



UC DAVIS

LAW REVIEW

UNIVERSITY OF CALIFORNIA, DAVIS, SCHOOL OF LAW • VOL. 44, NO. 4, APRIL 2011

Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action

*Jeffrey M. Hirsch**

The problems facing individuals who attempt to act together are considerable. Yet in perhaps no other area are these collective-action problems more acute than the workplace. This reality creates a serious issue for labor law, which guarantees employees the right to engage in collective action. Conditions in the modern workplace increasingly erect barriers to employees' ability to act together which threaten this right. Rather than knocking down these barriers, however, labor law over the last several decades has reinforced them. A key factor in this failure is the refusal of the courts and the National Labor Relations Board to recognize

* Associate Professor, University of Tennessee College of Law; Visiting Associate Professor, Vanderbilt University Law School. I would like to thank Matthew Bodie, William Corbett, Donelson Forsyth, William Herbert, Anne Marie Lofaso, and Benjamin Sachs for their helpful comments. This Article benefited greatly from feedback generated during presentations at the AALS Mid-Year Workshop on Work Law, Fourth Annual Colloquium on Current Scholarship in Labor and Employment Law, University of Tennessee College of Law, and Vanderbilt University Law School.

the substantial role that discourse plays in promoting employee collective action. Relying on public choice theory, game theory, and psychological research, this Article demonstrates the importance of employee discourse and shows that labor law has not given it the respect that it is due. Indeed, although employee discourse should be a major player in today's most high-profile labor law debates — including the discussions surrounding the Employee Free Choice Act and employees' right to use e-mail and the Internet at work — to date, it is largely absent from these discussions. Accordingly, this Article argues that employee discourse must be given far more consideration and protection, as the failure to do so will undermine even the most ambitious labor reforms' ability to expand employee collective action.

TABLE OF CONTENTS

INTRODUCTION	1093
I. THE ROLE OF DISCOURSE IN OVERCOMING COLLECTIVE-ACTION PROBLEMS	1095
II. REGULATING DISCOURSE IN THE WORKPLACE	1101
A. <i>The Hurdles to Workplace Communications</i>	1103
B. <i>Electronic Communications at Work</i>	1105
III. REVIVING WORKPLACE DISCOURSE.....	1111
A. <i>Employer Restrictions on Workplace Discourse</i>	1111
1. Employee-Only Communications.....	1112
2. Employee-Nonemployee Communications	1114
3. Electronic Communications.....	1119
B. <i>Discourse and Information During the Representation Process</i>	1124
1. Card-Check Certification	1129
2. Quick Elections	1135
3. Regulating Captive-Audience Speeches	1138
C. <i>Mandated Information Transference</i>	1140
1. <i>The Dana Corp. Notice</i>	1141
2. Informing Union Employees	1144
3. Informing Nonunion Employees	1146
CONCLUSION.....	1150

INTRODUCTION

The right to employee collective action is at the core of labor law.¹ Before employees can exercise that right, however, they must overcome numerous problems that interfere with their ability to act together. Among the most serious of these collective-action problems are the restrictions on employee discourse, particularly the restrictions on employees' ability to access and discuss relevant information. Despite the significance of these problems, labor law has largely ignored the role of employee discourse in promoting collective action. If that core right is to have meaning, this failure must be rectified.

Many of the most pressing issues in labor law — such as unions' access to employer property, employees' right to use employer-provided e-mail, and employees' ability to choose a representative — center on attempts to restrict employee discourse. Although discourse has a major influence on employees' ability to act collectively in these instances, courts, agencies, and policymakers rarely mention it, and even when these decisionmakers acknowledge discourse, they badly undervalue its significance.² Correcting that error requires a new conception and appreciation of discourse's role in fostering employee collective action. This Article attempts to promote such reform by providing a thorough account of discourse's importance to labor law — an account that has been conspicuously absent to date.³

Discourse — the act of people communicating with each other — is a central component of social interaction. Social interaction, in turn, is a necessary condition for groups to form and act collectively. Thus, without discourse there is no group action. All forms of discourse are not sufficient to prompt such action, however. It takes repeated interactions to establish the trust and feelings of shared interests that

¹ 29 U.S.C. § 157 (2006) (defining employees' right to act collectively under National Labor Relations Act ("NLRA")). "Labor law" typically refers to the regulation of collective action, as opposed to "employment law," which generally focuses on individual employment issues.

² See *infra* Parts III.A.2-3.

³ ELLEN DANNIN, TAKING BACK THE WORKERS' LAW 43-44 (2006) (arguing that NLRB should rely more on social science research); Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2078-79 (2009) (same). This absence speaks primarily to labor rules or decisions; other commentators have raised related themes before. See, e.g., Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753 (1994) (proposing to encourage employee free choice and workplace voice by restricting employer distortions of employee deliberations).

individuals require first to identify themselves as a group and, ultimately, act as one.⁴

Despite the importance of discourse to collective action, labor law has continually dismissed the need for substantial employee communications.⁵ In case after case, the courts or federal labor agencies — particularly the National Labor Relations Board (“NLRB” or “Board”) — acknowledge that discourse has a role in collective action, but give protection for such a limited amount that they might as well not have bothered. Under this prevailing view, labor law need only prevent employers from barring all forms of communication to satisfy employees’ right to collective action; courts have deemed even a mere theoretical opportunity to communicate sufficient.⁶ That view, however, is demonstrably untrue. As public choice theory, game theory, and psychological research show, collective action requires a significant level of discourse and information transference among individuals; mere sporadic or impersonal contacts are inadequate. Thus, to fulfill the rights embodied in the National Labor Relations Act (“NLRA”)⁷ and other labor laws, there must be far more protection for employees’ ability to communicate — protection for not only the frequency of communications but also the type. In short, if employees are to enjoy their statutory right to collective action, there must be a major revival in the appreciation and protection for workplace discourse.

As Part I of this Article illustrates, discourse plays a necessary and vital role in overcoming various collective-action problems. In Part II, the Article extends this analysis to the workplace and argues that current labor law fails to protect employee discourse to the extent needed to guarantee employees’ right to act collectively. Finally, in Part III, the Article explains how to implement a revived employee discourse doctrine using several current labor law issues as examples.

⁴ This Article will hereafter use “discourse” to describe the type of substantive interactions that can lead to collective action, as opposed to more basic communications.

⁵ This idea may also apply to employees’ communications with employers, unions, and other third parties. See *infra* notes 132-35, 219-21 and accompanying text.

⁶ *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 540-41 (1992); *Guard Publ’g Co. (Register-Guard)*, 351 N.L.R.B. 1110, 1114 (2007), *enforced in part, enforcement denied in part*, 571 F.3d 53 (D.C. Cir. 2009).

⁷ 29 U.S.C. §§ 151-69 (2006).

I. THE ROLE OF DISCOURSE IN OVERCOMING COLLECTIVE-ACTION PROBLEMS

Although it may appear so at times, portraying discourse as a crucial component of collective action is not a new idea. Researchers have long studied group dynamics, and the role of discourse in creating and fostering groups has often been part of that research.⁸ The significance of discourse results from its role as the key means to overcome collective-action problems.

As Mancur Olson described in *The Logic of Collective Action*, one of the foundational works on modern public choice theory, the ability of a group of individuals to act together becomes increasingly difficult as the group gets larger.⁹ Even if everyone in the group would benefit from coordinated action, each individual's rational, self-interested choice is often to avoid acting in concert.¹⁰ One reason is that in a larger group the potential benefit for each individual member is small, making the choice to expend resources to help with the group's goals less appealing.¹¹ Additionally, all individuals in a group will typically enjoy any gains resulting from collective action, regardless of whether they contributed, which creates a further disincentive to participate in the group's efforts. This "free rider" problem is a major hurdle both to initiating and to maintaining collective action.¹² Indeed, the free rider problem means that even groups that act collectively will typically do so at a suboptimal level.¹³

⁸ See, e.g., RALPH H. TURNER & LEWIS M. KILLIAN, COLLECTIVE BEHAVIOR 21 (1957) ("Unless there is a minimum of cultural homogeneity and a certain 'we'-feeling in a collectivity, there will not be a sufficient basis for the communication between individuals which is necessary for the development of collective action."); Leon Festinger, *Informal Communications in Small Groups*, in GROUPS, LEADERSHIP AND MEN 28, 35-38 (Harold Guetzkow ed., 1951).

⁹ MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 2, 11-12 (1965).

¹⁰ *Id.* at 34-36 (noting that individuals who get significant benefits from group action may incur costs of action themselves, which is more likely in smaller groups). However, as Elinor Ostrom and others have explained, social norms can lead individuals to act collectively despite what appears to be their rational, self-interested choice. See Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP. 137, 140-41 (2000). That said, Olson's arguments still point to highly relevant hurdles to collective-action, if not absolute bars.

¹¹ OLSON, *supra* note 9, at 49-52; see also Herbert Hovenkamp, *The Limits of Preference-Based Legal Policy*, 89 NW. U. L. REV. 4, 60 (1994) (noting also that reverse is true for small groups).

¹² Barenberg, *supra* note 3, at 933.

¹³ OLSON, *supra* note 9, at 28-31, 34-36 (defining optimal level of collective good existing where marginal benefit equals marginal costs, which occurs when each

However, it is at the initial stages of collective action that the free rider problem, as well as others, is most severe. When individuals first attempt to act together there are significant start-up costs, such as creating an organization to control the effort, and the benefits, if any, will initially be low.¹⁴ During this initial phase, it also can be difficult for the group to reach an agreement about what type of action to take and how to coordinate that effort once the group makes its decision.¹⁵ Moreover, as Olson observed, smaller groups tend to be more productive because they are more homogeneous and better able to coordinate group action even beyond the group's formative period.¹⁶ In both small and large groups, however, one common feature of starting, organizing, and coordinating collective action is that they require group members to communicate with each other.¹⁷ Thus, as the cost of communication increases, a group's ability to act decreases.¹⁸

The classic game theory problem, the prisoner's dilemma, illustrates the importance of discourse in overcoming barriers to collective action. In the most basic prisoner's dilemma game, two players who have been arrested for committing a crime together face the option of either exposing the other's involvement or staying quiet.¹⁹ If both players stay quiet, they would receive lower punishments than if they both exposed the other. However, if one stays quiet and the other talks, the player who talked goes free, and the player who stayed quiet faces severe punishment. The result in a single round of the game is usually that each player, worried about the other failing to stay quiet,

member of group shares equally marginal costs and benefits — likelihood that decreases as group size increases).

¹⁴ *Id.* at 22, 30-31.

¹⁵ *Id.*

¹⁶ *Id.* (noting also that larger groups generally need more agreement, coordination, and organization); see also Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 250-51 (1992) (describing groups engaging in public policy actions).

¹⁷ However, even with substantive communications and full information, individuals may not make rational decisions based on such information. Cynthia Estlund, *Just the Facts: Towards Workplace Transparency* 11 (N.Y.U. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 09-55; N.Y.U. Sch. of Law, Law & Econ. Research Paper Series, Working Paper No. 09-39, 2009) [hereinafter *Towards Workplace Transparency*], available at <http://ssrn.com/abstract=1485535> (citing endowment and framing effects that result from individuals' unwillingness at times to act in economically rational manner).

¹⁸ OLSON, *supra* note 9, at 46-47 (noting costs of bargaining and creating organizational structure).

¹⁹ ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 15-69 (1984).

exposes the other. The “dilemma” is that they would both have been better off staying quiet, but neither player has a way of ensuring that the other will do so.²⁰

The suboptimal outcome associated with the basic prisoner’s dilemma assumes that there is no communication among the players.²¹ Yet, with communication, the players can achieve a better result.²² If the players can converse with each other before deciding what to do, they can formulate a strategy that would benefit them both — in the classic problem, they would each stay quiet. Even with such a strategy, however, the game will still be “lost” if the players do not trust each other to maintain their silence. Accordingly, low levels of communication may still be insufficient; to win the game, the players often will need repeated interactions to help foster trust. That trust, in turn, increases the likelihood that the players will engage in the cooperative solution of staying quiet.²³

The workplace provides a real-world example of this problem because employees’ decisions whether to engage in collective action can, at times, resemble a prisoner’s dilemma.²⁴ For instance, where there is a fear of employer retaliation, most employees will be reluctant to put themselves at risk by initiating or openly engaging in collective action. However, if a large group of employees work together, there is a smaller chance that the employer will try to punish them all or be able to single out individual employees. Yet, like in the prisoner’s dilemma, each individual’s fear of acting alone and facing retaliation may prevent all employees from taking action. If the employees could effectively discuss their strategy and gain enough trust so that most of them participate, they could overcome this collective-action problem. Without substantial discussions, however, group action is unlikely to occur.

Psychological research confirms the importance of discourse in overcoming barriers to collective action. Studies have repeatedly shown that for a group to adopt certain beliefs or decisions, group

²⁰ *Id.*

²¹ *Id.*

²² Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 538 (2004).

²³ *Id.* at 538-39 (citing studies showing that trust and cooperation increases with communication and other factors, including Robyn M. Dawes & Richard H. Thaler, *Anomalies: Cooperation*, 2 J. ECON. PERSP. 187, 193 (1988) (“One of the most powerful methods for inducing cooperation in these games is to permit the subjects to talk to one another”)).

²⁴ *See infra* Part II (discussing workplace collective-action problems).

members must first consider and discuss those beliefs.²⁵ For example, psychologists often characterize the process of individuals' identifying themselves as members of a group, and ultimately acting in concert, as a type of "shared reality." This concept describes a group of individuals that share a common perception of an experience or issue.²⁶ A state of shared reality allows individuals to trust and to find a common identity with each other, eventually forming a group that can make decisions or act to promote shared interests.²⁷ This idea mirrors Olson's observation that groups exist to further common interests and that smaller groups are better able to achieve this goal²⁸ because it is generally harder to form a shared reality among a larger group of individuals.

One of the major determinants of whether a shared reality develops is discourse. Communication is required for individuals to share their views on subjects, which in turn is a necessary aspect of forming relationships.²⁹ However, this process takes time because the formation of interpersonal relationships usually requires frequent interactions to build trust and establish commonalities among individuals. Without a significant level of communication, it is unlikely that the interpersonal bonds necessary for group formation will develop.³⁰ Accordingly, substantive communication — discourse — is the linchpin to group formation and collective action.³¹

²⁵ See, e.g., DANIEL BAR-TAL, GROUP BELIEFS: A CONCEPTION FOR ANALYZING GROUP STRUCTURE, PROCESSES, AND BEHAVIOR 71-72 (1990) (describing importance of "dissemination" of group beliefs).

²⁶ Gerald Echterhoff et al., *Shared Reality: Experiencing Commonality With Others' Inner States About the World*, 4 PERSP. PSYCHOL. SCI. 496, 497-98 (2009) (defining "shared" broadly as "a conceptualization that emphasizes the experience of having common inner states regarding some aspect of the world"). There are other definitions of "shared reality" that are not relevant to this discussion. *Id.*

²⁷ NEIL J. SMELSER, THEORY OF COLLECTIVE BEHAVIOR 8 (1962) (arguing that shared beliefs are necessary for collective action).

²⁸ OLSON, *supra* note 9, at 7, 11-12; see also Jack M. Beermann, *Interest Group Politics and Judicial Behavior: Macey's Public Choice*, 67 NOTRE DAME L. REV. 183, 184 (1991) (describing how smaller groups with focused interests can more effectively obtain benefits through legislative process than larger groups with diffuse, or broadly allocated, interests).

²⁹ Echterhoff et al., *supra* note 26, at 497-98.

³⁰ *Id.* at 500 (citing DANIEL BAR-TAL, SHARED BELIEFS IN A SOCIETY: SOCIAL PSYCHOLOGICAL ANALYSIS (2000)) (noting that significant communication and interpersonal interactions are needed even where individuals affirmatively want to establish commonality). In certain situations, however, shared realities can also lead to "bad" group decisions. *Id.* at 515 (citing Robert S. Baron, *So Right It's Wrong: Groupthink and the Ubiquitous Nature of Polarized Group Decision-Making*, in 37 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 219, 234-35 (M.P. Zanna ed., 2005));

To be sure, individuals can form interpersonal relationships under many conditions including, for instance, a workplace in which an employer significantly limits non-job-related communications.³² Unless there is an absolute ban of all non-job-related matters, employees who interact every day are likely to form some type of interpersonal bond.³³ However, even if they can be considered a group in psychological terms, their ability to act on matters of common *work* interests will be significantly harmed by the communication policy. If employees are unable to discuss their work conditions and other matters of mutual concern frequently, then they will have a hard time determining each other's positions on these topics. This is a substantial impediment to collective action for at least two reasons. First, many employees will have difficulty evaluating their own positions on these issues because solidifying one's view of an especially complex or controversial issue often involves comparing that view to someone else's.³⁴ In essence, as one psychologist has stressed, "[k]nowledge is social."³⁵ Second, even if individuals have solidified their views, they are unlikely to act collectively without knowing the views of others. This is because individuals must have a common perception of an issue to form a shared reality.³⁶ If individuals are unaware of others' views on an issue, they will not be

Garold Stasser & William Titus, *Pooling Unshared Information in Group Decision Making: Biased Information Sampling During Discussion*, 48 J. PERSON. & SOC. PSYCHOL. 1467, 1477 (1985)).

³¹ See SMELSER, *supra* note 27, at 8; Donald G. Marquis et al., *A Social Psychological Study of the Decision-Making Conference*, in *GROUPS, LEADERSHIP AND MEN*, *supra* note 8, at 55, 64 (finding that more communication increased group productivity).

³² See *supra* Parts III.A.1, III.A.3.

³³ Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 9-10, 71 (2000) [hereinafter *Working Together*] (noting also that workplace interactions are still often subject to restraints that restrict freedom of communication).

³⁴ Echterhoff et al., *supra* note 26, at 496. The lack of this "social sharing" can leave individuals "uncertain, uncomfortable, [and] even physically agitated." *Id.* (citing RICHARD E. BYRD, *ALONE* (1938); S.E. Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, in *GROUPS, LEADERSHIP AND MEN*, *supra* note 8, at 177, 177-90).

³⁵ BAR-TAL, *supra* note 25, at 110 ("Knowledge is social. Much of any individual's knowledge is acquired from other people and is shared by them."); see also Festinger, *supra* note 8, at 28.

