

Nothing New Under the Sun: “The New Labor Law” Must Still Grapple With the Traditional Challenges of Firm-Based Organizing and Building Self-Sustainable Worker Organizations

Matthew Ginsburg

There’s no avoiding Walmart, Toyota, Amazon, T-Mobile, and Federal Express. The greatest concentration of unorganized workers in the United States is still employed at these and similar large multinational corporations.¹ Helping these workers form unions is essential for the labor movement not only to recover from its current state representing less than eleven percent—and, in the private sector, less than seven percent—of the workforce,² but also to maintain existing bargaining relationships and improve standards for workers at organized employers like General Motors, AT&T, and United Parcel Service. The labor movement’s economic and political power rests on the existing infrastructure of collective bargaining; there is no realistic path towards rebuilding labor’s voice in society that does not begin with organizing key firms in industries with significant existing union density.

Needless to say, this is no easy task. It will take high levels of worker engagement, significant organizational commitment from unions, and creativity from all involved. Even with these ingredients, it is far from clear that such

-
1. See Anthony Caruso, U.S. Census Bureau, *Statistics of U.S. Businesses Employment and Payroll Summary: 2012*, 1 (2015), <http://www.census.gov/content/dam/Census/library/publications/2015/econ/g12-susb.pdf> [<http://perma.cc/Z8N8-TXPM>] (noting that 51.6 percent of employees worked for large enterprises in 2012, a figure that has increased steadily since 2004).
 2. Bureau of Labor Statistics, U.S. Dep’t of Labor, *Union Members Summary for 2016* (2017), <http://www.bls.gov/news.release/union2.nro.htm> [<http://perma.cc/R9FH-ARDT>].

efforts will succeed. However, previous victories in organizing the automobile industry, the public sector, and home health care have faced similarly long odds. The key point is that there is no alternative to making the effort—no shortcut to rebuild the power of the labor movement through legislative efforts or litigation at a time when the labor movement’s ability to advance legislation and persuade judges has reached a nadir.

With this basic concept in mind, I offer three critiques of Professor Andrias’s provocative article,³ which—more than proposing “The New Labor Law” of its title—suggests a new sort of labor movement based on political advocacy rather than workplace representation.⁴ First, while the particulars of the modern employment relationship are continuously changing, the basic hierarchical employment relationship has not. It would thus be a mistake for the labor movement to take its eye off of what Andrias calls the “employer-employee dyad”⁵ at a time when labor’s resources are so limited and when so many workers in unorganized companies in the United States continue to work within that relationship. Second, any proposal for a new path forward for labor must grapple with the basic challenge of how to build financially sustainable organizations. There is no realistic possibility of achieving the funding required for significant union growth from the sources Andrias points to outside the labor movement, such as government, employers, or philanthropy. With the labor movement’s traditional mechanisms for funding—payment of dues via payroll deduction on either a voluntary basis or as part of a negotiated union security agreement—under increasing attack, the need for innovation in the self-financing of worker organizations is urgent. Finally, while Andrias’s proposal for mandatory sectoral bargaining is a worthwhile aspirational goal for some future date when union economic and political strength is greater, it is an ill-fitted response to present-day challenges. Any path to sectoral bargaining or other positive labor law innovation must pass through the way station of significant union growth at the firm level.

I. WHY FIRM-BASED ORGANIZING REMAINS IMPERATIVE

Professor Andrias correctly describes the myriad factors leading to the labor movement’s decline in the post-war period—“deindustrialization, outsourcing,

3. Kate Andrias, *The New Labor Law*, 126 *YALE L.J.* 2 (2016).

4. Andrias describes “the outline of a new labor law” as combining “bargaining that occurs in the public arena on a sectoral and regional basis” with “both old and new forms of worksite representation,” with the goal of “help[ing] achieve greater economic and political equality in society.” *Id.* at 8-9.

5. *Id.* at 9.

and antiunion campaigning” by employers—and correctly notes that “as union membership has plummeted, unions have had fewer workers to mobilize in politics and fewer resources to deploy on behalf of workers’ goals.”⁶ But rather than draw the obvious lesson that turning the tide requires an all-out focus on organizing the unorganized, Andrias claims that attempting to organize workers “in the contemporary, fissured economy” within the framework of outdated labor law is so difficult that the effort isn’t worth the candle.⁷

That suggestion disregards the fact that the highest concentrations of workers who are not union members in the U.S. still work for large corporations in traditional employer-employee relationships.⁸ There is simply no way to rebuild the labor movement at scale without facing this challenge. And, unless the labor movement succeeds in organizing the non-union competitors of organized companies, workers at those organized companies will continue to face downward pressure on wages and increased employer attacks on their bargaining representatives.

