## Labor Topic Paper

The 2025-26 policy debate topic should focus on radical changes to the structure of American labor law.

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Note: Throughout this paper, we opted to reduce our use of inline evidence in favor of hyperlinks to evidence in the index. If you see [blue underlined text](#_top), you can Control + Click it on Windows, or just click it on Mac, to see the corresponding evidence.

### Why Debate Labor?

#### 1. LABOR IS A TOPIC FOR OUR TIMES

Much of what we currently consider valuable about debate presumes the existence of a state that recognizes liberal democracy as a political form. By default, training students to use persuasion and argument as their primary political tools prepares them to operate in spaces that do not need to be seized because they are conceded.

In light of our present authoritarian turn, such concession can no longer be taken for granted. The [abduction](https://www.nbcnews.com/news/us-news/federal-immigration-authorities-detain-international-tufts-graduate-st-rcna198158) of students based on their race, immigration status, and [political expression](https://www.aljazeera.com/news/2025/4/11/us-judge-rules-pro-palestine-activist-mahmoud-khalil-can-be-deported) is not only extralegal – it is an assault on deliberative politics itself. This news is already grim. We cannot know what predations the next twelve months will bring.

One way that topics can address this issue is by striking a bargain: insulation from the collapse of American institutions achieved by designing ground that doesn’t depend on institutions for viability. But in a year where decades may happen in weeks, we may find that such a bargain consigns our activity to political and social irrelevance. We risk choosing a topic where planned divisions of ground degrade in the face of probable institutional decay without giving debaters anything meaningful to say about what is occurring around them.

Labor [tackles the issue of democratic backsliding head on](#_Strong_unions_are). Labor power has historically helped to build political power. If there is a path to redeem Democratic electoral politics, there is a credible argument that genuine labor empowerment and the enlistment of unions as allies in political mobilization are no longer optional.

Perhaps more importantly, labor law offers a means to discuss *workplace* democracy. Many students understand work in apolitical terms; though modern work is often unabashedly authoritarian, American history and labor education does not equip students to consider how their workplaces could be reorganized democratically.

Many topics can train debaters in *using* the levers of power, but a labor topic can educate debaters about the *sources* of that power in an area that has played, and may potentially yet play, a fundamental role in the scope and limits of our democracy.

We have not debated labor since 1982. Following two consecutive years of ‘safe’ topic choices, it’s time to step out of our comfort zone.

#### 2. WE MUST LEARN LABOR HISTORY

The debate community would benefit from engaging more deeply with labor history and historiographical debates surrounding labor. Our community consistently engages with debates over economic policy and capitalism, but (somewhat ironically) most often with greater attention paid to capital rather than class and exploitation, labor organization, and countervailing power. Historical education in the U.S. is often drawn to either civic edification in the form of narratives of gradual progress and reconciliation or a focus on military conflicts as defining for historical eras. Labor provides a point of engagement with the history of class, racial, and gender conflict (and solidarity) in eras of U.S. history before and after the major foreign policy and civil conflicts that frame much of our historical narration:

- Post Civil-War/Reconstruction conflicts in early U.S. industrialization, the rise of the AFL, and the consolidation of Jim Crow (and DuBois’ interpretation of the American Civil War as including the first successful revolutionary general strike by enslaved people)

- Industrial unionism and the post-WWI creation of the CIO, the passage of the NRLA

- Post-WWII backlash to the New Deal including substantial limitations on organized labor

- Deindustrialization, union-busting, and the fracturing of the New Deal coalition

The political and historical significance of labor relations and policy is evident in early college debate topics. Between 1931 and 1957 there were [9 labor topics](#_List_of_Past) concerning wages, standards for employment, and the role of the NLRB and organized labor.

It may seem obvious that the Great Depression and the vital issues of industrial labor relations would define policy debate for that era. Yet, contemporary debate occurs against the backdrop of the Great Recession (and jobless recovery), the COVID shock, and a potential generational shift in the organization of global production and we have not deeply engaged with the organization of labor. Topics in the past decade have used the lens of separation of powers, social insurance, or competition law to address the aftermath of these dramatic economic events and their effects on the administrative state constructed during the New Deal. A topic on labor law would encourage us to learn more deeply about the conflicts and political and legal responses that drove the creation of those institutions.

#### 3. CURRENT FOR THE RIGHT REASONS

Historians will look back at the early 2020s as an inflection point in economic organization.

FIRST: If you care about labor power, current labor law is unambiguously failing. The core governing framework for United States labor law is a piece of depression-era legislation called National Labor Relations Act. The NLRA turns 90 this year. The Taft-Hartley Act, its only major update, turns 77.

We are overdue for an update. A staggering statistic: 6% of private sector workers have union representation, even though 50% of private sector workers say they want it. This is an egregious failure for a body of law that purports to unshackle voluntary labor organizing.

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The Regulatory Review: You have written that the NLRA has failed to meet its objectives. What are the most concerning or pressing failures of the NLRA?

Sachs: The NLRA’s central statutory mission is ensuring that working people can choose freely to organize unions. To ensure this kind of employee free choice, the statute must make sure that employers do not interfere in union organizing campaigns in coercive ways, but the statute does not do this.

Today, fewer than 6 percent of private sector workers have union representation, even though more than 50 percent of workers say they want a union and even though union approval ratings are at their highest level in history.

This abysmal state of affairs represents a trend. Unions are dying, and labor law is culpable.

Dylan Matthews 23, Senior Correspondent and Head Writer for Vox's Future Perfect section, Vox staff member since 2014, specializes in global health, pandemic prevention, anti-poverty efforts, economic policy and theory, and philanthropy conflicts, "Labor unions aren't 'booming.' They're dying. Unions won't come back without fundamental changes to bargaining," Vox, 06/10/2023, https://www.vox.com/future-perfect/2023/6/10/23754360/labor-union-resurgence-boom-starbucks-amazon-sectoral-bargaining

Every once in a while, reporters see a few successful unionization drives in the US, like at Starbucks or Amazon, and conclude that the US is in the midst of a labor union resurgence, that unions are “booming,” or that they’re “suddenly and rapidly rebounding.”

I am, like all non-management Vox staff, a Writers Guild of America, East member, and a former member of Vox’s union bargaining committee, so I empathize with the urge to be optimistic about the future of organized labor, especially at a time when my comrades in the film and TV industries are striking for a better contract. I stand in solidarity with them and hope they get an excellent contract.

But I think it’s even more important to be honest about the situation. Organized labor is not booming, rebounding, or in a resurgence of any kind. Instead, it is in decline, as it has been for many years.

Official data from the Bureau of Labor Statistics starts in 1983. That year, 20.1 percent of all workers were in a union. That’s down to 10.1 percent as of 2022 — the lowest it’s ever been in that time frame. The decline has been basically continuous, with brief interruptions in 2008 and 2020 as non-unionized workers lost jobs faster than those with union protections. While public-sector unionization has fluctuated a bit (it fell from 36.7 percent to 33.1 percent from 1983 to 2022), by far the sharper decline is in the private sector, where rates fell from 16.8 to 6 percent.

Planet Money’s Greg Rosalsky put it well in a piece earlier this year: “While there was an uptick in labor organizing in 2022, we’re hardly witnessing a rejuvenated movement strong enough to dramatically reverse unions’ long-run decline.”

What’s driving the decline in unions?

Starting the data at 1983 gives a misleading picture: The decline of unions began well before then.

Harvard economist Richard B. Freeman has put together data on union membership going back over 100 years. It shows that the share of households with a union member was around 10-11 percent going into the Great Depression. Starting in 1937 (not coincidentally the year the Supreme Court upheld the pro-union National Labor Relations Act passed two years earlier), you see a dramatic rise in membership. The rate went from 13.2 percent in 1936 to 26.6 percent in 1938. The rate peaked at around a third of households, and stayed in that range for decades. But by the mid-1950s, a slight but perceptible decline was already starting, which has continued ever since.

I’ve seen two major theories for why this happened. The first emphasizes politics: Countries with more left-wing governments have seen smaller declines in unions. In Canada, for instance, the share of workers in a union has fallen, but the fall is less stark than in the US, which might be explainable by its more pro-union laws.

The second emphasizes the fact that union firms tend to expand their workforces less quickly than other firms. That makes sense: Unions raise wages, so union workforces cost more. But over time, this effect means a greater and greater share of the workforce is non-unionized because non-unionized firms are able to grow faster.

In a landmark 2001 paper, economist Henry Farber and sociologist Bruce Western credited this as a major factor behind union decline in the US. They estimated that unions would have to increase their organizing rate sixfold just to keep the US membership rate constant. To increase unionization, they’d need an even more dramatic and improbable explosion in organizing.

I lean toward the latter theory. It helps explain why you didn’t see a collapse in union rates when hostile governments (like those of Ronald Reagan or George W. Bush) came to power, but instead the same gradual decline as occurred under Democrats.

Laws, not vibes

Whatever explanation you choose, any attempt at union revitalization will require much more than organizing a few Starbucks locations. It will require wholesale change to labor law.

The political scientist David Madland’s book Re-Union gets into the details well, but the gist is you need to find ways to organize unions across whole sectors, not just workplace by workplace. In many European countries, firms don’t pay a penalty for paying good union wages; union contracts are “extended” to whole sectors. If UPS drivers win a good contract, FedEx would then have to abide by those terms too, even though it doesn’t have a staff union.

This would be an ambitious change. The PRO Act, the labor movements’ big priority in Congress (which is currently dead in the water given Republican control of the House), wouldn’t do much to further it; that act would mostly strengthen the existing workplace-based system, which is valuable but insufficient. Some states like California are experimenting with sectoral bargaining, but we’re in very, very early days yet.

The future of labor, I think, lies much more heavily in legal reform efforts meant to enable that kind of broader bargaining than it does in a few heavily publicized elections at individual companies. It’s not sexy work, but it’s the only thing that could return organized labor to the power it once had in the US.

The consequences have been brutal for labor.

Roger C. Hartley 24, Professor of Law at The Catholic University of America, award-winning teacher of constitutional law and labor law, author of four other books including Monumental Harm: Reckoning with Jim Crow Era Confederate Monuments, "Fulfilling the Pledge: Securing Industrial Democracy for American Workers in a Digital Economy," The MIT Press, 2024

The previous chapters of this book have documented an array of pathologies that have made our economic system since 1980 brutal for many American workers. One commentator has summarized that brutishness this way:

The years have brought wage stagnation, declining union density, widespread retaliation for organizing unions, under-resourced enforcement agencies, forced arbitration preventing access to judge and jury, a growing chasm between corporate and worker power, and the fissuring of the workplace (subcontracting, franchising, misclassification of workers, and other company practices to avoid employer status). The resulting degraded working conditions have exacerbated racial and gender disparities, as they disproportionately impact immigrant workers, Black workers, other workers of color, and women workers. On top of these problems, workers have more recently faced a devastating worldwide pandemic.

SECOND: Labor faces a moment of technological risk and opportunity.

The labor movement has struggled with the combination of automation and offshoring for much of its history. The rise of AI brings this confrontation to a head, as the aspiration to automate all aspects of intellectual labor comes within reach.

Depending on one’s view, this tendency is either an existential challenge to the power of labor, an opportunity to improve working conditions by allowing workers to labor alongside automated tools, an opportunity to supercharge economic productivity by trimming the expensive human ‘fat’ from economic production, a chance to institute unprecedented workplace surveillance, or an opportunity to transition to a utopian post-work economy.

Which of the above views prevail – if any – will be determined by the balance of workplace power.

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The big difference between today and the 1970s, of course, is that artificial intelligence won’t just affect manufacturing — it’s coming for everyone. That’s one reason public anxiety about its impact is palpable. Long-term, the concern is existential — could AI theoretically wipe out the human race? Short-term, it’s more practical — will AI take my job? In one survey of 2000 working Americans, 77 percent said they were concerned about job loss due to artificial intelligence. And the positions potentially at risk aren’t just blue-collar ones, but white-collar ones as well: coders and software engineers, financial analysts and traders, marketers and content creators, graphic designers and people working in the legal industry.

Is the anxiety justified? David Autor, an MIT economist who’s spent his career studying the labor-market impact of technological change, says … maybe. His position: While there’s no doubt that AI will disrupt the world of work, it remains too soon to tell exactly how.

Autor explains that what gives labor its value in the marketplace is expertise — a body of knowledge or a competence you possess that most people don’t have and that the world says is important. Expertise is what differentiates a crossing guard from an air traffic controller — both occupations regulate the flow of traffic, but the training and education it takes to keep a 7-year-old out of harm’s way is less than that required to stop two huge airliners from colliding. Hence, air traffic controllers earn more.

