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Civil Rights and the Low-Wage Worker

Article

***421 TOWARD FUNDAMENTAL CHANGE FOR THE PROTECTION OF LOW-WAGE WORKERS: THE
“WORKERS’ RIGHTS ARE HUMAN RIGHTS” DEBATE IN THE OBAMA ERA**[Ruben J. Garcia](#) [FN1]Copyright © 2009 University of Chicago; **Ruben J. Garcia**

As President Obama's administration begins this year, labor and employment policy is one of the areas that will likely change. This change will take the form of a legislative agenda that either offers new worker protections or reverses past decisions that have a negative effect on workers' rights. One of the first examples of change is the enactment of the Lilly Ledbetter Fair Pay Act, reversing a 2007 Supreme Court decision shutting the door on pay discrimination claims that were not timely because the employees did not know they had been discriminated against. [FN1] The legislation codified the “paycheck rule” that the Supreme Court had endorsed in earlier cases, where the time for filing a charge of discrimination was restarted with each new paycheck. [FN2] *422 There is also a strong push from organized labor to enact the Employee Free Choice Act, [FN3] which aims to facilitate the process of union organizing and increase the labor movement's ranks. The long-term effectiveness of these measures in enhancing the protection of workers, and particularly for the protection of low-wage workers, remains to be seen.

Each new presidential administration has high hopes for placing its stamp on labor policy. Republicans seek a return to laissez-faire economics, and Democrats seek more New Deal-style protections for workers. The pendulum swings between different administrations are familiar to labor and business, alike. In Democratic administrations, unions and plaintiffs seek to reverse business-friendly decisions from the courts and administrative agencies. Alternatively, Republicans seek to prevent further regulation of the economy by preventing new legislation and curtailing plaintiffs' lawsuits through procedural devices such as the Class Action Fairness Act of 2005. [FN4] This see-saw effect makes the expansion of workers' rights dependent on the outcome of elections. The uncertainty fails to produce fundamental changes for the enforcement of workers' rights.

The Ledbetter Act is emblematic of this pattern. After forty-five years of litigation under the Civil Rights Acts, the equal pay gap is not fully resolved. As President Obama said when he signed the bill, women still earn seventy-eight cents for the same work for every dollar that men earn, and “women of color [earn] even less.” [FN5] Over forty years of litigation under the Civil Rights Act and Equal Pay Act have yet to fully rectify that gap. In attempts to explain this wage gap, scholars have pointed to other aspects of structural and systemic discrimination in employment, such as job choice and levels of educational attainment. [FN6] There *423 are a variety of economic factors that also come into play, but even controlling for certain economic factors does not fully explain the gap. [FN7] These two examples highlight the need for a human rights framework to better protect low-wage workers. This Article explains how a human rights framework can be used more effectively to advocate for equal pay and the right to organize. The need for viewing workers' rights as human rights is due to the limits of the statutory reform process.

Although statutory change will continue to be an important part of Work Law, the limitations of statutory change raise the following questions applicable to the civil rights of low-wage workers. First, what kinds of legal advocacy will best further the rights of the most marginal workers in our society? Second, what discourse will best unify disparate strands of Work Law, such as employment discrimination, labor law, and employment law? In this Article, I argue that current statutory schemes divide workers into different categories. This is evident from the fact that there are different statutes to cover different kinds of employees. For example, there are separate statutes protecting the disabled, the aged, and non-citizens. [\[FN8\]](#) There are statutes that deal only with pay, some that deal with unequal pay related to gender, and some that deal with discrimination in all working conditions. [\[FN9\]](#) Under the National Labor Relations Act, for example, employees eligible to be unionized are divided into professional and nonprofessional employees, but they cannot be part of the same bargaining unit without an election. [\[FN10\]](#)

These dichotomies call for a new discourse about workers' rights unified by the principle that labor rights are human [*424](#) rights. Statutory rights by their nature are changeable, malleable, and politically contingent. Thus, they form an inadequate foundation for long-lasting change. Over more than twenty years, critical scholars have discussed the ways in which law has failed the most vulnerable in our society. The intervention of law to improve the conditions of people of color, women, and immigrants has achieved some successes and some failures.

While there have been notable legislative and judicial victories in areas such as racial profiling, sexual harassment, and hate crimes, there are other areas where progress is needed. Although the NLRA has been in effect since 1935 and explicitly encourages collective bargaining, the percentage of workers represented by labor unions has dropped from a high mark of 35 percent in the 1950s, to approximately 8 percent in the private sector. At the same time, the earning power of workers has decreased. [\[FN11\]](#) With the start of the Obama administration, hopes were high that the Employee Free Choice Act—a bill that would, among other things, make it easier to form unions—would be passed and signed as soon as Democrats obtained a 60-vote majority in the Senate. Enacting the EFCA turned out to be not as easy as expected. [\[FN12\]](#)

Labor advocates in the last several decades have shown greater interest in advocacy in constitutional and international areas of workers' rights. This advocacy has included addressing the needs of undocumented immigrants working in conditions approaching involuntary servitude, and the incorporation of international human rights principles into federal court actions dealing with corporate labor abuses abroad. Human trafficking laws have been enacted under congressional authority in Section II of the Thirteenth Amendment. [\[FN13\]](#) Recent scholarship has grounded the right to organize under the Thirteenth Amendment's prohibition of “involuntary servitude” on the theory that, without the right to associate and bargain, workers are not in the free labor condition that the Amendment intended for workers in [*425](#) the public and private sectors. [\[FN14\]](#) In addition, various courts have found international law protections for the right to organize and bargain collectively to be part of the “law of nations” under the Alien Tort Claims Act. [\[FN15\]](#) These innovations are important moves toward recognition of labor rights as ones that cannot be dependent on who is in political power at a particular time.

In this Article, I suggest a default interpretive rule could be used by courts to construe protective labor statutes in favor of workers. This can be done by reference to the many international principles that the United States is committed to with regard to workers' rights—including the freedom of association and the right to be free from discrimination, rights that are underlying the current debates about the amendment of the NLRA and the Equal Pay Act. While much of the effect of the fundamental rights analysis will be seen in how the courts apply these principles to statutory matters, workers' rights advocates can also use international principles to further workers' rights under domestic laws. Indeed, there are many instances currently of this approach being taken by labor unions and nongovernmental organizations.

A new dialogue about workers' rights requires critical examination of rights talk in Work Law. [\[FN16\]](#) Much of the debate surrounding the protection of the civil rights of minorities that occurred [*426](#) in Critical Race Theory and Critical Legal Studies [\[FN17\]](#) has yet to occur in the context of Work Law. In Work Law, the current focus is on incremental improvement of statutory rights. There is little attention to the kinds of rights that would best protect

workers. Quite apart from the need for improvements in statutory schemes is the need to conceive of workers' rights on a more basic level. This, I believe, is necessary for more fundamental change in the way that workers' rights are viewed and enforced in contemporary society. One way to accomplish this is through greater advocacy of certain minimum rights as recognized in international and constitutional law.

Numerous scholars have made cogent and worthy efforts to improve the statutory protection of workers. [\[FN18\]](#) Indeed, this is much of the focus in the field of Work Law. In many of those situations, statutes have played a positive role in social change. On the other hand, many statutory rights are still contested and debated. For example, the minimum wage is still a contested concept with many people questioning whether the minimum wage is ultimately a negative for low-wage workers. [\[FN19\]](#) Other rights, such as the right to be free from discrimination, the right to be free from slavery, and the right to be free from child labor have become part of international law, and have also been established in American law. [\[FN20\]](#)

In order to avoid the pendulum swings of politics, advocates must argue for more fundamental norms for the protection of labor rights. Statutory protections, while important, will not provide long-lasting change toward establishing workers' rights as *427 fundamental under constitutional and international law principles. Workers' rights must be seen as fundamental to the functioning of a democratic society, rather than as the special interest agenda of unions or plaintiffs' attorneys. This can be done through more advocacy for a minimum set of workers' rights as human rights, including the right to organize labor unions and the right to be free from discrimination, which undergird both the Employee Free Choice Act and the Ledbetter Act.

This Article places the movement toward international labor rights in the context of the debates among critical scholars about the importance of rights generally in liberal legalism. As in the prior debates, the need for minimum rights to protect outsiders such as low-wage workers is a starting point. In this Article, I establish that a minimum level of workers' rights is necessary and not problematic. The remaining question concerns the types of rights that will best protect marginal and low-wage workers and lead to a jurisprudence of fundamental worker rights. This is already being done in labor movement circles which rally under the banner that "labor rights are human rights." [\[FN21\]](#) Building upon the expansion of labor rights into international areas, I will describe the potential for these norms to be incorporated in the advocacy strategies of low-wage workers. I will rejoin the debate between whether social movements should rely on the courts or legislatures to protect their interests and apply these insights to the protection of worker rights.

This Article proceeds as follows. Part I begins by discussing the debate about the place of human rights dialogue for vulnerable workers. Part II discusses the state of the Equal Pay Act after the Lilly Ledbetter case and how the Equal Pay Act is emblematic of the way that statutory protections can divide workers. Part III looks at the possibilities of the Employee Free Choice Act, a statute that organized labor has made a priority in the Obama Administration, which is at its essence a restatement of what the law has required since 1935. Part III will also address how the EFCA does not, and cannot, address one of the largest segments of the low-wage worker population—immigrant workers. In order to further the needs of immigrant workers *428 seeking to organize regardless of their immigration status, a conception of freedom of association and collective bargaining as fundamental human rights must be the foundation of any attempt to change attitudes about the protection of workers' rights in our society today. Part IV discusses ways to make workers' rights fundamental in our society, and not politically contingent or perks for "special interests" when worker-friendly politicians are in power. [\[FN22\]](#) In the end, the Article draws upon scholarship on legal consciousness to transfer a discourse of fundamental rights to Work Law. The content and parameters of those rights is important for elevating these rights to a place where more people, especially judges, legislators, and policymakers, see them as fundamental.

I. The Tension Between Liberal Reform and Human Rights Strategies

Even when a statute is passed to improve the protection of workers, there is still resistance by the business community and a general ignorance about the foundations of why workers are protected. Instead of steady progress,

Work Law follows a pattern that Kimberle Crenshaw first identified in her foundational article *Race, Reform and Retrenchment*. [FN23] Crenshaw described a dialectical cycle of liberal incremental reform followed by backlash and retrenchment. The question then is whether a new discourse of workers' rights can be a better organizing principle for workers' rights, both for the labor movement and for advocates in courts.

