, there is often not yet a collective framework (i.e. “concerted activity”) that can protect her. Solidarity and organization are being constructed in this initial phase, and if the individual employee is targeted, her individual rights are infringed. Employers are aware of this, which is why they often fire a few select individuals rather than the bulk of the workforce. The proposed amendment recognizes the individual nature of early-stage union organizing, and provides prohibitions and protections for the individual so she can assert collective demands and enforce those through the collective mechanisms.

⁷⁰ Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2011).

⁷¹ Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2011).

⁷² Uniform Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4311 (2011).

⁷³ Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff (2008).

⁷⁴ 11 U.S.C. § 525 (2006).

⁷⁵ See, e.g., N.Y. EXEC. LAW § 296 (McKinney 2013).

⁷⁶ See, e.g., CAL. GOV’T CODE § 12940 (West 2013).

⁷⁷ See, e.g., WIS. STAT. § 111.31 (2013).

⁷⁸ See, e.g., WASH. REV. CODE § 49.60.180 (2012).

⁷⁹ See, e.g., N.J. STAT. ANN. § 34:8B-1 (West 2013).

⁸⁰ See, e.g., OR. REV. STAT. § 659.785 (2011).

C Making Labor Organizing a Civil Right in the Era of Trump⁸¹

Federal action to make labor organizing a civil right is inconceivable as long as Donald Trump is president and Mitch McConnell is Senate Majority Leader. But state and local efforts to make labor organizing a civil right in worker-friendly legislative bodies can be pursued.

Some courts have held that the National Labor Relations Act preempts state and local labor legislation for employees covered by the Act, which could make comprehensive state and local legislation problematic. But there are more than 25 million employees who are not covered by the NLRA who could therefore benefit from making labor organizing a civil right. These noncovered employees include 19.2 million state and local employees, 2.8 million civilian federal workers, 2.7 million agricultural laborers, and more than 700,000 domestic workers.⁸²

State and local action would also build awareness of the proposal and create momentum for a time when a more worker-friendly Congress could take up federal legislation and give workers seeking to organize unions their proper place in the Civil Rights Act.

Action at the state and local level to make labor organizing a civil right is particularly critical at this moment. Donald Trump's stunning success with white working-class voters in the 2016 election, including many union members, suggests progressives need new ways to reach this constituency.⁸³ Broadening the Civil Rights Act to address not only racial discrimination, but a type of discrimination many white working class people also face – for organizing a union – could have a powerful signaling effect, telegraphing that civil rights laws can address their larger economic concerns as well.

More broadly, at a time when American democracy is under tremendous stress – with attacks on the free press, an independent judiciary, and religious and racial minorities – we need a strong labor movement more than ever. Democracies need a strong middle class, and unions help create shared prosperity. As other chapters in this volume discuss in more detail, civic organizations that are run democratically can also be an important mechanism for acculturating citizens to the inner workings of democracy. Unions are among the most important of these organizations, bringing together rank-and-file workers from a variety of ethnic, racial, and religious backgrounds, and serving as what Harvard political scientist Robert Putnam calls “schools for democracy.”⁸⁴ Labor unions can also help create a culture of participation among workers. Being involved in workplace decisions and the give-and-take of collective bargaining, voting on union contracts, and voting for union leadership all have been called important drivers of “democratic acculturation.”⁸⁵

In addition, union members routinely engage in civic activities, such as staffing phone banks and canvassing voters door to door. This involvement can boost civic participation

⁸¹ Portions of this section are adapted from Richard D. Kahlenberg, *Hope in Dark Times: Resisting the Threat to Democracy with Union Activism*, AMERICAN EDUCATOR, Summer 2017.

⁸² Richard D. Kahlenberg & Moshe Z. Marvit, *Labor at a Crossroads: Can Broadened Civil Rights Law Offer Workers a True Right to Organize?*, THE AMERICAN PROSPECT (Jan. 12, 2015).

⁸³ Trump won white union members by a 12 point margin. Ronald Brownstein, *Will Trump Succeed in Dividing Organized Labor?*, THE ATLANTIC, March 9, 2017.

⁸⁴ ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 80–81, 337, 456, 494–496 (Simon & Schuster, 2000).

⁸⁵ Randall Garton, *Collective Bargaining Teaches Democratic Values, Activism*, Albert Shanker Institute (Sept. 16, 2011), www.shankerinstitute.org/blog/collective-bargaining-teaches-democratic-values-activism.

among union members and nonmembers alike. One study found that for every one percentage point increase in a state's union density, voter turnout increased between 0.2 and 2.5 percentage points. In a presidential election, a ten percentage point increase in union density could translate into 3 million more voters.⁸⁶ Likewise, research shows that unions played an important role in countering "an authoritarian streak" among working-class voters. Sociologist and political scientist Seymour Martin Lipset found that organized labor made workers more inclined to embrace democratic norms by inculcating "civic virtues in its members."⁸⁷

In these dark times, we need new solutions. Americans correctly take pride in the civil rights revolution of the twentieth century. Drawing directly upon that earlier model of success, we need today a labor rights revolution to restore our democracy.

⁸⁶ David Madland, Karla Walter, & Nick Bunker, *UNIONS MAKE THE MIDDLE CLASS: WITHOUT UNIONS, THE MIDDLE CLASS WITHERS* (Washington, DC: Center for American Progress Action Fund, 2011), 15. See also Benjamin Radcliffe & Patricia Davis, *Labor Organizing and Electoral Participation in Industrial Democracies*, 44 *AM. J. POL. SCI.* 132–141 (2000).

⁸⁷ Neil Gross, *The Decline of Unions and the Rise of Trump*, *NEW YORK TIMES* (Aug. 14, 2016); see also Seymour Martin Lipset, *Democracy and Working-Class Authoritarianism*, 24 *AM. SOC. REV.* 482–501 (1959).

Appendix: A Model Statute Making Labor Organizing a Civil Right

Section 1: No employer shall restrain, coerce or interfere with an employee's right to join a labor union, or engage in any act or act of reprisal which has the effect of restraining, coercing or interfering with an employee's decision to support, oppose or take any other position with respect to union membership.

Section 2: The district court shall issue injunctions (including preliminary injunctions) to redress any violation of Section 1, or reinstate the employee or provide any other appropriate injunctive relief on behalf of the affected employee or similarly situated employees.

Section 3: The district court shall grant full legal fees and costs to any employee who obtains any significant relief and in awarding the appropriate hourly rate the district court shall take into account the use of the hourly rate of the employer's lawyer as the lodestar for such determination.

Section 4: Sections 703(a)(1), 703(a)(2), 703(b), 703(c)(1), 703(c)(2), 703(d), 703(e) of the Revised Statutes (42 U.S.C. 2000e-2) are amended by inserting "on the basis of seeking union membership," after "sex,".

Section 5: The employee shall be entitled to all other relief provided under the Civil Rights Act of 1991, including back pay, compensatory, and punitive damages.

Section 6: All actions brought pursuant to Section 1, other than Section 2 injunctions, shall be filed and handled by the National Labor Relations Board and proceed under procedures established for the Equal Employment Opportunity Commission (29 C.F.R. 1601 et seq.).

Section 7: The Secretary of Labor shall be entitled to bring an action on behalf of any employee who has suffered a loss of rights under Section 1.

Section 8: No employer shall be liable to any employee for punitive damages for any violation of Section 1 during such period as the employer has entered a collective bargaining agreement with an employee representative or labor organization or has entered an agreement in good faith to use a third party arbitrator to determine the terms of an appropriate collective bargaining agreement in the event that the employer and employee representative fail to reach an agreement.