Part of the promise of AI, Autor says, is that it has the potential to give people greater expertise, which could increase their productivity and ultimately their value. He gives as an example a nurse practitioner or physician assistant who, thanks to the extraordinary power of artificial intelligence, could begin to make medical diagnoses that right now can only be done by an M.D. who has many years of intensive training. Indeed, Autor continues, the exciting thing about AI is that it could help people who don’t have elite educations — the type of workers left behind economically in the last several decades — expand what they can do and increase their worth in the workplace.

“The last four decades devalued the work of people who don’t have college degrees,” he says, noting the impact of both technology and deindustrialization. “They used to do skilled office work or skilled production work — now many of them do food service and security and cleaning.” Deployed the right way, AI could give such workers the tools to reverse that trend.

But there’s also the possibility that artificial intelligence could spin out in a different way. In making abundant certain types of expertise that are now relatively scarce — financial analysis, writing, graphic design, healthcare delivery, just to name a few — AI could allow companies to eliminate positions or pay people less, since what they do will have become a commodity. While such an approach might be more efficient and actually help the broader economy grow, it raises the question of whom that growth would benefit. Corporate bottom lines might improve, but we could simultaneously see an even more intense version of what we’ve seen over the last four decades — those at the top doing very very well, those in the middle or at the bottom struggling.

As with any new technology, Autor says the real unknowns about AI are all the ways people will use it that, right now, we can’t even imagine. He compares it to GPS, which was initially conceived and developed by the U.S. government as a way of guiding weapons systems. GPS does that, but decades later it does a lot more, from powering the geo-location functions in our smart phones to playing an integral role in the electrical grid.

“We often don’t know what the killer app of a new technology is because we think of it as a simple replacement for something we already have,” he says.

The good news when it comes to AI, Autor believes, is that nothing is yet determined. We can decide the tasks we want AI to do; we can control how it’s integrated into our jobs and lives; we can retrain people for new jobs AI will create. “I think we have agency in this,” he says. “It’s such a valuable tool, and there are many ways to use it.”

This is where Autor’s views come together with Shuler’s: The best course forward, both believe, is not to stop the development of AI or even the elimination of some jobs, but rather to include workers in the conversation so that we get the big upside of AI without a massive downside.

So what’s the best way to give people a voice in what’s coming?

Shuler, predictably, believes it’s through unions. “We think collective bargaining is actually the tool to manage this — labor and management sitting across the table, figuring it out together in partnership,” she says. “If we have the trust, and if we can look around the corner and see a better future, we’re going to be partners in that, rather than resisting it.”

Helping Shuler’s argument is not only the current momentum that labor has in the U.S., but also the fact that job anxiety is spreading to white-collar professions that never before felt threatened. “The level of insecurity that low-wage workers in manufacturing lived through now is coming after the professional class, who didn’t feel they had to face that level of disruption before,” says Patricia Campos-Medina, executive director of The Worker Institute at Cornell University and a Democratic candidate for Senate in New Jersey. “I think you’re going to see more labor activity and more labor unrest in the professional class as they have to face disruption in their careers and lives.”

Indeed, white collar professions were seeing a small uptick in union activity even before Chat GPT was unveiled in the marketplace in 2022. Tech workers at Google and Apple have organized in the last few years, as have video game developers, museum workers and medical residents (including those at high-profile institutions like Stanford, the University of Pennsylvania and Mass General Brigham in Boston).

“People are starting to see unions in a new and different light,” Shuler believes. “Because many people forgot that unions were the way to achieve a kind of justice in the workplace. Or they had a certain stereotype or perception of what a union was: Oh, that’s for industrial settings. Or that was before we had labor laws. Well, no, actually, it’s this thing called a union that enables you to come together with your co-workers for fairness on the job.”

Despite Shuler’s optimism, there remain huge obstacles to unions regaining the position they once held in American life and to them being the vehicle that best protects workers against the negative impact of AI. One challenge is cultural. Will, say, a group of financial analysts, with zero history of union participation, suddenly opt to bargain collectively over which tasks AI handles and which remain done by humans? An even bigger hurdle is structural. As Shuler points out, under current labor laws, the path to forming a union is long and fraught.

“It takes an act of absolute heroism to form a union these days through the NLRB process,” she acknowledges. “Most companies will fire you, harass you, intimidate you — they’ll do anything they can to prevent a union coming into their workplace.

“If we really had a free and fair way to form unions without fear of retaliation and reprisal,” she argues, “we would see tremendous growth.” While more recent data is hard to find, a 2017 survey from the Economic Policy Institute appears to back Shuler up on that point, with 48 percent of nonunion workers saying they’d vote to create a union in their workplace if they could.

A final impediment is one that hurt organized labor so much in the 1970s and 1980s — the perception that greedy unions can undercut corporate competitiveness. David Autor says that’s a particular bug of the American approach to unions.

“The structure of collective bargaining in the U.S. is problematic,” he says. “It’s fundamentally adversarial. It’s establishment by establishment. It’s a kind trench warfare.”

That makes Autor somewhat skeptical that the union movement is necessarily the best way to ensure worker rights in the rollout of AI. “I think we need a stronger framework for worker protection in the United States,” he says. “But will our 90-year-old union structure do that very effectively? I don’t want to say it can’t happen. I don’t say I don’t want it to happen. But it doesn’t seem very likely to happen.”

Autor says what might work better is the type of sectoral bargaining that happens in many western European countries, where, say, all auto workers essentially get the same contract, no matter which company they work for. (He acknowledges there’s not much political will for this, though progressives and some populist Republicans support it, and the AFL-CIO sees it as one way for workers to have a seat at the table.) Such an approach levels the competitive playing field for businesses, making them more likely to view labor as a partner, not an adversary. Autor also believes government regulation should play a role when it comes to protecting workers.

Broadly speaking, AI is one area where, at least at the moment, there’s political bipartisanship. In Congress, four senators — Majority Leader Chuck Schumer (D-N.Y.); Martin Heinrich (D-N.M.); Todd Young (R-Ind.); and Mike Rounds (R-S.D.) — have taken the lead on the issue, meeting frequently and organizing the AI Insight Forums to gather input from a wide array of voices. Meanwhile, last fall the Biden administration issued a sweeping executive order about AI that touches on everything from national security to protecting workers. Rather than laying out specific rules, the order mostly asks various federal agencies and departments to begin developing guidelines for AI. The devil — and the bipartisan fights — will likely be in the details.

When it comes to AI’s specific impact on the labor market, the politics seem particularly tricky for Republicans. Can they give the workers who are now part of their base protections from AI — while still appeasing a business class that’s focused on profits and wants low taxes and minimal regulation? It’s a challenging needle to thread. (Senators Young and Rounds didn’t respond to interview requests on the topic.)

Shuler says politicians and government officials have a long way to go before they can even become a voice in what’s happening. “These days I feel our regulatory environment, and our decision-makers, are so far behind the curve,” she says. It’s why she’s hopeful that, as people look for a kind of control they haven’t had in decades, they’ll turn somewhere else.

“Most people feel pretty scared and powerless when it comes to what’s on the horizon because there’s so much change happening,” she says. She mentions the ongoing impact of Covid-19, as well as climate change and now technology. “These are all big threats, and if you’re managing it by yourself, it’s pretty daunting. But if you’re coming together collectively in a union, you probably have a better shot at making it work for you.”

Whatever the perspective, it is vital to discuss automation and offshoring as questions of how power is allocated in the workplace, not as apolitical technological trends.

Jason Resnikoff 21, lecturer in the Department of History at Columbia University, “Conclusion,” in Labor's End: How the Promise of Automation Degraded Work, University of Illinois Press, 2021, pp. 187-192

In December 2018 General Motors announced that it would shutter the Lordstown plant as part of a larger move to cut fourteen thousand jobs from its payroll in the United States and Canada. The move came less than a decade after the Great Recession and the U.S. government’s bailout of the auto industry. In 2009 President Barack Obama had announced the bailout at Lordstown. “In the midst of a deep recession and financial crisis,” he said, “for me to have just let the auto industry collapse, to vanish, would have caused unbelievable damage to our economy—not just here in Lordstown, but all across the country. So we intervened for one simple and compelling reason: Your survival and the success of our economy depended on making sure that we got the U.S. auto industry back on its feet.” American taxpayers handed out $50 billion to General Motors, $11 billion of which was never repaid. Defending the decision to close Lordstown in 2018, Steven Rattner, former head of Obama’s White House Auto Task Force and lead negotiator of the auto bailout, explained why in the name of profit GM had no choice but to abandon its workers. “Yes,” he said, “automation played some role in lowering employment, but the bigger problem has been competition from countries like China that are now able to produce goods as well as we do or better using much cheaper labor. For carmakers, that has meant moving production to Mexico.”1 Although Rattner did not know it, what he said of “automation” in the early twenty-first century had been true of the word since its coining in the late 1940s. Yes, the introduction of machinery could reduce the amount of human labor necessary to produce goods, but it also obscured relationships among people. Under these conditions, social domination might appear the product of machine action rather than the decisions of managers, financiers, and lawmakers, all of whom are, of course, all too human.

All this had been many years in the making. Organized labor never recovered from the tumultuous 1970s. The workers’ rebellion could not overcome the combined forces of business’s renewed anti-unionism and the defection of Democrats from the house of labor in the second half of the 1970s. Rank-and-file militancy would persist throughout the decade, but as a sign of things to come, the activism of autoworkers fell apart with the onset of the 1973 oil shock and the recession that followed. By January 1975, half of all UAW members employed by the Big Three were on either indefinite or temporary layoff. The economic crunch of the late 1960s and early 1970s had encouraged workers to demand the humanization of their jobs, but when the bottom fell out of the auto industry, as it would soon enough for much of the rest of U.S. manufacturing, workers could no longer afford the radicalism of their demand to reconcile industrial production with a humane life. Abandoned by the New Democrats, divided among themselves, and facing the existential danger that was unemployment in the United States of America, the rebellion faltered, and with it, the demand for humanization. With the Reagan revolution of the 1980s and the loss of liberal allies in the halls of government, workers fought an ever-losing battle against the forces of neoliberalism and global capital.

The big dreams of the middle of the twentieth century were long over. Under conditions of tightening austerity and declining power, culture wars and a politics of division took up ever more of the political breathing space. The right wing offered white working Americans the meager consolations of patriotism and white supremacy, the liberal Left sold the bromides of globalization and the technocratic rule of experts, and the horizon of political possibility shrank from the full circumference of the Earth to a wall across the southern border. Also to suffer was any explicit national discussion of the meaning of work in the United States. Losing the power to organize among themselves, working people fought increasingly individual battles to keep body and soul together. Compared to the new regime of insecurity, what workers had once called inhuman industrial work was now considered a good job. Robots had not deprived these workers of their ability to provide for themselves. Managers chasing cheap labor around the globe had done that. In this moment of retreat, neither “automation” nor humanization described reality. Working people struggled instead for bare life, the most degraded meaning of work. Both “automation” and humanization had been instances of utopian thinking, but in the later years of the twentieth century, the nation seemed to have lost the ability to take utopia seriously. As some would insist in the last decade of the millennium, history appeared to have come to an end.

Irony once again proved itself the angel of history. In the decades immediately following World War II, critics had imagined with hope as much as dread a future in which “automation” would dispense with the need for industrial workers or perhaps any workers at all. Among those who expressed trepidation, Kurt Vonnegut had described a dystopian future when superfluous people wasted away in rundown cities, and James Boggs wrote of a hereafter in which an unemployed “scavenger” class had fallen out of society. Sure enough, by the turn of the twenty-first century once-booming American industrial cities stood in ruins while the under- and unemployed struggled to find well-paying jobs. But as had been true of industrial workers facing “automation” half a century earlier, these workers had not lost their jobs to the machine. Rather, for the most part, they lost them as they had in the postwar period—to other workers.2

Today, instead of going to their sped-up colleagues down the line, the jobs of the dispossessed go to sped-up and non-unionized workers in the right-to-work South, in the maquiladoras of Mexico, and in the transplanted factories of South and East Asia. Within the United States, hidden human labor likewise remains the secret of “automation” even in some of the most mechanized of American workplaces. This has led to an apparent paradox. On one hand, or so we are often told, “automation” is throwing people out of work. On the other, workers across the economy are undeniably working harder than before and for less. How can this be? How can the economy be wracked—simultaneously—by both chronic underemployment and ubiquitous overwork?3 This same confusion confronted observers of “automation” in the middle of the twentieth century. As one auto worker put it in the late 1950s: “All Automation has meant to us is unemployment and overwork. Both at the same time.”4 The explanation then was the same as it is now: Employers deploy technical innovations to speed up, degrade, and intensify human labor, allowing them to hire fewer workers and to sweat those who remain. Employers call this labor-saving; they call it “automation.”

