

September 2010

Revitalizing Labor Law

Benjamin Sachs

Follow this and additional works at: <https://scholarship.law.berkeley.edu/bjell>

Recommended Citation

Benjamin Sachs, *Revitalizing Labor Law*, 31 BERKELEY J. EMP. & LAB. L. 333 (2010).

Link to publisher version (DOI)

<https://doi.org/10.15779/Z380928>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Employment & Labor Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

DAVID E. FELLER MEMORIAL LABOR LAW LECTURE

April 15, 2010

Revitalizing Labor Law

Benjamin Sachs[†]

Thank you. It is a real honor to be here tonight. I'm grateful to the Journal and to the Feller family for the opportunity to say a few words about the state of contemporary labor law. I'm sorry to say that I never had the chance to meet David Feller. I very much would have liked to. His career path, it turns out, serves as a kind of model, maybe a sort of unreachable ideal, for my own. Professor Feller was, at the beginning of his career, a partner in the Washington labor firm of Goldberg, Feller and Bredhoff. That firm, by then operating as Bredhoff and Kaiser, was where I spent my second summer of law school. David also worked as an in-house counsel for several major labor unions, something I did for a few years with SEIU. He then became an academic, writing in addition to other things his *General Theory of the Collective Bargaining Agreement*, one of the central pieces of 20th century labor scholarship. And among his other contributions to the jurisprudence of labor law, Feller argued *Vaca v. Sipes*,¹ a Supreme Court decision that I had the chance to cover in my Labor Law course at Harvard on Monday. So it's an honor to give these remarks, but also a bit humbling.

At bottom, the National Labor Relations Act, our federal labor law, promises two things: First, the law aims to ensure that employees have a choice on the question of unionization, that employees can choose free of coercive interference whether they want to bargain individually or collectively with their employers. Second, if employees decide that they'd rather bargain collectively, the law intends to facilitate collective

[†] Assistant Professor of Law, Harvard Law School.

1. 386 U.S. 171, 171 (1967).

bargaining. It intends to ensure that where workers decide to unionize, employers and unions will, in fact, negotiate collective agreements.

These are profoundly important guarantees. Unions are not perfect institutions, and their economic effects are not uniformly positive. But in many settings, unionization is the only genuine mechanism through which employees can participate in the shaping of their work laws. Unions have also proven across time and geography to be an effective force for wage and income equalization. They've produced desirable shifts in the way compensation packages are structured, giving workers health insurance and pensions when these protections are not universally available. Unionization improves the chances that other workplace rights, including safety and health guarantees, will be enforced. And a vibrant union movement is crucial to the health of our political democracy.

But for more than three decades now, labor scholars have been withering in their criticism of the National Labor Relations Act. The critique is that the statute fails to fulfill its central statutory purposes. In 1983, for example, Paul Weiler commented that “[c]ontemporary American labor law more and more resembles an elegant tombstone for a dying institution.”² But what I'd like to do tonight is not bemoan the NLRA's failures, but to offer some potential avenues for revitalizing labor law in the United States. In broad strokes, I'm going to discuss two different kinds of approaches. The first will be a set of ideas for fixing the federal legal regime—ways to amend the Act or to change the way the statute is administered to correct its flaws. I'll concentrate on the ways we might rebuild the Act's election machinery in order to minimize managerial intervention in union campaigns and, thereby, to maximize employee choice. The second set of ideas I'll discuss are ways in which workers, unions, and employers can improve on the NLRA not by fixing the statute, but by avoiding it. In this vein, I'll talk about state and local interventions, the private reconstruction of the NLRA's rules by unions and employers, and the reliance on alternative statutory regimes to protect and facilitate workers' collective action.

So to motivate this discussion, let me start by very briefly reviewing what ails the NLRA, a story that most, if not all of you, already know. A threshold issue arises from the fact that the statute excludes completely from its coverage multiple groups of workers who constitute an increasing share of the U.S. labor force. The Act denies protection to a significant proportion of workers in the contingent labor force, foreclosing, for example, nearly all unionization options for temporary workers. Supervisors are also out, meaning that tens of thousands of workers, from

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

nurses to craftspeople to knowledge workers, have no federal labor law. Lastly, for all practical purposes, the NLRA excludes from its coverage undocumented immigrant workers, another large and growing subset of the U.S. labor force.