While a shift has already occurred in the form of new advocacy movements and legal theories, there remains a debate about the place of human rights discourse in the protection of workers' rights. A recent volume of *New Labor Forum* included a colloquy between Jay Youngdahl and Lance Compa on the question of whether the language of human rights is the best vehicle for promoting the protection of workers. [FN24] Youngdahl argued that *429 international human rights tend to be too individualistic and not focused on the solidarity that the labor movement needs to build collective power. Compa saw human rights as one important strategy among many and an important way of building coalitions with emergent movements. Youngdahl countered that the human rights frame is not the problem—the problem remains the need for workers to build enough power to resist capital's inevitable resistance to their demands. [FN25]

Although Youngdahl made good points about the need for solidarity and caution about the individualistic tendency in human rights, I agree with Compa that human rights discourse is needed to better protect workers in today's society. I believe that the discourse of human rights provides a frame that the broad public, and some judges and other decision-makers will more readily enforce worker rights if they are put in the language of human rights. Further, as amendment to legislation continues to be stymied, there will continue to be a need for alternative strategies to further workers' rights.

Certain key articles in the late 1980s and the early 1990s remain among the most cited and central works in Work Law. [FN26] For decades, critical theorists have seen Work Law as an intensely politicized arena which illustrated the “politics of law” very well. [FN27] Judges either tended to favor their class interests over worker solidarity or ignored issues of racial or gender power in the workplace. To a large extent, their critiques were perfectly true and accurate. The problem is that this approach to the protection*430 of workers' rights does not further the fundamental protection of marginalized workers. In this Article, I argue for an attitudinal change in which judges, legislators, and scholars see the fundamental value of workers' rights.

In a foundational article of *Critical Legal Studies*, Mark Tushnet wrote that rights talk “does not do much good [i]n the contemporary United States.” He continued, “[rights talk] is positively harmful.” [FN28] The challenge for legal scholarship that seeks to protect workers' rights has been to avoid the reification of rights as ends in themselves, as well as to sidestep the backlash against rights that has led in Work Law to judicial acceptance of the rights of dissenters in unions, or the right of employers to speak to their employees about unionization—both of which have weakened the labor movement in various ways. [FN29] The question for this Article then is not whether rights are needed, but what kind of rights are most effective in making a place for workers' rights among those considered fundamental to the functioning of democratic societies.

Streams of outsider jurisprudence have struggled with the limitations of rights ever since critical legal studies emerged in the 1970s and 1980s. [FN30] Outsider jurisprudence is the name given to a number of different genres of scholarship, which focus on the most marginalized members of society, including *Critical Legal Studies*, *Critical Race Theory*, *LatCrit Theory*, *Queer Theory*, and *Feminist Theory*, among others. [FN31] Labor and employment scholars must also come to grips with the role of rights talk in the protection of vulnerable workers. As an example, Jennifer Gordon experienced the implementation of rights strategies on behalf of immigrant workers in her work as director of the *431 *Workplace Project* in Long Island. In her book *Suburban Sweatshops: The Fight for Immigrant Rights*, Gordon described an approach that sought to use rights talk strategically, while building workers' capacity to organize collectively to accomplish their goals. [FN32]

Critical theorists long have noted the problems and opportunities created by intersecting legal identities affecting people of color. [FN33] Women of color, in particular, have been caught in the margins of race and sex by anti-

scrimination laws that seem to provide two different bases of protection, while actually providing less protection than for white women or black men. This scholarship has been important in showing the multiple identities of individuals. This Article also focuses on workers with intersecting identities—such as African American workers in unions, immigrants of color, and white women. The point of this Article is to introduce competing bodies of law as a further marginalizing factor for low-income workers. In the presence of competing bodies of law that attempt to address the multiple identities of individuals, paradoxically, less protection is accorded to low-wage workers.

There are several prescriptions to ameliorate the status of low-wage workers. A holistic approach to law making, for example, might lead legislators to take into consideration the gaps into which workers might fall. This approach, however, is difficult for legislators to implement because the compromises involved in the legislative process inevitably leave gaps through which some workers will fall. The recent eviscerations of the Equal Pay Act, discussed in this Article, and the Fair Labor Standards Act, in the recent revision to the overtime regulations, reveal the inadequacy of statutes in bringing lasting change to the material status of low-wage workers. [\[FN34\]](#) As a result, there is a need to fill in the gaps in rights protections, but as illustrated in [*432](#) numerous examples, statutes have not been able to fully protect workers. These include cases involving the labor rights of undocumented workers, noncitizens, workers of color in unions, and public employees. [\[FN35\]](#) In construing laws, courts could interpret laws in a more holistic way, so that the purposes of various statutes could be reconciled. [\[FN36\]](#) There are some established divisions between workers, based on, for example, supervisory status, professional status, or agricultural work. The justifications for these distinctions have been discussed elsewhere. [\[FN37\]](#) The workers I am discussing in this Article all fit into the statutory definition of “employee,” which means that they are subject to the control of an employer. [\[FN38\]](#)

The core paradox of statutory protections is that the proliferation of protective labor laws has failed to adequately protect the workers at which they are aimed. Although workers are better protected now than they were in the 1800s, worker protections are not as strong as they could be given the complex web of statutes that govern their working conditions. This is for several reasons. First, labor and employment statutory schemes are often in conflict. Several Supreme Court decisions tell the story of marginalized workers such as immigrants, workers of color, and [*433](#) women. The legal dynamics of marginalization affect all workers, however, because of the nature of interlocking statutory schemes.

Second, judges can marginalize workers by pitting different statutory schemes at odds with one another. This phenomenon raises the question of whether statutory protections can sometimes be counterproductive and whether the resources put toward protective labor legislation for workers should be refocused. Instead of departing from statutory protection altogether, attention should be paid to the constitutional and international human rights of workers. In the end, international and constitutional principles can inform the proper interpretation of statutory rights that do exist.

Third, critical legal theorists must grapple with a way to use international labor law concepts to bridge the legal margins that deny vulnerable workers adequate legal remedies without being caught in the trap of liberal legalism that legislative change sometimes lays. The place of international principles in American law is under dispute. Some judges have explicitly referred to foreign principles in their decisions, largely because of the Alien Tort Claims Act and its explicit incorporation of international law. Other judges have questioned the place of foreign law in the courts. [\[FN39\]](#) This Article will argue that international principles are important because they transcend the blowing winds of politics and establish worker rights as fundamental.

Debates about the best way to protect the most vulnerable members of society have vexed legal scholars and practitioners for decades. Most of these debates, however, revolve around rights or no rights. This Article questions whether the debate is so stark. Rather, the question is “what kind of rights?” This Article argues that constitutional and international worker rights should be the primary focus for advocates of worker rights. In the hierarchy of American law, constitutional and international rights have greater purchase than statutory rights.

There are other problems with statutory protections of workers' rights. First, protective labor legislation has been suspended in times of crisis, most recently in the post-9/11 era, such as the suspension of prevailing wage statutes in

New Orleans. *434 Second, statutes are also subject to be construed in ways that are at odds with their intent or purpose. Finally, statutes can be changed with the blowing winds of political change—sometimes for the better, but sometimes for the worse.

Besides leaving workers in many cases without protection, overlapping protections may actually impede worker solidarity and divide workers against themselves. I argue that gaps in legal protection, and in the divisions that they might create, can be addressed by reference to international human rights norms. As the law continues to recognize the universality of the concerns of all workers through international norms, workers themselves will be more likely to see their commonalities and organize for change. As shown in two recent legislative campaigns brought by the allies of labor, statutory changes are often changes at the edges of the law without changes to underlying structural features of inequality, or seeing some rights, such as the right to be free from discrimination or the right to free association, as minimum labor standards.

II. Lilly Ledbetter's Story: Caught in the Gaps Between Title VII and the Equal Pay Act of 1963

Equal pay is a good starting point to discuss whether the promise of statutory rights has been fulfilled. In his 1994 book *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, Michael W. McCann uses the pay equity movement as a case study for the thesis on the importance of legal rights for social movements. [FN40] He concludes that even when the movement had been unsuccessful in the courts, the activity furthered a discourse about pay equity that advanced the cause of the movement. [FN41] The recent Ledbetter episode highlights some of the lessons of McCann's work but also shows the limitations of statutory discourse. The arrival of the Obama Administration also provides an opportunity for social movements to decide the best means for long-term change for vulnerable workers.

The story of Lilly Ledbetter, and the legislation that intended to correct the injustice done in her case, is emblematic of the way that statutes frequently offer only piecemeal change. The Equal Pay Act of 1963 was the product of the efforts of feminists*435 and their allies in the wake of greater equality in the workplace. [FN42] In brief, the Act requires equal pay for equal work, but the employer can defend unequal pay if there is an alternative reason other than sex. [FN43] The issue in Equal Pay Act cases is whether women are paid differently for performing the same jobs as men. Plaintiffs in Equal Pay Act cases also can bring claims under Title VII of the Civil Rights Act of 1964, which covers pay practices that discriminate on the basis of protected categories like race, sex, and national origin. Victims of pay discrimination can sue under either the Equal Pay Act, Title VII, or both. The different limitations periods under the two statutes generally determine whether the plaintiff will bring suit under Title VII, the Equal Pay Act, or both. Under Title VII, the plaintiff has to bring a charge with the Equal Employment Opportunity Commission (“EEOC”) within six months of the “discrete acts” of discrimination about which the plaintiff complains. Discrete acts of discrimination include “termination, failure to promote, denial of transfer and refusal to hire.” [FN44] Under the Equal Pay Act, which incorporates the enforcement provisions of the Fair Labor Standards Act, a violation must be brought within two years of the violation, or three years for willful violations. [FN45]

The multiple options that are available to equal pay plaintiffs do not guarantee success. This is evident in Lilly Ledbetter's case. Ledbetter worked at Goodyear Tire and Rubber Company in Gadsden, Alabama from 1979 to 1998. [FN46] She worked her way up to be a supervisor, but before retiring in 1998, she anonymously received a payroll sheet in her mailbox showing that her salary was significantly lower than that of her male counterparts who performed the same work. Ledbetter sued under Title VII and the Equal Pay Act. Her case under Title VII went to a jury, which found pay discrimination. Although the record is unclear as to why, her Equal Pay Act claim was dismissed by the district *436 court. [FN47] Even if the “paycheck rule,” or the principle that the statute of limitations can be restarted with every discriminatory paycheck, might be used to allow a suit under Title VII, it does not affect the statute of limitations under the Equal Pay Act, which accrues either two or three years after the unequal pay decision.

On appeal, Ledbetter's jury verdict on the Title VII claim was set aside by the Eleventh Circuit on the grounds that the claim should have been time-barred in the district court. [FN48] After Ledbetter took the case to the U.S. Supreme

Court, Chief Justice John Roberts and Associate Justice Samuel Alito joined the Court, replacing Chief Justice William Rehnquist and Associate Justice Sandra Day O'Connor. While the replacement of two Republican justices with two other Republicans may not have made a difference in most cases, the retirement of Justice O'Connor negatively affected Ledbetter's chances on appeal. After all, Justice O'Connor was part of the unanimous Court in 1986 that decided *Bazemore v Friday*. This case was relied upon heavily by Ledbetter for its rule that the time for filing an EEOC charge resets with each new discriminatory paycheck. [FN49] Even the late Chief Justice Rehnquist joined the unanimous opinion in *Bazemore*.