Professor Andrias’s first rationale for shifting the labor movement’s focus away from firm-level organizing is that “labor law has failed.”⁹ While there is no doubt that the basic statutory framework of labor law—essentially unchanged since the Taft-Hartley amendments in 1947—is outdated, the administration of that law during the last eight years is inarguably more favorable to worker organizing now than it has been in a generation. During the Obama Administration, the National Labor Relations Board assertively exercised its delegated authority to “adapt the Act to changing patterns of industrial life”¹⁰ by clarifying or overruling prior precedents and undertaking a rulemaking to overhaul the Board’s election procedures. Andrias notes with approval important Board decisions relating to joint employers and independent contractors.¹¹ However, of equal or greater importance, the Board issued rules significantly streamlining the representation process¹² as well as important decisions

6. *Id.* at 23, 33.

7. *Id.* at 32.

8. See Caruso, *supra* note 1, at 1.

9. Andrias, *supra* note 3, at 24 n.109.

10. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975).

11. Andrias, *supra* note 3, at 81-83 (discussing *Browning-Ferris Indus. of California, Inc.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015); *Miller & Anderson, Inc.*, 364 N.L.R.B. No. 39 (July 11, 2016); *FedEx Home Delivery*, 361 N.L.R.B. No. 55 (2014)).

12. NLRB, Representation-Case Procedures, 79 Fed. Reg. 74308 (Dec. 15, 2014) (Final Rule), codified in various sections of 29 C.F.R. Parts 101, 102, and 103. The Board reports that the median number of days from petition to election has dropped from 38 to 23 days since the implementation of the new rules. See NAT’L LABOR RELATIONS BD., MEDIAN DAYS FROM

clarifying the ability of unions to petition to represent employees in any “appropriate unit” despite employer efforts to strategically add employees to the voting group to dilute union support.¹³ In the realm of remedies, the Board more aggressively exercised its authority under Section 10(j) of the Act to enjoin employer unfair labor practices,¹⁴ especially where employers seek to “nip in the bud” organizing drives by firing union supporters,¹⁵ and strengthened remedies in the few areas still possible under Supreme Court precedent.¹⁶ Of course, much of this progress is vulnerable to reversal once President Trump achieves a majority on the Board by appointing members to the NLRB’s two open seats, although reversal of individual precedents, as always, will take time. The point for present purposes is that the weak state of labor law does not alone explain the predicament the labor movement finds itself in, nor does it stand as an insurmountable barrier to firm-level organizing.

Professor Andrias also criticizes the labor movement for continuing to pursue a path “structured around an ideal—or imagined—labor-management relationship that, for the most part, no longer exists.”¹⁷ But the assumption underlying that critique—that the labor movement once dealt exclusively or even primarily with firms organized in such an archetypal manner—is erroneous. Indeed, the history of the labor movement’s growth has been marked by the use of creative methods to surmount the challenges presented by employer efforts to insulate themselves from organizing—from the early craft unions’ development of the hiring hall, detailed work rules, and full-time business agents

PETITION TO ELECTION, <http://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election> [<http://perma.cc/8ZZY-2Q6Y>].

13. *Macy’s Inc. v. NLRB*, 361 N.L.R.B. No. 163 (2015), *enforced sub nom. Macy’s Inc. v. NLRB*, 824 F.3d 557 (5th Cir. 2016); *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 N.L.R.B. 934 (2011), *enforced sub nom. Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).
14. 29 U.S.C. § 160(j) (2017).
15. Memorandum GC 11-01 from Lafe E. Solomon, Acting Gen. Counsel, Nat’l Labor Relations Bd., to All Regional Directors, Officers-in-Charge, and Resident Officers, *Effective Remedies in Organizing Campaigns* (Dec. 20, 2010). The number of 10(j) injunctions authorized annually doubled between 2008 and 2011 before decreasing somewhat starting in 2012. See NAT’L LABOR RELATIONS BD., LITIGATION-INJUNCTION, <http://www.nlr.gov/news-outreach/graphs-data/litigations/litigation-injunction> [<http://perma.cc/3NJS-8ZXX>].
16. See, e.g., *King Sooper, Inc.*, 364 N.L.R.B. No. 93 (2016) (changing the method of calculating search-for-work expenses as part of the make-whole remedy); *Tortillas Don Chavas*, 361 N.L.R.B. No. 10 (2014) (requiring compensation for additional income tax liability resulting from a lump-sum back pay award and requiring the employer to file a report with the Social Security Administration allocating back pay to periods in which pay would have been earned but for the employer’s violation); see also *HTH Corp.*, 361 N.L.R.B. No. 65 (2014) (suggesting a willingness to issue an award of front pay in appropriate cases).
17. Andrias, *supra* note 3, at 32-33.

as methods to control the labor market in a sector dominated by small firms,¹⁸ to the longshore unions' elimination of the "shape up" that gave unbridled discretion in hiring to employers,¹⁹ to the textile unions' success at organizing jobbers by applying pressure to companies higher up the production chain,²⁰ to more current efforts to organize widely-dispersed home healthcare and home-based childcare workers by enacting legislation to create a public employer of record with whom a union could bargain.²¹