Even for those workers who do come within the scope of the Act, the picture is not very bright. The statute guarantees employees a free choice on the union question. But, as critics have shown, the NLRA's rules of organizing do not deliver on this promise. Part of the issue stems from fairly basic collective action problems. The law, for example, allows employers to ban much speech about unionization on company property and to bar non-employee union organizers from company property entirely. These restrictions are all legal, but they nonetheless require employees who want to unionize to bear the substantial coordination costs of identifying and then contacting prospective supporters during non-work time and in non-work locations.

Beyond these more 'gentle' impediments, the statute has also failed to prevent several particularly pointed forms of managerial intervention, which create significant obstacles to employee choice. At the root of the problem are the current NLRA election rules. Under current law, the only way that employees can obligate an employer to bargain with their union is by winning a Board-conducted election. But the delay between the time that employees petition the Board for such an election and the time that ballots are actually cast creates a window of about six weeks. The problem is that during this extended campaign period, the Act does not effectively prohibit the use of a wide range of admittedly illegal tactics. A 2009 study reports, for example, that in fifty-seven per cent of the NLRB elections studied, employers threatened to close the firm. Somewhere in the neighborhood of thirty-four per cent of employers fire union supporters.³ Another study revealed that one in five workers who take a lead role in an organizing campaign is discharged for doing so.⁴ Again, this kind of conduct is illegal. Within the parlance of the NLRA, these forms of managerial intervention constitute unfair labor practices. But the NLRB's remedial regime is too weak to protect employees against these forms of employer intervention. The Board's remedies, for example, have to be exclusively compensatory, and its proceedings are subject to seemingly endless delays. In recent years, the median length of time between the filing of an unfair labor practice charge and the issuance of a Board order

3. KATE BRONFENBRENNER, NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING, ECON. POL'Y INST. BRIEFING PAPER NO. 235 1-2 (2009), available at <http://www.epi.org/publications/entry/bp235>.

4. JOHN SCHMIDT & BEN ZIPPERER, CENTER FOR ECON. POL'Y & RES., DROPPING THE AX: ILLEGAL FIRINGS DURING UNION ELECTION CAMPAIGNS, 1951-2007 1 (2009), available at <http://www.cepr.net/documents/publications/dropping-the-ax-update-2009-03.pdf>.

approached 500 days.⁵ An employer, on the other hand, can defeat an organizing drive by discharging a union supporter and keeping her out of the workforce for a matter of weeks or months. So the NLRA, in the words of Paul Weiler, fails to fulfill its promise that workers should have a genuine choice on the question of unionization.

But there's another problem. Workers who do unionize despite these hurdles face an uphill battle in securing a first collective bargaining agreement. The statute requires the parties to bargain in good faith, but the Board has almost no means of enforcing this requirement. Even when the bargaining delays are egregious, even when there is no genuine attempt to reach agreement, the Board can only order the parties to continue bargaining. The result is what Catherine Fisk calls "the catastrophic under-enforcement of the statutory right of employees to bargain."⁶

To many of you this much of the story is familiar, so let me now turn and offer some suggestions about what we might do. The first possibility is to fix the NLRA's organizing rules in order to better ensure that workers have a choice on the union question. Here's what I want to suggest. First, because the primary threat to employee choice comes from managerial intervention, labor law can promote choice by minimizing managerial intervention. Labor law can accomplish this goal, moreover, through a structural approach to the rules of union organizing. In particular, by changing the election rules in a way that enables employees to conduct and complete organizing drives without giving notice to management that a campaign is underway, the law can maximize protection for employee choice. I'm going to flesh out these claims by offering an analytic framework for grappling with the problem of choice, and then offering some potential preliminary approaches.

A useful way of thinking about employee choice comes from an unlikely source, and that is the literature on legal default rules. The basic idea is straightforward. Some legal regimes impose mandatory rules. Think of the minimum wage. Other legal regimes offer choices. For example, labor law gives workers a choice between union and individual employment contracting. Wherever the law offers a choice, it has to pick a starting point, an initial allocation of rights and statuses. The default is simply that starting point. The key insight of the default rule literature is that it matters a great deal which default we pick. And, in fact, defaults have a lot to do with choice. For one thing, if we want to ensure that parties have as much choice as possible, we don't want the default rule to stick. We want people to be able to choose either the default or its alternative with equal ease.

5. 74 NLRB ANN. REP. 152 (2009).

6. Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47, 47 (2009).