³⁶ Echterhoff et al., *supra* note 26, at 498-99 (citing Philip Brickman, *Is It Real? in NEW DIRECTIONS IN ATTRIBUTION RESEARCH* 5, 5-34 (J.H. Harvey et al. eds., 1978)) (describing commonality among individuals' "inner states").

able to develop a common perspective, thereby making shared reality and group action impossible.³⁷

The benefit of discourse is not merely as a determinant in whether group action of any kind will occur; discourse also influences the amount and quality of group action. In particular, studies have shown that as group members share more of certain types of information, the group becomes more productive.³⁸ In one study, researchers tracked a team of twelve airline employees who worked at a concourse of a major U.S. airport.³⁹ The researchers discovered that the team had developed over time, as each individual learned more about other team members, a strong and unanimous belief about its ability to achieve a certain level of on-time performance, which the team was able to maintain despite several unforeseen obstacles.⁴⁰ In contrast to the team's ability to match its on-time goal, the employees had more difficulty meeting other performance goals that were not as strongly or universally held.⁴¹ Moreover, when an unexpected crisis finally prevented the team from meeting its on-time goal, the employees' level of motivation dropped significantly.⁴² This study demonstrates the power of group beliefs: a strongly held shared view, resulting from a substantial level of communication, motivated all of the employees and resulted in improved performance for the group as a whole.⁴³ Absent that shared belief, the employees were less motivated, less confident, and less productive.⁴⁴

³⁷ DAVID HUME, A TREATISE OF HUMAN NATURE 538 (1952) (emphasizing that small groups do more because individuals are better able to know others' views and failure to contribute is more easily identifiable).

³⁸ Wendy P. van Ginkel & Daan van Knippenberg, *Group Information Elaboration and Group Decision Making: The Role of Shared Task Representations*, 105 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 82, 83 (2007).

³⁹ Cristina B. Gibson & P. Christopher Earley, *Collective Cognition in Action: Accumulation, Interaction, Examination, and Accommodation in the Development and Operation of Group Efficacy Beliefs in the Workplace*, 32 ACAD. MGMT. REV. 438, 438-39 (2007) (following team consisting of customer service representatives, ramp servicepeople, maintenance crew, cabin appearance personnel, and cargo personnel).

⁴⁰ *Id.* at 439, 443-44.

⁴¹ *Id.* at 451 (citing customer service goals).

⁴² Ironically, a labor dispute caused the crisis. *Id.* at 450-51.

⁴³ *Id.* at 439; see also van Ginkel & van Knippenberg, *supra* note 38, at 89 (describing experiment showing that group performance increased when group members share task goals more).

⁴⁴ Cf. Clyde Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHI.-KENT L. REV. 129, 135 (1993) (discussing advantages of Germany's and Japan's "shared enterprise" employment models).

As the airline example illustrates, the importance of discourse to employee collective action is particularly strong. At almost every stage of the collective-action process — from initially learning about an issue and discussing options for addressing it to formulating and carrying out various strategies — employees must clear hurdles that are as severe as those seen in virtually any group. Thus, workplace discourse plays a vital role in determining whether employees are able to act together to promote their common interests.⁴⁵

II. REGULATING DISCOURSE IN THE WORKPLACE

The importance of discourse has long been recognized in various aspects of work law.⁴⁶ Whether as a condition for an economically efficient labor market, a prerequisite for the enforcement of employees' rights, or a means for opposing unlawful employment practices, employees' ability to communicate and access information of various types has been a factor in many workplace policy debates.⁴⁷ Yet in no area is the concern over discourse more prominent than labor law.

Labor law's relationship with discourse and information is unique among other work laws because those interests are integral to its fundamental concept: employees should be free to engage in collective action. As the text of the NLRA states, the right to collective action was the primary purpose of the statute:

It is hereby declared to be the policy of the United States to . . .
encourag[e] the practice and procedure of collective
bargaining and [to] protect[] the exercise by workers of full

⁴⁵ See Donald C. Langevoort, *Taking Myths Seriously: An Essay for Lawyers*, 74 CHI.-KENT L. REV. 1569, 1578 (2000) (noting that groups working toward aim must "communicate information to each other, identify the nature of their task, assess costs, benefits and potential strategies, and arrive at some consensus for action").

⁴⁶ In a more recent example, Professor Cynthia Estlund has explored the importance of information to individual employee action. Estlund, *Towards Workplace Transparency*, *supra* note 17 (proposing mandatory disclosure of employer's workplace policies).

⁴⁷ See, e.g., 42 U.S.C. § 2000e-3(a) (2006) (prohibiting retaliation against employees' opposition to conduct unlawful under Title VII's antidiscrimination protections); PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 73-74 (1990) (discussing information asymmetries under at-will rule); Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 219-26 (2001) (discussing information asymmetries and transaction costs with regard to at-will employment); Christine Jolls, *Employment Law* 38-39 (Yale Law Sch., Pub. Law Working Paper No. 132, 2006), available at <http://ssrn.com/abstract=959453> (discussing information effects on labor supply).

freedom of association, self-organization, and designation of representatives of their own choosing⁴⁸

From the early days of the statute, the NLRB and courts have noted the role of discourse and information in employees' exercise of their right to association, self-organization, representation, and other forms of collective action.⁴⁹ These decisions implicitly recognized that labor law's guarantee of the right to engage in collective action necessarily depended on employees' ability to communicate among themselves and access enough information to decide whether and how to act together.⁵⁰

Although recognition of discourse's role in collective action has never fully vanished, over the last several decades, the NLRB and particularly the courts have increasingly dismissed the connection between the two. In case after case in which employer interests are weighed against employees' right to collective action, the need for discourse has frequently received little more than lip service.⁵¹ This disregard has substantially weakened employees' labor rights, for even where those rights are explicitly articulated in statutes or decisions, employees' inability to converse with each other often makes those rights useless.⁵² The cruel irony is that as the NLRB and courts have diminished the significance of discourse in overcoming collective-

⁴⁸ 29 U.S.C. § 151 (2006). This purpose is embodied in Section 7 of the Act, which states in part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" *Id.* § 157. These rights are enforced through Section 8(a)(1), which provides that "[i]t shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. *Id.* § 158(a)(1).

⁴⁹ See, e.g., *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1240-43 (1966) (discussing importance of effective union communications with employees during NLRB-run election); *infra* note 106, 305 (discussing collective action to promote interests of nonunion employees).

⁵⁰ *Mushroom Transp. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (recognizing that "almost any concerted activity for mutual aid and protection has to start with some kind of communication between individuals"); see also Laurence Monnoyer-Smith, *Deliberation and Inclusion: Framing Online Public Debate to Enlarge Participation. A Theoretical Proposal*, 5 *I/S: J.L. & POL'Y FOR INFO. SOC'Y* 87, 112 (2009) (discussing importance of deliberation and communications in group political action).

⁵¹ See *infra* Parts III.A.2-3.

⁵² Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 *STAN. L. REV.* 305, 331-32 (1994) [hereinafter *Labor, Property, and Sovereignty*].

action problems, changes in the workplace have made those problems more acute.⁵³

A. *The Hurdles to Workplace Communications*

Most modern employees face a very different environment than workers in the past. For instance, job security is much lower today, and employees spend less time with a given employer than before.⁵⁴ This increase in job mobility makes collective action more difficult because it decreases both employees' long-term interest in improving work conditions at a given firm and their willingness to incur the costs of collective action for a job they may not have for long.⁵⁵ The workplace has also become more diverse, which is largely beneficial, but makes it more difficult for employees to achieve consensus.⁵⁶ Moreover, increased competition among firms, especially in the global economy, has fueled more employer resistance to demands for better work conditions.⁵⁷ This resistance not only raises the risk of retaliation for employees who engage in collective action, but delays the possible benefits as well.⁵⁸

The enhanced complexity of the modern workplace also exacerbates a common problem for employees — a lack of relevant information. Information asymmetries affect many elements of employees' work life, including their ability to bargain with their employers and reach an economically efficient agreement.⁵⁹ Similarly, information

⁵³ There may also be a broader cultural shift away from social activities. *But see* Estlund, *Working Together*, *supra* note 33, at 3-4 (arguing that workplace is among most important places for social interaction). *See generally* ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (arguing that Americans' participation in social activities is decreasing).

⁵⁴ KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* 74-83 (2004); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 *HARV. C.R.-C.L. L. REV.* 91, 102 (2003).

⁵⁵ Kenneth G. Dau-Schmidt, *The Changing Face of Collective Representation: The Future of Collective Bargaining*, 82 *CHI.-KENT L. REV.* 903, 916 (2007). Employee mobility also makes it more difficult to maintain already existing collective-action efforts. *Id.* at 917.

⁵⁶ *Id.* (referring to demographic diversity); Katherine Y. Williams & Charles A. O'Reilly III, *Demography and Diversity in Organizations: A Review of 40 Years of Research*, 20 *RES. ORG. BEHAV.* 77, 120 (1998); *see* OLSON, *supra* note 9, at 46.

⁵⁷ Dau-Schmidt, *supra* note 55, at 916.

⁵⁸ *See* Barenberg, *supra* note 3, at 933 (describing employees' inability to enjoy long-term benefits of collective-action); *infra* notes 185-95 and accompanying text.

⁵⁹ *See supra* note 47. Information asymmetry refers to differences in parties' knowledge of types of relevant information, such as a firm's financial strength. *See*

asymmetries can create significant barriers to employee collective action. If employees are unaware of the options or legal protections for acting collectively, they are unlikely even to consider such action, much less actually attempt it.⁶⁰

To be sure, employees who are unionized or have been part of a union organizing campaign will typically have some information about their legal protections,⁶¹ but these employees are a small portion of the overall workforce.⁶² The reality is that most employees are probably unaware of their right to engage in many types of collective action, such as sharing salary information with coworkers, much less the way in which they can exercise those rights.⁶³

Michael L. Wachter, *Theories of the Employment Relationship: Choosing Between Norms and Contracts*, in THEORETICAL PERSPECTIVES ON WORK AND THE EMPLOYMENT RELATIONSHIP 163, 168 (Bruce E. Kaufman ed., 2004).

⁶⁰ For instance, information is especially important when a group of employees decide whether to seek collective representation. Employees' awareness of, and ability to discuss their options, are crucial factors in their ability to form a decision that accurately reflects the group's preferences. See *supra* notes 34-36 and accompanying text.

⁶¹ Unions are often able to overcome the information problem because they are knowledgeable, repeat players. Sunstein, *supra* note 47, at 260.

⁶² Private-sector union density — the percentage of all nongovernmental wage and salaried workers who are members of a union — declined in the United States from 35.7% in 1953 to 7.2% in 2009 (8.0% of workers in 2009 were covered by a union-negotiated collective-bargaining agreement; no coverage data available prior to 1977). Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database (2009)*, UNIONSTATS.COM (2010), <http://www.unionstats.com> (showing also that public-sector union density in 2009 was 37.4%–41.4% covered — and union density for all workers was 12.3%–13.6% covered); see also LEO TROY & NEIL SHEFLIN, U.S. UNION SOURCEBOOK: MEMBERSHIP, FINANCES, STRUCTURE, DIRECTORY A-1, A-3 (1985) (estimating 1953 data); Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey: Note*, 56 INDUS. & LAB. REL. REV. 349-54 (2003) (describing method used to compile union membership data starting in 1978, which had private-sector union density of 21.7%).

⁶³ Although employees' knowledge of their collective rights has not been well studied, related findings suggest a significant information gap in employees' awareness of their legal rights. RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 119 (1999) (finding that 83% of employees incorrectly believed that employers cannot fire someone for no reason); Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 134 (1997) (finding that approximately 80% of unemployed workers erroneously believed employer cannot terminate employees for whistleblowing or to hire other employees at lower wage, and nearly 90% erroneously believed that termination could not be based on employer's personal dislike of employee). Although these studies indicate that employees think they have more rights than they actually do, this misinformation could still cause problems, as employees may be too careless in how they engage in collective action and subject themselves to lawful terminations. More likely, however, is that employees make the opposite mistake regarding protections for collective action. Given the large number of terminations linked to union campaigns,

As discussed below, labor law has not only failed to take these collective-action problems into account, it has made them worse. Many labor law reforms would help reverse that trend; however, the most basic need is for the NLRB, courts, and other labor policymakers to acknowledge the important role that discourse plays in overcoming the hurdles to employee collective action. Such recognition would not be a cure-all because discourse cannot overcome all workplace collective-action problems, but a genuine change in perspective would dramatically improve employees' ability to act together. Without such a change, discourse and information will remain no more than a side note — an aside that may enjoy the occasional passing reference, but does little to promote employees' labor rights.

B. Electronic Communications at Work

Among the more promising answers to the lack of protection for discourse in the workplace are the recent, extraordinary advances in communication technology. The increased availability and affordability of the Internet, e-mail, instant messaging, and other types of electronic communications have transformed employees' interactions with each other and their employers.⁶⁴ This trend represents a substantial advance for workplace collective action, as the lower cost of communication and coordination can significantly enhance employees' ability to form and act as a group.⁶⁵ Electronic communications may also be a means for employees to avoid some of the significant limits the NLRB and courts have imposed on workplace discourse.⁶⁶

According to the Department of Labor, approximately 40% of all workers used the Internet or e-mail at work in 2003.⁶⁷ A private survey

employees may think they have few legal protections in such instances or the protections that do exist are inadequate. See *infra* note 187.

⁶⁴ Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA*, 76 GEO. WASH. L. REV. 262, 274-75 (2008).

⁶⁵ BAR-TAL, *supra* note 25, at 72; Dau-Schmidt, *supra* note 55, at 918.

⁶⁶ See *infra* Part III.A.

⁶⁷ BLS Finds 55 Percent of Employees Used Computers at Work in October 2003, Daily Lab. Rep. (BNA) No. 148, at D-24 (Aug. 3, 2005) [hereinafter *55 Percent of Employees Used Computers at Work*]. Use of instant messaging in the workplace is at a similar level. *Survey Finds More Employer Policies Focus on Employees' E-mail than IM, Blogs*, Daily Lab. Rep. (BNA) No. 137, at A-8 (July 18, 2006) (describing survey finding that 35% of employees used instant messaging at work); see also AMA/EPOLICY INSTITUTE, 2004 WORKPLACE E-MAIL AND INSTANT MESSAGING SURVEY SUMMARY 8 (2004), available at <http://www.epolicyinstitute.com/survey/survey04.pdf> (finding that 31% of employees used instant messaging, 94% of whom at least partially for business

conducted a year later found that the use of e-mail at work was even higher, with over 80% of employees spending an hour or more e-mailing each day.⁶⁸ Although the disparity in these numbers indicates the challenges in measuring e-mail use, the studies reveal a substantial reliance on workplace electronic communications, which has almost certainly increased in the intervening years. Although face-to-face discussions remain the ideal for organizing employees,⁶⁹ electronic communications have increasingly become a second-best substitute at least among employees who are frequent users of this technology. Because such workers are disproportionately young, the prevalence of workplace electronic communications will undoubtedly expand in the near future.⁷⁰

There are many reasons why e-mail and other electronic communications are becoming such an important part of employee collective-action efforts. Most obviously, general use of electronic communications has grown rapidly over the last couple of decades,⁷¹ and it is natural to see a parallel expansion in the workplace. Many employees may also believe that e-mail and other types of electronic communications can provide a veil of privacy — albeit one that is illusory.⁷² Further, for employees with access to their co-workers' e-mail addresses, electronic communications provide an easy and effective way to distribute information to a large number of people, many of whom may be difficult to reach by traditional means.⁷³ Finally, electronic communications have been an increasingly important response to labor law restrictions on the use of more

purposes).

⁶⁸ AMA/EPOLICY INSTITUTE, *supra* note 67, at 7 (reporting that 18.5% of employees spent from zero to fifty-nine minutes per day on e-mail; 24.9% spent sixty to eighty-nine minutes; 22.4% spent ninety minutes to two hours; 14.1% spent two to three hours; 10.3% spent three to four hours; and 9.9% spent more than four hours).

⁶⁹ See *infra* notes 83-97 and accompanying text.

⁷⁰ Dau-Schmidt, *supra* note 55, at 918-19.

⁷¹ U.S. DEP'T OF COMMERCE, *FALLING THROUGH THE NET: TOWARD DIGITAL INCLUSION 1* (2000), available at [http:// search.ntia.doc.gov/pdf/fttn00.pdf](http://search.ntia.doc.gov/pdf/fttn00.pdf) [hereinafter *FALLING THROUGH THE NET*].

⁷² See Stored Communications Act, 18 U.S.C. § 2701(c)(1) (2006) (exempting employer monitoring of own electronic systems from ban on unauthorized access of communications); William A. Herbert, *Workplace Electronic Privacy Protections Abroad: The Whole Wide World is Watching*, 19 U. FLA. J.L. & PUB. POL'Y 379, 384 (2008) (arguing that United States lacks effective right of workplace privacy, especially compared to other countries).

⁷³ For instance, electronic communications may be more useful in reaching salespersons, telecommuters, and other employees who do not spend a significant amount of time at the same worksite.

traditional discourse.⁷⁴ However, as discussed below, the electronic avenue is in jeopardy of being closed off to employees as well.⁷⁵

One prominent illustration of electronic communications' value to collective action is reflected in union organizing strategies. Unions have the resources and experience necessary to take advantage of new technology, as well as a strong incentive to use these tools to avoid legal constraints on more direct communications.⁷⁶ Thus, unions were quick to use the Internet to provide information to members and potential members.⁷⁷ Building on those efforts, recent organizing campaigns have increasingly incorporated e-mail and other electronic communication strategies.⁷⁸ Indeed, one union literally started in an Internet chat room and maintained all of its business meetings via electronic communications.⁷⁹

Technology's ability to enhance employee communication is significant but no panacea. Although helpful, electronic communications are not an equal substitute for face-to-face discussions. Personal interactions involve important social signals that give valuable information about the views of each participant.⁸⁰ Those signals help the participants understand the beliefs of others and, in turn, help shape each participant's own views.⁸¹ This view-shaping function is a precursor to the development of a group or group

⁷⁴ Hirsch, *supra* note 64, at 263, 268-69 (describing increasing number of union campaigns that avoid NLRB-election process).

⁷⁵ See *infra* Part III.A.3.

⁷⁶ Richard B. Freeman, *From the Webbs to the Web: The Contribution of the Internet to Reviving Union Fortunes* 2-5, 10-11 (Nat'l Bureau of Econ. Research, Working Paper No. 11298, 2005) (discussing unions' use of Internet and noting high quality of American unions' websites); *infra* Part III.A.2.

