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The New Labor Law

ABSTRACT. Labor law is failing. Disfigured by courts, attacked by employers, and rendered inapt by a global and fissured economy, many of labor law's most ardent proponents have abandoned it altogether. And for good reason: the law that governs collective organization and bargaining among workers has little to offer those it purports to protect. Several scholars have suggested ways to breathe new life into the old regime, yet their proposals do not solve the basic problem. Labor law developed for the New Deal does not provide solutions to today's inequities. But all hope is not lost. From the remnants of the old regime, the potential for a new labor law is emerging.

In this Article, I describe and defend the nascent regime, which embraces a form of social bargaining long thought unattainable in the United States. The new labor law rejects the old regime's commitment to the employer-employee dyad and to a system of private ordering. Instead, it locates decisions about basic standards of employment at the sectoral level and positions unions as political actors empowered to advance the interests of workers generally. This new labor law, though nascent and uncertain, has the potential to salvage and secure one of labor law's most fundamental commitments—to help achieve greater equality, both economic and political—in the context of the twenty-first century economy.

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INTRODUCTION

American labor unions have collapsed.[1] While they once bargained for more than a third of American workers, unions now represent only about a tenth of the labor market and even less of the private sector.[2] In the process, the United States has lost a core equalizing institution in politics and the economy.[3] Employment law, which protects employees on an individual basis irrespective of unionization, has not filled the void.[4] Economic inequality is at its highest point since the Gilded Age, when unionization rates were similarly low.[5] Workers have declining influence not only in their workplaces, but also in policymaking at the state and federal levels.[6]

For several reasons, current law offers little hope for reversing the trend.[7] The familiar explanation, and the focus of most attempts at labor law reform, is

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1. *See* JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 10-30 (2014); *cf.* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984) (describing, as of the mid-1980s, the role of trade unions in the United States).

2. ROSENFELD, *supra* note 1, at 1; *see also* Bureau of Labor Statistics, *Union Members Summary*, U.S. DEP'T LABOR, (2015), http://www.bls.gov/news.release/union2.nro.htm [http://perma.cc/3RU3-SPBS] (providing data about union membership in 2015). Despite recent declines, unions still represent about thirty-five percent of public sector workers; the unionization rate in the private sector is about six percent. Bureau of Labor Statistics, *supra*.

3. ROSENFELD, *supra* note 1, at 4-8; *see* Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 POL. & SOC'Y 152 (2010).

4. *See infra* Section I.B.

5. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 23-24 (2014). Inequality has increased even during periods of economic growth and increased productivity. *Id.*

6. *See* LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 2, 285 (2008); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 79-81, 157-58 (2012); ROSENFELD, *supra* note 1, at 170-81; KAY LEHMAN SCHLOZMAN ET AL., UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY 69-95 (2012); Thomas Byrne Edsall, *The Changing Shape of Power: A Realignment in Public Policy*, *in* THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980, at 269 (Steve Fraser & Gary Gerstle eds., 1989) [hereinafter RISE AND FALL OF THE NEW DEAL ORDER]; Hacker & Pierson, *supra* note 3, at 28; Monica Davey, *with Fewer Members, A Diminished Political Role for Wisconsin Unions*, N.Y. TIMES (Feb. 27, 2016), http://www.nytimes.com/2016/02/28/us/with-fewer-members-a-diminished-political-role-for-wisconsin-unions.html [http://perma.cc/2843-GB8P].

7. *See, e.g.*, Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1611-12 (2002) (arguing that the National Labor Relations Act has ossified); Alan Hyde, *The Idea of the Idea of Labour Law: A Parable*, *in* THE IDEA OF LABOUR LAW 88, 97 (Guy Davidov & Brian Langille eds., 2011) [hereinafter IDEA OF LABOUR LAW] (declaring that the "Idea of Labour Law" as a source of inspiration "is really over"); Paul Weiler, *Promises To*

that the National Labor Relations Act's (NLRA) weak enforcement mechanisms, slight penalties, and lengthy delays—all of which are routinely exploited by employers resisting unionization—fail to protect workers' ability to organize and bargain collectively with their employers.[8] But two other factors are perhaps even more important to labor law's failure to protect workers' right to organize and bargain in ways that help redistribute both economic and political power. First, the NLRA, with its emphasis on firm-based organizing and bargaining, is mismatched with the globalized economy and its multiple layers of contracting.[9] Indeed, these "fissured" corporate structures were adopted by employers in part to reduce labor costs and diminish the potency of the NLRA and employment law.[10] Second, the NLRA was never designed to ensure the vast majority of workers significant influence over the economy or politics.[11] Unlike legal regimes prevalent in Europe, the NLRA does not empower unions to bargain on behalf of workers generally, nor does it provide affirmative state support for collective bargaining.[12] Instead, it establishes a system of voluntaristic, decentralized unionism: collective bargaining is a private negotiation between individual employers and employees at worksites where a majority has chosen to unionize.[13]

Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 HARV. L. REV. 1769, 1769 (1983) (noting that "[c]ontemporary American labor law more and more resembles an elegant tombstone for a dying institution"). For additional scholarship exploring labor law's decline, see *infra* Section I.A.2. *But see* Lance Compa, *Not Dead yet: Preserving Labor Law Strengths While Exploring New Labor Law Strategies*, 4 U.C. IRVINE L. REV. 609, 610-12 (2014) (arguing that U.S. labor and employment law regimes constructed in the twentieth century are viable for the twenty-first century).

8. *See* Weiler, *supra* note 7, at 1769-70; *see also infra* notes 116-126 and accompanying text.

9. *See* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 290 (2004); *see also infra* notes 132-159 and accompanying text.

10. *See* JEFFERSON COWIE, CAPITAL MOVES: RCA'S SEVENTY-YEAR QUEST FOR CHEAP LABOR 2 (1999) (detailing one company's "continuous struggle to maintain the social conditions deemed necessary for profitability"); DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 10 (2014) (using the term "fissured" to describe the subcontracted economy in which employers shed business functions not central to their core and discussing multiple motivations for the corporate restructuring).

11. *See* Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1397 (1971); Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Relations*," 1990 WIS. L. REV. 1, 1; *see also infra* notes 49-56 and accompanying text.

12. *See infra* notes 163-177, 401-420 and accompanying text.

13. *See* Bok, *supra* note 11, at 1397; *see also infra* notes 49-56, 112-115 and accompanying text. Industry-wide pattern bargaining is permitted, though not mandated. Although pattern bar-

Some scholars have suggested ways to mend the old regime.[14] But their proposals do not solve the basic problem: labor law, developed during and after the New Deal, has been rendered inapt by contemporary managerial strategies and fails to provide tools capable of redressing today's inequities. Recognizing these limitations, many of labor's proponents have abandoned the project of labor law altogether, concluding that unionism in the contemporary political economy is hopeless.[15]

But the demise of the twentieth-century labor law regime is not the end of the road for the rights and interests of working people. Since 2012, over two dozen states and many more localities have raised their minimum wages.[16] Several of these, including California and New York, have enacted increases to $15 an hour—nearly $8 an hour more than the federal minimum—to be phased in over time.[17] Just a few years ago, increases of this scope and magnitude would have been unthinkable.[18] The wage laws have been accompanied by new regulations providing scheduling protection, sick time, and other benefits.[19]

At first glance, these seem to be ordinary state and local employment statutes, separate and apart from the law that governs collective activity by work-

gaining existed in certain sectors for a time, it largely collapsed in the face of deindustrialization and globalization. *See infra* notes 73, 79-82, 154-156 and accompanying text.

14. Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375, 399-400 (2007). For a discussion of the numerous proposals, see *infra* Sections I.C.1, III.A.

15. *See infra* Sections I.C.2, III.A.

16. *Minimum Wage Tracker*, ECON. POL'Y INST., (2016), http://www.epi.org/minimum-wage-tracker [http://perma.cc/HTG4-QHZQ]; *State Minimum Wages*, NAT'L CONF. ST. LEGISLATURES (2016), http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx [http://perma.cc/UQ4E-MYMC]; *City Minimum Wage Laws: Recent Trends and Economic Evidence*, NAT'L EMP. LAW PROJECT (Dec. 2015), http://www.nelp.org/content/uploads/City-Minimum-Wage-Laws-Recent-Trends-Economic-Evidence.pdf [http://perma.cc/VS5C-D3AX]. *But see* Alan Blinder, *When a State Balks at a City's Minimum Wage*, N.Y. TIMES (Feb. 21, 2016), http://www.nytimes.com/2016/02/22/us/alabama-moves-to-halt-pay-law-in-birmingham.html [http://perma.cc/WV4R-DJ7E] (describing the Alabama state legislature's decision to overrule Birmingham's local minimum wage). For further discussion of minimum wage increases, see *infra* Section II.B. For further discussion of state efforts to limit local wages, see *infra* Section IV.B.

17. *See* S.B. 3, 2016 Leg., Reg. Sess. (Cal. 2016); NAT'L EMP. LAW PROJECT, *supra* note 16; Press Release, New York Governor's Press Office, Governor Cuomo Signs $15 Minimum Wage Plan and 12 Week Paid Family Leave Policy into Law (Apr. 4, 2016), http://www.governor.ny.gov/news/governor-cuomo-signs-15-minimum-wage-plan-and-12-week-paid-family-leave-policy-law [http://perma.cc/NYP6-UCQC].

18. *See infra* note 278 and accompanying text.

19. *See infra* notes 288-295 and accompanying text.

ers.[20] But the sea change comes in response to a range of worker movements, especially the "Fight for $15," a campaign of low-wage workers organized by the Service Employees International Union (SEIU).[21] The express goal of these campaigns is not just higher wages but also "*a union*."[22] And many of the new laws they have won are a product of *bargaining*, either formal or informal, among unions, employers, and the state.[23]

From the efforts of these social movements, the outline of a new labor law is emerging. That outline is nascent and contested; chances of success are uncertain at best, and the specifics of what success would look like are far from clear. But from the social movements' efforts one can derive a path toward a new labor law regime that is distinct from, even oppositional to, the legal regime that has governed since the New Deal. The new labor law would combine social bargaining—i.e., bargaining that occurs in the public arena on a sectoral and regional basis—with both old and new forms of worksite representation. It is a more inclusive and political model of labor relations, with parallels to re-

20. On the distinction between employment law and labor law, see Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2688-89 (2008), which describes the traditional view that labor and employment law constitute dichotomous regulatory regimes but notes critiques of that view. *See also* Theodore J. St. Antoine, *Labor and Employment Law in Two Transitional Decades*, 42 BRANDEIS L.J. 495, 526-27 (2004) (explaining that the preceding "two decades have continued the shift of emphasis from labor law to employment law—from governmental regulation of union-management relations, with collective bargaining expected to set most of the substantive terms of employment, to the direct governmental regulation of more and more aspects of the employer-employee relationship" and expressing regret at the diminishment of "private initiative and the voluntary arrangements that have made collective bargaining such a uniquely valuable American institution"). For further discussion, see *infra* Section I.B.

21. *See* Patrick McGeehan, *Push To Lift Minimum Wage Is Now Serious Business*, N.Y. TIMES (July 23, 2015), http://www.nytimes.com/2015/07/24/nyregion/push-to-lift-hourly-pay-is-now-serious-business.html [http://perma.cc/S7M8-9VPH]; Jenny Brown, *Fast Food Strikes: What's Cooking?*, LABORNOTES (June 24, 2013), http://www.labornotes.org/2013/06/fast-food-strikes-whats-cooking [http://perma.cc/A739-Y6CQ]; *see also infra* Part II.

22. More precisely, the campaign demands $15 an hour and the right to a union "free of intimidation." *See* Arun Gupta, *Fight for 15 Confidential*: *How Did the Biggest-Ever Mobilization of Fast-Food Workers Come About, and What Is Its Endgame?*, IN THESE TIMES, (Nov. 11, 2013), http://inthesetimes.com/article/15826/fight_for_15_confidential [http://perma.cc/Y5V6-SNKS]; *see also* Lydia DePillis, *It's Not Just Fast Food: The Fight for $15 Is for Everyone Now*, WASH. POST (Dec. 4, 2014), http://www.washingtonpost.com/news/storyline/wp/2014/12/04/its-not-just-fast-food-the-fight-for-15-is-for-everyone-now [http://perma.cc/Z7GV-GJ6M]; Josh Eidelson, *Fast Food Strikes To Massively Expand*, SALON (Aug. 14, 2013), http://www.salon.com/2013/08/14/fast_food_strikes_massively_expanding_theyre_thinking_much_bigger [http://perma.cc/N9J2-6M3P].

23. *See infra* Section II.C.

gimes in Europe and elsewhere.[24] And it has the potential to salvage and secure one of labor law's most fundamental commitments: to help achieve greater economic and political equality in society.[25]

The new labor law promises several important changes. First, it would reject the old regime's commitment to the employer-employee dyad.[26] It would locate decisions about basic standards of employment at the sectoral, industrial, and regional levels, rather than at the level of the individual worksite or employer. Second, the new labor law would reject the principle of private ordering that was cemented in the years following the New Deal, under which labor negotiations are a private affair and the state plays a neutral and minimal role.[27]

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24. *See, e.g.*, KATHLEEN THELEN, VARIETIES OF LIBERALIZATION AND THE NEW POLITICS OF SOCIAL SOLIDARITY (2014) (distinguishing forms of labor law regimes). Sociologists use "social movement unionism" and "social justice unionism" to refer to union campaigns that aspire to change underlying social conditions by emphasizing union democracy and alliances with other social movements. *See, e.g.*, Cassandra Engeman, *Social Movement Unionism in Practice: Organizational Dimensions of Union Mobilization in the Los Angeles Immigrant Rights Marches*, 29 WORK, EMP. & SOC'Y 444, 446-48 (2015); Peter Waterman, *Social-Movement Unionism: A New Union Model for a New World Order?*, 16 REVIEW (FERNAND BRAUDEL CTR.) 245, 266-67 (1993); *see also* KIM MOODY, WORKERS IN A LEAN WORLD: UNIONS IN THE INTERNATIONAL ECONOMY (1997) (urging social movement unionism). While the efforts described in this Article may fall under such categories, the focus here is on the legal regime, not the internal workings of the unions.

25. For examples of scholarship identifying these or closely related values as some of the primary goals of labor law, see Ruth Dukes, *Hugo Sinzheimer and the Constitutional Function of Labour Law*, *in* IDEA OF LABOUR LAW, *supra* note 7, at 57-60; and Manfred Weiss, *Re-Inventing Labour Law?*, *in* IDEA OF LABOUR LAW, *supra* note 7, at 43-45; *cf.* FREEMAN & MEDOFF, *supra* note 1, at 246-47 (concluding that unionism has a "voice/response face," as well as a "monopoly face," with effects on efficiency, distribution of income, and social organizations); Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 990 (1984) (arguing that labor law is "founded on a policy that is the opposite of the policies of competition and economic efficiency").

26. *See* Karl Klare, *The Horizons of Transformative Labour and Employment Law*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 3, 23 (Joanne Conaghan et al. eds., 2002) ("[O]ne must wonder about the adequacy of a model of redistribution classically wedded to the employer-employee dyad, when traditional workers and traditional employers are replaced by a complex variety of social actors in paid employment.").

27. For an analysis of how law encouraged the earlier American labor movement's embrace of private ordering over statism, see William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989) [hereinafter Forbath, *The Shaping of the American Labor Movement*] (arguing that while the nineteenth-century labor movement sought to pursue a radical vision of social and political reform, encounters with the legal system at the turn of the century led the labor movement to turn toward "voluntarism," a commitment to the private ordering of industrial relations between unions and employers); *accord* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991) [herein-

Instead, the new labor law would position unions as political actors representing workers generally and would involve the state as an active participant in supporting collective bargaining—in a system I will term "social bargaining," but which is also known as "tripartism" or "corporatism."[28] Third, and related to the first two moves, the new labor law would reject the bifurcation between employment law and labor law that has governed since the New Deal by rendering the basic terms of employment for all workers subject to social bargaining.[29] Finally, the new labor law would maintain a role for worksite representation—but it would do so through a wider range of forms, not all of which would entail exclusive union representation.

In an important sense, the new labor law is not, in fact, new. It is a reinterpretation of principles advanced by earlier incarnations of the American labor movement[30] and embraced by systems abroad.[31] But support for a system of labor law that empowers unions to bargain on behalf of all or most workers, with active support from the state, has long been considered to exist only in the "political ozone."[32] The goal of social bargaining, the conventional wisdom

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after FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT]. For a discussion of how employer advocacy and court and congressional action helped push the system in the direction of private ordering in the years after the Wagner Act, see *infra* notes 61-77 and accompanying text.

28. Nelson Lichtenstein, *The Demise of Tripartite Governance and the Rise of the Corporate Social Responsibility Regime*, *in* ACHIEVING WORKERS' RIGHTS IN THE GLOBAL ECONOMY 95, 95 (Richard P. Appelbaum & Nelson Lichtenstein eds., 2016) (noting that the system was "often denominated as 'corporatism' in Europe, 'tripartism' in the United States").

29. The current phenomenon is markedly different from previous efforts to blur the distinction between employment law and labor law. Those tended to use employment law to achieve NLRA aims, *see* Sachs, *supra* note 20, at 2687 (documenting how "workers and their lawyers are turning to employment statutes like the Fair Labor Standards Act (FLSA) and Title VII of the Civil Rights Act of 1964" to facilitate "their efforts to organize and act collectively"), or abandoned a system of unionization in favor of self-regulation with elements of worker voice, *see* CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION 52-74 (2010) (describing the fall of collective bargaining and the proliferation of substantive mandates).

30. *See, e.g.*, LEON FINK, THE LONG GILDED AGE: AMERICAN CAPITALISM AND THE LESSONS OF A NEW WORLD ORDER 96 (2015); DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925 (1987); CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960 (1985). For further discussion, see *infra* notes 51-53, 65-67, 445 and accompanying text.

31. *See, e.g.*, THELEN, *supra* note 24 (examining labor market institutions in the United States, Germany, Denmark, Sweden, and the Netherlands).

32. *See* Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 961 (1994) (describing the pro-

holds, is unmoored from reality[33] and has no hope of passage.[34] However, this Article shows that a nascent form of social bargaining is developing organically in the United States.

The contribution of this Article is both descriptive and normative. I unearth the seeds of this new labor law and consider potential avenues for its growth, as well as likely hurdles.[35] I also defend the nascent labor law as a partial solution to the problems of economic and political inequality facing the nation,[36] as well as a way to protect workers' fundamental associational rights.[37] At the same time, I recognize the nascent regime's limitations, including the inherent

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spects for a union default rule as in the "political ozone"). Recently, there has been rising interest in social bargaining and a weakening of the consensus that it is an impossibility. *See* Brishen Rogers, *Libertarian Corporatism Is Not an Oxymoron*, 94 TEX. L. REV. 1623, 1624 (2016) (arguing for a model of labor relations in which the federal government "would strongly encourage or even mandate collective bargaining at the occupational or sectoral level (as corporatism has historically required), while leaving workers nearly unfettered choice as to bargaining representatives and removing certain core legal constraints on workers' concerted action"); David Rolf, *Toward a 21st Century Labor Movement*, AM. PROSPECT (Apr. 18, 2016) [hereinafter Rolf, *Toward a 21st Century Labor Movement*], http://prospect.org/article/toward-21st-century-labor-movement [http://perma.cc/DFV5-RRMU] (offering sectoral bargaining as one of several models for how workers could wield greater power); *accord* DAVID ROLF, THE FIGHT FOR FIFTEEN 253-58 (2016) [hereinafter ROLF, THE FIGHT FOR FIFTEEN]; Lawrence Mishel, *Lawrence Mishel Testifies Before the Democratic Platform Committee 2016*, ECON. POL'Y INST. (June 9, 2016), http://www.epi.org/publication/testimony-raise-americas-pay [http://perma.cc/5R7V-NMP6] (arguing for a "wholesale revision of labor laws to establish sectoral and occupational bargaining").

33. *See* Compa, *supra* note 7, at 610 (arguing that a labor and employment law system cannot be "wrenched from its historical moorings").

34. *See, e.g.*, Estlund, *supra* note 7 (discussing obstacles to labor law reform). *But see* Matthew Dimick, *Productive Unionism*, 4 U.C. IRVINE L. REV. 679 (2013) (emphasizing the importance of labor union structure to centralized bargaining and suggesting that unions can, on their own, move towards a more industrial system).

35. Though this Article focuses on legal obstacles, the political obstacles are significant as well. *See infra* notes 127, 360-372 and accompanying text.

36. To be sure, regulation of labor cannot, alone, remediate inequality; financial regulation, tax law, election law, and many other areas of law and policy are also essential, though beyond the scope of this Article.

37. Numerous international law instruments recognize the right of workers to organize, bargain collectively, and strike as fundamental human rights. *See, e.g.*, International Covenant on Civil and Political Rights art. 22, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171; G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 23 (Dec. 10, 1948); International Labour Conference, *ILO Declaration on Fundamental Principles and Rights at Work* (June 18, 1998). The United States has not ratified all of the relevant International Labour Organization Conventions. *See* Lance Compa, *Trade Unions and Human Rights*, *in* BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 351, 360 n.15 (Cynthia Soohoo et al. eds., 2007).

shortcomings of a domestic labor regime in an increasingly global economy[38] and the challenge of maintaining worker voice and union funding in a system not based primarily on traditional exclusive bargaining agreements.[39] Moreover, in a political environment hostile to reform, the new labor law is by no means certain, nor is it the only possible path forward. Some ongoing organizing efforts embrace certain of its principles—e.g., sectoral bargaining—but not others—e.g., its public or statist commitments; others experiment with different forms of worker voice and ownership.[40] The ambition of this project is not to prove that the nascent system of social bargaining is inevitable, nor to offer it as a complete solution to contemporary labor problems, but rather to document, analyze, and defend this important development.

A final caveat is in order: not everyone agrees that creating greater political and economic equality *should be* central functions of labor law.[41] I embrace those goals, however, and this Article assumes their validity without engaging the first-order debates. It also prioritizes the concern with achieving greater equality and leaves for another day important questions about how the emerging law's design could best accommodate other objectives, such as economic efficiency and productivity, internal union democracy, and industrial peace. Finally, the nascent labor law described in this Article raises numerous questions about the level of government at which labor law is and should be determined. The focus of this piece, however, is not on problems of federalism (or globalism), but rather on the substantive contours and structure of labor law.

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38. Notably, the Fight for $15 has an important global dimension and has used foreign and international law instruments. *See* Gaspard Sebag, *McDonald's Faces Antitrust Attack as Unions Complain to EU*, BLOOMBERG (Jan. 12, 2016), http://www.bloomberg.com/news/articles/2016-01-12/mcdonald-s-faces-antitrust-attack-as-trade-unions-complain-to-eu [http://perma.cc/66MX-BJCY]. These efforts are beyond the scope of this Article. For a discussion of some reform efforts focused on supply chain organizing and global labor law, see, for example, James Brudney, *Decent Labour Standards in Corporate Supply Chains: The Immokalee Workers Model*, *in* TEMPORARY LABOUR MIGRATION IN THE GLOBAL ERA 351 (Joanna Owens & Rosemary Howe eds., 2016).

39. For a discussion of these issues, see *infra* Section IV.B.

40. *See* Rolf, *Toward a 21st Century Labor Movement*, *supra* note 32; *infra* notes 349-350 and accompanying text.

41. For authors emphasizing these values, see *supra* note 25. Other scholars view protecting the efficiency of markets or the liberty of contract as law's primary function and object to current labor law, and unions on that ground. *E.g.*, Richard A. Epstein, *Labor Unions: Saviors or Scourges?*, 41 CAP. U. L. REV. 1 (2013); Posner, *supra* note 25, at 988; *cf.* Daniel DiSalvo, *The Trouble with Public Sector Unions*, 5 NAT'L AFF. 3, 17 (2010) (arguing that public sector unions "distort the labor market, weaken public finances, and diminish the responsiveness of government and the quality of public services"). These authors would likely object to the new labor law as well.

Part I describes the New Deal's labor law regime, traces its commitments, and explains why it fails workers today—and why employment law does not solve the problem. It then recounts past efforts to respond to the deficiencies of labor law—either by resuscitating the NLRA model or by abandoning it altogether. Part II furnishes a case study of the "Fight for $15" and related social movements and shows that, from close examination of their efforts, the outline of a coherent and fundamentally changed labor law emerges. I challenge existing accounts of these social movements, which describe them as "improvisational," scattershot, or quixotic.[42]

Part III evaluates the incipient labor law, contrasting it to the existing system of firm-based collective bargaining, on the one hand, and a post-union regulatory or self-governance approach, on the other. In so doing, this Part draws on models of social bargaining from Europe and elsewhere. Part IV analyzes the legal innovations now underway within labor law as a result of the ongoing movements; offers some initial recommendations for further statutory and doctrinal changes; and considers possible legal hurdles. Ultimately, while more work is needed to fill in the new labor law's contours and make its aspiration a reality, social bargaining represents a promising strategy for building a more equitable, inclusive, and democratic future—not just for workers, but for the country generally.

I. LABOR LAW'S DECLINE AND FAILED REVIVAL

A. The NLRA

1. From Wagner to Taft-Hartley: The System of Decentralized, Private Representation and Bargaining

The story of labor's rise—and then its steady and relentless decline—is, in large part, a story about law. The logical place to begin is in 1935, during the throes of the Depression. In the face of rising labor unrest, Congress enacted

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42. *See* Michael M. Oswalt, *Improvisational Unionism*, 104 CALIF. L. REV. 597 (2016) (providing a detailed account of the Fight for $15 and describing it as "improvisational"); *see also* Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C. IRVINE L. REV. 561, 563-64, 582 (2014) (concluding that the movements have little answer to "how to leverage worker power to accomplish lasting change"); Nelson Lichtenstein, *Two Roads Forward for Labor: The AFL-CIO's New Agenda*, DISSENT, Winter 2014, http://www.dissentmagazine.org/article/two-roads-forward-for-labor-the-afl-cios-new-agenda [http://perma.cc/YCY5-JRMD] (describing the fast-food movement as eschewing unionization and a collective contract).

the Wagner Act, the original National Labor Relations Act.[43] The NLRA recognized the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities, for the purpose of collective bargaining or other mutual aid or protection."[44] A sweepingly broad statute, the Act established the types of organizations workers could form, the procedures for doing so, and the subjects over which employers were required to negotiate, as well as an independent regulatory agency—the National Labor Relations Board (NLRB)—to enforce the regime.[45]

Until this point, the Supreme Court had narrowly interpreted Congress's power to legislate in the area of labor and employment: the Court had struck down numerous protective statutes on the grounds that they did not sufficiently implicate interstate commerce[46] or that they violated the liberty of contract.[47] But two years after the Wagner Act's passage, the Court, in a surprising about-face from its earlier precedent, upheld the Act as a proper exercise of Congress's Commerce Clause authority.[48] In so doing, the Court inaugurated both the modern era of federal legislative power and the modern era of American labor law.

On one account, the NLRA was, from its inception, a relatively conservative statute.[49] It represented an effort to deradicalize an increasingly powerful and

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43. National Labor Relations (Wagner) Act, 29 U.S.C. §§ 151-169 (2012); *see* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1389 (1993) ("[T]he opportunity for such a dramatic legislative initiative was generated by 'mass politics' in the form of popular electoral realignment, populist political organization, and mass labor unrest . . . . That opportunity was seized by loosely interconnected networks of political-technocratic entrepreneurs driven by progressive ideological commitment and ambition.").

44. National Labor Relations (Wagner) Act § 7.

45. Sachs, *supra* note 20, at 2685.

46. *E.g.*, Hammer v. Dagenhart, 247 U.S. 251, 277 (1918) (striking down, as exceeding the Commerce Clause, a federal law prohibiting transportation of goods produced in factories employing children).

47. *E.g.*, Adair v. United States, 208 U.S. 161, 180 (1908) (striking down, under a substantive due process liberty of contract theory, federal legislation forbidding employers from requiring employees to agree not to join a union); *cf.* Lochner v. New York, 198 U.S. 45, 64 (1905) (holding that a state law imposing limits on working hours violated the Due Process Clause of the Fourteenth Amendment).

48. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937).

49. *See* Theodore J. St. Antoine, *How the Wagner Act Came To Be: A Prospectus*, 96 MICH. L. REV. 2201, 2206 (1998) (reporting, based on interviews with the statute's drafters that "[a]t no point was there any discussion that the statute would revolutionize American employer-employee relations, beyond guaranteeing workers the right to organize and bargain collec-

militant workers' movement.[50] It also embodied the values of the more conservative elements of the American labor movement. That is, the statute reflected the early twentieth-century American Federation of Labor's commitment to private collective bargaining at the firm level instead of the class-based political or social bargaining that was advocated for by other strands of the American labor movement and that ultimately took hold in some European countries.[51] Indeed, the NLRA represented a break from the nation's previous, short-lived labor statute, the National Industrial Recovery Act (NIRA),[52] and other progressive and early New Deal era experiments, which invited trade associations and union leaders to establish wages and other working conditions jointly with the government.[53]

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tively"). The Court's decision to uphold the Wagner Act as a matter of commerce, rather than as an exercise of civil rights power, some contend, cemented the statute's more conservative dimensions. James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1 (2002); *see also* James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997) (distinguishing unionists' "constitution of freedom," which promised fundamental labor rights, from the progressive constitutionalism that ultimately prevailed after the New Deal, as well as from the laissez-faire constitutionalism of the *Lochner* era).

50. *See* St. Antoine, *supra* note 49, at 2202 n.10, 2206 (citing 4 SELIG PERLMAN & PHILIP TAFT, HISTORY OF LABOR IN THE UNITED STATES, 1896-1932: LABOR MOVEMENTS 609-14 (John R. Commons ed., 1935); PHILIP TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 435-50 (1964)).

51. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT, *supra* note 27, at 128-30; Forbath, *The Shaping of the American Labor Movement*, *supra* note 27, at 1125. Forbath shows that, while the nineteenth-century labor movement sought to pursue a radical vision of social and political reform, encounters with the legal system at the turn of the century led dominant elements of the labor movement to demand private ordering of industrial relations between unions and employers. On social bargaining in Europe, see *infra* notes 172-177, 401-420 and accompanying text.

52. This early New Deal statute was ultimately struck down on separation-of-powers grounds in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), which held that the code-making authority conferred by NIRA impermissibly delegated legislative power. *Id.* at 542. For a discussion of NIRA's promise and problems, see JEFFERSON COWIE, THE GREAT EXCEPTION 104-08 (2016).

53. Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 599-600 (2007); *see also* FINK, *supra* note 30, at 96, 102-08, 111-16 (noting that "as far back as the 1870s and continuing through the 1880s, the American labor movement imagined a positive role for government in buttressing workers' power and adjudicating major industrial disputes" and describing progressive era experiments with industrial commissions and dispute resolution from 1880 to 1920). Notably, drafters of the NLRA and the Social Security Act initially considered a tripartite form of oversight agency. And the Fair Labor Standards Act (FLSA), in its early years, included a mechanism for tripartism: it established industry committees who had discretion to set minimum wages on an industry-by-industry basis. Amendments to the FLSA eliminated the committees in 1949. *See* Bruce E. Kaufman,

In contrast, the NLRA facilitated union representation and bargaining at the level of the individual worksite and the individual employer. In some industries, unions were able to achieve sufficient density to force industry-wide or pattern bargaining, but the legal regime did not require it.[54] Moreover, under this system, the union's primary role was to represent the interests of its members through private collective bargaining, and the state's role was to serve as administrator and supervisor, rather than co-negotiator.[55] The NLRA also excluded millions of the most vulnerable workers—namely, domestic and agricultural workers—from its coverage.[56]

On another account, however, the Act was "perhaps the most radical piece of legislation ever enacted by the United States Congress."[57] It announced an affirmative national policy in favor of collective bargaining and economic redistribution; worked a fundamental change in the common-law employment relationship; and promised a system of nationwide industrial democracy.[58] Section 7 was particularly revolutionary, as it protected not only the right of unionized workers to bargain, but also the right of all workers to engage in concerted action for mutual aid or protection.[59] Senator Wagner went so far as to assert that

John R. Commons and the Wisconsin School on Industrial Relations Strategy and Policy, 57 INDUS. & LAB. REL. REV. 3, 23 (2003).