In the end, Chief Justice Roberts and Justice Alito were part of the five-member majority ruling against Ledbetter, with Justice Alito writing the Court's opinion. The Court concluded that the "discrete acts" required by the 180 day filing rule for Ledbetter's EEOC claim could not be renewed with each discriminatory paycheck. [FN50] Justice Alito wrote that the "paycheck rule" would not "breathe life into prior, uncharged discrimination." [FN51] Thus, Ledbetter requires workers who want to know if they are the victims of pay discrimination to seek information about their pay *437 compared to other workers. As Justice Ginsburg wrote on behalf of three other Justices in the dissenting opinion, the Court's decision encourages workers who think they have been discriminated against to try to ascertain their company's salary practices even though some workplaces prohibit any discussion of salary practices. [FN52]

Ledbetter is an example of a worker who is caught between different statutory schemes. In its recitation of the procedural posture of the case, the Court mentioned that the district court granted the defendants' summary judgment on Ledbetter's Equal Pay Act claim. [FN53] The record is not clear about why Ledbetter did not appeal the dismissal of this claim. Nonetheless, in the district court, Ledbetter might have been unable to meet the defense's argument that the pay disparity was based on a factor "other than sex." [FN54] Unlike the Paycheck Fairness Act, however, the Lilly Ledbetter Fair Pay Act did not deal with these defenses.

After the Court's ruling on May 29, 2007, Lilly Ledbetter became a symbol of the problem of equal pay and the appearance that the Supreme Court majority is indifferent to the plight of working women. Several commentators decried the Court majority's turning a blind eye to the precedent in *Bazemore*. Many of the commentators pointed to the difficulty that many workers have in ascertaining what their wages are and how this difficulty diminishes a worker's ability to bring a timely lawsuit. [FN55] The Court's interpretation of the statute, which is indifferent not only to the economic realities of working women, but also to the difficulty faced by all workers put the onus back on Congress to fill the gaps through which workers like Ledbetter will fall.

Democrats in Congress responded swiftly to seize upon the political momentum that Ledbetter's case provided. [FN56] Representative George Miller, a Democrat from California, introduced the Ledbetter Bill within a month of the Supreme Court's decision in 2007. Hearings followed that addressed the pay gap and the inability*438 of workers to know whether they had been discriminated against in pay. Comparable worth and the fact that thirty-seven years of litigation under the Equal Pay Act and Title VII had not fully closed the wage gap were not brought to the foreground as issues. The Bill made it through the newly Democratic-controlled House on a party line vote in July 2007 before stalling in the Senate throughout 2007 and 2008. The Senators holding the Bill expressed concern that it would lead to frivolous lawsuits, a common, yet ironic, response to a bill that deals entirely with procedure. [FN57]

The 2008 presidential campaign gave renewed life to Ledbetter's attempts to change the law. Ledbetter herself began joining Barack and Michelle Obama at various campaign stops. Ledbetter told her story as a way of emphasizing the next president's role in appointing more Supreme Court justices and the threat of further institutionalizing the conservative bent to the Court. In the late stages of the campaign, Ledbetter also did a voiceover for Obama's campaign in which she excoriated Republican presidential candidate John McCain for his claim that the pay gap could be narrowed if women would work harder and obtain more education. [FN58] According to focus groups, the Ledbetter advertisement registered very well for Obama's targeting of working women in the election. [FN59]

With Obama's election on November 4, 2008 and larger majorities for Democrats in Congress, the Ledbetter Bill was on a fast track to the President's desk. The enacted version of the Bill differed very little from the first version. The

Bill amends Title VII of the Civil Rights Act, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 to adopt the “paycheck accrual rule,” any time the discriminatory paycheck can be rooted back to a discriminatory pay practice. Each time a new paycheck is *439 issued, a new 180 day period for these statutes under the EEOC's jurisdiction is triggered during which a complainant may properly challenge any discriminatory conduct that impacted the paycheck's amount. A timely EEOC charge is a prerequisite to the plaintiff bringing suit. The plaintiff then can seek to recover back pay for two years during which the discriminatory practice occurred.

The Equal Pay Act is not enforced by the EEOC; it is subject to the remedies of the Fair Labor Standards Act of 1938. [\[FN60\]](#) As such, it does not require the filing of a charge as a prerequisite to a lawsuit. Perhaps because of the existence of the Title VII claim and perhaps because of the greater remedies available under Title VII, Ledbetter did not pursue the Equal Pay Act claim. The Lilly Ledbetter Fair Pay Restoration Act was, on January 29, 2009, the first Bill signed by the new President.

As much a victory as the Ledbetter bill is for the renaissance of congressional power over statutes interpreted by the courts, some perspective is in order. The law applies only to statutes enforced by the EEOC. It does nothing to modify the Bennett Amendment defenses that have served to defeat so many Equal Pay Act cases in previous years. The Bennett Amendment provides that all defenses that apply to the Equal Pay Act also apply to claims under Title VII of the Civil Rights Act of 1964. These defenses include the broad catch all of any factor “other than sex.” [\[FN61\]](#) Further, there is no discussion of comparable worth in any proposed legislation. [\[FN62\]](#)

In addition, the Paycheck Fairness Act was introduced as a companion to the Fair Pay Restoration Act that the President signed. This Bill does deal directly with the Equal Pay Act, including the beefing up of class actions, the limitation of employer defenses based on prior lower pay received at another job or other market forces. The Paycheck Fairness Bill purports to make Equal Pay Act litigation a greater threat to employers, which is one of the reasons that former President Bush promised to veto it if it made it to his desk. Although the Paycheck Fairness Bill passed the House of Representatives twice, most recently in January 2009 by a vote of 256 to 163, the prospects for the Bill in *440 the Senate hinge upon whether sixty senators will vote to bring the bill to a majority vote. This in turn depends on the final seating of all one-hundred Senators in the 111th Congress. Nevertheless, the Bill could flounder in the Senate without the momentum that was gained by Ledbetter's identification with the Fair Pay Restoration Act that reversed the result of her case.

The story of Lilly Ledbetter exemplifies a number of things about the promise and limitations of legislation in the making of social change. First, it is clear that Ledbetter fit into a political moment and an opportunity to deal with, ironically, a “discrete act” that was done to her by a majority of the Supreme Court. Secondly, Ledbetter was a sympathetic figure not just because her situation seemed familiar to many women, but because many women and men could sympathize with how difficult it would have been for Ledbetter to have obtained the data she needed to file the EEOC charge in the first place. Finally, the legislation was helped by the dovetailing presidential campaign and a larger Democratic majority in Congress. Still, the Senate vote in favor was sixty-one to thirty-six, and thus hardly overwhelming.

The fact that the Equal Pay Act amendments were put into separate bills suggests that legislative analysis warned against bringing the bills together because the two could not be supported as a package, even though there was an interrelationship between the bills. Second, the statute of limitations aspect of the case was sufficiently narrow to garner enough support, while the broader goals of the Paycheck Fairness Act would have more difficulty commanding a majority. Finally, the Ledbetter Bill would apply to a greater number of statutes enforced by the EEOC—those dealing with age and disability—rather than a bill that just deals with the Equal Pay Act, which is often seen as a problem for white women.

To be clear, Lilly Ledbetter's campaign created a rule that will help women of all colors expose pay discrimination. But the legislative campaign to do so resulted in a bifurcation of concerns under one statute from the enhanced

enforcement of another. That this division is a natural result of legislation is understandable. But the overall goal of changing the attitudes toward unequal pay in the economy remains undone. Comparable worth is certainly not anywhere on an agenda that focuses primarily on the litigation process under protective labor law statutes. Future plaintiffs may get in the courthouse door but still might not get past the defenses of the Bennett Amendment. Thus, the Ledbetter Act, while a procedural improvement, does not further the *441 normative discourse about the problem of unequal pay in American society.

Michael McCann focused on the battle for equal pay as a study of how social movements use litigation to mobilize. [FN63] Comparable worth is the idea that pay should be based on the value to the institution of the jobs at issue; not necessarily whether they require “equal skill, effort, and responsibility,” in the words of the Equal Pay Act. [FN64] McCann showed how advocates tried to use the existing statutory framework of equal pay to argue for greater rights than the statute would seem to allow. [FN65] The Supreme Court's decision in *Washington County v Gunther* [FN66] gave hope to comparable worth advocates that the comparable worth theory would work. [FN67] Justice Brennan's opinion, while hailed as a victory for comparable worth at the time, directly stated that the Court was not deciding the issue of comparable worth. [FN68] Nevertheless, then-Justice Rehnquist's dissenting opinion went to great pains to reject the idea that comparable worth claims were actionable under the existing statutory framework. Rehnquist's opinion has turned out to be the dominant view of the lower courts, according to McCann: “It is now clear that the bulk of subsequent decisions at all levels of the federal judiciary have agreed more with the Rehnquist position and significantly closed the doors of opportunity for comparable worth wage discrimination claims thought to be opened by *Gunther*.” [FN69]

This end of the comparable worth campaign in the United States did not stunt the growth of the theory in other countries. In the 1992 Treaty Establishing the European Economic Community, Article 141 endorsed the concept of comparable worth. [FN70] Also, the Canadian Human Rights Act makes comparable worth a policy that all of the country's provinces should further. [FN71] These *442 examples show that in other countries, equal pay and comparable worth are shown to be more of a priority than in the United States. There now seems to be little interest or willingness to debate the economic merits of comparable worth in the United States as part of domestic legislation.

III. The Employee Free Choice Act: Restoring the Rights that We Already Had

Now that Democrats control the White House and Congress, labor leaders see their best chance in years to pass labor law reform. Labor leaders are well aware, however, that bare majorities are not sufficient without at least a filibuster-proof majority in the Senate and a President who is willing to sign the legislation. This power gap was shown by the Employee Free Choice Act (“EFCA”), which aimed to codify card check agreements, and also increase penalties on employers. If enacted, the EFCA would require the National Labor Relations Board (“NLRB”) to certify a union without directing an election if a majority of the bargaining unit employees signed cards. In 2007, the Senate voted 51-48 to invoke cloture on the EFCA, nine votes short of the sixty needed to end debate and vote on the Bill. [FN72] Earlier in the year, the House of Representatives passed the Bill by a vote of 241-185, with President Bush promising to veto the Bill soon thereafter. [FN73]

One of the aims of the EFCA is to allow an arbitrator to decide contract terms for parties who cannot agree on a contract between the workers and the employer. This is intended to deal with the reality that almost a third of elections conducted by the NLRB resulted in no contract for the workers with the employer; a testament to the weakness of the legal duty to bargain in good faith. [FN74] The Bill also would increase penalties for violations of labor law, including treble damages and civil fines. [FN75] It would *443 make injunctions to stop violations of the law mandatory, taking away the discretion that the NLRB currently has to seek injunctions for unfair labor practices, which it does currently only in about 15 percent of cases. [FN76]

Although the EFCA has not passed Congress, its journey from organized labor's legislative wish list to a serious possibility in a mere four years showed the importance that organized labor put on EFCA. By way of a contrasting example, the Family Medical Leave Act was first introduced in 1984 and not passed until 1993. Nevertheless, one of

the main features of the EFCA, the card check provision, appears to be too controversial to be enacted. This provision would require the employer to bargain with the union on the presentation of cards authorizing the union to bargain on employees' behalf, rather than giving the employer the choice to demand a government conducted secret ballot election.