⁷⁷ Freeman, *supra* note 76, at 2-5, 10-11.

⁷⁸ See, e.g., U-Haul Co. of Cal., 347 N.L.R.B. 375, 385 (2006) (organizing drive started union website information); Frontier Tel. of Rochester, Inc., 344 N.L.R.B. 1270, 1277 (2005), *enforced*, 181 F. App'x 85 (2d Cir. 2006) (finding unlawful termination of employee who created webpage to encourage employee discussions during union campaign).

⁷⁹ The union is the Association of Pizza Delivery Drivers. Michelle Amber, *Union Loses First Attempts to Organize Pizza Drivers with Votes in Ohio, Nebraska*, Daily Lab. Rep. (BNA) No. 227, at A-7 (Nov. 26, 2004). The union later disbanded and many of its officers began working with the American Union of Pizza Delivery Drivers. Michelle Amber, *Union that Organized Florida Pizza Drivers Says It Gets Inquiries from Other Drivers*, Daily Lab. Rep. (BNA) No. 186, at A-9 (Sept. 26, 2006).

⁸⁰ See Echterhoff et al., *supra* note 26, at 503.

⁸¹ See *id.* at 510.

action.⁸² Electronic communications, however, are often unable to replicate these effects.⁸³

Psychological research into the “saying-is-believing” phenomenon reveals why face-to-face communications are superior to electronic ones. In a typical saying-is-believing study, a speaker describes one person to an audience who is familiar with the described subject.⁸⁴ The description starts with supplied passages that can be reasonably interpreted as either positive or negative, after which the speaker then provides her own descriptions of the subject. However, the speaker is told whether her audience likes or dislikes the subject. In repeated studies of this sort, speakers do two things. First, they adjust their descriptions to match what they were told about their audiences’ like or dislike for the subject.⁸⁵ Second, their own memory of the supplied description matches their audiences’ views of the subject.⁸⁶ The latter effect works as follows: after delays that range from as little as ten minutes to as long as several weeks, researchers asked speakers to repeat as accurately as they could the original, supplied descriptions. Speakers’ memories of the ambiguous passages mirrored their audience-adjusted description, rather than the supplied description they read initially.⁸⁷ This means that people not only adjust their

⁸² See *supra* notes 25-31 and accompanying text.

⁸³ Paul M. Schwartz, *From Victorian Secrets to Cyberspace Shaming*, 76 U. CHI. L. REV. 1407, 1442-43 (2009) (citing ALEX PENTLAND, *HONEST SIGNALS: HOW THEY SHAPE OUR WORLD* 82-83 (2008)); see Ann E. Carlson, *Recycling Norms*, 89 CALIF. L. REV. 1231, 1245 (2001) (stressing importance of personal contact in solving collective-action problems); see also William A. Herbert, *Workplace Consequences of Electronic Exhibitionism and Voyeurism* 1 (Dec. 16, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1524557> (noting that electronic communication can lead to miscommunication and “electronic exhibitionism”).

⁸⁴ Echterhoff et al., *supra* note 26, at 502-03 (describing various studies).

⁸⁵ This is referred to as an “audience-tuned message.” *Id.*; Leslie R.M. Hausmann et al., *Communication and Group Perception: Extending the “Saying is Believing” Effect*, 11 GROUP PROCESSES & INTERGROUP REL. 539, 539-40 (2008).

⁸⁶ Hausmann et al., *supra* note 85, at 540; C. Douglas McCann et al., *Primacy and Recency in Communication and Self-Persuasion: How Successive Audiences and Multiple Encodings Influence Subsequent Judgments*, 9 SOC. COGNITION 47, 57 (1991).

⁸⁷ This “audience-congruent memory bias” is not solely the result of knowing the audience’s views; rather, the speaker must actually communicate the audience-tuned message. Hausmann et al., *supra* note 85, at 540 (citing E.T. Higgins, *Achieving “Shared Reality” in the Communication Game: A Social Action that Creates Meaning*, 11 J. LANGUAGE & SOC. PSYCHOL. 107, 144-71 (1992); E.T. Higgins & W.S. Rholes, *“Saying is Believing”: Effects of Message Modification on Memory and Liking for the Person Described*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 363, 376 (1978); C.D. McCann & E.T. Higgins, *Personal and Contextual Factors in Communication: A Review of the “Communication Game,”* in LANGUAGE, INTERACTION AND SOCIAL COGNITION 144, 144-

message to fit an audience's view, but also alter their own interpretation of a subject to mesh with the views of their audience. For instance, one study showed that an eyewitness's memory of an event can change based on hearing another person's retelling of the witnessed event.⁸⁸ This saying-is-believing effect can also manifest itself in different situations, including where the subject is an individual or a small group.⁸⁹ The key is that a speaker and audience develop some form of interpersonal connection that results in a merging or sharing of beliefs.⁹⁰

The saying-is-believing effect illustrates why electronic communications cannot duplicate the interpersonal bonds that accompany face-to-face communications. The dynamic in face-to-face communications works in two directions; both the speaker and the audience influence each other. This influence is particularly strong where the speaker and audience are already part of a group, such as co-workers with a certain degree of familiarity and trust.⁹¹ Electronic communications can replicate some of this effect but not to the same extent.⁹² Additionally, face-to-face communications are better suited for applying social pressure or learning social norms. Groups, particularly smaller ones, may develop social norms, or impose social costs and rewards, that can often spur collective action where it might not otherwise occur.⁹³ Again, electronic communications can convey some of these social considerations but to a lesser degree than personal contact.

71 (G.R. Semin & K. Fielder eds., 1992)).

⁸⁸ See René Kopietz et al., *Shared-Reality Effects on Memory: Communicating to Fulfill Epistemic Needs*, 28 SOC. COGNITION 353, 373 (2010).

⁸⁹ Hausmann et al., *supra* note 85, at 549-50 (finding saying-is-believing effect when communicating with or about small group).

⁹⁰ Echterhoff et al., *supra* note 26, at 503.

⁹¹ *Id.* at 504 (citing and describing various studies); Gerald Echterhoff et al., *Audience-Tuning Effects on Memory: The Role of Audience Status in Sharing Reality*, 40 SOC. PSYCHOL. 150, 152 (2009) (finding that saying-is-believing effect is stronger between speaker and audience of equal status).

⁹² See Iris Bohnet & Bruno S. Frey, *The Sound of Silence in Prisoner's Dilemma and Dictator Games*, 38 J. ECON. BEHAV. & ORG. 43, 43-44 (1999) (finding that cooperation is much greater in face-to-face public-good games than in anonymous ones, including games in which players cannot communicate); Ostrom, *supra* note 10, at 140-41 (noting that players in game theory experiments cooperate less when communicating through computers rather than in person); *cf.* Jesse Dill, *Listen to Your State: Resolving the Nonemployee Union Representative Access Debate through State Property Law*, 12 TENN. J. BUS. L. 129, 141-42 (2010) (describing superiority of face-to-face communications in increasing voter turnout in political elections).

⁹³ See OLSON, *supra* note 9, at 61-62; Ostrom, *supra* note 10, at 140-41, 154.

This research's impact on labor law is two-fold. First, although electronic communications are an increasingly valuable category of employee discourse, they still have significant shortcomings compared to face-to-face communications. Second, this psychological research demonstrates the inaccuracy of the prevailing view that any single form of communication, no matter how impersonal, is sufficient to provide opportunities for employees to act together.⁹⁴ Collective action often requires a substantial level of interaction among individuals, and while electronic communications can be an important part of that dynamic, they will rarely be sufficient.

In addition to the inherent shortcomings of electronic communications, their use, although ubiquitous in some workplaces, is rare or nonexistent in many others. The "digital divide" that has kept many low-income people from enjoying access to electronic communications is also seen in the workplace, particularly with blue-collar and service jobs.⁹⁵ Moreover, even in workplaces dependent upon electronic communications, employees are often prohibited from using them to further their collective interests. In particular, the most common means for employees to communicate electronically involves the use of employer-owned computers or Internet service. As discussed in detail below,⁹⁶ this has created a tension between employees' ability to communicate and employers' desire to limit use of their property. Indeed, as of 2005, at least 76% of employers currently had some type of policy restricting employees' use of e-mail at work.⁹⁷

Labor law is particularly well suited to govern the balance between these competing interests. Yet, for years the NLRB failed even to acknowledge that electronic communications might warrant a new approach to its regulation of workplace discourse.⁹⁸ Once it finally addressed the question, it maddeningly rejected the mere notion that

⁹⁴ See *infra* Part III.A.2.

⁹⁵ FALLING THROUGH THE NET, *supra* note 71, at 98, 110.

⁹⁶ See *infra* Part III.A.3.

⁹⁷ *55 Percent of Employees Used Computers at Work*, *supra* note 67, at D-24 (noting also that 31% of those employers regulate instant messaging and 9% regulate blogging).

⁹⁸ See Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1, 3-4 (2000); Elena N. Broder, Note, *(Net)workers' Rights: The NLRA and Employee Electronic Communications*, 105 YALE L.J. 1639, 1655 (1996); Miles Macik, Note, "You've Got Mail." A Look at the Application of the Solicitation and Distribution Rules of the National Labor Relations Board to the Use of E-mail in Union Organization Drives, 78 U. DET. MERCY L. REV. 591, 604-05 (2001).

electronic communications present any unique issues. Indeed, one of the more frustrating aspects of the NLRB's regulation of discourse in general is that it consistently has failed to account for changes in the workplace, whether they involve e-mail and other advances in communications, different physical workspaces, or employees' evolving job duties.⁹⁹ These changes often create additional barriers to collective action, which makes the Board's restrictions on the rare innovations that actually enhance employee discourse all the more troubling.

Despite these new challenges, the NLRB and courts have been far more concerned with protecting employers' property concerns than promoting employees' ability to discuss matters of common interest. If employees' right to collective action is to have any meaning in the modern workplace, that approach must change.

III. REVIVING WORKPLACE DISCOURSE

Employees' ability to communicate and access relevant information implicates a large number of labor law issues. This breadth reveals the importance of employee discourse, but also makes reform attempts more complex. There is no magic bullet, no simple statutory amendment that will fully rejuvenate labor law's acknowledgement of discourse as a necessary element of collective action. Instead, reviving the role of discourse requires an approach as varied as the issues it touches. Some of those issues would benefit from statutory reform, while others need only an adjustment of agency and judicial mindsets. What follows, then, are discussions of some of the more high-profile labor issues involving employee discourse and recommendations to strengthen its role in these debates. These examples are just that — illustrations that can serve as a template for expanding protection of employee discourse more generally throughout labor law.

A. *Employer Restrictions on Workplace Discourse*

One issue that has arisen repeatedly under labor law is the tension between employers' property interests and employees' labor rights, especially the right to communicate. Like most employment laws and regulations, the right of employee discourse necessarily infringes on employers' control of their workplaces.¹⁰⁰ The NLRB and courts have

⁹⁹ See *supra* note 54.

¹⁰⁰ For example, prohibitions against discriminatory hiring conflicts with employers' control of access to their property. O. Lee Reed, *Nationbuilding 101: Reductionism in Property, Liberty, and Corporate Governance*, 36 VAND. J. TRANSNAT'L L.

long struggled to resolve that tension, and they frequently do so in ways that reveal a fundamental lack of appreciation for discourse's role in promoting collective action.

The basic problem with the jurisprudence in this area is that it often considers the mere possibility of contact as sufficient to satisfy employees' right to communicate, with little consideration for whether that contact provides a realistic opportunity for collective action. This view ignores the fact that the right to communicate exists only as a means to promote the right to collective action.¹⁰¹ Over the last few decades, this decoupling has become more pronounced, and it appears unlikely that the NLRB or courts will reverse that trend in the near future. Thus, congressional action may be the only genuine hope for achieving a more appropriate balance between employer property interests and employee discourse.

1. Employee-Only Communications

Initial attempts to balance employer and employee interests were relatively sympathetic to the importance of discourse. Some of the earliest cases under the NLRA concerned employer attempts to prohibit employees from communicating with each other at the workplace, setting up a conflict between employers' right to control use of their property and employees' right to act collectively.¹⁰² The Supreme Court ultimately addressed this conflict in *Republic Aviation v. NLRB*, where it approved a Board rule permitting only limited restrictions on employees' workplace discourse.¹⁰³

Republic Aviation involved several consolidated cases in which employers applied no-solicitation rules against employees who were trying to communicate with co-workers about unionization.¹⁰⁴ In its decision, the Court rejected an extreme property rights argument, emphasizing that all rights, including employers' property rights, have limits.¹⁰⁵ Those limits become especially salient when property interests are used to justify intrusions into employees' labor rights, as was the case in *Republic Aviation*.

673, 719 (2003).

¹⁰¹ See *supra* note 50.

¹⁰² See, e.g., *Peyton Packing Co.*, 49 N.L.R.B. 828 (1943) (establishing rule governing employers' ability to restrict protected employee speech at workplace).

¹⁰³ See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801 (1945), *enforcing* *LeTourneau Co.*, 54 N.L.R.B. 1253, 1262 (1944).

¹⁰⁴ See *id.* at 795-97.

¹⁰⁵ *Id.* at 798, 802 n.8.

The Court recognized discourse's role in promoting collective action, approving the NLRB's view that the workplace was "uniquely appropriate" for employee discussions and that limits on these discussions were in "clear derogation" of employees' labor rights.¹⁰⁶ This recognition of the connection between discourse and collective action was critical, as it was the key rationale for limiting employers' control over their property.¹⁰⁷ However, as described below, this tie ultimately unraveled when the Court addressed union organizers' and other nonemployees' attempts to communicate.¹⁰⁸

In balancing workplace discourse against employers' property interests, the Court in *Republic Aviation* approved the NLRB's rule that restrictions on employee communications in work areas, during work time, were presumptively valid, while restrictions that applied in nonwork areas or on nonwork time were not.¹⁰⁹ Employers could rebut this presumption by showing a special business justification for further limits.¹¹⁰ Future cases complicated this rule by, among other things, giving employers more leeway to restrict written communications,¹¹¹ but the *Republic Aviation* framework has traditionally struck an appropriate balance between employer property interests and employee discourse. Although the rule, which does not relate well to situations involving electronic communications or more flexible work schedules and work areas, has shown its age as the workplace has evolved, it remains an all-too-rare example of a labor rule that adequately respects employee discourse.¹¹²

Although modernizing the *Republic Aviation* analysis by ending the largely anachronistic distinction between oral and written communications and adjusting the concepts of "work time" and "work area" would make it more effective in the modern workplace, its basic

¹⁰⁶ *Id.* at 801 n.6 ("[T]he employees, working long hours . . . , were entirely deprived of their normal right to 'full freedom of association' in the plant on their own time, the very time and place uniquely appropriate and almost solely available to them therefor. The [employer's] rule is therefore in clear derogation of the [organizational] rights of its employees guaranteed by the Act."); accord *NLRB v. Magnavox Corp.*, 415 U.S. 322, 325 (1974); Estlund, *Working Together*, *supra* note 33, at 9-11 (describing importance of workplace to discourse).

¹⁰⁷ *See* 324 U.S. at 802 n.8.

¹⁰⁸ *See infra* Part III.A.2.

¹⁰⁹ 324 U.S. at 803 n.10 (quoting *Peyton Packing Co.*, 49 N.L.R.B. 828, 843-44 (1943)); *see also* *TeleTech Holdings, Inc.*, 333 N.L.R.B. 402, 403 (2001) ("A no-distribution rule which is not restricted to working time and to work areas is overly broad and presumptively unlawful.").

¹¹⁰ 324 U.S. at 803 n.10; *see also* *TeleTech Holdings*, 333 N.L.R.B. at 403.

¹¹¹ *See infra* note 155.

¹¹² *See infra* note 155.

structure is still sound.¹¹³ Indeed, *Republic Aviation* has proved so workable that it should serve as the basis for other communication analyses. As explained below, the NLRB and courts have strayed from this analysis when regulating communications involving nonemployees or new technology, resulting in a diminution of employees' ability to act collectively.¹¹⁴ A return to *Republic Aviation* in these situations would strengthen employees' labor rights, while still protecting employers' valid business interests.

2. Employee-Nonemployee Communications

In addition to the intra-employee discussions addressed in *Republic Aviation*, the other major source of positive information about collective action is a union organizer.¹¹⁵ However, the Supreme Court has long refused to extend to outsiders the protections that employee speakers enjoy, relying instead on a rule that looks more to a communication's source than its effect on employees' rights.¹¹⁶ The Court's motivation was an exaggerated concern for employer property interests, which led it to a rule that exists only through a severe discounting of discourse's role in promoting collective action.

In *Lechmere, Inc. v. NLRB*, the Court rejected the NLRB's attempt to balance employer and employee interests when union organizers try to access the workplace.¹¹⁷ The Court insisted that such a balance is rarely needed and held that employers should be allowed to bar nonemployees from communicating with workers in virtually all instances.¹¹⁸ The key to this holding was the Court's lack of respect for the importance of discourse.

The Court in *Lechmere* made a firm distinction between the importance of employee and nonemployee communications.¹¹⁹ Under *Republic Aviation*, employees have a direct right to communicate

¹¹³ 324 U.S. at 803 n.10; see also *TeleTech Holdings*, 333 N.L.R.B. at 403.

¹¹⁴ See *infra* Parts III.A.2, III.A.3.

¹¹⁵ William B. Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property*, 49 MINN. L. REV. 505, 512-13 (1965) (describing importance of union-employee contact at workplace).

¹¹⁶ See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

¹¹⁷ *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992) (rejecting NLRB's balancing rule in *Jean Country*, 291 N.L.R.B. 11, 14 (1988)).

¹¹⁸ *Id.* at 537-38, 540 (holding that "[i]t is *only* where access is infeasible that it becomes necessary and proper to . . . balanc[e] the employees' and employers' rights").

¹¹⁹ *Id.* at 533, 541.

because it is a core feature of collective action.¹²⁰ However, according to the Court, nonemployees only have a “derivative” right to communicate with employees.¹²¹ A nonemployees’ right is considered derivative because it exists only as a means of assisting employees in their decision whether to act collectively.¹²² Accordingly, under *Lechmere*, an employer can exclude all nonemployees from its workplace as long as it does not discriminate against union messages and the nonemployees have some alternate means to contact employees.¹²³

Even accepting this analysis,¹²⁴ public choice theory and psychological research do not support the weight that the Court gives to the employee-nonemployee distinction. As evidenced by its begrudging acknowledgement of the need for communication between employees and nonemployees,¹²⁵ the Court in *Lechmere* failed to comprehend the immense hurdles to employees’ learning about collective action. As a result, the derivative “right” is often worthless.

