

Law, Organizing, and Status Quo Vulnerability

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This is an era of striking economic and political inequality. The statistics are familiar, but a few numbers are worth highlighting. Income disparities in the United States are now the highest they have been since the Gilded Age,¹ with the top 1% of earners taking home 20.1% of national income.² In fact, the twenty wealthiest people in the United States own more wealth than the bottom half of the population put together: twenty individuals with more wealth than another 152 million people.³ On the political front, the picture is no better. Recent studies by political scientists Larry Bartels and Martin Gilens reveal that the government's policies reflect the views of the wealthy but not of the poor or middle class.⁴ As Gilens puts it, “when preferences between the well-off and the poor diverge, government policy bears absolutely no relationship to the degree of support or opposition among the poor.”⁵

There are multiple causes for the rise of economic and political inequality in the United States, but one such cause is the decline of unions. Between 1973 and 2007, union membership rates fell from 34% of the male private-sector workforce to 8% of that workforce.⁶ The private-sector rate is now below 7%.⁷ This dramatic decline is causally related to the increase in both economic and political inequality. Jake Rosenfeld and Bruce Western

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1. See, e.g., ESTELLE SOMMEILLER, MARK PRICE & ELLIS WAZETER, ECON. POLICY INST., INCOME INEQUALITY IN THE U.S. BY STATE, METROPOLITAN AREA, AND COUNTY 25–26 (2016), <http://www.epi.org/files/pdf/107100.pdf> [<https://perma.cc/HSK5-9W26>] (documenting the share of all income held by the top 1% of families in the United States between 1917 and 2013).

2. *Id.* at 4. In some areas of the country, the numbers are even more stark. In New York, for example, the average family in the top 1% of earners has forty-five times more income than an average family in the bottom 99%. *Id.* at 7.

3. CHUCK COLLINS & JOSH HOXIE, INST. FOR POLICY STUDIES, BILLIONAIRE BONANZA: THE FORBES 400 AND THE REST OF US 1 (2015), <http://www.ips-dc.org/billionaire-bonanza/> [<https://perma.cc/YMB5-SVHZ>].

4. LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 5–6 (2d ed. 2016); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 81 (2012).

5. GILENS, *supra* note 4, at 81.

6. Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 513 (2011).

7. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, UNION MEMBERS—2016 (2017), <http://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/3RBU-JKBV>].

estimate that up to one-third of the climb in income inequality for men, and one-fifth for women, across these decades is attributable to the decline in unionization rates.⁸ The decline in union strength is also routinely identified as a critical factor in explaining the rise in political inequality.⁹

The link between union decline and inequality has led to a burgeoning interest in how the union movement might be reinvigorated, with scholars and popular commentators from a wide range of fields exploring the question anew.¹⁰ For labor lawyers and legal academics, the primary area of focus is how law can better enable workers to organize unions when those workers wish to organize them. This is a notoriously difficult question because of an interrelated set of facts about labor in the United States. First, workplaces are nonunion by default, so unionization requires workers to take a series of difficult steps to change the status quo.¹¹ Second, unionization is a collective good and thus organizing a union poses all the difficulties and dilemmas of collective action.¹² Third, management is nearly uniformly opposed to unionization and has at its disposal a wide range of tools that are highly

8. Western & Rosenfeld, *supra* note 6, at 514.

9. JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 142 (2010); KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY 325–26 (2012).

10. On the scholarship side, see, e.g., Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 137 (2016) (“Recognizing the importance of unions as a vehicle for mobilizing and empowering the nonwealthy and reducing political and economic inequality, commentators have suggested reforms designed to reinvigorate unions as political organizations.”); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016); Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148 (2013); GILENS, *supra* note 4, at 158 (arguing that unions “would appear to be among the most promising interest group bases for strengthening the policy influence of America’s poor and middle class,” although a decline in unionization rates suggests that “unions’ success in these efforts is likely to be fairly limited”); HACKER & PIERSON, *supra* note 9, at 303 (“[T]he organizations that traditionally bolstered middle-class democracy have declined. Nowhere is this clearer or more fateful than with regard to American labor.”). For a sample of popular writing on the subject, see, e.g., Teresa Ghilarducci, *Farewell to America’s Middle Class: Unions Are Basically Dead*, ATLANTIC (Oct. 28, 2015), <http://www.theatlantic.com/business/archive/2015/10/unions-are-basically-dead/412831/> [<https://perma.cc/D9FT-4ZHY>]; Nicholas Kristof, *The Cost of a Decline in Unions*, N.Y. TIMES (Feb. 19, 2015), http://www.nytimes.com/2015/02/19/opinion/nicholas-kristof-the-cost-of-a-decline-in-unions.html?_r=0 [<https://perma.cc/FG74-7X38>]; Sean McElwee, *One Big Reason for Voter Turnout Decline and Income Inequality: Smaller Unions*, AM. PROSPECT (Jan. 30, 2015), <http://prospect.org/article/one-big-reason-voter-turnout-decline-and-income-inequality-smaller-unions> [<https://perma.cc/FY2D-TZJN>]; Robert Reich, *Unions Can Save the Middle Class*, SALON (June 6, 2015), http://www.salon.com/2015/06/06/robert_reich_unions_can_save_the_middle_class_partner/ [<https://perma.cc/YVU2-BBYL>].

11. See, e.g., Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 959–61 (1994) (reviewing barriers to unionization).

12. Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 680–85 (2016) (discussing impediments to unionization posed by collective action problems).

effective in deterring union-organizing efforts, greatly exacerbating the collective action problems that would hinder unionization even without managerial opposition.¹³ These facts make effective legal protection for organizing critical. They also make such protection challenging to design and enforce.

This Essay endeavors to deepen our understanding of how a legal regime like the National Labor Relations Act can make unionization feasible despite these challenges. It does this by offering a different way of understanding how labor law rights and remedies enable union organizing. Because the difficulties involved in unionization are similar to the difficulties that inhere in collective action and social movement mobilization generally, the Essay draws on a prominent strand of social movement theory to make its argument. Known as the political process model, this theory emphasizes two basic preconditions for successful collective action: one, objective structural conditions that make mobilization feasible and, two, the existence of a subjective view among participants that collective action is likely to succeed.¹⁴ Although the Essay relies on political process theory, these preconditions for mobilization are common across multiple approaches to social movements.¹⁵ The argument in this Essay is that law can facilitate both the objective and subjective preconditions for collective action.

The notion that law can create objective structural conditions for successful collective action is relatively familiar, but the point is worth reiterating, and the Essay will spend some time showing how labor law functions in this way. The Essay focuses, however, on the subjective front. Many scholars, including labor law scholars, have made the point that workers are likely to form unions only when they believe that such an effort is likely to succeed. As Rick Fantasia puts it in his seminal sociology of union organizing, “[w]hat workers here (or anywhere) will fight for is largely a function of what they can reasonably expect to win.”¹⁶ Workers’ views about

13. See, e.g., *id.* at 684 (discussing employers’ use of threats that unionization will result in closure of the business and their willingness to discharge employees as retaliation for supporting unionization).

14. See, e.g., DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY 1930–1970, at 34 (1st ed. 1982) (discussing “objective social conditions” and subjective belief that status quo is “subject to change” through group action). As discussed below, a third precondition is what McAdam calls “indigenous organizational strength.” *Id.* at 43. By this he means the existence of organizations that can (or can be built to) channel the collective action facilitated by the first two preconditions. See *id.* at 43–48 (analyzing the four critical resources provided by indigenous organizations); *infra* text accompanying notes 36–39 (discussing McAdam’s political process theory for collective action).

15. For a similar view in a different theoretical tradition, see, e.g., Mark Granovetter, *Threshold Models of Collective Behavior*, 83 AM. J. SOC. 1420 (1978).

16. RICK FANTASIA, CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION AND CONTEMPORARY AMERICAN WORKERS 170 (1988). In the labor law literature, Brishen Rogers’s recent work provides an insightful analysis. See, e.g., Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 313, 361 (2012) (“[E]mployees will be free to choose

likelihood of success, however, involve two sets of beliefs that theorists often merge. One is workers' belief about the union: how likely it is that a union will be organized and how powerful that union will be. This belief is informed, for example, by estimations of how many other workers are likely to participate in the union effort,¹⁷ and how militant the union is likely to be at the bargaining table. But predictions of *union* strength are only one side of the coin. Workers' views on the likelihood of success depend just as heavily on their perceptions of *managerial* strength. That is, workers' views about the likelihood of union success depend critically on their views about how vulnerable management is to challenge. This observation is critical to understanding how law functions in the context of organizing for collective action.