The opponents of the EFCA focus on what they call the antidemocratic aspects of the Bill. If signed into law, the Bill would require employers to bargain with a union upon a showing that more than 50 percent of its workers have authorized the union to bargain on their behalf. This could be accomplished by a showing of signed authorization cards presented by the union; thus employers dubbed the EFCA, “the card check bill.”

Despite the significant victory that the passage of the EFCA would represent in the new Democratic-controlled Congress, its significance also can be overstated. Current law already allows an employer to recognize and bargain with a union on the basis of authorization cards alone. [\[FN77\]](#) Further, students of labor law history know that the employer's ability to demand a secret ballot election upon a showing of cards is nowhere in the text of the National Labor Relations Act of 1935 (“NLRA”). [\[FN78\]](#)

In fact, the NLRA says nothing about how bargaining representatives are to be chosen, requiring only that the employer bargain in good faith with “representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes.” [\[FN79\]](#) The *444 National Labor Relations Board's function, as described later in the statute, is to confirm that the bargaining unit is “appropriate” and to determine “question[s] of representation.” [\[FN80\]](#)

In 1969, the Supreme Court determined that the employer has the absolute right to demand a secret ballot election in *NLRB v Gissel Packing*, [\[FN81\]](#) a case that upheld the legitimacy of authorization cards to show majority support after an employer's egregious unfair labor practices. [\[FN82\]](#) George Will, among others editorializing against the EFCA, quoted from Gissel on the op-ed page of the Washington Post, arguing that “the Supreme Court has said that the card-check system is ‘admittedly inferior to the election process.’” [\[FN83\]](#) What Will and other labor opponents do not mention is that this quote comes from Gissel, the case described above which held that, indeed, bargaining representatives can be chosen with authorization cards, even if the union loses a subsequent secret ballot election, if the employer has committed egregious unfair labor practices. [\[FN84\]](#)

This brings us back to the very reason that the EFCA is needed—because of egregious and rampant unfair labor practices by employers during election campaigns. [\[FN85\]](#) But it also brings us back to the importance of who occupies the White House, the same person who picks the Justices on the United States Supreme Court and the members of the NLRB. A new Supreme Court line up may look at the plain language of the NLRA and determine that the statute already requires the employer to recognize and bargain with a union upon any showing of majority support.

Indeed, this was the view of the NLRB and the Court until the oral argument in Gissel. In that case, counsel for the NLRB argued to the Supreme Court that an employer could refuse to bargain with a union that presented a facially accurate card majority even in the absence of a good faith doubt as to the validity *445 of the authorization cards. [\[FN86\]](#) For forty years since the NLRB stated in the Gissel case that an employer could insist on an election in all cases, except those where the employer has committed serious unfair labor practices, employers have held on to the right. Thus, the EFCA simply restates the law that seems to exist already within the text of the statute. It of course would be a powerful symbol to clarify the intent of the law with the EFCA, but other incentives for employer misconduct will exist.

But the EFCA as currently drafted does not address sufficiently the problems of one of the largest sectors who would like to be organized, immigrant workers. Certainly, a duty to bargain on the basis of cards alone would be an improvement over long election campaign battles in which immigrant workers are threatened with deportation. The facts of *Hoffman Plastic Compounds, Inc v NLRB* [\[FN87\]](#) are illustrative of how even in the absence of an election,

immigrant workers are caught between the margins of different bodies of law, such that reforming just one of them will not be enough. [\[FN88\]](#)

In *Hoffman*, the employer ran a plastics business in South Central Los Angeles. [\[FN89\]](#) In December 1988, a local of the Steelworkers began an organizing drive among *Hoffman*'s employees. A union organizer visited the plant frequently and distributed authorization cards to the employees, including the employee at the center of the Supreme Court decision, Jose Castro. [\[FN90\]](#) In January 1989, the employer interrogated employees about their union activity and then laid nine employees off, including Castro. The union did file an election petition, but withdrew it a few days before the election. [\[FN91\]](#)

The union filed an unfair labor practice charge against the employer because of the layoffs. [\[FN92\]](#) An Administrative Law Judge (“ALJ”) found that several employees had been fired in violation of the NLRA. At a hearing to determine the standard remedies such as back pay and reinstatement for the employees, Castro *446 admitted that he was not authorized to work in the United States and was actually born in Mexico. [\[FN93\]](#) The ALJ decided, consistent with NLRB practice, that reinstatement would not be available because of immigration law, but that back pay was not foreclosed because it is a remedy authorized by the statute and is a deterrent to future unfair labor practices. [\[FN94\]](#) The NLRB and the D.C. Circuit affirmed this ruling. [\[FN95\]](#)

The Supreme Court reversed the D.C. Circuit. [\[FN96\]](#) Writing for the five member majority, Chief Justice William Rehnquist ruled that granting back pay—pay that would have been earned but for the unlawful discrimination—to a worker who was not authorized to work in the United States would “trench upon” the important federal policies that are served by the Immigration Reform and Control Act of 1986 (“IRCA”). [\[FN97\]](#) Thus, the NLRB's remedy was beyond the NLRB's competence to award and was struck down. *Hoffman* has become a symbol of much of what is wrong with labor law, such as inadequate remedies, long delays, and a willingness by employers to retaliate against workers who are vulnerable because of their immigration status.

The EFCA does little to change the dynamics of immigrant worker organizing. As I have argued in other work, without changes in immigration law, the purposes of protecting immigrant workers under the NLRA, such as avoiding unfair competition and exploitation and deterring unfair labor practices, will not be effectuated. [\[FN98\]](#) Even without wholesale immigration reform, a mere change in the law restoring the NLRB's practice of granting back pay to workers regardless of immigration status is not politically saleable because of prevalent attitudes against undocumented immigrants in our society. In the end, immigrant workers regardless of status are a “discrete and insular minority” which cannot be fully protected through statutes. [\[FN99\]](#) As I will discuss below, one of the ways to accomplish this is to encourage judges to adopt universal norms of worker protection, not just as *447 rights in themselves, but also as guidance for the decision of difficult domestic law cases.

Finally, the passage of the EFCA has been cast by its opponents as a threat to democracy and even the First Amendment, in “taking away the secret ballot in union elections.” [\[FN100\]](#) This is another example in which the Constitution has been used to argue against worker protective norms. The merits of the claim seem dubious, since card check is a process of affirmatively supporting a union that is voluntary for the worker and is not being required by the government as where affiliation with organizations was requested by subpoena. [\[FN101\]](#) Nevertheless, the opponents of EFCA have consistently framed the debate in terms of democratic values. At the same time, the supporters of EFCA have not effectively made the claim that the low unionization rate reflects a deeper crisis of democracy. Advocates for the EFCA and for greater freedom of association in the work place must make the claim on those terms to better its chances for passage.

IV. The Need for a “Workers' Rights are Human Rights” Approach

What is needed, then, besides further legislative correction? Certainly, there will be a need for improvements in statutory protection. As discussed above, however, statutory change is necessary but not sufficient to fully protect

vulnerable and low-wage workers. For low-wage workers, legislative change can have palliative impact, but long-lasting change will come through normative innovations under constitutional and international law. In the case of gender relations, the command of equal protection under the law will apply only to public employment, but as in the case of other constitutional gender cases, stereotypes and norms about equal pay can be destabilized through litigation in the public sector.

Even rarer is any discussion of the international norms on equal pay that can be brought to bear on the United States' enforcement of the Equal Pay Act and other civil rights statutes. The Equal Remuneration Convention, Number 100, of the International Labor Organization (“ILO”) requires governments to take necessary steps to ensure that men and women receive *448 equal pay. [\[FN102\]](#) The North American Free Trade Agreement (“NAFTA”) also contains the equal pay principle as one of those which its member countries such as Canada, Mexico and the United States must “strive to improve.” [\[FN103\]](#) The North American Agreement on Labor Cooperation (“NAALC”), a side agreement to NAFTA, allows citizens in its member countries to bring complaints to dispute resolution bodies in each country that one of the three countries is failing to enforce its own labor laws. [\[FN104\]](#) This has led to a number of complaints brought by unions and advocacy groups for violations of employment discrimination and freedom of association principles, among others.

Not surprisingly, advocates bypassed international forums to address the Ledbetter decision, in light of the relatively friendly Congress and the pending presidential election. But doing so accepted the correctness of the decision under the current statutory regime. An ILO complaint at least would test whether the Supreme Court's decision effectively wrote the right of equal pay out of the law through procedural means. This is what happened in the case of Hoffman, where the Supreme Court held that undocumented workers were not entitled to back pay for violations of the NLRA. [\[FN105\]](#) The American Federation of Labor and the Congress of Industrial Organizations (“AFL-CIO”) made a complaint to the ILO after the decision, and it led to a finding that the United States should change its law to effectuate the principles of freedom of association that the United States should obey by virtue of its membership in the ILO. [\[FN106\]](#) This is one example of how labor rights can be seen as human rights.

*449 But it will not be easy to incorporate international norms into the discourse on the protection of workers' rights. First, there are structural obstacles to the incorporation of international law in federal law, as the United States has not signed on to all international instruments concerning worker rights. As a member of the ILO, the United States is deemed by the ILO to have accepted the Declaration on Fundamental Principles and Rights at Work and Annex, which holds freedom of association; collective bargaining and freedom from involuntary servitude, child labor and unlawful discrimination as fundamental to all member states regardless of whether they have adopted the conventions corresponding to the Fundamental Declaration. [\[FN107\]](#) Nevertheless, the United States has not adopted all of the individual conventions underlying the Declaration, such as Conventions 87 and 98 regarding freedom of association and collective bargaining. Whether the ILO's conception of membership is enough to place constraints on the United States to comport with international law is an argument that advocates must continue to make, in the face of some resistance from the United States. Simultaneously, however, the United States often responds that it need not adopt international conventions because domestic law already comports with international law. As described above, however, many workers fall through the gaps between domestic realities and international ideals.

Second, and a more vexing problem, is the inability to enforce many international and constitutional law principles. We first must confront the inability to enforce treaties that are not self-executing, which prevents residents of the United States from suing in federal courts to enforce them. Many of these treaties only impose obligations on governments to comply with international standards but do not give litigants the ability to challenge the government's failure to do so in court. For noncitizens, however, there is the Alien Tort Claims Act of 1789, which allows aliens to sue in federal court “for a tort only, committed in violation of the law of nations or a treaty of the United States.” [\[FN108\]](#) This statute has been used to challenge jus cogens offenses such as torture and forced labor committed with the help of private companies, but the courts have been less likely to hold many labor*450 rights violations as actionable against private companies. Nevertheless, there have been inroads in some district court decisions to hold companies liable for violations of freedom of association rights, but generally only in connection with acts of murder

or other violence.