Take, for example, the notorious “fulfillment centers” of Amazon. The company has boasted that its robots autonomously move packages across the shop floor. “The bottom line is this,” wrote one breathless journalist after taking a company tour: “We humans have to adapt to the machines as much as the machines have to adapt to us. . . . These days, industries that are short human labor need automation to survive.” But as spectacular as these devices might appear, they have nevertheless made up a relatively minor element of Amazon’s investment in “automation.” Rather than robots, it has been the company’s use of autonomous systems of worker surveillance that have saved on labor costs: wristbands that track the positions of the hands of workers and vibrate in warning when those hands appear idle, cameras that watch workers and alert managers when employees are in the wrong place or congregate in groups, and software designed to map potential union activity so it can be busted. Item scanners automatically tally the rate of packages processed per hour for each worker, measuring each employee’s “time off task” and meting out punishments to the slow. None of these devices have performed any warehouse work. Rather, they have saved Amazon money by driving human laborers to work harder and faster. Machines inform workers when they are falling behind, but not when they exceed expectations; this keeps workers stowing, packing, and picking items at a consistently sped-up rate, all day long. And as with sped-up auto workers in postwar factories across the United States, the machine-accelerated pace of human labor takes a toll on the human frame. “It took my body two weeks to adjust to the agony of walking 15 miles a day and doing hundreds of squats,” an Amazon employee explained. “But as the physical stress got more manageable, the mental stress of being held to the productivity standards of a robot became an even bigger problem.” It was this combination of mental and physical injury that led the National Council for Occupation Safety and Health in 2018 to name Amazon one of the most dangerous places to work in the United States.5

Amazon’s style of mechanization has been typical of twenty-first-century “automation.” These machines do not do the work; they regiment, degrade, and harry human beings on the line so that they act as though they are machines. Workers operating telephones in the insurance industry are monitored by machines that discipline not only how long they spend on each call but also what they say and the tone in which they say it. The much-vaunted artificial intelligence at play in ride-hailing and delivery apps pushes workers to labor harder both by measuring how much time they take between tasks (punishing those who fall behind) and with secretive algorithms that garnish their wages according to undisclosed criteria. Sensors embedded in convenience stores and retail outlets calculate, in the words of their manufacturer, a “true productivity” score for each worker, ranking workers from least to most productive. Along those lines, employers in heavy manufacturing have made recourse to cameras that continuously film employees on the assembly line, allowing computers, in the words of an executive at Toyota, “to create continuous streams of data from video of manual actions” that managers may use in Taylorist fashion to further speed up workers.6 Calling it “automation,” employers do indeed use machines to degrade and eliminate jobs. But once again, as was the case in the postwar period, these machines themselves often do not replace human workers; other workers do.

The current celebration of speedup and labor degradation counts as the third wave of the automation discourse. After its retreat in the mid-1970s, the word “automation” enjoyed a renaissance between the late 1980s and the mid-1990s. Boosters of globalization spoke of “post-industrialism” and a new “information economy” as they sought to depict financial deregulation and international trade deals as epoch-making, irresistible developments in the story of civilization. But despite its popularity, “automation” at the end of the century did not hold the public imagination as it had in the postwar period.

The more recent debate surrounding “automation” arose in the aftermath of the Great Recession of 2008. Globalized production, the growing power of Silicon Valley, innovations in robotics and artificial intelligence, the evergrowing economic and political importance of the Internet, and the weakness of unions and nation-states alike to check neoliberal capital once again made “automation” an urgent concern. But while the automation discourse in the middle of the twentieth century fed as much on utopian enthusiasm as it did existential unease, its twenty-first-century incarnation has been fueled instead by fears of dystopia and a pervading sense of powerlessness. The new automation discourse returns to familiar debates from the postwar period, only now with an inverted significance. It indicates a technological determinism less breathless but just as tenacious: a belief that the destiny of the people has been taken out of their hands, either by elites or the technology itself. Whereas in the postwar period Americans believed that the technocratic management of the economy could solve the problems of capitalism and history both, the reemergence of “automation” has come at a time when many people believe they are not in control of their society. Established political and social institutions no longer answer the call of their putative masters—the people and their democratic will. Economic, social, and environmental emergencies go unaddressed. Corporations and the executives who run them act as though they are perfectly free to decide the fate of billions. In this environment, many ask, “What will the machines do to us?” rather than, “What do we want our machines to do?” While the postwar automation discourse was composed in a major key, the twenty-first-century arrangement is played in minor, although it has the same effect: It hides labor so that it will cost less, explaining a political phenomenon as the operation of dispassionate technics.

The many discursive assumptions that must prevail in order to maintain this story of technological determinism often go unaddressed and unnoticed, as does the automation discourse’s implicit argument that the degradation of working conditions means industrial progress. When it appears in print, “automation” almost always seems to indicate a straightforward technological process.7 Take, for example, the reaction to a widely circulated paper by two economists seeking to show how robots have the potential to replace human workers in manufacturing. The study addresses the possible changes that robots could bring about on shop floors, although at present, it states, “because there are relatively few robots in the US economy, the number of jobs lost due to robots has been limited so far.” An op-ed in the New York Times reacted to this report by announcing, “The Robots Have Descended on Trump Country.” Another article ran, “Automation Nation: Evidence That Robots Are Winning the Race for American Jobs.”8

Yet while journalists pursue imaginary robots across the country, workers face degraded conditions, unemployment, and unremunerated labor, often in the very industries said to march in the vanguard of the automated future. Far from acting autonomously, artificial intelligence requires a vast amount of human labor if it is to create value. Human beings, hidden from public view and organized on a gig basis for extremely low pay, are absolutely necessary to assess content, verify decisions, and tailor results. This invisible labor of closing the gaps in artificial intelligence, what some have called “ghost work,” powers the systems of such profitable concerns as Google, Facebook, Microsoft, and Twitter. Google relies on an enormous “shadow work force” to make money, with temp workers outnumbering by tens of thousands the giant company’s full-time staff. New machines or applications, touted as breakthroughs in convenience, extend the reach of the workplace into hitherto inaccessible regions of an individual’s life so that one is, in fact, never off the job. While many struggle to find regular employment, others find themselves working for their employer at all hours, at home, in bed at night just before falling asleep. “Surveillance capitalism” has found ways to commodify and trade in some of the most intimate aspects of daily life. By the harvesting of data, produced by an individual’s often unremunerated interaction with a machine, private companies seek to trade in the labor of mere selfhood and, more remarkably, to shape it. Everywhere—everywhere—human labor remains of the utmost importance in the creation of value. Yet rarely is that labor recognized. And as long as labor remains invisible, those who profit from it need not pay for it.9

It is my hope that this book will help reorient the discussion away from speculation about the future and toward the facts of the past and present. The current use of the idea of “automation” allows critics to sidestep the question of how power should be distributed at the workplace today and to speak instead of the possible effects of one type of mechanism or another. The capabilities of our machines are, in fact, a separate point entirely. As Lewis Mumford wrote a half-century ago, it is not from machines that we learn the purpose of machines. Free people do not ask others, “What will happen to us?” They ask themselves, “What do we want?”

THIRD: Unions are a plausible antidote to fascism.

Labor history is replete with examples of unions operating on the front lines of anti-fascist struggle. This is no accident, as unions’ capacity to center democratic representation, decentralize power, and unify workers based on common material interests is antithetical to modern fascism’s racial and oligarchic foundations.

Bill Fletcher Jr. 25, Talk Show Host and Writer, Activist, Trade Unionist, Author of "The Man Who Changed Colors" and "The Man Who Fell From the Sky", "Unions as a 21st Century Anti-Fascist Force," Labor Viewpoint, In These Times, 04/08/2025, https://inthesetimes.com/article/unions-labor-trump-oligarchy-fascism

One of the principal difficulties facing the Democratic Party establishment and most leaders of organized labor is a failure to accept a fundamental reality: there is no normality. The failure to grasp this state of affairs has led to strategic paralysis and a tendency to believe that by being the ​“adults in the room,” the Democrats — or the trade union leadership — can embarrass the Republicans and force them to engage in good faith behavior. That is not the case.

The rise of President Trump’s Make America Great Again (MAGA) movement has represented the morphing of a broad, rightwing populist movement into a fascist movement that seeks to destroy constitutional democracy. The current purging of the federal government, through Elon Musk’s Department of Government Efficiency (DOGE), aims at both opening the doors to a kleptocracy as well as ensuring loyalty to the MAGA vision and its retrograde goals.

Yet while MAGA can be defined as fascist (or postfascist), what we do not yet see is full fascism in power. Rather what we are now witnessing appears to be something along the lines of Viktor Orbán’s regime in Hungary and, ultimately, a Putinesque regime, i.e., increased rightwing authoritarianism. Still, the aim of the Trump regime remains to destabilize all real and potential opposition.

MAGA, as a movement, has converged with the objectives of that segment of the capitalist class often referenced as ​“oligarchs.” Particularly situated in high tech, this group of capitalists has become very influential through their control over critical online and communications systems. Initially aligned, for the most part, with Democrats, the oligarchs appear to have decided that they are nothing short of superior beings that must seize the reins of government in order to operate it much like a business, and for their own ends. This includes expanding their wealth, but also for those, such as Musk, who have a quasi-science fiction vision of a future where the elite abandon Earth and settle Mars or some artificial satellite, there is the need for direct governmental involvement in such projects. Along with the oligarchs are those in the business class who simply wish to ravage the federal kitty, leading to the emergence of kleptocracy.

In earlier eras the expression ​“offensive of capital” would be used for moments when the capitalist class would move to reverse the victories that working people had won. We are now experiencing something more dramatic than that. This is a ​‘blitzkrieg’ of segments of capital in alignment with a mass rightwing movement, making the current attack especially dangerous. To put it another way, the millions of diehard MAGA supporters are not just observers but have become the foot-soldiers for Trump even when they may have an ambivalence about the objectives of the oligarchs.

Organized labor has been divided over whether and how to respond to this offensive. Roughly speaking, there are three general categories: the collaborators, the ostriches and the resisters. The ​“collaborators” are those unions that are going along with Trump’s agenda. The ​“ostriches” are those that are attempting to avoid conflict and hoping to simply last out the next four years. The ​“resisters” are those that seek to reject MAGA and the current offensive. Each of these categories are quite uneven and their approaches have their own limits. The resisters, for instance, are prepared to ally with other groups to a certain extent, but have a tendency to work on their own. The federal sector unions that are being forced to resist are mainly relying on litigation and lobbying, for instance, appearing to be largely uncomfortable with, or unprepared for, more mass actions, such as work stoppages. This dynamic may soon shift as a result of Trump attempting to obliterate collective bargaining for nearly one million federal workers.

The difference in approach among sections of organized labor is not, primarily, a disagreement over tactics. Rather, it reflects differences over how to understand the nature of the moment and, as a result, the question of what is the necessary strategy. The reality is that we are living through a time when forces of fascism are on the march. This means that confronting MAGA solely on the grounds of deteriorating working (or living) conditions is insufficient. The Trump regime is aiming to roll back all of the progress made throughout the 20th century, and is targeting political opposition wherever it arises. This requires an all-hands-on-deck response. This is not a moment for faux bipartisanship; it is a moment for resistance and obstruction to block the Trump administration from carrying out its far-right objectives.

Rank-and-file members of our unions should be won over to fully appreciate the nature of the danger facing us, and all that it implies. This begins with a major education effort among the membership coinciding with mobilizing against the specific attacks workers are facing, be they loss of jobs, loss of union recognition, moves against migrants, further attacks on the social safety net, failure to respond to increasing natural disasters or a dragnet on political speech. The job of working-class leaders is to link these threats together into a story about how Trump’s allies and the oligarchs are conspiring to steal from the majority, and institute a white, Christian nationalist authoritarian state, i.e., minority rule.

Taking on MAGA will need to involve, but not be limited to, labor militancy. Accompanying shrewd and creative tactical actions must be a proactive vision regarding an alternative to rightwing authoritarianism, an alternative many of us summarize as the fight for a ​“Third Reconstruction” — a political realignment carried out through a multiracial democratic movement from below. This is a challenging but essential task since many in this country have not only lost faith in constitutional democracy, but they have lost faith in the ability to bring about lasting progressive change.

Reversing this sense of pessimism is key to the survival of the labor movement, both among established trade unions as well as more nontraditional forms of labor organizing. Workers must be convinced of the possibility of beating back the darkness and winning. Indeed, our work must be guided by the notion that we are fighting for a future without fear.

