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## A HOLISTIC APPROACH TO TEACHING WORK LAW

MARION CRAIN\* AND PAULINE T. KIM\*\*

### INTRODUCTION

This essay discusses the holistic philosophy that guides us in thinking about and teaching Work Law.<sup>1</sup> As Michael Fischl has explained, most law school curricula divide the law of the workplace into three discrete topics: labor law, employment discrimination, and employment law—the “holy trinity” of American work law.<sup>2</sup> Labor Law traditionally encompasses the study of collective rights at work, particularly the law governing union organizing and collective bargaining.<sup>3</sup> Employment Discrimination deals with the statutes and case law that advance the antidiscrimination norm in the workplace through prohibitions on status discrimination at work.<sup>4</sup> Employment Law covers the statutes and common law governing individual rights at work, ranging from minimum standards legislation to judicially created doctrines based in tort and contract law.<sup>5</sup>

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1. This philosophy is further elaborated in a textbook we co-authored with our colleague, Michael Selmi. See MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, *WORK LAW: CASES AND MATERIALS* ix–x (2d ed. 2010).

2. Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERK. J. EMP. & LAB. L. 163, 165, 169–170 (2007).

3. Labor Law courses typically focus on the National Labor Relations Act, 29 U.S.C. §§ 151–169 (2011).

4. Employment Discrimination courses are organized around the core antidiscrimination statute, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2006), but also usually include coverage of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006), the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (West 2000 & Supp. 2008), and sometimes the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2006).

5. Employment Law courses tend to be survey courses, with coverage including the common law of wrongful discharge; contract law pertaining to the employment relation, including employee handbooks, covenants not to compete, and the law governing pre-dispute

It has become increasingly clear, however, that regulation of the employment relation defies such categorical thinking. Single actions by an employer can easily yield multiple claims by workers that cross traditional legal categories.<sup>6</sup> The traditional division also misses important opportunities to appreciate how the historical and social context shapes the form that labor market intervention takes. A holistic approach offers the opportunity to forge a comprehensive and coherent understanding of work law that will better prepare students for the realities of practice, where factual issues know no doctrinal boundaries.

Accordingly, we view regulation of the employment relation through a broad lens, organizing study in a basic introductory survey course around core themes of conflict that characterize the employment relation. We include job security, employee mobility, dignitary interests, voice, equality and non-discrimination, wages and hours, health and pension benefits, workplace safety, and public and private systems of justice. In each area, we ask students to consider how law should mediate the conflicts, what difference it makes whether employee rights are conceptualized collectively or individually, what influence the increasing racial, ethnic, and gender diversity of the workforce should have on law and workplace policy, whether dispute resolution systems should be privatized or remain in the public fora, and whether law is better suited than human resource practices, employer initiatives, or employee self-help measures to accomplish the desired goals.<sup>7</sup>

In this Essay, we offer two examples of how such holistic coverage might impact teaching and shape pedagogical goals.<sup>8</sup> The first example illustrates how legal problem-solving involving a concrete issue necessarily crosses doctrinal boundaries. More specifically, we consider the challenges surrounding the use of social media by employees, and the efforts of employers

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arbitration agreements; tort claims for infliction of emotional distress and invasion of privacy; statutory coverage of wage and hour laws, workplace safety, the provision of health care and pension benefits, and family leave; and other topics of interest to the professor that can be shoehorned into an already crowded semester.

6. Nicole Porter makes a similar point in her contribution to this Symposium. See Nicole Buonocore Porter, *A Proposal to Improve the Workplace Law Curriculum from a Corporate Compliance Perspective*, 58 ST. LOUIS U. L.J. 155 (2013). While she emphasizes teaching workplace law from a corporate compliance perspective, our focus is on how to transcend these doctrinal categories and present work law holistically to students from their first encounters with the subject. This goal is particularly important given that a significant number of schools no longer offer a separate labor law course. As Porter reports, 46 out of 195 law schools do not currently offer labor law. See *id.* at 158.

7. CRAIN, KIM & SELMI, *supra* note 1, at x.

8. We focus on these two examples because they involve very recent developments in work law, demonstrating the growing importance of approaching work law holistically. For additional examples of workplace issues that cross doctrinal boundaries, see Porter, *supra* note 6, at 162–169.

to regulate that use. The emerging tension over who controls employees' communications over social media implicates not only concerns about individual speech and privacy rights, traditionally part of employment law, but also the interests of employees in workplaces free of discrimination as well as their interest in responding collectively to shared concerns about working conditions, issues falling with the domains of employment discrimination and labor law, respectively. Thus, when considering the interaction between social media and the work relationship, a full appreciation of the legal risks and strategies facing employers, employees and their representatives requires facility with concepts across doctrinal categories. A holistic approach to teaching employment law not only enables students to cross these boundaries, it also enriches student understanding by highlighting the tensions as well as commonalities between these seemingly disparate areas of the law.

The second example involves a more general theme running throughout the law of work, the ability of employees to join together to leverage group power vis-à-vis their employer. Because most individual employees are relatively powerless against the consolidated power of the corporate employer, all three traditional work law subjects must address how, if at all, law should mediate that power imbalance. To what degree should law support the conceptualization of rights and facilitate the assertion of claims at a collective rather than individual level? In employment law, where the individual rights conception is most pronounced, the individual was historically left to rely on her own bargaining power. Congress soon found it necessary to establish minimum standards regarding matters such as wages, hours, and safety standards to prevent employers from exploiting individual vulnerability. In recent years, debate has centered around the availability of class claims under minimum standards legislation and in arbitration settings—are group claims essential to effectively enforce those rights? In employment discrimination, courts conceptualized discrimination as a harm that occurs to individuals because of their membership in a group, which may be sufficient to support class litigation in appropriate cases. The shifting nature of employment discrimination and evolving Supreme Court doctrine renders class discrimination claims increasingly difficult to maintain, however. In labor law, Congress responded to the imbalance of power by protecting unionization and mandating collective bargaining, explicitly permitting employees to band together to leverage their labor power. When we put the class and collective action claims from employment discrimination and employment law together with the labor law perspective, we can begin to see them all as a piece of the same conflict—a struggle over workers' ability to leverage group power rather than being forced to confront the employer as individuals.