54. *See infra* notes 79-82, 154-156 and accompanying text.

55. For further discussion, see *infra* notes 112-115, 162-177 and accompanying text.

56. National Labor Relations (Wagner) Act § 2. The agency-imposed exemption for small businesses also had the effect of exempting vulnerable workers, particularly women and minorities, from coverage, as did the statutory exemption for hospital workers, which was eventually limited. *See* CAROLINE FREDRICKSON, UNDER THE BUS: HOW WORKING WOMEN ARE BEING RUN OVER 29-31, 35-42 (2015).

57. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 265 (1978).

58. *Id.* at 266; *see also* Barenberg, *supra* note 32, at 769 n.31 (arguing for reforms that would make labor law's structures "more faithful to the pragmatic cooperationism" of Senator Wagner and his allies); Barenberg, *supra* note 43, at 1381 (examining Senator Wagner's "crusade to build a cooperative social democracy"); Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 496-97 (1993) (describing Senator Wagner's characterization of the Act).

59. National Labor Relations (Wagner) Act § 7, 29 U.S.C. § 157 (2012); *see* Eastex, Inc. v. NLRB, 437 U.S. 556, 564-67 (1978) (emphasizing breadth of section 7's protection); NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) (extending section 7 rights to nonunion employees). The scope of section 7 remains contested today. *Compare* Lewis v. Epic Sys. Corp., No. 15-2997 (7th Cir. May 26, 2016) (emphasizing breadth of section 7 protection and concluding that an employer's arbitration provision, requiring employees to bring any wage and hour claims through individual arbitration, violates section 7 of the NLRA) *with* Murphy Oil v. NLRB, 808 F.3d 1013 (5th Cir. 2015) (concluding that employer's individual

the Act was "the next step in the logical unfolding of man's eternal quest for freedom."[60]

Whatever the Wagner Act's initial promise, the years following the Act's passage gave rise to fierce political and legal conflict over its construction and application. Unions experienced a period of rapid growth and wielded significant economic and political power in the early New Deal state.[61] But they were also met with significant resistance from the business community, including in the form of legal challenges.[62] At the urging of employers, Supreme Court interpretations of the NLRA soon began to curtail utopian aspirations for a radical restructuring of the workplace.[63] The Court, among other things, undercut the Act's protection of the right to strike, made it easier for employers to oppose union campaigns, and generally shored up managerial rights of control over the workplace.[64]

Wartime mobilization temporarily strengthened labor's position and moved the legal regime away from private bargaining at the firm level toward a more inclusive, political, and statist form of unionism.[65] Under wartime pressure, the federal government invited labor and corporations into tripartite bargaining over national wage and economic policy.[66] For a period, the United States seemed poised to move to the kind of labor-backed corporatism or tri-

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arbitration agreements may prohibit class-wide claims, notwithstanding employee rights under section 7).

60. 79 CONG. REC. 7565 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT (WAGNER ACT) 1935, at 2321 (1959).

61. *See* Nelson Lichtenstein, *From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era*, *in* RISE AND FALL OF THE NEW DEAL ORDER, *supra* note 6, at 122, 122-23.

62. Klare, *supra* note 57, at 286-87 (describing how "the business community embarked upon a path of deliberate and concerted disobedience to the Act" in the years following its enactment). For a history of the early years of the internal workings of the NLRB, including the agency's transformation from a tripartite body designed to conciliate disputes between employers and unions to a quasi-judicial entity, see 1 JAMES GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW 1933-1937 (1974).

63. Klare, *supra* note 57, at 292-93, 301-10, 322-25, 327-34, 337.

64. JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 19 (1983) (citing NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938) (holding that employees engaged in an economic strike that is "protected" by section 7 are nonetheless subject to permanent replacement by their employer)); Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. ILL. L. REV. 547, 549-67 (describing changes in doctrine).

65. NELSON LICHTENSTEIN, A CONTEST OF IDEAS: CAPITAL, POLITICS, AND LABOR 80-84 (2013); Lichtenstein, *supra* note 61, at 124.

66. Lichtenstein, *supra* note 61, at 124; Wachter, *supra* note 53, at 610-13.

partism that would later characterize social policy in much of Europe and Scandinavia.[67] In the war's aftermath, however, the trade union movement found its efforts to maintain influence over the shape of the political economy stymied.[68] Trade unions faced a slew of hostile court decisions, a powerful remobilization of business and conservative forces in the legislative arena, and the dismantling of state-sponsored bargaining.[69]

In 1947, at the behest of business, and buoyed by popular concerns about rising labor militancy and union abuses, Congress passed the Taft-Hartley Act over President Truman's veto.[70] Taft-Hartley cemented labor law's commitment to private, firm-based bargaining while reducing the government's support for unionization.[71] No longer did the Act favor concerted action and collective bargaining; instead, it embraced employees' "full freedom" to engage in or refrain from such activity.[72] In addition, Taft-Hartley limited the ability of unions to exert economic pressure across employers: it prohibited secondary boycotts, wherein workers exert economic pressure by refusing to handle goods from another firm embroiled in a union dispute.[73] The amendments also placed other restrictions on the kinds of strikes allowed. Meanwhile, Taft-Hartley permitted states to enact "right-to-work" laws, which allow workers to opt out of paying union dues while maintaining a duty on the union to represent even noncontributing workers.[74] Finally, Taft-Hartley codified the Supreme Court's prior decisions allowing employers to campaign against unions as long as they did

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67. Lichtenstein, *supra* note 61, at 124-33.

68. LICHTENSTEIN, *supra* note 65, at 84-89; Lichtenstein, *supra* note 61, at 134.

69. Lichtenstein, *supra* note 61, at 134; *see* JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION, 1937-1947 (1981) (describing conditions that gave rise to the enactment of Taft-Hartley); TOMLINS, *supra* note 30, at 148-50 (describing divisions within the labor movement, as well as opposition from the business community).

70. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 141 (2012) (amending the National Labor Relations Act of 1935); *see* ARCHIBALD COX, *The Evolution of Labor-Management Relations*, *in* LAW AND THE NATIONAL LABOR POLICY 13-14 (1960); KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE BUSINESSMEN'S CRUSADE AGAINST THE NEW DEAL 31-32 (2010).

71. Labor historians disagree over whether Taft-Hartley was a codification and consolidation of preexisting legal restriction or a turning point. *See* TOMLINS, *supra* note 30, at 250-51 (discussing the extent to which reorientation was present in prior NLRB and Supreme Court decisions); Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763, 763-65 (1998) (reviewing the debate).

72. 29 U.S.C. § 151 (2012).

73. *Id.* § 158(b)(4).

74. *Id.* § 158(a)(3), 164(b).

not engage in threats of reprisals or promises of benefits;[75] expressly excluded independent contractors and supervisors from the law's protection;[76] and required officers of unions to sign affidavits asserting they were not Communists.[77]

The passage of Taft-Hartley was widely viewed by the labor movement as a resounding defeat.[78] Yet the extent to which the law would ultimately fail to protect workers' rights to engage in concerted action and collective bargaining, even at a narrow firm-based level, would not become clear for some time. Rather, the postwar years were marked by relative prosperity among organized workers.

Because unions in industries like auto and steel had already achieved significant density, they were able to force employers to engage in pattern or industry-wide bargaining, despite the absence of any legal obligation to do so.[79] In exchange for assurances of industrial discipline and stability, unions won substantial wage increases with cost of living adjustments, pensions, and generous health benefits.[80] The result was that workers in these highly organized,

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75. *Id.* § 158(c).

76. *Id.* § 152(3).

77. 29 U.S.C. § 159(h) (1958), *repealed by* Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959 § 201(d), Pub. L. No. 86-257, 73 Stat. 525. The Taft-Hartley Act also made a number of changes in the administration of the Act. For a discussion of the Taft-Hartley Act's changes and their effect on the contemporary labor movement, see Rich Yeselson, *Fortress Unionism*, 29 DEMOCRACY (Summer 2013), http://democracyjournal.org/magazine/29/fortress-unionism [http://perma.cc/RP3P-HZ8Z].

78. Lichtenstein, *supra* note 71, at 766 (describing labor's denunciation of the law as a "Slave-Labor Act").

79. LICHTENSTEIN, *supra* note 65, at 96-98 (describing union contract victories that covered multiple employers but noting that pattern bargaining never spread beyond core, highly organized manufacturing industries); NELSON LICHTENSTEIN, THE MOST DANGEROUS MAN IN DETROIT 271-98 (1995) [hereinafter LICHTENSTEIN, MOST DANGEROUS MAN] (describing "The Treaty of Detroit"); Mark Anner, Jennifer Bair & Jeremy Blasi, *Learning from the Past: The Relevance of Twentieth-Century New York Jobbers' Agreements for Twenty-First-Century Global Supply Chains*, *in* ACHIEVING WORKERS' RIGHTS IN THE GLOBAL ECONOMY 239 (Richard P. Appelbaum & Nelson Lichtenstein eds., 2013) (describing jobbers' agreements negotiated among workers, garment manufacturers, and purchasers in the U.S. garment sector in the early- and mid-twentieth century, negotiated at a time when the garment industry was less mobile). Industry-wide bargaining persists in some industries, including the arts and professional sports. *See, e.g.*, CATHERINE FISK, WRITING FOR HIRE: UNIONS, HOLLYWOOD, AND MADISON AVENUE (2016) (describing industry-wide bargaining in Hollywood). But while permitted, these arrangements are not required by law.

80. LICHTENSTEIN, *supra* note 65, at 96-98. For example, between 1947 and 1960, during the heyday of the United Automobile Workers, average wages in the automobile industry nearly doubled. LICHTENSTEIN, MOST DANGEROUS MAN, *supra* note 79, at 288.

oligopolistic industries—albeit largely white men—made significant gains, helping produce one of the most economically egalitarian periods in American history.[81] During these decades, increases in productivity consistently led to wage and benefit increases for middle-income Americans.[82]

At the same time, the 1950s and 60s were marked by complacency among many union leaders and members. Willing to settle for a private, depoliticized system of bargaining, many unions failed to organize new members;[83] some actively resisted membership by non-white workers.[84] Other unions sought to organize women and people of color, but they faced intense opposition from business, particularly in the South.[85] Meanwhile, employers, even in highly organized industries, began to develop a range of new management strategies that would ultimately lead to the near collapse of labor unions in the private sector.[86]

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81. Union density and pattern bargaining were by no means the only drivers of this relative economic equality. A range of other factors, including a growing economy, technological changes, the enactment of the GI Bill, comparatively low executive pay, robust financial regulation, a progressive tax system, and the entrance of women into the workforce all contributed to the rise of the American middle class and the period of relative economic egalitarianism. *See* COWIE, *supra* note 52, at 153; JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 88-90 (2010); MICHAEL LIND, LAND OF PROMISE 329-62 (2012); SUZANNE METTLER, SOLDIERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION (2007).

82. ROSENFELD, *supra* note 1, at 2.

83. Steve Fraser, *The 'Labor Question,' in* RISE AND FALL OF THE NEW DEAL ORDER, *supra* note 6, at 55 (arguing that workers came to seek personal satisfaction not in labor's control of politics or the economy, but in access to the consumer marketplace); Lichtenstein, *supra* note 61, at 143-44 (describing a transformation in the 1940s from a social democratic insurgency to an interest group content with a private, depoliticized system of collective bargaining).

84. For a discussion of the relationship of the white labor movement to black workers and the emerging civil rights movement, see SOPHIA Z. LEE, WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT (2014); for a discussion of the labor movement's relationship to immigrants, see Janice Fine & Daniel J. Tichenor, *A Movement Wrestling: American Labor's Enduring Struggle with Immigration, 1866-2007*, 23 STUD. AM. POL. DEV. 84 (2009).

85. *See* Elizabeth Tandy Shermer, *"Is Freedom of the Individual Un-American?" Right-to-Work Campaigns and Anti-Union Conservatism, 1943-1958*, *in* THE RIGHT AND LABOR IN AMERICA: POLITICS, IDEOLOGY, AND IMAGINATION 114 (Nelson Lichtenstein & Elizabeth Tandy Shermer eds., 2012) [hereinafter THE RIGHT AND LABOR] (describing right-to-work referenda campaigns in the South and Southwest during the post-war period).

86. Tami J. Friedman, *Capital Flight, "States' Rights," and the Anti-Labor Offensive After World War II*, *in* THE RIGHT AND LABOR, *supra* note 85, at 81-83.

2. *Economic Restructuring, Law, and Deunionization*

By the 1970s, unions had become more inclusive of minority and women workers and had organized large numbers of public-sector employees, as well as some key parts of the service sector.[87] The growth of unions in the public sector in particular meant that labor still had significant membership and resources.[88] But, in the private sector, unions were on the verge of losing much of their economic power—and the law would prove to be little help.

Over the course of the 1970s, 80s, and 90s, American businesses, faced with increased domestic and international competition, as well as restive capital markets and a push for higher profits, reshaped themselves.[89] Capital moved—both down South and overseas.[90] Manufacturing and industrial sectors of the economy shrank.[91] And corporations "fissured."[92] They shed activities deemed peripheral to their core business models and contracted out work to domestic and foreign subcontractors.[93] They also shrunk the portion of their labor force that enjoyed full-time work, vastly increasing their use of "contingent" work-

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87. LEON FINK, UPHEAVAL IN THE QUIET ZONE (1989) (describing the history of the health care union and its connection to the civil rights movement); JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW AND THE STATE, 1900-1962, at 193-95 (2004) (documenting the creation of new state public sector bargaining laws and the rise of public sector unions).

88. In more recent years, Republican governors and legislators in formerly pro-union states like Ohio, Michigan, Indiana, Wisconsin, West Virginia, and Illinois have sought, and in most cases won, new legislation that reduces public employee pensions and benefits; defunds public sector unions by eliminating dues check-off and agency-fee payments; and narrows the scope of public sector bargaining. *See* NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 286-89 (2013).

89. WEIL, *supra* note 10, at 3, 11, 52.

90. *See generally* JAMES C. COBB, THE SELLING OF THE SOUTH: THE SOUTHERN CRUSADE FOR INDUSTRIAL DEVELOPMENT, 1936-1990, at 96-121, 209-28 (1993) (describing the shift of manufacturing from the unionized north to the nonunion and low-wage southern states); COWIE, *supra* note 10, at 127-51 (documenting the shift of the Radio Corporation of America's production from the Midwest to Mexico and its impact on U.S. workers).

91. Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527, 1527 & n.1 (1996) (noting that by 1996 the service sector employed over three-quarters of the nonagricultural workforce).

92. WEIL, *supra* note 10, at 3-4 (describing fissuring as splitting off business and labor functions that were once managed internally).

93. *Id.* at 25, 125, 172, 174, 191, 292.

ers—part-time and temporary workers and independent contractors—as well as automated technology.[94]

Multiple factors drove the economic restructuring, including the desire to increase efficiency and reduce labor costs by focusing on core business competencies.[95] Avoiding unionization became a primary goal for many businesses. Following the lead of President Reagan in his fight against the air traffic controllers, employers began to retaliate aggressively against employees who exercised their right to strike.[96] Employers permanently replaced striking workers.[97] They also closed union plants and opened up low-wage nonunion plants in other locations; double breasting and subcontracting allowed employers to bypass existing collective bargaining arrangements.[98] They developed sophisticated campaigns to try to stop workers from organizing new unions.[99]

The courts largely permitted these tactics, privileging employers' managerial and property rights over employees' rights to organize, bargain, and strike. In a series of cases, for example, courts ruled that employers were not required to bargain over entrepreneurial decisions, including where to operate.[100] They

94. *Id.* at 160; Becker, *supra* note 91, at 1528-30; Lawrence F. Katz & Alan B. Krueger, The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015, at 3, 17 (Mar. 29, 2016) (unpublished manuscript), http://scholar.harvard.edu/files/lkatz/files/katz_krueger_cws_v3.pdf [http://perma.cc/8SBR-YCBG]. The use of contingent work arrangements, such as freelance and contract work, is sometimes referred to as the "gig" economy. *See* Emily Hong, *Making It Work: A Closer Look at the Gig Economy*, PAC. STANDARD (Oct. 23, 2015), http://www.psmag.com/business-economics/making-it-work-a-closer-look-at-the-gig-economy [http://perma.cc/5JRJ-PJ3H].

95. WEIL, *supra* note 10, at 3-4, 10-12.

96. *See* JEFFERSON COWIE, STAYIN' ALIVE: THE 1970S AND THE LAST DAYS OF THE WORKING CLASS 362-64 (2010) (describing an "assault" against unions and other working class institutions after President Reagan's crackdown on air traffic controllers); JOSEPH A. MCCARTIN, COLLISION COURSE: RONALD REAGAN, THE AIR TRAFFIC CONTROLLERS, AND THE STRIKE THAT CHANGED AMERICA (2011) (analyzing President Reagan's firing of air traffic controllers and its impact on the labor movement).

97. ROSENFELD, *supra* note 1, at 86-88.

98. PHILLIPS-FEIN, *supra* note 70, at 89-90 (describing corporations' decisions to move south to nonunionized areas); Becker, *supra* note 91, at 1528-30 (discussing the use of subcontracting to bypass collective bargaining arrangements).

99. *See* Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW 75 (Sheldon Friedman et al. eds., 1994); Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, E.P.I. BRIEFING PAPER NO. 235, 1, 10 tbl.3 (2009) [hereinafter Bronfenbrenner, *No Holds Barred*].

100. *See, e.g.*, First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981) (holding that employers had no duty to bargain over decisions to terminate contracts); Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965) (holding that an employer's decision to close his entire

also permitted the use of permanent replacements, the National Guard, and state police against striking workers who sought to resist concessionary contracts.[101] Meanwhile, deregulation reduced barriers to entry by nonunion, lower-wage firms, particularly in industries like transportation and telecommunication, resulting in more competitive markets but further contributing to unions' declining power.[102]

The trends of deindustrialization, outsourcing, and antiunion campaigning continued during subsequent decades, resulting in a contemporary American economy almost unrecognizable from the one that defined the New Deal.[103] Business gained more flexibility and higher profits, although disintegration of the production process meant that firms often had less control over their labor forces and decreased ability to achieve brand consistency and market power. The effect on workers was substantial. New jobs were created, and prices on many consumer goods decreased. But wages stagnated.[104] Workers increasingly came to fill contingent, nontraditional positions.[105] And as a proportion of the entire workforce, union membership declined from twenty-nine percent in

business, even if due to antiunion animus, is not an unfair labor practice); *see also* Becker, *supra* note 91, at 1527 (arguing that legal doctrine "decisively promote[d] the[] deployment" of subcontracting and other strategies to fissure the employment relationship); Terry Collingsworth, *Resurrecting the National Labor Relations Act—Plant Closings and Runaway Shops in a Global Economy*, 14 BERKELEY J. EMP. & LAB. L. 72, 76, 101-04 (1993) (critiquing the Supreme Court's decisions for allowing for the displacement of American workers); Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities,* 55 U. CHI. L. REV. 73, 90-91 (1988) (describing how the NLRB's efforts to allow bargaining over capital decisions were undercut by the federal courts of appeals and eventually by the Supreme Court).

101. *See* ROSENFELD, *supra* note 1, at 96. The Hormel strike also illustrates the failure of some unions to mount a vigorous, effective, industry-wide response to demands for concessions. AMERICAN DREAM (Miramax Films 1990) (documenting the Hormel strike of 1985).

102. *See, e.g.*, Dale L. Belman & Kristen A. Monaco, *The Effects of Deregulation, De-Unionization, Technology, and Human Capital on the Work and Work Lives of Truck Drivers*, 54 INDUS. & LAB. REL. REV. 502, 508 (2001) (concluding that deregulation accelerated the de-unionization of the trucking industry and contributed to a significant drop in earnings).

103. *See, e.g.*, STONE, *supra* note 9; WEIL, *supra* note 10, at 4; Mark Barenberg, *Widening the Scope of Worker Organizing: Legal Reforms To Facilitate Multi-Employer Organizing, Bargaining, and Striking*, ROOSEVELT INST. 1, 3 (Oct. 1 2015), http://rooseveltinstitute.org/wp-content/uploads/2015/10/Widening-the-Scope-of-Worker-Organizing.pdf [http://perma.cc/JWN2-DS57].

104. Lawrence Mishel, Elise Gould & Josh Bivens, *Wage Stagnation in Nine Charts*, ECON. POL'Y INST. (Jan. 6, 2015), http://www.epi.org/files/2013/wage-stagnation-in-nine-charts.pdf [http://perma.cc/R2C5-QAH5].

105. Katz & Krueger, *supra* note 94, at 2-3.

1973 to about fifteen percent in the early 1990s, even though more than sixty percent of workers continued to report a desire for collective representation.[106]

In the face of this transformation, the NLRB no longer could effectuate employees' statutory rights to form and join labor organizations.[107] Indeed, by 1984 the House Subcommittee on Labor-Management Relations released a report announcing "The Failure of Labor Law." The NLRA, the House committee concluded, "has ceased to accomplish its purpose."[108] Countless scholars and commissions subsequently echoed the assessment.[109] Indeed, even those academics, judges, and politicians who celebrated the NLRA as a continued success did so for its ability to further industrial peace—not for its ability to protect the right to organize or to facilitate workers' collective economic or political power.[110]

Notably, other industrialized countries experienced similar trends of globalization, the fissuring of the traditional employment relationship, and the use of automation. But unions in these countries did not experience the same collapse as American unions. In some countries, union density has remained steady or even increased, while income distribution has remained relatively constant.[111]

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106. RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 41 (1999) (finding that over sixty percent of workers desired greater influence in the workplace); LICHTENSTEIN, *supra* note 88, at 213. The losses were concentrated in the manufacturing sectors of the economy.

107. Julius G. Getman, *Explaining the Fall of the Labor Movement*, 41 ST. LOUIS U. L.J. 575, 578-84 (1997); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 61-62 (1993); Weiler, *supra* note 7, at 1769-70, 1774-1804.

108. H. SUBCOMM. ON LABOR-MGMT. RELATIONS OF THE H. COMM. ON EDUC. & LABOR, 98TH CONG., THE FAILURE OF LABOR LAW—A BETRAYAL OF AMERICAN WORKERS 1 (Comm. Print 1984).

109. Weiler, *supra* note 7, at 1770 (writing, in the early 1980s, that "[i]n the last decade or so, there has been an increasing appreciation that American labor law has failed to make good on its promise to employees that they are free to embrace collective bargaining if they choose"). For additional accounts by legal scholars, see sources cited *supra* notes 116-126; for human rights organizations' and political accounts, see, for example, LANCE COMPA, HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (2002); DUNLOP COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, U.S. DEP'T OF LABOR, FINAL REPORT (1995); for an historian's perspective, see, for example, COWIE, *supra* note 52, at 25-26.

110. *See, e.g.*, Michael L. Wachter, *The Striking Success of the National Labor Relations Act*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 427 (Cynthia L. Estlund & Michael L. Wachter eds., 2012) (arguing that the NLRA has achieved its most important goal: industrial peace).

111. HACKER & PIERSON, *supra* note 81, at 57-58; THELEN, *supra* note 24, at 35-37; *cf.* Jonas Pontusson et al., *Comparative Political Economy of Wage Distribution: The Role of Partisanship and*

To understand how American labor law failed, one must first understand its basic structure. The NLRA is premised on a principle of majority rule at particular worksites. If a majority of workers in an "appropriate" bargaining unit selects representation by a union,[112] that union becomes the exclusive collective bargaining representative for all workers in the unit.[113] Typically, selection occurs through a secret-ballot election, with the government agency serving as a neutral arbiter.[114] Once a bargaining representative is elected, the employer has an obligation to bargain in good faith.[115]

A well-developed critique by labor scholars focuses on how the governing rules of union elections fail to protect workers' statutory right to organize in the face of concerted management opposition.[116] Among its many problems, the law provides employers with great latitude to dissuade employees from self-organization, while offering unions few rights to communicate with employees about unionization's merits.[117] Unions are denied physical access to the workplace during an organizing campaign, but employers are permitted to compel employee presence for antiunion communication.[118] Meanwhile, the

Labour Market Institutions, 32 BRIT. J. POL. SCI. 281, 307 (2002) ("While market forces have tended to generate more inequality, there is nonetheless no uniform or universal trend towards more overall wage inequality among full-time employees across the OECD.").

112. 29 U.S.C. § 159 (2012).

113. *Id.*

114. *See id.* (establishing that recognition without an election, though not mandated, is permitted).

115. *Id.* § 158.

116. *See, e.g.*, James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563 (1996); Gottesman, *supra* note 107; Sachs, *supra* note 20, at 2694-2700; Weiler, *supra* note 7, at 1769-70; *see also* Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing* 43 (Cornell U. ILR Collection 2000), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=reports [http://perma.cc/74LQ-NQJ3] (noting that managerial opposition is "extremely effective in reducing union election win rates" and documenting the trends in such opposition).

117. *See* Kate E. Andrias, Note, *A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections*, 112 YALE L.J. 2415, 2433-44 (2003); *see also* Becker, *supra* note 58, at 516-23 (1993) (describing employers' influence on election timing as a tactic to deter unionization).

118. Neither of these rules was foreordained by the statute's text. The Act was initially interpreted as affording union organizers access to nonwork areas of the employer's facility; but that interpretation was reversed by the Supreme Court in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113-14 (1956). The Court has since reaffirmed its interpretation. *See* Lechmere, Inc. v. NLRB, 502 U.S. 527, 536-37 (1992). For further discussion, see Cynthia L. Estlund, *Labor, Property, and Sovereignty After* Lechmere, 46 STAN. L. REV. 305, 311-25 (1994). For discussion of the doctrine that allows employers to compel employees to attend antiunion meetings, see Andrias, *supra* note 117, at 2439-41.

NLRB's election machinery is extraordinarily slow; employers are able to defeat organizing drives through delay and attrition.[119]

Perhaps most important, the NLRB's remedial regime is too protracted and its penalties too meager to protect employees against employer retaliation.[120] One study found that about twenty-five percent of employers illegally discharge workers for union activity; more than one-half make illegal threats to close all or part of a plant.[121] When such illegal activity occurs, remedies are too little, too late. Employers who illegally terminate employees are liable only for backpay, minus any wages the worker has earned in the meantime—and the worker is obligated to mitigate any damages by looking for new employment.[122] Further, the median length of time between the filing of an unfair labor practice charge and the issuance of a Board order has been close to 500 days.[123]

The statute's goal of facilitating collective bargaining fares no better. The regime's "good faith" bargaining obligation is undermined by the Board's inability to impose contract terms as a remedy for a party's failure to negotiate in good faith. Thus, an employer determined to resist collective bargaining can drag out negotiations for years, making plain its refusal to enter into an agreement with the union.[124] Employees have little recourse. Not only are the Board's remedial powers limited, but the employer's "right" to permanently replace striking workers—established in 1938 by the Supreme Court but little used until the 1980s—"has rendered the strike useless and virtually suicidal for many employees."[125] Further weakening unions' bargaining position, the Court has strictly limited the scope of mandatory subjects of bargaining, concluding that matters of entrepreneurial judgment need not be negotiated. For this reason, the employer may avoid unionization by closing its operations, by subcon-

119. Weiler, *supra* note 7, at 1777 & n.24.

120. *See* Gottesman, *supra* note 107, at 73.

121. Bronfenbrenner, *No Holds Barred*, *supra* note 99.

122. *See* Weiler, *supra* note 7, at 1789-95 (describing the weaknesses of NLRA remedies).

123. 74 NLRB ANN. REP. 152 (2009).

124. Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47, 56 (2009).

125. Estlund, *supra* note 7, at 1538 (citing ATLESON, *supra* note 64, at 19-34). The federal courts and the Board have limited the right to strike in numerous other ways as well. *See* Craig Becker, *"Better Than a Strike": Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. CHI. L. REV. 351, 353 (1994).

tracting, by "doublebreasting" through a nonunion company, or by moving production.[126]

Unions and their allies in Washington have repeatedly sought to reform the NLRA to reduce employer interference in organizing drives and to strengthen the bargaining obligation. The proposed reforms have all failed.[127] The most recent bill, the Employee Free Choice Act (EFCA), would have required that the Board certify unions based on a showing that a majority of workers in a unit had signed cards indicating their desire for representation; the goal was to allow unions to avoid the NLRB's dilatory election process.[128] EFCA also would have mandated that parties unable to reach agreement on a first contract within four months submit to binding arbitration.[129]

The failure to pass EFCA and its predecessor reform bills were significant losses for the labor movement.[130] However, the import of the defeats may be overstated. It is not clear that any of the reform proposals would have done much to transform the American labor movement into an effective and powerful advocate for American workers in the contemporary political economy: the proposed reforms all centered on altering the existing mechanisms of organiz-

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126. *See* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981); Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965). Employer rights are particularly strong if the employer is making a change in the nature of its business or closing operations altogether. In such cases, employers typically need only bargain about the effect of the closure. *Id.*; *see also* sources cited *supra* note 100.

127. For a summary of reform failures, see Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1163-64 (2011); and Estlund, *supra* note 7, at 1612. There was one significant reform in the post-Taft-Hartley era: The Landrum-Griffin Act of 1959 imposed a regime for the regulation of internal union affairs and union democracy, while tinkering with some elements of Taft-Hartley. *See* Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.).

128. Employee Free Choice Act of 2007, H.R. 800, 110th Cong. (2007).

129. *Id*. Although the House of Representatives passed the Employee Free Choice Act in 2007, the bill died after a threatened senatorial filibuster. *See, e.g.*, Steven Greenhouse, *Democrats Drop Key Part of Bill To Assist Unions*, N.Y. TIMES (July 17, 2009), http://www.nytimes.com/2009/07/17/business/17union.html [http://perma.cc/6QAN-UWNT]; Alec MacGillis, *Executives Lay Out Compromise to "Card Check" Labor Bill*, WASH. POST (Mar. 22, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/03/21/AR2009032101449.html [http://perma.cc/9S8Y-BM4K]. In 2007, the bill died in the Senate after a cloture vote failed 51-48. *See* 153 CONG. REC. S8398 (daily ed. June 26, 2007).