The consolidation of Nazi power in Germany began with a targeted campaign of union liquidation. We must learn from the suppression of German trade unions.

American Postal Workers Union 24, "A Notorious Part of History: May 1933: The Dissolution of Labor Unions in Nazi/Fascist Germany," 5/23/2024, https://apwu.org/news/magazine-labor-history/notorious-part-history-may-1933-dissolution-labor-unions-nazifascist

History is valuable for lessons learned. As authoritarianism and a march toward fascist rule are taking a dangerous hold in the United States, the May 1933 lessons from Nazi Germany should be a wakeup call for all workers and our unions.

In early 1933, Hitler and the fascist Nazi party took power. At the time, the German free trade union movement was one of the largest in the world.

When Hitler was appointed Chancellor on Jan. 30, 1933, he did not have a majority in the German parliament (Reichstag). In order to consolidate power, in February 1933, the Nazi Party set fire to the Reichstag, and then blamed it on a “communist plot” to overthrow the government.

The fire was used to promote the “Reichstag Fire Decree,” which suspended all civil liberties and democratic rights, including: habeas corpus, privacy of the mail and telephone, freedom of expression and the press, the right to public assembly, and protections against search and seizure in relations to homes and property. Opposition leaders were arrested. All these draconian measures were used to allow Hitler to rule by decree.

However, the German labor movement’s seven million union members still posed a real threat to the Nazis’ fascist consolidation of power, despite the unions’ weakened state.

The Nazi Party’s paramilitary “storm troopers” (fascist armed thugs) stepped up attacks on union members and their offices in dozens of towns. The day after 1933’s May Day International Workers’ Day celebrations, real and free labor unions were outlawed throughout the country.

Police and “storm troopers” raided labor union offices across the country. Union funds were confiscated, and their organizations dissolved. The Nazis beat union officials, murdered many, and arrested many more. Leaders were imprisoned in concentration camps, including Dachau, which was specially built to imprison and murder trade unionists, members of the Communist Party (KPD), the Social Democratic Party (SPD) and other dissidents.

In place of genuine labor unions, workers were forced to join the German Labor Front (DAF), which was the national labor organization of the Nazi party.

Collective bargaining and the right to strike were abolished, and pay and working conditions were set by Nazi officials. The DAF counted bosses within its membership and was primarily used to spread the Nazis’ antisemitic propaganda among workers. Wages were frozen and the work week increased by 20 percent in just a few years.

With labor unions liquidated, the Nazis moved next to abolish political parties. Within six months of coming to power, Hitler had used a combination of his paramilitary thugs, a series of manufactured crises like the Reichstag fi re, and, importantly, the existing authority of the German constitution, to give himself absolute power to carry out some of the worst crimes against humanity in history. ■

### Proposed Wording

#### The [United States] should strengthen [legal protections for labor] by [at least]:

#### providing for [sectoral bargaining], secondary actions, or codetermination;

#### [restricting right to work laws] or [at-will employment];

#### or providing a [job guarantee].

Several important terms are highlighted for consideration. The substance and rationale for area selection is described [below](#_Candidate_Aff_Categories).

#### 1. UNITED STATES

This topic can and should say ‘United States,’ not ‘United States federal government.’ The [strength of federal labor preemption](#_Here_is_evidence) means that in practice, any topical proposal would require the federal government to act. At a minimum, Congress would [need to amend the NLRA](#_One_approach_would) to significantly scale back preemption in order to unblock policy action by states, guaranteeing neg access to politics and elections arguments about the federal government. Negs could also make arguments about states, although these would likely need to take a non-labor-law approach.

There is, however, a wrinkle: the National Labor Relations Act, which is the law authorizing preemption of state laws, is being [challenged under the Major Questions Doctrine and may be struck down during the season](#_Here_is_evidence). This is strictly good for all parts of the topic other than states. However, it would eliminate the only real objection to the states CP if the states CP is allowed to compete.

This risk might be worth running if this topic was large or difficult to grasp and the states CP was a necessary functional limit. But it is not. The proposed changes are massive shifts in labor law – the neg does not need states to defeat them.

The only strategies this excludes are those which use vertical separation of powers to bully the federal government into action (such as the poison pill preemption strategy or the uncooperative federalism strategy) and the CP that takes identical action to the affirmative at the state level. It also excludes the constitutional convention CP. The contributions of these strategies (if they are even positive) do not merit the use of a federal government agent.

#### 2. LEGAL PROTECTIONS FOR LABOR / AT LEAST

We feel strongly that the topic should create an extremely broad ceiling for action given the drastic actions required by every component of the floor. Affirmatives should be permitted to remedy enforcement deficiencies, increase protections for the right to strike, expand the scope of labor law protections to currently exempted sectors, remedy the misclassification of gig workers, and organize workers’ boards to cover parts of the economy not organically reachable by the listed topical actions. The purpose of this high ceiling is to ensure that affs are empowered to take all actions necessary to solve their harms, so long as those actions fall under the umbrella of labor law.

#### 3. SECTORAL BARGAINING

We may wish to choose a broader term for sectoral bargaining that encompasses [sectoral co-regulation](#_Sectoral_co-regulation_is) and labor standards boards.

#### 4. RIGHT TO WORK

This is the most incremental of the areas we recommend including. We are primarily choosing to include it because it is the largest of the live controversies in the area.

#### 5. AT-WILL EMPLOYMENT

We are unsure about including this area. If we choose to include this area, it may be preferable to phrase this as a [positive requirement for just cause in firing](#_Another_way_of).

#### 6. JOB GUARANTEE

We chose to say ‘job guarantee’ instead of ‘federal job guarantee’ reasons that are similar to the states discussion above.

#### Broader wordings

There are some legitimate reasons to err against a list. The intent of the list is to represent core proposals for moving labor law beyond enterprise-level and voluntary participation models.

Any list risks arbitrarily excluding critical proposals that accomplish these philosophical objectives. As an example, sectoral co-regulation is probably not included within sectoral bargaining, even though the justifications for sectoral co-regulation are far more aligned with the aff than the neg.

Lists are also clunky, inelegant, and exacerbate topicality research burdens. And, a non-list option may better accommodate topical critical affirmatives.

We opted to recommend a list here because we wanted the topic to compel radical action. If we chose a non-list wording, we would suggest including strong language to require aff teams to depart from current labor law principles.

Here are some options for initial consideration. The inclusion of these wordings on a final ballot would require a comparable level of vetting to the topicality work done in the lead-up to the topic committee meetings on antitrust, and the authors would be happily assist with this process if the area is chosen.

* Very broad: The United States should substantially strengthen legal protections for workers.
* Enterprise-Level Bargaining: The United States should strengthen legal protection for collective bargaining and/or worker governance above the enterprise-level.
* Narrower: The United States should reform labor law to strengthen workers’ freedom of association or worker participation in workplace governance.

### Candidate Aff Categories

Below is an overview of mechanisms that we evaluated for inclusion in the topic. Not all of these categories ended up in our recommended wording, but we are touching on the major categories for completeness’ sake.

#### 1. SECTORAL BARGAINING.

[Sectoral bargaining](#_Unions_need_to) allows unions to negotiate wages and working conditions across entire industries rather than negotiating employer-by-employer. This system is common in many European countries but largely absent in the U.S., where enterprise-level bargaining dominates.

The controversy centers on whether sectoral bargaining would increase union power and reduce wage inequality by standardizing conditions across industries, or whether it would create inflexible labor markets that harm economic growth and innovation. Proponents argue it prevents employers from undercutting labor standards through competition, while critics contend it removes important customization of working arrangements and could harm smaller businesses unable to meet industry-wide terms.

#### 2. SECONDARY ACTIONS.

[Secondary strikes (also called sympathy strikes)](#_The_Taft-Hartley_amendments) occur when workers strike to support another union's labor dispute without having grievances against their own employer. These strikes were significantly restricted by the Taft-Hartley Act in 1947, which prohibited unions from engaging in or encouraging secondary boycotts.

The controversy revolves around whether these restrictions unduly limit worker solidarity and union power or whether they prevent excessive economic disruption. Advocates for legalizing secondary strikes argue they're essential for addressing power imbalances when dealing with large corporations and complex supply chains. Opponents maintain that secondary strikes unfairly harm neutral third parties and can spread labor disputes beyond reasonable economic boundaries.

#### 3. CODETERMINATION.

[Codetermination](#_There_have_been) establishes formal mechanisms for worker participation in company decision-making, typically through representation on corporate boards or work councils. This approach is well-established in Germany and other European countries but remains rare in the United States.

The controversy involves competing perspectives on corporate governance and workplace democracy. Supporters argue that codetermination improves workplace conditions, reduces inequality, and creates more sustainable business practices by incorporating worker perspectives. Critics contend that it complicates decision-making, potentially reduces business agility, and conflicts with traditional American conceptions of managerial authority and shareholder primacy.

#### 4. ABOLISH RIGHT TO WORK.

[Right-to-work laws](#_Right_to_work), currently implemented in 27 states, prohibit unions from requiring workers to pay dues as a condition of employment, even when they benefit from collective bargaining agreements. These laws emerged from the Taft-Hartley Act's authorization of state-level restrictions on union security agreements.

The controversy centers on freedom of association versus free-rider problems. Proponents of right-to-work laws argue they protect individual worker choice about union membership and dues payment. Opponents counter that these laws deliberately weaken unions by forcing them to represent non-paying workers, creating financial strain while undermining collective bargaining power and ultimately depressing wages and working conditions.

#### 5. ABOLISH AT-WILL EMPLOYMENT.

[At-will employment](#_Just_cause_for), the dominant employment relationship in the U.S., allows employers to terminate workers for any reason (except those explicitly prohibited by law) without warning or cause. It stands in contrast to "just cause" termination standards common in unionized workplaces and many other countries.

The controversy involves balancing employer flexibility against worker security. Critics of at-will employment argue it creates fundamental power imbalances that enable arbitrary terminations, workplace intimidation, and undermine workers' ability to assert their rights. Defenders maintain that at-will employment facilitates necessary business adaptation, reduces litigation, and preserves freedom of contract between employers and employees in a dynamic economy.

We are on the fence about including this area. In the broader context of labor law, at-will retaliatory termination is frequently discussed as a union-busting tactic that is under-deterred by current NLRA penalties. As such, it risks blurring the otherwise clear line between aff arguments that advocate departure from current labor law frameworks and neg arguments that defend and strengthen those frameworks. That said, the radical nature of at-will employment abolition preserves sufficient ground that this is unlikely to be a practical concern.

#### 6. JOB GUARANTEE.

[Job guarantee programs](#_The_job_guarantee) entitle workers to a job by having the government serve as an employer of last resort. By providing an exit option for workers negotiating with their employers, a job guarantee strengthens labor bargaining power

Aside from the area listed below, this area would contain some of the smallest actions on offer. Although there is a credible argument to be made that a job guarantee requires economy-wide coverage, the experience of the high school topic shows that teams will likely attempt to find specific slices of the economy within which jobs might be guaranteed. This search will come with a cost, however: smaller affirmatives will struggle to justify the ‘guarantee’ mechanism as opposed to a simple public hiring program.

Note: as seen in the wording section, ‘Federal Job Guarantee’ is a term of art and may be worth including if concerns about aff scope merit a states-based functional limit uniquely in this area.

#### 7. EXPAND THE SCOPE OF COLLECTIVE BARGAINING PROTECTIONS.

For historical reasons, the NLRA [exempts](https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/are-you-covered) “public-sector employees… , agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors.”

This is the most incremental of the proposals that we seriously considered including on this list. It aims to remedy the exclusion of certain groups and industries, such as domestic workers, agricultural workers, and gig workers, from labor organization protection.

The disadvantage to including this plank under the resolution’s floor is that it would allow the aff to strengthen the current labor law paradigm of voluntary firm-level bargaining.

The advantage to including it is a set of affs that hews closer to the politically incremental while still providing uniqueness for labor law disadvantages by focusing on areas where coverage is currently weak.

On balance, we would NOT recommend including this area in a list.

#### 8. NLRA REFORMS / PRO ACT

There is a [lot](#_Advocates_of_transformative) in this area; if the topic committee wanted to expand the topic and add some controversial items to the list, there is plenty of material in this area of the literature to draw on.

These reforms are not included in our preferred wording because they are philosophically misaligned with other items on the list. However, they would be at home in broader resolutional phrasings that invite more general labor law expansions.