For our purposes, two recent developments in the literature are especially important. The first is what's called the preference eliciting theory, and it comes from statutory interpretation.⁷ The second is the reversible defaults theory from corporate law.⁸ These theories aim to determine how a legislature (or a court) should choose a default rule for a legal regime that's designed to maximize the satisfaction of some relevant preference set. Both of these theories also share a key insight. Because of various kinds of impediments, it's often more difficult to depart from one default rule than it would be to depart from another. And both of the theories then suggest the same approach. When the legislature doesn't know with certainty which default rule would, in fact, capture the parties' preferences, and departing from one default is more difficult than departing from the other, the legislature should choose the default rule from which it is easiest to depart. That way if the initial placement of the rule turns out to be wrong, if it turns out to be contrary to what the parties actually want, the parties are best positioned to exercise their preferences and correct the misplacement.

So adopting the default rule from which it is easiest to depart is one way to maximize choice, but it's not the only way. In certain contexts, the same preference-maximizing goals that can be achieved by changing the default rule can also be achieved by changing what's known as the altering rule, that is, by changing the process through which parties depart from the default. More specifically, by redesigning the process through which parties depart from a default rule in a way that eliminates the impediments that make the default sticky, we can maximize choice.

What does this have to do with labor law? Well, labor law's current default rule is, of course, non-union bargaining. In the default position, bargaining over terms and conditions of employment take place between individual employees and their employers. Labor law's current altering rule is the NLRB secret ballot election process. The way that employees depart from the non-union default and choose unionization is by voting in a secret ballot election conducted by the Board. But contemporary default theory suggests that these rules are inappropriate, at least from the perspective of employee choice. Indeed, this literature suggests that to ensure employee choice we either need a new default or a new altering rule.

Here's why. When it comes to maximizing the satisfaction of employee preferences on the union question, we have to be, by definition, entirely uncertain as to whether employees prefer the union or the non-union option. For each workplace and each bargaining unit, the law requires that employees be equally free to choose union or non-union

7. See EINER ELHAUGE, *STATUTORY DEFAULT RULES* 151-67 (2008).

8. Lucian Arye Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 NW. U. L. REV. 489 (2002).

bargaining. Given this uncertainty as to employee preferences, labor law should choose the default from which it is easiest to depart. But because of the collective action problems and the forms of employer intervention I've already mentioned, what we have is the default from which it is most difficult to depart. That is, because of managerial opposition to unionization, it's more difficult for employees to depart from the non-union default and choose unionization than it would be for them to depart from the union default and choose non-union bargaining.

The default theories I've outlined, then, give us two options for correcting this problem. First, we could change the default rule and impose a default of union bargaining. Second, we could keep the non-union default but change the altering rule. That is, if we maintain our non-union default, we can ensure employee choice by changing the process through which employees choose to unionize so as to eliminate the impediment that makes the non-union default so sticky. And because the impediments to employee choice come from managerial intervention, an altering rule that minimizes that intervention is the kind of rule that would mitigate the stickiness of the non-union default.

It's important to stress that either of these approaches, either a new default or a new altering rule, would be appropriate not because of any normative preference for unionization, nor because pro-union employees deserve special solicitude, nor because of a belief that more employees actually desire unionization than want non-union bargaining. To the contrary. These approaches are appropriate precisely because we assume complete uncertainty about what employees desire, and we want to maximize their ability to choose either union bargaining or non-union bargaining with equal ease.

So how do we decide between a new default and a new altering rule? Well, for those of you here today with any connection to the real world, this will not seem to be a hard decision. There may be no conceptual reason to prefer a new altering rule to a union default, but there are some highly significant pragmatic and political reasons for pursuing a new altering rule; among these, there is likely not a single vote in the United States Congress for a default rule of unionization.

To be sure, an altering rule that minimizes managerial participation in the employee organizing process raises a separate set of important questions that need to be addressed. The first is whether labor law ought to provide employers with an affirmative right to intervene in organizing campaigns. My view, following several others who have addressed this question, is that the argument in favor of an affirmative right for managerial intervention

depends on a flawed conception of what unionization entails.⁹ Unionization, for better or worse, does not affect a shift in sovereignty over the firm. As the rules of bargaining make abundantly clear, unionization is a far more limited process, in which employees decide to negotiate collectively rather than individually with their employers and name their agent for these purposes.