130. Harold Meyerson, *Under Obama, Labor Should Have Made More Progress*, WASH. POST (Feb. 10, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/02/09/AR2010020902465.html [http://perma.cc/M8T2-YAR2] (describing the Senate's inability to pass EFCA as "devastating and galling" for the unions).

ing and bargaining to make them more amenable to unions.[131] Yet, those mechanisms—geared toward worksite bargaining between single employers and their employees—are fundamentally mismatched with today's economy.[132]

Consider, for example, an auto manufacturer that once produced primary parts, assembled those parts into vehicles, and stored, transported, and distributed the vehicles to market.[133] Now, that manufacturer 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.[134] Or consider the modern retailer, which obtains goods from a host of factories and warehouses.[135] Those factories have long been staffed by workers who are employed by entities other than the retailer itself.[136] But in the contemporary economy, several contractors likely stand between any given factory or warehouse worker and the retailer. And the workers themselves are as likely to be classified as temporary employees or independent contractors as they are full-fledged employees.[137] Within the retail store, some of those who labor may be employees—many temporary or part-time. But those who clean, repair, and secure the building are more likely to be subcontracted.[138]

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131. For similar reasons, recent regulatory changes promulgated by the NLRB, which would shorten the election period and adjust other procedures, while important, are unlikely to be game changing. *See* Representation—Case Procedures, 79 Fed. Reg. 74308 (Dec. 15, 2014) (to be codified at 29 C.F.R. pts. 101-03). These rules recently survived legal challenge in the Fifth Circuit and the District of Columbia. *Associated Builders & Contractors of Tex. v. NLRB*, 826 F.3d 215 (5th Cir. 2016); *Chamber of Commerce of U.S. v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015).

132. *See* STONE, *supra* note 9; Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 5 n.5 (1993); Wachter, *supra* note 53, at 581.

133. For a detailed description and analysis of the various ecosystems of disintegrated employers, see generally WEIL, *supra* note 10; and Barenberg, *supra* note 103.

134. *See* WEIL, *supra* note 10, at 58-59, 68-69, 160; Barenberg, *supra* note 103.

135. WEIL, *supra* note 10, at 26, 170.

136. *Id.*

137. *See id.* at 128, 159-68, 173-77 (discussing the pervasiveness of temporary workers and independent contractors in various industries, including retail).

138. *Id.* at 102. Moreover, the retailer's supply chain is likely interwoven with others to form a complex production and distribution network. Goods sold by one big-box retailer may be produced in the same factories as those of other big-box retailers, transported by some of the same logistics companies to some of the same ports, unloaded by some of the same stevedoring companies, transported by some of the same trucking companies, and stored in some of the same warehouses, before ultimately arriving to the stores. *See* Barenberg, *supra* note 103, at 3.

Similarly, a building owner in a major city is now unlikely to hire many employees directly, instead entering into contracts with cleaning companies, security companies, landscapers, insurers, tenants, and others. So, too, a fast-food company may have a set of employees at its national headquarters, but it likely franchises with many small franchise owners, who in turn hire many part-time employees while contracting with cleaning companies, food suppliers, security companies, and others.[139] Or consider Uber, part of the new "platform" economy,[140] which has a team of lawyers, engineers, and high-tech workers at headquarters, but, it contends, only independent contractors providing the rides that make up the company's core business.[141]

Throughout these and other ecosystems of disintegrated or fissured employers, the NLRA has been of diminished relevance. Employers operate outside its reach for several reasons. First, the statute does not cover non-traditional work relationships. Independent contractors are expressly exempted.[142] Thus, if an entity like Uber is correct that its drivers are independent contractors—an issue now hotly contested—federal labor law would not protect them.[143] In those circumstances, Uber could terminate drivers' contracts in

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139. McDonald's, for example, has more than 35,000 restaurants but less than a fifth of them are actually operated by the McDonald's corporation. Oswalt, *supra* note 42, at 622.

140. Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 480 (2016) (defining the "platform economy" as "companies such as Uber, Lyft, TaskRabbit, Postmates, and Handy, all of which provide online platforms that match consumers with workers for short-term tasks").

141. *But see, e.g.*, Berwick v. Uber Techs. Inc., No. 11-46739 EK, slip op. at 10 (Cal. Labor Comm'r June 3, 2015) (holding that Uber drivers qualify as employees under California law).

142. National Labor Relations (Wagner) Act § 2(3), 29 U.S.C. § 152(3) (2012).

143. On February 2, 2016, the International Brotherhood of Electrical Workers, Local 1430 filed a formal petition with the NLRB to represent 600 Uber drivers who serve New York City's LaGuardia Airport, which they subsequently withdrew. *See* Uber USA, LLC, N.L.R.B., 29-RC-168855 (2016). State agencies are divided on the status of Uber divers. The California Labor Commissioner has ruled that they are employees. *See Berwick*, slip op. at 10. Authorities in eight states have concluded that they are not employees. *See* Tom Risen, *Employee or Contractor? Uber Ruling Could Affect Other Companies*, U.S. NEWS (June 18, 2015), http://www.usnews.com/news/articles/2015/06/18/employee-or-contractor-uber-ruling-could-affect-other-companies [http://perma.cc/JQ3E-2MSM] ("Labor authorities in Georgia, Pennsylvania, Texas, Colorado, Illinois and New York have upheld Uber's classification that its drivers are independent contractors."). Though Uber has settled several major class actions without conceding that its drivers are employees, there are numerous additional lawsuits pending. *See* Mike Isaac & Noam Scheiber, *Uber Settles Cases with Concessions, but Drivers Stay Freelancers*, N.Y. TIMES (Apr. 21, 2016), http://www.nytimes.com/2016/04/22/technology/uber-settles-cases-with-concessions-but-drivers-stay-freelancers.html [http://perma.cc/6RLL-X92X]; Heather Kelly, *Uber's Never-Ending Stream of Law Suits*, CNN MONEY (Aug. 11, 2016), http://money.cnn.com/2016/08/11/technology/uber

retaliation for concerted action and would be under no obligation to negotiate with a majority of drivers regarding the terms of their contract. FedEx, for example, has been successful in some circuits in resisting unionization efforts on the ground that its drivers are independent contractors.[144] To be sure, the classification of such workers as contractors, and therefore not covered by the statute, is contested. UPS workers perform work identical to that of FedEx employees and are classified as employees—and are unionized. But employers have actively exploited the exclusions in labor law when restructuring and reclassifying their work relationships; meanwhile, faced with intense management opposition and plagued by internal divisions, unions have historically failed to develop new ways to organize these workers on any significant scale.[145]

Second, as Professor Mark Barenberg has recently detailed, the NLRA is designed to channel organizing drives between groups of employees and *single* employers—not to facilitate collective action across multiple employers.[146] To win recognition, a worker organization must demonstrate majority support within one employer, and often within a subunit of that employer, within which workers share a "community of interest."[147] Moreover, only employers

-lawsuits [http://perma.cc/8JR9-TBXZ]. In addition, the NLRB continues to investigate complaints that Uber illegally bars drivers from discussing working conditions; the outcome of these will turn, in part, on whether the drivers are statutory employees. Daniel Wiessner, *Uber Drivers' Employment Status Is in NLRB's Hands After Settlement*, REUTERS LEGAL (Apr. 25, 2016), http://www.reuters.com/article/uber-settlement-nlrb-idUSL2N17SoCJ [http://perma.cc/Q6DW-KX5R].

144. FedEx Home Delivery v. NLRB, 563 F.3d 492, 498 (D.C. Cir. 2009) (emphasizing the presence of entrepreneurial opportunity in determining whether a worker is an independent contractor). The Obama Board has resisted the D.C. Circuit's interpretation. *See* FedEx Home Delivery, 361 N.L.R.B. No. 55, at 10, 16 (Sept. 30, 2014) (declining to adopt the D.C. Circuit's holding insofar as it treats entrepreneurial opportunity as the primary inquiry without sufficient regard for all of the common law factors and holding FedEx drivers to be employees). In other circumstances, FedEx has successfully resisted efforts to have its workers covered under the NLRA instead of the Railway Labor Act. *See* Kevin Bogardus, *FedEx Bests UPS in Lobbying Skirmish*, THE HILL (Feb 2, 2011, 11:24 AM), http://thehill.com/business-a-lobbying/141625-fedex-triumphs-over-ups-in-faa-labor-lobbying-skirmish# [http://perma.cc/2PN7-6283].

145. *But see* sources cited *infra* notes 211-217 (describing some exceptional organizing campaigns by unions and worker centers).

146. Barenberg, *supra* note 103.

147. *See, e.g.*, National Labor Relations (Wagner) Act § 9(b).

can be held liable for retaliating against workers for exercising their right to organize.[148]

The law does allow for "joint employers," but from the 1980s until just recently, employers had been successful in advancing a narrow interpretation of the term.[149] For over thirty years, the Board required an entity to exercise direct, immediate, and actual control over the terms and conditions of employment before the entity would be considered a joint employer.[150] Under this interpretation, it was exceedingly difficult for workers to hold liable an entity that retaliated against them for organizing, unless that entity was their immediate employer. As discussed further in Section II.C.1, in 2016 the NLRB returned to the prior, more expansive standard in a case called *Browning-Ferris*.[151] The majority held that "two or more statutory employers are joint employers of the same statutory employees if they 'share or codetermine those matters governing the essential terms and conditions of employment.'"[152] Several months later, in *Miller & Anderson*, the Board went a step further, holding that unions can seek representation elections in units that combine workers of one company with workers provided to the company by another organization as temporary or contract workers.[153]

These new developments are important attempts by the agency to respond to the realities of the contemporary fissured and contingent workforce, and, as discussed in Part IV, are an important step toward a new labor law regime—but they are still limited by the NLRA's enterprise-focus. They do not reach companies that participate in a supply chain or economic network, without sharing

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148. For example, the NLRB lacks authority to sanction or punish lawmakers or business-funded antiunion organizations for retaliating against workers for organizing. *See* Amanda Becker, *Legal Challenge to VW Union Election Could Be "Uncharted Territory,"* REUTERS (Feb. 14, 2014), http://uk.reuters.com/article/autos-vw-legal-idUKL2N0LJ1IT20140214 [http://perma.cc/J8RT-A7KZ] (describing efforts of Tennessee elected officials to dissuade Volkswagen workers from unionizing, including by threatening retaliation).

149. The Board's position changed with *Browning-Ferris Indus. of California, Inc.*, 362 N.L.R.B. No. 186, at 2 (Aug. 27, 2015).

150. TLI, Inc., 271 N.L.R.B. 798 (1984), *overruled by Browning-Ferris*, 362 N.L.R.B. No. 186; Laerco Transp., 269 N.L.R.B. 324 (1984), *overruled by Browning-Ferris*, 362 N.L.R.B. No. 186.

151. *Browning-Ferris*, 362 N.L.R.B. No. 186. For additional analysis, see *infra* notes 302-317 and accompanying text.

152. *Browning-Ferris*, 362 N.L.R.B. No. 186, at 2, 15 (quoting NLRB v. Browning-Ferris Indus. of Pa., Inc., 691 F.2d 1117, 1123 (3d Cir. 1982)).

153. Miller & Anderson, Inc., 364 N.L.R.B. No. 39 (July 11, 2016) (overruling H.S. Care, L.L.C., 343 N.L.R.B. 659 (2004)).

control over terms and conditions of employment, nor do they reach separate employers in a single industry.[154]

Third, even if a worker organization were to succeed in organizing several units across multiple employers, the NLRA does not require the merger of the different units for purposes of bargaining.[155] Multiunit bargaining is permitted and has been used in various industries where employers have agreed to it.[156] But it is not required. The legal obligation to bargain rests only with the "employer," and that employer is obligated to bargain only with its own "employees." Indeed, from the 1980s until the recent *Browning-Ferris* decision, only direct employers, not employers sharing control over employment, would have been under an obligation to bargain with downstream employees.

Fourth, the law significantly limits the ability to engage in cross-employer economic action. When seeking to win improvements in wages, benefits, or working conditions, the worker organization is not permitted to exercise economic pressure over a "secondary" employer to put pressure on another employer, even when their businesses are intertwined, as long as they are not formally joint employers.[157] A picket at corporate headquarters designed to coerce franchisees to negotiate a contract (assuming no joint-employment status) is thus illegal.[158] Nor may a worker organization sign an agreement that commits an employer to contract exclusively with unionized suppliers or buyers.[159]

3. Labor Law and Politics

The above features of labor law all make it exceedingly difficult for unions to exercise economic power on behalf of workers in the contemporary, fissured economy. The law is structured around an ideal—or imagined—labor-

154. *See id.* at 6-7 (emphasizing the limits of the Board's holding).

155. The formation of a multi-employer bargaining unit must be entirely voluntary; the Board will not approve the creation of such a unit over the objection of any party. Artcraft Displays, Inc., 262 N.L.R.B. 1233 (1982), *clarified by*, 263 N.L.R.B. 804 (1982); *see* Barenberg, *supra* note 103, at 11.

156. *See* sources cited *supra* note 79.

157. National Labor Relations (Wagner) Act § 8(b)(4), 29 U.S.C. § 158(b)(4) (2012).

158. *See* Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 226 (1982); NLRB v. Retail Store Emps. Union, Local 1001, 447 U.S. 607, 616 (1980).

159. *See, e.g.*, National Labor Relations (Wagner) Act § 8(e) (prohibiting so-called "hot cargo" agreements except in the garment and construction industries); Gimrock Constr., Inc., 344 N.L.R.B. 934 (2005). For further discussion, see Barenberg, *supra* note 103, at 21. As a result of these restrictions, some successful tactics used by agricultural employees, like the Coalition of Immokalee Workers, are off limits to most private-sector workers.

management relationship that, for the most part, no longer exists. The statutory decision to privilege firm-based contracts and to penalize cross-employer economic strategies thus leaves workers with little private, economic power in the modern economy.

At the same time, unions' political power has declined.[160] The most obvious reason for the diminished political influence of labor is 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.[161]

But the problem is more fundamental than the decline in union membership. The existing labor law regime does not grant unions a significant degree of public, political power. Indeed, the law encourages unions to focus their energy at the firm level and *not* at the social or political level. As discussed in Section I.B, the law facilitates organization and bargaining at the individual firm, not across a sector, and workers are restricted in their ability to engage in cross-employer collective action. Moreover, under the statute, unions have a legal duty to bargain and represent workers at the workplace,[162] not to serve as a voice for workers in politics and governance more generally.[163] If unions fail to discharge their duty at the firm level, they are subject both to administrative proceedings and to suit in federal court.[164]

The local, firm-based structure of American labor law brings advantages,[165] but it also leaves unions weakened in their ability to mount a powerful political defense of workers on a national or regional level. Unions must develop extensive bureaucracies to provide representational services, diminishing resources

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160. *See* ROSENFELD, *supra* note 1, at 159-81.

161. *See* ROSENFELD, *supra* note 1, at 168-73, 180-81; Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 153-54, 178-79 (2013).

162. *See*, *e.g.*, Air Line Pilots Ass'n v. O'Neill, 499 U.S. 64, 66 (1991) (applying a duty of fair representation to contract negotiations); Conley v. Gibson, 355 U.S. 41, 46-47 (1957) (holding that the duty of fair representation requires unions to pursue grievances in good faith).

163. *See* Sachs, *supra* note 161, at 155 (noting the worksite collective-bargaining focus of labor law and proposing an alternative that would bifurcate unions' political function and their economic function, allowing workers at a worksite to form a "political union" instead of a collective bargaining union); *cf.* Alan Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 TEX. L. REV. 1 (1981) (critiquing the effort of labor law to distinguish between the economic and the political functions of unions).

164. Vaca v. Sipes, 386 U.S. 171 (1967). The duty runs to non-members who decline to pay full union dues, as well as to dues-paying members.

165. For example, the duty of fair representation has played an important role in eliminating discrimination by unions, *see* Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944), while the enterprise focus of labor law has helped create well-funded workplace organizations and facilitated workplace voice, *see infra* Sections III.A, IV.B.

available for broader organizing and political work; this structure also provides an incentive to engage in political work that benefits existing members, as opposed to workers generally.[166] While many unions have been powerful advocates for legislation and regulation that benefit all workers—including health care, workplace safety, antidiscrimination, and wage and hour laws[167]—others have focused almost entirely on contract administration or on legislation that serves their own members, sometimes at the expense of more vulnerable and nonunionized workers.[168]

Indeed, it is in part because the law conceives of unions as private, firm-based representatives that the Supreme Court has limited the ability of employers and unions to use union dues for political purposes. The Court has held that workers who object to union membership may be required to fund the costs of representation, but may not be required to contribute to union expenses regarding matters of public concern.[169] According to the Court, work on matters of politics and public concern is not germane to unions' core function and therefore cannot justify any burden on an individual worker's speech.[170] Notably, the Court does not apply similar reasoning to corporations. Although campaign finance law regulates political spending by corporations and unions

166. The nation's history of privately provided health and pension benefits and the two-party political system, with no tradition of a labor party, also help explain, and are in part explained by, the comparatively apolitical orientation of labor unions. *See* LICHTENSTEIN, *supra* note 88, at 126, 143-44, 146.

167. *See id.* at 185-86.

168. *See id*. at 187-88.

169. *See* Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 738-42 (1988) (interpreting the NLRA not to allow compulsory payment of the portion of union fees used for matters of public concern); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977) (finding a First Amendment right of public-sector workers not to pay for the portion of union fees used for matters of public concern); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 762 (1961) (reaching the same result under the Railway Labor Act). The Supreme Court recently expanded the rights of objecting workers by prohibiting unions from collecting funds even for collective bargaining purposes from "quasi" public employees. Harris v. Quinn, 134 S. Ct. 2618, 2644 (2014). The Court was widely expected to extend *Harris*'s holding to all public sector employees in *Friedrichs v. California Teachers Ass'n*, but instead, after the death of Justice Scalia, the Court divided evenly on the question and existing precedent stands. 136 S. Ct. 1083 (2016).

170. *Cf. Street*, 367 U.S. at 801 (Frankfurter, J., dissenting) (arguing that "what is loosely called political activity of American trade unions . . . [is] activity indissolubly relating to the immediate economic and social concerns that are the *raison d'etre* of unions").

identically, the Court has not found that shareholders have a First Amendment right to object to corporations' political spending.[171]

Finally, the law gives unions no formal role in negotiating generally applicable wages or workplace standards—or other social benefits. This is a sharp difference from the short-lived "corporatist" or "tripartite" model of NIRA and from many European systems.[172] For example, in Germany, the union federations participate in basic decisions concerning national wage policy and policies relating to employment, economic growth, and social insurance.[173] Meanwhile, collective bargaining occurs on a regional basis, with unions and employers responsible for negotiating wage scales that cover all workers, at least in manufacturing sectors; those agreements then provide a floor above which local bargaining may occur.[174] In Denmark, unions have played an even more active role in negotiating social policy.[175] Unions and employers have, for example, collectively negotiated national policies on worker training and parental leave.[176] Throughout many other European countries, the law provides for various forms of "contract extension," where collective bargaining agreements are extended to apply to workers throughout a region or sector, effectively forming the basis for employment policy in those sectors.[177]

To be sure, the NLRA does protect, to some extent, workers' political activity. Section 7 has been interpreted to extend to workers' concerted activity that occurs through political channels—as long as such activity relates to employment issues.[178] In addition, unions, like other organizations, may engage

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171. Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After* Citizens United, 112 COLUM. L. REV. 800, 802-03 (2012) (objecting to the asymmetry).

172. Wachter, *supra* note 53, at 598, 606; *see also supra* notes 52-56, 66-69 and accompanying text.

173. *See* STEVEN J. SILVIA, HOLDING THE SHOP TOGETHER 38-41 (2013) (discussing the involvement of German trade unions in managing all important aspects of the welfare state); Clyde W. Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367, 385-88 (1980) (critiquing both American and German unions for obstructing union member participation in union decision making but concluding that American unions are comparatively more democratic).

174. THELEN, *supra* note 24, at 58.

175. *Id.* at 65-67.

176. *Id.* at 67.

177. Franz Traxler & Martin Behrens, *Collective Bargaining Coverage and Extension Procedures*, EURWORK (Dec. 17, 2002), http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/collective-bargaining-coverage-and-extension-procedures [http://perma.cc/2PWM-4HHP]; *see also* SILVIA, *supra* note 173, at 27-28 (discussing the German system of contract extension and its limitations).

178. Eastex, Inc. v. NLRB, 437 U.S. 556 (1978); *see also* Memorandum from Ronald Meisburg, Gen. Counsel, NLRB to All Reg'l Dirs., Officers-in-Charge, and Resident Officers, Memo-

in electoral politics and lobby government officials.[179] In some circumstances, they may also use political pressure to bring about concessions from employers regarding organization and collective bargaining.[180] In practice, many unions spend a great deal of energy and money on political activity with significant effect.[181] But while the law permits political action, it fails to empower unions at the political level, and it incentivizes a bureaucratic focus.

These features of American labor law matter not only for how unions spend their time and resources, but also for society more generally. When unions were large and strong, they helped engage workers in the political process and helped ensure that the government was responsive to the actual preferences of working people.[182] When particular unions moved beyond a focus on workplace representation of existing members and pursued a broader social justice mission at the sectoral, national, and political level, they helped bring about significant improvements in the lives of all working Americans.[183] Conversely, the decline in unionization rates and the failure of American law to structure unions in ways that facilitate workers' collective political power has contributed to a politics in which government is particularly responsive to the wealthy.[184]

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randum GC 08-10 (July 22, 2008) [hereinafter Memorandum from Ronald Meisburg] (providing guidelines for how to handle unfair labor practice charges involving political activity arising out of immigration rallies). As discussed previously, however, penalties for violations of section 7 are minimal, and the law imposes a host of restrictions on the kinds of concerted activity in which workers can engage. *See supra* notes 120-125 and accompanying text.

179. *See* Citizens United v. FEC, 558 U.S. 310 (2010) (declaring unconstitutional restrictions on independent corporate and union political expenditures).

180. *But see* James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. CAL. L. REV. 731 (2010) (describing how unions' ability to pressure employers to enter organizing framework agreements through the use of political pressure has been somewhat chilled by RICO suits brought by employers).

181. *See* ROSENFELD, *supra* note 1, at 170-73; Sachs, *supra* note 161, at 152, 168-71 (describing some successful political efforts of unions).

182. *See* ROSENFELD, *supra* note 1, at 159-81; Sachs, *supra* note 161, at 152-54.

183. *See, e.g.*, LICHTENSTEIN, *supra* note 88, at 58-59, 76-85, 262-64. *But see* ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY 17-18, 100-11, 141-43, 171-77 (2001) (detailing how a deeply embedded set of gender beliefs shaped even seemingly neutral social legislation to limit the freedom and equality of women).

184. *See* LICHTENSTEIN, *supra* note 88, at 186 (describing the structure of unions and its relationship to their political activity); Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 J. CONST. L. 419, 436-56 (2015) (summarizing research on government's responsiveness to the wealthy's interests); Sachs, *supra* note 161, at 153-54 (emphasizing how the decline in union membership reduces workers' influence in politics).

B. Employment Law: Distinct and Insufficient

Of course, labor law, which aims to protect collective action among workers, represents only one facet of American workplace law. Another is employment law, which offers "rights and protections to employees on an individual—and individually enforceable—basis."[185] Yet employment law suffers from as many limitations as labor law in the contemporary political economy.

Employment law comprises a wide range of federal laws, including Title VII and other antidiscrimination statutes,[186] the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA), and the Family and Medical Leave Act (FMLA).[187] It also includes numerous state statutes and state common law doctrines.[188] The state and federal laws operate largely independently of any collectivization in the workplace.[189] They prohibit discrimination on the basis of race, sex, and national origin, as well as other protected characteristics; and they guarantee minimum standards and fair treatment, including minimum wages, maximum hours, safe working conditions, and a modicum of family leave.

As labor law became ossified and decreased in relevance over the last few decades, employment law grew increasingly important.[190] In particular, the antidiscrimination statutes—the Civil Rights Act of 1964, the Equal Pay Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act—worked an important transformation in the American workplace. Togeth-

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185. Brudney, *supra* note 116, at 1570. For an account of how the division between labor law and employment law breaks down, see Estlund, *supra* note 118, at 329; and Sachs, *supra* note 20, at 2688-89.

186. *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (2012); Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2012); Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2012).

187. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2012); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (2012); Family Medical Leave Act of 1993, 29 U.S.C. § 2601 (2012).

188. For one synthesis of employment law, see Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225 (2013).

189. *See* Sachs, *supra* note 20, at 2688.

190. As one treatise declared in 1994, "a mere thirty years ago, there was no such thing as employment law." ROTHSTEIN ET AL., EMPLOYMENT LAW, at v (1994); *see also* ESTLUND, *supra* note 29, at 52-74 (describing the fall of collective bargaining and the proliferation of substantive mandates); St. Antoine, *supra* note 20, at 526-27 (explaining, in 2004, that the preceding "two decades have continued the shift of emphasis from labor law to employment law" and expressing regret at the diminishment of "private initiative and the voluntary arrangements that have made collective bargaining such a uniquely valuable American institution").

er, they opened up employment opportunities for millions of Americans.[191] More recently, the FMLA and the Affordable Care Act provided important new guarantees of economic benefits: unpaid family leave and the right to purchase medical insurance.

To great extent, the expansion of employment law is compatible with labor law. Like labor law, much employment law aims to improve workers' economic and social position to create greater societal equality.[192] Rather than displacing collective bargaining, most employment law statutes set a floor in the workplace above which unions can negotiate. As such, employment law functions to fulfill the substantive goals of unions and to extend the benefits won by unionized employees to a broader set of workers. Certain employment law statutes also include provisions that facilitate and protect collective action among workers.[193]

At the same time, scholars have documented tensions between the two regimes.[194] Employment law and labor law embrace fundamentally different approaches to protecting workers: bestowing individual rights in the case of employment law; facilitating collective power in the case of labor law.[195] Though these two approaches can be—and have been—mutually reinforcing, they can also conflict. Historians have documented how the rise of rights-conscious lib-

191. *See* NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 67-113 (2006) (tracing the struggle to pass and implement Title VII and analyzing the statute's impact).

192. *See* Bagenstos, *supra* note 188, at 230 & nn.18-21, 231 nn.22-24 (arguing that social equality is the normative justification for employment law and collecting similar arguments for labor law). Indeed, employment law and labor law were not always treated as distinctly as they are today. For example, a leading labor law casebook published in 1968 identified the wide range of new social legislation and the 1964 Civil Rights Act as areas of increasing interest and significance to labor relations law, without positing them as in conflict with the NLRA. *See* RUSSELL A. SMITH ET AL., LABOR RELATIONS LAW: CASES AND MATERIALS 53 (4th ed. 1968); *see also* MORRIS D. FORKOSCH, A TREATISE ON LABOR LAW 2-4, 18-22, 513-16 (2d ed. 1965) (arguing that economic and social security is the key to labor law and treating minimum standards legislation as well as collective bargaining law as part of the subject).

193. *See generally* Sachs, *supra* note 20, at 2687-93 (showing how the Fair Labor Standards Act and Title VII can provide a legal architecture to facilitate organizational and collective activity).

194. For leading accounts of the tension between collective and individual rights, see, for example, LICHTENSTEIN, *supra* note 88, at 141, 171; Brudney, *supra* note 116; Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 4 (1999); and 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 (1992).

195. *See* Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1319 (2012).

eralism undermined trade unionism in particular ways.[196] For example, conservative antiunion lawyers successfully adopted the arguments of the civil rights movement to advance their vision of a "right to work" free from union dues.[197] And in some circumstances, courts applied a broad labor preemption doctrine to deny unionized workers the benefit of state law employment rights.[198]

Not only did tensions emerge between the NLRA and individual rights regimes, but employment law was unable to fill the void left by a weakened labor movement and a labor law that failed to protect workers' ability to organize and bargain.[199] Enforcement of employment law is lax and violations are rampant, particularly in the fissured workplace.[200] Moreover, as with labor law, when employment is contracted out, fewer rights attach.[201] And court remedies are often unavailable because of mandatory arbitration clauses.[202] Finally, the

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196. LICHTENSTEIN, *supra* note 88, at x (arguing that as the concept of rights became "a near hegemonic way of evaluating the quality of American citizenship," the concept of solidarity "atrophied"); *see also id.* at 171 ("By advocating state protection as opposed to collective action, liberals implicitly endorsed the idea, long associated with antiunion conservatism, that the labor movement could not be trusted to protect the individual rights of its members."); REUEL SCHILLER, FORGING RIVALS: RACE, CLASS, LAW AND THE COLLAPSE OF POST WAR LIBERALISM 3, 5, 12 (2015) (arguing that labor law and fair employment law contradicted one another in ways that helped facilitate the demise of liberalism). Other historians trace the conflict between individual rights and collectivism to an earlier point. *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA 244 (1996) (describing the American political philosophy that emerged after the Civil War as one emphasizing "individual freedoms and personal autonomy rather than the duties incumbent upon members of organized and regulated communities" and "the common good").

197. *See* LEE, *supra* note 84, at 5-6, 73-75 (describing how the national right-to-work movement sought to align itself with the civil rights movement).

198. *See* Stone, *supra* note 194, at 577-78, 593-605.

199. For a contrary perspective, see Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012, 1040 (1984) (arguing that employment law better serves workers than labor law).

200. *See* ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 50 (2009); KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT 6-22 (rev. ed. 2011); WEIL, *supra* note 10, at 214-22.

201. *See* WEIL, *supra* note 10, at 190-201.

202. *See* Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71 (2014); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015); *see also* Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637 (2007) (describing employer-imposed

substantive rights provided by employment law, even when enforceable, are paltry compared to those in other industrialized countries and to those guaranteed by most collective bargaining agreements. Most nonunion workers are employed "at will" with few protections against termination;[203] federal law and most state laws lack guarantees of paid family leave, vacation, or sick time; and statutory minimums do not provide the wages or benefits necessary to keep workers out of poverty.[204] Despite the existence of a wide range of employment law statutes, in practice, many workers enjoy few rights at work. Workers' real incomes have barely increased during recent decades, even though total working hours are longer and educational attainment is greater.[205]

C. Efforts at Renewal

1. Resuscitation

For the past twenty years, against the background of the inadequate labor and employment law regimes, the labor movement has been trying to rejuvenate itself. 1995 was a turning point. Following years of globalization and outsourcing, unions at the time represented just over ten percent of private-sector workers, down from one-third in the 1950s.[206] Promising to usher in a new era of organizing, John Sweeney ran an insurgent campaign for the presidency of the American Federation of Labor and Congress of Industrial Organizations

arbitration and noncompete agreements, both of which require the employee to give up critical background rights to the advantage of the employer).

203. *See* Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 4 n.9, 5 n.10, 8 (2010) (noting that employment at will remains the default regime in all states but Montana and collecting scholarship critiquing the at-will rule); Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 8 (2002) ("[A]bsent a contractual provision for job security or a prohibited discriminatory or retaliatory motive, it remains true in every American jurisdiction, except Montana, that employees are subject to discharge without justification.").

204. *See* CONG. BUDGET OFFICE, PUB. NO. 4856, THE EFFECTS OF A MINIMUM WAGE INCREASE ON EMPLOYMENT AND FAMILY INCOME 11 (2014); KATHRYN J. EDIN & H. LUKE SHAEFER, $2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA (2015); David Cooper, *The Minimum Wage Used To Be Enough To Keep Workers out of Poverty—It's Not Anymore*, ECON. POL'Y INST. (Dec. 4, 2013), http://www.epi.org/publication/minimum-wage-workers-poverty-anymore-raising [http://perma.cc/MT9L-ZVFR].

205. LICHTENSTEIN, *supra* note 88, at 12-16; Mishel et al., *supra* note 104, at 4 fig.2, 7 fig.5.

206. *See* Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey: Note*, 56 INDUS. & LAB. REL. REV. 349, 352 tbl.1 (2003).