The Court’s lack of respect for workplace discourse is highlighted by its alternate access exception.¹²⁶ Under this exception, a nonemployee must be allowed some use of employer property where there are no “reasonable alternatives” to communicating with employees.¹²⁷ “Reasonable alternatives” could have many meanings, but the Court and NLRB have so narrowed the exception that it is effectively nonexistent. Aside from the rare case involving something like an off-shore oil rig or a remote logging camp, any opportunity to contact workers — no matter how difficult, expensive, or ineffective — is

¹²⁰ Republic Aviation Corp. v. NLRB, 324 U.S. 793, 801-02 (1945).

¹²¹ 502 U.S. at 533, 540 (citing *Babcock & Wilcox*, 351 U.S. at 113).

¹²² *Id.* at 532 (“[The right to] self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others.”).

¹²³ *Id.* at 535, 538; *infra* notes 127-29 and accompanying text.

¹²⁴ Commentators have widely criticized the derivative rights analysis by noting, for example, that the NLRA speaks to “employees” generally, not merely to employees of the specific employer involved. R. Wayne Estes & Adam M. Porter, *Babcock/Lechmere Revisited: Derivative Nature of Union Organizers’ Right of Access to Employers’ Property Should Impact Judicial Evaluation of Alternatives*, 48 SMU L. REV. 349, 354-56 & n.3 (1995); Alan L. Zmija, *Union Organizing After Lechmere, Inc. v. NLRB — A Time To Reexamine the Rule of Babcock v. Wilcox*, 12 HOFSTRA LAB. & EMP. L.J. 65, 101 (1994); see also Jeffrey M. Hirsch, *Taking State Property Rights Out of Federal Labor Law*, 47 B.C. L. REV. 891, 901-04 (2006) (noting other problems with *Lechmere* analysis).

¹²⁵ *Lechmere*, 502 U.S. at 539-41.

¹²⁶ *Id.* at 533.

¹²⁷ *Id.* at 537. The other general exception exists where the employer prohibits use of its real property in a discriminatory fashion. *Id.*; see also *infra* note 156.

deemed “reasonable.”¹²⁸ Thus, even indirect contact, such as advertisements in a large metropolitan area, is considered a reasonable alternative to accessing employees at work.¹²⁹ The rationale, to paraphrase the Court, is that the NLRA merely requires *some* contact with employees, not *effective* contact.¹³⁰ However, this rule conflicts with the Act’s goal of protecting employees’ ability to make informed decisions about collective action.¹³¹

As Professor Cynthia Estlund, among others, has noted, not all types of communication are equal.¹³² Newspaper advertisements, websites, and mailed materials typically provide only a limited amount of useful information. More importantly, these media lack any interpersonal contact, which is a critical factor in individuals’ ability to act together.¹³³ The Court, therefore, was wrong to hold that passive transfers of information satisfy employees’ right to learn about collective action.¹³⁴ If employees are to make an informed choice about acting collectively, they need to engage in true bilateral discussions that involve meaningful opportunities to present information and ask questions, especially given the significant risks and uncertainties involved.¹³⁵

The facts of *Lechmere* aptly show the divergence between reality and what the Court considers to be adequate communication. The union in *Lechmere* argued for application of the reasonable alternatives exception because the organizing took place in a large metropolitan

¹²⁸ *Lechmere*, 502 U.S. at 540-41 (citation omitted) (holding that employer may exclude nonemployee organizers from its premises unless organizers can “establish the existence of any ‘unique obstacles’ that frustrated access to . . . employees”); *Nabors Ak. Drilling, Inc. v. NLRB*, 190 F.3d 1008, 1014 (9th Cir. 1999).

¹²⁹ 502 U.S. at 540.

¹³⁰ *Id.* at 539 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956)) (“[The exception] does not apply wherever nontrespassory access to employees may be cumbersome or less-than-ideally effective, but only where ‘the *location of a plant and the living quarters of the employees* place the employees *beyond the reach of reasonable union efforts to communicate with them.*’”).

¹³¹ See sources cited *supra* note 50.

¹³² Estlund, *Labor, Property, and Sovereignty*, *supra* note 52, at 331-32 (arguing that *Lechmere* ignores fact that workplace communications are necessary to effective organizing); see also Estes & Porter, *supra* note 124, at 363-66; Zmija, *supra* note 124, at 101, 113-16.

¹³³ See BAR-TAL, *supra* note 25, at 71-72; Festinger, *supra* note 8, at 30 (stressing importance of physical proximity and face-to-face communications); *supra* Part I.

¹³⁴ *Lechmere*, 502 U.S. at 537-38 (emphasizing that “direct contact, of course, is not a necessary element of ‘reasonably effective’ communication; signs or advertising also may suffice”).

¹³⁵ See *supra* Part III.A (discussing risk of employer retaliation and information gaps that exist in organizing campaigns).

area, where reaching employees through mass media would be both expensive and ineffective.¹³⁶ Moreover, according to the union, using the strip of public property near the worksite would be unsafe because of the adjacent high-speed traffic.¹³⁷ The Court rejected the union's arguments, holding that those facts did not make the employees "inaccessible" for two reasons: because "direct contact, of course, is not a necessary element of 'reasonably effective' communication" and because, in any event, the union had been able to contact "a substantial percentage of them directly, via mailings, phone calls, and home visits."¹³⁸

It defies belief that using signs and advertising in a large metropolitan area is a "reasonably effective" means to inform a specific group of employees about unionization and foster the level of discourse needed for them to act together. Indirect contact is typically unable to promote collective action in the best of circumstances, much less where it involves costly advertising that has little chance of reaching its target audience in a useful manner.¹³⁹ Further, the direct contacts in *Lechmere* — home visits and mailings that occurred only as a result of the now-illegal practice of obtaining employees' names and addresses through their license plates¹⁴⁰ — did not allow employees to communicate among themselves, which is a crucial aspect of group action. Indeed, as evidence of the inferiority of these modes of communication, the "substantial percentage" of direct contacts in *Lechmere* involved only 20% of the employees and, not surprisingly, resulted in only one signed authorization card.¹⁴¹ In short, the Court's unjustifiably restrictive definition of reasonable contact has eliminated in most instances any realistic opportunity for useful employee-nonemployee discourse.

This limitation on discourse interferes not only with nonemployee-instigated collective action, but also with group action that employees initiate. By allowing employers to bar all but the most superficial of

¹³⁶ *Lechmere*, 502 U.S. at 540.

¹³⁷ *See id.* at 533, 540 (rejecting NLRB's agreement with union's argument).

¹³⁸ *Id.*

¹³⁹ *See supra* notes 92-93 and accompanying text.

¹⁴⁰ Following *Lechmere*, Congress prohibited obtaining employee information from license plates in most instances under the Federal Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2724(a) (2006); *see also* *Pichler v. UNITE*, 542 F.3d 380, 384, 396 (3d Cir. 2008) (affirming approximately \$5 million award against union for obtaining home addresses from employee license plates).

¹⁴¹ *Lechmere*, 502 U.S. at 530 (noting that union was able to get names and addresses of 41 of 200 employees, whom they contacted through four mailings, in addition to some phone calls and home visits).

outside contact, the Court has undermined employees' ability to confront issues in their workplace. Even in situations where employees would benefit from collective action, they may not be able to act without input from an individual with perceived authority on the topic.¹⁴² This is because group members, before agreeing to a joint decision, frequently rely on an authority figure to consider and support the decision.¹⁴³ Although some employees may be able to fulfill that role, it is often well-informed, professional union organizers who are most capable of acting as the voice of authority.¹⁴⁴ But organizers' effectiveness in fostering group decision-making strongly depends upon their ability to converse with employees in a meaningful way.¹⁴⁵ By holding that the NLRA protects only the most rudimentary access to employees, rather than success at organizing them,¹⁴⁶ the Court has virtually guaranteed that, in most workplaces, access will never equal success.¹⁴⁷ This conflicts with the NLRA's guarantee that employees have the right to advance their interests as a group because without input from outsiders, collective action may never have a chance to occur.

Prior to *Lechmere*, the NLRB attempted to address this concern by balancing employers' property interests against the need for nonemployee discourse in a given situation.¹⁴⁸ Because the Court is unlikely to reconsider its rejection of that balancing test, the solution is up to Congress. Reviving the NLRB's balancing test or applying some form of the *Republic Aviation* analysis could permit substantive communications between employees and nonemployees, while still

¹⁴² BAR-TAL, *supra* note 25, at 71-72.

¹⁴³ *Id.*

¹⁴⁴ See generally *Lechmere*, 502 U.S. at 540-41 (recognizing that access to union organizers is important part of employees' ability to learn about and possibly exercise their right to self-organization).

¹⁴⁵ BAR-TAL, *supra* note 25, at 72 (describing influence on group members as depending on status and strength of those imparting information, immediacy — in terms of space and number of contacts — with group members, and number of sources of information); Ostrom, *supra* note 10, at 149.

¹⁴⁶ *Lechmere*, 502 U.S. at 540-41.

¹⁴⁷ *Id.* at 543 (White, J., dissenting) ("Moreover, the Court in *Babcock* recognized that actual communication with nonemployee organizers, not mere notice that an organizing campaign exists, is necessary to vindicate § 7 rights. If employees are entitled to learn from others the advantages of self-organization, it is singularly unpersuasive to suggest that the union has sufficient access for this purpose by being able to hold up signs from a public grassy strip adjacent to the highway leading to the parking lot."); Anne Marie Lofaso, *Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199, 214-16 (2010).

¹⁴⁸ Jean Country, 291 N.L.R.B. 11, 14 (1988).

respecting employers' valid business interests. Either of these reforms would allow the NLRB to recognize constructive discourse as an indispensable component of collective action. Leaving *Lechmere* undisturbed, however, guarantees that for many employees, the NLRA is but an empty promise.

3. Electronic Communications

One of the biggest ironies of the current approach to workplace discourse is that when a new form of communication developed that was both effective and seemed to avoid the restrictions of *Lechmere*, the NLRB squelched it. E-mail and other electronic communications represented one of the few options that, while not as effective as interpersonal discourse, still provided a viable avenue for discussing matters of mutual interest. Additionally, electronic communications' use of employers' personal — rather than real — property, diminishes the conflict between property rights and labor rights.¹⁴⁹ In sum, electronic communications seemed to be one of the few effective means that unions could employ to interact with employees in a post-*Lechmere* world.¹⁵⁰ But in a recent case, *Register-Guard*, the NLRB rejected that assumption and more. In yet another instance of employer interests trumping employees' labor rights, the NLRB concluded that employers could bar electronic communications under basically the same conditions as *Lechmere*.¹⁵¹ More significantly, this rule applied not only to nonemployees but to employees' electronic communications as well.

In *Register-Guard*, the NLRB addressed an employer's policy prohibiting use of a firm's communication equipment for nonbusiness solicitations.¹⁵² Despite this policy, the employer had frequently

¹⁴⁹ E-mail and other types of electronic communications systems are personal property — a type of chattel — which is entitled to significantly less protection against trespass than real property. *Intel Corp. v. Hamidi*, 71 P.3d 296, 302-03 (Cal. 2003) (noting that trespass of chattel, unlike real property trespass, requires proof of harm).

¹⁵⁰ Hirsch, *supra* note 64, at 273-76.

¹⁵¹ Lofaso, *supra* note 147, at 217.

¹⁵² The policy stated:

Company communication systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of The Register-Guard. Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.

allowed personal e-mails on its equipment.¹⁵³ However, the employer ultimately enforced the policy against an employee, the local union president, who had sent three union-related e-mails to employees' work accounts.¹⁵⁴ The discipline appeared to be a straightforward *Republic Aviation* issue of an employee communicating with other employees, but the NLRB had a much different perspective.¹⁵⁵

In reviewing the administrative law judge's determination that the policy was lawful but the discipline of the union president was not,¹⁵⁶ the NLRB called for an extraordinarily rare oral argument and invited amicus briefs, giving hope that it would thoroughly consider the multitude of issues that electronic communications implicate.¹⁵⁷ Instead, the Board reflexively sided with employer property interests, even though such a decision required it to ignore well-established property and labor law.

The NLRB's central conclusion was that, "[c]onsistent with a long line of cases governing employee use of employer-owned equipment, we find that the employees here had no statutory right to use the

Guard Publ'g Co., 351 N.L.R.B. 1110, 1111 (2007), *enforced in part, enforcement denied in part*, 571 F.3d 53 (D.C. Cir. 2009) (holding that policy applied only to *solicitations*, not informational or proselytizing messages).

¹⁵³ *Id.*

¹⁵⁴ *Id.* Two e-mails were sent from union computers and one e-mail was sent from a work computer. *Id.* at 1112.

¹⁵⁵ E-mail does raise potential complications under *Republic Aviation*, specifically whether e-mail should be treated as an oral solicitation or a written distribution and whether to apply the traditional work time/work area exception. TeleTech Holdings, Inc., 333 N.L.R.B. 402, 403 (2001) (allowing employers to bar oral or written communications in work areas during work time); Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615, 616, 620 (1962) (giving oral solicitations more protection against employer interference than written distributions); *see also* Hirsch, *supra* note 64, at 285-95. However, because the Board concluded that *Republic Aviation* does not apply to electronic communications, it did not address these issues.

¹⁵⁶ 351 N.L.R.B. at 1136. The policy was alleged to have violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), and the discipline was alleged to have discriminated against union activity, in violation of Section 8(a)(3). *Id.* § 158(a)(3) (making it unfair labor practice for employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization").

¹⁵⁷ The Board announcement stated that it was "especially interested" in questions that included whether employees or nonemployees have a right to use employer e-mail and, if so, what extent employers can limit such use; whether traditional solicitation and distribution rules should apply; whether employers can monitor e-mail use; whether location is relevant to these questions; and current employer practices of limiting e-mail use. Notice of Oral Argument and Invitation to File Briefs at 1-2, *Register-Guard*, No. 36-CA-8743-1 (NLRB Jan. 10, 2007), *available at* http://www.nlr.gov/nlr/about/foia/documents/notice_of_argument.pdf.

[employer's] e-mail system for Section 7 matters."¹⁵⁸ Thus, according to the Board, employers can restrict almost all use of their electronic communication systems, as long as they do not discriminate against union messages.¹⁵⁹ The basis for this conclusion was the supposed rule that employers have a virtually unfettered right to control use of their personal property, even by employees.¹⁶⁰ Yet this analysis was problematic for several reasons.

As an initial matter, this "rule" consisted of a weak set of precedents that should no longer apply in any situation, especially one involving communication tools as important as e-mail and the Internet. These precedents were literally comprised of a series of self-citing, conclusory statements that gave employers broad control over property such as telephones and bulletin boards.¹⁶¹ The NLRB's reliance on these statements both ignored their vulnerability and abandoned the opportunity to engage in the first substantive analysis of employers' control over their communication systems and other personal property.

This missed opportunity was particularly harmful because in adopting these precedents, the NLRB turned property law on its head. Real property — which was the employer's ostensible interest in *Republic Aviation* and other communication cases — warrants far more protection than personal property.¹⁶² Accordingly, an employer's interest in controlling its personal property should be given *less* weight than its interest in controlling real property, not *more* weight as the NLRB concluded in *Register Guard*. The Board could perhaps be forgiven for misconstruing an area outside of its expertise, even

¹⁵⁸ 351 N.L.R.B. at 1114.

¹⁵⁹ The *Register-Guard* Board dramatically narrowed the definition of "discrimination" in communication cases by concluding that it meant only treating communications of a similar character unequally. 351 N.L.R.B. at 1117-18 (allowing, for instance, employer to exclude "membership organizations" from workplace, but allowing all others); see also Jeffrey M. Hirsch, *E-Mail and the Rip Van Winkle of Agencies: The NLRB's Register-Guard Decision*, in *WORKPLACE PRIVACY: HERE AND ABROAD — PROCEEDINGS OF THE NEW YORK UNIVERSITY 61ST ANNUAL CONFERENCE ON LABOR 204-09* (2009).

¹⁶⁰ 351 N.L.R.B. at 1114.

¹⁶¹ See *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-64 (6th Cir. 1983); *Honeywell, Inc.*, 262 N.L.R.B. 1402, 1402 (1982), *enforced*, 722 F.2d 405 (8th Cir. 1983); *Container Corp.*, 244 N.L.R.B. 318, 318 n.2 (1979), *enforced*, 649 F.2d 1213 (6th Cir. 1981) (per curiam); see also Hirsch, *supra* note 159, at 193 ("[E]very single case cited by the majority in *Register-Guard* failed to engage in any substantive discussion of the extent to which employers should be allowed to limit employees' use of employers' personal property. Instead, the cases merely cite each other blindly.").

¹⁶² See *supra* note 149 and accompanying text.

though it is a basic rule that most first-year law students learn, but the irony is that it did so as a means to disregard labor law.

As noted, the distinction between *Republic Aviation*'s robust protection of workplace discourse and the meager protection of *Lechmere* had explicitly been based on whether the speaker was an employee.¹⁶³ Under this dichotomy, the NLRB should have applied *Republic Aviation* to the employee e-mails in *Register-Guard*.¹⁶⁴ Thus, the NLRB's insistence on using a quasi-*Lechmere* analysis directly contradicted precedent of both the Supreme Court and the Board itself.¹⁶⁵ Compounding this offense is that the contradiction was a means to permit employers far greater leeway to hinder employee discourse.

In an area that purportedly attempts to balance employer and employee interests, electronic communications represented a sea of change.¹⁶⁶ Despite the NLRB's description, e-mail and other electronic communications are substantively distinct from traditional forms of communication. Use of an employer's worksite, like in *Republic Aviation* and *Lechmere*, is a physical invasion that often involves some degree of interference with the employer's enjoyment of its property.¹⁶⁷ In contrast, e-mail and other electronic communications are far less intrusive.¹⁶⁸ With rare exception,¹⁶⁹ using an employer's e-mail system for nonbusiness purposes does not interfere appreciably with other

¹⁶³ See *supra* notes 119-22 and accompanying text.