#### 9. PUBLIC SECTOR UNIONS

There’s a [lot](#_Aff---Mech---Federal_Workers) in this area as well. We would generally advise against dipping into this well for topical mechanisms, since it is difficult to craft a mechanism that differentiates contestable / controversial / structural changes from incremental rollbacks of Trump’s assault on the public workforce.

### Ground---Organizing Questions

#### This topic aims to structure ground around several core organizing questions:

#### 1. Is what’s good for workers best for the rest?

Aff teams will argue that labor victories are a win-win. Fairly compensated workers spur demand and accelerate productivity growth through greater buy-in to the means of production. Better working conditions and fair wages grow the middle class; a strong middle class is necessary for democracy and characterized what many now consider in retrospect to have been the golden age of American capitalism.

Neg teams will argue that labor victories are a lose-lose. In a zero-sum market, rents extracted through labor blackmail must come at the expense of others. Increased labor costs are wrapped into increased production costs, which in turn are passed on to consumers. Capital that might have been invested in labor-saving and productivity-improving automation must instead be invested into wages. If you believe workers are getting a raw deal, you should be looking to maximize production efficiency and redistribute the results after the fact, not alter the terms of the American labor settlement.

#### 2. What is the appropriate unit of collective bargaining organization?

United States labor law is based on a voluntarist model of collective bargaining at the firm level:

- Voluntarist, meaning that labor law is extremely protective of workers’ rights to opt out of bargaining as a unit, and

- Firm- or enterprise-level, meaning that even collective bargaining occurs between workers and particular workplaces rather than restructuring an entire economy or sector.

This topic forces affs to disagree with one or both of these principles. They will argue that voluntarist labor law undermines collective bargaining because it is the textbook definition of a collective action problem, where any worker can privately benefit by crossing the picket line or not paying union dues. They will argue that firm-level negotiations create competitive penalties for firms that permit their workers to unionize, which encourages union-busting tactics. They will argue that firm-by-firm negotiations are a slog, create abundant veto points for capital, and pit individual workers and managers against each other instead of encouraging them to cooperate in the name of workplace fairness.

Neg teams can defend the principles of current labor law. They can argue that firms should compete with each other for workers, and that sectoral approaches impose uniformity that prevents employers from engaging in a race to the top. They can argue that the weakness of labor law outcomes results from insufficient procedural protection, and that a genuine, adequately protected right to voluntarist firm level bargaining results in the best outcomes for workers. They can argue that one-size-fits-all bargaining neglects important differences between firms within a sector.

#### 3. What is the appropriate scope for workplace democracy?

United States labor law currently operates based on a clear separation between issues appropriate for worker governance and issues more appropriately left to management discretion. The presumption of labor law is that workers are entitled to bargain over their wages and working conditions but are not entitled to weigh in on decisions about the broader trajectory of corporate decision-making. This view protects managerial autonomy and shareholder primacy but is at odds with a broader commitment to workplace democracy in which workers get a say over what is done with the fruits of their labor.

Aff teams will directly (e.g. via co-determination) or indirectly (by increasing labor bargaining power) increase worker control over corporate agenda-setting. Doing so will allow workers to change the business practices of their employers, for good or ill.

#### 4. Is labor law good for workers?

Aff teams will argue that labor law creates a demarcated safe space for collective bargaining and organization. Neg teams will argue that labor law is an empty promise that’s watered down and subverted in practice, pacifies insurrectionary labor politics, and constrains what would otherwise be a field of unconstrained struggle on which workers hold all the cards.

#### 5. Freedom for workers, or freedom from work?

Aff teams will argue that class power can be built around a common structural position within the relations of production. They will argue that work must be done no matter what, and that technologist appeals and appeals to care economies, voluntary networks, and mutual aid alike merely replicate the power relations of production in opaque ways that make it harder to secure fair compensation or worker power.

Neg teams will argue that we must pursue a post-work economy, or at least move in a post-work direction. Rather than worker power, neg teams will argue for policies like reduced working hours or a universal basic income. For a variety of different reasons, neg teams will argue that work itself is a prison and suggest that human potential should be limited from work altogether.

#### 6. Should we build political power around labor, or other categories?

Many labor unions have been [historically racist institutions](#_A_labor_topic). The first unions did not admit Black workers, and even those that did treated them as lower priority than white workers. Unions such as the AFL were also instrumental in pushing for immigration restrictions such as the Chinese Exclusion Act, on the grounds that immigrant workers would outcompete white US nationals for jobs.

Since Du Bois’ *Black Reconstruction*, which framed the end of slavery and Reconstruction as a general strike by Black workers, many have taken up a vision of workers’ emancipation as a tool for racial justice. In this vein, pro-labor white workers highlight the inclusiveness of unions (after their initial rejection of Black workers). However, other scholars critique this view, arguing that it neglects the subjugation of Black workers even within nominally inclusive unions and plays into historically exclusionary tropes of the liberated white working class. Some of these ideas are already frequently raised in debates under the umbrella of capitalism Ks of affs focused on anti-blackness, and many popular authors such as Tiffany King expressly critique the frame of labor when applied to Blackness.

Similar debates occur with respect to other categories. How can worker liberation account for disability, when disability is often constructed as economic disutility? How can labor politics address Indigenous claims to territorial sovereignty that may conflict with industrial development or resource extraction? Should we coalesce worker identity along national, or international lines?

### Ground---Aff Themes

#### 1. ECONOMIC DEMOCRACY AND PROSPERITY

Affirmatives will argue that labor reforms create a more democratic economy that benefits all Americans. By empowering workers through sectoral bargaining, co-determination, or ending at-will employment, the affirmative strengthens the [foundation of democratic capitalism](#_Aff---Adv---Democracy). This approach contends that labor empowerment creates virtuous economic cycles: well-paid workers become consumers who create demand, fostering business growth and job creation. The affirmative can frame its advocacy through a middle-class prosperity lens, arguing that labor reform rebalances power relations to create sustainable, shared growth.

The fundamental justification for many labor reforms is that workplaces should be democratic, just as our political system is democratic. Affirmative teams can argue that co-determination, secondary strikes, and collective bargaining rights all serve a deeper democratic principle: those affected by decisions should have a voice in making them. This theme positions workplace authoritarianism as anomalous in a democratic society and presents labor reform as a necessary extension of democratic values into economic life. This framing also enables affs to connect workplace democracy to political democracy, arguing that corporate authoritarianism undermines democratic citizenship.

#### 2. INEQUALITY AND ECONOMIC JUSTICE

Labor reform offers a market-based solution to [growing economic inequality](#_Sectoral_bargaining_is). Affirmatives can argue that falling unionization rates directly correlate with rising inequality and that stronger labor law creates better distribution of economic gains without requiring direct redistribution through taxation. By strengthening worker bargaining power, reforms like sectoral bargaining and secondary strikes address inequality at its source rather than treating symptoms. This approach enables affirmatives to claim economic justice advantages while avoiding socialism disadvantages.

#### 3. LABOR LAW AS CIVIL RIGHTS

Affirmatives can frame labor reform as completing [unfinished civil rights business](#_At_will_employment) by addressing the historical exclusion of vulnerable workers. By eliminating right-to-work laws or expanding NLRA protections to excluded workers, the affirmative addresses the racist and xenophobic origins of American labor law that deliberately excluded domestic workers, agricultural laborers, and others. This framing positions labor reform as anti-racist action that brings legal protections to those who have been systematically denied them, allowing affirmatives to claim intersectional advantages while maintaining economic focus.

#### 4. AUTOMATION

Affirmatives can argue that strengthening labor law is increasingly [urgent in an era of rapid technological change and automation](#_Aff---Adv---Automation). As artificial intelligence and robotics transform industries, workers face growing displacement and bargaining disadvantages that exacerbate inequality. Labor reforms like sectoral bargaining and co-determination create institutional mechanisms for workers to negotiate the implementation of new technologies, ensuring that productivity gains from automation are shared rather than captured entirely by capital.

Without robust labor protections, automation functions as a one-sided power tool that enables employers to replace workers or threaten replacement during negotiations. This dynamic accelerates wage stagnation and wealth concentration, fueling economic insecurity and populist backlash. By contrast, countries with stronger labor institutions like Germany have managed technological transitions with less disruption and more equitable outcomes.

The affirmative can position labor law reform as creating a framework for "technological democracy" where workers help shape how automation is deployed rather than merely reacting to its consequences. This approach addresses the root causes of technology-driven inequality and channels technological change toward broad prosperity rather than narrow enrichment. It also defuses potentially destructive populist movements by ensuring economic transitions maintain social cohesion rather than exacerbating divisions between winners and losers in the automated economy.

#### 5. INTERNATIONAL COMPETITIVENESS

Rather than accepting the negative's economic competitiveness arguments, affirmatives can flip this frame by arguing that strong labor protections [actually enhance American competitiveness](#_Sectoral_bargaining_is_1). High-road labor policies like those in Germany and Scandinavia create productive, committed workforces with reduced turnover and higher skill levels. By adopting a stakeholder model through co-determination or sectoral bargaining, American firms can focus on long-term growth rather than short-term financialization, ultimately producing more sustainable competitive advantage in global markets. This approach enables affirmatives to claim both economic and worker welfare advantages.

#### 6. RESTORING ECONOMIC FEDERALISM

Affirmatives can focus on [removing federal preemption barriers](#_A_variety_of) that prevent states from implementing stronger labor protections. This approach targets the artificial nationalizing effect of NLRA preemption while preserving federalism values of state experimentation. Affs can argue that removing these barriers would create laboratories of democracy in labor policy while respecting local economic conditions and preferences. This framing allows affirmatives to claim federalism advantages and avoid defensive states counterplan ground while still advancing worker protections.

### Ground---Neg Themes

#### 1. COMPETITIVENESS DA.

This [disadvantage](#_Union_power_hurts) targets the fundamental shift away from voluntarist firm-level collective bargaining that unites all of our proposed mechanisms.

Neg teams will argue that this structural overhaul would significantly reduce economic flexibility and dynamism. By limiting employers' ability to individually determine wages, working conditions, and employment relationships, these reforms would create rigid labor markets that cannot adapt to changing economic conditions, technological disruption, or global competition.

Critics argue that sectoral bargaining and secondary strikes would force employers to accept industry-wide standards regardless of individual productivity or profitability. Codetermination would subordinate business decisions to non-market considerations. Abolishing right-to-work and at-will employment would remove crucial flexibility mechanisms that allow firms to adjust to market fluctuations. Collectively, these changes would create what opponents characterize as European-style labor market rigidities in an American context, potentially driving capital flight, reducing investment, slowing innovation, and ultimately harming both economic growth and job creation.

#### 2. CPs TO REPAIR THE NLRA.

A variety of the most prevalent complaints about the current NLRA structure center on inadequate enforcement resources and inadequate remedies for labor law violation. These criticisms are content with the employee-employer structure of current labor law but point out that companies are insufficiently deterred from union-busting activities. Their focus is accordingly on [strengthening union busting penalties](#_The_fundamental_framework). Such approaches have a strong case for increasing participation in current labor bargaining frameworks and avoid disadvantages to more systemic overhauls like sectoral bargaining.

#### 3. STATES CP.

If we choose to allow a states CP on the topic, this would be a strong generic against a narrow subset of cases and quite a weak generic against most core-of-the-topic cases. The reason is that although states have wide latitude for action in areas not addressed directly by federal labor laws, the [case for preemption](#_Preemption_is_quite) is quite strong in areas of overlap. As a result, the states CP is likely to be a powerful generic against NLRB scope expansion cases and small job guarantee cases while remaining quite weak against other areas.

Nevertheless, we would not recommend making the states CP compete with the topic as a whole. The problem is that preemption stems from the NLRA, which is [at risk of being invalidated](#_Here_is_evidence) on Major Questions grounds by the new conservative majority. NLRA invalidation would eliminate most federal preemption of state labor law, which risks radically unsettling the topic in the middle of the season. Since political considerations are sufficiently represented by the electoral aspects of the topic and the changes required by the topic are quite significant, there is no need to include states and politics as a fallback generic.

If representing a debate about federalism is important, this can be done on the aff since cases about the NLRA will be forced to take federal action to limit preemption in order to unblock state labor protection activity. There are [strong advocates](#_One_approach_would) for such affirmatives.

#### 4. AREA NEG.

You can see a preview of some of the area neg throughout the evidence appendix, but it’s worth noting that all of the proposed actions involve radically overhauling the structure of American labor law. Moreover, the proposed wording is limited enough that this is actually a viable approach to neg strategizing. These DAs will be net benefits to CPs that repair and enforce the NLRA framework.