## I. INDIVIDUAL VERSUS COLLECTIVE INTERESTS: THE CASE OF SOCIAL MEDIA

The explosive growth in popularity of social media platforms, like Facebook and Twitter, has transformed how people communicate with one another, and this transformation has inevitably affected workplace relations as well. Some firms, particularly those with a broad consumer base, have sought to harness the power of social media to promote their products and services and manage their public images. At the same time, widespread private use of social media by individuals has heightened firms' interests in monitoring and controlling the communications of their employees. For their part, employees have an interest in unfettered use of these new platforms, as a means of communication, entertainment, affiliation, and self-definition. The difficulties in mediating this tension between employer and employee interests are exacerbated by the increasingly blurred boundary between work and private life.<sup>9</sup> Employer-provided equipment is frequently used for personal as well as work-related communications, while employees are increasingly being encouraged to access work materials on their own personal devices, which are used for off-duty purposes as well.<sup>10</sup>

If one were to examine the legal implications of the growing use of social media solely within the frame of employment discrimination law, one concern would likely predominate: how to prevent discriminatory harassment, particularly sexual harassment. Title VII prohibits discrimination based on certain protected characteristics, including sex,<sup>11</sup> and the Supreme Court has made clear that harassing behavior constitutes discrimination when it is "sufficiently severe or pervasive" to create a hostile work environment.<sup>12</sup> While actionable harassment can occur along other protected dimensions, such

9. See, e.g., Pauline T. Kim, *Electronic Privacy and Employee Speech*, 87 CHI.-KENT L. REV., 901, 901–02 (2012); Patricia Sánchez Abril, Avner Levin & Alissa Del Riego, *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*, 49 AM. BUS. L.J. 63, 64 (2012); Ariana R. Levinson, *Toward a Cohesive Interpretation of the Electronic Communications Privacy Act for the Electronic Monitoring of Employees*, 114 W. VA. L. REV. 461, 467–68 (2012); Robert Sprague, *Invasion of the Social Networks: Blurring the Line Between Personal Life and the Employment Relationship*, 50 U. LOUISVILLE L. REV. 1, 1 (2011); Robert Sprague, *Orwell Was an Optimist: The Evolution of Privacy in the United States and Its De-Evolution for American Employees*, 42 J. MARSHALL L. REV. 83, 83–84 (2008).

10. See, e.g., *Mintz v. Mark Bartelstein & Assocs., Inc.*, 885 F. Supp. 2d 987, 999 (C.D. Cal. 2012) (finding plaintiff had a limited expectation of privacy in personal mobile phone used to make business calls and paid for in part by employer); Yaron Dori & Jeff Kosseff, *Employers Must Obtain Employee Consent For BYOD Programs*, LAW360 (May 24, 2013, 11:12 AM), [http://www.cov.com/files/Publication/cfc92c70-1ddd-4ce0-9a88-25ec908324df/Presentation/PublicationAttachment/f2476f96-c4d4-4dd3-b575-28614fc436f1/Employers\\_Must\\_Obtain\\_Employee\\_Consent\\_for\\_BYOD\\_Programs.pdf](http://www.cov.com/files/Publication/cfc92c70-1ddd-4ce0-9a88-25ec908324df/Presentation/PublicationAttachment/f2476f96-c4d4-4dd3-b575-28614fc436f1/Employers_Must_Obtain_Employee_Consent_for_BYOD_Programs.pdf) (reporting trend among companies to require workers to "bring their own devices" to access work email and other work-related applications).

11. 42 U.S.C. § 2000e-2(a)(1) (2006).

12. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

as race or national origin, the overwhelming majority of harassment cases have involved charges of sexual harassment.<sup>13</sup> The existence of a sexually hostile work environment may be established based on sexual advances or jokes by supervisors or co-workers, the use of degrading language, or the presence of pornography or highly sexualized images in the workplace. Many of the behaviors that could give rise to a hostile work environment—propositions, the sharing of pornography, highly sexualized or derogatory language and jokes—can occur as easily via electronic communications as in face-to-face interactions, and so the growth of social media seems to expand the avenues by which discriminatory harassment might occur. And because co-workers may communicate with one another outside of work on social media platforms, questions arise regarding the employers' responsibility for comments and behaviors occurring outside the workplace and off-duty.<sup>14</sup>

Given the risks of legal liability for sexual harassment, the employment discrimination frame might suggest that employers should engage in extensive monitoring of their employees' activities on all social media platforms, whether engaged in on- or off-duty, and discipline them for any activities that violate employer-imposed norms of propriety. This impulse to monitor is likely reinforced by case law establishing the contours of an employer's vicarious liability for harassment. In *Ellerth* and *Faragher*, the Supreme Court held that an employer could avoid vicarious liability for a hostile work environment created by a supervisory employee if the employer "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and the employee unreasonably failed to take advantage of employer-provided opportunities to address the harassment.<sup>15</sup> Although much of the subsequent case law focused on the adequacy of employers' sexual harassment complaint procedures and the "reasonableness" of employee behavior, an open question remains as to what other steps an employer must take to prevent harassing behavior in order to take advantage of the affirmative defense.

Consideration of employment discrimination law raises other concerns about the use of social media. An employee's or applicant's online activities can reveal a host of personal information, including information about protected characteristics that might not otherwise be apparent to the employer.

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13. See CRAIN, KIM & SELMI, *supra* note 1, at 637.

14. See, e.g., *Blakey v. Cont'l Airlines Inc.*, 751 A.2d 538, 543 (N.J. 2000) (holding employer would be liable for failing to remedy workplace harassment based on statements posted by co-employees on electronic bulletin board); *Amira-Jabbar v. Travel Servs., Inc.*, 726 F. Supp. 2d 77, 85–86 (D.P.R. 2010) (granting employer's summary judgment on racial harassment claim that included allegation that a co-worker had posted an offensive racial comment on Facebook). See also Jeremy Gelms, *High-Tech Harassment: Employer Liability Under Title VII for Employee Social Media Misconduct*, 87 WASH. L. REV. 249, 249–50, 269–72 (2012).

15. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

For example, online posts by an individual, or her associates, might disclose her religion, the existence of a disability, or an intimate association with someone of another race, all prohibited bases for making employment decisions under anti-discrimination laws.<sup>16</sup> Online postings may also reveal an individual's family medical history, a form of genetic information. Under the recently enacted Genetic Information Nondiscrimination Act,<sup>17</sup> however, employers are prohibited not only from taking adverse actions based on an employee's, or applicant's, genetic traits, but also from requesting or collecting such information.<sup>18</sup> Using the frame of employment discrimination law thus focuses attention on the particular traits protected by law and how social media might make employees more vulnerable to adverse actions based on those protected characteristics.

Examined from the perspective of employment law, however, the tension over employee use of social media has a different cast. Employment law has long been concerned with individual rights of workers, including their interests in autonomy and in avoiding dignitary harms. Thus, when considering social media, concerns about employee privacy and speech come to the fore. Although in some ways just another mode of communication, social media—and electronic communications more broadly—present distinct challenges. Unlike more traditional forms of communication, electronic communications can be easily monitored in real time or permanently stored for later retrieval and analysis. They can also be infinitely and exactly replicated and distributed to large numbers of people almost instantaneously. As individuals move more of their personal lives online, the details of their associations, activities, and beliefs are increasingly vulnerable to surveillance and subsequent disclosure, including by or to their employers.

The growing use of social media thus raises complex issues about when and under what circumstances employers may legitimately access employees' personal accounts. Courts have struggled to define when an individual employee has a reasonable expectation of privacy,<sup>19</sup> and how statutory

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16. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2006) (religion); The Americans with Disabilities Act, 42 U.S.C. §§ 12112(a) (2006) (disability); *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008) (association); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994–95 (6th Cir. 1999) (association); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (association).

17. 42 U.S.C. §§ 2000ff to -11 (2012).