¹⁶⁴ 351 N.L.R.B. at 1123-24 (Members Liebman and Walsh, dissenting).

¹⁶⁵ The majority in *Register-Guard* disclaimed this conflict, but failed to explain satisfactorily how its ruling was consistent with the employee-nonemployee distinction emphasized in *Lechmere*. *Id.* at 1116 n.12.

¹⁶⁶ William R. Corbett, *Awaking Rip Van Winkle: Has the National Labor Relations Act Reached a Turning Point?*, 9 NEV. L.J. 247, 271 (2009).

¹⁶⁷ Malin & Perritt, *supra* note 98, at 48-49; cf. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 435 (1982) (holding permanent physical invasion of property was unconstitutional taking of property). Of course, under *Republic Aviation*, a physical invasion by employees to engage in communications may be protected by the NLRA. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 795-97 (1945).

¹⁶⁸ Fisk & Malamud, *supra* note 3, at 2072-73 (citing evidence of e-mail's costs provided in *Register-Guard* amicus briefs and criticizing Board for failing to address data). This is especially true when employees communicate with their own hardware, using only the employer's communication network — as was the case with two of the e-mails in *Register-Guard*. See *supra* text in note 154.

¹⁶⁹ See, e.g., *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1019 (S.D. Ohio 1997) (noting argument that extremely large volumes of e-mail from spammer diminished computer system's performance); *Washington Adventist Hosp., Inc.*, 291 N.L.R.B. 95, 102-03 (1988) (concluding electronic message was not protected because it automatically appeared on employees' computers and remained until deleted).

uses of the system.¹⁷⁰ Therefore, if the need to balance employer and employee interests is to be taken seriously,¹⁷¹ use of employers' e-mail systems for collective-action purposes deserves greater protection.

The NLRB's failure to protect electronic communications repeats *Lechmere's* mistake of assuming that any mode of discourse satisfies employees' right to collective action.¹⁷² The Board's conclusion that employers should not have to yield any control of their personal property unless employees are "entirely deprived" of even indirect contact with others ignores the realities of group action.¹⁷³ Substantive interaction is required for individuals to act together. Although electronic communications are not ideal, they provide an effective means of discourse that can promote employees' labor rights while imposing few legitimate costs on employers.¹⁷⁴ The NLRB should be promoting electronic communications, not curtailing their use.

The Obama NLRB is likely to dismantle *Register-Guard*. If it does so by applying an updated *Republic Aviation* analysis, the Board could

¹⁷⁰ *Intel Corp. v. Hamidi*, 71 P.3d 296, 308 (Cal. 2003) (sending of unwanted e-mail did not cause "any physical or functional harm or disruption"); *Guard Publ'g Co.*, 351 N.L.R.B. 1110, 1125 (2007) (Members Liebman and Walsh, dissenting). Excessive nonbusiness use of e-mail and the Internet can conceivably result in some costs to the employer. *Register-Guard*, 351 N.L.R.B. at 1114 (arguing that employer may want to limit nonbusiness e-mail for purpose of "preserving server space, protecting against computer viruses and dissemination of confidential information, and avoiding company liability for employees' inappropriate e-mails"). However, in most instances, labor-related e-mail would represent a very small number of messages with virtually no costs to the employer. *Hamidi*, 71 P.3d at 308 (rejecting e-mail trespass claim because "[t]he system worked as designed, delivering the messages without any physical or functional harm or disruption. These occasional transmissions cannot reasonably be viewed as impairing the quality or value of [the employer's] computer system").

¹⁷¹ *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) ("Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.").

¹⁷² To be fair, as the Board noted, the employees in *Register-Guard* had more alternatives than did the union in *Lechmere* because the *Register-Guard* employees could still engage in oral solicitations and literature distribution. 351 N.L.R.B. at 1115. However, the Board's decision does little for the growing number of employees whose communications with coworkers frequently, if not mostly, take place through electronic means. *Id.* at 1116 n.13 (declining to "pass on circumstances, not present here, in which there are *no means* of communication among employees at work other than e-mail" (emphasis added)).

¹⁷³ *Id.* at 1115.

¹⁷⁴ One obvious cost to most employers is collective action by their employees; however, the interest in suppressing collective action is illegitimate under the NLRA. *See supra* text in note 48.

significantly improve employees' ability to act together in workplaces that rely heavily on electronic communications. Moreover, congressional action that applied a similar rule to nonemployee speakers, or some other reform that effectively overturns *Lechmere*, would promote discourse in workplaces that use fewer electronic communications.¹⁷⁵ This wholesale reform would impose a simple analysis that adequately protects all employees' ability to access information and discuss group strategy.

If labor law's right to collective action is to exist in any meaningful way, there must be more recognition of the importance of workplace discourse. Employees ultimately may decide not to act collectively. However, only if they possessed relevant information and opportunities for substantive discussions can we presume that they based their choice on the risks and benefits involved, rather than an inability to overcome the barriers to collective action.

B. *Discourse and Information During the Representation Process*

Another area in which discourse plays a key role is the process by which employees choose a collective-bargaining representative. Throughout the representation process — from the initial stages of employees' contemplating the desirability of collective representation to the later steps of ultimately choosing a specific representative — discourse and access to certain types of information is crucial. Indeed, the process is unlikely ever to begin without employees having a basic familiarity with union representation and an ability to discuss its costs and benefits.¹⁷⁶ During an organizing campaign, employees learn about unionization from many actors including coworkers, employers, unions, and at times outside groups. If employees' final choice on whether to seek collective representation is to be truly free, they must have the opportunity to interact among themselves and process these disparate sources of information. Without a significant amount of such

¹⁷⁵ The new rule could impose a presumption that employer restrictions on most workplace communications are invalid — perhaps excepting communications during work time, to the extent it can be delineated — while allowing the employer to rebut that presumption based on a valid business justification. Yet, to keep the rule relevant to the modern workplace, it would have to abandon the current distinction between oral and written communications, as well as lessen the significance of a designated work area or work time. See sources cited *supra* note 155. Finally, some Board-established norms would also be helpful, such as a certain number of union distributions or opportunities to address employees allowed during a typical campaign.

¹⁷⁶ See *supra* notes 121-22, 132-45 and accompanying text.

interaction, employees will be unable to form the social bonds and opinions necessary to make a well-reasoned decision.¹⁷⁷

Yet, in today's workplace, this picture of employees' rationally weighing the costs and benefits of collective representation is largely an illusion. Unions, in particular, have widely criticized the NLRB's regulation of the representation process as limiting, rather than protecting, employees' freedom to consider unionization. As a result, this area is the subject of one of the few serious attempts to modify the NLRA in decades, the Employee Free Choice Act ("EFCA").¹⁷⁸ Although it is presently unclear whether Congress will ever enact some form of the bill,¹⁷⁹ EFCA provides a useful illustration of the role that discourse plays throughout the representation process and why it deserves far more consideration than it has garnered thus far.

Since its introduction, EFCA has been the center of a fierce political debate that has involved hyperbolic views on both sides, ranging from suggestions that the bill will save the economy to suggestions that it will open the door for a Sopranos-style workplace run by union mobsters.¹⁸⁰ Largely absent in these debates — even in more moderate, well-reasoned discussions — has been the bill's impact on employee discourse and collective action. On one hand, this is surprising because the potential impact of the bill is significant. On the other hand, EFCA is merely the most recent of many instances in which discourse has taken an unjustified backseat to other considerations.¹⁸¹ Correcting that oversight, whether through EFCA or other labor law

¹⁷⁷ See *supra* Part I.

¹⁷⁸ Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009). The only other recently proposed amendment to the NLRA that had any serious backing in Congress was The Teamwork for Employees and Managers Act of 1995, H.R. 743, 104th Cong. (1996) ("TEAM Act"), which would have lowered restrictions on employer-sponsored workplace participation groups. *Id.* § 3 (amending 29 U.S.C. § 158(a)(2)). The House and Senate passed the TEAM Act, which President Clinton vetoed. 142 CONG. REC. H8816 (1996).

¹⁷⁹ Alec MacGillis, *Specter Unveils Revised EFCA Bill*, WASH. POST, Sept. 15, 2009, http://voices.washingtonpost.com/capitol-briefing/2009/09/specter_unveils_prospective_de.html.

¹⁸⁰ Compare Stewart Acuff, *Mobilizing for the Employee Free Choice Act*, HUFFINGTON POST (Feb. 16, 2009), http://www.huffingtonpost.com/stewart-acuff/mobilizing-for-the-employ_b_167153.html (stating that "our economy cannot be fixed until we pass [EFCA] . . . and restore balance to [a ruined] economy"), with Center for a Democratic Workplace, *Changes*, <http://www.youtube.com/watch?v=N6yrZtq27e0> (last visited Mar. 6, 2011) (showing advertisement using actor who was mobster (Johnny Sack) in *The Sopranos* television series to suggest undue influence on employees to sign cards).

¹⁸¹ See *supra* Part III.A.

reforms, is an important step in providing employees the freedom to engage in collective action that the NLRA intended.

The centerpiece of the original EFCA legislation would have expanded the options for choosing a union. Current law allows for two distinct selection procedures. The traditional avenue is through an NLRB-run election; the alternative occurs when an employer voluntarily recognizes and bargains with a union that can show support from a majority of employees.

An official election, although never the exclusive means of selecting a representative under the NLRA, has long been the preferred route to unionization.¹⁸² The election process formally begins once at least 30% of a group of employees indicates that it wants an election or already supports a given union.¹⁸³ Following such a showing, the NLRB will arrange for an election to be held at the workplace, usually a month or two later.¹⁸⁴

This process is far from perfect, however. The most serious problem, at least from unions' perspective, is that employers have substantial leeway to sway the vote. Weak penalties¹⁸⁵ give many employers the freedom and incentive to engage in unlawful campaign tactics, such as firing or threatening union supporters and retaliating against union activity.¹⁸⁶ Studies have shown that, despite their illegality,

¹⁸² NLRB v. Gissel Packing Co., 395 U.S. 575, 596 (1969); Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 507-15 (1993) (noting that NLRB used to order recognition or bargaining without election). This refers only to an NLRB election; at times, a union and employer will agree to abide by the results of an election not run by the NLRB, which is considered another form of voluntary recognition. See e.g., *Baggage Handlers at Los Angeles Airport Vote for Representation by SEIU Local 1877*, Daily Lab. Rep. (BNA) No. 129, at A-7 (July 5, 2000) (describing employer's agreement to abide by employees' vote on union representation in privately run election).

¹⁸³ 29 U.S.C. § 159(c) (2006); 29 C.F.R. § 101.18(a) (2011). Evidence of employee support for an election is usually made through authorization "cards" that employees sign indicating a desire for an election, designating a union as the employee's collective-bargaining representative, or both. *Gissel*, 395 U.S. at 595-610.

¹⁸⁴ See *infra* note 236.

¹⁸⁵ There are currently no monetary fines for unfair labor practices; at most, the employer will face backpay awards for unlawful terminations. The typical "penalty" for election misconduct is to re-run an election that the union lost. However, this is often well worth the risk for an employer because delay seriously undermines organizing efforts. See Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009) (amending NLRA to include fines for unfair labor practices related to representation process); DANNIN, *supra* note 3, at 52-55; *infra* note 190.

¹⁸⁶ RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 234-36 (1984) (describing studies); Morris M. Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, 22 J. LAB. RES. 519, 528-

terminations, threats, and other discipline targeting union supporters are widespread in organizing campaigns. For example, Professor Kate Bronfenbrenner recently found widespread use of a variety of tactics that are typically illegal including discharge of union activists in 34% of campaigns, threats in 69%, harassment in 41%, and interrogations in 64%.¹⁸⁷ Other studies have estimated that one out of eighteen workers in an organizing campaign faces some form of unlawful discrimination.¹⁸⁸

Employers are also allowed to engage in many lawful strategies that significantly reduce support for a union.¹⁸⁹ For example, an employer can file challenges that delay the vote, decreasing a union's chance of success once the election finally occurs.¹⁹⁰ Even if a union has already won an election, an employer can still file challenges — ones that postpone official recognition of the win for years in some instances,

30 (2001). See generally Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 5-24 (2008) (describing NLRB election process and many of its problems).

¹⁸⁷ Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing* 10-11 (Econ. Policy Inst. Briefing Paper No. 235, 2009) (survey of 1999-2003 campaigns), available at http://epi.3cdn.net/edc3b3dc172dd1094f_0ym6ii96d.pdf; see also COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS (commonly known as "Dunlop Commission"), FACT FINDING REPORT 86 (1994), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1279&context=key_workplace (finding unlawful terminations in 25% of campaigns).

¹⁸⁸ Charles Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 EMP. RTS. & EMP. POL'Y J. 317, 330 (1998); see also Paul Weiler, *Promises To Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1781 (1983) (estimating that union supporters have one in twenty chance of being fired for exercising labor rights).

¹⁸⁹ Virtually all employers mount some opposition to union. Bronfenbrenner, *supra* note 187, at 11 (finding opposition in 96% of campaigns and average of 11 tactics — both lawful and unlawful — per campaign).

¹⁹⁰ Generally, the longer the time period, the more difficult it is for the union to maintain support. Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 75, 78-79 (Sheldon Friedman et al. eds., 1994) (describing win rate declining from 53% if election occurs within 50 days after election petition, to 41% if election occurs 61-180 days later); see James Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 832 (2005) (describing why unions try to obtain employer neutrality and voluntary recognition agreements); Myron Roomkin & Richard N. Block, *Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence*, 1981 U. ILL. L. REV. 75, 88-89 (1981) (finding similar results to Bronfenbrenner).

often resulting in the union losing majority support before it ever has the chance to represent employees.¹⁹¹

Additionally, employers are permitted to make strong anti-union statements to employees. Although lawful in most instances, these statements — enhanced by the “home-field advantage” employers enjoy because the election and most campaigning occurs at the worksite — are extremely successful in reducing support for unions.¹⁹² One of the most prominent of these strategies is the “captive-audience speech,” in which an employer disparages a union during a meeting that employees are required to attend.¹⁹³ Captive-audience speeches are extremely effective at undermining unions’ support; thus, it is not surprising that employees often face a large number of them during organizing campaigns.¹⁹⁴ Indeed, recent studies have typically found that about 90% of employers use captive-audience speeches in contested elections.¹⁹⁵

The results of these techniques, and others, have made the NLRB election process one of futility for many unions.¹⁹⁶ Unions, therefore, have increasingly avoided official elections and have turned instead to an alternate form of representation in which they pressure employers to recognize and bargain with unions based on a “card-check”

¹⁹¹ Brudney, *supra* note 190, at 834 n.65, 868-69. The NLRB officially recognizes a vote in favor of a union by “certifying” the union as the exclusive bargaining representative of the employees. 29 U.S.C. § 159(c) (2006).

¹⁹² Bronfenbrenner, *supra* note 187, at 10 (not distinguishing between lawful and unlawful statements); FREEMAN & MEDOFF, *supra* note 186, 234-36 (describing studies). Statements may be unlawful if they contain threats. 29 U.S.C. § 158(c) (2006); NLRB v. Gissel Packing Co., 395 U.S. 575, 617-18 (1969).

¹⁹³ Paul M. Secunda, *The Captive Audience: United States: Toward the Viability of State-Based Legislation To Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL’Y J. 209, 214 (2008).

¹⁹⁴ Bronfenbrenner, *supra* note 187, at 10, 13 (finding that 89% of employers used average of 10.4 captive-audience speeches and that unions won 73% of campaigns without such speeches but only 47% with speeches).

¹⁹⁵ *Id.*; *Internationally Recognized Core Labour Standards in the United States: Report for WTO General Council Review of the Trade Policies of the United States*, INTERNATIONAL CONFEDERATION OF FREE TRADE UNIONS, 3 (2004), available at <http://www.icftu.org/www/pdf/usclsreport2004.pdf> (finding captive-audience speeches by 92% of employers in contested elections); see also FREEMAN & MEDOFF, *supra* note 186, 234-37 (describing studies); Kleiner, *supra* note 186, at 526-30.

¹⁹⁶ It is difficult to tie directly employers’ lawful and unlawful campaign activities to unions’ success rates, but the correlative evidence is quite strong. See Bronfenbrenner, *supra* note 187, at 10-13. More support for that argument, albeit weaker, is that employer unfair labor practices are more prevalent in mid- and large-sized firms, where unions’ success rate is lower. Brudney, *supra* note 190, at 830, 870 (noting also that it is more difficult generally for unions to organize larger groups of employees).

showing of majority support.¹⁹⁷ Under the card-check process, if a majority of employees attest — usually by signing an authorization card — to their desire to be represented by a union, the employer can “voluntarily recognize” the labor organization.¹⁹⁸ Currently, however, the employer always has the option of rejecting voluntary recognition and forcing the union to seek an NLRB election; it is the employer’s choice alone.¹⁹⁹ Despite the difficulties in convincing employers to give up their right to insist on an election, unions now seek voluntary recognition in over 80% of organizing drives.²⁰⁰ The question whether such recognition should remain a voluntary choice of employers is the subject of EFCA, one of the more contentious labor proposals in the last fifty years.

1. Card-Check Certification

Although EFCA was originally introduced in the waning days of President George W. Bush’s final term,²⁰¹ the election of President Barack Obama in 2008 led union interests to make a renewed push for the bill, which would be the first significant amendment to the NLRA in decades.²⁰² The 2009 EFCA legislation contained several provisions

¹⁹⁷ The NLRB conducted 2,871 elections in Fiscal Year 2002, but only 2,085 elections in Fiscal Year 2008 — a 27% decrease. See Brudney, *supra* note 190, at 824, 834 (noting that majority of new union organizing avoids NLRB-election process, largely because employers’ disproportionate power to sway employees undermines fairness of Board-run elections); Memorandum from Arthur F. Rosenfeld, Nat’l Labor Relations Bd., Office of the Gen. Counsel to Emps. (Feb. 4, 2003), available at http://www.nlr.gov/shared_files/GC%20Memo/2003/Summary_of_Operations_FY2002.pdf; Press Release, Nat’l Labor Relations Bd., NLRB Gen. Counsel Issues Report on FY 2008 Operations (Oct. 29, 2008), available at http://www.nlr.gov/shared_files/Press%20Releases/2008/R-2675.pdf.

¹⁹⁸ Under the current NLRA, the Board can certify a union as a collective-bargaining representative only if it has won an NLRB election. 29 U.S.C. § 159(c)(1)(A) (2006).