The second question concerns the loss of information available to employees in an organizing campaign conducted with a minimum of managerial involvement. The decrease in the quantity of information available to employees, information about the demerits of unionization, is a cost of adopting a new rule like the ones I'll propose. But for several reasons this cost will not outweigh the benefits to choice. Primary among these is that employers will still have the opportunity to express their views about unions. Management could inform employees when they're hired and at regular intervals why it believes unionization is not in the interests of the firm. In this respect, the new election rules would require management to change the timing of its information delivery, but would not disable management from communicating such views.

Having decided that labor law needs a new altering rule, how do we design one? The challenge is to change the election process in a manner that allows employees to conduct their organizing efforts with a minimum of managerial intervention. How could we do that? What would such an election process look like?

Well, one possibility is card check. In a card check regime, employees register their choice on the question of unionization by signing a card indicating they want to unionize. Once a majority of employees have signed cards, the organizing drive is over, and the employer is obligated to bargain with the union. If a majority of employees sign cards before management becomes aware of the campaign, management will have no opportunity to intervene. And even if management is aware of the existence of the campaign, card check enables employees to complete much more of their organizational efforts before the anti-union work can begin. But, in addition to some problems with open decisionmaking that I've discussed in other work,¹⁰ card check does not appear to be a politically viable approach. That's because the current statute gives management the right to request a Board conducted secret ballot election if and when employees demand recognition. So card check would require a statutory amendment. This was the intent of the Employee Free Choice Act, but the prospects for passage of card check legislation are dim at best.

9. See, e.g., Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1813 (1983).

10. Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 713-18 (2010).

So what labor law calls for is a decisional mechanism that preserves the Board's secret ballot election machinery while still enabling employees to minimize managerial intervention. Let me offer two potential proposals. The first would borrow technologies now used in union elections in airline and railroad industries and would permit employees to cast secret ballots in their homes over the phone, via the Internet, or through the mail. As they do under current NLRA procedures for election petitions, unions would gather names of employees they believe work in a relevant bargaining unit, and the Board would then send these employees confidential voter identification numbers and instructions about how to vote. Although union organizers would be entitled to visit employees at their homes, they'd be barred from interfering when employees enter their votes. If the union secured the support of more than 50 percent of the bargaining unit, it could demand recognition. The employer would then be entitled to challenge the eligibility of voters and the definition of the unit.

The second proposal draws on the model of early voting now used in U.S. political elections. Here, once the union reached a certain threshold of support, the Board would establish a polling place, which would remain open during the organizing campaign. Employees could, if they wanted, go to the polling place and cast a ballot in favor of or in opposition to unionization, but the Board would not inform the employer of the existence of the campaign or of the opening of the polling place.

Many of the details obviously remain to be worked out, but both of these designs preserve the secret ballot, and both perform the legitimate function of minimizing managerial interference in the employee organizing process.

In short, contemporary legal thinking on choice suggests that a reordering of the NLRA's election rules is in order. A new election mechanism is thus one approach to revitalizing labor law. It is in many ways the most obvious approach, and one with significant promise, but it's far from the only approach. And so with the time I have left, I want to suggest three other avenues for labor law reform, each of which, as I said, depends on avoiding the NLRA, not repairing it.

The first of these avenues is state and local innovation. Now, one cannot say the words "labor law" and "state and local" in the same sentence without eliciting an instant reaction: "But what about preemption?" And indeed, it would be difficult to find a regime of federal preemption broader than the one grounded in the National Labor Relations Act. As a result of these preemption rules we have no traditional labor law in the cities and states. There are no state laws governing private sector union organizing, nor city ordinances policing labor-management relations. But states and

cities are nonetheless contributing to labor law's redevelopment in multiple ways, and I'm going to discuss two of them.¹¹

In the first, state and local governments assume the role of employer and collective bargaining partner for an expanding set of atypical workers who are excluded from NLRA coverage. The second form of local intervention that I'll discuss involves states and cities operating in their proprietary capacities, as funders, financiers, and contractors, and requiring that employers who receive public funds agree to alternate rules for union organizing and recognition. The first trend is visible in the home care and childcare industries. A substantial segment of the home care industry, for example, consists of so-called independent providers ("IP's") of home care services. While the employment status of these IP's can vary according to the particular way in which services are provided, the workers have been classified as employees of the individual in whose home they work or as independent contractors, and under either classification they are denied NLRA protection. The picture for home-based childcare providers is much the same. But because federal labor preemption doctrine leaves states free to regulate the union activity of workers exempted from its coverage, the statute's failure to provide labor law for these workers leaves open the development of local law to fill the gap.