The existing literature stresses the prospects for union strength and focuses on how law can and does (or does not) contribute to the building of that strength. Here, in contrast, I focus on the other side of the coin. I argue that labor law can facilitate unionization by convincing workers that management (and the nonunion system of workplace relations it supports) is susceptible to challenge. When labor law intervenes visibly in the workplace and renders management observably subject to an authority more powerful than itself, the law helps convince workers that management and its preferred system of authority relations is vulnerable. Persuading workers that management is vulnerable, in turn, improves workers' assessments of the likely success of unionization. It therefore increases workers' willingness to participate in unionization efforts and facilitates unionization among workers who desire it—labor law's central function.¹⁸

The vulnerability discussed here, it is important to stress, is vulnerability to law and to a form of workplace organization the law protects. Vulnerability as used in this Essay, then, implies only that management is functionally subject to a set of laws that clearly governs its conduct. Managers involved in union campaigns often vigorously contest such vulnerability, telling workers, for example, “[I don’t] give . . . a damn about the law,”¹⁹ or “I’m the total dictator,”²⁰ or simply “I am the law.”²¹ These statements are meant to scuttle unionization efforts by conveying an aura of *invincibility*. But given

unionization only if unionization is a realistic option, and only if they perceive it as a realistic option.”).

17. For an excellent discussion, see, e.g., Brishen Rogers, “Acting Like a Union”: *Protecting Workers’ Free Choice by Promoting Workers’ Collective Action*, 123 HARV. L. REV. F. 38, 47–48 (2010) (explaining that “no one is inclined to participate unless everyone else . . . is also participating”).

18. See Sachs, *supra* note 12, at 693 (discussing labor law’s goal of maximizing employee choice on the question of unionization).

19. Baberton Manor, 252 N.L.R.B. 380, 390 (1980).

20. E.E.C., Inc., 297 N.L.R.B. 943, 947 (1990).

21. Caroline Gardens Apartment Corp., No. 2-CA-23514, 1990 WL 1222181, at *2 (N.L.R.B. Div. of Judges Jan. 17, 1990).

that institutions ought to be subject to the laws that govern them, the form of vulnerability discussed in this Essay is a normatively desirable one. And one that labor law should ensure.

In fact, a wide range of labor law rights and remedies can be understood as demonstrating to workers that management is vulnerable—on this meaning—to labor law and to unionization. One such remedy, known as notice reading, will help illustrate the point and motivate the discussion.²² In a typical unfair labor practice proceeding, the NLRB orders the employer to comply with a set of affirmative commands—to reinstate a discharged worker, for example, or to cease and desist from surveilling union activity—and also to post a notice detailing the terms of the Board’s order.²³ Notice postings themselves generally are uncontroversial and generate little employer resistance. On the other hand, in certain cases the Board will order the employer not only to post the notice but also to read that notice to its employees. These orders generate intense employer opposition and harsh judicial skepticism. In one prominent case, the employer characterized the notice-reading order as “design[ed] to humiliate and embarrass”²⁴ The D.C. Circuit has described the remedy as “humiliating and degrading to the employer” and as “incompatible with the democratic principles of the dignity of man.”²⁵

Notice readings, like most remedies, have various effects. Like a notice posting, a notice reading conveys facts to employees, perhaps more effectively than postings do.²⁶ But notice readings also have a separate effect, captured by the view that they are humiliating, embarrassing, and undignified. When management reads to employees a list of actions the law requires it to take and not take, management *enacts* its vulnerability to labor

22. For a recent discussion of the remedy, see Andrew Strom, *Class Bias on Display at the D.C. Circuit*, ONLABOR (May 26, 2016), <https://onlabor.org/2016/05/26/class-bias-on-display-at-the-d-c-circuit/> [<https://perma.cc/YC55-FLTM>].

23. For one of countless examples, see, e.g., HTH Corp., 361 N.L.R.B. No. 65, at 3 (2014) (highlighting the NLRB’s broad discretion to exercise remedial authority—including the notice posting requirement).

24. *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 401 (D.C. Cir. 1981) (quoting employer’s brief).

25. *Int’l Union of Elec., Radio, & Mach. Workers, AFL-CIO v. NLRB*, 383 F.2d 230, 233–34 (D.C. Cir. 1967).

26. Notice readings are often defended on the ground that in-person communication is more effective than written communication. See, e.g., Thomas C. Barnes, Note, *Making the Bird Sing: Remedial Notice Reading Requirements and the Efficacy of NLRB Remedies*, 36 BERKELEY J. EMP. & LAB. L. 351, 360–64 (2015) (labeling spoken notice “a more effective remedy” and detailing how it better furthers restorative and deterrent purposes); John W. Teeter, Jr., *Fair Notice: Assuring Victims of Unfair Labor Practices That Their Rights Will Be Respected*, 63 UMKC L. REV. 1, 2 (1994) (advocating for notice reading in light of the greater effectiveness of oral statements). The NLRB itself advocates readings when workforce illiteracy rates are high. NLRB General Counsel Memorandum OM 16-21, *Notice Reading In Cases Where Unit Employees Have Literacy Issues* (June 21, 2016), <https://www.nlr.gov/reports-guidance/operations-management-memos> [<https://perma.cc/9BWF-QZGE>].

law.²⁷ Such a public commitment to comply with the law's requirements may well be experienced by managers as humiliating and embarrassing. But this tells us more about management's views of the legitimacy of labor law than about the remedy of notice reading. More important than the embarrassment a manager might feel is the signal the reading sends to employees—a signal of the legal fact that employers are susceptible to labor law and to the unionization project labor law protects.

Numerous labor law rights and remedies not only function in this way but can also be defended on these grounds. The very basic right to discuss unionization at the workplace, for example, not only enables employees to communicate with each other about the virtues of unionization, but also signals that the employer's control over the workplace is not absolute.²⁸ The same was true, perhaps even more so, when union organizers had a partial right to enter employer property to discuss unionization with employees: their very presence signaled that managerial control had its limits and that managerial power might therefore be subject to challenge.²⁹ Reinstatement orders clearly have this impact as well, as does the right to have a coworker present at a disciplinary interview.³⁰

The goal of this Essay is to show that by convincing workers of management's vulnerability, labor law can facilitate union organizing and thereby advance its statutory mission. Recognizing that labor law can function in this way, in turn, suggests some new, perhaps unorthodox, reforms to the labor law regime. In the final Part, the Essay proposes these reforms, including a requirement that all covered employers read a notice of labor law rights to their employees on a regular basis.³¹ The conclusion suggests that the argument developed here in the context of labor law has implications for collective action and social movement mobilization more broadly.

I. The Political Process Model: An Overview

A large literature in sociology is dedicated to addressing the question of why and under what conditions social movements emerge.³² And while the

27. For an example of an actual notice reading, see *infra* text accompanying note 89.

28. See *infra* text accompanying notes 110–12 (emphasizing that despite employers' vigorous objections to union discussions in the workplace, the NLRB's enforcement of the right to discuss unionization at work demonstrates management vulnerability).

29. See *infra* text accompanying notes 133–34 (recognizing the importance of vulnerability to the prospects for unionization).

30. See *infra* text accompanying notes 113–18 (demonstrating that reinstatement indicates that the employer is still susceptible to the law and discussing a union campaign study showing that union win rates were higher after union activists were discharged and later reinstated by the NLRB).

31. As discussed, such a requirement would probably require statutory amendment. See *infra* Part III.

32. For a review, see Doug McAdam, *Conceptual Origins, Current Problems, Future Directions*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS* 24–25 (Doug McAdam et al.

precise definition of “social movement” is contested,³³ the literature is at its core dedicated to examining “the origins of collective action.”³⁴ One prominent theory of social movement emergence is the political process model. As elaborated by Doug McAdam, political process theory stresses three necessary preconditions for movement emergence, that is, for the successful generation of collective action. The first is the existence of a “structure of political opportunities” that offers potential movement participants an “objective ‘structural potential’ for collective . . . action.”³⁵ What constitutes such a structural potential depends, of course, on the nature of the movement or the form of collective action being contemplated. The focus of McAdam’s work was the American civil rights movement (broadly defined), and he points to a set of social and economic dynamics—including the collapse of cotton as the core of the southern economy, migration, the increase in black electoral strength, and World War II—as constituting the relevant opportunities that made the civil rights movement possible.³⁶ But, in general terms, political opportunities are the objective structural conditions necessary to make a specific form of collective action possible.

Second, and most important for present purposes, McAdam argues that the successful emergence of collective action depends on the “collective assessment [by potential participants] of the prospects for *successful* insurgency.”³⁷ This assessment itself turns on participants believing two related sets of things: one, participants must be optimistic about the potential strength of the organizations they are forming; and two, they must believe that the status quo regime is “vulnerable to challenge.”³⁸

Vulnerability is thus central to the political process theory of mobilization; it is a *sine qua non* of collective action.³⁹ The idea is intuitively

eds., 1996) (observing that “[t]he concept of political opportunities has . . . proven to be a welcome addition to the analytic arsenal of movement scholars”).

33. DAVID A. SNOW, SARAH A. SOULE & HANSPETER KRIESI, *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 6–11 (2004) (listing examples of the variety of definitions of social movements and noting that they may differ in what terms are emphasized or accented).

34. DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970*, at viii (2d ed. 1999).

35. *Id.* at 48.

36. *See id.* at 73–83; *see also* MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS 4* (2004) (analyzing “factors behind the nation’s racial transformation”).

37. MCADAM, *supra* note 14, at 40 (emphasis added).

38. *See id.* at 40, 49 (discussing the “importance of indigenous organizations” and perceptions of a vulnerable political system as factors in “cognitive liberation”).

39. Although McAdam is credited with developing the theory, he was not the first—nor the last—to identify perceptions of vulnerability as a prerequisite for collective action. In discussing vulnerability, McAdam himself draws on Piven and Cloward, who wrote in their influential book, *Poor People’s Movements*, that for a movement to emerge, “[t]he social arrangements that are ordinarily perceived . . . immutable must come to seem . . . *mutable*.” FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 12 (1977) (emphasis added). In a similar vein, Rick Fantasia describes the importance—to union organizing specifically—of demonstrating to workers that “a seemingly omnipotent authority [i.e.,

accessible. If individuals believe that the current regime is invincible, that there is no prospect for change, then they are unlikely to participate in a collective effort to make such change, assuming that participation will entail costs—as it always will. This dynamic also explains why rulers, especially authoritarian ones, attempt to convey invulnerability to potential challengers. The literature on competitive authoritarianism is thus replete with examples of regimes deploying elections to “generate a public image of invincibility.”⁴⁰ Closer to home, the dynamic helps explain why managers often attempt to communicate that managerial control—and the default regime of individual bargaining it defends—is invulnerable in the face of a union-organizing campaign. NLRB and court decisions contain countless statements like: “I am the boss, and no God damn Union is coming in here”⁴¹

Third, and finally, political process theory posits that successful collective action depends on “indigenous organizational strength,” or resources within the relevant community that permit prospective movement participants to take advantage of the structural and cognitive opportunities discussed above.⁴² When there is objective structural potential for collective action and when participants believe that the existing regime is vulnerable to challenge, the emergence of sustained collective action still depends on an organization capable of channeling such activity. Here, McAdam has in mind both existing organizations within communities that can channel collective activity, as well as more informal networks within those communities that can facilitate the creation of such organizations.⁴³

II. Labor Law and Political Process Theory

This Essay’s primary goal is to show how labor law can contribute to workers’ perception that management is vulnerable to unionization and thereby to satisfy political process theory’s second prong. But before getting to that discussion, this Part briefly shows how law can also contribute to the other two preconditions identified by the political process school. This Part thus proceeds by first taking up law’s contribution to objective structural opportunity and organizational viability before turning, in subpart B, to the core discussion of vulnerability.

management] could be overcome.” FANTASIA, *supra* note 16, at 145. Steven Buechler, in reviewing the evolution of social movement theory, stresses the importance to movement emergence of the “established order becom[ing] vulnerable to the actions of contenders.” Steven M. Buechler, *Social Strain, Structural Breakdown, Political Opportunity, and Collective Action*, 2 SOC. COMPASS 1031, 1039 (2008). His conception, though, is more objective than subjective.

40. BEATRIZ MAGALONI, VOTING FOR AUTOCRACY: HEGEMONIC PARTY SURVIVAL AND ITS DEMISE IN MEXICO 9 (2006).

41. *Barbers Iron Foundry*, 126 N.L.R.B. 30, 46 (1960).

42. MCADAM, *supra* note 14, at 43.

43. *See id.* at 43–48 (discussing the “significance of indigenous organizations,” formal and informal).

A. *Political Opportunities and Organizational Strength*

Within the framework of political process theory, it should be easy to see how labor law rights and remedies might provide the objective structural potential for successful collective action and how they can constitute a kind of micro-political opportunity structure.⁴⁴ In fact, although the political process frame may be unfamiliar, the idea that labor law aims to provide workers with an objectively feasible opportunity to unionize is fairly traditional.⁴⁵ A very brief overview is in order.

The most basic way labor law functions as opportunity structure is by making it illegal for employers to terminate workers who engage in union-organizing activity. Without this threshold assurance, union organizing would be exceedingly difficult and likely impossible: if workers lose their jobs when they try to form unions, they will either not try to unionize or they will not succeed. But such terminations would be legally permissible absent labor law's prohibition.⁴⁶ It is worth pausing to emphasize the point, precisely because it may have become too familiar: without labor law's prohibition on union-related discharges, it would be legally permissible for employers to fire anyone who engages in union organizing.⁴⁷ At certain historical moments, workers have been able to overcome the brute force of anti-union discharges

44. Throughout the bulk of this discussion, I will ignore the question of whether labor law's protections are actually enforced. I do this because my goal is to offer a theoretical account of how labor law functions—when it does function—and so I set the critical issue of enforcement aside. As many, myself included, have described elsewhere, American labor law suffers from a profound enforcement problem in practice. See, e.g., Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2694–700 (2008) (describing the NLRA's "deeply inadequate remedial regime").

45. See, e.g., Sachs, *supra* note 12, at 656 (discussing labor law's goal of enabling employee choice on the union question). In Part IV, I note that the lack of enforcement can undermine law's capacity to demonstrate to workers that management is vulnerable to the law of union organizing. See *infra* Part IV.

46. This is true because of the background legal rule of at-will employment. Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEG. HIST. 118 (1976); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 953–54 (1984).

47. Put somewhat differently, absent some external restraint, employers facing unionization will generally engage in what Richard Posner famously calls "rational predatory action." Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 994 (1984). Because unionization imposes costs on firms and—though this was not Posner's point—because unionization deprives managers of some of their control over the workplace, Posner predicts that management's rational response to union organizing is the termination of union supporters. See *id.* In fact, in a leading study of union-organizing drives, researchers concluded that employers opposed the union 96% of the time. See KATE BRONFENBRENNER, ECON. POLICY INST., NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING 10 tbl.3 (May 20, 2009), <http://www.epi.org/publication/bp235/> [<https://perma.cc/P6FG-3WMD>]. More to the point, studies suggest that employers terminate up to 20% of active union supporters. See, e.g., Sachs, *supra* note 12, at 684 (collecting sources). Such terminations remove union supporters from the workplace and thus from the organizing effort. Terminations also signal to other potential union supporters that the cost of union support is very high. They are thus highly effective at subverting organizing. See, e.g., *id.* at 684–85 (citing BRONFENBRENNER, *supra* note 47, at 10–11 tbl.3).

by preventing other employees—through picketing and other forms of social pressure—from accepting jobs left vacant by those fired for union activity.⁴⁸ But when workers lack the social power to deter such discharges, law has the capacity to prohibit them and make unionization feasible.⁴⁹

While necessary, this type of threshold protection is hardly sufficient to provide workers with a genuine opportunity to unionize.⁵⁰ Unionization, like collective action of all kinds, calls on workers to overcome a set of coordination and information hurdles. With respect to coordination, a union campaign requires organizers to garner the support of a majority of a given workforce.⁵¹ This, in turn, requires that organizers contact and speak with a large number of workers, who can be dispersed across large geographical areas. In a number of ways, labor law can make this coordination possible. First, although background rules of property and contract would entitle employers to prohibit organizers from using the workplace as a centralized locus for union activity, labor law allows organizers to do just that. Thus, for example, the law permits employees to use nonworking areas of their workplace (during nonworking time) to solicit support for unionization and to exchange information about unionization.⁵² For a time, moreover, labor law also permitted full-time union organizers to conduct union activity on

48. It is also possible for labor market conditions to make anti-union discharges too costly to some employers.

49. There is a loose parallel available in Professor Klarman's analysis of the civil rights movement. Klarman shows how ensuring a basic guarantee of physical safety and security was necessary to enable African Americans to engage in protest activity during the civil rights era. *See* KLARMAN, *supra* note 36, at 445 (discussing factors contributing to the physical security necessary for social protest among urban blacks). This is not to equate the protection of physical safety and the protection against discharge. It is only to say that just as physical safety constituted a threshold for participation in the civil rights movement, protection against discharge is a threshold for participation in union-organizing activity.

50. Another threshold protection is labor law's prohibition on the bargaining of individual employment contracts once a union is organized. *See* *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338–39 (1944) (holding that individual contracts cannot survive collective contracts). Under background contract rules, an employer could subvert the effects of a successful union-organizing drive by offering individual employment agreements to its employees. If those individual employment agreements were superior to the collective deal that the union struck, many of the employees would likely accept them, and thereafter have much less reason to continue to support the union. If the individual employment agreements were inferior to the collective deal, the employees would have no incentive to accept them, unless the employer made rejecting the agreement grounds for sanction (demotion, discharge, etc.), which, absent legal prohibition, the employer likely would do. Labor law, however, flatly prohibits employers from bargaining individual contracts in the presence of a union-negotiated collective bargaining agreement (absent union consent). *Id.*

51. More specifically, of a given bargaining unit. *See* 29 U.S.C. § 159(a) (2012) (“Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes . . .”).