¹⁹⁹ *Id.*; *Linden Lumber Div. v. NLRB*, 419 U.S. 301, 304-06 (1974).

²⁰⁰ See Brudney, *supra* note 190, at 839-40. See generally Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125, 136 (2003) (citing increase in unions seeking voluntary recognition).

²⁰¹ The bill was initially introduced in 2007, during the Bush Administration, but without any serious thought that it would pass at the time. Employee Free Choice Act of 2007, H.R. 800, 110th Cong. (2007) & S. 1041, 110th Cong. (2009); John Logan, *End of the Road for the Employee Free Choice Act, or Just the Opening Salvo?* POLITICAL AFFAIRS (June 28, 2007), <http://www.politicalaffairs.net/end-of-the-road-for-the-employee-free-choice-act-or-just-the-opening-salvo/> (passing House by 241-185 vote, but falling 9 votes short of overcoming Senate filibuster).

²⁰² In 1974, Congress enacted a narrow set of amendments, extending coverage to the nonprofit health care industry. Health Care Institution Amendments, Pub. L. No.

related to representation and initial bargaining processes, but the one that garnered the most attention and criticism was the card-check certification requirement.²⁰³

The card-check rule would require the NLRB to certify a union that could demonstrate that a majority of employees wanted it as their collective-bargaining representative — a showing based on signed authorization cards instead of an election.²⁰⁴ This represents a major shift from the current regime, under which the employer alone decides whether a union with a card-check majority can represent employees.²⁰⁵ Card-check certification would give this choice to unions and employees, with the purpose of making unionization easier by avoiding the problems associated with NLRB-run elections.²⁰⁶

In the face of fierce opposition from many quarters, legislators stripped the card-check provision from the proposed EFCA.²⁰⁷ However, the proposal is still worth addressing, as it illustrates two distinct views of the right to engage in collective action: collective action as a social good and as an act of individual choice. These divergent accounts play important roles in current labor law debates,²⁰⁸ and each would benefit greatly from an enhanced recognition of the importance of discourse in promoting employee collective action.

93-360, 88 Stat. 395 (1974) (codified at 29 U.S.C. §§ 152, 158, 183). Prior to that act, the other substantial amendments to the NLRA occurred in the 1959 Labor-Management Reporting and Disclosure Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified in scattered sections of 29 U.S.C.) (implementing, among other things, reporting requirements for unions and procedural rights for union members), and in the 1947 Taft-Hartley Act, Labor-Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified in scattered sections of 29 U.S.C.) (adding, among other things, union unfair labor practices).

²⁰³ Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009).

²⁰⁴ *Id.* § 2(a).

²⁰⁵ 29 U.S.C. § 159(c)(1)(A) (2006).

²⁰⁶ Michele Campolieti et al., *Labor Law Reform and the Role of Delay in Union Organizing: Empirical Evidence from Canada*, 61 INDUS. & LAB. REL. REV. 32, 33, 34 (2007) (citing findings showing higher success rate in card-check provinces than quick-vote election provinces, both of which have higher success rates than current U.S. elections). See generally Sara Slinn, *An Empirical Analysis of the Effects of the Change from Card-Check to Mandatory Vote Certification*, 11 CAN. LAB. & EMP. L.J. 259 (2004) (finding that Canadian card-check procedures had significantly higher rate of union success than various other election procedures, particularly in private sector).

²⁰⁷ See Steven Greenhouse, *Democrats Drop Key Part of Bill To Assist Unions*, N.Y. TIMES, July 17, 2009, at A1.

²⁰⁸ See Fisk & Malamud, *supra* note 3, at 2033-36 (describing tension between Wagner Act and Taft-Hartley Act).

EFCA's card-check rule embodies a view of collective action as a social good.²⁰⁹ This approach — which is also reflected in the Wagner Act,²¹⁰ the original version of the NLRA — regards employee collective action as a benefit for not only employees, but society as a whole. Indeed, the Wagner Act's preamble explicitly states that collective action can equalize bargaining power in the workplace and reduce industrial strife, thereby improving the national economy.²¹¹

Card-check certification makes sense under this social-good approach.²¹² Expanding employee collective action is itself a policy aim; thus, lowering barriers to collective action takes precedence over most other considerations.²¹³ Card-check certification aptly fulfills that goal. Although it is unlikely that the rule would vastly increase union density,²¹⁴ it would make unionization easier and, therefore, do more to satisfy the social-good approach than current law.

This view of collective action as a social good was soon joined by another, often countervailing, approach. In the 1949 Taft-Hartley amendments to the NLRA, Congress acted on an alternative policy goal that stresses employees' individual freedom to choose whether or not to engage in collective action.²¹⁵ Under this view, the right to

²⁰⁹ "Social good" is used here only to denote the idea that promoting collective action will make society better off, primarily in the economic sense. It is not intended to contribute to the philosophical debate regarding the term's meaning. See Samuel J. M. Donnelly, *Towards a Personalist Jurisprudence: Basic Insights and Concepts*, 28 LOY. L.A. L. REV. 547, 586-89 (1995).

²¹⁰ Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2010)).

²¹¹ 29 U.S.C. § 151 (2006).

²¹² See Brudney, *supra* note 190, at 856-60 (arguing that card-check recognition is consistent with NLRA, particularly given its use soon after enactment of Wagner Act).

²¹³ See Adrienne E. Eaton & Jill Kriesky, *NLRB Elections Versus Card Check Campaigns: Results of a Worker Survey*, 62 INDUS. & LAB. REL. REV. 157, 159 (2009) (noting theory that card-check recognition "reduces conflict and leads to more positive labor relations").

²¹⁴ See *infra* note 242 and accompanying text.

²¹⁵ Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified in scattered sections of 29 U.S.C.). The tension between the two approaches was on display in the testimony of NLRB Chairman Battista and Member (now Chair) Liebman before a joint congressional hearing. Chairman Battista argued that the Taft-Hartley Act made the NLRA neutral; thus, labor law is indifferent to whether employees choose to engage in collective representation. *The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights: Joint Hearing Before the House Subcommittee on Health, Employment, Labor & Pensions, and the Senate Subcommittee on Employment & Workplace Safety*, 110th Cong. 18 (2007) (statement of Chairman Robert Battista). In contrast, Member Liebman expressed the view that the NLRA still promotes collective representation, albeit with Taft-Hartley's limits: "The law's overriding aim was and still is to make it possible for workers to freely choose collective representation and to

collective action focuses on individual choice, rather than the outcome of that choice.

Card-check certification raises problems for this individual-choice approach. Although consistent in many ways — if signed authorization cards accurately reflect employees' views, card-check certification reduces employer coercion and enhances free choice²¹⁶ — the rule risks interfering with individual choice in its attempt to promote collective representation. For instance, opponents of card-check certification argue that it would allow unions to coerce employees and misrepresent the significance of signing an authorization card.²¹⁷ Alternatively, if one does not accept such criticism,²¹⁸ the perceived shortcomings of card-check certification create a lack of legitimacy that could decrease support for an individual union and the labor movement as a whole.

More generally, card-check certification raises concerns regarding employees' ability to learn and communicate about unionization — concerns that are troublesome under both views of collective action. As Professor Matthew Bodie has explained, the election process already has difficulty providing employees the type of information needed to make a fully informed decision about unionization.²¹⁹ By

promote collective bargaining.” *Id.* at 64 (statement of Member Wilma Liebman) (emphasis added).

²¹⁶ See generally Slinn, *supra* note 206 (finding that Canadian card-check procedures had significantly higher rate of union success than various other election procedures, particularly in private sector).

²¹⁷ See, e.g., *Changes*, *supra* note 180 (showing *Sopranos* ad); see also Charles B. Craver, *Rearranging Deck Chairs on the Titanic: The Inadequacy of Modest Proposals To Reform Labor Law*, 93 MICH. L. REV. 1616, 1641 (1995) (arguing that secret ballots would be preferable to card-check certification in “perfect world” of quick elections and adequate enforcement of illegal tactics); Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 669 (2010) (citing critics). The NLRA, however, already outlaws such actions and would consider substantiated claims of coercion or misrepresentation in determining whether the union has a valid showing of majority support. 29 U.S.C. § 158(b)(1)(A) (2010); *Gulf Caribe Maritime, Inc.*, 330 N.L.R.B. 766, 766 n.2 (2000). Moreover, the Eaton and Kriesky survey found that employer anti-union pressure was substantially greater than pro-union pressure from union organizers or coworkers. Eaton & Kriesky, *supra* note 213, at 170 (noting also that employees believed they were free to choose for or against union equally when voting in NLRB-election or card-check processes).

²¹⁸ There are many reasons not to accept these criticisms, both as a factual matter and because these supposed defenses of employee free choice often come from employers who work hard to prevent employees from unionizing. See *supra* notes 182-95 and accompanying text.

²¹⁹ Bodie, *supra* note 186, at 35-38 (characterizing union organizing process as more like decision to purchase services rather than political election).

circumventing formal elections and reducing employers' opportunity to present their views, card-check certification would reduce employees' access to information and ability to communicate among themselves.²²⁰ The result is that employees will have a more difficult time making an informed, free choice about collective representation.²²¹ Further, the lack of information, and other problems that card-check certification implicates, invite skepticism, thereby reducing the reform's value as a social good.²²²

A recent survey of employees who had experienced an organizing campaign confirms the negative impact of card-check certification on their access to information.²²³ In the survey, Professors Adrienne Eaton and Jill Kriesky found a small but statistically significant decrease in the adequacy of information provided to employees in card-check campaigns versus NLRB-run elections.²²⁴ To be sure, some of that information — such as coercive statements or threats — is not beneficial,²²⁵ but other information — such as the union's effectiveness or the employer's ability to provide more compensation — is helpful. Basically, card-check certification throws out the good with the bad. The result is that many employees will be forced to decide whether to unionize with a suboptimal level of information.²²⁶ Indeed, one of the

²²⁰ Unions generally strive to keep card-check campaigns secret for as long as possible. Sachs, *supra* note 217, at 665, 671.

²²¹ RICHARD A. EPSTEIN, *THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT 25* (2009).

²²² Of course, card-check certification will often advance the social good approach by making unionization easier. However, the lack of information in some instances can reduce the likelihood that employees will choose a union. *See infra* notes 227-29 and accompanying text.

²²³ Eaton & Kriesky, *supra* note 213, at 170-71.

²²⁴ *Id.* at 168 (analyzing surveys of employees involved in card-check organizing and NLRB elections, asking whether they had sufficient information about several subjects needed to make informed decision about unionization). *But see* Brudney, *supra* note 190, at 876 (arguing that information is not serious concern because employers have ability and motive to promote nonunion workforce long before campaign, that most important time for employees' informed choice is contract negotiations, and that informational advantages of elections assumes idealized process).

²²⁵ Eaton and Kriesky's survey also found that employees viewed information from employers as less accurate than information from unions. *See* Eaton & Kriesky, *supra* note 213, at 169, 171.

²²⁶ *See, e.g.,* Dana Corp., 351 N.L.R.B. 434, 443 (2007) (emphasizing that employees need forty-five day decertification window after voluntary recognition to allow them "to fully discuss their views concerning collective-bargaining representation"). *But see id.* at 449 (Members Liebman and Walsh, dissenting) (noting employees' need to discuss while union solicited support and arguing that employer's

findings in the Eaton and Kriesky survey demonstrates how this lack of information could hurt union organizing efforts.

The survey found that employees who believed that they lacked sufficient information were far less likely to sign an authorization card — effectively voting against the union.²²⁷ Similarly, the survey found that nearly half of employees who did not support the union, in both card-check and election campaigns, claimed that lack of familiarity was the reason.²²⁸ In effect, the lack of information appears to have a direct relationship with employees' refusal to join together with other employees — exactly the result one would expect from theories of collective action.²²⁹ The extent to which this problem influences the outcome of organizing campaigns is unclear, but the Eaton and Kriesky survey demonstrates that the card-check process deprives employees of information that they perceive as valuable.²³⁰

Although the removal of card-check certification from EFCA was more the result of political calculations than reasoned policymaking, it provides a valuable lesson for future reform efforts.²³¹ In particular, reforms should avoid pitting the two views of collective action against each other. Even ignoring the political risks of sacrificing one view to favor the other, a principled approach to labor law must recognize the limits of each. Collective action is beneficial in many circumstances, but not in all. Similarly, individual free choice is important, but for that choice to be truly free, there must be a substantial level of information and discourse existing in an environment devoid of coercion. Card-check certification, although addressing serious problems in the NLRB-election process, fails to balance these concerns.

A better approach would address the current shortcomings of Board elections while still encouraging discourse, access to information, and

antiunion campaign is not needed to foster employee free choice); Sachs, *supra* note 217, at 707-12 (arguing that information is sufficient in card-check campaigns because employers have incentive to express their views, employees are typically aware of what being nonunion means, and third-party organizations provide information about unions).

²²⁷ Eaton & Kriesky, *supra* note 213, at 168.

²²⁸ *Id.* (finding that 42% of employees cited lack of familiarity as major reason for lack of support, although most workers who signed cards felt they had sufficient information).

²²⁹ See *supra* Part II. Some of this effect is likely due to employees' unwillingness to support a given union or unions in general, rather than a lack of desire to act collectively in other situations. But the finding still shows information's ability to promote or inhibit individuals' willingness to engage in collective action.

²³⁰ Eaton & Kriesky, *supra* note 213, at 171.

²³¹ Greenhouse, *supra* note 207.

freedom of choice. None of these goals are easy to accomplish, but their aims are consistent. Free choice depends upon access to a high level of information and discourse combined with the ability to exercise that choice without fear of coercion or retaliation. Thus, labor law reforms that diminish coercive election practices while increasing the flow of information and the opportunity for discourse will both enhance individual choice and increase the amount and quality of collective action. There are numerous proposals that address some of these goals,²³² but this Article will focus on those raised as part of the EFCA debate.

2. Quick Elections

One reform that some have proposed to improve the election process was the “quick election,” a direct substitute for EFCA’s card-check provision. EFCA proponents regarded the quick election as a second-best solution that was more politically viable than card-check certification.²³³ The quick election is a procedure, used off-and-on in several Canadian provinces, that has the potential to reduce the level of coercion in elections.²³⁴ The idea is to compress the election period so that employers have less time to influence the election, thereby decreasing the risk of coercion.²³⁵

Current NLRB-run elections occur, on average, thirty-eight days after a petition is filed, and 95% of all elections occur within fifty-six days after filing.²³⁶ During that period, employers usually bombard employees with anti-union messages, both legal and illegal. Studies

²³² See generally William B. Gould IV, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?*, 70 LA. L. REV. 1 (2009) (discussing various reform proposals).

²³³ MacGillis, *supra* note 179.

²³⁴ Manitoba Labor Relations Act, R.S.M., c. L-10 § 48(3) (Can.) (describing seven-day “quick election”); Newfoundland Labour Relations Act, R.S.N.L., c. L-1 § 47(4) (Can.) (providing for five-day “quick election” period); Nova Scotia Trade Union Act, R.S.N.S., c. 475 § 25(3) (Can.) (five days); Ontario Labour Relations Act, R.S.O., c. 1 § 8(5) (Can.) (five days). British Columbia used to have a ten-day period. Campolieti at al., *supra* note 206, at 48-49.

²³⁵ A shorter period would also reduce opportunities for illegal coercion. Similarly, EFCA would increase remedies for coercion and other unlawful campaign conduct. Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 4 (2009).

²³⁶ Press Release, Nat’l Labor Relations Bd., *supra* note 197, at 6 (noting median). Data over the last decade shows a similar average, as well as the potential for significant post-election delay — up to 1,705 days in one instance. John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 INDUS. & LAB. REL. REV. 3, 10 n.9 (2008) (finding average election took forty-one days and 95% of elections occurred within seventy-five days).

have long shown that such messages work exceedingly well; increases in anti-union tactics, especially captive-audience speeches, result in significant decreases in union support.²³⁷ Even when a union is able to get elected, delays in certifying the result reduce the likelihood of the union being able to reach an initial collective-bargaining agreement — referred to as a “first contract” — with the employer.²³⁸

The argument for implementing quick elections is that a shortened campaign period will reduce the chance of employer coercion leading to a union loss or failure to reach a first contract.²³⁹ Yet, because they reduce the opportunity for discussion and information gathering, quick elections raise some initial concerns about their impact on employee discourse. Ultimately, however, quick elections provide a rare example in which less discourse is more. Indeed, unlike card-check certification or the status quo, quick elections are able to satisfy both the social-good and individual-choice approaches to collective action.²⁴⁰

Quick elections can fulfill the goals of the social-good approach if they can increase unions’ success in organizing campaigns. Data from Canada indicate that this, in fact, is the result of quick elections. In Canada, shorter election cycles have substantially increased unions’ effectiveness in organizing employees or bargaining on their behalf, particularly when there is substantial compliance with the time limits.²⁴¹ Thus, quick elections would likely expand collective action in the United States.²⁴²

²³⁷ See *supra* notes 183-95 and accompanying text.

²³⁸ Bronfenbrenner, *supra* note 187, at 3 (finding that 52% of unions do not have first contract one year after winning an election, and 37% do not have contract two years later); see also Karen Bentham, *Employer Resistance to Union Certification*, 57 RELATIONS INDUSTRIELLES/INDUS. REL. 159, 180 (2002) (providing Canadian data); William N. Cooke, *Determinants of the Outcomes of Union Certification Elections*, 36 INDUS. & LAB. REL. REV. 402, 402 (1983) (providing U.S. data).

²³⁹ See Weiler, *supra* note 188, at 1812.

²⁴⁰ See *supra* notes 209-18 and accompanying text.

²⁴¹ For instance, a recent study showed that quick elections, in combination with expedited unfair labor practice hearings, can increase the chances of unions becoming certified. See Campolieti at al., *supra* note 206, at 48-49, 53-54 (using data from British Columbia and Ontario — whose representation laws alternated between card-check certification and quick elections periods of seven to ten days). See generally Brudney, *supra* note 190, at 880 n.297 (citing studies showing union win rates in Canadian quick elections roughly similar to U.S. card-check drives).