Moreover, the examples that Professor Andrias provides of industries in which the fissured nature of the employment relationship prevents organizing refute her thesis. She recounts the "auto manufacturer that once produced primary parts" and "assembled those parts into vehicles" but now "is more likely to own only the assembly stage of production, relying on separate corporations—some foreign, some domestic—linked by exclusive or non-exclusive supplier-purchaser contracts, to perform the remaining functions."²² The United Auto Workers have succeeded in organizing auto parts suppliers where the union already represents the core manufacturer,²³ including an important recent example of temporary agency workers who used the successful threat of a recognition strike to both achieve union recognition and win permanent jobs.²⁴ Similarly, Andrias points out the difficulty of organizing cleaning companies when "a building owner in a major city is now unlikely to hire many employees directly."²⁵ But this is precisely the workforce that the Service Employees International Union (SEIU) has so successfully organized through its Justice for Janitors campaign—a campaign Andrias rightfully holds out as a successful model for "organiz[ing] fissured employers by pressuring the entities that ex-

18. ROBERT MAX JOHNSON, *THE FORMATION OF CRAFT LABOR MARKETS 194-97, 209-12* (1984).

19. IRVING BERNSTEIN, *THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER 1933-1940*, at 254-56, 294-95 (1970).

20. *Id.* at 84-87.

21. PEGGIE R. SMITH, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390, 1390 (2009) (describing the SEIU victory in an election to represent 74,000 home care workers as the "largest increase since 1941 in new union membership resulting from a single union election").

22. Andrias, *supra* note 3, at 28.

23. *See, e.g., Dana Corp.*, 356 N.L.R.B. 256 (2010), *enforced*, 698 F.3d 307 (6th Cir. 2012) (describing a longstanding bargaining relationship between the automotive parts supplier and the UAW where the employer agreed to neutrality at newly opened plants).

24. *See* Olivia Perkins, *Detroit Chassis in Avon Averts Strike by Accepting Temp Workers in Union*, THE PLAIN DEALER (April 19, 2016), http://www.cleveland.com/business/index.ssf/2016/04/detroit_chassis_in_avon_averts_1.html [<http://perma.cc/N885-CZX2>].

25. Andrias, *supra* note 3, at 29.

ercise actual control over the conditions of employment, even if there is no immediate, formal employment relationship.”²⁶

Even in the so-called “on-demand” or “digital platform” economy, where Andrias deems employers “unorganizable” through traditional methods,²⁷ the most striking aspect of labor relations is not how difficult it is to organize as a legal matter, but rather how ubiquitous creative worker organizing has become. At Uber, for example, different groups of workers have variously engaged in successful mass strikes over reimbursement rates,²⁸ the creation of an “Independent Drivers Guild” through which drivers can consult and negotiate collective benefits,²⁹ and the union-backed passage of city legislation creating a quasi-collective bargaining process that closely mirrors the NLRA.³⁰ At the same time, other groups of workers continue to contest Uber’s claim that it is not an employer and that its drivers are independent contractors,³¹ with at least some groups pursuing the ultimate goal of organizing the company through the NLRA process.³² Whether any of these specific efforts survive and flourish, the speed with which the labor movement has adjusted to these new economic relationships strongly contradicts Andrias’s claim that “American labor unions

26. *Id.* at 61 & n.319.

27. *Id.* at 83.

28. Matthew Miller & Serena Saitto, *Uber Drivers Protest in NYC Against Rising Commission*, BLOOMBERG TECH. (Sept. 13, 2014), <http://www.bloomberg.com/news/articles/2014-09-12/uber-drivers-protest-in-nyc-against-rising-commission> [http://perma.cc/NHW3-9CNE].

29. See INDEPENDENT DRIVERS GUILD, <http://drivingguild.org/> [http://perma.cc/42LG-8KT3]. Independent Drivers Guild is sponsored by Machinists Union District 15 in New York City.

30. See SEATTLE.GOV, <http://www.seattle.gov/council/current-issues/giving-drivers-a-voice> [http://perma.cc/JB8F-LCJN] (describing the legislation). The legislation was supported by Teamsters Local 117, which seeks to organize drivers for Uber and other on-demand transportation companies through a union-backed organization it calls the “App-Based Drivers Association.” See ABDA SEATTLE, <http://www.abdaseattle.org/> [http://perma.cc/27FY-XKDG].