Finally, the act of citing international law has been criticized by elected officials and some judges. Judge Richard Posner, an influential judge on the Seventh Circuit Court of Appeals, has been skeptical of the use of international law in federal courts. [\[FN109\]](#) Supreme Court Justice Antonin Scalia has decried the use of international law as guidance to the Court in cases involving sodomy, affirmative action, and the juvenile death penalty. [\[FN110\]](#) International law has been called undemocratic and more protective of workers than the United States law has traditionally been. [\[FN111\]](#) During the hearings on the nomination of Judge Sonia Sotomayor to the Supreme Court, many of the senators were critical of the use of international law in judicial opinions.

All of these challenges to incorporating international law norms into law are daunting. The benefits of doing so, however, are not to bring international law in for its own sake, or because it might be more protective of the worker. Indeed, in some instances it is far from clear that workers would be better off under the vague outlines of international or constitutional principles than the specific, technical protections of statutes. The reason for doing so is the same for attempting to bring constitutional norms to bear where possible. It is to show that Work Law rights are fundamental and intrinsic for inhabitants of all nations to (1) recognize their full potential in a democracy, (2) show the common bonds between all workers regardless of status, and (3) show that workers' rights should not be as subject to the shifting winds of politics as they have been; rather, certain fundamental principles should be agreed upon. I will address each of these in turn.

First, it is clear that labor rights are needed to effectuate many other rights in our society that are considered fundamental, even when only asserted against the government. The First ***451** Amendment to the Constitution, for example, only protects citizens against government abridgement of rights to speak, associate, and assemble. Nevertheless, if the freedom to associate in unions is squelched by employers to the point where workers are afraid to assemble under the threat of losing their jobs, they will be less likely to join together for political or other civic purposes. Sociologist Robert Putnam has identified a tendency in modern society for “bowling alone,” that is, not participating in civic groups. [\[FN112\]](#) But, regardless of whether this is a cause or effect of the decline of unionization over the last fifty years, there is little doubt that a lack of organizations at work, where most people spend the majority of their time, does not add to civic ferment. Further, constitutional rights for public employees, who can bring cases under the First Amendment, have been cut back by recent Supreme Court and legislative decisions. [\[FN113\]](#) This requires a renewed attention to the Constitution as a source of rights, but also perhaps to other sources of rights, which the United States labor movement has been utilizing recently.

Second, statutes by their nature divide workers into different categories. Rights under the NLRA, for example, do not apply to supervisors. And yet the NLRA in its first ten years of existence allowed supervisors to form unions. It was not until the Taft-Hartley Act of 1947, which cut back the right to organize in a number of ways that supervisors were excluded from the protection of the law. [\[FN114\]](#) Moreover, the Supreme Court has gradually made it more likely that people would be considered supervisors rather than employees, thus removing workers from the protection of the Act. [\[FN115\]](#) This is another example of how protective labor legislation just as easily can be regressive in its coverage and scope as it can be improved through progressive political gains.

International law, while not silent on the question of supervisors, is much more universal in its coverage of workers. There is no definition of “employee” in the ILO conventions. Rights are held to apply to “workers,” as ILO Convention 87 says, “without ***452** any distinction whatsoever.” [\[FN116\]](#) When the Supreme Court recently retracted the coverage of the NLRA from a group of charge nurses in *Kentucky River Community Care v NLRB*, [\[FN117\]](#) the AFL-CIO took a complaint to the ILO. [\[FN118\]](#) This is another example of how international norms might be used to further the discussion about the restrictive nature of the law, even though there does not seem to be much will to change the result in *Kentucky River* legislatively.

Finally, we should ask what would elevate workers' rights norms to a place where they are not merely a political football. This is not to suggest that there never will be some disagreement, often in good faith, about the intent of the

statute. Indeed, some of the beauty of our system is that politics allows different and new conceptions of labor and employment law with each new administration. Whatever the benefits for deliberative democracy of these pendulum swings, however, they do not lead to better protection for workers. As I have pointed out above, even under recent Democratic administrations, pro-worker labor law reform was often stifled and incomplete. For example, in its first sixteen years of existence, the Family and Medical Leave Act has provided rights to many workers, but for a large group of the population, it is still unusable because it provides only an entitlement to twelve weeks of unpaid leave. [\[FN119\]](#)

This strategy might be criticized for not providing enough support for workers in desperate need of relief under statutory schemes that need enforcement. My goal is not to diminish the needs for statutory protections. Instead, this Article is about the way that public international and constitutional norms can be brought to bear to enhance the enforcement of existing statutes and encourage the creation of new ones. In the end, how we see workers' rights is influenced by our position on a number of different issues. International and constitutional workers' rights principles at least stand apart from the political processes that have led to their existence and, ultimately, their deterioration.

*453 I do not suggest that in all cases statutory change cannot transmit norms. Rebecca Zietlow has made a powerful argument in her book to that effect. [\[FN120\]](#) There is an interesting counterfactual case to be made: What if *Brown v Board of Education* [\[FN121\]](#) had not been decided? [\[FN122\]](#) Would the United States have made the progress in civil rights that it has with statutes alone? Perhaps in the area of civil rights, permanent norms against discrimination could have been achieved through statutory change alone. The backlash against the Court's *Brown* decision shows that constitutional norms did not take hold immediately. And yet, the Court's place as an institution purportedly above politics may have led to greater legitimacy of its nondiscrimination principle under the Constitution. Again, despite the studies conducted by Gerald Rosenberg for his book *The Hollow Hope: Can The Courts Bring About Social Change?*, it is hard to know with certainty whether change would have occurred without *Brown*. [\[FN123\]](#)

Whether *Brown* was necessary for a change in attitudes about race and civil rights, the field of Work Law is constructed as a contest between warring factions and as zero sum games. The statutory and regulatory competition that takes place between labor and capital misses the mark in terms of a minimum floor of fundamental rights that should be agreed upon. As a result, employer resistance to unions is up, and minimum wage requirements are flouted.

Some argue that when dollars and cents are involved voluntary compliance with fundamental workers' rights cannot be expected. As a result, many feel that workers' rights are simply a matter of political struggle. Instead, what is needed is a conception of workers' rights that transcends politics. Despite the politics inherent in constitutional law-making, from Supreme Court appointments to coalition building on the Court, constitutional *454 norms have inherently more staying power than statutes simply because it is harder to amend the Constitution.

One legitimately can ask whether it makes sense to argue for the labor movement to return to constitutional norms as a primary source of protection. Indeed, a main impetus for the NLRA was to avoid the courts and constitutional litigation. Progressive attempts to pass labor legislation in the early twentieth century were thwarted by substantive due process decisions such as *Lochner v New York*. [\[FN124\]](#) The courts were inhospitable to labor organizing and frequently enjoined peaceful labor disputes. [\[FN125\]](#) And yet, it was labor organizing in the early twentieth century that fortified the First Amendment as a robust protection against government interference with expressive activity. More recently, that ground has been ceded to a resurgence of the rights of private property holders to resist labor activity, as well as the commandeering of First Amendment principles by employers to resist unionization.

There are certainly dangers in over reliance on constitutional rights. By their nature, constitutional rights are generally limited to government action, except in the case of the Thirteenth Amendment, which applies both to public and private action. Nevertheless, even as to public employees, the labor movement has retreated from constitutionally-protected freedom of association after some notable setbacks. In the end, the constitutional protection for the "right to assemble" should apply to all types of associations, even those for economic purposes, but the courts have

limited the right to “expressive associations,” which itself has had pernicious effects on state protections against discrimination. A broader vision of freedom of association is found in international protections, and can be used to inform statutory questions when the issue returns to the Supreme Court.

Despite different forms of advocacy, protective labor statutes will continue to be necessary. But they must be drafted, construed, and enforced in keeping with fundamental principles embodied in the Constitution and international law. These principles include deference to freedom of association, and construing existing statutes in favor of worker protection, as the Court might have done in *Ledbetter and Hoffman Plastic Compounds*. *455 The constitutional dialogue can begin with the Thirteenth Amendment's prohibition of involuntary servitude, but it need not end there. The First Amendment protects the freedom to associate from government interference. The explicit reference to the right to assemble in the Constitution shows the importance that the Framers placed on associations as an important part of democratic values. As discussed above, it has been part of the ILO's mission since the founding of that organization in 1919.

These principles can form the backbone of a canon of construction that courts can use to be more protective of worker rights—the *Charming Betsy* [FN126] analysis. In the 1804 *Charming Betsy* decision, Chief Justice John Marshall wrote: “[a]n act of Congress ought never to be construed in violation of the law of nations, if any other possible construction remains.” [FN127] This interpretive rule is used by courts to construe statutes in a way that does not conflict with treaties ratified by the United States. This has been commonly used in international law and could be used in a number of contexts to reach a result that is more protective of workers' rights than recent court cases have been. Charles Morris, in his book *The Blue Eagle at Work*, has also used *Charming Betsy* to buttress his arguments that the NLRA, as written, requires an employer to bargain directly with a group of employees even if they do not speak for all of the employees at a workplace. [FN128] Thus, international law principles can and should inform statutory interpretation, as long as statutes continue to be the dominant form of lawmaking to protect low-wage workers.

Conclusion: Toward a New Legal Consciousness about Workers' Rights

The transmission of norms about the law is the subject of the work of many scholars. Much of the groundwork of this field was laid by French sociologist Pierre Bourdieu. He posited that law has discursive and symbolic power. [FN129] Other scholars have taken an empirical look at the law's transmission of norms. [FN130] Legal *456 consciousness scholars attempt to determine the theoretical and empirical ways that the law mattered to individuals. [FN131]

A different consciousness about labor rights can be transmitted in a number of ways, whether through court decisions, legislation, or even statements by the President of the United States. This may not affect the attitudes of all people, but it may have an effect on courts' willingness to enforce statutes in a way that is consistent with the worker friendly principles of international law.

The point of this Article has been to apply some of the lessons of the discursive effect of law to the field of Work Law. One of the ways in which the law has failed low-wage workers has been in employer resistance to following the law protecting labor organizing. For a variety of reasons, there is a moral as well as legal valence to discriminating against people on the basis of their race and sex. Violating the law of union organizing, wage and hour laws and immigration enforcement has less of an impact because the law is seen as part of a political and economic struggle for resources and power. In some sense, Work Law is essentially contested and will always in some way be a struggle for resources and power. There is a need to change the terms of the way workers' rights are debated. The way to do this, I think, is through a human rights discourse. In the end, even if the law is not completely effective in resolving social problems, it may provide important normative lessons that will encourage compliance. This Article has tried to determine the best way to translate laws into norms that encourage compliance. In the area of Work Law, statutes have not been completely translated into norms. Instead, the political see-saw vacillates between protection and retrenchment of workers' rights.