(AFL-CIO) and won.[207] The AFL-CIO turned to the NLRB election process with renewed vigor—but met with little success. First, there was the problem of capacity. Fewer than five percent of affiliate unions maintained a department capable of organizing new workers.[208] But even among local and national unions committed to organizing, and even in sectors where workers overwhelmingly reported their desire for unions, the legal roadblocks discussed above rendered the traditional NLRA electoral mechanisms inadequate.

Unions thus pushed for amendments to the NLRA that would make organizing and bargaining easier.[209] At the same time, they attempted to work around the existing law. They sought to develop alternative mechanisms to obtain traditional recognition and collective bargaining arrangements.[210] One approach was to engage in private ordering by seeking private agreements with employers in order to alter the ground rules for union organizing and first contract bargaining. In such agreements, employers typically pledge to remain neutral with respect to whether their employees organize; they also may allow unions access to employer property, recognize the union when a majority of workers sign cards requesting representation, or agree to some form of expedited election or first contract arbitration.[211] As Professor Benjamin Sachs has shown, some such agreements were the product of state and local interventions. Through a system of tripartite bargaining, unions have reached agreements with employers and local governments that result in card check recogni-

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207. *See* Steven Greenhouse, *Man in the News: John Joseph Sweeney; New Fire for Labor*, N.Y. TIMES (Oct. 26, 1995), http://www.nytimes.com/1995/10/26/us/man-in-the-news-john-joseph-sweeney-new-fire-for-labor.html [http://perma.cc/X4BS-SQ55].

208. VANESSA TAIT, POOR WORKERS' UNIONS: REBUILDING LABOR FROM BELOW 192 (2005).

209. *See supra* notes 127-129 and accompanying text.

210. *See* Sachs, *supra* note 127 (describing "tripartite lawmaking" strategies); Sachs, *supra* note 14, at 376 (locating labor law's "new dynamism" in private agreements, state government action, and reliance on employment law).

211. *See* James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 837-38 (2005) (describing the increased use of quasi-private, contractually based "neutrality" agreements that establish a set of ground rules for union recognition and usually a private mode of dispute resolution in place of, or in addition to, the rules and machinery of the NLRA); César F. Rosado Marzán, *Organizing with International Framework Agreements: An Exploratory Study*, 4 U.C. IRVINE L. REV. 725, 770-71 (2014) (examining the use of privately negotiated "International Framework Agreements" that commit employers to neutrality concerning unionization across multiple countries). Unions' ability to pressure employers to enter neutrality agreements has been chilled somewhat by employers' use of RICO suits. *See* Brudney, *supra* note 180.

tion, limits on employer involvement in union campaigns, union access to employer property, and more effective enforcement of the duty to bargain.[212]

Another approach was to create pathways to organization for workers exempted from federal law. For example, unions used innovative lawyering and legislative strategies to transform state-funded home-care workers into state employees, or quasi-state employees, in numerous jurisdictions. After doing so, they won the right to hold representational election for these workers.[213] The organization of home care and childcare workers thus added to labor's ranks in the public sector, using a model that tracked the NLRA.

Finally, while unions sought to bring new workers under the NLRA's basic framework, other worker advocates attempted different forms of collective action. One important innovation to that end was the emergence of organizations known as worker centers.[214] Worker centers, which became increasingly prevalent in the 1990s and 2000s, are community-based, non-profit organizations that provide legal and social services to low-wage, often immigrant workers.[215] They also engage in advocacy work, leadership development, and collective action in order to improve working conditions in the lowest wage industries.[216]

The worker center campaigns filled an important void in vulnerable communities, while the innovative union campaigns brought tens of thousands of new workers—largely women, immigrants, and people of color—into the labor

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212. *See* Sachs, *supra* note 127, at 1155-57.

213. *See, e.g.*, Linda Delp & Katie Quan, *Homecare Worker Organizing in California: An Analysis of a Successful Strategy*, 27 LAB. STUD. J. 1, 6 (2002).

214. *See* JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM (2006). For further discussion of the worker-center movement, see, for example, JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (2005); and Ruth Milkman, *Introduction* to WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY 1 (Ruth Milkman et al. eds., 2010) [hereinafter WORKING FOR JUSTICE].

215. FINE, *supra* note 214, at 2, 12, 72-77; Janice Fine, *New Forms To Settle Old Scores: Updating the Worker Centre Story in the United States*, 66 INDUS. REL. 604, 606-09 (2011). In 1985, there were five organizations identifying as worker centers; by 2014 there were more than 200. Kati L. Griffith, *Worker Centers and Labor Law Protections: Why Aren't They Having Their Cake?*, 36 BERKELEY J. EMP. & LAB. LAW 331, 331 (2015); *see also* Milkman, *supra* note 214, at 8-10 (describing the rise of worker centers in Los Angeles).

216. Fine, *supra* note 215, at 606-09. Tactics include systematically filing wage claims against employers who violate the wage and hour laws, picketing employers who violate the law, organizing economic boycotts against particular companies, and passing legislation designed to strengthen labor standards in the lowest wage sectors. Through these mechanisms, worker centers have provided a vehicle for collective voice and leadership development among low-wage immigrant workers. *Id.*; *see also* Sachs, *supra* note 20, at 2687 (documenting how workers centers' use of employment statutes like FLSA and Title VII of the Civil Rights Act of 1964 facilitated their efforts to organize and act collectively).

movement. Yet, for the most part, neither produced any fundamental change in labor law or the structure of labor relations. With a few notable exceptions, most worker centers expressly rejected the goal of collective bargaining and remained local in structure, without substantial power to affect the national economy or politics.[217] Meanwhile, the union campaigns did not aim to transform the basic system of labor law established by the NLRA. As Professor Cynthia Estlund remarked in 2006, unions engaged in trying to revitalize labor law were "largely committed to a more or less recognizable regime of union organization and collective bargaining."[218] Their innovations did not so much "transform the nature of labor relations—of unionization, majority rule, and collective bargaining—as they [sought] to smooth the path that leads there."[219]

Most scholars urging labor law reform have operated in this vein as well. For example, they have argued in favor of amending the NLRA's election machinery to remove the obstacles to unionization;[220] for more frequent elections to facilitate workers' entry and exit from unions;[221] and for a private cause of action to enforce NLRA rights.[222] They have also explained why judicial and agency opinions that narrowly interpret the NLRA ought to be reversed.[223] For example, scholars have critiqued precedent that limits union access to employer

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217. Fine, *supra* note 215, at 609-11. Many worker centers have a focus on internal democracy and leadership development, but they derive most of their funding from foundations, to which they are accountable, rather than from their members. *Id.* The worker centers that are industry-specific (for example, taxi drivers and domestic workers) have demonstrated more interest in acquiring collective bargaining rights, *id.* at 623, and in certain geographic locations, worker centers have worked closely with unions, *see* Milkman, *supra* note 214, at 2-3.

218. Cynthia L. Estlund, *The Death of Labor Law?*, 2 ANN. REV. L. & SOC. SCI. 105, 117 (2006).

219. *Id.*

220. *See, e.g.*, Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 713-27 (2010) (urging a system of confidential phone and internet voting or continuous in-person and mail ballot voting).

221. *See* Samuel Estreicher, *"Easy In, Easy Out": A Future for U.S. Workplace Representation*, 98 MINN. L. REV. 1615, 1615 (2014) (proposing that "every two or three years . . . employees . . . after an initial minimal required showing of interest, would have an opportunity to vote in a secret ballot whether they wish to continue the union's representation, select another organization, or have no union representation at all"); Michael M. Oswalt, *Automatic Elections*, 4 U.C. IRVINE L. REV. 801 (2014) (proposing automatically or annually scheduled elections for workers to select bargaining representatives).

222. *See* RICHARD D. KAHLENBERG & MOSHE Z. MARVIT, WHY LABOR ORGANIZING SHOULD BE A CIVIL RIGHT: REBUILDING A MIDDLE-CLASS DEMOCRACY BY ENHANCING WORKER VOICE (2012).

223. *See, e.g.*, ELLEN DANNIN, TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS (2006) (arguing for a long-term litigation campaign to overturn decades of judicial precedent that distorts the NLRA's meaning).

property;[224] that permits employees in right-to-work states not to pay for legally mandated representation;[225] and that forecloses the possibility of minority or members-only unions[226] and "company unions."[227] Supporting these efforts is the work of scholars who seek to rewrite First Amendment doctrine to better protect ongoing collective action among workers, again within the current statutory framework.[228] As with the unions' earlier organizing efforts, these scholarly arguments largely operate within labor law's basic framework of non-statist, decentralized, firm-based bargaining.

2. Abandonment

While unions and many academic supporters sought to invent new ways to bring workers under the NLRA's basic framework, others abandoned the project of labor law, asserting the need for a post-union approach. Indeed, some abandoned the idea of traditional labor law. Most notably, since the 1970s, a movement has emerged in support of corporate self-governance. That is, multinational corporations, whether on their own or when pushed by human rights groups, unions, and NGOs, have adopted corporate codes of conduct and agreed to let outside groups monitor their compliance with these codes.[229] For businesses, these voluntary codes of conduct are a tool to enhance brand

224. *See* Estlund, *supra* note 118.

225. *See* Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-To-Work Law*, 4 U.C. IRVINE L. REV. 857, 858-59 (2014) (arguing for a reinterpretation of the relationship between federal and state law on the ability of unions to collect money from the employees they represent to defray the cost of services they provide).

226. *See* CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE (2005) (urging a reinterpretation of the NLRA that would support the practice of nonexclusive members-only bargaining).

227. Crain & Matheny, *supra* note 42, at 605. In a somewhat more significant departure, Benjamin Sachs has recently argued for "political unions" that would mirror NLRA unions but would engage not in collective bargaining but in political action. *See generally* Sachs, *supra* note 161.

228. *See* Marion Crain & John Inazu, *Re-Assembling Labor*, 2015 U. ILL. L. REV. 1791 (arguing that freedom of assembly should be a source of legal protection for labor unions and worker advocacy efforts); Charlotte Garden, *Citizens, United and* Citizens United*: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1 (2011) (arguing that recent First Amendment doctrine in the campaign finance context calls into question the validity of cases limiting protections for labor speech); Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617, 2617 (2011) (arguing that "labor speech—which plays a unique role in civil society—should be on equal footing with civil rights speech").

229. ESTLUND, *supra* note 29, at 77-128.

reputation and to achieve regulatory forbearance.[230] For NGOs and worker advocates, they are a way to improve labor standards when domestic and international law fail.

Scholars, including some labor and employment law experts, have celebrated the turn toward self-regulation as a way to create more flexible and modern governance systems.[231] For example, Cynthia Estlund has argued in support of self-regulation, while urging changes to its operation in order to give workers a genuine collective voice.[232] On this account, self-regulation can help fill the void left by the decline of unions and the weakness of employment law. Indeed, where strong worker organizations are present, as in the case of the Coalition of Immokolee Workers in Florida, corporate codes of conduct have been remarkably successful.[233]

But for the most part, corporate social responsibility efforts are characterized by profound weaknesses.[234] The programs suffer from low levels of transparency; effective sanctions are rare; and, without strong regulatory systems or unions, workers are typically unwilling to report problems to private monitors, even when the monitors operate in good faith.[235] Even the most aggressive self-

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230. James J. Brudney, *Envisioning Enforcement of Freedom of Association Standards in Corporate Codes: A Journey for Sinbad or Sisyphus?*, 33 COMP. LAB. & POL'Y J. 555, 555-56, 598 (2012).

231. *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992); ESTLUND, *supra* note 29; *see also* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 218-24 (1990) (calling for expansion of nonunion forms of worker participation); Estlund, *supra* note 194, at 319, 324 (arguing for a hybrid model of "monitored self-regulation"); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004) (documenting and applauding the turn toward new governance).

232. ESTLUND, *supra* note 29; Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351 (2011) (arguing for mandatory information disclosure to improve employers' compliance with statutory minimums; to make more efficient the operation of labor markets; and to strengthen the factual foundation for the reputational rewards and sanctions). Allowing employer-established worker committees would require a change to section 8(a)(2) of the NLRA or its interpretation. *See* Electromation Inc., 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148, 1161 (7th Cir. 1994) (holding that employer's decision to establish "action committees" violated section 8(a)(2)'s prohibition on an employer dominating or interfering "with the formation or administration of any labor organization"). For some tentative thoughts on how new forms of workplace organization could serve as vehicles for worker voice, in a system that also includes social bargaining, see *infra* Section IV.B.3.

233. *See* Brudney, *supra* note 38.

234. WEIL, *supra* note 10, at 262-64; Brudney, *supra* note 230, at 567-74.

235. Brudney, *supra* note 230, at 567-74.

monitoring programs have had mixed success at best, with studies documenting pervasive code violations.[236]

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In short, by the metrics of protecting workers' associational rights and facilitating greater economic and political equality, the innovations of the past decades have all failed. Since the early 2000s, when scholars began exploring a revitalized labor law and reporting the rise of both worker centers and self-regulation, economic inequality has increased;[237] union density has declined;[238] most workers still lack a meaningful voice in their place of employment; and working people's influence in politics remains feeble.[239]

No doubt, there are numerous explanations for the failure of labor law's revitalization and the continued weakness of employment law. The extraordinary opposition to reform mounted by conservative groups and business interests cannot be overstated, nor can the efforts to weaken the existing regimes.[240] But even if the reforms identified thus far had been achieved, and the innovative strategies more fully realized, they would have done little to ameliorate the failure of labor law to provide workers significant power in the contemporary political economy.

II. THE CONTOURS OF A NEW LEGAL FRAMEWORK

The incipient labor law being forged by today's social movements offers a more promising path. Like many earlier efforts, the Fight for $15 and other contemporary low-wage worker movements operate outside of traditional labor law and focus on the lowest paid workers in the economy. But the new movements, more so than their predecessors, are refusing labor law's orientation around the employer-employee relationship. By demanding $15 an hour and the right to *a union for all workers*, they are seeking to bargain at the sec-

236. *Id.* at 573.

237. For the most famous of the many recent accounts of the rise in inequality, see PIKETTY, *supra* note 5.

238. Unions now represent about seven percent of the private-sector workforce. Bureau of Labor Statistics, *supra* note 2.

239. GILENS, *supra* note 6; PHILLIPS-FEIN, *supra* note 70; Hacker & Pierson, *supra* note 3.

240. For example, several states have undertaken to limit collective rights of workers and to prevent organized labor from requiring fair share fees. *See, e.g.*, Monica Davey, *Unions Suffer Latest Defeat in Midwest with Signing of Wisconsin Measure*, N.Y. TIMES (Mar. 9, 2015), http://www.nytimes.com/2015/03/10/us/gov-scott-walker-of-wisconsin-signs-right-to-work-bill.html [http://perma.cc/DQ7B-62SA]; *see also supra* notes 127-129 and accompanying text.

toral and regional level, rather than at the firm level. In this way, they are extending and augmenting the work of earlier campaigns, like SEIU's Justice for Janitors campaign, which sought to organize entire industries in particular localities, while learning from less successful campaigns that focused on single firms, like the multi-year effort to organize Walmart.

In addition, and in a more notable break from the past, the Fight for $15 and other contemporary low-wage worker movements are rejecting the notion that unions' primary role is to negotiate traditional private collective bargaining agreements, with the state playing a neutral mediating and enforcing role. Instead, the movements are seeking to bargain in the public arena: they are engaging in social bargaining with the state on behalf of all workers. In so doing, they are collapsing the distinction between employment law and labor law and rendering the basic terms of employment for all workers subject to social bargaining. Finally, although they are embracing sectoral, social bargaining, the new movements are not abandoning worksite organization. To the contrary, they are using social bargaining to strengthen and supplement traditional collective bargaining, while beginning to experiment with new forms of workplace organization.

This Part undertakes a case study of the Fight for $15, contextualized among similar ongoing movements, to show how the outline of a new labor law is beginning to emerge.

A. Evolution of the Movement: From McDonald's, to Fast Food, to Low-Wage

Now known as the "Fight for $15," the campaign among low-wage workers began to make headlines in 2012 under banners ranging from "Fast Food Forward" in New York to "Raise up MKE" in Milwaukee to "Fight for $15" in Chicago.[241] Though some media accounts described the early efforts as spontaneous, the campaign, from the beginning, was funded and organized by SEIU, one of the nation's largest unions.[242] In some localities, SEIU provided funding and training to grassroots community organizations already working with fast-food workers; in others, the union itself initiated contacts with workers and built new local organizations.[243] In both cases, organizers funded by SEIU met

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241. Gupta, *supra* note 22; *see also* Oswalt, *supra* note 42, at 622-26 (describing the origins of the fast-food movement); William Finnegan, *Dignity*, NEW YORKER (Sept. 15, 2014), http://www.newyorker.com/magazine/2014/09/15/dignity-4 [http://perma.cc/TB7H-EN3A] (describing the fast-food movement from an individual worker's perspective).

242. Gupta, *supra* note 22.

243. *Id.*

with workers, built committees of workers, and eventually, after months of work, helped workers launch small-scale demonstrations and strikes, demanding $15 an hour and the right to form unions free from intimidation.[244]

The first actions were in New York. On November 29, 2012, several hundred workers at McDonald's, Burger King, Domino's, KFC, Taco Bell, Wendy's, and Papa John's walked off the job.[245] The strikes did not fit the typical NLRA model. Although they were organized by SEIU, they occurred among employees who had not yet won union recognition or certification at their particular worksites.[246] In addition, the strikes, for the most part, did not reflect majority participation at any given facility; they were not a response to a breakdown in collective bargaining; they were short in duration and without an expectation of management concessions.[247] Moreover, although the campaign focused much of its public criticism and protest on one company—McDonald's[248]—the worker organizing, from the beginning, was not limited to a single corporate target.[249]

The actions spread over the course of the next year, primarily among fast-food workers. In December, several hundred fast-food workers in Chicago went on strike; in April and May of 2013, fast-food employees went on strike in seven cities; and in August, workers staged strikes in sixty cities.[250] By 2014,

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244. *Id.*

245. Steven Greenhouse, *With Day of Protests, Fast Food Workers Seek More Pay*, N.Y. TIMES (Nov. 29, 2012), http://www.nytimes.com/2012/11/30/nyregion/fast-food-workers-in-new-york-city-rally-for-higher-wages.html [http://perma.cc/X8J7-59R9]; Josh Eidelson, *In Rare Strike, NYC Fast-Food Workers Walk Out*, SALON (Nov. 29, 2012), http://www.salon.com/2012/11/29/in_rare_strike_nyc_fast_food_workers_walk_out [http://perma.cc/5BWG-4JW6].

246. Steven Greenhouse, *How To Get Low-Wage Workers into the Middle Class*, ATLANTIC (Aug. 19, 2015), http://www.theatlantic.com/business/archive/2015/08/fifteen-dollars-minimum-wage/401540/ [http://perma.cc/UK3A-QNG6].

247. Brown, *supra* note 21; Steven Greenhouse, *Strong Voice in 'Fight for 15' Fast-Food Wage Campaign*, N.Y. TIMES (Dec. 4 2014), http://www.nytimes.com/2014/12/05/business/in-fast-food-workers-fight-for-15-an-hour-a-strong-voice-in-terrance-wise.html [http://perma.cc/H74T-E7JQ].

248. *See, e.g.*, Leslie Patton, *McDonald's Workers Arrested at Protest near Headquarters*, BLOOMBERG (May 22, 2014), http://www.bloomberg.com/news/articles/2014-05-21/mcdonald-s-tells-employees-to-stay-home-as-protests-loom [http://perma.cc/QE6E-A3TG].

249. Oswalt, *supra* note 42, at 623.

250. Erika Eichelberger, *How Those Fast-Food Strikes Got Started*, MOTHER JONES (Dec. 5, 2013), http://www.motherjones.com/politics/2013/12/how-fast-food-strikes-started [http://perma.cc/HM2X-2XZA]. For an excellent analysis of the legality of the strikes, see Oswalt, *supra* note 42.

however, the movement had expanded beyond fast food.[251] Home health aides, federal contract workers, childcare workers, and airport workers, all of whom had already been involved in SEIU organizing campaigns, began to frame their struggles as part of the Fight for $15. They joined the day-long strikes and protests held in 190 cities on December 4, 2014. More surprisingly, workers who were not involved in existing official union campaigns joined as well. Employees at gas stations, discount outfits, and convenience stores—including BP, Shell, Speedway, Family Dollar, Dollar Tree, and Dollar General—participated in strikes and protests, after having attended meetings and followed social media campaigns over the prior months.[252]

By the spring and summer of 2015, the campaign had definitively altered its message. Without backing away from the demand for "$15 and a union" for fast-food workers, and while continuing to put pressure on McDonald's in particular, the campaign now identified itself as building a "broad national movement of *all low-wage workers*."[253] A March Atlanta organizing meeting featured not only fast-food and home care workers, but also activists from Black Lives Matter and civil rights movement veterans.[254] The inclusion of activists from other movements reflected not only the campaign's adept use of social media and its effective networking, but also its commitment to a social and inclusive form of unionism. By expressly embracing Black Lives Matter, the campaign again asserted that its goals were not limited to achieving gains at any particular workplace, but rather aimed to advance the interests of workers generally.[255]

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251. DePillis, *supra* note 22.

252. *Id.*; *see also* Greenhouse, *supra* note 247.

253. Steven Greenhouse, *Movement To Increase McDonald's Minimum Wage Broadens Its Tactics*, N.Y. TIMES (Mar. 30, 2015) (emphasis added), http://www.nytimes.com/2015/03/31/business/movement-to-increase-mcdonalds-minimum-wage-broadens-its-tactics.html [http://perma.cc/468W-XM8F].

254. *Id.* The movement has worked closely with Black Lives Matter; there is considerable overlap among participants in certain cities. *See, e.g.*, JP Massar, *Black Lives Matter Joins Fight for $15 Today in the Bay Area*, DAILYKOS (Nov. 10, 2015), http://www.dailykos.com/story/2015/11/10/1448366/-Black-Lives-Matter-Joins-Fight-for-15-Today-in-the-Bay-Area [http://perma.cc/6FUQ-42SK]; *The #Fightfor15 and the Black Lives Matter Movement March Together*, FIGHT FOR $15, http://fightfor15.org/april14/main/the-fightfor15-and-the-black-lives-matter-movement-march-together [http://perma.cc/DQ9X-UBEV].

255. Notably, at SEIU's subsequent convention, following a decision of fast-food workers to formally join SEIU, the union adopted as a key pillar of its work, a commitment "to end anti-Black racism because everybody deserves the opportunity to participate, prosper and reach their full potential." Tyler Downey, *We Won't Have Economic Justice Without Racial Justice*, SEIU HEALTHCARE CAN., http://www.seiu.org/blog/2016/5/we-wont-have-economic-justice-without-racial-justice [http://perma.cc/7L6A-MSED]; *see also Call to Action*, SEIU,

The next mass action was even larger than the previous one. On April 15, 2015, "tens of thousands of low-wage workers, students and activists in more than 200 American cities" participated in protests and strikes.[256] Since then, the campaign has held a series of mass protests, often focused specifically on national political events, such as presidential debates,[257] but also on local labor disputes involving a range of different workers, including airport workers and adjunct faculty members at universities.[258] Meanwhile, other unions and worker organizations, including Our Walmart, the American Federation of State, County, and Municipal Employees (AFSCME), and the Communication Workers of America (CWA), which were already engaging in similar struggles, have begun to associate themselves under the Fight for $15 banner.[259]

Throughout, social media has played an important role, allowing SEIU and the other unions to involve more workers and reach more members of the public than they otherwise would have.[260] The union has used web sign ups, text messages, and Twitter to involve workers who have never had personal contact with a union organizer. In addition, the SEIU-managed Fight for $15 website

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http://seiu2001.org/2016/06/28/seiu-international-convention [http://perma.cc/MU9T-LQYJ].

256. Noam Scheiber, *In Test for Unions and Politicians, a Nationwide Protest on Pay*, N.Y. TIMES (Apr. 15, 2015), http://www.nytimes.com/2015/04/16/business/economy/in-test-for-unions-and-politicians-a-nationwide-protest-on-pay.html [http://perma.cc/DN78-MXHF].

257. *See, e.g.*, Justin Miller, *The Fight for 15 Descends on the GOP Debate*, AM. PROSPECT (Jan. 29, 2016), http://prospect.org/article/fight-15-descends-gop-debate [http://perma.cc/37RK-YWCK].

258. *See, e.g.*, Daniel Moore, *Fight for $15 Demonstration Attracts Hundreds from Pitt, Worker Unions*, PITTSBURG POST-GAZETTE (Feb. 26, 2016), http://www.post-gazette.com/local/city/2016/02/26/Fight-for-15-draws-hundreds-of-demonstrators-in-Oakland/stories/201602270028 [http://perma.cc/59WD-UGR7] (describing involvement by the students, staff, and faculty at the University of Pittsburgh).

259. *See, e.g.*, Khorri Atkinson, *Walmart Workers Lend Voices to Fight for $15*, MSNBC (Nov. 13, 2015), http://www.msnbc.com/msnbc/walmart-workers-lend-voices-fight-15 [http://perma.cc/KPU2-HG4U] (describing OUR Walmart's involvement with the movement); Dave Kreisman, *Cab Drivers Among Thousands "Fighting for 15,"* AM. FED'N ST., COUNTY & MUNICIPAL EMPLOYEES (Apr. 16, 2015), http://www.afscme.org/blog/cab-drivers-among-thousands-fighting-for-15 [http://perma.cc/MQG3-FTRS] (describing the involvement of AFSCME Cab Driver organization); *Why the Fight for $15 Is Our Fight, Too*, COMM. WORKERS OF AM. (Nov. 12, 2015), http://www.cwa-union.org/news/entry/why_the_fight_for_15_is_our_fight_too [http://perma.cc/Z49Y-78D9] (describing the involvement of the CWA with Fight for $15 demonstrations).

260. Telephone Interview with Judy Scott, Gen. Counsel, SEIU (Apr. 10, 2016). On the relationship between social movements and social media, see generally VICTORIA CARTY, WIRED AND MOBILIZING: SOCIAL MOVEMENTS, NEW TECHNOLOGY, AND ELECTORAL POLITICS (2011).

provides workers with an instruction manual for how to engage in one-day strikes and allows them to download a "strike letter" that they can give to their managers explaining that they are asserting rights under section 7.[261]

B. The Standard Account: Minimum Wages and Employment Standards

Though the Fight for $15 has, from the beginning, framed its demands as "$15 *and a union*," the wage plea has captured far more attention than the call for union rights. News coverage often depicts the movement as exclusively about wages. As Professor Michael Oswalt observes, this portrayal is unsurprising. The wage demand "is provocative, easy to explain, and plays to a policy change that the public and progressive politicians generally support."[262]

And, indeed, the campaign, working alongside community groups, has had great success in shifting the terms of debate around the minimum wage and in bringing about policy change.[263] Cities across the country—including Seattle, Oakland, San Francisco, Los Angeles, San Diego, Santa Fe, Albuquerque, Kansas City (Missouri), Chicago, Louisville (Kentucky), and Portland (Maine)—have passed wage increases in response to pressure from groups allied with the Fight for $15.[264]

The first victories predictably occurred in liberal cities and states. For example, in 2013, after the initial wave of protests, the New York legislature agreed to increase the state minimum wage slowly from $7.25 to $9 by 2016.[265] Mayor Bill de Blasio argued that the amount was insufficient in New York City, urging an increase to $15 by 2019.[266] In Seattle, the initial victory was less ambiguous.[267] There, fast-food strikes were timed to coincide with the 2013 mayoral runoff elections. Ed Murray, then a state senator, endorsed a $15 minimum wage. On May 1, 2014, following Murray's election as mayor, a task force he appointed proposed to raise the minimum wage to $15 an hour over four

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261. *How To Go on a One-Day Strike*, FIGHT FOR $15, http://fightfor15.org/for-workers [http://perma.cc/G5VX-EZAZ].

262. Oswalt, *supra* note 42, at 626.

263. Extrinsic factors, like the end of the economic slowdown and the decrease in unemployment, also help explain the success of $15 an hour statutes in various cities.

264. McGeehan, *supra* note 21; *see also* sources cited *supra* note 16 (detailing new laws).

265. Brown, *supra* note 21.

266. Jillian Jorgensen, *De Blasio Calls for Higher NYC Minimum Wage than Cuomo Proposal*, OBSERVER (Feb. 3, 2015), http://observer.com/2015/02/de-blasio-calls-for-higher-nyc-minimum-wage-than-cuomo-proposal [http://perma.cc/J2ZA-HCXF].

267. For a history of minimum wage organizing in Seattle, see ROLF, THE FIGHT FOR FIFTEEN, *supra* note 32, at 97-164.

years for businesses with more than five hundred employees, and over seven years for smaller businesses.[268]

In the November 2014 elections, minimum wage victories spread beyond traditionally "blue" localities. Voters in Republican strongholds like Arkansas, Nebraska, and South Dakota all passed, by significant margins, referenda to raise their minimum wages, albeit to levels lower than $15.[269] These measures passed notwithstanding significant victories by Republican candidates in the same jurisdictions.[270] Meanwhile, voters in Oakland approved a thirty-six percent increase to $12.25 per hour, and voters in San Francisco approved a gradual increase to $15.[271]

By the spring of 2015, private employers were beginning to respond as well. McDonald's and Walmart announced that they would raise minimum pay for employees to $8.25 and $9 an hour, respectively, more than a dollar above the wage they had been paying in many locations. Facebook went so far as to raise its minimum wage to $15 an hour for workers employed by contractors.[272]

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268. Harold Meyerson, *Seattle's $15 Minimum Wage Agreement: Collective Bargaining Reborn?*, AM. PROSPECT (May 7, 2014), http://prospect.org/article/seattles-15-minimum-wage-agreement-collective-bargaining-reborn [http://perma.cc/G772-Z3SH].

269. Marianne Levine & Timothy Noah, *Minimum Wage Hikes Win*, POLITICO (Nov. 5, 2014), http://www.politico.com/story/2014/11/minimum-wage-increase-wins-in-four-red-states-112565 [http://perma.cc/73HT-3G82]; Seth Freed Wessler, *Minimum Wage Hikes: Where Voters Gave Themselves a Raise*, NBC NEWS (Nov. 5, 2014), http://www.nbcnews.com/feature/in-plain-sight/minimum-wage-hikes-where-voters-gave-themselves-raise-n241616 [http://perma.cc/M56Z-23LW]. On November 4, 2014, voters in South Dakota approved a ballot initiative that increased the minimum wage from $7.25 per hour to $8.50 per hour beginning January 1, 2015. The measure also guarantees an increase in the minimum wage each year after to account for inflation and sets tipped employees' wages at half that of the minimum wage. *South Dakota Increased Minimum Wage, Initiated Measure 18 (2014)*, BALLOTPEDIA, http://ballotpedia.org/South_Dakota_Increased_Minimum_Wage,_Initiated_Measure_18_(2014) [http://perma.cc/YU9W-HEEZ].

270. *See* Wessler, *supra* note 269 (observing that "[e]ven as Republicans gained control of the U.S. Senate and Republican governors comfortably won elections in Arkansas, Nebraska and South Dakota, significant majorities of voters in these states threw their weight behind the wage hikes").

271. Tiffany Camhi, *Oakland Minimum Wage Increases by 36 Percent Monday*, KQED NEWS (Mar. 2, 2015), http://ww2.kqed.org/news/2015/03/02/oakland-minimum-wage-measure-ff [http://perma.cc/A5WJ-2EBD]; Ben Rooney, *San Francisco Votes in $15 Minimum Wage*, CNN MONEY (Nov. 5, 2014), http://money.cnn.com/2014/11/05/news/san-francisco-increased-minimum-wage [http://perma.cc/866C-ZXJG].