31. See *N.Y. Taxi Workers Alliance v. Uber Techs., Inc.*, No. 16-8299 (S.D.N.Y., Oct. 24, 2016).

32. See, e.g., Conor Skelding, *Union Files To Represent Uber Drivers Serving LaGuardia*, POLITICO (Feb. 3, 2016), <http://www.politico.com/states/new-york/city-hall/story/2016/02/union-files-to-represent-uber-drivers-serving-laguardia-030906> [http://perma.cc/7LCG-66LG] (describing the NLRB representation petition, later withdrawn, filed by the International Brotherhood of Electrical Workers local union to represent Uber drivers operating out of New York’s LaGuardia Airport). Uber drivers around the country have filed unfair labor practice charges with the NLRB. Since all of these charges raise the threshold issue of whether Uber drivers are employees, the Board has consolidated its investigation of these charges and recently succeeded in persuading a district court to enforce its subpoena seeking information about Uber’s relationship with its drivers. See *NLRB v. Uber Techs., Inc.*, 4:16-MC-80057, 2016 U.S. Dist. LEXIS 145069 (N.D. Cal., Oct. 19, 2016).

have collapsed” in the face of changing work relationships and unfavorable law.³³

None of this is to say that the labor movement should be sanguine about the current state of affairs. To the contrary, because of the numerous challenges that unions face, they must concentrate their scarce resources on the most realistic paths for large-scale growth. As I describe in more detail below, such efforts necessarily must rely on the labor movement’s own resources rather than the goodwill of employers, government, or philanthropy, and thus require a sharp focus on the building of self-sufficient organizations. But the broader point is that the labor movement has been in peril before and, despite repeated predictions to the contrary, has always managed to adapt and survive.

II. THE CONTINUED NECESSITY OF BUILDING SELF-SUFFICIENT WORKER ORGANIZATIONS

A key question any proposed new strategy for labor must address—one which Professor Andrias recognizes but does not explore at length—is that of organizational sustainability. Any serious effort to rebuild the labor movement—through the firm-based organizing model that I describe or the political advocacy model that Andrias proposes—will require significant resources. Under federal law, those resources may not come from employers³⁴ and, as a practical matter, funding for core union-building activities such as organizing and political advocacy will not come from government.³⁵ At the end of the day, workers must pay for their own organizations. A plan for organizational self-sufficiency is thus fundamental to any proposal for a new labor law or a new labor movement. The labor movement’s opponents understand this point all too well. The vast majority of the major attacks on unions in the last decade have focused on limiting the labor movement’s sources of funding.

33. Andrias, *supra* note 3, at 5.

34. 29 U.S.C. § 186 (2012) (setting forth civil and criminal penalties for prohibited transactions); *see also* 29 U.S.C. §§ 158(a)(2), (b)(1) (2012) (making it an unfair labor practice for an employer to contribute financial support to a labor organization and for a union to accept such support). Professor Andrias suggests that employers might fund unions through joint training funds. Andrias, *supra* note 3, at 97. Such joint funds, while lawful, are strictly regulated to ensure that funds are only used for the agreed-upon and statutorily-permissible purpose. *See* 29 U.S.C. § 186(c)(6) (2012). Such training funds, therefore, are not an available resource for organizing or political advocacy.

35. Professor Andrias similarly suggests that local and state governments might provide grants to unions to run worker training programs and operate benefit programs. Andrias, *supra* note 3, at 97. The use of public funds, however, is limited to the designated purpose of those funds. Funding for worker training and benefits programs, therefore, is not a solution to the problem of how to pay for union growth.

The Taft-Hartley Act of 1947, which was largely enacted to check union power, added Section 14(b) to the NLRA, permitting individual states to enact so-called “right-to-work” laws that prohibit the making or enforcement of union security agreements.³⁶ Over the past several years, it has become *de rigueur* for Republican-controlled state governments to enact such laws, as well as laws barring or limiting employers from deducting fully-voluntary union dues, immediately upon gaining political power.³⁷ In Kentucky, for example, the legislature recently worked through the weekend so that the newly-elected Governor could sign both such laws within days of taking office.³⁸ Shortly thereafter, Missouri followed suit by enacting its own “right to work” law, although the state AFL-CIO and NAACP immediately filed a petition for a state-wide referendum on the law in an effort to overturn it.³⁹

At the same time, anti-union groups have pursued an aggressive effort to constitutionalize the law of union security in the public sector so as to outlaw agency fee arrangements as contrary to the First Amendment. In its 1977 *Abood v. Detroit Board of Education* decision, the Supreme Court squarely held that agency fees in the public sector were valid as a constitutional matter.⁴⁰ The Court explained that the government interest in conducting labor relations with an adequately-financed exclusive bargaining representative justified any limited interference with the First Amendment rights of employees who opposed union representation, particularly if the fee charged to such employees was for collective-bargaining activities only, rather than related to the expres-

36. 29 U.S.C. § 164(b) (2012).