18. *Id.* § 2000ff-1(b). The Act makes it unlawful for an employer to “request, require or purchase genetic information” subject to certain exceptions.

19. *Compare* *Bohach v. City of Reno*, 932 F. Supp. 1232, 1234, 1236 (D. Nev. 1996) (finding no expectation of privacy in pager messages), *and* *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D. Pa. 1996) (holding employee did not have reasonable expectation of privacy in messages sent over company owned e-mail system) *with* *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 663 (N.J. 2010) (concluding employee had reasonable expectation of privacy in

limitations on electronic access created in an era predating Facebook or MySpace should apply to social media platforms.<sup>20</sup> What is the legal significance, for example, of privacy settings established by the employee? Or the fact that the individual's account is password protected? Does a "friend" request by a supervisor threaten an employee's personal privacy? Legislatures have begun to step in, with nearly a dozen states passing statutes to protect employee privacy by prohibiting employers from requesting or requiring that employees or applicants turn over their passwords to their social media accounts.<sup>21</sup> Pushing against greater protection of employee privacy are employers' needs to safeguard trade secrets and other confidential business information.

Social media platforms are not only vehicles for personal communications, but also fora for the individual to express her opinions and concerns to a broader public. Precisely because social media is such a powerful tool for broadcasting opinions, employees have an interest in using it to engage in unfettered speech—whether for purposes of self-expression or advocacy on public issues. And for precisely the same reason, employers may fear that an employee's publicly-expressed opinions may cause reputational or other harm to the firm. Thus, the speech aspects of social media are another locus of tension in the employment relationship. Public employees have alleged that employer retaliation for their speech and associations on social media violate

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email exchanged with her attorney on her personal, password-protected email account accessed through a company-provided laptop computer), and *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548, 560 (S.D.N.Y. 2008) (finding former employee had reasonable expectation of privacy in personal, password-protected email accounts). The Supreme Court recently declined to decide the question of whether a public employee had a reasonable expectation of privacy in personal text messages sent on an employer-provided pager in *City of Ontario v. Quon*, 130 S. Ct. 2619, 2629–30 (2010).

20. See Stored Communications Act, Title II of the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2701–12 (2006); *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 113–14 (3d Cir. 2004); *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 876 (9th Cir. 2002); *Pietrylo v. Hillstone Rest. Grp.*, No. 06–5754, 2008 U.S. Dist. LEXIS 108834, at \*18–20. (D.N.J. July 25, 2008).

21. To date, the following states have enacted such statutes: Arkansas, ARK. CODE ANN. § 11–2–124 (2013); California, CAL. LAB. CODE § 980(b) (West 2013); Maryland, MD. CODE ANN., LABOR & EMPL. § 3–712 (West 2013); Illinois, 820 ILL. COMP. STAT. 55/10 (2013); Michigan, MICH. COMP. LAWS § 37.273 (2012) UTAH, UTAH CODE ANN. § 34–48–201 (2013); New Mexico, N.M. STAT. ANN. § 50–4–34 (2013); Colorado, COLO. REV. STAT. § 8–2–127 (2013); Washington, WASH. REV. CODE § 49.44.0003 (2013); and New Jersey, N.J. STAT. ANN. § 34:6B-6 (2013). Similar legislation is pending in the U.S. Congress. See Michael O. Loatman, *Congress May Limit Employer Access to Personal Social Media Accounts*, 28 DAILY LAB. REP. (BNA), Feb. 11, 2013, at 23 (reporting that a proposed Social Networking Online Protection Act (SNOPA) was introduced in Congress).



their First Amendment rights.<sup>22</sup> Employees in the private sector generally lack legal protection for their individual off-duty expression,<sup>23</sup> and numerous instances of workers losing their jobs because of their online activities outside the workplace have been reported.<sup>24</sup> Given the lack of legal regulation in this area, private firms are increasingly promulgating social media policies that attempt to establish standards for their employees' social media use, even off-duty, on pain of discipline or discharge, while scholars have argued for explicit legal protection for the speech rights of private sector workers.<sup>25</sup>

Even though employees may lack robust legal protection under doctrines intended to protect individual speech and privacy, retaliation for certain forms of employee speech can give rise to employer liability. In particular, speech *among* employees relating to shared workplace concerns, such as wages, hours, or working conditions are protected as a form of collective activity. Thus, examining employees' social media use from a labor law perspective highlights a new set of legal issues. Section 7 of the National Labor Relations Act (NLRA) broadly protects workers' rights to self-organization, encompassing not only formal union organizing, but also all "concerted activity" undertaken for "mutual aid or protection."<sup>26</sup> Numerous National Labor Relations Board (Board) and court decisions have established that these

22. These claims have met with varying degrees of success. *See, e.g.*, *Bland v. Roberts*, No. 12-1671, 2013 WL 5228033, \*15-16 (4th Cir. Sept. 18, 2013) (holding that "liking" the Facebook campaign page of a candidate for sheriff was constitutionally protected speech); *Mattingly v. Milligan*, No. 4:11CV00215 JLH, 2011 WL 5184283, at \*4 (E.D. Ark., Nov. 1, 2011) (holding that plaintiff's Facebook post referring to the firing of several fellow employees in the Circuit Clerk's office was constitutionally protected speech). *But see* *Gresham v. City of Atlanta*, No. 1:10-CV-1301-RWS, 2011 WL 4601020, at \*2, \*5 (N.D. Ga. Sept. 30, 2011) (finding police officer's Facebook comments constitutionally protected, but concluding that government's interest in efficiency outweighed plaintiff's interest in speech and therefore no First Amendment violation occurred).

23. The First Amendment restricts government, not non-state actors, although it could provide a public policy basis for protecting private sector employees from retaliation for their speech. *See, e.g.*, *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 900 (3d Cir.1983). In addition, a handful of states have statutes that protect private employee speech, or related interests, such as political activity. *See* Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 313-33 (2012). Employee speech might also be protected if it falls within a specific statutory or common law protection for whistleblower speech—that is, speech reporting or objecting to specified types of unlawful employer practices. *See* Kim, *supra* note 9, at 924. For the most part, however, private employees' off-duty speech unrelated to the workplace is not legally protected.

24. *See, e.g.*, Kim, *supra* note 9, at 912-13; Robert Sprague, *Fired for Blogging: Are There Legal Protections for Employees Who Blog?*, 9 U. PA. J. LAB. & EMP. L. 355, 357-58 (2007).

25. *See, e.g.*, Ann C. McGinley & Ryan P. McGinley-Stempel, *Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media*, 30 HOFSTRA LAB. & EMP. L.J. 75, 79-80 (2012).