A human rights frame is not a cure-all for the needs of low-wage, vulnerable workers. The constitutional welfare rights movement and “the end of welfare” show that constitutional rights are not necessarily going to translate into an ethic of care about the poor. [\[FN132\]](#) Nevertheless, the language of rights has a *457 powerful sway on individuals, and indeed is the language that is used to argue against worker protections in the name of “freedom of contract.” What must occur is the re-conceptualization of worker rights that governments, courts and private parties see as fundamental—including the right to associate and bargain collectively, and be free from discrimination.

In the context of the welfare rights movement, Elizabeth Wickenden said in 1969: “I think you have to face up to the fact that you cannot eat welfare rights, you cannot clothe your children in rights, and you do not really take your place in society by having a remedy for injustice under the law.” [\[FN133\]](#) These words could be equally true for low-wage workers' rights as for the rights of low-wage workers. Despite this realization, however, workers' rights will continue to be a part of the legal landscape. How these rights are viewed is part of the problem for low-wage workers. Without some minimum floor of rights, low-wage workers will continue to lose ground in wages, benefits and legal protection. As I have argued, these rights are best grounded in the fundamental norms of free labor—the right to freedom of association and the right to be free from discrimination.

[\[FNd1\]](#). Associate Professor, California Western School of Law, San Diego. Thanks to the editors of The University of Chicago Legal Forum for putting on the Symposium “Civil Rights and the Low-Wage Worker” and to all of the Symposium participants. Thanks also to Peggie Smith for her comments on the piece at the “Critical Race Theory at 20” Workshop at the University of Iowa College of Law. Sara Hoppenrath provided excellent research assistance in the editing process. This Article will be adapted in my forthcoming book, *Marginal Workers: How Legal Fault Lines Divide Workers and Leave Them Without Protection* (NYU 2010). Please do not cite, quote or distribute without the author's express permission.

[\[FN1\]](#). [Ledbetter v Goodyear Tire and Rubber Co., 127 S Ct 2162 \(2007\)](#) (holding that employees cannot challenge ongoing compensation discrimination if the employer's original discriminatory decision occurred more than 180 days before, even when the employee continues to receive paychecks that have been discriminatorily reduced), rev'd by statute as stated in [Siri v Princeton Club of NY, 59 AD 3d 309, 309 n 1 \(A D NY 2009\)](#) (“The Lilly Ledbetter Fair Pay Act provides that ‘an unlawful employment practice occurs, with respect to discrimination in compensation[,] each time wages, benefits, or other compensation is paid’ and effectively nullifies Ledbetter.”)

[\[FN2\]](#). Lilly Ledbetter Fair Pay Act of 2009, [Pub L No 111-2, 123 Stat 5 \(2009\)](#), amending [29 USCA § 626, 633a, 794a](#); and [42 USCA § 2000e-5](#), e-16 (2000 & Supp 2009). “An unlawful employment practice occurs with respect to discrimination in compensation of this title when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or practice.” [42 USC § 2000e-5\(e\)\(3\)\(A\)](#).

[\[FN3\]](#). HR 1409, § 4(b), 111th Cong, 1st Sess (Mar 10, 2009), available at <<http://govtrack.us/congress/billtext.xpd?bill=h111-1409>> (last visited Mar 21, 2009).

[\[FN4\]](#). Class Action Fairness Act of 2005, [28 USC §§ 1332\(d\), 1453](#), 1771-75.

[\[FN5\]](#). Barack Obama, Remarks by the President Upon Signing the Lilly Ledbetter Bill, The White House Blog (Jan 29, 2009), available at <http://www.whitehouse.gov/blog_post/AWonderfulDay/> (last visited Apr 7, 2009). See also Darlene Superville, Equal-Pay Bill Becomes Law, Obama's First, The Press of Atlantic City A3 (Jan 30, 2009) (summarizing the signing of the Lilly Ledbetter Fair Pay Act of 2009).

[FN6]. See, for example, Susan Strum, [Second Generation Structural Discrimination](#), 101 Colum L Rev 458, 461 (2001). Racial and gender inequalities persist mostly through second generation discrimination that consists of cognitive biases and patterns of interaction. This type of discrimination cannot be combated properly through courts interpreting and enforcing specific rules fashioned for a more deliberate, first generation type of discrimination.

[FN7]. Compare Richard A. Posner, An [Economic Analysis of Sex Discrimination Laws](#), 56 U Chi L Rev 1311, 1334 (1989) (supporting a laissez faire method to combat discrimination and stipulating that antidiscrimination laws interfere with economically efficient behavior and, therefore, reduce the overall social welfare of women), with John J. Donohue, [Prohibiting Sex Discrimination in the Workplace: An Economic Perspective](#), 56 U Chi L Rev 1337, 1347 (1989) (articulating a dynamic efficiency argument that shows that “a law penalizing discrimination will succeed in driving out the discriminators— thereby reducing the psychic costs of discrimination—even more quickly than would occur under laissez faire”).

[FN8]. Americans with Disabilities Act of 1990, [42 USC §§ 12101 et seq \(2000 & Supp 2008\)](#); Rehabilitation Act of 1973, [29 USC §§ 701 et seq \(2000 & Supp 2008\)](#).

[FN9]. Title VII of the Civil Rights Act of 1964, [42 USC §§ 2000e et seq \(2000 & Supp 2008\)](#).

[FN10]. National Labor Relations Act, [29 USC § 159\(b\)](#), gives the NLRB the power to certify bargaining units, except that the Board “shall not decide that the unit is appropriate for any purposes if such unit includes both professional and nonprofessional employees unless a majority of such professional employees vote for inclusion in such unit.”

[FN11]. Union Membership Posts Significant Gain in 2008, BLS Reports, Daily Labor Report AA-1 (BNA Jan 29, 2009) (comparing the sum of private sector and public sector union membership, currently 12.4 percent, to private sector union membership only, currently 7.6 percent).

[FN12]. Steven Greenhouse, Democrats Drop Key Part of Bill to Assist Unions, NY Times A1 (July 17, 2009) (discussing the political forces arrayed against card check).

[FN13]. See, for example, Trafficking Victims Protection Act of 2000, [Pub L No 106-386, 114 Stat 1464](#) (2000 & Supp 2008), codified at [22 USC §§ 7101-7200](#).

[FN14]. See Maria Ontiveros, Immigrant Workers' Rights in a Post-Hoffman World—Organizing Around The Thirteenth Amendment, 18 Geo Imm L J 651, 662-74 (2004) (proposing that the Thirteenth Amendment should apply to undocumented workers); James Gray Pope, The [Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957](#), 102 Colum L Rev 1, 3-13 (2002) (arguing that the Thirteenth Amendment, rather than the Commerce Clause, should be used to enforce labor and human rights); Lea VanderVelde, The [Labor Vision of the Thirteenth Amendment](#), 138 U Pa L Rev 437, 438-39 (1989) (suggesting that the Thirteenth Amendment includes issues of labor beyond the abolition of slavery). See also [US Const Amend XIII, § 2](#) (“Neither slavery nor involuntary servitude shall exist in the United States, or any place subject to their jurisdiction.”).

[FN15]. See [28 USC § 1350 \(2000\)](#) (“The district courts shall have original jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”); [Estate of Rodriguez v Drummond Co](#), 256 F Supp 2d 1250, 1259-60 (N D Ala 2003) (“As previously noted, three conditions must be met for subject matter jurisdiction under the [Alien Tort Claims Act]: (1) the plaintiff must be an alien; (2) the cause of action must be for a tort; and (3) the tort must be committed in violation of the law of nations or a treaty of the United States.”).

[FN16]. Work Law is the general term used to describe the constituent subjects of Labor Law, Employment Law, Employment Discrimination and Employee Benefits. The field includes the public and private sector workers, and

incorporates tort doctrines, constitutional law, and contract analysis. Basically, the field of Work Law addresses the legal ramifications that arise anytime work is done.

[FN17]. See, generally, [Minority Critiques of the Critical Legal Studies Movement](#), 22 Harv CR-CL L Rev 297, 297-434 (1987) ; Responses to Minority Critiques of the Critical Legal Studies Movement, 23 Harv CR-CL L Rev 293, 293-414 (1988).

[FN18]. Ellen Dannin, Taking Back the Workers Law (Cornell 2005); Paul Secunda, [Reflections on the Technicolor Right of Association](#), 96 Kentucky L J 343 (2008); Rebecca E. Zietlow and James Gray Pope, The [Toledo Auto-Lite Strike of 1934 and the Fight Against “Wage Slavery,”](#) 38 U Toledo L Rev 839, 839-54 (2007); Lea VanderVelde, The [Thirteenth Amendment of Our Aspirations](#), 38 U Toledo L Rev 855, 855-81 (2007); Risa L. Goluboff, [Race, Labor, and the Thirteenth Amendment in the 1940s Department of Justice](#), 38 U Toledo L Rev 883, 883-94 (2007). See also Risa L. Goluboff, The Lost Promise of Civil Rights (Harvard 2007).

[FN19]. David Card and Alan B. Krueger, Myth and Measurement: The New Economics of the Minimum Wage (Princeton 1997); George Borjas, David B. Freeman and Lawrence F. Katz, On the Labor Market Effects of Immigration and Trade, in George Borjas and David B. Freeman, Immigration and the Workforce (National Bureau of Economic Research 1992).

[FN20]. International Labour Organization, Declaration of Fundamental Principles and Rights at Work, available at <www.ilo.org/declaration>. See also [US Const. Amend XIII](#) (prohibition of involuntary servitude), Fair Labor Standards Act of 1938 (child labor provision); Civil Rights Act of 1964, [42 USC § 2000e et seq.](#)

[FN21]. James A. Gross, ed, A Long Overdue Beginning: The Promotion and Protection of Workers' Rights as Human Rights in Workers' Rights as Human Rights (ILR 2003); Gay Seidman, Beyond the Boycott: Labor Rights, Human Rights and Transnational Activism (Russell Sage 2007); Zaragoza Vargas, Labor Rights are Civil Rights: Mexican American Workers in Twentieth Century America (Princeton 2005); Jennifer Gordon, Suburban Sweatshops: The Fight For Immigrant Rights (Harvard 2005).

[FN22]. For analysis of how unions and plaintiffs' lawyers are treated as special interests, see, for example, Walter Olson, The Excuse Factory: How Employment Law Is Paralyzing the American Workplace 163 (Free Press 1997).

[FN23]. Kimberle W. Crenshaw, [Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law](#), 101 Harv L Rev 1331 (1988).

[FN24]. Jay Youngdahl, Solidarity First: Labor Rights are Not the Same as Human Rights, 18 New Labor Forum 31 (Winter 2009); Lance Compa, Solidarity and Human Rights, A Response to Youngdahl, 18 New Labor Forum 38 (Winter 2009). See also James A. Gross, ed, Workers' Rights as Human Rights 107 (Cornell 2006).