37. Between 2012 and 2016, Wisconsin, Indiana, Michigan, and West Virginia all enacted such laws. Robert McCartney, ‘Right to Work’ is Hot Election Issue Between Unions, *Business in Va.*, WASH. POST (Oct. 14, 2016), http://www.washingtonpost.com/local/virginia-politics/right-to-work-is-hot-election-issue-between-unions-business-in-va-and-4-other-states/2016/10/14/c49c1862-8f25-11e6-a6a3-d50061aa9fae_story.html [http://perma.cc/5B7G-TBB6]; see also Kurt Erickson, *Missouri House Endorses Anti-Union ‘Paycheck Protection’ Measure*, ST. LOUIS POST-DISPATCH (Feb. 9, 2017), http://www.stltoday.com/news/local/govt-and-politics/missouri-house-endorses-anti-union-paycheck-protection-measure/article_5df77b8a-9d22-54f2-80a1-0563a7bb64d4.html [http://perma.cc/4DLL-FZBG] (discussing legislation that would limit public employers from deducting union dues).

38. Steve Bittenbender, *Kentucky Lawmakers Pass ‘Right to Work’ Legislation*, REUTERS (Jan. 7, 2017), <http://www.reuters.com/article/us-kentucky-unions-idUSKBN14RoBN> [http://perma.cc/4SQN-SJYQ].

39. Jason Hancock, *Governor Eric Greitens Signs Missouri Right-To-Work Bill, but Unions File Referendum To Overturn It*, KANSAS CITY STAR (Feb. 6, 2017), <http://www.kansascity.com/news/politics-government/article130983664.html> [http://perma.cc/2PCL-2DG2]. The law is scheduled to take effect on August 28, 2017. Referendum supporters must collect signatures from approximately 90,000 voters before that date in order to place the law on the 2018 state-wide ballot.

40. 431 U.S. 209 (1977).

sion of political views.⁴¹ In *Friedrichs v. California Teachers Association*,⁴² however, teachers who opposed the union—encouraged by dicta in recent Supreme Court decisions in *Knox v. Service Employees International Union, Local 1000*⁴³ and *Harris v. Quinn*⁴⁴—sought to overrule *Abood* and have the Court hold agency fee requirements in the public sector unconstitutional. While an eight-member Court divided equally in *Friedrichs* after the death of Justice Antonin Scalia, with the election of Donald Trump and the near-certain appointment of a Supreme Court Justice unfriendly to the labor movement, it will not be long before a new case presenting the same issue reaches the Court again.⁴⁵

Indeed, one of the largest and most successful examples of innovative organizing in the new economy—home care organizing—illustrates both the centrality of organizational self-sufficiency and the concomitant legal challenges. In the early 2000s, Illinois, like a number of other states, amended its public sector collective bargaining law to permit home healthcare workers, who are paid by the state with federal Medicaid funds but who work in thousands of private homes, to bargain collectively with a designated state agency.⁴⁶ As a result, thousands of home healthcare workers in Illinois, and tens of thousands of workers in other states that enacted similar laws, formed unions and were able to improve their working conditions despite the highly-atomized nature of their work.⁴⁷ Crucially, inclusion under the Illinois public sector collective bargaining law permitted the union to collect dues and agency fees from all workers who benefitted from the union’s representation, thus making a statewide homecare workers union financially viable.

41. *Id.* at 222, 235-36.

42. 136 S. Ct. 1083 (Mar. 29, 2016) (per curiam).

43. 132 S. Ct. 2277 (2012); see *id.* at 2289 (stating that the free rider argument relied upon in the *Abood* line of cases is “generally insufficient to overcome First Amendment objections”).

44. 134 S. Ct. 2618 (2014); see *id.* at 2632 (stating that “[t]he *Abood* Court’s analysis is questionable on several grounds” and that “several have become more evident and troubling in the years since [the case was decided]”).

45. One likely candidate is *Janus v. AFSCME*, No. 16-3638 (7th Cir. 2017), a case that raises the same challenge to *Abood* as *Friedrichs* did and that is currently pending in the U.S. Court of Appeals for the Seventh Circuit.

46. See *Harris*, 134 S. Ct. at 2623-26 (describing the statutory framework and enactment of the Illinois law).

47. See P. Smith, *supra* note 21 (describing California organizing). Home-based childcare workers who receive public funding have used a similar model to organize. See, e.g., Stacy Jones, *All Together Now: Statewide At-Home Child Care Workers’ Union 2,000 Strong*, THE STAR-LEDGER (June 3, 2000), http://www.nj.com/business/index.ssf/2012/06/all_together_now_statewide_at-.html [<http://perma.cc/JY5E-JGDN>] (describing organizing in New Jersey).