26. 29 U.S.C. § 157 (2006).

rights apply not only when workers belong to a union or are attempting to form a union, but to unorganized workers as well, even though they may not have any conscious intent to organize at the time.<sup>27</sup> These precedents have recognized that in order to meaningfully protect the right to organize, informal joint discussions among employees—the precursors to group action—must also be protected.<sup>28</sup> Even individual activity may be protected as concerted where “individual employees seek to initiate, to induce, or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.”<sup>29</sup>

In a series of recent decisions, the Board has made clear that these section 7 protections can apply to workers’ discussions on social media.<sup>30</sup> For example, the Board found that several employees were engaged in protected concerted activity when they complained about their supervisor in a conversation on Facebook. The Facebook discussion had followed a meeting in which the workers raised concerns about their safety when closing the employer’s store after most of the businesses in the area had already closed. The administrative law judge viewed their Facebook posts as a continuation of that group effort to address their concerns, but the Board concluded “the Facebook postings would have constituted protected concerted activity in and of themselves” because they related to their terms and conditions of employment.<sup>31</sup> Thus, the employer’s decision to discharge the employees because of their Facebook posts constituted a violation of section 8(a)(1).<sup>32</sup>

The Board has also scrutinized employers’ social media policies for compliance with the NLRA. Prior Board authority established that a work rule

27. See, e.g., *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 17 (1962); *NLRB v. Phx. Mutual Life Ins. Co.*, 167 F.2d 983, 988 (7th Cir. 1948), *cert. denied*, 335 U.S. 845 (1948); *NLRB v. Guernsey-Muskigum Elec. Coop., Inc.*, 285 F.2d 8, 12 (6th Cir. 1960); *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 247–48 (1977).

28. Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1701 (1989).

29. *Meyers Indus.*, 281 N.L.R.B. 882, 887 (1986).

30. See, e.g., *Design Tech. Grp.*, 359 N.L.R.B. No. 96, 2012–2013 NLRB Dec. (CCH) ¶ 15,687 (Apr. 19, 2013); *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164, 2012–2013 NLRB Dec. (CCH) ¶ 15,620 (Sept. 28, 2012); *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 2012–2013 NLRB Dec. (CCH) ¶ 15,656 (Dec. 14, 2012). The status of these decisions is uncertain after the D.C. Circuit held in *Noel Canning v. NLRB*, 705 F.3d 490, 506–07 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (2013), that since January 2012 three of the Board’s members have lacked constitutionally valid appointments, leaving the Board without a quorum to take lawful action. See, e.g., *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2642 (2010). Nevertheless, the issue is likely to recur, as the Board has received numerous charges alleging interference with protected rights based on employer’s retaliation for employees’ use of social media and many similar cases are pending.

31. *Design Tech. Grp.*, 359 N.L.R.B. No. 96.

32. *Id.*

violated section 8(a)(1) when the rule “would reasonably tend to chill employees in the exercise of their section 7 rights.”<sup>33</sup> Even if the rule does not explicitly prohibit section 7 activities, it is unlawful if “employees would reasonably construe the language to prohibit section 7 activity.”<sup>34</sup> The Board has recently found that an employee handbook that broadly prohibits any online statements “that damage the Company, defame any individual or damage any person’s reputation clearly encompass[ed] concerted communications protesting . . . treatment of [] employees” and therefore violated 8(a)(1).<sup>35</sup> In another case, the Board found that an employer’s Social Media Policy unlawfully restricted employees’ section 7 rights where it prohibited employees from making “disparaging or defamatory comments” about the employer or making negative comments online during “Company time.”<sup>36</sup>

Viewed through a labor law lens, social media use by employees raises both the possibility and the attendant risks of collective activity. The labor laws were intended to redress the imbalance of power between the employer and individual employees by permitting workers to join together and bargain as a group. One of the challenges for workers seeking to organize a union is how to reach and engage with others who might share similar concerns about workplace conditions. The traditional deference accorded the employer to control its property and the production process has made organizational efforts at the workplace difficult,<sup>37</sup> while reaching a dispersed group of workers after hours also poses challenges. Social networking sites, listserves and the like open a new avenue for reaching and engaging co-workers—the sort of precursors to group action protected under section 7. And yet, the ubiquity and informality of communications on social media often make it difficult to characterize the nature of these interactions. Are online complaints about work by an employee an initial step toward group action? Or merely unprotected griping by the individual?<sup>38</sup> And how far can an employer go in promulgating

33. *Lafayette Park Hotel*, 326 N.L.R.B. 825 (1998).

34. *Martin Luther Mem'l Home, Inc.*, 343 N.L.R.B. 647 (2004). In addition, a rule may be unlawful without explicitly prohibiting section 7 activities if “the rule was promulgated in response to union activity; or . . . the rule has been applied to restrict the exercise of Section 7 rights.” *Id.*

35. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, 2012–2013 NLRB Dec. (CCH) ¶ 15,602 (Sept. 7, 2012).

36. *Dish Network Corp.*, 359 N.L.R.B. No. 108, 2012–2013 NLRB Dec. (CCH) ¶ 15,695 (Apr. 30, 2013).

37. *See, e.g., Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527, 532–33 (1992).

38. *See, e.g., Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 2012–2013 NLRB Dec. (CCH) ¶ 15,656 (Dec. 14, 2012) (Hayes, J., dissenting) (arguing that Facebook postings were “mere griping” not protected concerted activity).

policies to protect its reputation and proprietary information before they would “tend to chill employees in the exercise of their section 7 rights?”<sup>39</sup>

Our purpose here is not to resolve, or even to catalog in a comprehensive way, the many legal issues arising from the intersection of social media use and the workplace. Rather, the point is to provide a concrete illustration of the limitations of the traditional tripartite division of work law into the study of employment discrimination, employment law, and labor law. Using any of these frames alone presents a distorted and highly incomplete picture of the issues raised by employees’ use of social media. Simply put, those challenges cannot be understood without taking a holistic perspective on the issue, one that brings to bear insights from all three doctrinal areas. Similarly, the communicative potential of social media offers possibilities and risks across traditional boundaries. Individual employees may use social media to engage in whistleblowing; unions may use it as a channel for organizing workers; and plaintiffs’ lawyers may use it to reach potential members in a collective action. In short, students who cannot recognize how an issue like the use and regulation of social media in the workplace raises issues across doctrinal boundaries are not prepared to practice law. We believe that a holistic approach to teaching law—one that constantly keeps in view the competing frames through which we might approach conflicting interests in the workplace—is necessary to teach students when and how to transcend doctrinal boundaries.

## II. INDIVIDUAL VERSUS COLLECTIVE ACTION: LEVERAGING GROUP POWER

As the preceding materials on social media illustrate, individual vulnerability to employer power circumscribes the ability to exercise voice in the workplace. The limited bargaining power that individual employees possess also renders substantive rights assertion and enforcement challenging. Workers have historically sought to leverage power by banding together—whether as plaintiffs in class or collective actions, through more informal workplace networks, or in formal organizations like unions. Employers have resisted these efforts vigorously, characterizing the employment relation as primarily a matter of individual contract and highlighting the role of individual agency. By tracing the ebb and flow of such efforts and the law’s response to them, we use the theme of the struggle to leverage group power to demonstrate the relationships between what at first blush might seem to be disparate areas of work law.