52. *See, e.g., Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803–04 n.10 (1945) (“It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property.”).

company property, within certain limits.⁵³ Second, labor law also provides organizers with valuable information about the workers whose support will ultimately be required, information that an employer would otherwise have no obligation to disclose. So, when a threshold of support is reached, the law requires the employer to provide a union with names and addresses of workers in the bargaining unit, allowing organizers to reach workers outside the workplace and before or after the work day.⁵⁴

Unionization also requires the existence of viable organizations capable of channeling and facilitating workers' collective action, the need anticipated by political process theory's third precondition for collective action. Here, labor law plays an important role in making unions—and not just unionization—viable. As many have observed, one of the most difficult tasks in fostering social movement organization—including union organization—is a sustainable financing mechanism. Indeed, this task is the quintessential collective action problem. Unions provide public goods to workers in the form of, for example, higher wages, safer working conditions, and just-cause employment protections.⁵⁵ Because unions are required to offer these terms on an equal basis to all workers in a bargaining unit—and because their positive effects generally extend well beyond workers in the bargaining unit⁵⁶—there is a free-rider problem inherent in the union project: all workers have access to the goods unions provide, and if no worker is required to pay for those goods, many will decide not to do so.⁵⁷ Labor law gives unions a mechanism to overcome this free-rider problem in the form of union security agreements and dues checkoff provisions.

Union security agreements are contractual clauses in collective bargaining agreements that require employees to pay dues to the union as a condition of employment.⁵⁸ Where such agreements are operative, if an employee fails to pay dues to the union, the employer is obligated to

53. See *Babcock & Wilcox Co.*, 109 N.L.R.B. 485, 494 (1954) (permitting nonemployee union representatives to distribute union literature on an employer's parking lot).

54. See *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239–40 (1966) (addressing standards of disclosure in representation elections).

55. See, e.g., JAMES T. BENNETT & BRUCE E. KAUFMAN, *WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE* (2007) (compiling scholarship regarding the social and economic effects of unions, including their impact on wages, benefits, workplace policies, job satisfaction, and conflict resolution).

56. This includes the so-called “threat effect” and ways in which unions affect wage-bargaining norms in the nonunion sector. See Western & Rosenfeld, *supra* note 6, at 514 (noting that nonunion employers may increase wages to avoid unionization).

57. Indeed, Mancur Olson relied on the union example to describe his logic of collective action. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 66–97 (1965).

58. Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in Beck*, 27 HARV. J. ON LEGIS. 51, 57 (1990).

discharge the employee.⁵⁹ By making dues payments mandatory—or, at least, a condition of employment—union security agreements help solve the free-rider problem that would otherwise plague unions. Labor law plays a somewhat less prominent role here than in the previous examples, but it is still crucial. Without a labor statute—and assuming unions could get organized in the first place—employers and unions could contractually agree to condition employment on workers’ paying union dues. But labor law goes further than permitting the negotiation of such clauses, as background contract principles would. Under the NLRA, employers have a duty to bargain in good faith with unions and this bargaining duty explicitly covers the negotiation of union security agreements.⁶⁰

In addition to union security clauses—which make dues payments mandatory—labor law also facilitates the bargaining of dues checkoff clauses. These clauses are administrative: they allow unions to deduct dues directly from employees’ paychecks, automatically and on a recurring basis.⁶¹ But this administrative process can be highly significant by saving unions the substantial burden of manually collecting dues payments each month from thousands, or even hundreds of thousands, of workers. Labor law facilitates this process by making dues checkoff clauses a mandatory subject of bargaining,⁶² and by treating an employer’s failure to agree to such a clause as evidence of that employer’s failure to bargain in good faith.⁶³

Taken together, these labor law rights help make unionization a viable prospect for workers. They create the “objective structural potential” for unionization and help ensure the existence of organizations capable of channeling workers’ collective efforts.

B. Vulnerability

Structural potential and organizational viability, however, are not enough to generate collective action. A subjective view among participants that their mobilization is likely to succeed is also necessary. Perceptions about the likelihood of success, moreover, depend on two sets of projections: one concerning the potential strength of the group attempting to organize and another concerning the vulnerability of the status quo regime that the group hopes to alter. In our context, workers’ perceptions of the likelihood of success of a union campaign combine views about, first, how likely it is that a union can be organized and (if organized) how strong it will be, and second,

59. *Id.*

60. This is not to say that employers are legally obligated to agree to such clauses, but they must bargain over them. *See, e.g.,* NLRB v. Gen. Motors Corp., 373 U.S. 734, 737–38, 744–45 (1963).

61. *See* Bethlehem Steel Co., 136 N.L.R.B. 1500, 1502 (1962) (describing a checkoff obligation requiring the employer to deduct union dues from employees’ pay).

62. Reed & Prince Mfg. Co., 96 N.L.R.B. 850, 851 (1951).

63. H.K. Porter Co., Inc., 153 N.L.R.B. 1370, 1372 (1965).

how vulnerable management is to a campaign designed to change the status quo.

The legal literature and the literature on law and social movements tends either to merge these two factors or to focus on the first. In his pivotal study of the relationship between law and the mobilization of the pay-equity campaign, for example, Michael McCann summarizes the law and social movement scholarship by quoting Piven and Cloward for the proposition that when participants “begin to assert their ‘rights’ that imply demands for change,’ there develops a new sense of efficacy; people who ordinarily consider themselves helpless come to believe that they have some capacity to alter their lot.”⁶⁴ McCann also argues that “once it became widely known that the courts weighed in favorably, the prospects for change appeared promising and commitments to political organizing seemed worth the effort.”⁶⁵ Why? Because judicial victories “signaled to potential activists that they might be able to count on judicial support for the cause.”⁶⁶ McCann’s work thus deftly illustrates the importance of participants’ views about likelihood of success—and he highlights the ways law can contribute to these perceptions—but his focus is on the efficacy of the movement, not on the vulnerability of the opposition.

Some scholars of the civil rights movement similarly attribute to legal victories this ability to increase participants’ optimism about the prospects for successful organizing and thus to increase the likelihood of successful mobilization. Mark Tushnet, writing about *Brown v. Board of Education*⁶⁷ and the Montgomery Bus Boycott, puts it this way:

The boycott succeeded . . . because it lasted so long. Historians are uncomfortable with counterfactuals. Still, we can wonder whether the participants would have been so persistent . . . had they not known that one of the nation’s major governing institutions had endorsed the principle for which they were contending.⁶⁸

Indeed, even Michael Klarman, perhaps the leading skeptic of law’s relationship to social movement mobilization, acknowledges that law can inspire participants and change perceptions about the possible: “*Brown* also plainly inspired blacks. To have the Court declare segregation to be unconstitutional was symbolically important, and it furthered the hope and the conviction that fundamental racial change was possible.”⁶⁹ Again, then,

64. MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 89–90 (1994) (quoting FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 4 (1977)).

65. *Id.* at 64.

66. *Id.* at 89.

67. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

68. Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 VA. L. REV. 173, 178–79 (1994).

69. KLARMAN, *supra* note 36, at 463.

these scholars recognize the importance of both belief in the possibility for change through collective action and the ability of law to shape such beliefs. But they subsume within this belief participants' views of the vulnerability of the status quo regime.

Like these writers, my previous work has focused on the importance to organizing success of workers' belief in their own efficacy and has missed the other side of the predictive coin. Describing law's ability to generate collective action, I have argued that "successful experiences with small-scale forms of collective activity increase the likelihood that workers will undertake successive, and more difficult forms of collective action."⁷⁰ To make this point, I consolidated the work of labor sociologists, all of whom stress the importance of workers' views of their own capacities to organize for change. Rick Fantasia, for example, argues that when workers participate in successful "mini-insurrections" they gain a "courageousness" that can be a "crucial component of union formation."⁷¹ Rachel Meyer writes that union organizing requires organizers to "make it possible for people to first succeed at small collective actions in order that they become aware of their power to make change."⁷² And Mark Steven Freyberg, also discussing unionization, concludes:

[C]ollective efficacy fuels successful action [and] reinforces feelings of efficacy in actors and encourages the spread of such feelings to non-participants. This in turn, encourages further, more widespread and intense collective acts.⁷³

Workers' optimism about the prospects for their own organization are critical to the success of their organizational efforts. But a subjective belief in the likely success of collective action depends not only on optimism about the group being organized. It turns equally on the view that the regime in power is susceptible to challenge and change.⁷⁴ If workers believe that management, which supports nonunion governance, is invincible,⁷⁵ then workers will not attempt to unionize; if workers think management is susceptible to unionization, organizing becomes possible.