As many of you know, California's In-Home Supportive Services system provides a leading example. Under IHSS, home care workers receive their paychecks from the State, but workers are hired, supervised, and discharged by the individual client. So for years thousands of low-wage workers in California were paid by the same state agency and performed the same work, but they had no employer for NLRA purposes—no one with whom they might bargain collectively over wages and working conditions. The California legislature responded by authorizing counties to establish a public authority or another entity to constitute an employer.¹² Under California law, home care workers were authorized to organize, to elect a collective representative, and then to bargain collectively over wages and benefits with the public authority of the county in which they work.¹³ Similar state action has offered coverage to home care workers in Illinois, Massachusetts, Michigan, Oregon and Washington, and to childcare workers in Illinois, Iowa, Michigan, New Jersey, Oregon, Washington, Wisconsin, and the list goes on. By assuming the role of employer and collective bargaining partner for these atypical workers, state governments step into the breach left by the NLRA's exclusion of an expanding segment of the workforce.

11. For discussion of other state and local developments, see Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. (forthcoming March 2011).

12. Cal. Welf. & Inst. Code § 12301.6.

13. Cal Welf. & Inst. Code § 12302.25.

A second exception to the federal labor preemption doctrine has left room for a second body of emerging state and local law—namely, states and localities are subject to federal preemption only when they regulate. But when they act in their proprietary capacities, they are freed from this preemption scrutiny. So through legislation aimed at employees who receive public funds or who work on public contracts, states and cities are also contributing to the reordering of the rules of union organizing. These local laws typically require employers who receive public funds to enter into labor peace agreements with unions. In some instances, the statutes directly define an alternative range of permissible and impermissible conduct. For example, they'll require employers to allow union organizers access to the workplace. Or they'll prohibit one-on-one meetings between supervisors and workers. In other instances, the statutes mandate only that unions and employers reach a private accord that guarantees labor peace, and they leave it to the parties to define permissible conduct.

What emerges from these state and local proprietary interventions are partial and localized responses to some of the NLRA's most profound pathologies. Some of these recent attempts have been struck down as preempted. When California enacted a law that prohibited recipients of state funds from using those monies to promote or deter union organizing efforts, the Supreme Court held the law preempted.¹⁴ But other forms of intervention have been upheld against preemption challenges and seem viable even in light of the Supreme Court's recent ruling.¹⁵

What these developments suggest, I think, is that even under current preemption rules, there is important room for state and local innovation. But despite these opportunities, it's fair to say that the room left by the NLRA's broad preemption regime is narrow. And so these state and local developments also invite a broader inquiry about the preemption regime itself. Seventy-five years after Congress passed the Act, the question is: Does it still make sense to allow this federal labor law to set labor policy for the entire nation? Or, given the problems with the federal law, have we reached a point when federal uniformity should give way to broader and more explicit forms of state and local variation?

This is, of course, a complicated question for any legal regime, and its resolution requires sorting through some thorny problems about federalism. I won't hazard a complete answer here, but I'd like to offer a few preliminary thoughts. Given the multiple pathologies of the current federal law, the potential benefits of state and local variation are significant. Local variation might, for example, contribute to a reinvigorated protection for the organizing rights of employees. It might allow experimentation with

14. *Chamber of Commerce v. Brown*, 522 U.S. 60 (2008).

15. *See, e.g., HERE, Local 57 v. Sage Hospitality*, 390 F.3d 206 (3d. Cir. 2004).

minority or non-exclusive unionization. With a less restrictive preemption regime, states could also facilitate forms of work organization that the NLRA has been rightly condemned for impeding. Localities might also help mitigate the vitriol that attends many NLRB organizing campaigns by allowing unions and management to discuss the terms of a collective bargaining agreement prior to the completion of an organizing drive.

State and local variation might also have an important feedback effect on the federal law. As we all know, labor law reform has been stymied in D.C. for more than thirty years now. In 1977, legislation that would have mandated a shortened schedule for union election, rebalanced communication opportunities, and strengthened the collective bargaining obligation was blocked by a five-week filibuster and died after six failed cloture votes. Thirty years later, the story is the same. The Employee Free Choice Act remains blocked by a threatened filibuster. State and local experimentation could provide a kind of antidote to this federal gridlock. As Rick Hills suggests, when states and cities regulate powerful interests, those interests have the incentive and the resources to demand a congressional response. So if states were to, for example, mandate card check recognition, Congress might finally be jarred to action.