In a holistic Work Law course, we begin by covering labor law principles at a relatively superficial level to provide the theoretical backdrop for this theme. The struggle for power in labor law is patent. The law explicitly

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39. *Lafayette Park Hotel*, 326 N.L.R.B. 825 (1998).

protects workers' rights to make common cause by forming a union as a device to leverage, and thus equalize, bargaining power.<sup>40</sup> We then segue to the rise of the individual rights regime, pointing out how labor unions advanced workers' power by lobbying for legislation protecting individual employment rights, including most of the statutes that are more typically covered in Employment Law and Employment Discrimination.<sup>41</sup> These statutes serve to raise the floor from which unions bargain for their members,<sup>42</sup> but they also advance the interests of workers as a class. However, the rights themselves—unlike those created by the NLRA—are conceptualized as fundamentally individual in nature.<sup>43</sup> And therein lies the dilemma: given the small amounts at stake for low wage workers, how many individual employees will be able to persuade a private attorney to take the case, and how many will possess the financial and psychological/emotional resources to persevere when the employer mounts sustained resistance? Although unions sometimes are able to use class actions under these statutes as catalysts to “galvanize nascent forms of collective organization,”<sup>44</sup> workers more often rely upon the efforts of union substitutes to leverage group power, including plaintiffs' class action lawyers, nonprofit workers' centers, and administrative agencies.<sup>45</sup> We ask whether these entities

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40. National Labor Relations Act, 29 U.S.C. § 151 (2006). The Court upheld the statute against constitutional challenge in *NLRB v. Jones & Laughlin Steel Corp.*, explaining:

Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.

*N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

41. CRAIN, KIM & SELMI, *supra* note 1, at 31.

42. Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169, 174–87, 192 (1991).

43. Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 395 (2002).

44. Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2689 (2008). Such efforts are complicated by the labor law doctrine that unions impermissibly influence election results (i.e. engage in vote-buying) when they provide prospective bargaining unit members with free legal services in a class action wage or civil rights action filed during an organizing drive prior to a union election. *See, e.g.*, *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578, 579 (6th Cir. 1995); *Freund Baking Co. v. NLRB*, 165 F.3d 928, 935 (D.C. Cir. 1999); *Detroit Auto Auction, Inc. v. NLRB*, No. 97–6487, 98–5096, 1999 WL 435160, at \*2 (6th Cir. July 17, 1999).

45. *See* Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385 (2006) (discussing efforts of alternative worker organizations that function more like social justice movements than like traditional unions).

are likely to be as effective as unions in this endeavor,<sup>46</sup> or whether other agendas may threaten to overwhelm their efforts. In particular, do class actions engage workers as active agents in resisting their own exploitation and produce the sorts of lasting and forward-looking changes that unionization and collective bargaining offer, or are they simply vehicles for financial recoveries for lawyers?<sup>47</sup>

In the litigation context, aggregation of claims offers significant advantages over individual rights enforcement for addressing workplace power differentials. Class claims help to equalize resources between the disputants, respond to the asymmetries of market information for workers and employers, and facilitate deterrence and forward-looking resolution of claims as well as compensation for past rights violations.<sup>48</sup> Congress, government agencies, and the courts have at some points in history actively supported aggregation of claims, but in recent years the courts have demonstrated increasing hostility toward collective action.<sup>49</sup> Most employment law and employment discrimination professors cover the shifting approach to class and collective claims as matters of evolving procedural law, rather than as a struggle to leverage collective worker power. By approaching the cases in the traditional

46. See Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 593, 624, 637–38 (1992) (explaining unique role played by unions and collective bargaining in workplace governance and arguing that the collective bargaining system is superior to individual employment protections because it enhances voice, improves productivity, allows for flexibility and fosters efficiency, enhances enforcement, and offers more stability).

47. See Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination and Its Effects*, 81 TEX. L. REV. 1249, 1252 (2003) (arguing that class litigation is focused on remedying past discrimination rather than altering the workplace structure to prevent future discrimination, and observing that incentive structures for attorneys and diversity task forces are poorly aligned with the goal of furthering forward-looking change).

48. Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 146 (2011).

49. Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 728, 759–60 (2010). Legislative and judicial hostility toward group action in the litigation context is not limited to the labor and employment law field. See Resnik, *supra* note 48, at 145–46 (explaining how resistance to class action opportunities has spanned the economic spectrum, from litigation efforts by Legal Services on behalf of the poor to securities litigation); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Civil Procedure*, 88 N.Y.U. L. REV. 286, 318 (2013) (examining recent Supreme Court jurisprudence on federal civil procedure and concluding that it is “decidedly pro-business,” in part because it makes aggregation of individual claims in public fora very difficult, reducing the plaintiffs’ choice to one “between collective access to the judicial system or no access at all”); Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES, (May 4, 2013), [http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?pagewanted=all&_r=0).

way, however, we miss opportunities to show students how these cases connect to the larger theme of the struggle to leverage power, why they are so hard-fought, and the difference that the outcome makes on the ground.

A series of seemingly disparate cases from employment discrimination and employment law contexts illustrate the pendulum swings of the law as employers seek to deal with employees individually, workers resist by attempting collective action, and law responds, leading in turn to strategic responses from employers and new tactics by workers struggling to leverage group power. For example, in *Wal-Mart Stores v. Dukes*, the Supreme Court vacated certification of a nationwide class of women workers at Wal-Mart who alleged that a corporate policy of discretion to local managers and corporate officers combined with a culture replete with sex stereotyping resulted in discriminatory pay and promotion decisions.<sup>50</sup> The Court found that the proposed class did not satisfy the commonality requirement of Rule 23(a) of the Federal Rules of Civil Procedure.<sup>51</sup> After the Court found the class action inappropriate in the absence of a specific discriminatory company policy, many lower courts have applied *Dukes* to block class action discrimination suits where the plaintiffs rely on aggregate statistics, expert testimony, and discretionary managerial decision making to prove discrimination.<sup>52</sup> Thus, the

50. *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541, 2548, 2556–57 (2011).

51. *Id.* at 2550–57.

52. *See, e.g., Davis v. Cintas Corp.*, 717 F.3d 476, 486–489 (6th Cir. 2013) (applying *Dukes* and denying certification of proposed nationwide sex discrimination class action by female applicants rejected for positions as sales representatives; plaintiffs used statistical evidence and expert testimony to support allegations of a white male-dominated business culture that was replicated through subjective hiring decisions); *Stockwell v. City of San Francisco*, No. C 08–5180 PJH, 2011 WL 4803505, at \*7 (N.D. Cal. Oct. 11, 2011) (denying class certification where employees alleged only aggregate statistical evidence of disproportionate impact); *Bell v. Lockheed Martin Corp.*, No. 08–6292 (RBK/AMD), 2011 WL 6256978, at \*6–7 (D.N.J. Dec. 14, 2011) (denying certification where managerial discretionary decisionmaking would have to be examined in the individual context of each employee’s circumstances). Nevertheless, the *Dukes* bar has not proved to be completely insurmountable. Where plaintiffs are able to identify a specific discriminatory policy and the class size is significantly smaller than the *Dukes* class, some courts have allowed certification. *See, e.g., Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 509, 545 (N.D. Cal. 2012) (certifying class action where plaintiffs were able to identify a discriminatory policy at the top ranks of management, and distinguishing *Dukes* because plaintiffs there challenged a *lack of policy* that allowed discrimination to flourish at lower levels); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 488–91 (7th Cir. 2012) (certifying class action race discrimination case where class size of 700 was sufficiently limited to avoid placing undue pressure on the employer to settle, and distinguishing *Dukes* based on class size of 1.4 million which might coerce the defendant into settling simply to avoid the risk of financial destruction); *Chen-Oster v. Goldman, Sachs & Co.*, 877 F. Supp. 2d 113, 117–19 (S.D.N.Y. 2012) (granting class certification where plaintiffs alleged companywide policies). *See also* Linda S. Mullenix, *A Year After ‘Wal-Mart,’ Class Actions Not Dead Yet*, NAT’L L.J., June 11, 2012, at 10 (reviewing federal district court decisions that distinguished *Dukes* and permitted