272. Alison Griswold, *Facebook Is Raising Wages for Contractors to $15 an Hour*, SLATE (May 15, 2015), http://www.slate.com/blogs/moneybox/2015/05/15/facebook_increases_contractor_wages_to_15_an_hour.html [http://perma.cc/B9LF-WJX6]; Sruthi Ramakrishnan, *Wal-Mart To Raise Wages for 100,000 U.S. Workers in Some Departments*, REUTERS (June 2, 2015), http://www.reuters.com/article/wal-mart-stores

Then, on July 22, 2015, after Fight for $15 workers spent months organizing, demonstrating, speaking with the press, and testifying, the Wage Board of the State of New York announced that it was recommending a pay raise for most of the state's fast-food workers to $15 an hour—an increase of more than six dollars per hour, to be implemented over the course of several years.[273] The same day, the University of California system announced it would raise the minimum wage for all of its employees and contract workers to $15 an hour.[274] In subsequent months, lawmakers in Oregon, New York, and California approved legislation that substantially raises those states' minimum wages—to $15 in New York and California.[275] Several cities, including Washington, D.C., have since followed suit.[276]

Wage increases of this magnitude and scope would have been unthinkable just a few years ago. Democrats and liberal economists who bemoaned the inadequacy of existing minimum wages tended to advocate for nine, or maybe

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-wages-idUSL3NoYO42Q20150602 [http://perma.cc/S865-2JDW]; Samantha Sharf, *McDonalds To Raise Wages: Will It Be Enough To Please Employees, Shareholders?*, FORBES (Apr. 1, 2015), http://www.forbes.com/sites/samanthasharf/2015/04/01/mcdonalds-to-raise-wages-will-it-be-enough-to-please-employees-shareholders [http://perma.cc/H3QM-UL5D].

273. David Klepper & Deepti Hajela, *Fast Food Workers Celebrate Plan for $15 Wage in New York*, NEWS 12 WESTCHESTER (July 23, 2015), http://westchester.news12.com/fast-food-workers-celebrate-plan-for-15-wage-in-new-york-1.10669526 [http://perma.cc/S2FK-AWDH]; Patrick McGeehan, *New York Plans $15-an-Hour Minimum Wage for Fast Food Workers*, N.Y. TIMES (July 22, 2015), http://www.nytimes.com/2015/07/23/nyregion/new-york-minimum-wage-fast-food-workers.html [http://perma.cc/VDX9-6FV2].

274. Ian Lovett, *University of California System Set To Raise Minimum Wage to $15 an Hour*, N.Y. TIMES (July 22, 2015), http://www.nytimes.com/2015/07/23/us/university-of-california-system-set-to-raise-minimum-wage-to-dollar15-an-hour.html [http://perma.cc/785R-PCV3].

275. Steven Greenhouse, *How the $15 Minimum Wage Went from Laughable to Viable*, N.Y. TIMES (Apr. 1, 2016), http://www.nytimes.com/2016/04/03/sunday-review/how-the-15-minimum-wage-went-from-laughable-to-viable.html [http://perma.cc/Q58V-HHBB] (discussing the New York and California plans to raise wages to $15 an hour); Kristena Hansen, *Oregon Lawmakers Approve Landmark Minimum Wage Increase*, ASSOCIATED PRESS (Feb. 19, 2016), http://www.bigstory.ap.org/article/d5e9bb6d3e4a47ab84098fdbef5f55f2/oregon-lawmakers-approve-landmark-minimum-wage-increase [http://perma.cc/W6MT-DXGK] (describing the Oregon plan, which imposes a series of gradual increases, such that, by 2022, the state's current $9.25-an-hour minimum will increase to $14.75 in Portland, $13.50 in smaller cities, and $12.50 in rural areas).

276. Aaron C. Davis, *D.C. Lawmakers Approve $15 Minimum Wage, Joining N.Y., Calif.*, WASH. POST (June 7, 2016), http://www.washingtonpost.com/local/dc-politics/deal-reached-for-15-minimum-wage-in-dc-unions-say/2016/06/07/cff3dd66-2c2a-11e6-9de3-6e6e7a14000c_story.html [http://perma.cc/95XP-XD65] (describing Washington, D.C.'s minimum wage hike).

ten, dollars an hour—certainly nothing close to $15.[277] Moreover, support for minimum wage hikes in Republican-leaning states seemed unthinkable.[278] While the Fight for $15 is not the only explanation for the sea change—continued economic growth and low unemployment are contributing factors—observers agree that the Fight for $15 has been instrumental.[279]

The movement has also helped shift debate at the federal level.[280] Whether to raise the minimum wage, and how high, became an issue in the 2016 presidential campaign, and a $15 minimum wage has won the endorsement of the *New York Times* Editorial Board[281] and the Democratic Party.[282] And although federal minimum wage legislation has stalled,[283] the Obama Administration

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277. *See* Charlotte Alter & Zeke Miller, *Obama Supports $10 Minimum Wage*, TIME (Nov. 7, 2013), http://nation.time.com/2013/11/07/obama-supports-10-minimum-wage [http://perma.cc/3L98-G7AR] (describing Democratic support for a $10 hourly wage in 2013).

278. *See, e.g.*, Mara Liasson, *Shifting Stance, Some GOP Candidates Back State Minimum Wage Hikes*, NPR (Sept. 24, 2014), http://www.npr.org/2014/09/24/351246893/subtle-sea-change-on-minimum-wage-as-gop-candidates-back-state-hikes [http://perma.cc/W4MJ-XYG7] (noting that "[a]s free-market conservatives, Republicans are philosophically opposed to raising the minimum wage").

279. *See* Greenhouse, *supra* note 275.

280. *See* Ned Resnikoff, *How Low-Wage Strikes Helped Change the Conversation in Washington*, MSNBC (Dec. 7, 2013), http://www.msnbc.com/all-2 [http://perma.cc/D5YK-AWVS]. In his 2013 State of the Union Address, President Obama proposed a modest increase in the minimum wage. President Barack Obama, Remarks by the President in the State of the Union Address (Feb. 12, 2013), http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address [http://perma.cc/S93Z-EL3T]. In December of the same year, the President described income inequality as the "defining challenge of our time" and called for legislation that would raise the federal minimum wage to $10.10, more than the $9.00 he originally suggested. Paul Lewis, *Obama Throws Support to Minimum Wage Movement in Economy Speech*, GUARDIAN (Dec. 4, 2013), http://www.theguardian.com/world/2013/dec/04/obama-support-minimum-wage-inequality-speech [http://perma.cc/AH7X-VX9L].

281. Editorial, *New Minimum Wages in the New Year*, N.Y. TIMES (Dec. 26, 2015), http://www.nytimes.com/2015/12/27/opinion/sunday/new-minimum-wages-in-the-new-year.html [http://perma.cc/W7HE-VB8Z] (arguing that "[s]ooner or later, Congress has to set an adequate wage floor for the nation as a whole" and that "the new minimum should be $15").

282. *See* Kristin East & Daniel Strauss, *Sanders Claims Victory on $15 Minimum Wage in Party Platform, but Is Defeated on TPP*, POLITICO (July 9, 2016), http://www.politico.com/story/2016/07/bernie-sanders-minimum-wage-party-platform-225325 [http://perma.cc/B7DL-BSVY].

283. *See, e.g.*, Wesley Lowery, *Senate Republicans Block Minimum Wage Increase Bill*, WASH. POST (Apr. 30, 2014), http://www.washingtonpost.com/news/post-politics/wp/2014/04

has moved forward with executive action. One subgroup of the Fight for $15, identifying itself as "Good Jobs Nation," successfully pressed for an executive order that raises wages for individuals working on new federal service contracts. The executive order provides only $10.10 an hour; the federal contract workers continue to seek $15 and have engaged in numerous one-day strikes to support their demands.[284] Meanwhile, a recently promulgated Department of Labor regulation, long demanded by unions and allied policy organizations,[285] will raise the wages of millions of additional workers by raising the threshold below which salaried workers are entitled to overtime.[286]

In addition, the Fight for $15, with help from other worker organizations and community groups, has successfully pushed for new legislation guaranteeing other minimum labor standards. For example, the movement has provided a boost to longstanding efforts of family and women's organizations to pass laws mandating paid sick time. In numerous protests and press events, workers participating in Fight for $15 actions have highlighted the risks posed to workers and customers by the absence of paid sick leave among low-wage workers.[287] Under this new pressure, in the period since 2013, cities including Port-

/30/senate-republicans-block-minimum-wage-increase-bill [http://perma.cc/GCF4-H3LN] (noting the bill's unclear path to approval given Republican obstruction).

284. *See* Exec. Order No. 13,658, 79 Fed. Reg. 9,851 (Feb. 12, 2014); Mike DeBonis, *National Push for $15 Minimum Wage Hits Home for U.S. Senate Workers*, WASH. POST (July 21, 2015), http://www.washingtonpost.com/politics/national-push-for-15-minimum-wage-hits-home-for-us-senate-workers/2015/07/21/54dd7e14-2fc0-11e5-8f36-18d1d501920d_story.html [http://perma.cc/XCM2-6C7Q]; Sam Frizell, *Bernie Sanders Joins Striking Government Workers Ahead of Pope's Visit*, TIME (Sept. 22, 2015), http://time.com/4044632/bernie-sanders-pope-francis-strike [http://perma.cc/LH3N-DWQM]; GOOD JOBS NATION, http://goodjobsnation.org [http://perma.cc/4P26-S4XB].

285. Proponents included organizations such as the Economic Policy Institute and the National Employment Law Project. *See* Noam Scheiber, *White House Increases Overtime Eligibility by Millions*, N.Y. TIMES (May 17, 2016), http://www.nytimes.com/2016/05/18/business/white-house-increases-overtime-eligibility-by-millions.html [http://perma.cc/T7R2-Z6JH]; Rachel Gillett, *Experts Weigh In on How Obama's Overtime Rule Change Could Benefit Millions of Workers and Employers*, BUS. INSIDER (July 1 2015), http://www.businessinsider.com/what-new-overtime-law-means-for-everyone-2015-6 [http://perma.cc/9AVM-9Y3T].

286. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 29 C.F.R. § 541 (2016); Scheiber, *supra* note 285.

287. *See, e.g.*, Héctor Figueroa, *Paid Sick Days Legislation a Victory for People of Color and Working New Yorkers,* 32BJ SEIU, http://www.seiu32bj.org/blogs/paid-sick-days-legislation-a-victory-for-people-of-color-and-working-new-yorkers [http://perma.cc/KM3V-SZUK]; Eli Magaña, *Finally! $15 an Hour and Paid Sick Leave for IHSS Providers*, AFSCME (Mar.

land, Maine; New York City; Eugene, Oregon; San Diego; Oakland, California; Jersey City; Montclair, New Jersey; Trenton, New Jersey; and Philadelphia, along with the States of Massachusetts and California, have responded with new laws mandating paid sick time.[288] The Department of Labor also recently proposed a rule that would mandate paid sick time for federal contractors.[289]

The movement—the Fight for $15 along with a host of other worker organizations and community groups—has also pressed for legislation to change scheduling practices in the retail and fast-food industries.[290] In particular, workers object to being kept on part-time status even when additional hours are available and to having their shifts continually change.[291] Vermont and San Francisco have responded with laws that give workers the right to request flexible or predictable schedules, and officials in New York City are considering similar legislation.[292] Voters in SeaTac, Washington approved a measure that "bars employers from hiring additional part-time workers if their existing part-timers want more hours."[293] Similar bills have been introduced in California and New York,[294] as well as in Congress.[295] Several private employers, includ-

29, 2016), http://www.afscme.org/blog/finally-15-an-hour-and-paid-sick-leave-for-ihss-providers [http://perma.cc/69SN-USKS].

288. *See State and Local Action on Paid Sick Days*, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES 1 (July 2015), http://www.nationalpartnership.org/research-library/campaigns/psd/state-and-local-action-paid-sick-days.pdf [http://perma.cc/3TJN-S9DV].

289. *See* Establishing Paid Sick Leave for Federal Contractors, 81 Fed. Reg. 9592, 9592 (proposed Feb. 25, 2016) (to be codified at 29 C.F.R. pt. 13).

290. *See* Ann Belser, *Irregular Work Schedules: Efficient for Employers, but Tough for Workers*, PITTSBURGH POST-GAZETTE (Apr. 26, 2015), http://www.post-gazette.com/business/career-workplace/2015/04/26/Irregular-work-schedules-efficient-for-employers-but-tough-for-workers/stories/201504260090 [http://perma.cc/7WF4-RK5Z]; Gillian B. White, *The Very Real Hardship of Unpredictable Work Schedules*, ATLANTIC (Apr. 15, 2015), http://www.theatlantic.com/business/archive/2015/04/the-very-real-hardship-of-unpredictable-work-schedules/390498 [http://perma.cc/TMA3-FGYK].

291. *See* Steven Greenhouse, *A Push To Give Steadier Shifts to Part-Timers*, N.Y. TIMES (July 15, 2014), http://www.nytimes.com/2014/07/16/business/a-push-to-give-steadier-shifts-to-part-timers.html [http://perma.cc/33EX-K7ZM].

292. *See id.*

293. *See id.*

294. *See* Ross Barkan, *State Senator Pushing Bill To Regulate Unpredictable Work Schedules*, OBSERVER (Apr. 22, 2015), http://observer.com/2015/04/state-senator-pushing-bill-to-regulate-unpredictable-work-schedules [http://perma.cc/8BYS-W925]; Lisa Jennings, *California Lawmakers Introduce 'Fair Scheduling' Bill*, NATION'S RESTAURANT NEWS (Feb. 18, 2015), http://nrn.com/government/california-lawmakers-introduce-fair-scheduling-bill [http://perma.cc/D7MJ-7F5Y].

295. *See* Katie Johnston, *Bills Seek More Stable Hours for Low-Paid Workers*, BOS. GLOBE (July 20, 2015), http://www.bostonglobe.com/business/2015/07/19/growing

ing Gap, Abercrombie & Fitch, Starbucks, and Victoria's Secret have also announced that they will change their on-call scheduling practices.[296]

C. A New Unionism

While commentators have celebrated the Fight for $15's victories, they have largely failed to recognize its broader implications for labor law. In fact, much of the media and scholarly coverage of the Fight for $15 emphasizes that the effort is *not* unionism. One journalist wrote, "the effort seems aimed at organizing low-wage workers *not into a union* but into a force that could extract changes from local government."[297] Another commented, "[t]he campaign is more about public relations than actual economic coercion."[298] Academic experts have similarly observed that "the unions have no strategy for building a real organization sustained by actual dues-paying members."[299]

It is true that the Fight for $15's leaders admit that they are aware of no clear path to unionization in its traditional sense.[300] But the workers and staff interviewed by these same journalists emphasize that they are building a labor organization, not merely generating political pressure to enact new employment law. Even journalists who frame the campaign as centered on public relations have acknowledged that "those who participate do in fact seem interested in joining a union."[301]

-movement-stabilize-work-schedules/VdXNFH3AQQlD40xaHuzaIN/story.html [http://perma.cc/USG4-TF5D] (describing Senator Elizabeth Warren's introduction of a federal bill to "require employers to stabilize schedules, from posting work shifts several weeks in advance to giving additional pay to workers who are on call, or whose shifts are cut or changed on short notice").

296. *See* Rachel Abrams, *Gap Says It Will Phase Out On-Call Scheduling of Employees*, N.Y. TIMES (Aug. 26, 2015), http://www.nytimes.com/2015/08/27/business/gap-says-it-will-phase-out-on-call-scheduling-of-employees.html [http://perma.cc/U39M-3VXP]; Krystina Gustafson, *On-Call Scheduling Debate: Where Retailers Stand*, CNBC (Feb. 4, 2016), http://www.cnbc.com/2016/02/04/on-call-scheduling-debate-where-retailers-stand.html [http://perma.cc/2GVR-YTHC].

297. Brown, *supra* note 21.

298. DePillis, *supra* note 22.

299. Lichtenstein, *supra* note 42; *see also* Crain & Matheny, *supra* note 42, at 563-64, 582 (noting that worker movements are faced with the "vexing challenge of how to leverage worker power to accomplish lasting change"); Oswalt, *supra* note 42 (characterizing the Fight for $15 and related movements as improvisational).

300. *See* Eidelson, *supra* note 22.

301. DePillis, *supra* note 22.

Ultimately, although the path to unionization is unclear, from close examination of the movements' efforts, a coherent vision of unionism—and of a legal framework to support it—emerges. That emerging framework rejects the old regime's commitment to the employer-employee dyad and to a system of private ordering. Instead, it locates decisions about basic standards of employment at the sectoral level and positions unions as social actors empowered to advance the interests of workers generally.

1. From Workplace to Sector

From the outset, the Fight for $15 rejected the NLRA's premise that organizing and bargaining occur at individual worksites between the formal employer and its employees. A consistent argument of the campaign has been that corporate entities with effective power over workers—not only immediate employers—have a responsibility to negotiate.

Consider the campaign's efforts with respect to McDonald's. Recognizing the futility of holding elections at McDonald's franchise stores on a one-off basis, the Fight for $15 has sought to define McDonald's as the joint employer of all McDonald's employees. SEIU set forth its legal arguments in response to the NLRB's request for views in *Browning-Ferris Industries of California, Inc.*[302] That case, in which the union position ultimately proved victorious, involved a Browning-Ferris Industries (BFI) recycling plant in California. The plant's drivers and loaders were employed directly by BFI and were represented by the Teamsters. Several hundred sorters, screen cleaners, and housekeepers who also worked at the facility wished to join the union. The problem: they were employed not by BFI but by Leadpoint, a subcontractor.[303]

The relationship between BFI and Leadpoint was a conventional labor supply contract, similar to those used throughout the janitorial, security, maintenance, warehouse, and other sectors.[304] Under the BFI-Leadpoint arrangement, BFI and Leadpoint jointly decided many of the terms and conditions of the Leadpoint workers, but only Leadpoint exercised direct and immediate control.[305] Thus, applying the definition of joint employer that had governed since

302. Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186 (Aug. 27, 2015); *see* Brief of the Service Employees International Union as Amicus Curiae, *Browning-Ferris*, 362 N.L.R.B. No. 186 (No. 32-RC-109684).

303. *See Browning-Ferris*, 362 N.L.R.B. No. 186, at 2-6.

304. *Id.* at 18-20; *see also supra* Section I.A.2.

305. Under the agreement, many employment responsibilities are shared: both companies employ supervisors and lead workers at the facility. Leadpoint does the hiring, firing, and payroll of its own workers, while BFI exercises control over whom Leadpoint can hire, by set-

the mid-1980s, the Regional Director issued a decision finding that Leadpoint was the sole employer of the employees seeking to unionize.[306]

In its amicus brief, SEIU, joining the Teamsters and other unions, urged the Board not to require an entity to exercise direct and immediate control over a worker in order to be considered a joint employer under section 2(2) of the Act.[307] Instead, SEIU argued, the Board ought to return to the standard set forth in the 1980s by the Third Circuit in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc*.[308] That standard asks whether the alleged joint employer "has retained for itself sufficient control o[ver] the terms and conditions of employment of the [affected] employees" to enable that entity to "share or codetermine . . . matters governing the essential terms and conditions of [those employees'] employment."[309]

To support the union position, SEIU and fellow amici emphasized that a sizeable proportion of the labor force now works in contingent employment relationships involving subcontractors, staffing agencies, and franchisees. In particular, the SEIU brief detailed how fast-food brands have imposed comprehensive regimes of operational uniformity and monitoring systems on their franchisees, thereby significantly affecting the working conditions of all franchise employees. It also described how brands "control the economics of each franchise owner's business," effectively "stripping the franchisees of any meaningful opportunity to determine the terms and conditions of their workers' employment, except at the margins."[310]

SEIU and other unions admitted that their desired standard would require significant changes in the way corporations conceive of their employment relationships in the modern, fissured economy—and would significantly alter legal entitlements and liabilities, returning the legal standard to the one in place prior to the 1980s. Amicus briefs filed in opposition by the Chamber of Com-

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ting employment standards and reserving the right to reject any personnel. BFI establishes the facility's work plan, its stream of work, the schedule of working hours, and the number of workers to be assigned to a particular task, while Leadpoint chooses the individual workers. The two companies share in training, though Leadpoint takes the lead. While the contract specifically provides that Leadpoint determines pay rates, it also prevents Leadpoint from paying employees more than comparable BFI employees. *Browning-Ferris*, 362 N.L.R.B. No. 186, at 18-20.

306. *Id.* at 6.

307. Brief of the Service Employees International Union as Amicus Curiae, *supra* note 302, at 1, 18-20.

308. *See id.* (citing 691 F.2d 1117 (3d Cir. 1982), *enforcing* 259 N.L.R.B. 148 (1981)). The standard was adopted by the Board in *Laerco Transportation & Warehouse*, 269 N.L.R.B. 324 (1984).

309. 691 F.2d at 1123 (emphasis omitted).

310. Brief of the Service Employees International Union as Amicus Curiae, *supra* note 302, at 18.

merce and others made this point as well, as did Republican presidential candidates and members of Congress.[311] According to the industry and its supporters, the joint-employment legal theory advanced by the Teamsters, SEIU, and other unions would upend the franchise industry, reducing its profitability and flexibility.[312] They argued that the union-urged standard would both destabilize existing contracting relationships and widen the scope of labor disputes, forcing firms to participate in bargaining even where they lack authority to control all terms and conditions of employment.[313]

While the legal arguments were still pending before the NLRB in Washington, organizers and workers pressed their claims on the ground. They filed numerous unfair labor practice charges against both McDonald's and franchise owners, claiming that workers faced retaliation for participating in Fight for $15 activity.[314] In these cases, SEIU took the position that McDonald's was a joint employer even under the more restrictive standard. The effort has been successful, at least in the initial phases. On December 19, 2014, the NLRB announced that it was issuing complaints against McDonald's franchisees and their franchisor, McDonald's USA, LLC, as joint employers.[315] Then, on August 27, 2015, in a split decision, a majority of the Board ruled in favor of the unions in *Browning-Ferris*.[316] Joint employment, the Board concluded, exists

311. *See* Brief of the Chamber of Commerce of the United States of America as Amicus Curiae, *Browning-Ferris*, 362 N.L.R.B. No. 186 (No. 32-RC-109684), http://www.chamberlitigation.com/sites/default/files/cases/files/2014/U.S.%20Chamber%20Amicus%20Brief%20--%20Browning%20Ferris%20Industries%20of%20California%20%28NLRB%29.pdf [http://perma.cc/7PM9-GQBR]; Brian Mahoney, *Rubio Slams "Joint Employer,"* POLITICO: MORNING SHIFT (Aug. 21, 2015), http://www.politico.com/tipsheets/morning-shift/2015/08/nlrb-speaks-on-bargaining-units-bellhops-rubio-slams-joint-employer-seius-air-traffic-controllers-moment-019723 [http://perma.cc/YJ8Q-A2T5] (describing remarks by Marco Rubio).

312. Brief of the Chamber of Commerce of the United States of America as Amicus Curiae, *supra* note 311, at 9-10.

313. *See Browning-Ferris*, 362 N.L.R.B. No. 186, at 8 (summarizing the parties' arguments).

314. McDonald's USA, LLC v. Fast Food Workers Comm., 363 N.L.R.B. No. 144 (Mar. 17, 2016); *see also McDonald's Fact Sheet*, NAT'L LAB. REL. BOARD, http://www.nlrb.gov/news-outreach/fact-sheets/mcdonalds-fact-sheet [http://perma.cc/2TE3-P9D7].

315. *McDonald's Fact Sheet*, *supra* note 314. In early August, the NLRB denied McDonald's request for a more detailed explanation of the NLRB's new definition of what it means to be a joint employer or to dismiss the case. Two members of the Board dissented, arguing that McDonald's was being denied due process.

316. *Browning-Ferris*, 362 N.L.R.B. No. 186. The Board criticized the earlier restrictive approach, writing that it "has resulted in findings that an entity is not a joint employer even where it indirectly exercised control that significantly affected employees' terms and conditions of employment" or where it directly exercised control over employees in ways deemed "limited

whenever two or more employers "share or codetermine those matters governing the essential terms and conditions of employment."[317] As Part IV explains, that decision, along with subsequent developments in NLRB proceedings involving McDonald's and other employers, opens the door to a change in the way organizing and bargaining occurs under the NLRA.[318]

SEIU's Fight for $15 campaign is by no means the first effort to organize fissured employers by pressuring the entities that exercise actual control over the conditions of employment, even if there is no immediate, formal employer relationship.[319] But the Fight for $15 suggests the possibility of a more fundamental shift away from the employer-employee dyad. The movement's initial conceit may have been to build a union of a particular brand's fast-food workers by focusing on an entire company, like McDonald's, instead of particular franchisees. The *Browning-Ferris* decision advances this more modest goal. Yet, as discussed above, over time, the campaign expanded to embrace all fast-food workers and then even broader swaths of low-wage and gig economy work-

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and routine." *Id*. at 10-11. It noted that millions of American workers work in contingent employment relationships and concluded that, "to the extent permitted by the common law," the statute should be read to "encompass the full range of employment relationships wherein meaningful collective bargaining is, in fact, possible." *Id*. at 13; *see also id*. at 21 ("It is not the goal of joint-employer law," the Board concluded, "to guarantee the freedom of employers to insulate themselves from their legal responsibility to workers, while maintaining control of the workplace. Such an approach has no basis in the Act or in federal labor policy."); *supra* notes 149-152 and accompanying text; *infra* notes 425-432 and accompanying text.

317. *Browning-Ferris*, 362 N.L.R.B. No. 186, at 15. Essential terms include not only wages and hours, but also the number of workers to be supplied, scheduling, seniority and overtime, work assignments, and the manner and method of work performance. *Id*. Joint employment may exist when an entity reserves the right to exercise control over such details of work, even if control is not in fact exercised. Joint employment also may exist when an entity controls such terms in a way that is indirect or attenuated. *Id*.

318. *See infra* notes 425-432 and accompanying text.

319. SEIU's successful Justice for Janitors movement of the 1990s employed a similar strategy, focusing on building owners as well as the janitorial contractors who employed the workers. *See* Catherine L. Fisk et al., *Union Representation of Immigrant Janitors in Southern California: Economic and Legal Challenges*, *in* ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 199, 199 (Ruth Milkman ed., 2000). UNITE HERE has used similar tactics in the hospitality industry, as have former UNITE HERE and allied worker centers against garment sweatshops. *See* Scott L. Cummings, *Hemmed in: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1, 17 (2009) (discussing how the anti-sweatshop movement in Los Angeles sought "to make legal responsibility follow economic power by rupturing the legal fiction that protected profitable manufacturers and retailers from the labor abuses committed by their contractors").

ers.[320] As such, the campaign is making clear its aspiration to negotiate employment standards on industrial, sectoral, and regional levels, rather than at the level of the individual employer or even the individual supply chain.[321] As the next Section elaborates, to advance this goal, the campaign is using strategies that push beyond even *Browning-Ferris*.

Ironically, the NLRB's recent ruling in the case involving college football players, though a defeat for the petitioning workers, resonates with the Fight for $15's arguments about sectoral bargaining.[322] There, the Board dismissed a petition by Northwestern University's college football players who were seeking to unionize.[323] Rather than considering the merits of the players' claims that they should qualify as workers under the Act, the Board declined jurisdiction.[324] The reason: most National Collegiate Athletic Association (NCAA) teams were at public universities not subject to the NLRA and having a "single institution" organized into a union within an integrated economy of unorganized institutions would make little sense.[325] Yet it is precisely a workplace-

320. The Fight for $15's efforts to shift responsibility higher up the fissured employment chain has also led it to support organizing efforts of franchisees themselves. On April 30, 2015, SEIU launched a website designed to build a national network of fast-food franchisees that want stronger protections for their businesses against franchisors. Candace Choi, *Labor Organizers Seek Unusual Ally in Fast-Food Franchisees*, CHI. TRIB. (Apr. 30, 2015), http://www.chicagotribune.com/business/ct-fast-food-franchisees-0501-biz-20150430-story.html [http://perma.cc/U74J-J9V5]. The union has supported legislative efforts of franchise owners designed to protect them from retaliation by brands. For example, a California bill passed by the legislature but vetoed by Governor Brown would have made it harder for franchisors to terminate contracts with franchise owners. Kate Taylor, *California Governor Vetoes Bill That Would Expand Franchisee Rights*, ENTREPRENEUR (Sept. 30, 2014), http://www.entrepreneur.com/article/237951 [http://perma.cc/D4A8-3NP6] (describing SEIU's support for the California bill). At the behest of parent companies, Governor Brown vetoed the bill and urged franchise owners and parent companies to come up with a solution both sides could agree on. Jeremy B. White, *Gov. Jerry Brown Vetoes Franchise Bill*, SACRAMENTO BEE (Sept. 30, 2014), http://www.sacbee.com/news/politics-government/capitol-alert/article2615644.html [http://perma.cc/7L6E-XJ74]. A similar bill was under consideration in Pennsylvania and has been referred to committee. *See* H.R. 1346, 2014-2015 Leg., Reg. Sess. (Pa. 2015).

321. Part IV, *infra*, discusses possible legal frameworks that could support this broader ambition.

322. Nw. Univ. & Coll. Athletes Players Ass'n, 362 N.L.R.B. No. 167 (Aug. 17, 2015).

323. *Id.*

324. *Id.* at 3.

325. *Id.* at 6; *see also id.* at 3 (explaining that a bargaining unit of a single team's players "would not promote stability in labor relations"). No doubt the novelty of the football players' arguments and the ramifications of intervention for college sports played a role in the Board's decision—indeed, the Board so acknowledged. *Id.* at 3 ("We emphasize that this case involves novel and unique circumstances.").

by-workplace, employer-by-employer system of organization and bargaining—with individual units organized amidst seas of unorganized workers—that has governed since the New Deal.

2. *From Private to Social*

While working to move bargaining to a more industrial scale, the Fight for $15 has also embraced a form of state-backed social bargaining. These two moves are related. In order to move bargaining beyond the single employer to the industrial, sectoral, and regional level, the Fight for $15 has sought to engage the state directly in bargaining over workers' conditions. In so doing, the campaign is transforming the post-New Deal conception of labor disputes as private affairs, largely beyond the reach of the state; it is changing the role of the union from the representative of particular members to an advocate for workers generally; and it is weakening the divide between employment law and collective bargaining.

The move to social bargaining by the Fight for $15 has been less explicit than the move away from the formal employer-employee relationship. Traditional corporate-focused tactics, including protests, strikes, and media campaigning, remain a centerpiece of the campaign. But far more than predecessor efforts, the campaign has explicitly addressed its demands to government actors. It has sought $15 an hour, rules requiring reliable schedules, and mandates for sick leave simultaneously from government and companies. Indeed, the union's demands on state, local, and federal government actors to directly impose minimum labor standards have garnered as much media attention and more concrete successes than the employer-focused tactics.[326]

To some extent, these efforts look like familiar legislative campaigns for employment regulation. The labor movement has long been involved in pushing legislation relevant to workers' rights. For example, unions were instrumental in helping pass the Civil Rights Acts, OSHA, the FMLA, and, most recently, health care reform.[327] But although these bills were a political priority for the labor movement, union-organizing campaigns operated separately from the legislative ones and focused on different goals.[328]

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326. *See supra* Sections II.A-B.