#### 5. MAJOR QUESTIONS DA.

The [impending invalidation of the NLRB on major questions grounds](#_The_NLRA_will) and the aff’s likely desire to insulate themselves from such judicial rollbacks grants the neg access to a strong precedent disadvantage (depending on how the aff chooses to describe their agent). This disadvantage would argue that the major questions doctrine is good, and that protecting labor law from judicial rollback would require watering down the doctrine in a way that is undesirable.

#### 6. MOVEMENTS DA.

[Labor law must be destroyed so that it may be reborn](#_Labor_law_needs). Labor organizing suffers a chicken-and-egg problem: meaningful legal protections cannot be achieved without building labor power, but labor power cannot be built without meaningful legal protections. The movements DA argues that those who advocate immediate labor reforms are putting the cart before the horse, guaranteeing weak protections that lack durable public support and trading off with genuine popular mobilization.

A less radical [subcomponent](#_Labor_movements_should) of this argument focuses on federalism, pointing out that a collapse in federal labor law can actually enable the labor movement to secure a diversity of protections at the state level and operationalize the benefits of laboratories for democracy. While this argument obviously links most to resolutional wordings that require federal action, the ability to impact *experimentation* rather than division of power between levels of government enables the neg to object to uniform state protections as well.

#### 7. KRITIK OF LABOR ORGANIZING.

[Kritiks](#_Neg---K---Militant_Unionism) of labor organizing can challenge its use as a political vehicle from the left, arguing that traditional union structures reproduce rather than challenge capitalist relations of production. While purporting to represent worker interests, unions frequently become bureaucratized institutions that discipline their members into accepting compromises with management.

The critique targets the legalistic framework of labor relations embedded in reforms like the proposed mechanisms. By channeling worker militancy into state-sanctioned procedures and negotiations, these reforms domesticate genuine resistance and ensure that challenges to capitalism remain within boundaries acceptable to capital.

A more radical strand of this critique draws on autonomist Marxist traditions to argue that official labor organizations tend to privilege the interests of predominantly white, male industrial workers while marginalizing women, racial minorities, and service workers. These critics point to historical examples where unions [defended racial segregation](#_A_labor_topic) in workplaces and excluded immigrant labor.

Instead of strengthening existing union structures or expanding their reach, this perspective advocates for autonomous worker organizing outside of and often against formal union bureaucracies – including wildcat strikes, workplace occupations, and community-based solidarity networks that reject the mediation of the state in labor disputes.

#### 8. KRITIK OF WORK.

This critique fundamentally questions the centrality of work to social life and political imagination. Drawing on anti-work theorists from anarchist, Marxist, and feminist traditions, it challenges the assumption that labor relations should be reformed rather than abolished altogether.

The critique contends that the labor topic's focus on organizing, bargaining, and protecting employment reinscribes rather than challenges the wage relation itself. By seeking to make work more democratic or secure, labor reforms ultimately strengthen rather than weaken capitalism's hold over human life and creativity.

Feminist critics particularly emphasize how traditional labor organizing and protections have historically privileged waged labor while ignoring or devaluing unwaged reproductive labor primarily performed by women. Environmental critics highlight how a work-centered society perpetuates [unsustainable production and consumption](#_Neg---K---Degrowth) regardless of who controls the workplace. [Disability](#_Neg---K---Disability) critics highlight the harmful equation of work with productivity.

The alternative is not simply better labor conditions but a radical reduction in necessary labor time through automation, universal basic income, or dramatic redistribution of existing work. This perspective challenges debaters to imagine forms of social reproduction and value creation beyond capitalist employment relations altogether.

### Novice Accessibility

Labor issues directly connect to students' lived experiences, making this topic accessible even to beginners. Many undergraduates work part-time jobs or have family members who work, giving them intuitive understanding of workplace dynamics, fair treatment, and compensation. Unlike abstract policy topics, labor debates address tangible questions that novices can grasp without extensive background knowledge: Should workers have more say in workplace decisions? Should it be harder to fire employees? These questions require no specialized vocabulary to understand and engage with meaningfully. This connection between debate and everyday life helps novices see the relevance of their arguments and builds investment in the activity. As they progress, they can layer on more sophisticated economic and political analysis while maintaining this accessible grounding.

The labor topic offers clear moral frameworks that novices can easily apply. Economic justice arguments about fair wages and working conditions provide straightforward ethical foundations for arguments on both sides. Similarly, business competitiveness arguments present clear opposing values that novices can defend. This balance of accessible advocacy positions means first-year debaters won't get lost in technical policy details before they've mastered basic argumentation skills. Instead, they can develop their abilities while discussing matters they already have opinions about.

### Answers to Answers

#### 1. We just debated the economy.

Despite appearances, this is a topic about *distributional politics* – not an “economy topic.” Recall that in debates about the antitrust topic’s largest cases, teams very rarely talked about the economy as such. Instead, aff teams talked about the distributional and technological consequences of concentrated corporate power, while neg teams talked about the importance of large national champion firms for international competitiveness. Similarly, arguments on a modern labor topic should focus more on the economy’s structural design – what is the point of an economy, and whose interests should an economy serve – than on whether ‘the economy’ is ‘high’ or ‘low.’

The forthcoming recession will overshadow any chosen topic. It will shape the arguments we cut and loom large in debaters’ and coaches’ lived conditions. The political and economic instability likely to dominate the next few years of our lives is a political inflection point. This topic sets up discussions about *how* we decline and recover, which are the best discussions to have in such a context.

#### 2. All neg DAs are the econ DA in a costume. How is the neg supposed to go for that? Have you read the news?

You are thinking of the business confidence DA. Such a DA is in fact currently quite bad. As suggested above, debates about the effect of labor power on the speed and configuration of labor automation and corporate profit margins will offer more nuance.

Neg teams will, of course, be welcome to unwind the Trump tariffs and attempt to go for DAs with fast time frames about perception and GDP. Such an approach may be effective in setting up a time frame argument against affirmatives that choose to focus on more structural harms.

#### 3. High schoolers just debated the job guarantee.

a. The resolution’s presentation of the job guarantee distorted debates on the high school topic in ways that mitigate the impact of overlap. First, the T argument that fiscal redistribution requires taxation had strong evidence to support it. Second, the requirement to defeat states forced teams to choose a debt-funded job guarantee anyway, spurring a year of debates that focused more on inflation and Modern Monetary Theory than on job guarantees as a policy category.

b. 17-year-olds who have mostly not taken macroeconomics classes are worse at debating the economy than undergraduates. This manifests in greater argument sophistication and innovation to a degree that argument recycling will not be a viable strategy. You’d never know from last year’s Carbon Tax debates even though Carbon Dividend was a popular high school UBI affirmative.

c. The job guarantee was only a small part of the fiscal redistribution topic. Most teams chose to read small social security reform cases because they did not want to rock the economic boat. And, it’d only be a small part of this topic, since the same strategic dynamic would reward exploring other aspects of this topic as well.

d. It is good for topics to include extremely radical policy actions. The practical upshot of this inclusion is that you can choose for your K debates to be about the value of a labor analytic instead of about the value of labor law incrementalism vs radicalism. We would guess that most people find the former debate to be more interesting than the latter.

e. Even if that’s wrong, this objection is a reason to exclude job guarantee from the list, not a reason to avoid debating labor law.

#### 4. I want a foreign policy topic.

a. There’s a good chance that you don’t actually like foreign policy topics; instead, you like military topics that solve and cause war impacts between big countries. Your nostalgia for the latter should not drive you to support the former.

Let’s strip out the *military* topics and take a look at the remaining ‘foreign policy’ topics from the last 20 years. If you weren’t around for these topics personally, ask someone who was how they enjoyed their experience:

- 2019-2020 – Resolved: The United States Federal Government should establish a national space policy substantially increasing its international space cooperation with the People’s Republic of China and/or the Russian Federation in one or more of the following areas: arms control of space weapons; exchange and management of space situational awareness information; joint human spaceflight for deep space exploration; planetary defense; space traffic management; space-based solar power.

- 2011-2012 – Resolved: The United States Federal Government should substantially increase its democracy assistance for one or more of the following: Bahrain, Egypt, Libya, Syria, Tunisia, Yemen.

- 2007-2008 – Resolved: that the United States Federal Government should increase its constructive engagement with the government of one or more of: Afghanistan, Iran, Lebanon, the Palestinian Authority, and Syria, and it should include offering them a security guarantee(s) and/or a substantial increase in foreign assistance.

- 2005-2006 – The United States Federal government should substantially increase diplomatic and economic pressure on the People’s Republic of China in one or more of the following areas: trade, human rights, weapons nonproliferation, Taiwan.

And in high school (I think there are more, but this is as far back as Wikipedia goes):

- 2016-2017 – Resolved: The United States federal government should substantially increase its economic and/or diplomatic engagement with the People's Republic of China.

- 2013-2014 – Resolved: The United States federal government should substantially increase its economic engagement toward Cuba, Mexico or Venezuela.

A quick skim will remind you of two important details.

First, half of these were awful:

- Space was a boring slog of bad assurance debates matched up against cases that solved nothing of consequence.

- Democracy assistance was similarly compromised by US impotence in the face of topic-relevant harms, but DAs were similarly compromised by link uniqueness problems. The Orientalism K ruled the roost.

- Very little – as it turned out then and as we are learning now – can be accomplished by diplomatically and economically pressuring China.

- Cuba engagement debates were good, but engagement with Mexico was already high and there was no topical plan that Venezuela would accept. This was a neoliberalism topic with no DAs.

- China engagement was an enormous topic; the neg had to rely strongly on general themes of ‘alliance balancing.’ This went okay in the halcyon days of the Asia Pivot, but this topic didn’t have much else going for it – a pretty big problem in 2025.

Obviously, none of that is a reason to reject a foreign policy topic on its face – the next one could be good! But it is a reminder to exercise caution about viewing ‘foreign policy’ topics with rose-tinted glasses.

Second, these topics require the existence of a basically stable international order and American foreign policy apparatus in order to function. The Japan Proliferation DA appeared in almost every space topic 1NC (a fact that anyone who debated or coached the more recent nuclear weapons topic hopefully recognizes as laughable, and strong evidence that debate will convince itself anything is a real argument if doing so is necessary to fill a 1NC). This is understandable. Fast war impacts are fun and easy to research. But news flash: [‘shock’](https://www.liberalcurrents.com/trump-alarmists-were-right-we-should-say-so/) [links](https://www.businessinsider.com/trump-tariffs-economists-academics-trade-policy-letter-2025-4) [are](https://www.economist.com/leaders/2025/04/10/trumps-incoherent-trade-policy-will-do-lasting-damage) [non-unique](https://manhattan.institute/article/trumps-tariffs-are-incoherent-and-destructive), [and](https://www.ft.com/content/451f1f3d-2f09-4714-a43a-608718799455) [the](https://cpsblog.isr.umich.edu/?p=3442) [liberal](https://www.washingtonpost.com/opinions/2025/03/26/global-liberal-order-democracy-threat/) [order](https://www.bbc.com/news/articles/c2er9j83x0zo) [is](https://carnegieendowment.org/emissary/2025/02/trump-executive-order-treaties-organizations?lang=en) [likely](https://foreignpolicy.com/2025/04/21/trump-china-trade-war-security/) [not](https://moderndiplomacy.eu/2025/03/07/end-of-liberal-international-order/) [long](https://nationalinterest.org/feature/world-to-come-the-return-of-trump-and-the-end-of-the-old-order) [for](https://responsiblestatecraft.org/biden-foreign-policy-failures/) [this](https://jacobin.com/2025/03/what-comes-after-globalization) [world](https://www.americanprogress.org/article/trump-forfeits-u-s-global-leadership-at-americans-expense-and-to-chinas-gain/). Our days of credibly going for the Japan Prolif DA against ‘send a letter to China’ affs are over. It is not pedagogically valuable to pretend that nothing has changed.

b. If you don’t buy any of that, you probably think that predictions of Trump collapsing the international order are alarmist or overblown. If this is your position, you should want to debate foreign policy next year, not this year. We are in the early days of the administration, when alarmists can make their case most strongly and ‘realists’ have the thinnest record to rely on to demonstrate that concerns about sustainability are overblown.

Since labor law is a legal topic, choosing labor law reform this year permits a foreign policy topic next year. In two years, the liberal order will have proven itself resilient to disruption and you’ll have Trumper answers for days.

#### 5. I don’t want a legal topic.

a. Non-unique. Since our last two years have been foreign and domestic, choosing a non-legal topic this year will force us to have one next year. Unless you’re a senior, you’re not getting out of this.

b. Labor is a legal topic that captures the strengths of other legal topics while avoiding their weaknesses:

- Legalization provoked so many debates about reform vs. pessimism in part because laws about public morality weren’t a great anchor for non-reformist reforms and the many disparate areas meant spending time on tying together any alternative arguments was difficult. Labor law avoids this because it has a direct connection to political outcomes while still being interesting to engage as a body of *law* rather than merely a collection of policies.