[FN25]. Lance Compa, Solidarity and Human Rights: A Response to Youngdahl (cited in note 22); Jay Youngdahl, Youngdahl Replies, 18 New Labor Forum 46, 46-47 (2009) (“The human rights framing just puts off the fundamental issue in the workplace—how are the efforts of labor to be divided? This has been the nexus of the fight between labor and capital since the dawn of capitalism. It is why labor can never be a human rights movement like others. The hostile management response to the Employee Free Choice Act (EFCA) is not because it is a human rights issue; it is because increased unionization has the potential to strengthen the ability of workers to get more of the pie.”).

[FN26]. Elizabeth M. Iglesias, [Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!](#), 28 Harv CR-CL L Rev 395, 399-403 (1993) (proposing that the intersection between the National Labor Relations Act (“NLRA”) and Title VII works to limit the chance for women of minorities to obtain redress for workplace harms and to prevent change in the workplace); Paulette M. Caldwell, [A Hair Piece: Perspectives on the](#)

[Intersection of Race and Gender, 1991 Duke L J 365, 383-85 \(1991\)](#) (explaining how minority racial characteristics are treated in antidiscrimination law); Kimberle W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U Chi Legal F 139, 140-50 (coining and explaining the term “intersectionality”).

[FN27]. See, for example, Karl E. Klare, *Critical Theory and Labor Relations Law*, in David Kairys, ed, *The Politics of Law: A Progressive Critique* 539 (Basic Books 1998); James B. Atleson, *Values and Assumptions in American Labor Law* (Massachusetts 1983).

[FN28]. Mark Tushnet, An [Essay on Rights, 62 Tex L Rev 1363, 1386 \(1984\)](#).

[FN29]. [Pattern Makers League of North America, AFL-CIO v NLRB, 473 US 95 \(1985\)](#) (union members can resign at any time); [Communications Workers of America v Beck, 487 US 735 \(1988\)](#) (union members can change their status to “agency fee payers” and be responsible only for the costs of grievance administration and collective bargaining.)

[FN30]. See, for example, John Henry Schlegel, *American Legal Realism and Empirical Social Science* 1 (North Carolina 1995) (“[I]t was not until the 1920s that more than an isolated soul would claim that legal science was unscientific.”); Roberto Mangabeira Unger, *The Critical Legal Studies Movement* 50-51 (Harvard 1986) (suggesting that the distinction between questionable and acceptable legal classifications under the equal protection doctrine may “reinforce entrenched positions in the social division of labor and systematic, discontinuous differentials of access to wealth, power and culture”).

[FN31]. See Francisco Valdes, *Culture, “Kulturkampf,” and Beyond: The Antidiscrimination Principle Under the Jurisprudence of Backlash*, in Austin Sarat, ed, *The Blackwell Companion to Law and Society* 271 (Wiley Blackwell 2004); Francisco Valdes, [Outsider Scholars, Legal Theory and OutCrit Perspective, 49 De Paul L Rev 831 \(2000\)](#).

[FN32]. Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigration Rights* 148-84 (Belknap 2005).

[FN33]. I use critical theory in this Article to include a number of genres of “outsider jurisprudence,” such as Critical Race Theory. For foundational writings on outsider jurisprudence, consider Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (NYU 2001); Richard Delgado and Jean Stefancic, eds, *The Latino/a Condition: A Critical Reader* (NYU 1998); Kimberle W. Crenshaw, et al, eds, *Critical Race Theory: The Key Writings that Formed the Movement* (New Press 1995); Angela P. Harris, [Foreword: The Jurisprudence of Reconstruction, 82 Cal L Rev 741, 744 n 15 \(1994\)](#) (pointing out that Mari Matsuda coined the term “outsider jurisprudence”).

[FN34]. Jared Bernstein and Ross Eisenbrey, *Eliminating the Right to Overtime Pay*, Report of the Economic Policy Institute (June 26, 2003).

[FN35]. [Hoffman Plastic Compounds, Inc v NLRB, 535 US 137 \(2002\)](#); [Espinoza v Farah Manufacturing Company, 414 US 86 \(1973\)](#); [Emporium Capwell v Western Addition Community Organization, 420 US 50 \(1975\)](#); [Garcetti v Ceballos, 547 US 410 \(2006\)](#) (cases discussed in the articles in the note directly below).

[FN36]. This Article builds on previous work that I have done, and places it in a theoretical framework about how law impacts the lives of workers. See **Ruben J. Garcia**, *Labor's Fragile Freedom of Association*, 8 U Pa J Labor and Empl L 283, 285-86 (2006) (suggesting that the events of September 11, 2001, in combination with national concerns of illegal immigration, led to the Supreme Court's anti-immigration decision in [Hoffman, 535 US 137](#); **Ruben J. Garcia**, [Across the Borders: Immigrant Status and Identity in Law and Lat Crit Theory, 55 Fla L Rev 511, 519 \(2003\)](#) (arguing that Title VII of the Civil Rights Act of 1964 should be amended by Congress to prohibit discrimination against immigrants authorized for employment under the law); **Ruben J. Garcia**, [Ghost Workers in an Interconnected World:](#)

[Going Beyond the Dichotomies of Domestic Immigration and Labor Laws](#), 36 U Mich J L Reform 737, 765 (2003) (“Labor law and immigration law reform are both needed, but until that happens, courts must reconcile separate bodies of law in a way that serves the stated policy objectives of both statutory schemes.”); **Ruben J. Garcia**, [New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement](#), 54 Hastings L J 79, 112 (2002) (proposing that identity caucuses can assist in democratizing labor unions for the benefit of women, immigrants, and minorities).

[FN37]. William B. Gould, A Primer on American Labor Law 36 (MIT, 4th ed 2004).

[FN38]. For a discussion of the factors determining employee status, see, for example, [Donovan v Sureway Cleaners](#), 656 F2d 1368, 1370 (9th Cir 1981) (formatting a six-factor test for determining whether a worker is an employee). See also [Donovan v DialAmerica Mktg.](#), 757 F2d 1376, 1385 (3d Cir 1985) (adopting the Sureway Cleaners test to hold that persons working from home researching telephone numbers were employees under the Fair Labor Standards Act of 1938).

[FN39]. Richard Posner, No Thanks, We Already Have Our Own Laws: The Court Should Never View a Foreign Legal Decision as a Precedent in Any Way, Legal Affairs (July-Aug 2004), available at <http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp> (last visited Apr 5, 2009) (arguing that foreign legal decisions should not have any precedential value).

[FN40]. Michael McCann, Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization (Chicago 1994).

[FN41]. *Id.* at 23-47.

[FN42]. See *Id.*

[FN43]. See [29 USC § 206\(d\)](#) (1) (2000) (“No employer shall discriminate between employees on the basis of sex by paying wages to employees at a rate less than the rate at which he pays wages to employees of the opposite sex for equal work.”). See also Robert L. Nelson and William P. Bridges, *Legalizing Gender Inequality: Courts, Markets and Unequal Pay for Women in America 2* (Cambridge 1999) (“[A] substantial portion of the pay differences between male and female jobs, especially in large organizations, cannot be attributed to the market and does not rest on efficiency principles.”).

[FN44]. [National Passenger Corp. v Morgan](#), 536 US 101, 114 (2002).

[FN45]. [29 USC § 255\(c\)](#) (2008).

[FN46]. [Ledbetter v Goodyear Tire and Rubber Co.](#), 127 S Ct 2162, 2166 (2007).

[FN47]. *Id.* See also [Ledbetter v Goodyear Tire Co.](#), 421 F3d 1169, 1175 n7 (11th Cir 2005).

[FN48]. *Id.* at 1185.

[FN49]. [Bazemore v Friday](#), 478 US 385, 395-96 (1986) (“Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII.”).

[FN50]. See also [Nat'l Railroad Passenger Corp v Morgan](#), 536 US 101, 116-18 (2002) (holding that Title VII prohibits recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period and that consideration of the entire scope of a hostile work environment claim, including behavior outside statutory time period is

appropriate so long as any act contributing to that hostile work environment takes places within the statutory time period); Del [State College v Ricks, 449 US 250, 256-59 \(1980\)](#) (holding that the filing limitation periods of Title VII commence at the time of the alleged discriminatory acts, not when the consequences of the acts culminate).

[FN51]. [127 S Ct at 2165](#).

[FN52]. [Id at 2181-84](#) (Ginsburg dissenting).

[FN53]. [Id at 2169](#) (majority).

[FN54]. [29 USC § 206\(d\)\(1\)](#) (2000).

[FN55]. See, for example, Rafael Gely, [Pay Secrecy/Confidentiality Rules and the National Labor Relations Act](#), 6 *U Pa J Lab & Emp L* 121 (2003).

[FN56]. Robert Pear, Justices' Ruling in Discrimination Case May Draw Quick Action from Obama, *NY Times* A13 (Jan 4, 2009) (reporting that Obama and Democrats in Congress would take quick action to overturn the Supreme Court's decision in Ledbetter); Lori Montgomery, White House Threatens to Veto Discrimination Bill, *Wash Post* A04 (Apr 23, 2008) (discussing how Republicans in the White House threatened to veto the Lilly Ledbetter Fair Pay Bill).

[FN57]. See, for example, Carl Hulse, Republican Senators Block Pay Discrimination Measure, *NY Times* A22 (Apr 24, 2008) (quoting Sen. Orrin Hatch, "The only ones who will see increases in pay are some of the trial lawyers who bring cases.").

[FN58]. "Need Education" Advertisement, available at <<http://www.youtube.com/watch?v=QxqjAejRF94>> (last visited Mar 19, 2009) ("I worked at this plant for twenty years before I learned the truth. I'd been paid forty percent less than men doing the same work. John McCain opposed a law to give women equal pay for equal work. And he dismissed the wage gap saying women just need education and training. I had the same skills as the men at my plant. My family needed the money. On the economy, it's John McCain who needs an education.").

[FN59]. Nina Totenberg, Fair Pay Law Strikes a Blow for Equal Pay, National Public Radio (Jan 29, 2009), available at <<http://www.npr.org/templates/story/story.php?storyId=99995431>> (last visited Mar 19, 2009).

[FN60]. [29 USC § 201 et seq \(2000 & Supp 2009\)](#).

[FN61]. [29 USC § 206\(d\)\(1\)](#).

[FN62]. See Carin Clauss, [Comparable Worth—The Theory, Its Legal Foundation, and the Feasibility of Implementation](#), 20 *U Mich J L Ref* 7, 17-83 (1986) (discussing the wage gap associated with sex-segregated occupations).

[FN63]. McCann, Rights at Work (cited in note 38).

[FN64]. [29 USC § 206\(2\)\(d\)\(1\)](#) (2000).

[FN65]. McCann, Rights at Work (cited in note 38).

[FN66]. [452 US 161 \(1981\)](#).