²⁴² However, an increase in union success from quick elections is unlikely to reverse substantially the large decline in U.S. union density. See *supra* note 62. Although some of this decline is probably due to employer tactics, other factors — particularly the increasingly competitive global economy — make a substantial resurgence in union representation unlikely. See Jeffrey M. Hirsch & Barry T. Hirsch,

Quick elections accomplish the goals of the individual-choice approach as well. Although an employer can provide some useful information for employees deciding whether to unionize, there are diminishing returns and, in many occasions, outright costs to repeated communications by the employer.²⁴³ As employers' anti-union messages become less informative and more coercive, employees' ability to choose freely whether to unionize becomes compromised.²⁴⁴ Even if employees have sufficient information to weigh the potential costs and benefits of organizing, the employer's recurring communications may result in a justifiable belief that one of the chief costs is the potential for retaliation. Limiting the election period in order to minimize this illegitimate cost is warranted.

Despite the need for some limits on the duration of election campaigns, concern for employee discourse is still appropriate. In particular, employees' ability to access information and discuss their options should not be overly burdened by the attempt to reduce coercion. For example, in Canada, the typical period for quick elections is between five and seven days,²⁴⁵ which is similar to the low end of proposals under EFCA.²⁴⁶ That cycle, however, seems too short to provide employees with a genuine opportunity to learn about and discuss unionization. This is especially true in large workplaces where many employees may be absent for part or all of the election period. Indeed, a five-day election is so short that it appears — probably not coincidentally — to mirror card-check certification more than a real election. A longer period, such as fourteen days, seems more reasonable. Two weeks is ample time for almost all employees to be informed about unionization and engage in discussions about their options, while at the same time minimizing the coercive effects of employers' anti-union missives.²⁴⁷

The Rise and Fall of Private Sector Unionism: What Next for the NLRA?, 34 FLA. ST. U. L. REV. 1133, 1138-39 (2007).

²⁴³ See Bodie, *supra* note 186, at 53-54 (emphasizing strong incentives for employers to provide negative information about union and positive information about itself).

²⁴⁴ See *supra* notes 187-90.

²⁴⁵ See *supra* note 234. However, actual delays in Ontario and British Columbia, which had seven- and ten-day quick election rules respectively, were 50.6 days in Ontario (from 1995-1998) and 23.8 days in British Columbia (from 1987-1992). See Campolieti et al., *supra* note 206, at 50-51.

²⁴⁶ See Greenhouse, *supra* note 207, at A1 (noting proposals from five to ten days).

²⁴⁷ But see Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. LAW. 117, 127 (1996) (arguing that two weeks is insufficient for employees to hear anti-union view).

3. Regulating Captive-Audience Speeches

Among the lawful tactics that employers use to stave off unionization, perhaps none are as prevalent and effective as captive-audience speeches. For decades, these mandatory speeches have been lawful as long as they do not occur within twenty-four hours of an election and are not threatening.²⁴⁸ As noted, several studies have shown that frequent use of captive-audience speeches dramatically reduces support for a union.²⁴⁹ Consequently, they are a common and recurring part of most organizing campaigns, which is a major factor in unions' avoidance of NLRB-run elections.

Captive-audience speeches, it has been argued, are inconsistent with employees' freedom to choose whether to unionize.²⁵⁰ Indeed, prior to 1953, the NLRB considered these speeches to be illegal unless an employer also provided the union access to employees.²⁵¹ Since that time, the NLRB and courts have not only allowed employer-only speeches, but also limited union access to the workplace more generally, resulting in employees typically receiving an extraordinarily unbalanced picture of unionism.²⁵²

Despite the controversy surrounding captive-audience speeches, there have been few attempts to limit their use. One recent exception, which implicates preemption issues, has been a push for state regulation.²⁵³ A few states have considered prohibitions against captive-audience speeches, but they remain in the minority.²⁵⁴ However, following the demise of EFCA's card-check rule, federal legislators have proposed a different solution to the captive-audience

²⁴⁸ See *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429-30 (1953) (emphasizing that union has no reasonable means to respond in that short period of time).

²⁴⁹ See *supra* notes 194-95.

²⁵⁰ See *Secunda*, *supra* note 193, at 209-10, 226-27.

²⁵¹ See *Bonwit-Teller, Inc.*, 96 N.L.R.B. 608, 614-15 (1951), *modified*, 104 N.L.R.B. 497 (1953). The NLRB overruled *Bonwit-Teller* in *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953), *approved by* *NLRB v. Steelworkers (NuTone & Avondale)*, 357 U.S. 357 (1958).

²⁵² See *supra* Part III.A.

²⁵³ See *Secunda*, *supra* note 193, at 212, 238-40 (arguing that NLRA preemption does not apply). *But see* Kye D. Pawlenko, *The Non-Viability of State Regulations of Workplace Captive Audience Meetings: A Response to Professor Secunda*, 32 *HAMLIN L. REV.* 191, 191-95 (2009).

²⁵⁴ Oregon recently enacted a captive-audience law, which is currently being challenged on First Amendment and NLRA preemption grounds. See Or. Laws, SB 518, ch. 658 (2009); *Associated Or. Indus. v. Avakian*, No. CV 09-1494-MO, 2010 U.S. Dist. LEXIS 44263, at *4-6 (D. Or. May 6, 2010); see also *Secunda*, *supra* note 193, at 226-28 (noting states that considered such laws).

problem. Under a proposed amendment to EFCA, captive-audience speeches would remain lawful. But when an employer held such a speech, it would also have to give the union a right to address employees at the workplace. In essence, this proposal would return the law back to the early days of the NLRA.²⁵⁵ Although potentially an improvement over the status quo because of its ability to promote collective action and individual choice,²⁵⁶ this approach is problematic.

The crux of the problem with the equal-access rule is that in many instances it would simply reduce employees' access to information about unionization. Many, if not most, employers would forgo captive-audience speeches to avoid giving a union access to the workplace. It is in employers' interests to keep positive information about unionization at a minimum because such information is a key ingredient in employees' willingness to organize.²⁵⁷ For most employers, preserving this information barrier would be more beneficial than conducting a captive-audience speech. In addition, employers would easily be able to skirt the rule. Employers are well aware that holding nonmandatory meetings would generally serve the same purpose as a captive-audience speech. Even if a meeting is "voluntary," most employees would feel obligated to attend, giving employers virtually the same opportunity to influence the election as before.²⁵⁸ The likely result of this reform, therefore, is neither an increase in collective action nor greater protection for individual choice.

Instead of allowing employers to decide whether employees can hear from a union at work — the most useful venue for employee discourse — labor law should promote employees' opportunity to hear from both sides. The NLRB or Congress could continue to allow employer captive-audience speeches, but also give unions reasonable access to the workplace, no matter what the employer does.²⁵⁹ If employees are to make a truly free choice about unionization, they need to learn

²⁵⁵ See MacGillis, *supra* note 179.

²⁵⁶ See *supra* notes 209-18 and accompanying text.

²⁵⁷ See *supra* note 228.

²⁵⁸ Cf. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (emphasizing "the economic dependence of the employees on their employers, and the necessary tendency of the former . . . to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear").

²⁵⁹ This rule is well within the NLRB policymaking authority. *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429 (1953) (noting statutory authority to ban captive-audience speeches made within twenty-four hours before election); see *Bonwit-Teller, Inc.*, 96 N.L.R.B. 608, 614-15 (1951) (prohibiting captive-audience speeches generally), *overturned* by *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953).

about the possible costs and benefits. Although information from the union and the employer is suboptimal, hearing from both sides is more helpful than hearing from just one.²⁶⁰

This rule would be relatively easy to implement and could be modeled on the existing *Republic Aviation* scheme. Under the *Republic Aviation* analysis proposed earlier, unions would have a presumptive right of reasonable access to the workplace; employers could rebut this presumption if legitimate business needs warrant more stringent restrictions.²⁶¹ Such a rule would address the inequities of the current regime. Employers could continue to make captive-audience speeches, but unions' new access rights would allow them to respond far more effectively. Moreover, the risk of coercion from frequent captive-audience speeches would be muted if this rule were enacted contemporaneously with a quick election provision. A two-week period would allow for dramatically fewer captive-audience speeches than most employees currently face. Thus, employees would benefit from more balanced information and a lower incidence of coercion.

C. Mandated Information Transference

Beyond the more complex role of interpersonal discourse is the reality that employees generally will not even consider collective action without access to basic information about the process. If employees are unaware of legal protections for collective action or lack information about their strategic options, the probability that they will seek out such information on their own and act upon it is remote.²⁶² Accordingly, a meaningful right of collective action requires employees to have enough information to exercise that right.²⁶³

Despite this reality, the NLRB does almost nothing to ensure that employees are knowledgeable about their labor rights or options for exercising them.²⁶⁴ Instead, the Board has largely left the task of informing employees to private parties — primarily unions and

²⁶⁰ See Cass R. Sunstein, *Deliberative Trouble?: Why Groups Go to Extremes*, 110 YALE L.J. 71, 105-06 (2000) (arguing that, to avoid excessive polarity in decision-making, groups should be able to deliberate among themselves and not be isolated from opposing views); *infra* notes 290-91 and accompanying text.

²⁶¹ See *supra* note 175.

²⁶² This is especially true of nonunion collective action. See *infra* Part III.C.2.

²⁶³ See Barenberg, *supra* note 3, at 793-97 (noting that employee free choice depends on ability to deliberate over relevant information, including disparate viewpoints).

²⁶⁴ There are a few, limited exceptions to the NLRB's refusal to inform employees. See *infra* note 284.

employers — while at most prohibiting statements that appear threatening or coercive.²⁶⁵ The NLRA does not require this abdication; it is silent on the issue of information and, therefore, provides the Board with considerable latitude to ensure proactively that employees are well informed.²⁶⁶ Refusing to take advantage of this opportunity is unfortunate because a lack of information hinders employee collective action and makes the NLRB less relevant, especially in an economy where there is a dearth of unions to inform employees about their labor rights.²⁶⁷ One notable exception to this failure arose in a recent, controversial NLRB decision. This exception was a limited advance, but it is worth considering as a model for future attempts to expand employees' access to information.

1. The *Dana Corp.* Notice

This modest expansion of employee access to information occurred in the NLRB's *Dana Corp.* decision.²⁶⁸ *Dana Corp.* was part of what union interests refer to as the 2007 "September Massacre," in which the Bush Board reversed numerous precedents — some of which were decades old — to favor employer interests.²⁶⁹ At issue in *Dana Corp.* was employees' ability to question a voluntarily recognized union's majority support.²⁷⁰ In particular, the NLRB reconsidered its policy of providing a "voluntary-recognition bar" against decertification efforts. Although this issue was not directly related to information transference, the NLRB's creation of a new notice requirement raised interesting questions about how the agency should regulate employees' access to information.

When the NLRB certifies employees' vote for a union in an official election, the union generally enjoys one year of an irrebuttable

²⁶⁵ See 29 U.S.C. § 158(c) (2006); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969).

²⁶⁶ See *infra* notes 292-94, 314-18 and accompanying text (providing options for information transference).

²⁶⁷ See *supra* note 62.

²⁶⁸ 351 N.L.R.B. 434 (2007).

²⁶⁹ There was a rush to issue these decisions in September 2007 because the Board was scheduled to lose several members to expiring terms. See ANNE MARIE LOFASO, AM. CONSTITUTION SOC'Y, SEPTEMBER MASSACRE: THE LATEST BATTLE IN THE WAR ON WORKERS' RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT 2 (May 14, 2008), <http://www.acslaw.org/files/ACS%20September%20Massacre.pdf>.

²⁷⁰ Without majority support, a union is barred from acting as the employees' exclusive collective-bargaining representative. 29 U.S.C. § 159(a) (2006); *Int'l Ladies' Garment Workers Union (Bernhard-Altman Tex. Corp.) v. NLRB*, 366 U.S. 731, 738-39 (1961).

presumption of majority support.²⁷¹ During this agency-created “certification bar” period, neither the employer nor employees can attempt to oust the union, even if there is solid evidence that a majority of employees no longer want it. After this year of protection, however, employers and employees can rebut the presumption of majority support under certain scenarios.²⁷²

The certification bar is justified by several policy concerns, including the need to give the union time to bargain without facing pressure to produce “hot-house results” and to reduce an employer’s incentive to delay negotiations in the hope that the union’s support will erode.²⁷³ The NLRB had long recognized that these policy concerns also apply to situations in which an employer voluntarily recognized a union.²⁷⁴ Thus, the Board maintained a voluntary recognition bar that strongly resembled the certification bar, except for a shorter, six-month period of protection.²⁷⁵

²⁷¹ *Brooks v. NLRB*, 348 U.S. 96, 98, 104 (1954) (approving Board rule that certification, “based on a Board-conducted election, must be honored for a ‘reasonable’ period, ordinarily ‘one year,’ in the absence of ‘unusual circumstances’”). “Unusual circumstances” that can shorten the one-year time period can occur where: “(1) the certified union dissolved or became defunct; (2) as a result of a schism, substantially all the members of officers of the certified union transferred their affiliation to a new local or international; (3) the size of the bargaining unit fluctuated radically within a short time.” *Id.* at 98-99.

²⁷² Employees trying to get rid of a union must use the decertification process; employers with evidence of a loss of majority support can seek a decertification election, unilaterally withdraw recognition of the union, or under certain conditions conduct a poll. 29 U.S.C. § 159(c)(1)(A)(ii) (2006) (requiring expressed interest of at least 30% of employees for decertification election petition); *Levitz Furniture Co. of the Pac. Inc.*, 333 N.L.R.B. 717, 717 (2001) (allowing employer to withdraw recognition based on showing that union in fact lost majority support, to file petition for election based on good-faith “reasonable uncertainty” as to union’s majority support, and to conduct poll with certain safeguards based on good faith reasonable doubt about union’s majority support).

²⁷³ *Brooks*, 348 U.S. at 99-100 (noting also need to hold employees responsible for their vote, decrease frequency of union raiding, and promote stable labor-management relations); *Dana Corp.*, 351 N.L.R.B. 434, 446 (2007) (Members Liebman and Walsh, dissenting). Union “raiding” refers to one union trying to replace another as a group of employees’ collective-bargaining representative. Kye Pawlenko, *Reevaluating Inter-Union Competition: A Proposal to Resurrect Rival Unionism*, 8 U. PA. J. LAB. & EMP. L. 651, 656 (2006) (arguing that increased competition among unions will increase union membership).

²⁷⁴ *Keller Plastics E., Inc.*, 157 N.L.R.B. 583, 587 (1966) (stressing, in particular, need for “reasonable time to bargain”).

²⁷⁵ *Sound Contractors*, 162 N.L.R.B. 364, 366 (1996); *Keller Plastics*, 157 N.L.R.B. at 587. Although usually around six months, a “reasonable time” for the voluntary recognition bar can vary depending on the amount of time parties have bargained and how the bargaining process has developed. *Royal Coach Lines*, 282 N.L.R.B. 1037,

In *Dana Corp.*, the NLRB ostensibly maintained the six-month voluntary recognition bar.²⁷⁶ However, it carved out a new forty-five-day period immediately following voluntary recognition,²⁷⁷ during which a group of 30% or more employees can petition the NLRB for a decertification election to oust the union.²⁷⁸ This new rule was explicitly intended to discourage voluntary recognition in favor of Board-run elections,²⁷⁹ and it will easily satisfy that aim, as it will often make voluntary recognition ineffective where a union lacks support from at least 70% of employees.²⁸⁰

Critics of *Dana Corp.*'s new forty-five-day window described it as an unjustified affront to voluntary recognition, which had been permitted under the NLRA since its enactment.²⁸¹ But more relevant to the issue of information transference is the NLRB's enforcement mechanism for its new rule. Under *Dana Corp.*, the union will enjoy a voluntary recognition bar only after employees receive notice of their right to file a decertification petition during the forty-five-day window and that period has passed without such a petition.²⁸² The NLRB was specific about the notice's implementation: after voluntarily recognizing a union, an employer must notify the Board, which will then provide

1038 (1987), *enforcement denied on other grounds*, 838 F.2d 47 (2d Cir. 1988).

²⁷⁶ 351 N.L.R.B. at 435.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 443. The employees can alternatively petition for an election to select a different union as their collective-bargaining representative. *Id.* at 436. This window applies only to employee decertification, not to employer attempts to expel the union. *See supra* note 272.

²⁷⁹ 351 N.L.R.B. at 438 (stating that "freedom of choice guaranteed employees by Section 7 is better realized by a secret election than a card check").

²⁸⁰ Because only 30% of employees can force an election, even a union confident of maintaining majority support may initially seek an NLRB election if that support is less than 70%; an election will be faster than getting voluntarily recognized by the employer and then winning a subsequent decertification election. *Dana Corp.*, 351 N.L.R.B. at 444, 447-48 (Members Liebman and Walsh, dissenting); LOFASO, *supra* note 269, at 13.

²⁸¹ *Dana Corp.*, 351 N.L.R.B. at 445 (Members Liebman and Walsh, dissenting); *The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights*, *supra* note 215, at 4-6, 8-12 (quoting testimony and questions critical of *Dana Corp.*); Corbett, *supra* note 166, at 256; Raja Raghunath, *Stacking the Deck: Privileging "Employer Free Choice" Over Industrial Democracy in the Card-Check Debate*, 87 NEB. L. REV. 329, 366-67 (2008); *see also* Fisk & Malamud, *supra* note 3, at 2062-63 (criticizing majority and dissent for failing to support arguments with empirical evidence).

²⁸² 351 N.L.R.B. at 441.

detailed notices informing employees of their right to seek decertification during the forty-five-day window.²⁸³

At first blush, this notice requirement seems innocuous. However, the NLRB's motivation for the notice was also criticized because it was the first time that the Board had ever imposed a general, affirmative duty to provide employees with information about their labor rights.²⁸⁴ The Board has never formally sought to inform employees of their right to join a union or otherwise engage in collective action; rather, its first foray into the world of nonremedial notification focused solely on employees' right to get rid of a union.²⁸⁵

2. Informing Union Employees

A future NLRB is likely to reverse *Dana Corp.* as well as the notice requirement.²⁸⁶ But why not keep the notification? Why not inform employees that they can force out a union after six months²⁸⁷ or after a year if there was an election? This is an important right that employees should understand when choosing whether to seek union

²⁸³ *Id.* at 443 (providing what is now basic text of notice).