Yet, it was this aspect of the law—the union’s ability to collect dues and agency fees from all the workers it represents—that was targeted by anti-union forces. In *Harris v. Quinn*, the Right to Work Legal Defense Foundation solicited individual homecare workers to challenge the deduction of an agency fee from their state reimbursement on First Amendment grounds.⁴⁸ The Court, while casting much doubt on the continued vitality of *Abood*, held the Illinois agency fee arrangement unconstitutional on the narrower basis that the homecare workers were “not full-fledged public employees” and that *Abood* must be “confine[d] . . . [to] reach . . . full-fledged state employees.”⁴⁹

Harris thus provides a very recent and relevant example of the challenges involved in solving the organizational sustainability problem when organizing workers in the new economy. Yet, the campaigns that Professor Andrias cites as models for her proposed new labor law are especially notable for not having addressed, much less solved, this admittedly very difficult problem.

The Fight for \$15 illustrates the challenge of organizational sustainability faced by broad sector-wide campaigns in the absence of the ability to negotiate a collective bargaining agreement with any particular employer. Andrias acknowledges the basic problem, explaining that SEIU has already “spent vast amounts of money organizing the grassroots Fight for \$15” — meaning that the Fight for \$15 is largely funded by dues and fees from employees represented under traditional collective bargaining arrangements⁵⁰ — and that “[I]acking the promise of membership dues via exclusive bargaining agreement with particular employers, or another source of funding, the union cannot sustain its efforts indefinitely.”⁵¹ Andrias cites an interview with the campaign’s director in which he states his hopeful view of “a giant, nationwide organization of low-wage workers that would be financially sustainable,” and suggests that “[i]f we had a vehicle or mechanism where people could join the organization and fund those fights, I think many people would happily join.”⁵² But, as SEIU would very likely acknowledge, in the absence of dues deduction and a union security agreement with an employer, the challenge of persuading a sufficient number of widely-dispersed low-wage workers to voluntarily remit sufficient regular dues to make a campaign like the Fight for \$15 sustainable, as well as the prac-

48. *Harris*, 134 S. Ct. at 2626.

49. *Id.* at 2638.

50. Andrias, *supra* note 3, at 93-94 & n.486 (citing a news report on SEIU filings with Department of Labor that detail the union’s expenditures on the Fight for \$15 campaign).

51. Andrias, *supra* note 3, at 94.

52. *Id.* at 83 & n.436 (quoting the Fight for \$15 campaign director as quoted in Steven Greenhouse, *Fight for \$15: The Strategist Going to War To Make McDonald’s Pay*, THE GUARDIAN (Aug. 30, 2015), <http://www.theguardian.com/us-news/2015/aug/30/fight-for-15-strategist-mcdonalds-unions> [<http://perma.cc/D9HS-3YPR>]).

tical challenge of designing a mechanism to collect those dues, is, to say the least, formidable.⁵³

Professor Andrias also holds out worker centers, like the Coalition of Im-mokalee Workers, as a model for the new labor law.⁵⁴ Yet, as Andrias acknowledges, worker centers “derive most of their funding from foundations.”⁵⁵ That funding generally is dependent on the worker center maintaining its status as a nonprofit charitable or educational organization under section 501(c)(3) of the Internal Revenue Code. This limits the ability of the worker center to engage in direct worker organizing since maintenance of status under section 501(c)(3) requires the worker center to focus on activities that benefit the public at large.⁵⁶ In contrast, labor unions are organized under section 501(c)(5) of the Code to protect the specific interests of their members in bargaining with their employer, and contributions to unions are not tax-deductible.⁵⁷ Because foundation grants to organizations other than public charities, like unions, require additional compliance documentation,⁵⁸ foundations are frequently loath to provide funding to unions. Of course, just as a labor union can set up an organization under section 501(c)(3) for an approved charitable or educational purpose that can receive foundation funding, a worker center can set up a labor organization under section 501(c)(5) to directly organize workers for collective

53. Presumably with this challenge in mind, in New York City, the campaign has pushed for city legislation that would require fast food employers to “allow [workers] to make voluntary automatic contributions to a non-profit organization of their choice that would fight to protect their rights, safeguard compliance with minimum wage increases, and improve their communities.” Fast Food Forward, *Sign the Petition: Fast Food Workers Need Fair Scheduling, Right To Form Their Own Organization* (Dec. 5, 2016), <http://fastfoodforward.org/nycfastfoodbills/> [<http://perma.cc/3U4R-GCMV>].

54. Andrias, *supra* note 3, at 45.

55. *Id.* at 43 n.217.

56. See Brian Glick, *Appendix D: How Worker Centers Can Keep 501c3 Tax Exempt Status*, in KIM BOBO & MARIÉN CASILLAS PABELLÓN, *THE WORKER CENTER HANDBOOK: A PRACTICAL GUIDE FOR STARTING AND BUILDING THE NEW LABOR MOVEMENT* 307-10 (2016). A worker center that seeks to deal directly with employers regarding the wages and working conditions of its employees also risks being categorized as a “labor organization” for purposes of the NLRA and the Labor Management Reporting and Disclosure Act (LMRDA), making the worker center subject to the NLRA’s prohibitions on certain economic pressure and protest activities and to the LMRDA’s reporting requirements. See Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 *BERKELEY J. EMP. & LAB. L.* 232, 238 (2009).