327. LICHTENSTEIN, *supra* note 88, at 185-86.

328. *Id.* at 186 (noting that although unions supported the enactment of the civil rights bills, Medicare and Medicaid, and OSHA, the 1960s and 1970s "were barren of virtually any legislative or ideological payoff for organized labor as an institution or . . . as a social movement with the kind of aura necessary to set the political and social agenda").

The current local legislative efforts, in contrast, are deeply integrated into ongoing workplace campaigns and the demands are consonant.[329] Indeed, the one-day strikes—occurring in a range of workplaces and industries, and with only a minority of employees at a given worksite participating—are as much as a form of social protest in support of public demands as an attempt to exercise coercive economic power over any particular employer. These efforts exploit the capacious nature of section 7 of the NLRA, which has been interpreted to protect concerted action by workers even when they are not union members and even when the target of such action is not the employer, as long as there is a clear nexus to employment issues.[330] Throughout, the campaign has positioned workers as active participants in determining new state and local standards. In interviews with the press, workers-leaders have articulated their goals as improving conditions through their collective power. These activists have also emphasized their own role in determining the new policies.[331]

From these fledgling and evolving efforts, one can derive a glimmer of tripartism in labor relations largely abandoned since the New Deal: triangle bargaining among workers, employers, and the state over wages and benefits.[332] The recent experience with the New York Wage Board provides the most concrete example. On May 6, 2015, after growing protests and strikes in New York organized by the Fight for $15, Governor Andrew Cuomo announced that he would take executive action to raise wages.[333] As Cuomo explained, New York State law permitted the labor commissioner to investigate whether wages paid in a specific industry or job classification are sufficient to provide for the life

329. *See supra* Sections II.A-B.

330. *See supra* note 59 and accompanying text.

331. *See, e.g.*, Greenhouse, *supra* note 247 (quoting an activist's belief that "[t]he way to achieve [the $15 hourly wage] is to get all types of low-wage workers involved"); Ned Resnikoff, *Fast Food Convention Portends Escalation in Strikes*, MSNBC (July 28, 2014), http://www.msnbc.com/msnbc/fast-food-convention-portends-escalation-strikes [http://perma.cc/JWA6-LRVM] (noting fast-food convention organizers' openness to more radical methods in response to popular desire for such methods).

332. This is labor tripartism in the traditional sense, where unions, the state, and business work together to set wages and other conditions for the labor market. It is distinct from the form of tripartism Benjamin Sachs describes, in which unions use tripartite bargaining to achieve alternate mechanisms to replace the NLRA's process. *See generally* Sachs, *supra* note 127 (describing how government actions in areas unrelated to labor but of importance to employers are traded for private agreements between unions and employers that reorder the rules of organizing and bargaining).

333. Andrew M. Cuomo, Opinion, *Fast Food Workers Deserve a Raise*, N.Y. TIMES (May 6, 2015), http://www.nytimes.com/2015/05/07/opinion/andrew-m-cuomo-fast-food-workers-deserve-a-raise.html [http://perma.cc/DD3Q-53CZ]. As Cuomo noted, the New York Legislature had rejected his proposal to raise the minimum wage statutorily. *Id.*

and health of those workers, and, if not, to impanel a wage board to recommend what adequate wages should be.[334] Invoking Franklin Roosevelt's aggressive use of executive power against moneyed interests, Cuomo directed the Commissioner to exercise such authority.[335] The next day, New York's Acting Commissioner for Labor issued a memorandum providing data to show that "a substantial number of fast-food workers in the hospitality industry are receiving wages insufficient to provide adequate maintenance and to protect their health" and began the wage board process.[336]

Critically, New York law did not simply permit the executive to establish a wage board; it required that the board be comprised of equal numbers of representatives from labor, management, and the public.[337] For its board, New York chose one representative from each group: Byron Brown, Mayor of Buffalo, representing the public; Kevin Ryan, Chairman and Founder of the online retailer Gilt, representing businesses; and Mike Fishman, Secretary-Treasurer of SEIU, representing labor.[338] The Board Members held hearings across the state over the next forty-five days. Workers, organized by the Fight for $15, participated in great numbers at these hearings. They reported "the impact of low pay on their health and emotional well-being and reported myriad hardships," and they told personal stories about their inability to afford food, clothing, and other basic needs on their current wages, and about the health and safety risks to which they were exposed at work.[339] Many academic observers and some employers agreed that wages were inadequate.[340] In response, restaurant operators and business activists warned of negative economic consequences; and economists tried to predict the effects of an increase.[341] On July 21, the

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334. *Id.*; N.Y. LAB. LAW § 654 (McKinney 2016).

335. Cuomo, *supra* note 333. Cuomo noted that the average fast-food CEO earned $23.8 million in 2013, while entry-level fast-food workers earned only $16,920 a year, qualifying many for public assistance. *Id.*

336. Mario J. Musolino, Acting Comm'r of Labor, *Determination Regarding Adequacy of Wages*, N.Y. DEP'T LAB. (May 7, 2015), http://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Determination_wages_050715.pdf [http://perma.cc/8QRV-VYGT].

337. N.Y. LAB. LAW § 655(1) (McKinney 2016) ("A wage board shall be composed of not more than three representatives of employers, an equal number of representatives of employees and an equal number of persons selected from the general public.").

338. *Fast Food Wage Board*, N.Y. DEP'T LAB., http://labor.ny.gov/workerprotection/laborstandards/wageboard2015.shtm [http://perma.cc/5JGM-9PTU].

339. FAST FOOD WAGE BD., N.Y. DEP'T OF LABOR, REPORT OF THE FAST FOOD WAGE BOARD TO THE NYS COMMISSIONER OF LABOR 10-11 (2015).

340. *Id.* at 11.

341. *See, e.g.*, Rick Karlin, *New York Fast Food Wage Board Hears Testimony About Potential Mandate of Higher Minimum Wage,* ALB. TIMES UNION (June 22,

Board announced its decision: $15 for fast-food restaurants that are part of chains with at least thirty outlets, to be phased in over the course of six years, with a faster phase-in for New York City.[342]

Though the Fight for $15 did not initially describe its efforts with local governments as bargaining, it came to do so over time. In a rare media interview published on August 30, 2015, the Fight for $15 campaign director Scott Courtney reflected: "I would call what happened [in New York] collective bargaining, and I would call that a union," even though there was no "bargaining" with employers.[343]

To be sure, as an example of tripartism, the New York wage board is partial. There was no restaurant representation on the Board; no comprehensive bargaining occurred; and the Board's mandate was limited to wages.[344] However, other localities have convened wage boards or task forces that have broader formal participation and more expansive mandates. For example, Sacramento's new wage task force includes the heads of major business groups, including the local Chamber of Commerce and the California Restaurant Employers, as well as the heads of major unions and community organizations.[345] Seattle and Tacoma have also used business-labor boards or task forces to set their new minimum wages and employment standards.[346] The Mayor of Chicago has appointed a task force to consider mandating paid sick time and other benefits.[347]

2015), http://www.timesunion.com/tuplus-local/article/New-York-fast-food-wage-board-hears-testimony-6343045.php [http://perma.cc/7HT2-THSF].

342. McGeehan, *supra* note 273.

343. 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/WYP5-S7BW].

344. Notably, the wage board's wage powers were suspended under the new state-wide law raising the minimum wage to $15. *See infra* Section IV.B.

345. Allen Young, *Here's the List of Who's on the Mayor's Minimum Wage Task Force*, SACRAMENTO BUS. J. (June 25, 2015, 2:34 PM), http://www.bizjournals.com/sacramento/news/2015/06/25/heres-the-list-of-whos-on-the-mayors-minimum-wage.html [http://perma.cc/3WEN-C5HK] (describing the Sacramento mayoral task force with representatives from business, labor, and non-profits); *Mayor Johnson Convenes Task Force To Make Recommendation on Potential Minimum Wage Increase*, CITY OF SACRAMENTO (July 25, 2015), http://www.cityofsacramento.org/City-Manager/Media-Releases/Mayor-convenes-Income-Inequality-Task-Force [http://perma.cc/UDW8-VL9X].

346. *See* Josh Feit, *What Do We Want? $15! When Do We Want It? In a Little While!*, SEATTLE METROPOLITAN (July 30, 2014), http://www.seattlemet.com/articles/2014/7/30/history-of-seattles-minimum-wage-law-august-2014 [http://perma.cc/K28B-WWFB] (describing Seattle's minimum wage fight and the work of the Mayoral Income Inequality Advisory Committee, which included leading business and labor leaders); Kate Martin, *Tacoma Mayor Picks Minimum Wage Task Force Members*, NEWS TRIB. (May 12, 2015), http://

The extent to which these committees actually engage in tripartite negotiations with the ability to make binding recommendations varies. Many provide only advice or recommendations that must still be enacted through ordinary legislative processes, and some have been unable to reach consensus, offering multiple proposals from different constituents. Still, occurring in the context of the broader Fight for $15 campaign, the use of these tripartite structures represents an important shift. So too the Department of Labor's new overtime rule can be viewed as the product of social bargaining. The regulation was stalled for years within the Executive Branch until the public debate around wages began to shift. The unions and their allies drove the Administration to make the rule change a priority, and they and business counterparts commented extensively on the proposed rule, helping influence its final shape.[348]

The move toward state-backed social bargaining sets the Fight for $15 apart from several other innovative and important worker campaigns, like SEIU's own Justice for Janitors campaign or the work of the Coalition of Immokalee Workers.[349] Those efforts are similarly sectoral, but they are rooted in private ordering. For example, the Coalition of Immokalee Workers, which is an organization of tomato workers in southwest Florida, has brought to bear worker and consumer pressure on national and international retail brands. The pressure campaigns—not subject to the NLRA's prohibition on secondary boycotts because of agriculture's exemption from the statute—have resulted in private

www.thenewstribune.com/news/local/politics-government/article26288548.html [http://perma.cc/QS59-6QGD] (describing the composition of Tacoma's new minimum wage task force, which includes representation from labor, business, grassroots activist groups, and clergy).

347. Chicago's new Working Families Task Force has a broad mandate and significant business representation, but minimal representation from unions. *See* Thomas A. Corfman, *Emanuel Takes Step Toward Paid Leave for Sickness, Childbirth*, CRAIN'S (June 23, 2015), http://www.chicagobusiness.com/article/20150623/NEWS02/150629968/emanuel-takes-step-toward-paid-leave-for-sickness-childbirth [http://perma.cc/QR4R-JG24].

348. *See* Jana Kasperkevic, *Good News: Overtime Pay May Finally Be Coming to a Paycheck near You*, GUARDIAN (Mar. 15, 2016), http://www.theguardian.com/business/2016/mar/15/overtime-pay-labor-department-threshold-rule [http://perma.cc/D74Y-MZJL] (reporting that the proposed rule was "a long time coming"). The DOL received over 270,000 comments in response to its notice of proposed rulemaking. Wage & Hour Div., *Final Rule: Overtime: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees under the Fair Labor Standards Act*, U.S. DEP'T LAB., http://www.dol.gov/whd/overtime/final2016 [http://perma.cc/JF7M-ZFFJ].

349. *See About CIW*, COALITION IMMOKALEE WORKERS (2012), http://www.ciw-online.org/about [http://perma.cc/LZY9-WVXY].

agreements that implement wage increases and improve worker conditions. These agreements are monitored and enforced through private programs.[350]

In contrast, the Fight for $15 is making demands on state actors, as well as employers. It has systematically engaged regulatory and legislative structures, through testimony, strikes, and protests. In so doing, the campaign has positioned government as a co-negotiator in determining workers' material conditions; it has pushed government actors away from the role they have occupied since Taft-Hartley, while moving labor unions more squarely into the public policy space.

3. Conclusion: Blurring the Employment/Labor Distinction; the Broader Social Movement; and the Uncertain Future of Worksite Representation

By positioning unions as political actors with authority to negotiate the basic terms of employment for workers generally, the Fight for $15 is embracing a more social form of labor law. It is also eroding the distinction between labor law and employment law. Under the emerging model, employment law is no longer just a collection of individual rights to be bestowed by the state. Instead, it is a collective project to be jointly determined and enforced by workers, in conjunction with employers and the public.

Though the Fight for $15 is the most prominent and largest movement embracing this approach, it is not alone. As is evident from the discussion above, its work has been supplemented by a host of other organizations, ranging from think tanks to community based groups—and the movement itself is made up of a range of different unions, organizing in different industries, from OUR Walmart to more traditional unions like CWA and AFSCME.[351] In addition, other organizations, which initially started as worker centers not committed to collective bargaining, have independently begun demanding a more sectoral and public form of labor law. Groups like National Domestic Workers Alliance (NDWA), for example, are organizing among workers long excluded from labor law.[352] Some of the NDWA affiliates have combined efforts to pass new wage and hour legislation with demands for sector-wide bargaining.[353] Like

350. *See* Brudney, *supra* note 38.

351. *See supra* notes 253-259 and accompanying text.

352. EILEEN BORIS & JENNIFER KLEIN, CARING FOR AMERICA: HOME HEALTH WORKERS IN THE SHADOW OF THE WELFARE STATE (2012); David Bornstein, *A Living Wage for Caregivers*, N.Y. TIMES: OPINIONATOR (July 10, 2015), http://opinionator.blogs.nytimes.com/2015/07/10/organizing-for-the-right-to-care/ [http://perma.cc/2L4M-GJQL].

353. *See History & Mission*, DOMESTIC WORKERS UNITED (Apr. 20, 2016) http://www.domesticworkersunited.org/index.php/en/about [http://perma.cc/Z7T6-ACMZ]. For ex-

the Fight for $15, NDWA seeks industry-wide standards, public bargaining, and a political role for the worker-organization. The Taxi Worker Alliance is another example of a worker organization attempting to build a national presence and engage in sectoral, social bargaining.[354]

While the Fight for $15 and these other campaigns have directed their demands to government, they also maintain a commitment to worker voice, unionism, and collective action—their goals are not purely regulatory. Public statements by campaign leaders evidence this continued commitment to worksite organization and representation. The union leaders admit they do not know precisely what such an organization will look like—but they are nonetheless committed to it.[355]

As discussed further in Section IV.B, existing efforts suggest two, not mutually exclusive, possibilities. First, social bargaining could serve as a floor above which traditional firm-based collective bargaining will occur. Indeed, social bargaining appears to be strengthening unions' ability to engage in traditional collective bargaining.[356] Second, the efforts of the Fight for $15 and other worker organizations suggest the possibility of new forms of union funding and worksite organization that could accompany social bargaining and traditional unions. Specifically, the Fight for $15's minority strikes and self-organized worker actions point toward organizations that would not depend on majority status at a given facility, on a system of exclusive representation, or on traditional collective bargaining agreements.[357] Meanwhile, other movements are exploring different models that could also supplement social bargaining.[358]

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amples of new laws urged by DWA, see Domestic Workers Bill of Rights, ch. 481, 2010 N.Y. Sess. Laws 1315 (McKinney) (codified at N.Y. EXEC. LAW §§ 292, 296-b (McKinney 2014)); for new federal regulations, see 29 C.F.R. § 552 (2015). For a history of this movement, see, for example, BORIS & KLEIN, *supra* note 352; and Hina Shah & Marci Seville, *Domestic Worker Organizing: Building a Contemporary Movement for Dignity and Power*, 75 ALB. L. REV. 413, 413-14 (2012).

354. Jacqueline Leavitt & Gary Blasi, *The Los Angeles Taxi Worker Alliance*, *in* WORKING FOR JUSTICE, *supra* note 214, at 109-24; *see also* Fine, *supra* note 215, at 615 (describing efforts of taxi worker organizations to create a federated structure); Milkman, *supra* note 214, at 17 (describing taxi workers' efforts as a mix between worker center and union approaches).

355. *See supra* notes 300-301 and accompanying text.

356. *See infra* Section IV.B.1.

357. *See infra* Section IV.B.2.

358. *See infra* Section IV.B.3.

III. THE CASE FOR THE NEW LABOR LAW

The rough outline of an aspirational new labor regime emerges from the Fight for $15 and similar movements. The regime makes fundamental changes to the traditional NLRA approach. While retaining a role for traditional collective bargaining and allowing for new forms of voluntary worksite organization, the new regime positions unions as political actors with authority to negotiate basic terms of employment on a sectoral and regional basis; these negotiations occur with state actors as well as with employers. The new, still embryonic, labor law thus embraces a more public and social approach, while eroding the distinction between labor law and employment law. At the same time, it is *not* traditional employment law: it rests on a commitment to collective power rather than individual rights.

Given the extent to which this nascent regime departs from existing models, criticisms of the move come easily. This Part considers those criticisms—focusing on the extent to which the new labor law is contested even within the labor movement and by those who share its normative commitments. It then provides an affirmative case for the ability of the aspirational framework to advance the goals of economic and political equality, while recognizing some areas of concern.[359]

A. Weaknesses of the Emerging Regime

Significant divisions have emerged within the labor movement about the strategy of bargaining outside the employer-employee relationship in partnership with the state. The fault lines can be seen most clearly in the debate about whether newly enacted labor and employment standards should exempt unionized shops. At least six of the twenty U.S. cities and counties that have set minimum wages above state and federal levels include a provision allowing unions to waive the wage mandate as part of a collective bargaining agreement.[360] These exemptions are no accident. SEIU and the Fight for $15 have supported

359. As previously noted, this Article assumes that realizing greater societal equality, both economic and political, is an important goal of law generally, and of labor law in particular. Accordingly, this Part does not take on critics who object to using labor law as a tool to achieve greater equality or, relatedly, as a tool to augment the political and economic power of workers. It also leaves for another day important design concerns relating to efficiency, union democracy, and industrial peace. *See supra* note 41 and accompanying text.

360. Eric Morath & Alejandro Lazo, *Minimum-Wage Waivers for Union Members Stir Standoff*, WALL ST. J. (Aug. 17, 2015), http://www.wsj.com/articles/minimum-wage-waivers-for-union-members-stir-standoff-1439857915 [http://perma.cc/LQ77-HBEH].

universal minimum labor standards and have opposed exemptions. But some other segments of the labor movement have vigorously sought exemptions that allow union shops to negotiate below minimums, as a tool to support traditional shop-by-shop organizing.

Debate erupted last year in Los Angeles.[361] Days before the Los Angeles City Council approved the new minimum wage of $15 an hour, several prominent labor leaders, including those from the County Federation and UNITE HERE, advocated for inclusion of a waiver for unionized workplaces. In their view, an exemption would provide labor and management with the flexibility to negotiate better benefits for all union members or to allocate greater raises to more senior workers.[362] The head of the Los Angeles County Federation of Labor, Rusty Hicks, emphasized the importance of "freedom" in negotiations.[363]

Other members of the labor movement disagreed. California SEIU leaders denounced the exemption, as did some rank-and-file activists and allies of the labor movement in local government, for undermining worker rights.[364] When asked about the Los Angeles debate, a prominent SEIU official from Seattle, Washington, said: "At this point in our history, we have to be very careful to send the message that we stand up for all workers . . . . A wage is a wage is a wage . . . . It's very hard to justify why you'd want any worker to make less than the minimum wage."[365] Though the exemption did not make the final statute in Los Angeles, the debate is not over; the City Council is expected to revisit the possibility.[366] A similar debate occurred in Kansas City.[367] Meanwhile, em-

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361. Peter Jamison et al., *L.A. Labor Leaders Seek Minimum Wage Exemption for Firms with Union Workers,* L.A. TIMES (May 27, 2015), http://www.latimes.com/local/lanow/la-me-ln-los-angeles-minimum-wage-unions-20150526-story.html [http://perma.cc/E9EA-DJ6Z].

362. *Id.*

363. *Id.* Notably, while some economists believe that an increased minimum wage would result in job loss among low-wage workers, *see* David Neumark et al., *More on Recent Evidence on the Effects of Minimum Wages in the United States*, 3 IZA J. LAB. POL'Y 1 (2014) (discussing studies which reach conflicting conclusions about the effects of a minimum wage on job loss), labor leaders have not voiced this concern.

364. David Zahniser & Emily Alpert Reyes, *Labor Leaders' Credibility Slips in Minimum-Wage Debate*, L.A. TIMES (June 15, 2015), http://www.latimes.com/local/cityhall/la-me-wage-exemption-20150615-story.html [http://perma.cc/GJW6-VUK6].

365. Peter Jamison, *Why Union Leaders Want L.A. To Give Them a Minimum Wage Loophole*, L.A. TIMES (July 27, 2015), http://www.latimes.com/local/cityhall/la-me-union-exemption-20150726-story.html [http://perma.cc/5AGP-495N].

366. *Id.* ("'Unions in America, obviously we're in decline,' said Dave Regan, president of SEIU-UHW, the union that represents home healthcare workers and is leading the campaign for a California ballot measure to raise the statewide minimum wage to $15. 'I don't think we help ourselves by taking positions where we don't hold ourselves to the same standards as every-

ployers charge that the unions supporting exemptions do so in order to coerce employers to agree to unionization.[368] They argue that the exemptions disturb the balance of power that Congress imposed with the NLRA and therefore are preempted by federal law under the *Machinists* doctrine.[369]

Division within the labor movement extends beyond the question of exemptions from local legislation. Some labor leaders and union allies have raised concerns about the shift away from worksite-based bargaining toward industrial and social bargaining. For example, SEIU faces criticism from some of its own members who wonder whether a campaign to raise minimum wages is a good way to spend their dues money.[370] Meanwhile, some labor experts have urged SEIU to turn back to NLRB elections or other more traditional union campaigns that are more likely to produce dues-paying members.[371] Taking the critique further, a few leaders within the labor movement have openly objected to the new social welfare legislation, arguing that wages, benefits, and sick time should be set through collective bargaining in the "private system," not by law.[372]

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body else.'"); *see also* Morath & Lazo, *supra* note 360 (describing rank-and-file opposition to the exemption).

367. *See* Morath & Lazo, *supra* note 360 ("Behind the scenes, labor leaders who worked with lawmakers on the provision were divided [on whether to include a waiver for unionized shops], said Pat 'Duke' Dujakovich, president of Greater Kansas City AFL-CIO.").

368. *Id.*; Sean Hackbarth, *Where Have Unions Gotten Minimum Wage 'Escape Clauses?'*, U.S. CHAMBER COM.: ABOVE THE FOLD (June 3, 2015), http://www.uschamber.com/above-the-fold/where-have-unions-gotten-minimum-wage-escape-clauses [http://perma.cc/7UYF-ZFZA].

369. *See, e.g.*, Am. Hotel & Lodging Ass'n. v. City of Los Angeles, 119 F. Supp. 3d 1177, 1179 (C.D. Cal. 2015) (denying a motion for a preliminary injunction against a Los Angeles hotel wage statute exempting unionized hotels), *aff'd*, No. 15-55909, 2016 WL 4437618 (9th Cir. Aug. 23, 2016). In *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), the Supreme Court held that states may not regulate conduct if it is within a zone of activity that Congress intended to leave open to the free play of economic forces. For further discussion of preemption law, see *infra* Section IV.A.2.

370. Greenhouse, *supra* note 246. This criticism has abated somewhat with the campaign's success.

371. *Id.* (quoting a former NLRB official for the proposition that "[i]f you want to start organizing, you can start methodically at corporate-owned stores in big cities like New York, Chicago, and L.A.").

372. Bob Kastigar, *Comment* to *Emanuel To Launch Task Force on Paid Leave, Worker Issues*, PROGRESS ILL. (Mar. 16, 2015), http://www.progressillinois.com/news/content/2015/03/16/emanuel-launch-task-force-paid-leave-worker-issues [http://perma.cc/BDD4-UGR3]. These arguments echo the early twentieth century AFL position. *See* TAIT, *supra* note 208, at 5 (describing the early AFL-CIO strategy of favoring internal, contractual means of resolving disputes).

The division within the labor movement could be seen as a debate about whether to prioritize, over all else, the organization of new dues-paying members at a time when organizing is essential to unions' viability. But more fundamentally, the divide is over whether to hold fast to the system of privatized, firm-based collective bargaining with exclusive representation that has defined American labor relations since the New Deal—or to embrace a fundamentally different model of unionism in which social bargaining plays a key role.[373]

The impetus to reject social bargaining and hold fast to the current collective bargaining model is understandable. First, the commitment to private ordering over state engagement is a rational reaction to the particular historical experience of the American labor movement. Nineteenth and early twentieth century unions in the United States frequently confronted court injunctions and state repression.[374] In response, the labor movement—or significant portions of it—sought to achieve a laissez-faire state policy toward collective action.[375] The hope was that unions, free from state intervention, could facilitate a system of genuine reciprocal solidarity and workplace democracy.[376] Though that goal was never fully achieved, voluntarism—the aspiration of private ordering—remains central to many unions' cultures.[377] The possibility of true self-help still holds allure, which is heightened by continued hostility toward collective action on the part of many courts and state actors.[378] Moreover, the attraction of private self-help is deeply rooted in U.S. culture and law more generally.[379] This is not only a libertarian impulse. A danger arises when the state colonizes and manages social movements and civil society. In achieving state-supported social bargaining, one may worry, the labor movement may lose its independence and autonomy.

Second, a system of privatized, firm-level collective bargaining is familiar, and given substantial political obstacles, revitalization is easier to envision than any fundamental reform. As Professor Lance Compa recently wrote, "a labor

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373. *See* Harold Meyerson, *The Seeds of a New Labor Movement*, AM. PROSPECT (Oct. 30, 2014), http://prospect.org/article/labor-crossroads-seeds-new-movement [http://perma.cc/AP2Y-FHU9].

374. *See* FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT, *supra* note 27, at 128-66.

375. *Id.*; TOMLINS, *supra* note 30.

376. *Cf.* Barenberg, *supra* note 43, at 1427-28 (describing Wagner's vision of labor relations).

377. For an analysis of how the framework of labor relations has encouraged unions to hold fast to strategies of self-help, see Rogers, *supra* note 11, at 6, 9.

378. *See* Kate Andrias, *Building Labor's Constitution*, 94 TEX. L. REV. 1591, 1611 (2016) (describing court rulings against collective action by workers and the labor movement's response).

379. *See* SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM 22-23 (1996).

and employment system cannot be wrenched from its historical moorings."[380] It is important "not to be so frustrated with problems and so enamored of novelty that we undermine hard-won foundations in our labor law system."[381] To some extent, this is an argument about political feasibility. Defenders of the existing system emphasize that decisive change favoring unions is not likely, given the political environment.[382] Rather, "we are stuck with the infrastructure of the current labor and employment law system."[383]

Relatedly, fundamental reform could undermine the interests of existing labor organizations.[384] Indeed, the emerging legal model threatens the existence of unions as they are traditionally constructed. The problem is not only that existing union officials have an interest in resisting reform that could undermine their employment, but also that the lack of an obvious funding mechanism for the emerging forms of bargaining could undermine workers' power in the economy and politics, notwithstanding the system's theoretical promise.[385]

Finally, a move toward social bargaining diminishes the emphasis on worksite organization. The current regime's emphasis on the workplace has value. It offers the possibility of genuinely democratic struggle and economic power.[386] Compa offers a variant of this argument: "Our[] [system] correctly places the inherent conflict between workers and owners in a capitalist economy at the heart of the labor-management relationship."[387] On this account, the New Deal's embrace of private, firm-based bargaining produced tangible gains

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380. Compa, *supra* note 7, at 610.

381. *Id.* at 612.

382. *Id.* at 611 (listing the various reforms unions hope for but cannot enact); *cf.* Estlund, *supra* note 7, at 1531 (detailing the extent to which "American labor law has been . . . insulated from both internal and external sources of renovation").

383. Compa, *supra* note 7, at 612.

384. *Cf.* DiSalvo, *supra* note 41, at 3, 13 (arguing that existing dues mechanisms give unions a "privileged position" compared to other interest groups).

385. See *infra* Section IV.B for further discussion of this problem.

386. For emphasizing this point, I thank Bob Master, Communication Workers of America. *Cf.* Clyde Summers, *Worker Participation in Sweden and the United States: Some Comparisons from an American Perspective*, 133 U. PA. L. REV. 175, 215-17 (1984) (comparing Swedish and U.S. regimes and concluding that because of the firm-based system of bargaining in the United States, "the union member's voice in . . . union decisions and policies on economic issues is much more direct and effective in the United States than in Sweden"); Summers, *supra* note 173 (comparing American and German unions).

387. Compa, *supra* note 7, at 610.

at the place of production that workers had been unable to achieve through earlier efforts at social and industrial bargaining.[388]

All of the above objections are likely to be levied by those who support the existing system of collective bargaining.[389] Another category of critique comes from those who have given up on collective bargaining altogether in favor of a regulatory or self-governance approach.[390] As previously noted, some who urge this position oppose unions in principle, as inefficient and self-dealing.[391] But even some labor officials have adopted a post-union approach, urging a turn away from collective bargaining toward ordinary regulation and employer self-governance.[392] For example, one prominent union official involved in the Fight for $15 has advocated a new social contract that would create no new protections for bargaining.[393] Other union organizations have switched to engaging in extensive political coalition work in place of worker organizing.[394] The

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388. *Id*. (citing IRVING BERNSTEIN, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920-1933 (1960) (describing the weakness of the American labor movement in the 1920s); and IRVING BERNSTEIN, TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933-1941 (1970) (highlighting the labor movement's eventual gains under the New Deal)).

389. For a discussion of how to mitigate these concerns, see *infra* Section IV.B.

390. *See supra* Section I.C.2.

391. *See supra* note 41 and accompanying text. Notably, those opposing the move toward more sectoral bargaining, including in the modest form embraced by *Browning-Ferris*, include some supporters of corporate social responsibility. These corporations argue that an expanded bargaining obligation on employers who influence terms and conditions of employment would disincentivize companies from requiring subcontractors to adopt good labor practices. *See* Brief for Microsoft Corp. & HR Policy Ass'n as Amici Curiae Supporting Petitioner at 27, Browning-Ferris Indus. of Cal., Inc. v. NLRB, No. 16-1028 (D.C. Cir. June 14, 2016). The argument, however, is premised on the resistance of the company at the top of the supply chain to collective bargaining.

392. *See* Meyerson, *supra* note 373; GROWTH², http://www.growth2llc.com [http://perma.cc/L4MU-8XMR] (describing the group, a partnership of Andrew Stern, former SEIU president, and Chris Chafe, former labor organizer and political and legislative director, as "unlock[ing] value by creating new relationships between capital, labor, and entrepreneurs, to deliver shared success for workers, investors, companies, and customers").

393. *See* Nick Hanauer & David Rolf, *Shared Security, Shared Growth*, DEMOCRACY (Summer 2015), http://www.democracyjournal.org/37/shared-security-shared-growth.php [http://perma.cc/S9ET-WSA3] (urging the adoption of "a twenty-first-century social contract" that endows every American worker with a new "Shared Security Account," accompanied by a new set of "Shared Security Standards," without mention of new forms of unions or new collective labor guarantees); *see also* Meyerson, *supra* note 373 (reporting that Rolf argues that "labor should focus its remaining energies on bequeathing its resources to start-up projects that may find more effective ways to advance workers' interests than today's embattled unions can").

394. Lichtenstein, *supra* note 42 (discussing union efforts at political coalition building in place of worker organizing); *see also* Meyerson, *supra* note 373 (describing AFL-CIO's Working

grounds for this post-union approach are pragmatic. Given that unions have declined significantly in the modern economy and that political opposition to unionism is so extensive, it makes sense to look elsewhere—to employment law, to self-governance, to technological innovation—to address problems in the workplace.[395] On this account, collective bargaining, whether at the firm level or at the sectoral and political level, is a relic.