possibility for success on such claims has been significantly diminished. Because Rule 23 does not apply to the EEOC, one might posit that its systemic litigation program could be the mainstay of employment discrimination class actions under Title VII in situations where a specific discriminatory policy is not readily identifiable.<sup>53</sup> But the EEOC and equivalent state agencies are increasingly overwhelmed with claims,<sup>54</sup> leaving private lawyers as the primary watchdogs for civil rights enforcement.

Similar enforcement challenges plague wage and hour law. The provisions of the Fair Labor Standards Act (FLSA) can be enforced through civil actions brought either by the Secretary of Labor or by the aggrieved workers themselves.<sup>55</sup> Wage and hour violations are widespread, and the Wage and Hour Division of the Department of Labor is overwhelmed.<sup>56</sup> Individual workers struggle to find a lawyer willing to take their cases, since the typical recovery under the FLSA for any individual worker is low. Until recently,

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class certification where plaintiffs were able to identify a specific common policy and practice, and arguing that forecasts of the demise of class litigation may be premature).

53. By the end of 2012, twenty percent of the EEOC's litigation docket consisted of systemic cases. Lydell C. Bridgeford, *EEOC's Systemic Program Set to Fill Gap in Private Class Actions, Attorneys Predict*, 244 DAILY LAB. REP. (BNA) (Dec. 19, 2012), at A-5, A-6; see *EEOC Litigation Statistics, FY 1997 through FY 2012*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> (last visited Aug. 24, 2013).

54. In the last three years, the EEOC has processed close to 100,000 claims of workplace discrimination per year. See *Charge Statistics, FY 1997 through FY 2012*, EEOC, <http://www1.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Aug. 24, 2013); see also Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 56–58 (1996) (arguing that volume of claims and lengthy and cumbersome administrative process might justify abolishing the agency and allowing plaintiffs to proceed directly to court).

55. Fair Labor Standards Act of 1938, 29 U.S.C. § 204(f) (2006).

56. See Lawrence E. Dubé, *Labor Solicitor Sees Low-Wage Epidemic and Urges Employers to Take 'High Road'*, 109 DAILY LAB. REP. (BNA) June 6, 2013, at AA-1 (describing mismatch between staffing at Department of Labor and high rate of noncompliance with wage and hour laws, and discussing enforcement difficulties); Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, NELP.ORG, 2, 5, <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1> (last visited Aug. 23, 2013) (reporting on results of survey of low wage workers in four cities finding that two-thirds of the workers had suffered some form of wage violation during the preceding week, with the average worker losing fifteen percent of her earnings as a result). Further, a forensic audit performed by the Government Accountability Office (GAO) in 2008–09 concluded that the Department of Labor's Wage and Hour Division was quite ineffective in its enforcement mechanisms, offering a confusing and discouraging complaint intake process, failing to record complaints, failing to investigate, failing to use all available enforcement tools, and characterized by lengthy delays. *GAO's Undercover Investigation: Wage Theft of America's Vulnerable Workers Hearing Before the H. Comm. on Educ. & Labor*, 111th Cong. 36–37 (2009) (statement of Greg Kutz, Managing Director, U.S. Government Accountability Office); Steven Greenhouse, *Labor Agency is Failing Workers, Report Says*, N.Y. TIMES, Mar. 25, 2009, at A16.



however, collective action claims under the FLSA have been quite attractive to the plaintiffs' bar. Unlike class actions, collective actions under the FLSA are opt-in claims, and they require plaintiffs only to be "similarly situated," a standard that has historically been easier to satisfy than Rule 23's commonality requirement.<sup>57</sup> In 2013, the Supreme Court threw a monkey wrench into the mix, however, when it ruled that employers may "pick off" the lead plaintiff in an FLSA collective action by offering her all the relief she has requested so that her personal interest in the litigation is eliminated; if no other employees have joined the action at that point, the lead plaintiff cannot seek relief for similarly situated workers, and the case must be dismissed.<sup>58</sup>

Workers' ability to leverage power through collective action wage and hour claims is further hindered by the spillover of the *Dukes* rationale. Although some courts have held that the *Dukes* enhanced commonality requirements are completely inapplicable to wage and hour claims under the FLSA,<sup>59</sup> others have extended the *Dukes* reasoning to the FLSA context.<sup>60</sup> Additionally, in *Comcast Corp. v. Behrend*, a consumer-initiated class action antitrust claim by current and former Comcast subscribers in the Philadelphia area, the Court erected another hurdle to class claims, requiring that plaintiffs establish at the class certification stage that individual injury will be capable of

57. See David Borgen & Laura L. Ho, *Litigation of Wage and Hour Collective Actions under the Fair Labor Standards Act*, 7 EMP. RTS. & EMP. POL'Y J. 129, 130–31 (2003) (describing differences between the two types of actions); Daniel C. Lopez, Note, *Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions, and the Rules Enabling Act*, 61 HASTINGS L.J. 275, 278, 309 (2009) (discussing hybrid actions combining state law wage and hour claims and FLSA collective action claims and arguing that joinder is confusing and that the two theories are in fundamental tension with one another; the author proposes repealing the collective action vehicle under the FLSA).

58. *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523, 1527–32 (2013).

59. See, e.g., *Essame v. SSC Laurel Operating Co.*, 847 F. Supp. 2d 821, 828 (D. Md. 2012) (stating that Rule 23 standards are "generally inapplicable" to FLSA collective actions and certifying plaintiff class in overtime pay case); *Creely v. HCR ManorCare, Inc.*, Nos. 3:09 CV 2879, 3:10 CV 417, 3:10 CV 2200, 2011 WL 3794142, at \*1–2 (N.D. Ohio July 1, 2011) (refusing to apply *Dukes* to FLSA collective action for overtime pay, and granting conditional certification at the earliest phase of the action; final certification was ultimately denied, but the court did not cite *Dukes*), *final certification denied*, 920 F. Supp. 2d 846.