- "Courts"-type topics presume negative ground related to court capital, legitimacy, and internal politics that is tough to translate into our current legal environment. We need to design legal topics that don't assume we can translate 90s/2000s strategies about the courts into the present.

- Antitrust was an experiment in branching out to a new area that had some strengths and weaknesses but proves we can have a strong set of debates about macroeconomics and law. Tying debates about economic allocation to labor- rather than firm-level coordination is a more grounded way to engage in a similar set of controversies.

## Definitions

### United States

#### The term “United States” refers to the federal government of the United States

NHIB 97, New Hampshire International Banking Act, TITLE XXXV: BANKS AND BANKING; LOAN ASSOCIATIONS; CREDIT UNIONS, CHAPTER 384-F, Section 384-F:2 – Definitions, http://www.gencourt.state.nh.us/rsa/html/XXXV/384-F/384-F-2.htm

XXII. "United States,'' when used in a geographical sense, means the several states, the District of Columbia, Puerto Rico, Guam, American Samoa, the American Virgin Islands, the Trust Territory of the Pacific Islands, and any other territory of the United States; and, when used in a political sense, means the federal government of the United States.

#### The United States means the nation, the territory or the states collectively

Harlan F. Stone 45, Chief Justice of the US Supreme Court, writing the court’s opinion in HOOVEN & ALLISON CO. v. EVATT, TAX COMMISSIONER OF OHIO, Argued November 7, 8, 1944, Decided April 9, 1945, http://scholar.google.ca/scholar\_case?case=15188855763817953191&q=324+us+652&hl=en&as\_sdt=2,5

The term "United States" may be used in any one of several senses. It may be merely the name of a sovereign occupying the position analogous to that of other sovereigns in the family of nations. It may designate the territory over which the sovereignty of the United States extends, 672\*672 or it may be the collective name of the states which are united by and under the Constitution.[6]

#### The United States has multiple meanings---but with respect to the provenance of law, it includes states.

Paul Andrew Mitchell 1, B.A., M.S., Counselor at Law, Federal Witness, Private Attorney General, “The Three United States,” in The Federal Zone: Cracking the Code of Internal Revenue, Supreme Law Library, Electronic Eleventh Edition, http://www.supremelaw.org/fedzone11/docs/chapter4.doc

In the previous chapter, a handy matrix was developed to organize the key terms which define the concepts of status and jurisdiction as they apply to federal income taxation. In particular, an alien is any individual who is not a citizen of the "United States\*\*". The term "citizen" has a specific legal meaning in the Code of Federal Regulations ("CFR") which promulgate the Internal Revenue Code ("IRC"):

Every person born or naturalized in the United States\*\* and subject to its jurisdiction is a citizen.

[26 CFR 1.1-1(c), emphasis added]

What, then, is meant by the term "United States" and what is meant by the phrase "its jurisdiction"? In this regulation, is the term "United States" a singular phrase, a plural phrase, or is it both?

The astute reader has already noticed that an important clue is given by regulations which utilize the phrase "its jurisdiction". The term "United States" in this regulation must be a singular phrase, otherwise the regulation would need to utilize the phrase "their jurisdiction" or "their jurisdictions" to be grammatically correct.

As early as the year 1820, the U.S. Supreme Court was beginning to recognize that the term "United States" could designate either the whole, or a particular portion, of the American empire. In a case which is valuable, not only for its relevance to federal taxes, but also for its terse and discrete logic, Chief Justice Marshall exercised his characteristic brilliance in the following passage:

The power, then, to lay and collect duties, imposts, and excises, may be exercised, and must be exercised throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of states and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States\* than Maryland or Pennsylvania ....

[Loughborough v. Blake, 15 U.S. (5 Wheat.) 317]

[5 L.Ed. 98 (1820), emphasis added]

By 1945, the year of the first nuclear war on planet Earth, the U.S. Supreme Court had come to dispute Marshall's singular definition, but most people were too distracted to notice. The high Court confirmed that the term "United States" can and does mean three completely different things, depending on the context:

The term "United States" may be used in any one of several senses. [1] It may be merely the name of a sovereign\* occupying the position analogous to that of other sovereigns in the family of nations. [2] It may designate the territory over which the sovereignty of the United States\*\* extends, or [3] it may be the collective name of the states\*\*\* which are united by and under the Constitution.

[Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945)]

[brackets, numbers and emphasis added]

This same Court authority is cited by Black's Law Dictionary, Sixth Edition, in its definition of "United States":

United States. This term has several meanings. [1] It may be merely the name of a sovereign occupying the position analogous to that of other sovereigns in family of nations, [2] it may designate territory over which sovereignty of United States extends, or [3] it may be collective name of the states which are united by and under the Constitution. Hooven & Allison Co. v. Evatt, U.S. Ohio, 324 U.S. 652, 65 S.Ct. 870, 880, 89 L.Ed. 1252.

[brackets, numbers and emphasis added]

In the first sense, the term "United States\*" can refer to the nation, or the American empire, as Justice Marshall called it. The "United States\*" is one member of the United Nations. When you are traveling overseas, you would go to the U.S.\* embassy for help with passports and the like. In this instance, you would come under the jurisdiction of the President, through his agents in the U.S.\* State Department, where "U.S.\*" refers to the sovereign nation. The Informer summarizes Citizenship in this "United States\*" as follows:

1. I am a Citizen of the United States\* like you are a Citizen of China. Here you have defined yourself as a National from a Nation with regard to another Nation. It is perfectly OK to call yourself a "Citizen of the United States\*." This is what everybody thinks the tax statutes are inferring. But notice the capital "C" in Citizen and where it is placed. Please go back to basic English.

[Which One Are You?, page 11]

[emphasis added]

Secondly, the term "United States\*\*" can also refer to "the federal zone", which is a separate nation-state over which the Congress has exclusive legislative jurisdiction. (See Appendix Y for a brief history describing how this second meaning evolved.) In this sense, the term "United States\*\*" is a singular phrase. It would be proper, for example, to say, "The United States\*\* is ..." or "Its jurisdiction is ..." and so on. The Informer describes citizenship in this United States\*\* as follows:

2. I am a United States\*\* citizen. Here you have defined yourself as a person residing in the District of Columbia, one of its Territories, or Federal enclaves (area within a Union State) or living abroad, which could be in one of the States of the Union or a foreign country. Therefore you are possessed by the entity United States\*\* (Congress) because citizen is small case. Again go back to basic english [sic]. This is the "United States\*\*" the tax statutes are referring to. Unless stated otherwise, such as 26 USC 6103(b)(5).

[Which One Are You?, page 11]

[emphasis added]

Thirdly, the term "United States\*\*\*" can refer to the 50 sovereign States which are united by and under the Constitution for the United States of America. In this third sense, the term "United States\*\*\*" does not include the federal zone, because the Congress does not have exclusive legislative authority over any of the 50 sovereign States of the Union. In this sense, the term "United States\*\*\*" is a plural, collective term. It would be proper therefore to say, "These United States\*\*\*" or "The United States\*\*\* are ..." and so on. The Informer completes the trio by describing Citizenship in these "United States\*\*\*" as follows:

#### It means the federal government, a state, or DC.

IRS 75, Internal Revenue Service, “Technical Explanation of the Convention Between the United States of America and the Republic of Iceland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital,” 5/7/95, PDF

The term "United States" means the United States of America. When used in a geographical sense, the term means the states of the United States and the District of Columbia. Thus, the Convention does not apply to possessions of the United States or the Commonwealth of Puerto Rico. The term "Iceland" means the Republic of Iceland.

When used in a geographical sense, the terms "United States" and "Iceland" also include their respective territorial seas and continental shelves, generally in accordance with the principles of section 638 of the Code.

The term "one of the Contracting States" or "the other Contracting State" is defined to mean the United States or Iceland as the context requires.

The term "person" is defined as including an individual, a partnership, a corporation, an estate, a trust or any body of persons.

#### Prefer our evidence---it’s a holistic assessment, whereas theirs cherry-picks constitutional interpretation.

Timothy Tymkovich 21, Senior Circuit Judge, US Court of Appeals for the Tenth Circuit, “Fitisemanu v. United States, 1 F.4th 862,’ , 6/15/21, Lexis

D. The majority erroneously relies on congressional actions 50 years after adoption of the Citizenship Clause to conclude that it does not apply to American Samoa.

Though I regard the Citizenship Clause as unambiguous, the majority doesn't. In characterizing the clause as ambiguous, the majority never considers what "in the United States" means in the Citizenship Clause, choosing instead to find ambiguity based on other uses of "United States" in other constitutional provisions enacted at other times. In my view, this approach mixes apples and oranges, for the term "United States" is used in the Constitution sometimes as shorthand for

• the aggregation of states (U.S. Const. Preamble; amend. XI),

• the entity created by the states (art. I, § 8, cls. 16, 18; art. III, § 1; art. VI, cl. 2), and

• a place (amend. XIV, § 1; art. II, § 1, cl. 5; art. I, § 8, cl. 1).

See Part III(B)(7), above. The Citizenship Clause unambiguously uses the term "in the United States" to refer to a place. So we can parse the Citizenship Clause's meaning only by considering the use of the term "United States" when the clause was adopted and ratified.

But my esteemed colleagues do something different: They decline to consider the public understanding of "in the United [\*898] States" or the intent of the drafters when extending birthright citizenship [\*\*73] to everyone born "in the United States." Indeed, no one in the case—not the parties, the intervenors, or my colleagues—has pointed to a single contemporary judicial opinion, dictionary, map, census, or congressional statement that treated U.S. territories as outside the United States from 1866 to 1868.

#### It’s the ‘best reading.’

Guy C. Charlton & Tim Fadgen 22, Charlton is an Associate Professor of Law at University of New England (Australia) and Adjunct Professor at AUT (New Zealand) and Curtin University (Australia); Fadgen is a Senior Lecturer in Public Policy at University of Auckland. He holds a PhD (University of Auckland) and J.D. (University of Maine), “Case Note: Fitisemanu v. United States: U.S. Citizenship in American Sāmoa and the Insular Cases,” 39 UCLA Pac. Basin L.J. 25, Spring 2022, Lexis

Since the district court concluded that the Fourteenth Amendment constitutionalized the English common-law rule for birthright, the remaining question left for the court to consider was whether American Sāmoa is located "in the United States" for purposes of the Citizenship clause. The Plaintiffs argued that the phrase includes both States and Territories. The United States and American Sāmoan Governments argued that "[t]he best reading of the Citizenship Clause is that U.S. territories are not 'in the United States' within the meaning of the Clause because 'in the United States' means in the 50 States and the District of Columbia." 22 They supported this argument based on the text of the Tenth Amendment, and the language of Article IV, Section 3, which draws a general distinction between "the United States' . . . and lands belonging to the United States". 23They also cited the difference in the language between the 13th and 14th amendments. 24

### Labor Law vs Employment Law

#### Using “labor” in the topic may exclude rights for individuals, focusing on collective rights.

Daniel J. Galvin 19. From Labor Law to Employment Law: The Changing Politics of Workers' Rights. Studies in American Political Development, 33(1), 50-86. https://doi.org/10.1017/S0898588X19000038

18. Although the terms “labor law” and “employment law” are sometimes used interchangeably, legal scholars draw an important distinction between the two: whereas labor law focuses on collective bargaining, unionization, and other issues that may arise between groups of workers and their employer, employment law covers all other laws, regulations, and policies regarding individual workers’ rights and the relationship between the employer and the individual employee. By establishing minimum workplace standards (like the minimum wage, enforced through regulation) and individual rights and protections (like workers’ privacy rights, which may be vindicated in court), employment law uses the alternative delivery mechanisms of regulation and litigation to achieve many of the same objectives labor law seeks through collective bargaining: namely, boosting wages and regulating the terms and conditions of employment.