[FN67]. [Id at 167-77](#) (holding that the Bennett Amendment explicitly incorporated only limited defenses to unequal pay and did not otherwise bar suits based on a comparison of payment for different jobs).

[FN68]. 452 US 166.

[FN69]. McCann, *Rights at Work* at 37 (cited in note 38).

[FN70]. Treaty Establishing the European Community, Feb 7, 1992, OJ (C 224) 1 (1992) 1 CMLR 573 (1992), art 141 (as in effect in 1999), available at <<http://eur-lex.europa.eu/en/treaties/dat/11997E/htm/11997E.html#0173010078>> (last visited Mar 21, 2009). See also Mark A. Rothstein and Lance Liebman, *Employment Law* 488 (Foundation 6th ed 2007).

[FN71]. See Rothstein and Liebman, *Employment Law* (cited in note 68).

[FN72]. Roll Call vote on the Motion to Invoke Cloture on the Motion to Proceed on HR 800, 110th Congress, at <http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00227> (last visited Mar 21, 2009).

[FN73]. Roll Call on HR 800 in the 110th Congress, available at <<http://clerk.house.gov/evs/2007/roll118.xml>> (last visited Mar 21, 2009).

[FN74]. *Employee Free Choice Act Now, Myth vs. Reality: the Reality is the Employee Free Choice Act Helps American Workers and their Families*, available at <<http://www.intellectualconservative.com/2009/01/15/critiquing-the-employee-free-choice-act/>> (last visited Mar 21, 2009). See also <<http://www.employeefreechoiceactnow.org/index.html>> (last visited Mar 21, 2009).

[FN75]. HR 1409, § 4(b) (cited in note 3).

[FN76]. HR 1409, § 4(a), amending National Labor Relations Act (“NLRA”), [29 USC § 160\(l\)](#) (2000). William B. Gould, IV, [The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States](#), 43 *USF L Rev* 291 (2008).

[FN77]. [29 USC § 159](#) (2000).

[FN78]. [29 USC § 151](#) et seq (2000).

[FN79]. [29 USC § 159\(a\)](#) (2000).

[FN80]. [29 USC § 159\(c\)\(1\)\(B\)](#) (2000).

[FN81]. [395 US 575](#) (1969).

[FN82]. [Id at 597-99](#).

[FN83]. George F. Will, *Dues and Don'ts: For Unions, Coercion Over Persuasion*, *Wash Post* A19 (June 20, 2007) (quoting [Gissel, 395 US at 603](#)).

[FN84]. [395 US at 597-99](#). See also Laura J. Cooper and Dennis R. Nolan, *The Story of the NLRB v. Gissel Packing*:

The Practical Limits of Paternalism, in Laura J. Cooper and Catherine L. Fisk, eds, *Labor Law Stories* Ch 5 (Foundation 2005).

[FN85]. Kate Bronfenbrenner and Tom Juravich, *It Takes More than House Calls: Organizing to Win with a Comprehensive Union Strategy*, in Richard W. Hurd and Rudolph A. Oswald, eds, *Organizing to Win: New Research on Union Strategies* 41 (Cornell 1998).

[FN86]. [Gissel](#), 395 US at 609.

[FN87]. [535 US 137 \(2002\)](#).

[FN88]. [Id at 146-52](#) (holding that the Immigration Reform and Control Act of 1986 (“IRCA”) prohibited the NLRB from awarding backpay to undocumented aliens).

[FN89]. [Id at 140](#). See also Catherine L. Fisk and Michael J. Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights without Remedies for Undocumented Immigrants*, in Laura J. Cooper and Catherine L. Fisk, eds, *Labor Law Stories* Ch 5 (Foundation 2005).

[FN90]. *Id.*

[FN91]. [535 US at 140](#).

[FN92]. [Id at 140-41](#).

[FN93]. [Id at 141](#).

[FN94]. [Id at 141-42](#).

[FN95]. [535 US at 142](#).

[FN96]. [Id at 142, 152](#).

[FN97]. [Id at 137, 138, 144, 151](#).

[FN98]. Garcia, 8 U Pa J Labor and Empl L at 285-86 (cited in note 34); Garcia, [55 Fla L Rev at 519 \(cited in note 34\)](#); Garcia, [36 U Mich J L Reform at 765 \(cited in note 34\)](#).

[FN99]. [United States v Carolene Products Co, 304 US 144, 152 n 4 \(1938\)](#) (using the phrase “discrete and insular minorities” to describe those groups of persons that require judicial protection in order to access their constitutional rights).

[FN100]. See David Rivkin and Lee Casey, *Why Card Check is Unconstitutional*, Wall St J A23 (Mar 30, 2009).

[FN101]. [NAACP v Alabama ex rel Patterson, 357 US 449 \(1958\)](#).

[FN102]. *Equal Remuneration Convention (No 100) (164 ratifications), Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, 165 UNTS 303 (June 29, 1951), available at <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C100>> (last visited Mar 21, 2009). See also Louis Henkin, [U.S. Ratification of](#)

[Human Rights Conventions: The Ghost of Senator Bricker](#), 89 Am J Intl L 341, 342 (1995) (“[A]dherence to a convention will not change, or require change, in U.S. laws, policies or practices, even where they fall below international standards.”); Louis Michael Seidman, *Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review* 113 (Yale 2001).

[FN103]. [North American Agreement on Labor Cooperation \(“NAALC”\)](#), 32 ILM 1499, 1503 (Sept 14, 1993). See also North American Free Trade Agreement (“NAFTA”) Between the Government of Canada, the Government of United Mexican States and the Government of the [United States of America](#), 32 ILM 605 (1993).

[FN104]. NAALC at 1503 (cited in note 101).

[FN105]. [Hoffman](#), 535 US at 140.

[FN106]. ILO Governing Body Establishes Commission of Inquiry to Examine Violations of Trade Union Rights in Belarus Latest Report of ILO Committee on Freedom of Association Cites Belarus, Cuba, Zimbabwe, Others, ILO/03/48 (ILO Nov 20, 2009), available at <http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang—en/WCMS_005299/index.htm> (last visited Mar 21, 2009).

[FN107]. [ILO Declaration on Fundamental Principles and Rights at Work and Annex](#), 37 ILM 1233, 1233-34 (1998) (“The Declaration adopted by the Conference proclaims that all member States of the ILO have a legal obligation arising from their membership in the ILO to apply certain basic principles of fundamental human rights.”).

[FN108]. [28 USC § 1350 \(2000\)](#).

[FN109]. Richard A. Posner, [56 U Chi L Rev at 1334 \(cited in note 6\)](#).

[FN110]. See Norman Dorsen, [The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer](#), 3 Intl J Const L 519, 529-30 (2005).

[FN111]. Donald Dowling, Jr., [The Practice of International Labor and Employment Law: Escort Your Labor/Employment Clients Into the New Millenium](#), 17 Labor Lawyer 1 (2001).

[FN112]. Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* 1-24 (Simon & Schuster 2000) (discussing the disintegration of social capital and its effect on the decline in social networks, civic engagement and community organizations).

[FN113]. *Garcetti v Ceballos*, 547 US 210 (2006) (holding that a public employee could not state a constitutional claim for retaliation based on statements that were part of the part of the plaintiffs' job duties).

[FN114]. [29 USC § 185 \(2000\)](#).

[FN115]. See, for example, [NLRB v Kentucky River Community Care, Inc](#), 532 US 706, 711-12 (2001) (holding that employers have the burden of proving their employees' supervisory status in an unfair labor practice hearing).

[FN116]. ILO Committee on Freedom of Association, United States (Case No 2227), Report No. 332, ¶¶ 559, 610 (2003), available at <<http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?Lang=EN&hdroff=1>> (last visited Mar 21, 2009).

[FN117]. [NLRB v Kentucky River Community Care, Inc](#), 532 US 706 (2001).

[FN118]. Complaint Against the Government of the United States Presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) Report No 349, Case No 2524, available at <[http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=4787&chapter=3&query=\(United+States\)%40ref&highlight=&querytype=bool&context=0](http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=4787&chapter=3&query=(United+States)%40ref&highlight=&querytype=bool&context=0)> (last visited Mar 21, 2009).

[FN119]. [29 USC §§ 2601-54](#) (2000 & Supp 2008).

[FN120]. Rebecca Zietlow, *Enforcing Equality: Congress, the Constitution and the Protection of Individual Rights* 118 (NYU 2006) (discussing specifically how Congress has acted as an important protector of rights as the Supreme Court has, using Title VII of the Civil Rights Act of 1964 as an example).

[FN121]. 394 US 294 (1955).

[FN122]. *Id.* at 298-99 (holding that any local law allowing racial discrimination in public education is unconstitutional).

[FN123]. Gerald N. Rosenberg, *The Hollow Hope: Can The Courts Bring About Social Change?* 338 (Chicago 1st ed 1991) (“U.S. courts can almost never be effective producers of significant social reform.”). But see, for example, Michael Paris and Kevin McMahon, *The Politics of Rights Revisited: Rosenberg, McCann and the New Institutionalism*, in David Schultz, ed, *Leveraging the Law: Using the Courts to Achieve Social Change* 63 (Peter Lang 1998).

[FN124]. [198 US 45, 53 \(1905\)](#) (holding that the “right to free contract” was implicit in the due process clause of the Fourteenth Amendment).

[FN125]. See, for example, [Vegeahn v Guntner, 44 NE 1077, 1077-78 \(1896\)](#) (holding that the coercion by union interfered with the right of an employer to hire whom it pleases, and the right of workers to enter into employment).

[FN126]. [6 US \(2 Cranch\) 64 \(1804\)](#).

[FN127]. *Id.* at 118.

[FN128]. Charles J. Morris, *The Blue Eagle at Work: Reclaiming Democratic Rights in the Workplace* (Cornell 2004).

[FN129]. Pierre Bourdieu and Richard Terdiman, [The Force of Law: Toward a Sociology of the Juridical Field, 38 Hastings L J 805, 838 \(1987\)](#) (“Law is the quintessential form of the symbolic power of naming that creates the things named.”); Pierre Bourdieu and John B. Thompson, *Language and Symbolic Power* (Harvard 1991).

[FN130]. See, for example, Patricia Ewick and Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* 34-39, 224-30 (Chicago 1998) (discussing the ways in which Americans' lives are affected by the way they think about and use the law).

[FN131]. Sally Engle Merry, [Legal Pluralism, 22 L & Socy Rev 869, 879-87 \(1988\)](#) (discussing various normative orders).

[FN132]. Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973* (Yale 1991); Austin Sarat and Stuart A. Scheingold, eds, *The World's Cause Lawyers Make: Structure and Agency in Legal Practice* at 58-59 (Stanford 2005). On the ethic of care, see Dwight Furrow, *Reviving the Left: The Need to Restore Liberal*

Values in America (Prometheus 2009).

[\[FN133\]](#). Davis, Brutal Need at 119 (cited in note 130) (quoting Wickenden).

1 U. Chi. Legal F. 421

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