57. John Francis Reilly et al., *IRC 501(c)(5) Organizations*, INTERNAL REVENUE SERV. (2003), <http://www.irs.gov/pub/irs-tege/eotopicj03.pdf> [<http://perma.cc/JBP7-2ECR>].

58. *Reliance by Grantors on Public Charity Status of Grantees*, INTERNAL REVENUE SERV. (2016), <http://www.irs.gov/charities-non-profits/private-foundations/reliance-by-grantors-on-public-charity-status-of-grantees> [<http://perma.cc/7TQ2-Y5NY>].

bargaining. However, because foundation funds directed to the worker center cannot be used for 501(c)(5) purposes, the creation of a worker center-aligned labor organization does not solve the basic organizational sustainability question described in this Section.

To be clear, this is not a criticism of these organizations or their funders. The willingness of unions to invest current resources in the future of worker representation has always been a hallmark of our movement, with the most notable example being the United Mine Workers of America's underwriting of the Steel Workers Organizing Committee in the 1930s.⁵⁹ However, key to the success of such historical efforts has been that the investment of existing union resources into organizing new areas of the economy has led to the creation of new sustainable organizations. It is too early to tell whether SEIU's support for the Fight for \$15 or the support offered by the AFL-CIO and other organizations to worker centers will have the same result. But the question presented is urgent.

Indeed, as Professor Andrias aptly notes, because of continued attacks on the labor movement's traditional means of self-financing through dues deduction and union security agreements, the question of organizational sustainability is important not only for the Fight for \$15 and worker centers but as a model for the continued sustainability of traditional firm-based unions.⁶⁰ As I explained at the outset of this Section, for both legal and practical reasons, reliance on government and employer funding for union growth is a non-starter. Rather, the key area for innovation is internal organizing and, insofar as technology can aid such organizing, technological innovation. Many unions recruit a very high percentage of members in states that prohibit union security agreements in the private sector and in states that prohibit union security and, in some cases employer dues deduction, in the public sector. In the private sector, an oft-noted model is UNITE HERE Local 226 in Las Vegas, Nevada, better known as the Culinary Workers Union, which maintains a high percentage of membership through robust internal organizing despite the union's inability to negotiate union security clauses under state law.⁶¹ In the public sector, the American Federation of Teachers has built up significant membership in states that do not allow collective bargaining by offering a range of education-specific professional services, such as low-cost occupational liability insurance, in addi-

59. BERNSTEIN, *supra* note 19, at 453 (estimating "roughly that the steel campaign cost \$2.5 million in the first year [from mid-1936 to mid-1937], most of it coming from the United Mine Workers").

60. Andrias, *supra* note 3, at 95-96.

61. See Ed Komenda, *Union Ties: The Fates of Culinary and the Strip Are Inextricably Linked*, VEGAS INC. (May 6, 2013), <http://vegasinc.com/business/2013/may/06/union-ties-fates-culinary-and-las-vegas-strip-are/> [<http://perma.cc/JU8A-B4KF>].

tion to focused legislative and policy advocacy.⁶² And many unions, especially in the public sector, now encourage members to pay their dues via “bank draft,” i.e., electronic fund transfer from their checking or savings account, rather than by employer deduction from their paychecks, either out of necessity because of state law or to insulate the union from future attacks on employer dues deduction.⁶³

In all cases, the key questions are how to build an organization that workers want to support and then how functionally to ensure that workers can do so in a way that makes the organization sustainable. The answers to these questions are central to any new labor movement and thus to any new labor law.

III. MANDATORY SECTORAL BARGAINING IS AN IMPORTANT GOAL, BUT NOT A REALISTIC PATH FORWARD FOR UNION GROWTH

Finally, Professor Andrias puts forward mandatory sectoral bargaining—which she defines as government-mandated bargaining at the industrial sector level with the collectively-bargained agreement “apply[ing] to all employers in the industry or region”—as a “New Labor Law” strategy for “enhanc[ing] the economic and political power of workers.”⁶⁴ While sectoral bargaining is a worthy long-term goal for the labor movement, it is not a realistic path for rebuilding union power in the current political and economic environment.

Needless to say, as Professor Andrias acknowledges, there is no realistic path for such a proposal at the federal level, with Republicans hostile to the labor movement in control of both the executive and legislative branches.⁶⁵ But even in some brighter future political time, Andrias’s proposal fails to grapple with the closely-related organizational issue addressed in the previous Sections. Without a strong foundation of self-sustaining firm-based unions, there is no political force that can bring a mandatory sectoral bargaining system into existence, much less ensure that it functions in a manner that benefits workers. Andrias’s recounting of the inability of the labor movement to succeed in attempts at less sweeping labor law reform during periods when the labor movement

62. See, e.g., *FAQs on Texas AFT*, TEXAS AFT, <http://www.texasaft.org/about-us/faqs-texas-aft/> [<http://perma.cc/8KE5-34FV>] (listing the available benefits and stating that the union has 64,000 members despite the absence of state collective bargaining rights).