²⁸⁴ Bodie, *supra* note 186, at 22 (citing Fla. Mining & Materials Corp., 198 N.L.R.B. 601, 603 (1972), *enforced*, 481 F.2d 65 (5th Cir. 1973) (rejecting employer argument for affirmative duty on union to reveal information about being placed in trusteeship)). The NLRB's only other general information requirements are: 1) after an election is ordered, employers must provide unions with employees' names and home addresses, Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1239-40 (1966); and 2) employers must post copies of the NLRB's *Notice of Election*, which notifies workers of balloting details, for at least three days before the election. *Notice of Election*, § 11314, NAT'L LAB. REL. BD., Aug. 2007, available at <http://www.nlr.gov/nlr/legal/manuals/CHMII/Sections11300-11350.pdf>. The NLRB also requires posting of notices to inform employees of unfair labor practice findings at a specific workplace. See Guard Publ'g Co. (Register-Guard), 351 N.L.R.B. 1110, 1121, 1132 (Appendix) (2007), *enforcement denied on other grounds*, 571 F.3d 53 (D.C. Cir. 2009).

²⁸⁵ LOFASO, *supra* note 269, at 13; cf. Epilepsy Found., 331 N.L.R.B. 676, 684 (2002) (Member Hurtgen, dissenting) (expressing concern that nonunionized employers will be unaware of their right to deal with employees individually if employees can demand coworker to accompany them in investigatory interview, but not expressing concern with nonunion employees being unaware of their rights), *enforced in relevant part*, 268 F.3d 1095 (D.C. Cir. 2001), *overruled by IBM Corp.*, 341 N.L.R.B. 1288 (2004).

²⁸⁶ See *Notice and Invitation to File Briefs*, NAT'L LAB. REL. BOARD (Aug. 31, 2010), available at http://www.nlr.gov/sites/default/files/documents/236/rite-aid_lamons-gasket_notice_conf.pdf (inviting briefs for NLRB's reconsideration of *Dana Corp.* in forthcoming case, Lamons Gasket Co., 355 N.L.R.B. No. 157 (2010)); *Dana Corp.*, 351 N.L.R.B. at 434.

²⁸⁷ The six-month period refers to the pre-*Dana Corp.* voluntary-recognition bar. See *supra* notes 275-77.

representation. In addition, this information could help unions in some instances because employees might be more willing to vote for a union that they can oust after developing buyer's remorse.

Further, why not expand the notice requirement? Employees should be aware of their broad right to seek collective representation without interference from employers.²⁸⁸ If a union is already on the scene, it can provide that message, but a government notice would have more credence than biased union information.²⁸⁹ Moreover, there may never be a union presence at the workplace if employees are too uninformed or scared to investigate unionization in the first instance.

The NLRB or Congress could also mandate the transference of a wider range of information than is contained in a general notice. For instance, once an organizing campaign has begun, employees still lack many pieces of relevant information about unionization. As Professor Matthew Bodie has shown, relying on the union and employer to provide information fails to give employees a complete picture.²⁹⁰ Details about the union's effectiveness in representing employees during workplace disputes, the kind of contract — if any — it will be able to negotiate with the employer, and other aspects of the collective-representation process are often lacking in an organizing campaign.²⁹¹

It is impossible to provide employees with the totality of relevant information, yet many improvements over the current system are available. The Department of Labor, for example, collects financial and other information from unions, but it does not make that information readily available to employees.²⁹² The NLRB could post summaries of

²⁸⁸ 29 U.S.C. § 158(a)(3) (2006).

²⁸⁹ See *infra* notes 317-18 and accompanying text (discussing potential problems with notice postings). "Union employees" is used in this section — in contrast to "nonunion employees" in the next — to refer to employees in a workplace with a union presence, including a workplace that is the target of an organizing campaign.

²⁹⁰ Bodie, *supra* note 186, at 50-69 (citing information problems caused by incentives for both unions and employers to overstate negative aspects of other, information asymmetries resulting from difficulty in observing and predicting quality of union services, lack of competition among unions, absence of third-party sources of information, difficulty in ending union representation, lack of rules against misrepresentations, and lack of public confidence in NLRB's election procedure).

²⁹¹ *Id.* at 50-51.

²⁹² This information is required under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 431 (2006). The Department of Labor posts the information on its website, but there is no requirement that employees be made aware of its existence. Bodie, *supra* note 186, at 60-61 (noting problems with method of information collection); Office of Labor-Management Standards, *Union Reports, Other Reports, and Collective Bargaining Agreements*, U.S. DEPT OF LAB., available at

this information in appropriate workplaces and provide access to the full documents via the Internet; alternatively, it could require unions to provide such information to employees they are trying to organize. The NLRB could also pursue one of these options to make available relevant employer financial data, especially because employers — particularly privately held firms — are largely immune from having to release information useful to employees.²⁹³ Further, the Board could require the employer and union to report on the basic terms and conditions of their collective-bargaining agreements with other parties.²⁹⁴ Although these steps would not provide “full information” in the economic sense,²⁹⁵ they would enhance employees’ ability to make reasoned judgments about the potential costs and benefits of collective representation.

3. Informing Nonunion Employees

Although important in union settings, access to information is a far greater need for nonunion employees.²⁹⁶ Workplaces with a union presence at least have one source of information about employees’

www.unionreports.gov (last updated Sept. 16, 2010).

²⁹³ Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 394 (1995). Publicly held companies must make public their financial data; however, that data is indecipherable to most employees. Michael R. Seibecker, *Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary-Based Discourse*, 87 WASH. U. L. REV. 115, 128-36 (2009) (discussing problems with corporate disclosures). There is no such requirement for privately held firms. The NLRB currently requires an employer to provide a union already established as the employees’ representative with certain financial data if the employer claims that economic conditions make it impossible to meet the union’s demands. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956).

²⁹⁴ The Department of Labor makes public some collective-bargaining agreements. See *supra* note 292. But there is no attempt to ensure that employees are made aware of and have access to agreements involving their employer or a pertinent union. Moreover, a summary of basic terms will be far more useful to employees than the often complex language of a full agreement.

²⁹⁵ Bodie, *supra* note 186, at 70-72 (noting problems with mandatory disclosure regime, including identifying what type of information to disclose and what entities to include under mandate, creating incentives to avoid NLRB-election process, and “information overload”); Anne Marie Lofaso, *Towards a Foundational Theory of Workers’ Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1, 63 (2007).

²⁹⁶ Estlund, *Towards Workplace Transparency*, *supra* note 17, at 20 (stressing advantage of unionized employees of nonunionized employees in obtaining information about working conditions); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 76-77 (1993).

labor rights. That source may be suboptimal,²⁹⁷ but it is far better than the information void that typically exists in the absence of a union.

This reality has helped to sustain one of the best-kept secrets of labor law: that the NLRA and other labor statutes also protect nonunion employees.²⁹⁸ Although no data exist on nonunion employees' knowledge of their labor rights, it is safe to assume that most are completely unaware of their right to engage in collective action.²⁹⁹ A rudimentary analysis of the NLRB's intake data supports the notion that the NLRA is little known outside of the union context. For instance, in Fiscal Year 2009, over 16,000 allegations of employer unfair labor practices were filed with the Board.³⁰⁰ Of these charges, only 2615 (i.e., 15.8%) did not make allegations that clearly involved a labor organization of some kind,³⁰¹ and the actual number of nonunion cases is much smaller because many of these charges still had a union on the scene.³⁰² Indeed, a search of NLRB decisions during the same period found only 4 out of 347 (i.e., 1.2%) unfair labor practice cases that did not identify a union.³⁰³ Although the exact number is unclear, these data show that a large majority of charges filed with the NLRB involve employees proximate to a union.³⁰⁴

Despite the predominance of union-related cases at the NLRB, many important workplace disputes implicate nonunion collective rights. Employee attempts to obtain a safer work environment, to talk about

²⁹⁷ See *supra* note 290.

²⁹⁸ See *infra* note 305.

²⁹⁹ This observation is based largely on the author's experiences as a labor attorney and academic, which has included exposure to many employees, and even attorneys, who are oblivious to labor law's role in the nonunion workplace.

³⁰⁰ 74 NLRB ANN. REPORT 1, 94 (2010) (noting 16,541 charges).

³⁰¹ This figure was based on cases involving only Section 8(a)(1) and Section 8(a)(4) charges. 29 U.S.C. § 158(a)(1) (2006) (prohibiting interference with employees' Section 7 rights), (a)(4) (prohibiting retaliation against filing NLRA charges or testifying). The other unfair labor practices involve an employer's unlawful support for a labor organization, *id.* § 158(a)(2); discrimination based on union activity or membership, *id.* § 158(a)(3); and an employer's failure to bargain in good faith with employees' collective-bargaining representative, *id.* § 158(a)(5).

³⁰² A typical situation giving rise to such charges is the initial stage of a union campaign. See, e.g., Cmty. Med. Ctr., 354 N.L.R.B. No. 26 (2009) (finding Section 8(a)(1) violation based on charge filed by union).

³⁰³ This includes both administrative law judge and NLRB decisions over that period. These searches probably underestimate the number of nonunion filings, as unrepresented employees are more likely to file unmeritorious charges.

³⁰⁴ The disparity is even greater if unfair labor practice charges against unions are included. In that instance, the total number of charges is 22,908, with 2,615 (11.4%) charges clearly not involving unions. 74 NLRB ANNUAL REPORT: FISCAL YEAR 2009, at 94 (2010).

each others' pay and terms of employment, and to discuss conditions at work are but a few of the many actions protected solely by labor law.³⁰⁵ However, nonunion employees' ignorance of these protections means that their labor rights are underenforced. Indeed, the lack of knowledge appears so severe that it may effectively eliminate those rights for most workers.³⁰⁶

One major cause of this information gap is the NLRA's enforcement process. The NLRB, like other labor agencies, is reactive; it does not investigate potential unfair labor practices unless someone files a charge.³⁰⁷ Yet, if employees are unaware of their labor rights, a charge will never materialize. This, along with the low union density in the United States, means that labor rights are largely illusory for the vast majority of employees.³⁰⁸

One optimistic take on this information gap is that there is a lot of unmet potential. It is true that the exclusive administrative enforcement of the NLRA eliminates a private right of action that would bring more attention and litigation resources to nonunion labor rights.³⁰⁹ However, if more nonunion employees were aware of their rights, administrative enforcement promises real gains. Unlike most attorneys, agencies such as the NLRB are willing to pursue cases even where there is little to no money at stake.³¹⁰ This contrasts with employment laws that rely primarily on private enforcement, which have been undermined by many employees' inability to obtain representation.³¹¹ Thus, if nonunion employees were made aware of the NLRA, they could see dramatic improvements in their ability to enforce at least some of their workplace rights.

Whether it is possible to close the nonunion information gap is a different question. The NLRB could pursue an extensive public

³⁰⁵ See, e.g. *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 12 (1962) (noting nonunion employees leaving work because of extreme cold in plant); Leonard Bierman & Rafael Gely, *Love, Sex and Politics? Sure. Salary? No Way: Workplace Social Norms and the Law*, 25 *BERKELEY J. EMP. & LAB. L.* 167 (2004) (describing NLRA protections for employees discussing pay).

³⁰⁶ See *supra* note 63.

³⁰⁷ 29 U.S.C. § 160(b) (2006).

³⁰⁸ See *supra* note 62.

³⁰⁹ See James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 *COMP. LAB. L. & POL'Y J.* 221, 231-33 (2005).

³¹⁰ See *Grouse Mountain Assocs.*, 333 N.L.R.B. 1322, 1327 (2001), *enforced*, 56 *Fed. App'x* 811 (9th Cir. 2003).

³¹¹ This problem is particularly severe for low-wage employees. Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 *N.C. L. REV.* 859, 879-84 (2008) (discussing barriers to enforcing employment discrimination rights).

relations strategy or conduct workplace inspections, but the lack of resources is an obvious hurdle. The Board has long struggled to maintain its enforcement duties under budget constraints that, at times, have been severe.³¹² Thus, spending time and money to broaden its exposure or enforcement capabilities may be a luxury that the NLRB cannot afford. Seeking additional funding for these efforts may be worth the trouble, however. Given that 92% of private sector employees are nonunion, the NLRB's own relevance depends in part on serving their interests.³¹³ Additionally, the continued failure to inform nonunion employees of their labor rights makes the NLRA a mere shadow of what Congress intended.

Barring any substantial increase in funding, is there anything that the NLRB can do? Implementing mandatory disclosure rules on employers and unions is one option, but it would have a limited reach in the nonunion sector.³¹⁴ A different, and relatively inexpensive, strategy would be to expand the use of notice postings like the one in *Dana Corp.*, as well as electronic notices where appropriate.³¹⁵ The Board itself — just prior to this Article going to print — proposed a rule that would do just that. Under the rule, all firms covered by the NLRA would have to post official notices that would inform employees of most of their rights under the NLRA.³¹⁶

One problem with notices, however, is that their effectiveness may be limited. In particular, there is a risk of information overload, which occurs when a multitude of notices drown each other out.³¹⁷ Although

³¹² Michael J. Goldberg, *Inside Baseball at the NLRB: Chairman Gould and His Critics*, 55 STAN. L. REV. 1045, 1064 (2002) (reviewing WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB (2000)). Moreover, if the NLRB is successful in making nonunion employees aware of the NLRA's applicability, there will be further strain on the agency's enforcement capabilities.

³¹³ See *supra* note 62.

³¹⁴ See *supra* notes 292-95 and accompanying text.

³¹⁵ See *supra* note 283. There have been unsuccessful attempts to require such a notice. *AFL-CIO General Counsel Urges NLRB to Require Notices Describing NLRA Rights*, 192 Daily Lab. Rep. (BNA) at A-10 (Oct. 3, 2003). Moreover, the Department of Labor has recently issued a proposed rule to require federal contractors to post NLRA-rights notices. *Notification of Employee Rights Under Federal Labor Laws*, 74 Fed. Reg. 38,488, 38,488 (Aug. 3, 2009).

³¹⁶ NATIONAL LABOR RELATIONS BOARD, PROPOSED RULES GOVERNING NOTIFICATION OF EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT, 29 C.F.R. pt. 104 at 8-9, 37-40 (2010) (describing notice that informs employees of most of their NLRA rights, while excluding employees' right to object to portions of their dues to go to activity unrelated to the union's representation which, as the proposal notes, unions must already provide such notice to covered employees).

³¹⁷ See Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 CORNELL J.L. & PUB.

there are already several mandatory workplace notices, information overload is unlikely to be a serious issue for a new NLRB notice.³¹⁸ This is because the labor information gap is so great that narrowing it is an easy target. For most employees, a simple notice providing general information about their labor rights and, most importantly, identifying the NLRB as a point of contact would be a dramatic improvement over the status quo. Even if employees do not absorb specific details, an NLRB notice would serve an important function by providing a general awareness of labor rights. Moreover, many employees will look more carefully at a board of notices when they have a workplace problem. Those employees currently see nothing about their right to engage in collective action. Therefore, establishing an NLRB presence on that board would give the agency a much greater opportunity to protect the labor rights of a large and previously overlooked group of employees.

Notice postings are no panacea, but their potential benefit illustrates the magnitude of the current labor information gap. Whether a future attempt to address this issue focuses on notices as opposed to other strategies is far less important than the existence of the attempt itself. Any reform is likely to achieve a dramatic improvement in employees' knowledge and enjoyment of their labor rights, especially in the nonunion sector. That improvement, in turn, would help revive the NLRB, as its relevance would no longer be limited to a shrinking population of employees.

CONCLUSION

Employee discourse is a vitally important, yet neglected, part of labor law. Despite its recognition in the early days of the NLRA as a necessary element of collective action, employees' right to communicate and access information has repeatedly taken a backseat to other considerations. Indeed, in many instances, it would be an exaggeration to say that the NLRB and courts are even giving lip

POL'Y 199, 221-23 (2005); Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 444-49 (2003). But see Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 675-76 (1979) (arguing that information overload is often not serious problem).

³¹⁸ The Department of Labor requires posters — including ones addressing safety and health, discrimination, wage and hour protections, family and medical leave, disabilities, military service discrimination, use of polygraphs, and agricultural workers — that are available at: <http://www.dol.gov/oasam/programs/osdbu/sbrefa/poster/matrix.htm>.

service to the important role that discourse plays in promoting employees' labor rights.³¹⁹

This neglect directly conflicts with the fundamental mechanics of collective action. Public choice theory, as well as relevant game theory analyses, has reasoned that many of the barriers to collective action can be overcome through information, discourse, and coordination. Psychological research has bolstered these theoretical arguments. Studies consistently demonstrate that a significant degree of information and interpersonal interaction is needed for individuals to self-identify as a group and ultimately act together to further the group's interests. The totality of this theoretical and psychological research strongly supports the original policies of the NLRA, which stressed the need to protect employee discourse as a means to foster collective action.³²⁰

Appreciation for this linkage between discourse and collective action has been lost in the ensuing years. Often mentioned, but rarely respected, employee discourse has become a second-class citizen in the world of labor law. Even when a case directly implicates employee communications, the NLRB and courts consistently misconstrue or disregard the difference between superficial contact and true discourse. This disconnect severely undermines employees' labor rights, for without discourse there is no collective action.

Several high-profile labor law issues illustrate the consequences of discounting employee discourse.³²¹ For instance, the regulation of workplace discourse has become so far adrift that the NLRB now views e-mail as an affront to employer interests, rather than a low-cost, effective means for employees to exercise their right to collective action.³²² Similarly, attempts to reform the current representation process threaten to undermine their own goals by ignoring the significance of discourse.³²³ These proposals would likely improve employees' ability to unionize, but only by diminishing their opportunity to learn about and discuss options for collective representation.³²⁴ Alternate reforms that made the role of employee discourse more prominent could provide similar benefits at a lower cost.

Finally, the failure to give employee discourse its due has maintained a significant gap in employees' knowledge of their labor

³¹⁹ See *supra* notes 51-53 and accompanying text.

³²⁰ See *supra* Part I.

³²¹ See *supra* Part III.

³²² See *supra* Part III.A.3.

³²³ See *supra* Part III.B.

³²⁴ See *supra* Part III.B.1-2.

rights and options for exercising those rights. Because employees cannot take advantage of something that they do not know exists, any reform effort — particularly one targeting nonunion employees — will have a limited effect as long as that gap persists.³²⁵ Yet, information alone is not enough. To have a genuine opportunity to act together, employees must also have the ability to discuss that information among themselves. Thus, if labor law is to achieve its stated goals, it must promote the twin pillars of information and discourse. Without such support, the promise of collective action will remain, for many employees, nothing but a mirage.

³²⁵ See *supra* Part III.C.