There are, of course, risks in allowing local variation, and primary among these is the potential for a race to the bottom in labor law. If permitted to do so, some states and cities might use dramatically weakened labor laws as a mechanism to attract business. The risk of a race to the bottom is a real one, but it's not inevitable. Economists Richard Freeman and Joel Rogers in fact predict that states would not race anywhere, but would instead vary their laws on private sector unionization in accordance with how they currently regulate union organizing and bargaining in the public sector.¹⁶

A lot more work needs to be done to determine the likely impact of a relaxed NLRA preemption regime, but the potential benefits of such a change suggest that this work would be well worth the effort. There's a political reason to think about this question too. If current politics mean that substantive labor law reform is off the table, perhaps changes to the preemption regime constitute a viable alternative.

I've now suggested two forms of potential labor law reform. The third, like state and local innovation, depends not on fixing the federal statute, but avoiding its reach. And here I have in mind the private reconstruction of organizing and bargaining rules by unions and employers. Through contractual agreement, unions and employers can build their own rules for organizing campaigns and for collective bargaining.

16. Richard B. Freeman and Joel Rogers, *The Promise of Progressive Federalism*, in *REMAKING AMERICA: DEMOCRACY AND PUBLIC POLICY IN AN AGE OF INEQUALITY* 205, 219 (Joe Soss, Jacob S. Hacker, and Suzanne Mettler, eds., 2007).

A few statistics should help demonstrate that this trend is a significant one. In 2004, the garment and hotel workers unions reported that 85 percent of their new members were organized through private agreements with employers.¹⁷ Over a recent four-year span, SEIU organized 100,000 private sector members through such contracts while adding only 80,000 through the NLRB.¹⁸ And in 2006, that union relied on private agreements in 100 percent of its campaigns to organize janitors and security guards.¹⁹

The legal backdrop for these developments is relatively straightforward. Although the NLRA prohibits state and local governments from intervening in union organizing and bargaining, the statute affirmatively facilitates the private reordering of these rules. As construed by the Board, national labor policy favors the honoring of private, voluntary agreements. When unions and employers agree to alternative organizing and bargaining rules, moreover, these are contracts between an employer and a labor organization, which, by virtue of §301 of the Act, are enforceable in federal court.²⁰ Taking advantage of the NLRA's solicitude for private agreement, unions and employers across geography and industry are replacing the federal regime's rules with privately negotiated ones.

In some private agreements, the employer consents to exempt itself from the organizing process entirely. Other agreements explicitly preserve the employer's ability to express anti-union sentiments and instead tailor conditions under which the employer can communicate its views. Unions and employers have developed a range of mechanisms for assessing employee preferences. The most well known is, of course, card check. But unions and employers have also contracted to establish private election procedures.

Now, private ordering of this sort is no panacea. The most fundamental problem is that under current law an employer never has a legal obligation to enter into such an agreement. That means, in practical terms, that only unions with some source of ex ante power can benefit from such private mechanisms. Unions that can put together effective, comprehensive campaigns, leverage existing bargaining units, or take advantage of local political influence can secure such agreements, but unions without these sources of power cannot. Nonetheless, for unions that can negotiate them, such agreements constitute a source of significant dynamism.

Given the advantages of these agreements the NLRB needs to help facilitate rather than stifle their development. I said earlier that the NLRA

17. James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 830 n.48 (2005).

18. *Id.*

19. Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 376, 380 n. 32 (2007).

20. See 29 U.S.C. § 185 (2006).

favors the honoring of voluntary agreements, but in recent years the Board has taken steps that threaten this principle. The Board held recently that unions organized pursuant to privately negotiated rules are entitled to less protection against decertification than are unions organized through the Board's procedures.²¹ That decision is wrong on the law, and it makes it harder to negotiate productive alternatives to the NLRA, so it's also wrong as a matter of policy.

In the few minutes that I have left, let me describe one final avenue of labor law reform, one that I've called "employment law as labor law." Here workers and their lawyers are turning away from the NLRA entirely, not waiting for federal reform or even for state and local development, and relying instead on employment statutes like the Fair Labor Standards Act and Title VII as the legal guardians of their efforts to organize and act collectively. In this model, employment law functions as both the locus of the workers' collective activity and as the legal architecture that protects their collective action from employer interference.