63. See, e.g., *Organizing for Power*, AFSCME WORKS (2012), <http://www.afscme.org/news/publications/newsletters/works/winter-2012/organizing-for-power> [<http://perma.cc/XSN5-SMFB>] (stating that after Wisconsin eliminated the payroll deduction for union dues for public employees, AFSCME launched a highly-successful campaign to sign members up for payment of dues via bank draft).

64. Andrias, *supra* note 3, at 79-80.

65. *Id.* at 84.

had much greater political clout makes this clear.⁶⁶ If the labor movement could not secure passage of the Labor Reform Act of 1977 during the Carter Administration, a law banning the permanent replacement of strikers during the Clinton Administration, or the Employee Free Choice Act during the Obama Administration—all at times when traditional unions were stronger and the Democratic Party controlled the presidency and both houses of Congress—how can a labor movement that represents less than seven percent of the private sector workforce expect to win mandatory sectoral bargaining in 2020 or 2024, no matter who is president? It is a bitter pill, but organizational growth on a firm-by-firm basis must precede any effort to significantly change the legal rules governing labor relations in the United States.

This recognition is not to downplay the importance of sectoral bargaining as a goal. Sectoral bargaining was central to the labor movement’s success at raising wages and improving working conditions for all workers—organized and unorganized—during most of the twentieth century, until the combination of globalization, deregulation, and state-encouraged anti-union attacks during the 1980s dismantled or significantly weakened such bargaining in industries like trucking, airlines, and meatpacking.

And, of course, Professor Andrias is correct that various forms of state encouragement have often been a factor in making sectoral bargaining work, beginning with the National Industrial Recovery Act and continuing under various New Deal programs and the War Labor Board.⁶⁷ In the present day, a variety of remaining government interventions in the labor market in specific sectors of the economy—including most notably the Davis-Bacon Act⁶⁸ and the Service Contract Act⁶⁹—continue to create a wage floor that, by removing incentives for employers to compete by cutting labor costs and aggressively opposing unionization, makes organizing more feasible. Andrias’s suggestion that state and local wage boards, where they exist, could play a similar role is thus a potentially fruitful one although, as she admits, of very limited geographic reach.⁷⁰

Overall, then, the most important point of Professor Andrias’s meditation on sectoral bargaining for the present period is a modest one—that, “[t]o the extent wages and benefits are taken out of competition by local or state law,” “employers would have less reason to resist worksite collective bargaining,”

66. *Id.* at 27 & n.127.

67. *Id.* at 15, 17-18.

68. Davis-Bacon Act, 40 U.S.C. §§ 3141-3148 (2012).

69. McNamara-O’Hara Service Contract Act of 1965, 41 U.S.C. §§ 351-358 (2012).

70. Andrias, *supra* note 3, at 85-87 (noting that legislative authority for sector-specific wage- and hour-setting exists in California, Colorado, and New Jersey).

“enhanc[ing] unions’ ability to organize new workers into traditional unions.”⁷¹ In other words, where feasible, the mandated extension of union-negotiated wages and working conditions to unorganized competitors does not serve as a substitute for firm-based organizing, but rather creates a framework that can facilitate new organizing as well as provide greater stability for existing bargaining relationships by removing competition based on labor costs and thereby decreasing the incentive for non-union firms to fight unionization. In this way, state and local strategies can facilitate the firm-by-firm organizing that is a prerequisite before the labor movement can seek to ascend the higher peaks that Andrias has in her sights.

* * *

As Professor Andrias correctly acknowledges, the challenges facing the labor movement in the United States are great. Contrary to her suggestion, however, there are few actors outside of the labor movement itself—in government, among employers, or in philanthropy—who are willing to provide a lifeline to unions, and none, even if willing, who could do so at the scale needed to rebuild the labor movement. The reality is that the task of constructing a new labor law falls to the labor movement itself. That is a difficult fact, but one that must be acknowledged in order to make the best use possible of the labor movement’s existing resources to organize for the future.

Matthew Ginsburg is Associate General Counsel of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).

Preferred Citation: Matthew Ginsburg, *Nothing New Under the Sun: “The New Labor Law” Must Still Grapple With the Traditional Challenges of Firm-Based Organizing and Building Self-Sustainable Worker Organizations*, 126 Yale L.J. F. 488 (2017), www.yalelawjournal.com/forum/nothing-new-under-the-sun.

71. *Id.* at 94.