70. Sachs, *supra* note 44, at 2735.

71. FANTASIA, *supra* note 16, at 121, 137, 145.

72. Sachs, *supra* note 44, at 2736 (quoting Rachel Meyer, *The Irony of Power: Collective Action and Efficacy in Working Class Struggle 2* (Aug. 12, 2005) (unpublished manuscript) (on file with author)).

73. Mark Steven Freyberg, *Constructing the UAW Dodge Local 3: Collective Identity, Collective Efficacy, Collective Action* 224 (1996) (unpublished Ph.D. dissertation, University of Michigan). Brishen Rogers's work is also illuminating. He shows that union-organizing success depends on employees believing that "unionization is a realistic option," a belief which itself turns on workers' experience "build[ing] collective power" during their organizing campaign. Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 313, 361 (2012).

74. MCADAM, *supra* note 14, at 49.

75. MAGALONI, *supra* note 40, at 9.

The literature to date has not addressed law's ability to influence perceptions of vulnerability.⁷⁶ Yet labor law has significant capacity to shape workers' perceptions of management in just this way. To see this we can start by observing how strenuously managers attempt to convince workers of management's *invulnerability* to union organizing, expressed as invulnerability to unions themselves, as invulnerability to the law that protects unionization, or as invulnerability to both. NLRB opinions thus routinely quote management asserting that unionization simply will never occur:

“[T]here will never be a union in this shop.”⁷⁷

“[The firm will] never be a union shop, never, never, never.”⁷⁸

“[N]o son of a bitch [will] bring a union to Wellstream.”⁷⁹

Board opinions also contain repeated assertions that management is immune from labor law and thus that management need not, and will not, yield to its mandates:

“[I don't] care about the law.”⁸⁰

“I don't care what you have been promised by the administration, the government, or anybody else. I am running this department and I will do it my way.”⁸¹

“[N]o other law don't mean nothing, this is my law[:] You just do as I say . . . I am the law . . . I don't care about the court . . . I don't care about the federal law”⁸²

76. In his history of the civil rights movement, Aldon Morris comments—unfortunately only in passing—that NAACP litigation had the effect of rendering the entrenched regime “vulnerable at some points.” ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* 26 (1984).

77. *United States v. Electro-Voice, Inc.*, No. 3:94-CV-1037RM, 1995 WL 353146, at *3 (N.D. Ind. May 4, 1995), *rev'd sub nom.*, *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559 (7th Cir. 1996).

78. *Insta-Print, Inc.*, 343 N.L.R.B. 368, 374 (2004).

79. *Wellstream Corp.*, 313 N.L.R.B. 698, 706 (1994); *see also Sun Co.*, 103 N.L.R.B. 359, 373 (1953) (“I don't care how many of you men join the union. . . . Don't you know that this will never be a union shop?”); *Ra-Rich Mfg. Corp.*, 120 N.L.R.B. 503, 506 (1958) (“There will never be a union in this place as long as I live.”); *Schoolman Transp. Sys., Inc.*, 319 N.L.R.B. 701, 703 (1995) (employer states that as long as he was with the firm, “there would never be a union here”); *NLRB v. Vanguard Oil & Serv., Inc.*, No. 75-4222, 1980 WL 18736, at *4 (2d Cir. Sept. 2, 1980) (“Ain't no union going to come in here.”), *report and recommendation adopted* (2d Cir. Oct. 10, 1980); *Bon Hennings Logging Co.*, 132 N.L.R.B. 97, 104 (1961) (“There will never be a union man on my job.”), *enforcement granted in part and denied in part by Bon Hennings Logging Co. v. NLRB*, 308 F.2d 548, 558 (9th Cir. 1962).

80. *Pac. Techs., Inc.*, No. 13-CA-33518, 1996 WL 33321406, at *2 (N.L.R.B. Div. of Judges Apr. 9, 1996).

81. *Acad. of Art Coll.*, 241 N.L.R.B. 839, 841 (1979).

82. *Caroline Gardens Apartment Corp.*, No. 2-CA-23514, 1990 WL 1222181, at *2 (N.L.R.B. Div. of Judges Jan. 17, 1990) (internal quotations omitted).

“I have the power here. I am your boss I do whatever I want”⁸³

And, in a consolidation of these various examples, one general manager made the point this way to an employee he was about to fire:

“I have news for you. You will never have a union in this shop This is my shop. I will run this . . . shop my way. I am the law. I am the . . . law in this place and you get that straight.”⁸⁴

Statements like these are designed to quash organizational efforts by convincing workers that management is invulnerable to unionization.⁸⁵ NLRA rights and remedies can be understood, in contrast, as signals to workers that management’s assertions are untrue. In other words, in the “struggle for [workers’] hearts and minds” that shapes every organizing campaign,⁸⁶ law can counter the claim that management is impervious to unionization.

To illustrate the point, I start with the remedy of notice reading, a remedy that calls on management to proclaim its vulnerability to labor law in front of an audience of workers. As noted in the Introduction, as a remedy in unfair labor practice proceedings, the NLRB on occasion orders employers to assemble their employees and to read them a notice. The notice states that the NLRB has found the employer in violation of federal law and it lists the actions that the employer must take and not take to remedy its illegal actions.⁸⁷ In a 2014 decision, for example, the Board ordered the employer to:

[H]old a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice . . . is to be read to the

83. *Ardley Bus Corp.*, 357 N.L.R.B. 1009, 1011 (2011) (internal quotations omitted); *see also* *The Broker*, 282 N.L.R.B. 1265, 1269 n.9 (1987) (“I don’t care about the Supreme Court.”); *Barberton Manor*, 252 N.L.R.B. 380, 390 (1980) (“[I don’t] give . . . a damn about the law.”).

84. *Cleveland Pressed Prods. Corp.*, 203 N.L.R.B. 290, 293 (1973) (internal quotations omitted).

85. *Cf. MCADAM*, *supra* note 14, at 49 (indicating an increased likelihood of unionization when employees perceive management’s vulnerability). This is not to imply that conveying invincibility is the only strategy management uses to defeat union organizing. For example, Karen Brodtkin and Cynthia Strathmann point out that management may attempt to avoid unionization by building—or at least conveying—a culture of managerial “paternalism” in which management is the head of a “benevolent corporate family.” Karen Brodtkin & Cynthia Strathmann, *The Struggle for Hearts and Minds: Organization, Ideology, and Emotion*, 29 LAB. STUD. J. 1, 3, 17 (2004).

86. Rogers, *supra* note 73, at 318 (quoting Brodtkin & Strathmann, *supra* note 85, at 3).

87. *See, e.g.*, *HTH Corp. v. NLRB*, 823 F.3d 668, 672–74 (D.C. Cir. 2016); *NLRB v. Homer D. Bronson Co.*, 273 F. App’x 32, 39–40 (2d Cir. 2008); *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 929–30 (D.C. Cir. 2005); *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 956, 962 (2d Cir. 1988); *United Food & Commercial Workers Int’l Union, AFL-CIO v. NLRB*, 852 F.2d 1344, 1348–49 (D.C. Cir. 1988); *Conair Corp. v. NLRB*, 721 F.2d 1355, 1385–87 (D.C. Cir. 1983); *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 400–04 (D.C. Cir. 1981); *J. P. Stevens & Co. v. NLRB*, 417 F.2d 533, 539–40 (5th Cir. 1969); *NLRB v. Bush Hog, Inc.*, 405 F.2d 755, 757–59 (5th Cir. 1968); *Textile Workers Union of America, AFL-CIO v. NLRB*, 388 F.2d 896, 902–05 (2d Cir. 1967); *J. P. Stevens & Co. v. NLRB*, 380 F.2d 292, 303–05 (2d Cir. 1967).

employees in both English and Spanish by the Respondent's chief executive officer or, at the Respondent's option, by a Board agent in that officer's presence.⁸⁸

The notice that the employer was required to read to its employees stated, among other things:

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice. FEDERAL LAW GIVES YOU THE RIGHT TO [f]orm, join, or assist a union[;] [c]hoose representatives to bargain with us on your behalf[;] [and] [a]ct together with other employees for your benefit and protection WE WILL NOT discharge or otherwise discriminate against any of you for supporting [the] union.

. . . .

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten you with unspecified reprisals because you engaged in union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.⁸⁹

We have no direct way to measure the effect of such readings on employees' perceptions of management, or more particularly, on employees' perceptions of how vulnerable to challenge management is. But there is some helpful indirect evidence of this effect. For one, employers themselves characterize the remedy in stark terms that indicate what employers believe the remedy's impact on employees' views will be. Most tellingly, employers routinely characterize the remedy as *humiliating* and *embarrassing*. In *Teamsters Local 115 v. NLRB*,⁹⁰ for example, the employer argued that the notice-reading requirement "demonstrates that the Board is intent on its

88. *Marquez Bros. Enters., Inc.*, 361 N.L.R.B. No. 150, at *2 (Dec. 16, 2014). In *Marquez*, as in most cases, the employer has the option of allowing a Board agent to read the notice to the employees, in the presence of the employer, rather than reading the notice itself. With respect to demonstrating vulnerability, whether the notice is read by the employer or by the board agent in the employer's presence seems unlikely to matter much. For another example, see *HTH Corp.*, 361 N.L.R.B. No. 65 (2014), in which the Board orders the employer to:

[C]onvene meetings at [the workplace] during working time, scheduled to ensure the widest possible attendance, at which the attached notice and Explanation of Rights are to be read to all employees, supervisors, and managers. The meetings shall be held in the presence of a Board agent, and the notice and Explanation of Rights shall be read by [a senior management official] or, at the [Employer's] option, by the Board agent in the presence of [the senior management official] At least two supervisors/managers must be present at each reading.