B. A Qualified Defense

The foregoing critiques have merit. But they pose a challenge for the design and enactment of the new labor law, rather than a reason to resist its development.

Consider, first, the post-union approach, i.e., exclusive reliance on employment regulation or corporate self-governance. This may be the path of least resistance, but for several reasons, regulation and self-governance, without the existence of strong worker organizations, are unlikely to achieve many of the most important aims of labor law.

First, an employment-law or governance approach does nothing to facilitate worker voice or to protect the right to associate—to organize, bargain, and strike. These rights are both recognized in domestic law and enshrined in international law.[396]

Second, an employment-law or governance approach does little to shift how power is distributed in society. Strong worker organizations, in contrast, help redistribute power, which, over time, helps maintain a measure of political and economic equality.[397] Unions help shift the balance of power through several mechanisms. Most obviously, organized labor exercises collective bargain-

America as "a community-based campaign that until recently hadn't dealt with its members' workplace concerns or had a presence in those workplaces").

395. *See* Meyerson, *supra* note 373; *see also supra* notes 392-394 and accompanying text (describing the post-union approach).

396. *See* sources cited *supra* note 37.

397. *See, e.g.*, FREEMAN & MEDOFF, *supra* note 1; ROSENFELD, *supra* note 1; WHAT DO UNIONS DO?: A TWENTY-YEAR PERSPECTIVE (James T. Bennett & Bruce E. Kaufman eds., 2007); Hacker & Pierson, *supra* note 3, at 186; *see also* Judith A. Scott, *Why a Union Voice Makes a Real Difference for Women Workers: Then and Now*, 21 YALE J.L. & FEMINISM 233 (2009) (discussing the role of unions in advancing gender equality); David Vogel, *The "New" Social Regulation in Historical and Comparative Perspective*, *in* REGULATION IN PERSPECTIVE: HISTORICAL ESSAYS 182 (Thomas K. McCraw ed., 1981) (noting that in nations with strong trade unions, occupational safety and health standards tend to be stringent).

ing power that affects wage rates.[398] But unions also have the capacity to affect corporate governance decisions, such as executive compensation.[399] In addition, they can push policymakers to address issues relating to workers, to ensure enforcement of statutory standards, and to "resist policy changes that further inequality."[400] Comparative studies support the conclusions that strong unions are associated with reduced wage dispersion,[401] enhanced welfare state generosity,[402] and increased electoral participation among low income groups. They also play a networking and informational function by making working-class voters aware of partisan differences and their implications for policy.[403]

Finally, effective and democratic worker organizations bring other important benefits over a purely regulatory approach: they have the potential to create workplace democracy[404] and thus serve as an important training ground for political democracy.[405] Unions can also improve workplace outcomes by facilitating voices of affected participants.[406] Indeed, even leading scholars urging a governance approach recognize the necessity of facilitating worker voice in some shape or form.[407]

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398. Hacker & Pierson, *supra* note 3, at 186 (citing PETER ALEXIS GOUREVITCH & JAMES J. SHINN, POLITICAL POWER AND CORPORATE CONTROL: THE NEW GLOBAL POLITICS OF CORPORATE GOVERNANCE (2005)).

399. *Id.*

400. *Id.*

401. Pontusson et al., *supra* note 111, at 282 (discussing the ways in which different labor market institutions, including centralized wage bargaining, affect the distribution of income in a country and concluding that unions promote the relative wages of poorly paid workers); Michael Wallerstein, *Wage-Setting Institutions and Pay Inequality in Advanced Industrial Societies*, 43 AM. J. POL. SCI. 649, 669 (1999).

402. EVELYNE HUBER & JOHN D. STEPHENS, DEVELOPMENT AND CRISIS OF THE WELFARE STATE 1, 104, 115-16 (2001); Kathleen Thelen, *Critical Dialogue: What Unions No Longer Do*, 13 PERSP. ON POL. 155, 155 (2015) (reviewing ROSENFELD, *supra* note 1).

403. *See* Jonas Pontusson, *Unionization, Inequality and Redistribution*, 51 BRIT. J. INDUS. REL. 797, 807-08 (2013); Thelen, *supra* note 402, at 155; *see also* Harold Meyerson, *Get Out the Union Vote*, AM. PROSPECT (Nov. 9, 2012), http://prospect.org/article/get-out-union-vote [http://perma.cc/NA3N-EXHV] (documenting voting patterns in the 2012 election).

404. *See* Barenberg, *supra* note 43, at 1422-27 (describing the aspiration that unions serve as vehicles for democratic consent and cooperation in the workplace and in the polity).

405. CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY (2003); FREEMAN & MEDOFF, *supra* note 1, at 7-11.

406. FREEMAN & MEDOFF, *supra* note 1, at 7-11; Barenberg, *supra* note 43, at 1493 n.482 (collecting literature suggesting that unions can increase productivity by giving employees a voice). The data supporting this point are somewhat dated, but the theoretical case remains strong.

407. *See, e.g.*, ESTLUND, *supra* note 405, at 162-81.

Why not, then, try to revive the existing system of firm-based bargaining? Because as earlier parts of this Article demonstrated, traditional NLRA collective bargaining is profoundly mismatched with the contemporary economy in which employers are fissured and work is increasingly global, contingent, shared, and automated.[408] Moreover, the existing system of firm-based collective bargaining largely removes unions from the spaces of politics and governance, in an era in which those arenas are increasingly dominated by organized wealth.[409]

The new labor law regime emerging from the efforts of the Fight for $15 and similar social movements is thus far more promising than either the purely regulatory approach or the traditional NLRA approach. To be sure, its merits depend in large part on the details. To that end, in Part IV, I consider how, concretely, the new labor law might continue to develop in the United States. But at the level of principle, the arguments in favor of a more sectoral and social form of labor law are significant.

Perhaps the most straightforward reason to embrace the new labor law is that it would enable unions to negotiate in ways that respond to the problem of the fissured employer. Under the emerging system, no longer would the bargaining relationship be structured around the outmoded employer-employee dyad. Workers throughout an economic sector would bargain together, whether employed by the lead firm, one of the contracted firms, or any particular plant. This would avoid protracted legal battles about the identity of the employer while strengthening unions' ability to implement their goal of raising worker wages.

For several reasons, sectoral bargaining, which is common throughout Europe,[410] better serves labor law's goal of increasing workers' bargaining power so as to reduce economic and political inequality.[411] Researchers have shown that firm-based bargaining has some impact on income inequality, but the impact is primarily felt within firms; bargaining compresses wages within the firm at which it occurs.[412] The existing model of firm-based bargaining thus tends to raise wages throughout an industry only if there is enough union presence in the industry or geographic area to pose a threat to nonunionized firms;

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408. *See supra* Section I.A.2.

409. *See supra* Section I.A.3.

410. *See* Traxler & Behrens, *supra* note 177.

411. Dimick, *supra* note 34, at 699 ("Overall, centralized bargaining reduces income inequality to a dramatically greater extent than decentralized bargaining.").

412. FREEMAN & MEDOFF, *supra* note 1, at 79-82.

employers raise wages to stave off unionization or to compete for labor.[413] This rarely occurs under our current regime in which sectoral bargaining, though permissible, is not required. In contrast, mandatory sectoral bargaining directly impacts wages throughout the labor market; agreements apply to all employers in the industry or region, helping create more wage compression overall.[414] Unions empowered to bargain sectorally also tend to be more effective at shaping public policy and democratic decision making.[415] Their more expansive mandate enhances their incentive and ability to serve as a counterweight to organized business interests in the political sphere.[416]

The U.S. experience demonstrates, however, that simply *allowing* unions to bargain sectorally is unlikely to accomplish much—the NLRA already permits multi-employer bargaining to the extent employers and unions agree to it.[417] Nor would the voluntary centralization of union organizations necessarily produce sectoral bargaining.[418] A critical addition is active support from the state: for sectoral bargaining effectively to reduce wage inequality, employers must be required to engage in it, and its fruits must be extended throughout the labor market.[419] Such state-supported sectoral bargaining—social bargaining—also provides workers greater influence in politics, over a host of policy decisions that affect workers' daily lives. Indeed, comparative studies suggest that, from the perspective of creating egalitarian outcomes at the societal level, the two most important factors in a labor law regime are the establishment of broadly

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413. Dimick, *supra* note 34, at 699.

414. *See* Pontusson et al., *supra* note 111, at 289-90, 301 (concluding that bargaining centralization has an egalitarian effect on overall distribution of wages); Wallerstein, *supra* note 401, at 649, 669, 672-76 (concluding that an important factor in explaining pay dispersion is whether wage-setting occurs at an individual, plant, industrial, or sectoral level). For further discussion, see Dimick, *supra* note 34.

415. Rogers, *supra* note 11, at 40-43.

416. *Id.* Indeed, as Matthew Dimick has argued, moving to a more centralized bargaining system could shift incentives for unions in ways that address many efficiency-based objections to collective bargaining as well. Dimick, *supra* note 34, at 692. When union structures are highly decentralized and firm-based, the rational response of unions is to advocate for "seniority-based layoff policies, job definitions and demarcations, internal labor markets, rules limiting employer discretion over technology, manning and staffing requirements, and so forth." *Id.*

417. *See supra* note 155 and accompanying text.

418. THELEN, *supra* note 24 (examining contemporary changes in labor market institutions in the United States, Germany, Denmark, Sweden, and the Netherlands); Wolfgang Streeck & Anke Hassel, *Trade Unions as Political Actors*, *in* INTERNATIONAL HANDBOOK OF TRADE UNIONS 335 (John T. Addison & Claus Schnabel eds., 2003) (discussing the importance of centralized or industrial bargaining and affirmative state support for unions); *cf.* Dimick, *supra* note 34 (arguing for centralization).

419. THELEN, *supra* note 24, at 5, 9-10, 194, 203-07.

inclusive union organizations and the capacity of the state actively to broker deals between employer and union organizations.[420]

Governmental support for bargaining need not be accompanied by governmental control of labor organizations or restrictions on their freedoms—just as the absence of state support for bargaining under the current system does not ensure protection from state interference. Indeed, the American system includes significant governmental control over labor organizations, and significant court sanction of labor protest, despite the ideal of a voluntaristic, private system of labor relations.[421] In contrast, numerous European systems grant unions significant political power but leave them much less fettered in their internal operations and in their ability to exercise economic power.[422] In short, the extent of state intervention in unions is highly contingent, the product of multiple policy choices, and does not necessarily follow from giving unions more power to bargain at the social level.

The case for social bargaining as a means to enhance the economic and political power of workers is thus compelling. But the argument fails to respond to one of the critiques launched by proponents of the existing system: that the new labor law may well undervalue vibrant workplace organizations and may minimize the extent of worker voice at the place of employment. Our current system places the workplace at the heart of the labor-management relationship and seeks to increase worker voice and dignity at that location. Local unions, organized at the firm level, can have a significant impact on the daily work ex-

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420. Comparing the Nordic countries, Germany, and the United States, Thelen concludes that a range of market economies and labor law systems can produce egalitarian results. The key factors are encompassing unions and a strong, active state. *Id.* at 204-05. The organization of employers is also key but tends to follow from the power and organization of labor, supported by the state. *Id.* at 207; *see also* SILVIA, *supra* note 173, at 41 (emphasizing the central role that the law and state institutions play in sustaining the German industrial relations system).

421. *See* Andrias, *supra* note 378, at 1610-11 (summarizing court interventions); Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 174 (2015) (exploring how "[l]abor law both restricts and empowers labor unions").

422. *See* Federico Fabbrini, *Europe in Need of a New Deal: On Federalism, Free Market, and the Right To Strike*, 43 GEO. J. INT'L L. 1175, 1185-89 (2012) (describing the more extensive rights of unions to engage in strikes in France, Italy, and the Nordic countries, all of which vest unions with significant power to engage in sectoral bargaining); Clyde Summers, *Comparisons in Labor Law: Sweden and the United States*, 7 INDUS. REL. L.J. 1, 17-22 (1985) (comparing the United States, where "legal intervention in internal union processes is substantial," to Sweden, where there is almost a "total void of legal rules concerning the internal process of unions"). *But cf.* Fabbrini, *supra*, at 1195-1236 (exploring how EU law is beginning to erode the nationally protected rights to sectoral bargaining).

perience of individual workers and can shift their relationships with immediate supervisors in ways that enhance workers' dignity.[423]

But the nascent labor law does not, and need not, eschew a system of workplace organizations altogether. Indeed, the Fight for $15 and other new campaigns suggest the possibility of a hybrid in which sectoral social bargaining would accompany either the existing system of exclusive representation at individual shops, or a new, developing system of non-exclusive representation, under which members-only worker organizations, or perhaps even works councils, would exist at individual worksites to supplement social bargaining.

IV. DEVELOPING THE NEW LABOR LAW

In the end, for those committed to achieving greater economic and political equality, the strongest objection to the emerging labor law regime is not that it would be ineffective but that it is unlikely to be achieved. Commentators have described earlier proposals for mandatory sectoral bargaining as fanciful and from the "political ozone."[424] But as Part II demonstrated, social bargaining is already nascent through the efforts of the Fight for $15 and other social movements. This Part elaborates on the existing legal footholds that could be deepened to facilitate the new labor law in the United States and considers potential obstacles.

A. A Legal Framework for Social Bargaining

The NLRB took a critical step toward more centralized bargaining with its recent *Browning-Ferris* decision.[425] Returning to the broader, common law joint employment test in use before the mid-1980s, the Board emphasized its responsibility to adapt the NLRA to "changing patterns of industrial life."[426] Whether the Board's standard will survive court review, hostile congressional oversight, or reconsideration by a different Board are open questions.[427] But if

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423. *See supra* notes 386-388 and accompanying text.

424. Barenberg, *supra* note 32, at 961.

425. Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186, at 7 (Aug. 27, 2015); *see supra* notes 149-152, 302-318 and accompanying text.

426. *Browning-Ferris*, 362 N.L.R.B. No. 186, at 11 (quoting NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975)). The Board also criticized its predecessors for narrowing the joint employment standard beyond what was statutorily necessary. *Id.* at 10.

427. The case is on appeal. *Browning-Ferris*, 362 N.L.R.B. No. 186, *appeal filed*, No. 16-1064 (D.C. Cir. Feb. 17, 2016). Republican lawmakers, joined by a few Democrats, have introduced legislation to reverse the Board's decision, *see* Protecting Local Business Opportunity Act, H.R.

the standard endures, it will further the goal of sectoral unionism advanced by the Fight for $15—to a point. As a result of the *Browning-Ferris* decision, employer responsibility for bargaining, as well as employer liability for violations of organizing rights, will move higher up the supply chain.[428] This is true for labor contracts between companies and their subcontractors, for franchise agreements and other supply-chain employment relationships,[429] and also for companies that contract with temp agencies. Indeed, the Board followed its *Browning-Ferris* decision with *Miller & Anderson, Inc.*, holding that unions can seek to represent temp-agency workers combined with the employees at the firm where the temps are stationed.[430] These decisions also effectively expand the permissible targets for unions' economic activity, by limiting the effect of the prohibitions on secondary boycotts.[431] And, along with other recent Board decisions, the new standards narrow the ability of employers to classify workers as independent contractors.[432]

That said, the reinstated joint employment standard does not require multi-employer bargaining. It supports firm-wide and perhaps supply-chain-wide

3459, 114th Cong. (2015), and have held oversight hearings, *see, e.g.*, *Who's the Boss? The "Joint Employer" Standard and Business Ownership: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*, 114th Cong. (2015), http://www.help.senate.gov/hearings/whos-the-bossd-the-joint-employer-standard-and-business-ownership [http://perma.cc/5ETZ-5ZEZ]. The House Appropriations Committee also has advanced a bill that would block spending on many of the NLRB's initiatives. *See* STAFF OF H. COMM. ON APPROPRIATIONS, 114TH CONG., MAKING APPROPRIATIONS FOR THE DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES FOR THE FISCAL YEAR ENDING SEPT. 30, 2017 (Comm. Print 2016), http://appropriations.house.gov/uploadedfiles/bills-114hr-fc-ap-fy2017-ap00-laborhhsed.pdf [http://perma.cc/GT3W-P7EJ].

428. *See supra* notes 148-157 and accompanying text (explaining the law on employer liability for unfair labor practices and the law on multi-employer bargaining).

429. An administrative law judge is now considering the application of *Browning-Ferris* to McDonald's. *See* McDonald's USA, LLC v. Fast Food Workers Comm., 363 N.L.R.B. No. 144 (Mar. 17, 2016); John Herzfeld, *Sides Clash at McDonald's Joint Employer Hearing*, DAILY LAB. REP. (Mar. 10, 2016), http://www.bna.com/sides-clash-mcdonalds-n57982068447 [http://perma.cc/U3Z9-QL62].

430. Miller & Anderson, Inc., 364 N.L.R.B. No. 39 (July 11, 2016) (overruling H.S. Care L.L.C., 343 N.L.R.B. 659 (2004)).

431. *See supra* notes 157-159 and accompanying text (explaining law on secondary boycotts and strikes).

432. *See supra* notes 311-313; *see also* FedEx Home Delivery, 361 N.L.R.B. No. 55, at 10, 16 (Sept. 30, 2014) (declining to adopt the D.C. Circuit's holding insofar as it treats entrepreneurial opportunity as the primary inquiry without sufficient regard for all of the common law factors and holding FedEx drivers to be employees).

bargaining, but not sectoral or regional bargaining.[433] Without more substantial reform, these doctrinal developments are merely another tweak, albeit a positive one, on the existing system. Unions could gain new members from employers previously thought unorganizable—McDonald's, Uber, and others—through traditional organizing methods and firm-based collective bargaining agreements. Much commentary surrounding *Browning-Ferris* seems to assume this path. Indeed, while pursuing a sectoral strategy, SEIU also appears to be following a traditional path of corporate pressure against McDonald's, with some success.[434] Some of the recent efforts to organize Uber drivers through NLRA processes fall in this category as well.[435]

How, then, to create the legal infrastructure to enable sectoral bargaining? In public statements, Scott Courtney, the Fight for $15's campaign director, has expressed a commitment to this path, expressly rejecting a traditional firm-based union as the campaign's goal. Instead, according to journalist Steven Greenhouse, Courtney "envisions a giant, nationwide organization of low-wage workers that would be financially sustainable" and would continually engage in systematic and broad-based tripartite bargaining.[436] The Fight for $15 offers McDonald's and other companies the opportunity to engage in a conversation on those terms.[437]

One could imagine a new federal law that would require bargaining on a sectoral basis. Such a statute could draw on successful elements from regimes elsewhere in the world,[438] or from our own history.[439] A proposal for wholesale

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433. Professor Mark Barenberg, in a recent paper published with the Roosevelt Institute, argues for more fundamental statutory reform of the definition of "employer" and the existing concept of bargaining units in order to enable industrial bargaining within the existing NLRA framework. His proposals would allow workers to define the scope of their bargaining unit across employers, though they would not mandate sectoral bargaining or provide a mechanism for extending the fruits of collective bargaining throughout an industry. *See* Barenberg, *supra* note 103.

434. For example, "as a result of the Fight for $15's prodding, Brazilian prosecutors are investigating alleged wage theft, child labor and unsafe conditions at McDonald's franchised operations, while the European Union is investigating it for more than $1bn in alleged tax evasion." Greenhouse, *supra* note 343.

435. *See supra* note 143. *But cf.* Seattle, Wash., Ordinance 124968 (Dec. 23, 2015) (allowing drivers to unionize and adopting a local rate-setting mechanism).

436. Greenhouse, *supra* note 343. Courtney further stated, "If we had a vehicle or mechanism where people could join the organization and fund those fights, I think many people would happily join." *Id.*

437. *Id.*

438. For a discussion of such regimes, see, for example, THELEN, *supra* note 24, at 24; Estreicher, *supra* note 132, at 27-33 (evaluating German and Canadian styles of labor law reform);

federal law reform would, of course, require sensitivity to American particularities and governmental structure, as well as to constitutional constraints including limits on private delegation.[440] This is a worthwhile long-term project. But design of such a statute, at this juncture, is premature. Critics are correct that comprehensive federal labor law reform is wholly unrealistic in our contemporary political climate. Indeed, far more modest labor law reform has repeatedly failed in Congress, even under periods of unified Democratic governments.[441] Tellingly, the Fight for $15 has made comparatively little progress on the federal level even on its wage demands.[442]

A more realistic route is to expand the use of social bargaining at the local and state level. Much of this can be done within the confines of federal law—though legal challenges exist.

1. *Expanding Local and State Sectoral Bargaining*

At the outset, tripartite, sectoral bargaining can be expanded at the local and state level using existing mechanisms. In New York, the tripartite wage board is no longer in operation. As part of the compromise bill to raise the state-wide minimum wage to $15, employers successfully mobilized to strip the Commissioner's authority to establish higher minimums for particular occupations.[443] But several states other than New York grant executive branch actors

Streeck & Hassel, *supra* note 418 (analyzing the role of modern trade unions in a variety of countries); and *supra* notes 172-177 and accompanying text.

439. *See supra* notes 52-53, 172 and accompanying text.

440. For example, any federal law would need to contain statutory standards that limit executive discretion and do not excessively delegate legislative power to private groups. *See* Carter v. Carter Coal Co., 298 U.S. 238, 238-42 (1936) (striking down the Bituminous Coal Conservation Act of 1935 in part because it unconstitutionally delegated public power to private groups); A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537, 541-42 (1935) (striking down the NIRA on the ground that the unbound code-making authority given to the President, with input from trade and industry groups, impermissibly delegated legislative power). The validity of these cases has been questioned, but the Court has had few opportunities to revisit the private nondelegation doctrine in recent years. *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1228 (2015) (holding that Amtrak is a governmental entity, rather than an autonomous private entity, and therefore not reaching the private nondelegation question).

441. *See supra* notes 127-130 and accompanying text.

442. *See supra* notes 280-284 and accompanying text.

443. S. 6406C, 239th Leg., Reg. Sess. (N.Y. 2016). Existing wage orders remain in effect and New York law still allows the Commission to act regarding hours. *See id.* § 5; Nat'l Rest. Assoc. v. Comm'r of Labor, 34 N.Y.S.3d 232, 235-36 (App. Div. 2016) (discussing the legislative history surrounding the enactment of the law).

the power to raise wages or regulate hours in particular sectors of the economy.[444] Many require or encourage public hearings as part of the process.[445] Several of these statutes, including those in California, Colorado, and New Jersey, expressly provide for tripartite commissions: wage boards with representation from employee groups, industry groups, and the public.[446]

For example, California law provides for an Industrial Welfare Commission (IWC) composed of two union representatives, two employer representatives, and one representative from the general public, all appointed by the governor, with the consent of the California State Senate.[447] The IWC's authority goes beyond creating a basic minimum wage: it has authority to evaluate wages in "an occupation, trade, or industry" to ensure they are adequate "to supply the cost of proper living." It also can consider whether "the hours or conditions of

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444. *E.g.*, MASS. GEN. LAWS ANN. ch. 151 § 7 (West 2013); N.D. CENT. CODE ANN. §§ 34-06-01 to -08 (West 2014); *see also* sources cited *infra* note 446 (describing statutes creating tripartite commissions).

445. *See, e.g.*, CAL. LAB. CODE § 1178.5 (West 2011); COLO. REV. STAT. §§ 8-6-108 to -109 (2013); N.D. CENT. CODE ANN. § 34-08-01 (West 2014).

446. *See* CAL. LAB. CODE §§ 70-74, 1173, 1178 (West 2011) (authorizing an Industrial Welfare Commission, appointed by the Governor, and composed of two representatives of employers, two from recognized labor organizations, and one from the general public; requiring commission to review adequacy of minimum wage every two years; and providing for industry-specific wage boards); COLO. REV. STAT. § 8-6-109 (2011) (authorizing a wage board comprised of an equal number of employer, employee, and public representatives); N.J. STAT. ANN. § 34:11-56a4.7 (West 2011) (establishing the "New Jersey Minimum Wage Advisory Commission" with "five members as follows: the Commissioner of Labor and Workforce Development, ex officio, who shall serve as chair of the commission, and four members appointed by the Governor as follows: two persons who shall be nominated by organizations who represent the interests of the business community in this State and two persons who shall be nominated by the New Jersey State AFL-CIO); *id.* § 34:11-56a8, a9 (providing that the Commissioner may establish a wage board to set minimum rates for employees in particular occupations; such boards shall be composed of equal numbers of employer, employee, and public representatives). Arizona law also permits the establishment of a tripartite wage board, but only to address wages of minors. AZ. REV. STAT. ANN. § 23-314 (2012). Meanwhile, reflecting the approach when wage boards were first enacted, Illinois law authorizes boards to address the wages of women and children. 820 ILL. COMP. STAT 125/5.1 (2011) (allowing wage boards "composed of not more than 2 representatives of the employers in any occupation or occupations, an equal number of representatives of the employees in such occupation or occupations and of one disinterested person representing the public, who shall be designated as chairman"). Other states previously had wage boards but have since repealed them. *See, e.g.*, N.H. REV. STAT. ANN. § 279:5 (1987) (repealed 1995) (authorizing a wage board).

447. CAL. LAB. CODE. § 70.1 (West 2011). The labor representatives must be drawn from "members of recognized labor organizations." *Id.* IWC dates to 1913, but until the 1970s applied to women and child workers only. *See* Indus. Welfare Comm'n v. Superior Court, 613 P.2d 579, 583-84 (Cal. 1980).

labor" are "prejudicial to the health, moral, or welfare of employees."[448] If the IWC determines that wages, hours, or conditions are inadequate, it selects a wage board—again composed of two labor and two employer representatives, along with a neutral representative—to investigate and make recommendations.[449] Recommendations that receive the support of two-thirds of the wage board's members are incorporated into IWC proposed regulations, which are then subject to public hearings.[450] The IWC has been used repeatedly in the past to set wages, overtime, and other standards in over sixteen industries.[451]

New Jersey law provides for a Minimum Wage Advisory Commission (WAC or Commission).[452] The Commissioner of Labor and Workforce Development serves as chair. As in California, the Commission's members are appointed by the Governor and include representatives from business and labor. New Jersey law further specifies that the business representatives "shall be nominated by organizations who represent the interests of the business community in this State" and the labor representatives "shall be nominated by the New Jersey State AFL-CIO."[453] The WAC is charged with evaluating the minimum wage annually.[454] The law also allows the Commissioner to establish sectoral wage boards, composed of labor and business representatives, which then recommend minimum wages in particulars sectors. Wage boards can be established if the Commissioner believes "that a substantial number of employees in

448. CAL. LAB. CODE. § 1178.5 (West 2011).

449. *Id.* §§ 1178, 1178.5.

450. *Id.* § 1178.5(c).

451. *See* CAL. CODE REGS. tit. 8, §§ 11000-11170 (2016); Indus. Welfare Comm'n, *Wage Orders*, CAL. DEP'T INDUS. REL. (July 2014), http://www.dir.ca.gov/IWC/WageOrderIndustries.htm [http://perma.cc/RU26-PQDP] (listing a series of minimum wage and industry wage orders); *see also* Tiffanny Brosnan, *California's Wage Orders: Landmines and Goldmines*, ORANGE COUNTY L., June 2012, at 12 (reporting that "[a]ll California employers must comply with a multitude of wage and hour laws that go well beyond setting minimum wages and calculating overtime pay" and describing the IWC's seventeen different Wage Orders, "each one applicable to a particular industry" ranging from "Manufacturing to Mercantile" with "fine distinctions made between them"); Shah & Seville, *supra* note 353, at 425-28 (discussing the history of the IWC's role in regulating domestic work). Although the IWC is not in operation now, its existing orders are still enforced. *See Industrial Welfare Commission (IWC)*, CAL. DEP'T INDUS. REL., http://www.dir.ca.gov/iwc/iwc.html [http://perma.cc/8RHP-RQ2Y].

452. N.J. STAT. ANN. §§ 34:11-56a4.7 et seq. (West 2016).

453. *Id.* § 34:11-56a4.7.

454. *Id.* § 34:11-56a4.8(a); *see also Minimum Wage Advisory Commission*, N.J., DEP'T LAB. & WORKFORCE DEV., http://lwd.dol.state.nj.us/labor/lwdhome/MinWageCommission.html [http://perma.cc/S8PR-8DZT] (describing the mission of the Commission and collecting annual reports).

any occupation or occupations are receiving less than a fair wage."[455] The law also provides for a public hearing process after which the Commissioner decides whether to approve or reject the report.[456]

To date, the experience with these tripartite commissions has been mixed. In California, as well as recently in New York, wage boards have successfully established wage and hour protections above federal minimums in particular sectors of the economy. But most wage boards have been moribund for years, while others have been abandoned.[457] Moreover, even where the wage board process has been used, the potential for social bargaining has been underrealized. Unions have not frequently engaged the commissions through widespread mobilization, testimony, and collective action.[458] The boards also have structural limitations. The ability of workers to use wage boards to their benefit depends in large part on the identity of the Governor in the state; he or she influences when such boards act and who constitutes them. Furthermore, the neutral representatives on the commissions effectively decide disagreements. These individuals, selected by the partisan governors, serve as the swing votes and thereby minimize the extent to which true bargaining occurs. This weakness is pronounced when there is no broader worker mobilization exerting pressure on the commissions.

Nonetheless, more could be done to use existing wage boards aggressively, as was done by the Fight for $15 in New York. In jurisdictions where worker organizations have significant political influence, and where the executive branch is amenable, unions can petition wage boards to act. Where statutes permit, they can demand sector-by-sector wage and benefit improvements, beyond minimum wage increases. They can also engage workers in collective action designed to achieve such gains, as the Fight for $15 did in New York. Indeed, the Fight for $15 has announced its intention to pursue further wage board action.[459]

Progressive states and localities could also enact new, stronger sectoral bargaining statutes. A range of possibilities are worth exploring. For example, state or local laws could give tripartite commissions broader mandates on a sec-

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455. N.J. STAT. ANN. § 34:11-56a8 (West 2016).

456. *Id.* § 34:11-56a16 (West 2016).

457. *See supra* note 446.

458. *But see supra* Section II.C.2 (describing recent New York activity).

459. Max Zahn, *Can the Fight for $15 Replicate Its New York Wage Board Victory Around the Country?*, IN THESE TIMES (Oct. 15, 2015), http://inthesetimes.com/working/entry/18516/fight-for-15-wage-board-minimum-wage [http://perma.cc/6CD7-5E4X] (quoting Mary Kay Henry, President of SEIU, stating that the movement would seek "to set up wage boards everywhere in the country").

tor-by-sector basis, making clear the authority is not limited to setting bare minimums, nor to wages. Wage scales, benefits, working conditions, leave policies, and scheduling rights could all be subject to bargaining. Such laws could also require commissions to act periodically rather than only upon executive branch request or public petition. The laws could further provide, building on the New Jersey model, that the composition of the commissions include the elected leadership of NLRB-certified unions in the particular sector, as well as leaders of the relevant industry groups and firms. And the laws could facilitate real bargaining by diminishing the power of the neutral representatives, perhaps by creating evenly split commissions or by incorporating an arbitration process in the event of a stalemate, while maintaining ultimate state supervision.

Whether through existing or improved statutes, collective action by workers is an essential component of effective social bargaining. As previously discussed, the law already offers some protection for collective action through political channels.[460] Thus, workers could, as they did in New York, testify before wage boards, demonstrate in favor of certain results, and organize their coworkers. Section 7 of the NLRA would protect such activity even if the workers are not union members—as long as they do not violate a collective bargaining agreement or engage in other unprotected or illegal activity.[461] The statute would also protect concerted political organizing in the workplace, as long as it occurs off duty, in a nondisruptive manner, or otherwise in accordance with nondiscriminatory work rules.