An example I have in mind, one that I've written about in some detail,²² involves immigrant workers in Brooklyn in a collective campaign for better wages. Demanding overtime pay, these employees staged pickets at their factory and held demonstrations across New York City. In order to disrupt the campaign's momentum, the factory owner discharged the campaign's leader, a sewing machine operator named Maria Arriaga. Rather than turning to the NLRA for relief, however, Arriaga and the community workers' center, where she was a member, pressed the Department of Labor to file suit under the Fair Labor Standards Act. With protests continuing at the factory, a federal judge, acting pursuant to the Fair Labor Standards Act's anti-retaliation clause, issued a preliminary injunction ordering Arriaga's reinstatement.²³ The speed of the injunction, coming nine days after the motion was filed, and thus nearly two years faster than an NLRB order might have issued, constituted a significant and potentially dispositive improvement over the NLRA.

On some accounts, this story and others like it are surprising. The traditional academic model, now under considerable pressure from a number of scholars,²⁴ posits two modes of legal intervention into the workplace. The first is the NLRA, often just "labor law," in which substantive workplace standards are defined through the collective efforts of workers. The other regime, "employment law," is conventionally understood as an individual rights regime in which workplace rights are

21. *In re Dana Corp.*, 351 N.L.R.B. no. 28 (Sept. 29, 2007).

22. *See Benjamin Sachs, Employment Law as Labor Law*, 29 *CARDOZO L. REV.* 2685 (2008).

23. *Id.*

24. *See, e.g., Richard Michael Fischl, Rethinking the Tripartite Division of American Work Law*, 28 *BERKELEY J. EMP. & LAB. L.* 163, 213-14 (2007).

defined by statute and granted to individual workers irrespective of the extent of their collective organization. The prevailing view has long been that the individual rights granted by employment law are in some tension with labor law's attempt to foster collective organization and activity.²⁵ Campaigns like the Brooklyn one cast some doubt on this view and invite us to think more systematically about what a legal regime needs to do to foster collective action.

I want to suggest that a legal regime can foster collective action by performing three functions, each of which employment statutes are capable, albeit imperfectly, of performing. First, in order for a group of workers to act collectively, they have to develop a common understanding of a shared workplace problem and form a group identity strong enough to sustain a collective response to that problem. Organizers, workers, and lawyers can invoke employment law to diagnose workplace conditions as injustices suffered by the workforce as a whole. Thus, for example, the Fair Labor Standards Act can be used to reframe the low wages paid to an immigrant workforce, not as a natural fact of life for garment workers, but as a wrong perpetrated by the garment factory's operators on their employees. In this way employment law can function as what social psychologists would call a collective action frame.²⁶

Second, once a group of workers is galvanized to combat a workplace problem collectively, they have to contend with actions designed to interfere with their efforts. Employment law promises to do a better job than the NLRA at insulating at least the early stages of collective activity from employer interference. That's true because the anti-retaliation provisions of these statutes offer workers stronger remedies, better enforcement mechanisms, and a broader scope of coverage than does traditional labor law.

Employment law's ability to galvanize nascent forms of collective organization and protect workers' early organizing efforts makes it a viable, but potentially truncated, form of labor law. After all, workers who wish to organize for more than what's already provided by statute, a wage above the minimum, for example, or health care, will find no protection in any existing employment law. But we know that workplace organizing operates according to self-reinforcing dynamics of success and failure. Workers' successful involvement in what Rick Fantasia calls "mini-insurrections"²⁷ increases their willingness to participate actively in more full-scale campaigns. And social psychological research, again, suggests that

25. Sachs, *Employment Law as Labor Law*, *supra* note 22, at 2701-07.

26. *Id.* at 2722-25.

27. RICK FANTASIA, CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS 137 (1988).

individuals will reciprocate their fellows' contributions to previous collective endeavors by participating in future ones.²⁸

So those early stages of workplace organizing, those stages reached by employment law, are critical. By facilitating success at these early moments of collective action, employment law can perform a third function. It can set in motion dynamics that generate successive and more robust forms of collective activity.

To be sure, this final source of labor law revitalization is the most nascent, and its future development the most contingent. But, like the other avenues I've discussed, it may offer at least a partial corrective to the shortcomings of the National Labor Relations Act.

Thank you again for the opportunity to be here tonight. It's been a pleasure to have the opportunity to speak about the current state of American labor law and to offer some thoughts about how that legal regime might be revitalized. I look forward to your questions.

28. Sachs, *Employment Law as Labor Law*, *supra* note 22, at 2738-44.