89. *Marquez Bros.*, 361 N.L.R.B. at App.

90. 640 F.2d 392 (D.C. Cir. 1981).

design to humiliate and embarrass [us].”⁹¹ In *Conair Corp. v. NLRB*,⁹² the employer similarly argued that a notice reading is “punitive, oppressive, and unwarranted.”⁹³ More colorfully, in *J. P. Stevens & Co., Inc. v. NLRB*,⁹⁴ the employer attacked the order by asking of the NLRB, “Upon what meat doth this our Caesar feed?”⁹⁵ The Shakespeare quote suggests not only an intensely humiliating effect of the notice-reading requirement but a degrading one.⁹⁶ And one need not be a psychoanalyst to know that, if management is humiliated and embarrassed by an NLRB order, this could contribute to a perception among workers that management is not quite as invincible as management wishes to convey.⁹⁷

Many judges called on to review the NLRB’s notice-reading orders, moreover, share employers’ views about the remedy. Thus, judicial opinions characterize notice reading as “humiliating and degrading,”⁹⁸ as “incompatible with the democratic principles of the dignity of man,”⁹⁹ and as tantamount to “ignominy.”¹⁰⁰ Writing about a notice reading in a case in which a senior manager had responded to a preliminary board order by saying “[f]uck the judge,”¹⁰¹ the D.C. Circuit describes its reaction to the notice-reading remedy as follows:

What is the subtext communicated by the sort of scene the Board would mandate? What is communicated to the assembled workers and the perpetrator himself? “You see before you one of your managers, who normally has a responsibility to make important choices as to your work. But who is he? Not merely is he a lawbreaker, but he is a

91. *Id.* at 401.

92. 721 F.2d 1355 (D.C. Cir. 1983).

93. *Id.* at 1385.

94. *J. P. Stevens & Co., Inc. v. NLRB*, 380 F.2d 292 (2d Cir. 1967).

95. *Id.* at 304; *see also* Brief for Petitioner at 48, *UNF West, Inc. v. NLRB*, 844 F.3d 451 (5th Cir. 2016) (No. 16-60124) (arguing that the notice-reading remedy should “not [be] available to humiliate employers for run of the mill allegations”); Brief of Petitioners at 37–39, *HTH Corp. v. NLRB*, 823 F.3d 668 (D.C. Cir. 2016) (Nos. 14-1222, 14-1283) (characterizing the notice-reading remedy as a “humiliating and counterproductive experience,” an “extreme ‘ad hominem remedy,’” and an “affront to [the employer’s] dignity”); Brief for Petitioners at 26, *Three Sisters Sportswear Co. v. NLRB*, 55 F.3d 684 (D.C. Cir. 1995) (Nos. 94-1154, 94-1169) (characterizing the notice-reading remedy as “demeaning”).

96. *See, e.g.*, Marvin L. Vawter, “*Julius Caesar*”: *Rupture in the Bond*, 72 J. ENG. & GERMANIC PHILOLOGY 311, 311, 322 (1973) (interpreting phrase to convey “the enormity of Caesar’s tyranny” and construing “meat” as a metaphor for the “self-debased bodies” of Caesar’s subjects).

97. *See* Jeff Elison & Elizabeth J. Dansie, *Humiliation*, in *ENCYCLOPEDIA OF ADOLESCENCE* at 1342, 1346–47 (Roger J.R. Levesque ed., 2011) (describing devaluation of a humiliated party in the eyes of the relevant audience).

98. *Int’l Union of Elec., Radio, & Mach. Workers, AFL-CIO v. NLRB*, 383 F.2d 230, 233 (D.C. Cir. 1967).

99. *Id.* at 234.

100. *Id.*

101. *HTH Corp.*, 361 N.L.R.B. No. 65, 2 n.10 (2014).

pathetic creature who can be forced to spout lines some government officials have put in his mouth. He is not even a parrot, who can choose when to speak; he is a puppet who speaks on command words that he may well abominate. We have successfully turned him into a pathetic semblance of a human being.”¹⁰²

For the D.C. Circuit, then, notice reading is likely to have a *profound* effect on workers’ perception of management’s strength. From a boss who could confidently cast off an NLRB order with a “fuck the judge” comment, the manager becomes a “pathetic creature” and a “semblance of a human being” who lowly NLRB officials can force to “spout lines” about union rights.

We need not accept the circuit court’s robust view to agree that a notice reading might impact employees’ subjective impressions of management’s vulnerability. A notice reading, palpably and viscerally, makes clear to employees that management is not, as management would have it, the only law in the workplace. It helps establish that management is not, in fact, invincible. And if government officials—not especially lofty ones—can overcome managerial resistance to the legal rules of union organizing, perhaps that will contribute to workers’ belief that they might overcome managerial opposition to unionization. Borrowing McAdam’s more circumspect language, we could say that the order is likely to constitute a “cognitive cue” that management is now “vulnerable to challenge.”¹⁰³

Notice reading is a clear example of how labor law remedies can work in this way, but it is not the only NLRA right or remedy with this capacity. Indeed, all those rights and remedies that effect an observable incursion into management’s prerogatives can contribute to a perception among workers that management is vulnerable to labor laws and labor unions. Take the right of employees to request the presence of a coworker during a disciplinary interview, the so-called *Weingarten* right. In *NLRB v. J. Weingarten, Inc.*,¹⁰⁴ the Supreme Court upheld the Board’s rule that any employee facing an investigatory interview with management has a protected right to request the presence of a union representative at that interview.¹⁰⁵ *Weingarten* arose in the context of an already-unionized workplace, and the question of whether nonunion employees enjoy *Weingarten* rights has been a vigorously contested and oft-litigated one over the last four decades. The Board has flip-flopped on the question,¹⁰⁶ but it is clear that when *Weingarten* rights are

102. *HTH Corp. v. NLRB*, 823 F.3d 668, 677 (D.C. Cir. 2016).

103. *MCADAM*, *supra* note 14, at 49.

104. 420 U.S. 251 (1975).

105. *Id.* at 252–53.

106. *Compare* *Materials Research Corp.*, 262 N.L.R.B. 1010 (1982) (extending the *Weingarten* right to unrepresented employees), *with* *Sears, Roebuck, and Co.*, 274 N.L.R.B. 230 (1985) (finding *Weingarten* inapplicable absent a recognized union). *See also* *Epilepsy Foundation*, 331 N.L.R.B. 676 (2000) (returning “to the rule set forth in *Materials Research*” that “*Weingarten* rights are

available to nonunion employees, they—like notice readings—can help demonstrate employer vulnerability. Investigatory interviews, after all, are a site for the direct exercise of managerial power: employees are facing discipline or discharge and enjoy few to no due process rights. Such interviews can thus be experienced by workers as expressions of near total managerial authority. As the Board has put it, an employee in an investigatory interview is “alone in the locus of managerial authority.”¹⁰⁷

For just this reason, however, the right to insist upon a coworker’s presence at an investigatory interview can have important effects on the workers involved. Professor Finkin, in his article on *Weingarten* rights, comments on the “substantial psychological benefit” that flows from having a coworker present at such an interview.¹⁰⁸ The *Weingarten* opinion itself speaks to the right’s effect on worker perceptions when it holds that the presence of a coworker can “redress the perceived imbalance of economic power between labor and management.”¹⁰⁹ And although neither Finkin nor the *Weingarten* Court had workers’ perceptions of managerial vulnerability in mind, such perceptions are likely one of the psychological implications of the rule’s legal mandate. In a locus of otherwise unchecked managerial authority, the law enables workers to experience managerial authority as checked.

Or take the right of workers to discuss unionization on company property, even in circumstances when the employer seeks to prohibit such discussions. Since the 1940s, the Board has maintained a rule that employees have a presumptive right to talk union at work, as long as they do so during nonwork time.¹¹⁰ Employers routinely and vigorously object to such discussions among their workforces, asserting property rights to control what employees do and what they talk about while at work. Again, the NLRB reports are filled with examples:

I own this company, I own this building, I own this land And if I have to . . . I’ll block the driveway with my jeep and my shotgun and

applicable in the nonunionized workplace”); *IBM Corp.*, 341 N.L.R.B. 1288 (2004) (overruling *Epilepsy Foundation* and holding that the *Weingarten* right does not apply to a nonunionized workplace).