60. See, e.g., *Ealy v. Pinkerton Gov't Servs., Inc.*, 514 F. App'x. 299, 304 (4th Cir. 2013) (applying *Dukes* to an FLSA claim); *MacGregor v. Farmers Ins. Exch.*, No. 2:10–CV–03088, 2011 WL 2981466, at \*4 (D.S.C. July 22, 2011) (finding *Dukes* treatment of Rule 23's commonality requirement "illuminating" at the conditional certification stage in an FLSA collective action suit); *Wang v. Chinese Daily News*, 709 F.3d 829, 832, 836 (9th Cir. 2013) (vacating original opinion certifying California state law wage and hour claims as a class action and FLSA claims as a collective action following remand by Supreme Court, and instruction to reconsider the decision in light of *Dukes*); see also *Forrand v. Fed. Express Corp.*, No. CV 08–1360 DSF (PJWx), 2013 WL 1793951, at \*1, \*6 (C.D. Cal. Apr. 25, 2013) (refusing to certify class under California wage and hour law, citing *Dukes*).

proof at trial through evidence common to the class, and that damages are measurable on a class-wide basis.<sup>61</sup> The *Comcast* analysis, too, was soon applied to wage and hour claims.<sup>62</sup> A recent high-profile case involving a class of former interns at Hearst Corporation who argued that they had been misclassified as interns rather than employees and thus were owed back wages suffered a defeat at the class certification stage; the district court judge cited both *Dukes* and *Comcast* in support of his decision.<sup>63</sup>

In still another line of cases, workers bound by predispute arbitration agreements signed as a condition of obtaining employment have attempted to leverage group power by bringing class claims before arbitrators. The typical predispute arbitration agreement waives the right to proceed on statutory or common law claims arising out of employment in court or administrative fora in exchange for a private dispute resolution process. In cases involving such waivers, the question has arisen whether a waiver of the right to bring class claims in both public fora and in arbitration is enforceable. In *AT&T Mobility v. Concepcion*, the Supreme Court ruled in a consumer context that such a waiver was enforceable, relying on the pro-arbitration policy of the Federal Arbitration Act.<sup>64</sup> In 2013, the Court went further still in an antitrust context, ruling that a class action waiver is enforceable even where the cost of proving an individual claim exceeds the potential recovery, preventing (as the plaintiffs argued) the effective vindication of federal statutory rights.<sup>65</sup> Relying heavily on *Concepcion*, the majority held that the policy favoring arbitration requires that arbitration agreements be strictly enforced; the effective vindication exception established in the Court's earlier cases does not apply simply because a claim is expensive to prove.<sup>66</sup> In a powerful dissent, Justice Kagan argued that the Court's decision allows the more powerful party to a contract to use its power to coerce agreement to contract terms that essentially eliminate its liability, while the statutory rights remain superficially intact.<sup>67</sup>

61. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1430, 1435 (2013).

62. See *Roach v. T.L. Cannon Corp.*, No. 3:10-CV-0591 (TJM/DEP), 2013 WL 1316452, at \*3 (Mar. 29, 2013) (lower court applied *Comcast* to deny certification to class of Applebee's employees suing under state law for unpaid wages because monetary relief would have to be calculated individually for each member of the class), *appeal filed*, available at <http://www.citizen.org/documents/Roach-v-Cannon-Corp-Petition-Appeal-Class-Certification.pdf> (2d Cir. April 12, 2013). But see *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513-16 (9th Cir. 2013) (finding that district court abused its discretion in denying class certification in wage and hour claim under California law and distinguishing *Comcast* because data for calculating damages could be readily culled from the company's electronic payroll and timekeeping database).

63. *Wang v. Hearst Corp.*, No. 12 CV 793(HB), 2013 WL 1903787, at \*6-10 (S.D.N.Y. May 8, 2013).

64. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

65. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2307-12 (2013).

66. *Id.* at 2309-10.

67. *Id.* at 2313-16 (Kagan, J., dissenting).

But suppose that the ban on class claims offends the policy explicitly advanced by another federal statute, such as the NLRA? In *D.R. Horton, Inc.*, the NLRB ruled that a class action waiver in an employment arbitration agreement interfered with employees' NLRA section 7 rights to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.<sup>68</sup> The Board reasoned that collective pursuit of a workplace grievance in arbitration is part of the concerted legal action historically protected under the NLRA. Although employers may require employees to pursue arbitral proceedings on an individual basis, they may not compel employees to waive their rights to collectively pursue litigation of employment-related claims in *all* forums. The case is currently on appeal to the U.S. Court of Appeals for the Fifth Circuit,<sup>69</sup> but so far, most courts have rejected the Board's reasoning, believing it inconsistent with the Court's ruling in *Concepcion* and the Federal Arbitration Act.<sup>70</sup>

It is perhaps easiest to appreciate the role of leveraging power in a Labor Law course. Nearly the entire semester in a traditional Labor Law course is spent examining the evolution of unionism as a tool to enhance worker power, and the law's efforts first to repress it,<sup>71</sup> then to support it,<sup>72</sup> and ultimately to

68. *D. R. Horton, Inc.*, 357 N.L.R.B. No. 184, 2012–13 NLRB Dec. (CCH) ¶ 15546 (Jan. 3, 2012) *appeal docketed*, No. 12-60031 (5th Cir. argued May 31, 2012).

69. *Id.* For an excellent and prescient analysis of the issues involved in harmonizing mandatory arbitration agreements with NLRA rights, see Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 217–18 (2003).

70. See, e.g., *Richards v. Ernst & Young, LLP*, No. 11-17530, 2013 WL 4437601 (9th Cir. Aug. 21, 2013) (asserting that *D.R. Horton* cannot be reconciled with *Concepcion*); *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290 (2d Cir. 2013) (declining to follow *D.R. Horton*); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013) (holding that the court is not required to defer to the NLRB's interpretation of Supreme Court precedent, and "that arbitration agreements containing class waivers are enforceable in claims brought under the FLSA"); *Delock v. Securitas Sec. Servs. USA*, 883 F. Supp. 2d 784, 787 (E.D. Ark.2012) (holding that the NLRB has no special experience with the FAA and its decisions interpreting the FAA are not necessarily entitled to deference).