However, as Section I.A.2 documented, existing penalties for employer violations of section 7 are weak.[462] Moreover, the current interpretation of section 7 does not permit workers to withhold their labor in support of their wage and benefit demands unless those demands are directed at their employer.[463] Nor does it permit them to engage in partial strikes, planned intermittent work stoppages, or secondary economic activity to advance their demands.[464] This doctrine is ripe for Board and Court reinterpretation—a subject for another pa-

460. *See supra* note 178 and accompanying text.

461. *Id.*

462. *See supra* notes 116-125 and accompanying text.

463. *See* Memorandum from Ronald Meisburg, *supra* note 178, at 10-11 (citing Eastex, Inc. v. NLRB, 437 U.S. 556, 568 n.18 (1978) (stating, in dicta, that "[t]he argument that the employer's lack of interest or control affords a legitimate basis for holding that a subject does not come within 'mutual aid or protection' is unconvincing. The argument that economic pressure should be unprotected in such cases is more convincing.")).

464. *Id.* at 12; *cf.* Oswalt, *supra* note 42, at 658-69 (describing the law on intermittent strikes and arguing that the Fight for $15 strikes do not qualify).

per.[465] In the meantime, unions can organize their actions so that they fall within existing law's protection.[466]

2. The Problems of Home Rule and Preemption

More expansive use of sectoral bargaining would undoubtedly come under legal challenge. To date, arguments that sectoral wage commissions violate the Equal Protection and Dormant Commerce Clauses have been easily dismissed: the statutes have a rational basis and do not discriminate between in-state and out-of-state businesses.[467] So too, courts have rejected separation of powers and administrative law challenges: the statutes set forth a clear legislative policy position and then vest more specific decision-making authority in an expert body, without excessively delegating to private parties.[468] Any expansion of so-

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465. *See, e.g.*, Becker, *supra* note 125, at 377-78 (critiquing the doctrine on collective labor action and intermittent strikes for failing to "set forth any . . . standard by which to judge whether particular strikes are indefensible"); Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685, 752 (1985) (arguing that both the NLRA and the Constitution afford greater protection for political strikes). For recent scholarship arguing that workers' collective activity deserves greater protection than it currently receives, either under the NLRA or under the Constitution, see, for example, Crain & Inazu, *supra* note 228; Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277 (2015); and Rogers, *supra* note 32.

466. Oswalt, *supra* note 42, at 658-69.

467. As the New York Appellate Division recently explained, the Dormant Commerce Clause is not violated when "'there is no differential treatment of identifiable, similarly situated in-[s]tate and out-of-[s]tate interests' on the face of the wage order" and there is no evidence that "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." Nat'l Rest. Ass'n v. Comm'r of Labor, 34 N.Y.S.3d 232, 239-40 (App. Div. 2016) (quoting Tamagni v. Tax Appeals Trib. of N.Y., 695 N.E.2d 1125, 1133 (N.Y. 1998)). Equal protection challenges have been dismissed as the employers have failed to show the legislatures acted without a rational basis. *See, e.g.*, Int'l Franchise Ass'n, Inc. v. City of Seattle, 803 F.3d 389, 407 (9th Cir. 2015) (holding, with respect to the Seattle $15 minimum wage law, that "[t]he district court did not clearly err in finding a legitimate purpose in the classification and a rational relationship between franchisees and their classification as large employers;" a "reasonably conceivable state of facts" could support the classification based on "the economic benefits flowing to franchisees" and franchisees' ability to "handle the faster phase-in schedule"), *cert. denied*, 136 S. Ct. 1838 (2016).

468. *Nat'l Rest. Ass'n*, 34 N.Y.S.3d at 238 (noting that "the Commissioner is tasked with making complex economic assessments in issuing a wage order, but has special expertise to do so in the form of investigative powers in the area of wages and leadership of an agency capable of providing expert guidance" and that "the basic policy decisions underlying wage orders were made and articulated by the Legislature" (internal citations omitted)).

cial bargaining at the state or local level would have to maintain these basic characteristics, while attending to other constitutional constraints.[469]

Local law reform would face additional obstacles. Municipal corporations are subdivisions of the state and only have authority to enact laws if the state has granted them such powers.[470] As a result, state governments can deny localities authority to engage in social bargaining or can overrule particular social bargaining that occurs at the local level. In circumstances where state government is more conservative than city or county government, elimination of home rule powers or rejection of particular regulations is a real danger. [471] The threat may be particularly salient where the locality is governed by a racial minority who lacks effective representation at the state level.[472] For example, the Alabama legislature just voted to nullify a City of Birmingham law that would have set the city's minimum wage at $10.10.[473]

Another risk is that employers or other aggrieved parties could challenge both state and local legislation on federal NLRA preemption grounds. The FLSA does not preempt state and local wage legislation, as long as the non-federal benefits exceed the floors set by federal statutes.[474] States can pass, for example, higher minimum wages, more protective scheduling laws, and paid

469. The analysis for each locality and state would vary; for a brief review of some of the relevant federal law on private delegations, see *supra* note 440.

470. *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) ("Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . in the absolute discretion of the State."); RICHARD BRIFFAULT & LAURIE REYNOLDS, STATE AND LOCAL GOVERNMENT LAW 278-79 (2009).

471. *See* ZACHARY ROTH, THE GREAT SUPPRESSION 73-87 (2016) (describing how conservative state governments, often at the behest of industry groups, have enacted state laws to block progressive local legislation, but acknowledging that preemption can cut in favor or against progressive goals).

472. *Cf.* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1908-09 (1994) ("A centralized regional authority that encompasses several localities leaves little opportunity for politically empowered cultural communities to form and thrive.").

473. *See* Teresa Tritch, *The Backlash in Birmingham*, N.Y. TIMES: TAKING NOTE (Feb. 29, 2016, 1:23 PM), http://takingnote.blogs.nytimes.com/2016/02/29/the-backlash-in-birmingham [http://perma.cc/6FWA-VMWK]. Notably, the legislature in Alabama is majority white; Birmingham is majority African-American. *Id.* Alabama is one of five states with no state minimum wage. *Id.* Workers in Birmingham, represented by the NAACP, filed suit challenging the Alabama law, arguing that the state effort to nullify the local wage violates the Fourteenth Amendment's Equal Protection Clause. According to the complaint, the decision was "racially motivated" and "disproportionately impacts African-American residents." Complaint at 3, Lewis v. Bentley, No. 16-CV-00690 (N.D. Ala. Apr. 28, 2016).

474. 29 U.S.C. § 218(a) (2012).

sick time provisions; so too can localities, as long as their home rule provisions permit them to do so. But opponents of social bargaining could potentially argue that once states or localities allow extensive social bargaining over wages and other terms or conditions in particular industries, they have entered the field of labor-management relations and are therefore subject to NLRA preemption.

In contrast to the FLSA, the NLRA's preemption regime is extremely broad.[475] There are two seminal cases. First, the Court concluded in *San Diego Building Trades Council v. Garmon* that Congress intended to prohibit states from regulating activity that is even "arguably" protected or prohibited by federal law.[476] Second, the Court held in *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission*[477] that Congress's decision to leave certain activity unregulated by the NLRA implied Congress's intent that these forms of union and employer conduct be left completely unregulated.[478] Where Congress left conduct "to be controlled by the free play of economic forces," [479] the states, like the NLRB, cannot regulate it.[480]

Here, it is the latter doctrine that poses a threat. *Machinists* could be invoked in opposition to local or state tripartite wage and benefit laws on the ground that this kind of legislation is not an ordinary wage and hour law, but is rather a form of collective bargaining. And, the argument would run, the NLRA clearly leaves the substantive outcome of bargaining "to be controlled by the free play of economic forces."[481]

Though plausible, adopting this position would require a significant expansion of preemption law.[482] The Court has repeatedly emphasized the prohibition against state actors shifting the balance of power in privately negotiated

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475. Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355, 374-94 (1990). For a summary of labor preemption doctrine and its origins, see Sachs, *supra* note 127, at 1164-69.

476. 359 U.S. 236, 245-46 (1959).

477. 427 U.S. 132 (1976).

478. *Id.* at 141 (citing NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 488-89 (1960); and Hanna Mining Co. v. Dist. 2, Marine Eng'rs Beneficial Ass'n, 382 U.S. 181, 187 (1965)).

479. *Id.* at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)).

480. *Id.* at 149.

481. *Id.* at 144, 149-50.

482. The question of the proper scope of federal preemption doctrine in the labor context, which has cut both for and against unions, is the subject of much scholarly attention. *See, e.g.*, Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine To Allow the States To Make More Labor Relations Policy*, 70 LA. L. REV. 97, 163-88 (2009); Estlund, *supra* note 7, at 1530-31, 1569-79; Gottesman, *supra* note 475; Sachs, *supra* note 127.

agreements,[483] but it has never curtailed the ability of states and local governments to pass universally applicable employment legislation. Indeed, the Court has held that laws of general applicability are not preempted even when they "alter[] the economic balance between labor and management."[484] Here, unions would not be obtaining exclusive bargaining agreements as the result of tripartite negotiations, strengthening the case that the laws are truly of general applicability and the state is not entering the field of bargaining.[485]

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483. *See, e.g.*, Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 618 (1986) (preempting Los Angeles's decision to condition the award of a taxi franchise on the taxi company's agreement to settle a strike).

484. N.Y. Tel. Co. v. N.Y. State Dep't of Labor, 440 U.S. 519, 532 (1979) (plurality opinion); *see also* Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) ("It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers."). The California Supreme Court has rejected a labor law preemption challenge to its state's wage commission. Indus. Welfare Comm'n v. Superior Court, 613 P.2d 579, 600-01 (Cal. 1980) (emphasizing states' authority to go beyond the federal legislation in adopting more protective regulations for the benefit of employees). For similar reasons, under current doctrine, a First Amendment challenge should fail. Any effect on the expressive interests of employers or objecting workers would be indirect. *See* Lyng v. Int'l Union, UAW, 485 U.S. 360, 360-61 (1988) (holding that a statute denying food stamps to striking workers does not directly and substantially interfere with First Amendment rights).

485. *Cf.* Sachs, *supra* note 127 (discussing preemption arguments with respect to tripartite negotiations that result in privately negotiated agreements).

In addition to the legal challenges discussed above, to the extent local law permits independent contractors to engage in bargaining, antitrust law could also pose an obstacle. The antitrust laws contain a labor exemption, *see* Clayton Act § 6, 15 U.S.C. § 17 (2012) (making clear that labor unions are not combinations or conspiracies in restraint of trade within the meaning of section 1 of the Sherman Act, 15 U.S.C. § 1 (2012)); Clayton Act § 20, 29 U.S.C. § 52 (2012) (restricting the use of injunctions against union activity); Connell Constr. Co. v. Plumbers Local Union No. 100, 421 U.S. 616, 621-26 (1975) (discussing the origins and scope of the "nonstatutory" labor exemption that extends to concerted activities and agreements between labor and non-labor parties), but many commentators believe that the labor exemption, at least under current doctrine, would not apply to concerted action among low-wage independent contractors, *see, e.g.*, Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 977-79 (2016); Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors,"* 26 BERKELEY J. EMP. & LAB. L. 143, 168-74 (2005). *But cf. id.* (explaining that when independent contractors engage in concerted action in conjunction with an employee labor union, in order to eliminate unfair competition between themselves and regular employees, the exemption may apply).

Seattle Ordinance 124968, which provides for collective bargaining and rate setting for drivers of hired cars, including Uber cars, has been challenged on antitrust grounds, as well as labor preemption grounds. *See* Chamber of Commerce v. City of Seattle, No. C16-0322RSL (W.D. Wash. Aug. 9, 2016) (unpublished order) (dismissing suit for lack of stand-

B. Building Sustainable Worksite Organization

While the absence of exclusive bargaining agreements may help safeguard the fruits of social bargaining from legal challenge, this feature of the new labor law is also a limitation. Exclusive bargaining relationships tend to result in procedures that ensure that workers have a voice in specific workplace issues, through grievance procedures and local negotiation. They also tend to involve contractual provisions that require employers to collect dues from workers and remit them to the union. Without this form of "dues check-off" it is not clear how tripartite social bargaining would result in financially sustainable worker organizations. SEIU, for example, has spent vast amounts of money organizing the grassroots Fight for $15.[486] Lacking the promise of membership dues via exclusive bargaining agreements with particular employers, or another source of funding, the union cannot sustain its efforts indefinitely, even if it continues to win improvements for workers through the expanded use of state and local initiatives.[487]

Yet the nascent labor law regime emerging from the Fight for $15 should not lead one to conclude that exclusive bargaining agreements are relics—or that mechanisms for worker voice and union funding will fall by the wayside.

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ing). Assuming the drivers are independent contractors who do not qualify for the labor exemption, a likely issue will be whether the ordinance qualifies for *Parker* immunity, which allows states to enact anticompetitive regulation when acting in their sovereign capacities. *See* Parker v. Brown, 317 U.S. 341 (1943). *Parker* immunity does not apply directly to local and municipal governments, but local law can be immune if it restricts competition in a manner authorized by state law. *See* City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 370 (1991). In order for *Parker* immunity to apply, the regulatory restraint of trade must be "clearly articulated and affirmatively expressed as state policy" and the scheme must be "'actively supervised' by the State." Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 103, 105 (1980) (quoting City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 410 (1978)). Any social bargaining statutes that apply to independent contractors would have to be designed with these requirements in mind.

486. Alejandra Cancino, *Union Spent at Least $2 Million Last Year on Fight for $15 Movement*, CHI. TRIB. (May 29, 2014), http://www.chicagotribune.com/business/chi-union-spending-fight-for-15-20140529-story.html [http://perma.cc/5KK9-S3MC].

487. The immediacy of unions' loss of funding has receded. Prior to Justice Scalia's death, the Supreme Court was widely anticipated to rule in *Friedrichs v. California Teachers Ass'n*, No. 14-915 (argued Jan. 11, 2016), that mandatory agency fees in the public sector are unconstitutional, or that workers must affirmatively opt-in to paying fees. Unions like SEIU would likely have faced a substantial decline in their revenue. On March 29, 2016, however, the Supreme Court issued a one sentence four-four per curiam opinion affirming the lower court and maintaining the existing doctrine. 136 S. Ct. 1083 (2016) (mem.); *see also supra* note 169 (detailing the Supreme Court's restrictions on union fee collecting).

1. *Social Bargaining as a Complement to Exclusive Bargaining Agreements*

To date, social bargaining seems to be strengthening unions' ability to engage in traditional collective bargaining. Union leaders report that social bargaining has made it easier to obtain successful contracts because it has shifted employer expectations.[488] For example, thousands of nursing-home workers recently won a contract guaranteeing $15 an hour from three nursing-home chains in Pennsylvania,[489] while janitors in Colorado and the Pacific Northwest won new contracts that will raise their pay to $15.[490] The mounting political support for wage gains seems to have softened some employer opposition at the traditional bargaining table.

To the extent wages and benefits are taken out of competition by local or state law, it makes sense that employers would have less reason to resist worksite collective bargaining. So too, when the state grants labor power to negotiate at the sectoral level, it is logical that unions' overall position in society would be strengthened. Historical and comparative experience tends to support these assumptions.[491] Indeed, lessons from history suggest that social bargaining could enhance unions' ability to organize new workers into traditional unions. As scholars have documented, "during the periods when corporatism was in effect, under either the NIRA or subsequent, industry-specific regulation, unions grew in strength."[492] And newly unionized shops, with successful contracts, can provide continued dues payments for labor organizations.

2. *New Funding Mechanisms*

Still, a system based primarily on social bargaining cannot produce the same revenue for unions that was generated by firm-level exclusive representa-

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488. Telephone Interview with Judy Scott, Gen. Counsel, SEIU (Apr. 10, 2016).

489. David Wenner, *Thousands of Pa. Nursing Home Workers Will Get $15 an Hour*, PENNLIVE (Apr. 5, 2016), http://www.pennlive.com/news/2016/04/seiu.html [http://perma.cc/2EFC-N6QE].

490. Tripp Baltz, *Denver Janitors Ratify Deal Paying $15 an Hour in Fourth Year*, 134 Daily Lab. Rep., at A-6 (July 13, 2016), http://news.bna.com/dlln/DLLNWB/split_display.adp?fedfid=93885587&vname=dlrnotallissues [http://perma.cc/W3BJ-UVDJ]; Rhonda Smith, *SEIU Members OK Pact for 2000 Janitors in Oregon, Washington*, 133 Daily Lab. Rep (BNA), at A-2 (July 12, 2016), http://news.bna.com/dlln/DLLNWB/split_display.adp?fedfid=93797426&vname=dlrnotallissues [http://perma.cc/4C5J-F3Q8].

491. *See* Wachter, *supra* note 53, at 631-32; sources cited *supra* note 421.

492. Wachter, *supra* note 53, at 631-32; *see* Lichtenstein, *supra* note 61, at 122-23; *supra* notes 65-68 and accompanying text.

tion at its peak. Unions in a social bargaining context may represent many workers, but the workers are not required to pay dues. This problem is not dissimilar to the challenge facing unions in light of right-to-work laws. As previously discussed, current law provides that when a majority of employees in a bargaining unit choose union representation, all employees in the unit are then represented by the union and the union must represent all of the employees equally.[493] Twenty-six states, however, have enacted laws granting such union-represented employees the right to refuse to pay the union; [494] section 14(b) of the NLRA gives states the authority to do so.[495] An inequity in the law results: the union is legally obligated to provide services to all workers in the bargaining unit but nonmembers need not pay for services.[496]

In light of the rise of right-to-work laws, and the threat of new constitutional law prohibiting mandatory union dues, scholars have begun to explore alternative funding mechanisms.[497] Some of these proposals could be translated to a system of social bargaining. For example, one option, urged by Professors Catherine Fisk and Benjamin Sachs, is for the NLRB to abandon its rule forbidding unions from charging nonmembers a fee for representation services. Under the Board's current rule, a union violates section 8(b)(1)(A) of the NLRA if it insists that nonmembers pay for representation in disciplinary matters, even where the nonmember has a right not to pay for the union's repre-

493. *See supra* notes 112-113, 115, 162 and accompanying text.

494. *See Right-to-Work Resources*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx [http://perma.cc/ADK3-P44P]. West Virginia approved right-to-work legislation in February 2016. *Id.*

495. Labor Management Relations (Taft-Hartley) Act § 14(b), 29 U.S.C. §164(b) (2012).

496. Fisk & Sachs, *supra* note 225, at 880. In recent months, a few judges have concluded that this system constitutes an unconstitutional taking. Sweeney v. Pence, 767 F.3d 654, 671-84 (7th Cir. 2014) (Wood, J., dissenting); IAM v. Wisconsin, No. 2015CV00628 (Wis. Cir. Ct. Apr. 8, 2016). Professors Catherine Fisk and Benjamin Sachs argue that the NLRA does not permit the current inequity. In their view, a better reading of section 14(b) would conclude that federal law permits states to ban mandatory payments that are the equivalent to the full cost of membership, but that states cannot ban lesser mandatory payments to cover the cost of services. Fisk & Sachs, *supra* note 225, at 874-79.

497. *See supra* notes 169, 487 (discussing the movement by the then-five-Justice conservative majority on the Supreme Court toward constitutionalizing right-to-work doctrine in the public sector).

sentation generally.[498] This position, Fisk and Sachs explain, is required by neither statute nor court doctrine, and could be changed by agency action.[499]

Fisk and Sachs's argument for fee-for-service can be extended to the social bargaining context, where the union is advancing the interests of, and may be called upon to serve, nonmember workers who are not required to make dues payments. Thus, under a social bargaining model, unions should be able to charge for services, and specifically should be able to charge nonmembers more than they charge members. For example, unions could charge a low monthly fee to workers who voluntarily join the union; that fee could be paid by electronic funds transfer. Members would be entitled to a variety of services and benefits. At the same time, the union could offer services on a fee-based model to nonmembers.[500] Such a ruling would require less of a shift in precedent than the one urged by Fisk and Sachs, as the existing doctrine does not consider the problem of fees absent exclusive bargaining relationships.

While a fee-for-service arrangement is unlikely to produce substantial income, it could be supplemented with additional revenue streams. One possibility, offered by some commentators, is for governmental entities to fund worker organizations.[501] A limited variation of this approach is for local and state governments to provide grants to worker organizations to help with the enforcement and implementation of social bargaining laws; indeed, several states and localities already use worker organizations to help enforce local labor standards.[502] Though mandating such arrangements on a national basis would be a non-starter, expanded use of this model may be possible in localities where workers have significant political power. Grants to unions to run worker-training programs and to operate benefit programs could also be expanded.[503]

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498. Fisk & Sachs, *supra* note 225, at 860 (discussing section 8(b)(1)(A), which makes it an unfair labor practice for a union to "restrain or coerce employees in the exercise of the rights guaranteed" in section 7); *see, e.g.*, NLRB v. North Dakota, 504 F. Supp. 2d 750, 757 (D.N.D. 2007); Columbus Area Local, 277 N.L.R.B. 541, 543 (1985).

499. Fisk & Sachs, *supra* note 225, at 860.

500. *Cf.* NLRB v. Gen. Motors Corp., 373 U.S. 734, 743-44 (1963) (prohibiting a union from requiring membership).

501. Daniel Hemel & David Louk, *Is* Abood *Irrelevant?*, 82 U. CHI. L. REV. DIALOGUE 227, 229 (2015); Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 N.Y.U. L. REV. 144, 144 (2016) (urging this approach in the public sector as a solution to the perceived First Amendment problem with check offs of mandatory dues).

502. Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552, 558-60 (2010) (discussing existing efforts at tripartite enforcement).

503. In Europe, unions frequently have a role in the administration of social insurance. Streeck & Hassel, *supra* note 418, at 347.

While performing these tasks, unions could increase their solicitation of voluntary dues from worker-participants.

Employers might also contribute to union funding. For example, unions and employers could agree—privately or through tripartite bargaining—to create new hiring halls,[504] or training funds,[505] partially funded by employers. These models would have to be designed so as not to run afoul of section 158(a)(2)'s ban on company unions or the prohibition on employers giving a "thing of value" to unions, but existing law leaves room to do so.[506] Indeed, many industries have successfully used union-run training programs to the benefit of employees and employers.[507]

Pursuing any of the above alternatives would require attending to important design considerations, such as how to structure funding to ensure the continued independence of unions and their fealty to workers' interests.[508] For now, however, the point is simply that alternative funding sources are possible, even without federal statutory reform.

3. Worksite Representation and Alternative Forms of Worker Voice

Not only are alternative funding sources available, but social bargaining also opens up space to explore different forms of worksite representation. The Fight for $15 suggests one possibility: that unions could engage smaller groups of workers at particular facilities where the union lacks a majority but where workers benefit from broader social bargaining. The Fight for $15's worksite

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504. The hiring hall used by the Culinary Union in Las Vegas may provide a model. *See* Harold Meyerson, *Las Vegas as a Workers' Paradise*, AM. PROSPECT (Dec. 11, 2003), http://prospect.org/article/las-vegas-workers-paradise [http://perma.cc/88JQ-8UDF].

505. *See* Peter Chomko et al., *Union-Management Training that Works*, PERSP. ON WORK 42 (2014), http://1199ctraining.org/docs/POW_Vol18_Rnd4.pdf [http://perma.cc/XZ5C-SLB3] (discussing the success of District 1199's training fund).

506. *See* 29 U.S.C. §§ 158(a)(2), 186 (2012); Mulhall v. UNITE HERE Local 355, 667 F.3d 1211 (11th Cir. 2012), *cert. granted*, 133 S. Ct. 2849, *cert. dismissed as improvidently granted*, 134 S. Ct. 594 (2013); Dana Corp., 356 N.L.R.B. No. 49 (Dec. 6, 2010); *cf.* Tang, *supra* note 501, at 172-225 (analyzing the legality of employer-funded, that is government-funded, unions in public sector and advocating this approach).

507. *See* Harris v. Quinn, 134 S. Ct. 2618, 2649 n.4 (2014) (Kagan, J., dissenting) (describing the relationship between employees and those who receive government funding).

508. *Cf.* Fine, *supra* note 215, at 610 (discussing the challenges of worker center funding); *supra* note 421 and accompanying text (discussing the contingent relationship between statism in labor relations and union independence).

actions at facilities where only a small number of workers affiliate with the movement are a fledgling example of this strategy.[509]

To date, the Board has permitted minority unions—and protected minority strikes—but it has refused to require employers to bargain with these groups of workers.[510] As Professor Charles Morris has argued, the Board could change its position and adopt a rule requiring members-only bargaining.[511] On his account, section 7 of the NLRA protects the right to engage in concerted action, to organize, and to bargain, but does not limit these rights to workplaces where a majority of workers have chosen a union.[512] Section 9 provides a mechanism for choosing a union that enjoys the power of exclusive representation, but it does not prohibit members-only bargaining.[513] Moreover, the Court has recognized that members-only bargaining is consistent with the policies of the NLRA and that agreements between employers and minority unions are enforceable under section 301 of the Labor Management Relations Act.[514] In short, while statutory law is not clear as to the obligation of employers to bargain with minority unions, such an interpretation by the agency would be reasonable.[515]

Minority unionism on its own, without social bargaining, has significant limitations. Small groups of workers lack significant bargaining power. But when combined with a social bargaining system under which the state or local government requires sectoral bargaining across the region, minority unionism

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509. *See supra* Part II.

510. *See* Fisk & Sachs, *supra* note 225, at 870-72 (discussing, for example, Charleston Nursing Center, 257 N.L.R.B. 554, 555 (1981); and Dick's Sporting Goods Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, Office of the Gen. Counsel, NLRB, to Gerald Kobel, Reg'l Dir., Region 6, NLRB 13 (June 22, 2006)).

511. MORRIS, *supra* note 226; *see also* Catherine Fisk & Xenia Tashlitsky, *Imagine a World Where Employers Are Required To Bargain with Minority Unions*, 27 A.B.A. J. LAB. & EMP. L. 1, 10-19 (2011) (assessing the advantages and risks of members-only bargaining); Clyde Summers, *Unions Without Majority—A Black Hole?*, 66 CHI.-KENT L. REV. 531, 534 (1990) (arguing that the NLRA allows non-majority unions and describing how unions without majorities can represent and serve the interests of workers in the workplace).

512. MORRIS, *supra* note 226, at 99-101, 156-57; *see also* 29 U.S.C. § 157 (2012) (granting employees the rights to organize and to engage in collective bargaining without limiting these rights to workplaces where a majority of employees have voted to unionize).

513. 29 U.S.C. § 159 (2012).

514. Labor Management Relations Act of 1947 § 301, 29 U.S.C. § 185 (2012); Retail Clerks Int'l Ass'n, Local Union 128 v. Lion Dry Goods, Inc., 369 U.S. 17, 29 (1962).

515. *See* Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 844-45 (1984) (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)) (discussing the principle of judicial deference to administrative interpretation where such choices "represent[] a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute").

could ensure that the workplace democracy inherent in the current model not get lost in favor of far-away tripartite structures. It could also help unions continue to fund themselves.

Other alternatives for new worksite structures exist as well; the minority unionism emerging from the Fight for $15 is just one possibility. For example, scholars have documented how worker movements are experimenting with other ways to enhance worker voice, from the use of supply chain agreements,[516] to the creation of works councils,[517] to the insistence on worker ownership.[518] Though these approaches have not yet been joined with social bargaining on any significant scale, they are compatible with and could enhance the broader project.[519]

In short, while critics are correct to worry that the "new labor law" and its mechanisms for stronger industrial-level wage bargaining and political power for workers do not necessarily provide vast resources to unions or entail the kind of workplace-level representation or employee voice that firm-based bargaining historically provided in the United States, social bargaining is compatible with sustainable workplace structures. Further exploration of their contours is for another day.

CONCLUSION

For low-wage workers active in the Fight for $15, the new labor law is a matter of personal necessity. But their efforts have broader implications. We live today in what many have called a "Second Gilded Age," with high levels of economic inequality, pronounced social and racial stratification, rising anti-

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516. *See* Rogers, *supra* note 32 (discussing the range of alt-labor models that could be combined with corporatism); *supra* notes 349-350 and accompanying text.

517. *See* Jack Ewing & Bill Vlasic, *VW Plant Opens Door to Union and Dispute*, N.Y. TIMES (Oct. 10, 2013), http://www.nytimes.com/2013/10/11/business/vw-plant-opens-door-to-union-and-dispute.html [http://perma.cc/9PPW-CLDY] (describing Volkswagen's willingness to experiment with the works council model, within the confines of American labor law, which prohibits company-established unions). *But see* Neal E. Boudette, *Volkswagen Reverses Course on Union at Tennessee Plant*, N.Y. TIMES (Apr. 25, 2016), http://www.nytimes.com/2016/04/26/business/volkswagen-reverses-courseon-union-at-tennessee-plant.html [http://perma.cc/832V-EEXL].

518. *See* Rolf, *Toward a 21st Century Labor Movement*, *supra* note 32 (offering Kaiser Permanente and its twenty-eight unions as an example of co-determination; Home Care Associates in the Bronx as an example of a worker-owned cooperative; and the Publix grocery chain as an example of an Employee Stock Ownership Programs).

519. *See* Rogers, *supra* note 32.

immigrant sentiment, failing infrastructure, resurgent corporate capital, and "an increasingly supplicant public sphere."[520]

As in the Progressive Era, a central problem facing the nation is the unchecked political and economic power of corporations and oligarchs.[521] The new labor law offers a possible path forward.[522] Harkening back to abandoned projects of the Progressive Era, [523] it represents a promising strategy for building a more equitable, inclusive, and democratic state. It suggests that regulation can be a vehicle through which the public contests economic power. It suggests that lawmaking can be a site of real democratic participation, where different groups in society share in decision making. And it suggests that regulation can strengthen civil society by giving organizations a formal role in the democratic process.

Ultimately, the path out of the ashes of the New Deal labor law is only beginning to emerge. But the contours of a new legal regime are discernible from action in workplaces, on the streets, in legislatures, and before agencies. While the temptation to patch up the old model remains, to do so without confronting its core weaknesses would be a mistake. Likewise, to abandon collective bargaining altogether in favor of governance and regulation would offer little hope of addressing the deep structural inequities in our politics and economy. The revitalization of American democracy and a return to shared prosperity depend on the development of a new, more inclusive, and more political form of unionism. The foundation exists for more work to come.

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520. WILLIAM NOVAK, A NEW DEMOCRACY: LAW AND THE CREATION OF THE MODERN AMERICAN STATE 64-65 (forthcoming 2017).

521. *See* K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION (forthcoming 2016); Andrias, *supra* note 184.

522. Existing efforts to address the imbalance of power fall short of remedying these problems. Campaign finance regulation, for example, has been moderately successful at best, as have efforts to insulate the regulatory process. *See* Andrias, *supra* note 521, at 446-52, 496-97 (discussing mechanisms of agency "capture" and problems with seeking to insulate agencies from such capture); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999) (showing how political actors adjust to campaign finance regulation by reorganizing and redirecting political spending in ways not reached by existing law); Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1 (2012) (showing how *Citizens United v. FEC*, 558 U.S. 310 (2010), led to the near complete deregulation of independent expenditures).

523. *See* NOVAK, *supra* note 520.