107. *NLRB v. Ill. Bell Tel. Co.*, 674 F.2d 618, 621 (7th Cir. 1982); cf. Matthew W. Finkin, *Labor Law by Boz – A Theory of Meyers Industries, Inc., Sears, Roebuck and Co., and Bird Engineering*, 71 IOWA L. REV. 155, 186–87 (1985) (highlighting that investigatory interviews often resemble criminal interrogations and require management to “remain in firm command of the interview at all times”).

108. Finkin, *supra* note 107, at 187.

109. 420 U.S. at 262 (quoting *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965)).

110. *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943), cited in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803–04 n.10 (1945).

I hope that the ringleader [of the union organizing] is in the front lines so I can blow his head off.¹¹¹

Against such assertions of employer control, the right to discuss unionization at work provides employees with another experience of managerial vulnerability to labor law. This may be particularly true in the many cases where employers attempt to enforce an illegal ban on union speech and are then required by the Board to allow such discussions.¹¹² Employees who engage in conversations about unions at work do so despite employer opposition and, thus, only because of their employer's susceptibility to labor law's dictates.

Finally, take the remedy of reinstatement, which is perhaps the most salient way the NLRB can demonstrate an employer's susceptibility to law. Employers facing union campaigns may discharge up to 20% of active union supporters.¹¹³ The message such discharges send is unmistakable, and the impact of discharge on union success rates is profound.¹¹⁴ Precisely because discharge is such a powerful managerial tool, however, an order of reinstatement can have a powerful countervailing impact on employee views of managerial control: reinstatement is a demonstration that even the employer's ultimate form of authority is constrained by the obligations of law.¹¹⁵ And, here, we have a helpful bit of empirical evidence. In her study of union campaigns, Kate Bronfenbrenner identified a set of cases in which union activists were discharged during an organizing drive but then reinstated by NLRB order prior to the time the union election was held.¹¹⁶ Bronfenbrenner shows that union success rates were higher in these cases than in cases where no union activist was discharged at all. In her sample, in cases where no union activist was discharged, the union won 45% of the time.¹¹⁷ On the other hand, where a union activist was discharged but then reinstated before the union election, the win rate was 58%, or 13% *higher*

111. Hagerstown Kitchens, Inc., 244 N.L.R.B. 1037, 1038 (1979); *see also* Care Manor of Farmington, Inc., 314 N.L.R.B. 248, 250 (1994) ("You can organize on your own time from your own home, but I will not have it on my property."); A & T Mfg. Co., 265 N.L.R.B. 1560, 1570–72 (1982) ("It's your right to promote a union . . . [but] you can't do it on my property, you can't do it on my time, you can't do it on my job . . ."), *enforced in part, vacated in part*, 738 F.2d 148 (6th Cir. 1984).

112. *See, e.g.*, Loparex LLC v. NLRB, 591 F.3d 540, 545, 552 (7th Cir. 2009); Stanford Hosp. & Clinics v. NLRB, 325 F.3d 334, 338–42, 346 (D.C. Cir. 2003); United Parcel Serv., Inc. v. NLRB, 228 F.3d 772, 775–78, 780–82 (6th Cir. 2000).

113. *See* JOHN SCHMITT & BEN ZIPPERER, CTR. FOR ECON. & POLICY RESEARCH, DROPPING THE AX: ILLEGAL FIRINGS DURING UNION ELECTION CAMPAIGNS 11 (2007).

114. *See supra* note 47.

115. *See* 29 U.S.C. § 160 (2012) (empowering the NLRB to prevent unfair labor practices).

116. KATE BRONFENBRENNER, UNEASY TERRAIN: THE IMPACT OF CAPITAL MOBILITY ON WORKERS, WAGES, AND UNION ORGANIZING 48–49 (2000), <http://digitalcommons.ilr.cornell.edu/reports/3/> [<https://perma.cc/YVZ2-9JGV>].

117. *Id.* at tbls. 8–9.

than in campaigns where there had been no discharge.¹¹⁸ Here, then, data suggestive of the dynamic at the heart of this Essay: where the NLRB intervenes in a manner that makes management visibly susceptible to the power of law, union organizing is more likely to succeed.

III. Implications

This Essay claims that employee perceptions of employer vulnerability are an important factor in the generation of employee collective action. Such perceptions are, in fact, a necessary precursor to such collective action. The Essay also endeavors to show that the enforcement of labor law, at least when such enforcement is directly experienced by workers, can contribute to these perceptions of managerial vulnerability.

To be clear, the Essay does not claim—as it would be foolish to do—that employee perceptions of vulnerability are sufficient for the generation of collective action. Far more than this belief is required to enable unionization.¹¹⁹ Nor does the Essay claim that labor law is the sole means by which employer vulnerability can be demonstrated. To the contrary, much of labor history is defined by workers and unions that have established the employer's vulnerability through their own acts, often entirely unassisted by—or, more accurately, hindered by—the legal regime.

But if the claims in the Essay are correct—that perceptions of vulnerability matter and that law can contribute to them—then there are implications for labor law. Namely, labor law ought to be structured so that employees do in fact experience management as subject to the rules of union organizing. Moreover, such experiences should be available to all employees and not just those who happen to be parties to an NLRB proceeding and a Board-ordered remedy.

One way to start would be for the Board to require all employers to read to its employees a notice of union-organizing rights. Such readings could be required, for example, on an annual basis and irrespective of the presence of ongoing organizing activity. Indeed, requiring such readings before organizing begins makes conceptual sense, given that organizing might not begin unless and until employees believe the employer is vulnerable to a campaign. More modestly, a notice reading could be required as part of the Board's representation-election procedures. Thus, when a union demonstrates to the Board that it has support from 30% of a relevant

118. *See id.* The data do not allow us to rule out another causal route: when an employer perceives that a union drive is likely to succeed, it fires a union activist in a manner that generates the relatively rare NLRB reinstatement order. In this case, the data reflect employer perceptions of the union's chances of success, and not necessarily any impact on employee perceptions.

119. For recent discussions of the range of factors necessary to generate successful unionization efforts, see, e.g., Rogers, *supra* note 73, at 361; Sachs, *supra* note 12, at 680–84 (discussing the collective action problem and forms of managerial intervention that deter unionization efforts).

bargaining unit and invokes the Board's election machinery,¹²⁰ the Board could—in addition to requiring that the employer disclose names and addresses of bargaining-unit members—require the employer to read employees a notice of their NLRA rights.¹²¹

Whether such a notice-reading requirement could be enforced by the Board absent legislative amendment is an open question. The Board recently adopted a rule requiring all covered employers to post a notice detailing employees' rights under the NLRA.¹²² Implementation of the rule, however, has been enjoined by the Fourth Circuit on the ground that the Board lacks statutory authority to go beyond its “reactive” role of “addressing unfair labor practice charges and conducting representation elections upon request.”¹²³ In addition, the D.C. Circuit found that enforcement of the rule ran afoul of § 158(c) of the NLRA,¹²⁴ which prohibits the Board from finding an unfair labor practice based on the dissemination of noncoercive speech.¹²⁵ If the Fourth Circuit and D.C. Circuit opinions remain the governing standards, the Board likely could not—absent congressional action—order employers to engage in regular notice readings outside the context of unfair labor practice proceedings. On the other hand, the Board could perhaps adopt the more modest proposal sketched above and make such a reading part of the representation-election procedure, at least under the Fourth Circuit's view of the law.¹²⁶

120. 29 U.S.C. § 159(e)(1) (2012).

121. John Teeter recommends notice reading as a remedy for violations of the Act, a proposal that is fully defensible on the grounds articulated here but that does not go far enough to communicate vulnerability to employees engaged in, or considering, organizing. *See* Teeter, *supra* note 26, at 2 (arguing that “employers should always be required to read notices aloud to their workers as a standard remedy for violations of the Act”).

122. 29 C.F.R. § 104.202(a) (2012), *invalidated* by Chamber of Commerce of the U.S. v. NLRB, 721 F.3d 152, 154 (4th Cir. 2013).

123. Chamber of Commerce of the U.S. v. NLRB, 721 F.3d 152, 154 (4th Cir. 2013).

124. Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 959 (D.C. Cir. 2013), *overruled in part* by Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 22–23 (D.C. Cir. 2014).

125. *See* 29 U.S.C. § 158(c) (2012) (barring evidence of unfair labor practices based on expression of views absent a “threat of reprisal or force or promise or benefit”).