71. Labor activism was initially treated as an act of criminal conspiracy, and workers were tried and convicted for forming combinations "injurious to the public good." Workers' demands for higher wages were cast as efforts to "artificially" raise the prices of items that they produced, harming consumers and the community; criminal penalties were thus appropriate. See Transcript of Record, *Commonwealth v. Pulis (Philadelphia Cordwainers Case)*, Mayor's Ct. Phila. (1806), reprinted in A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 62–69, 228–33 (John R. Commons et al. eds., 3d ed. 1910). Combinations of workers were also seen as potentially dangerous, likely to resort to violence, and disruptive to commerce (and ultimately, threatening to the market structure). See Morris D. Forkosch, *The Doctrine of Criminal Conspiracy and its Modern Application to Labor*, 40 TEX. L. REV. 303, 318–20 (1962) (discussing how the English common law viewed combinations of workers to raise wages and reduce hours as an unlawful conspiracy, and how this view was accepted in the earliest days of the American republic). Early courts also routinely issued injunctions against strikes and picketing, a remedy that because of its timeliness was even more effective than criminal

adopt a private ordering regime featuring contract and dispute resolution mechanisms designed to channel worker protest toward therapeutic outlets for discussion and (hopefully) compromise.<sup>73</sup> Even professors who strive to retain a posture of ideological neutrality will find themselves embroiled in class discussions of cases that turn on the question of the balance of power and the interplay between law, self-help by employers, and group action by workers.<sup>74</sup> Employer resistance to traditional union organizing is manifest in well-financed anti-union campaigns, and many employer-side lawyers are essential participants in this effort.<sup>75</sup> Cases involving employer bargaining obligations routinely chastise the National Labor Relations Board for placing its thumb on one side of the scale, admonish the Board that it should not pass on the

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prosecution in suppressing labor unionism. See *Vegeahn v. Guntner*, 44 N.E. 1077, 1078 (Mass. 1896). See William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1179 (1989) (discussing judicial repression of the “semi-outlawry” of collective action by labor unions); JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 7–8 (1983) (discussing law’s hostility and concern with the risk of “anarchy” stemming from collective action).

72. See Wagner Act of 1935 § 1, 29 U.S.C. § 151 (2006) (stating that it was the policy of the United States to encourage the practice of collective bargaining and full freedom of worker self-organization). Covered employees were afforded the right to organize and employers were required to bargain collectively with them through representatives of their choosing. The right was made effective through the proscription of employer unfair labor practices.

73. See *General Electric Co.*, 150 N.L.R.B. 192, 194 (1964) (explaining that good faith bargaining entails “the serious intent to adjust differences and to reach an acceptable common ground”) (quoting 1 NLRB ANN. REP. 85 (1936)). Some have been more critical of the functions of collective bargaining as defined by American courts. See, e.g., Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 267 (1978). One of my early students suggested that collective bargaining was effectively merely “an opium for the people.” KARL MARX, *CRITIQUE OF HEGEL’S ‘PHILOSOPHY OF RIGHT’* 131 (Joseph O’Malley ed., Annette Jolin & Joseph O’Malley trans., 1970).

74. See ATLESON, *supra* note 71, at 7–8 (arguing that labor law is coherent only when consideration is afforded to hidden values and assumptions manifested by legal doctrine); Klare, *supra* note 73, at 318–336 (explaining how differing ideologies have pervaded the judicial process in labor law); James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1564 (1996) (explaining how law has undermined the legitimacy of group action); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 1 (1999) (explaining how individual rights have supplanted group rights in American work law).

75. See Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, ECON. POL’Y INST., 1–2 (May 20, 2009), <http://www.epi.org/publication/bp235/> (analyzing employer anti-union strategies in NLRB-supervised elections between 1999 and 2003 and finding extensive use of threats to close the plant, discharges of pro-union workers, and threats to cut wages and benefits); John Logan, *Consultants, Lawyers, and the “Union Free” Movement in the USA since the 1970s*, 33 INDUS. REL. J. 197, 198 (2002) (describing employers’ rising use of anti-union consultants and the tactics that they recommend).

substantive terms of labor contracts, and often contain sharp-tongued dissents.<sup>76</sup> Cases involving the use of economic weapons in labor disputes, whether employees' use of the strike weapon or employers' resort to lockouts, turn on whether the Court believes that the Act should be interpreted to afford more or less protection to workers or to the employer in that circumstance, which in turn dictates the power balance between the parties in bargaining.<sup>77</sup> The law's alternating receptivity and hostility to group action in NLRA jurisprudence thus provides a clear organizing theme for the course.<sup>78</sup>

Viewed in isolation, the employment discrimination and employment law cases that focus on status-based discrimination theory or procedural requirements for class claims look quite distinct. When taught in discrete topical units, these cases present a confusing array of doctrines that students struggle to master. But when connected to the history of conflict over leveraging of group power in labor law, these disparate areas can be seen as part of a larger whole. Students comprehend the various doctrines more readily and are better equipped to pull arguments from one area into the others and to predict how the law will next evolve. So, we ask, is some form of group action essential in the employment context for workers to advance their interests? Does it make a difference which form the group action assumes—class action, collective action, class claim in arbitration, or formal unionism and collective bargaining? How should law advance, cabin, or frame these mechanisms to achieve justice in the workplace?

### CONCLUSION

The two examples discussed here illustrate the difference it makes to adopt a more comprehensive frame in teaching the law of work rather than adhering to the traditional tripartite division into labor law, employment discrimination, and employment law. The first—examining how social media use interacts with the workplace—highlights the importance of recognizing legal issues without regard to doctrinal category. Such an approach is not only practically important, it also helps to deepen student understanding of the competing interests at stake and how they inter-relate. For example, employee interests in privacy appear in some tension with efforts to eliminate harassing behavior

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76. See, e.g., *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 407–08 (1952) (cautioning the Board that it could not seek to alter the balance of power by shaping the substantive bargain struck by the parties; to do so would “disrupt collective bargaining,” which the board was not empowered to do); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) (observing that fundamental premise of the Act is freedom of contract, with governmental supervision of procedure only).

77. *ATLESON*, *supra* note 71, at 19–34, 44–66.

78. See *id.* at 7 (arguing that labor law is coherent only when consideration is afforded to hidden values and assumptions manifested by legal doctrine).

that may affect the work environment. In other ways, however, privacy rights and anti-discrimination norms can be mutually reinforcing, as when employees seek to keep certain personal characteristics, such as genetic or other medical information, from becoming the basis for employment decisions.<sup>79</sup>

The second example—the historical and continuing struggle by workers to leverage group power in dealing with the employer—further illustrates how a broader frame enriches student comprehension, offering a theme that ties the course together across time and topics. Looking across doctrinal boundaries reveals that individual and group conceptions of workers’ interests continually struggle for dominance, showing how developments in the law lead logically to a further response as the underlying struggle over power in the workplace continues. Emphasizing this theme connects seemingly unrelated developments, making convoluted doctrine more comprehensible and helping students to begin to predict how the law will evolve next.

The holistic approach to teaching work law we outline here is a philosophy, not a set curriculum. Such an approach could inform the development of a stand-alone survey course in a school that only has the resources to offer one class on a work law topic. However, the approach is also amenable to use in traditional courses, ensuring that the materials relating to labor law, employment discrimination, or individual rights are not taught in a vacuum. A holistic view of the work relationship is particularly useful in the introductory Employment Law course, where, given the absence of a core federal statute to offer an organizing theme, the challenge of coherence is most pressing. Rather than presenting the field as a series of unrelated statutory and common law doctrines, a more comprehensive view offers organizing themes and allows students to develop a deeper understanding of the core tensions underlying all of the law of work.

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79. See, Genetic Information Nondiscrimination Act, 42 U.S.C. §§ 2000ff–1 (2006) (prohibiting both discrimination on the basis of genetic characteristics and the privacy of employees’ genetic information); Pauline T. Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protection for a Brave New Workplace*, 96 NW. U. L. REV. 1497, 1501 (2002).