126. The D.C. Circuit's opinion in *National Association of Manufacturers* was overruled in part by *American Meat Institute v. U.S. Department of Agriculture*, 760 F.3d 18, 22–23 (D.C. Cir. 2014) (en banc). In any event, the fact that notice reading involves reading rather than posting could generate compelled-speech challenges under the First Amendment, in addition to any statutory limitations on the Board's authority to enforce such a rule. The constitutional validity of the notice-posting rule is relatively settled, at least to the extent that the requirement is limited to factual information—as would be the requirement proposed here. *See Am. Meat Inst.*, 760 F.3d at 21 (quoting *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)) (describing the mandated disclosure as “limited to ‘purely factual and uncontroversial information’”). Whether the verbal requirement would make the reading more susceptible to compelled-speech attack is beyond the scope of this Essay. For a discussion, see Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 869 (2015) (exploring “the burgeoning doctrine of compelled commercial speech”).

In addition to highlighting the desirability of a global notice-reading requirement, the Essay's argument about vulnerability points to new ways to think about—and new ways to defend—other contested rights. Two examples should be obvious from the above discussion. One, the extension of *Weingarten* rights to the nonunion workplace can be defended as a means of enabling nonunion workers to experience the employer's susceptibility to labor law.¹²⁷ Two, the rapid reinstatement of workers discharged during organizing campaigns—through increased use of the Board's authority to seek preliminary injunctive relief in cases of retaliatory discharge—can be defended on the same ground.¹²⁸

More broadly, recognizing the importance of vulnerability to the prospects for unionization suggests another reason why workplace access rights for nonemployee union organizers are so critical. This issue arises in at least two ways. First, union organizers often wish to speak with employees on company property. Doing so is frequently the best way—and at times the only way—for organizers to overcome the considerable coordination costs that inhere in trying to reach employees in their homes, or elsewhere outside of work. While the Supreme Court has recognized that “[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others,”¹²⁹ the Court's current jurisprudence forecloses—for all practical purposes—any claim that nonemployee organizers have a right to enter employer property to convey those advantages to employees.¹³⁰ The Court's rule, announced in *Lechmere, Inc. v. NLRB*,¹³¹ has been roundly and persuasively critiqued, most

127. For other arguments supportive of *Weingarten* rights in the nonunion workplace, see Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 814–15, 815 n.91 (1989); Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1749–50 (1989).

128. The Board's authority flows from § 10(j) of the Act. See 29 U.S.C. § 160(j) (2012) (describing the Board's power to petition any United States district court upon issuance of a complaint of an unfair labor practice); see also Sachs, *supra* note 44, at 2695, 2695–96 n.35 (mentioning the Board's power under § 10(j) to seek injunctive relief in cases of retaliatory discharge). Other defenses of rapid reinstatement can be found in Charles J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 EMP. RTS. & EMP. POL'Y J. 317, 357–58 (1998); PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 243–44 (1990). Of course, even 10(j) injunctions can take time, and on the account offered here, ought to be accelerated to best serve their purpose. See, e.g., NLRB General Counsel Memorandum GC 17-02, Report on the Midwinter Meeting of the ABA (Mar. 10, 2017), <https://www.nlr.gov/reports-guidance/general-counsel-memos>, [<https://perma.cc/U6JG-26S3>] (providing statistics related to the timing of § 10(j) injunctions).

129. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

130. See, e.g., Cynthia L. Estlund, *Labor, Property, and Sovereignty after Lechmere*, 46 STAN. L. REV. 305, 319 (1994) (discussing the *Lechmere* holding that nonemployee organizers “virtually never have the right to enter private property to communicate with unorganized employees”).

131. 502 U.S. 527 (1992).

prominently by Cynthia Estlund.¹³² But understanding the importance of vulnerability to law gives us another way of thinking about the problem with *Lechmere*.

As vigorous as employers are when it comes to attempts to prohibit their own employees from talking union at work, they are even more adamant when it comes to the ability of full-time union organizers to come onto employer property to discuss unionization. One employer put it this way: “If [a union organizer] comes onto my property, I’ll fill his butt with lead.”¹³³ This opposition stems in part from the fact that physical presence of union organizers on company property marks a major incursion into the employer’s control over the workplace. Excluding union organizers thus reinforces a perception of employer control. By the same token, a legal requirement that employers admit union organizers conveys to workers management’s susceptibility to the law of union organizing.¹³⁴ The union organizer’s physical presence on company property is a direct instantiation of law’s power to compel employers to respect the union-organizing right.

The second context in which access rights for nonemployee organizers is critical is the union’s right of reply to employer captive audience meetings. In organizing campaigns, employers nearly always require employees to attend meetings during which managers express their opposition to unionization.¹³⁵ Labor law protects management’s right to hold such meetings and to make them mandatory.¹³⁶ At one time, the NLRB offered unions a right of reply: if management held a captive audience meeting, the union was entitled to come onto company property and present its side of the story.¹³⁷ But this right was extinguished soon after it was established, and since 1953 unions have enjoyed no right to enter employer property in order to respond to management’s anti-union captive audience meetings.¹³⁸ Again,

132. See Estlund, *supra* note 130, at 308 (denying that a “naked property right” should “trump the substantial statutory interests of organized employees”).

133. *Mid-State, Inc.*, 331 N.L.R.B. 1372 (2000).

134. A cinematic example of this dynamic is available from *Norma Rae*. NORMA RAE (Twentieth Century Fox Film Corp. 1979). In an early sequence, the union organizer (Reuben Warshawsky) is excluded from the factory by a locked fence: the image is unmistakably one of employer power and control. Later in the film, however, the labor board orders the employer to allow Warshawsky to inspect a company bulletin board. The scene of Warshawsky walking through the factory—through what has previously been a site of unquestioned managerial authority—and, more particularly, the workers’ reaction to Warshawsky’s presence, unmistakably conveys the workers’ emerging sense that the employer is not invincible.

135. According to Bronfenbrenner’s work, captive audience meetings are held in more than 90% of union campaigns. BRONFENBRENNER, *UNEASY TERRAIN*, *supra* note 116, at tbl.8.

136. So long as they are held more than twenty-four hours before workers are scheduled to vote on unionization. *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429 (1953).

137. See *Bonwit Teller, Inc.*, 96 N.L.R.B. 608, 612 (1951) (holding, at the time, that unions have a right to present their case to employees under the same circumstances as employers).

138. See *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 408–09 (1953) (ruling that an employer may lawfully deny a union’s request to rebut speech on company premises).

the doctrine has been persuasively critiqued,¹³⁹ but the vulnerability thesis gives us a new way of doing so. Allowing unions to come into the workplace and speak to an assembled group of workers, and to counter management's negative message about unionization, would be a powerful message about the employer's susceptibility to the law of union organizing.

Finally, and most generally, the importance of vulnerability gives us another way to understand—and object to—the profound weaknesses in the NLRA's enforcement regime. As many have observed, the NLRA suffers from major enforcement problems.¹⁴⁰ The agency charged with enforcing the statute's substantive mandates is often slow and weak.¹⁴¹ And even when the Board endeavors aggressively to enforce the law, it is restrained by the remedial arsenal available to it: among other stark examples, the NLRB lacks the authority to order any type of punitive damages.¹⁴² This often means that it is economically rational for employers to violate the labor laws and suffer the rather paltry damage awards the Board can order; it means that the available remedies “simply are not effective deterrents to employers.”¹⁴³ From the employees' perspective, remedial weakness contributes to a perception of employer *invulnerability*. Accordingly, improving enforcement would—among other things—help establish for employees the type of employer vulnerability highlighted here.

IV. Conclusion

For students of social movements, law's contribution to collective action has long been a subject of intense interest. This Essay shows that law can perform such a role by shaping perceptions about the vulnerability of the status quo. In particular, the Essay shows that labor law can contribute to workers' perceptions that the existing regime of managerial control is susceptible to challenge and thereby to facilitate union organizing. In doing so, the Essay offers a new way to both understand and to defend a host of NLRA rights and remedies.

If the thesis here is correct, however, its implications extend beyond labor law and labor unions. Indeed, because all social movements depend on participants viewing the relevant status quo regime as subject to change, law's ability to shape perceptions of vulnerability may be relevant across social movement contexts. One obvious place to look is the civil rights movement, and in particular, to the role played by civil rights litigation in the

139. Paul M. Secunda, *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, 215 (2008).

140. See, e.g., Sachs, *supra* note 44, at 2694–700.

141. See, e.g., *id.* at 2696.

142. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1552 (2002).

143. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1788–89 (1983).

generation of that movement. For example, perhaps part of what cases like *Brown v. Board of Education* did was to convey that the structure of Jim Crow was becoming less invincible. Although he makes the point only in passing, Aldon Morris suggests as much in his history of the civil rights movement:

The endless court battles and agitation of the NAACP kept pressure on the Southern white power structures to abolish racial domination. It would be misleading to present the courtroom battles in a narrowly legal light. Their importance was more in demonstrating to Southern blacks and the NAACP that the Southern white power structure was vulnerable at some points.¹⁴⁴

In broad terms, when law demonstrates to challengers that those in power are subject to an authority greater than themselves, law has the potential to convey the vulnerability of the regime and thereby to open space for mobilization.

144. ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* 26 (1984).