#### Individual rights and protections are employment law

Daniel J. Galvin 19. From Labor Law to Employment Law: The Changing Politics of Workers' Rights. Studies in American Political Development, 33(1), 50-86. https://doi.org/10.1017/S0898588X19000038

Scholars have examined the effects unions once had in boosting wages for both union and non-union workers alike and in elevating the broader “moral economy,” including putting upward pressure on “norms of fairness regarding pay, benefits, and worker treatment,” and have ably demonstrated that as unions have declined, these broader effects have dis- appeared as well.104 In contrast to those more ephem- eral effects, employment laws represent a far more durable (although certainly not permanent) legacy. Notwithstanding their downsides and trade-offs, dis- cussed further below, enshrining legal rights and pro- tections for all employees in public statutes appears to constitute a major institutional achievement indeed.105

#### Labor law excludes interactions between individual employees and the govt

Daniel J. Galvin 19. From Labor Law to Employment Law: The Changing Politics of Workers' Rights. Studies in American Political Development, 33(1), 50-86. https://doi.org/10.1017/S0898588X19000038

Labor law and employment law are, in many ways, dichotomous institutions. The former is designed to foster workers’ collective action and collaboration and to promote the idea of “collective rights,” while the latter directs attention to individual experiences, private lawsuits, and independent, case-by-case inter- actions between individual employees and regulatory agencies. In fact, the two legal regimes have operated as oppositional alternatives throughout American history. In Karen Orren’s canonical Belated Feudalism, for example, it was the Supreme Court’s antiquated interpretation of individual rights that protected the feudal common law of master-and-servant for almost 150 years while frustrating workers’ efforts at collec- tive action and self-organization.133 Only after a long “succession of assaults” by labor unions were those barriers finally broken down and the liberty of contract doctrine supplanted by the New Deal’s col- lective bargaining regime.134 Abrasions between individual-rights and collective-rights systems likewise underpin Paul Frymer’s investigation, discussed above, of how the courts’ interpretation of civil rights laws, especially Title VII of the Civil Rights Act, had an enervating effect on unions, the labor movement, and the New Deal coalition.135

### Labor Rights

#### Labor rights def

DOL. “What are workers’ rights?” International Labor Affairs Bureau, Department of Labor, https://www.dol.gov/agencies/ilab/our-work/workers-rights#:~:text=rights,respect%20and%20promote%2C%20which%20are

There is no single definition or definitive list of workers' rights. The International Labor Organization (ILO) identifies what it calls "fundamental principles and rights at work" that all ILO Members have an obligation to respect and promote, which are:

* freedom of association and the effective recognition of the right to collective bargaining;
* elimination of all forms of forced or compulsory labor;
* effective abolition of child labor;
* elimination of discrimination in respect of employment and occupation; and
* a safe and healthy working environment.

The ILO has adopted – and supervises the application of – international labor conventions in each of these areas. Other important ILO standards deal with conditions of work, including wages and hours of work, but these standards are not considered "fundamental" or "core" conventions.

United States trade law adds “acceptable conditions of work” with respect to minimum wages, hours of work, and occupational safety and health to that list, calling them "internationally recognized labor rights."

Before the Bipartisan Trade Deal of May 10, 2007, U.S. trade agreements did not include non-discrimination on the list of "internationally recognized labor rights" covered by agreements' labor chapters. U.S. trade preference programs still omit that fundamental right from their list.

#### Employees rights includes collective bargaining

NLRA. 29 U.S. Code § 157 “Right of employees as to organization, collective bargaining, etc.” (July 5, 1935, ch. 372, § 7, 49 Stat. 452; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 140.) https://www.law.cornell.edu/uscode/text/29/157

 Sec. 7. [§ 157.] Employees shall have 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

#### “Labor rights” includes health and safety.

ILO 23. “Labour Rights are Human Rights for all Workers,” International Labor Organization, July 13, 2023, https://www.ilo.org/resource/article/labour-rights-are-human-rights-all-workers

Labour rights are human rights. They protect against unjust and hazardous conditions of work that harm not only the workers, but their families, employers and members of local communities.

#### “Right-to-work” internationally is free choice of employment, equal pay, and unionization

UDHR. Article 23, Universal Declaration of Human Rights, United Nations, https://www.un.org/en/about-us/universal-declaration-of-human-rights.

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

### Labor Standards

#### From various rights to working conditions

Gary Burtless 01. “Workers’ Rights: Labor standards and global trade,” Brookings, September 01, 2001. https://www.brookings.edu/articles/workers-rights-labor-standards-and-global-trade/

Many proponents of labor standards would expand the core list of ILO protections to cover workplace safety, working conditions, and wages. The U.S. Trade Act of 1974 defines “internationally recognized worker rights” to include “acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.” The University of Michigan, for example, obliges producers of goods bearing its insignia to respect the core ILO standards and also requires them to pay minimum wages and to offer a “safe and healthy working environment.”

The labor standards that might be covered by a trade agreement fall along a continuum from those that focus on basic human rights to those that stress working conditions and pay. On the whole, the case for the former is more persuasive. Insisting that other nations respect workers’ right of free association reflects our moral view that this right is fundamental to human dignity. Workers may also have a “right” to a safe and healthy workplace, but that right comes at some cost to productive efficiency. Insisting that other nations adopt American standards for a safe and healthy workplace means that they must also adopt our view of the appropriate trade-off between health and safety, on the one hand, and productive efficiency, on the other.

#### Fair Labor Standards Act covers individual standards such as min wage

DOL. Department of Labor, Wage and Hour Division, “Wages and the Fair Labor Standards Act,” https://www.dol.gov/agencies/whd/flsa

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments. Covered nonexempt workers are entitled to a minimum wage of not less than $7.25 per hour effective July 24, 2009. Overtime pay at a rate not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek.

### Labor Rights & Standards

#### Together, rights and standard provide unionization, right-to-work (the international law version), safety, non-discrimination, and conditions of employment

Lance Compa 93. “Labor Rights and Labor Standards in International Trade” https://ecommons.cornell.edu/items/3fe9336c-2479-4706-822f-8f053eacd1f3

International and regional human rights charters are one source of international labor rights and standards. Conventions and recommendations of the International Labor Organization are another. There are also common labor laws and practices among democratic countries. Together, these sources shape a consensus on general principles, if not always on application, of basic labor rights and standards. 1 They include:

* the right of association, and the conjoined rights to form trade unions and bargain collectively with employers, as well as to participate in civil and political affairs of a society;
* free choice of employment, with absolute prohibitions on the use of forced or compulsory labor;
* prohibitions on child labor, and limitations on youth labor;
* non-discrimination in employment;
* adequate wages, limits on working hours, health care and other features of social security, and occupational safety and health protection.

### Protection

#### Protections refers to the broad spectrum of rights and working standards.

Samantha Cherney and Lynn A. Karoly 19. “Do Workers' Protections Need to Depend on Employee Status? Looking Beyond AB 5,” RAND Commentary, October 17, 2019, https://www.rand.org/pubs/commentary/2019/10/do-workers-protections-need-to-depend-on-employee-status.html

The U.S. labor system, and the related patchwork of laws and regulations, evolved in the industrial era when an employer-employee arrangement became the norm. Over time, a variety of worker protections were established at both the federal and state levels. The policies that were developed include provisions governing hours and time off, wages and benefits, discrimination and forms of harassment, worker safety, and whistleblower claims. These policies define the rules that govern employer behavior, as well as the remedies for workers when employers fail to follow the rules.

#### “Strong worker protections” include

Lance Compa 93. “Labor Rights and Labor Standards in International Trade” https://ecommons.cornell.edu/items/3fe9336c-2479-4706-822f-8f053eacd1f3

From the standpoint of international investors seeking to maximize profits, strong worker protections curb the most efficient use of labor and create disincentives to invest. Minimum wage requirements, child labor laws, occupational safety and health standards, job security rules, union organizing rights and collective bargaining obligations all interfere, to a greater or lesser degree, with pure market forces. They impose costs on companies trying to compete in the global economy. From the investor's standpoint, these costs could be minimized or avoided in countries with lower standards or less stringent enforcement of labor rights and labor standards. Such countries become tempting targets for new investment aimed at cost-saving production systems.

### Freedom of Association

#### The protection of “workers’ full freedom of association” reflects the language of the NLRA.

NIWR 24, National Institute for Workers’ Rights, "The Right to Talk to Co-Workers and Management About Working Conditions: A Study of Enforcement at the NLRB," Focus Areas, 04/02/2024, https://niwr.org/2024/04/02/report-concerted-activities/#:~:text=The%20Act%20set%20out%20to,unionized%20workers

I. How Federal Law Protects Workers Trying to Improve Working Conditions

The National Labor Relations Act (“the Act”), also known as the Wagner Act, was enacted in 1935 to protect workers’ rights to form and join unions, engage in collective bargaining, and take part in other concerted activities for the purpose of collective bargaining or mutual aid and protection. The law was created in response to decades of worker unrest, strikes, and violence, and it aims to promote industrial peace and stability by balancing the rights of workers and employers. At its core, the Act reflected the understanding that empowering workers to discuss their working conditions with one another is a public good, something that yields benefits not only for workers themselves but also for the economy and country as a whole.

The Act set out to bolster worker power and facilitate peaceful employee-employer relationships by “protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”[11] The Act expands on the specific rights that follow from this goal in its preceding sections, which articulate the rights and limitations on employers, unions, and non-unionized workers. The relevant section for our purposes is Section 7, which articulates the protected rights of non-unionized workers:

“Employees shall have 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].”[12]

The right most relevant for non-union employees tends to be the right to “engage in other concerted activities” for “mutual aid or protection.”[13] This may take many forms, including discussing wages with colleagues, collecting petition signatures to raise awareness over safety issues, and emailing coworkers with concerns about company policy. As is clear from the statute, this right is distinct from and broader than anything directly related to union organizing, and applies to all private-sector employees with a few limited exceptions.[14]

#### This language is designed to evoke a connection to the broader first amendment freedom of association, which refers to the ability to align with others in an organization.

US Constitution Annotated No Date, "Overview of Freedom of Association," Amdt1.8.1, https://constitution.congress.gov/browse/essay/amdt1-8-1/ALDE\_00013139/#:~:text=U,12%20Footnote

Starting in the 1950s, the Court began to refer to the freedom of association as a right distinct from, but closely related to, the freedoms of speech and assembly, which are expressly listed in the First Amendment.11 By 1958, the Court considered it beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of civil liberties such as the freedom of speech.12 Although political association is a classic example of expressive association,13 the First Amendment also protects forms of ‘association’ that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members.14

Only a few Supreme Court decisions involving the freedom of association concern direct restrictions on association. For example, in Coates v. Cincinnati, the Court held that a local ordinance violated the freedoms of association and assembly on its face.15 The challenged ordinance made it a crime for three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by.16 According to the Court, this ordinance was aimed directly at activity protected by the Constitution—the freedoms of association and assembly.17

More commonly, the Court has considered cases in which the regulation of other behavior indirectly affects the freedom to associate. For example, because association supports other First Amendment activity, the Court has recognized that compelling disclosure of one’s associations can inhibit exercising protected First Amendment rights, particularly where disclosure would subject an individual to threats, harassment, or economic reprisals.18 Accordingly, First Amendment protections are triggered not only by actual restrictions on an individual’s ability to join with others to further shared goals, but also by laws or regulations that may have a chilling effect on association.19

The Court’s decisions in this area, though not always reconcilable, reflect a balancing of First Amendment rights and governmental interests as well as the major political and social events of the era. For example, in the 1950s and 1960s, the Court adjudicated many cases in which the government asked U.S. citizens to reveal or disavow their actual or perceived affiliations with the Communist Party.20 The Court largely credited concerns that states and the federal government expressed at that time about the security threat that Communism posed to the United States,21 even while applying increasing First Amendment scrutiny to laws that burdened the association of other groups.22 Describing its own decisions in 1963, the Court explained, the Communist Party is not an ordinary or legitimate political party[,] and thus, Party membership is a permissible subject of regulation and legislative scrutiny.23 While the Court later abandoned some of its presumptions about the dangers of bare association, the Court’s care with respect to issues of national security remained evident in later cases, such as a 2010 decision upholding a ban on domestic support of designated foreign terrorist organizations.24

Although many of the leading Supreme Court decisions on the freedom of association concerned burdens on association, the Court has also held that compelled association can violate the First Amendment.25 For example, in some circumstances, laws requiring organizations to include persons with whom they disagree on political, religious, or ideological matters can violate members’ freedom of association, particularly if those laws interfere with an organization’s message.26

As with other individual rights protected by the Constitution, the freedom of association is not absolute.27 First, the government may prohibit agreements to engage in illegal conduct, even though such agreements undoubtedly possess some element of association.28 Second, forms of association that are neither intimate nor expressive within the meaning of First Amendment case law may not receive constitutional protection.29 Third, as noted above, even when a law implicates protected association, the government’s interests may outweigh the burdens on association in some circumstances.30 Finally, although individuals have a right to organize as a group to express their views, there is no corresponding constitutional obligation on the part of the government to listen to the group’s concerns.31

#### In the labor context, freedom of association means the right to organize.

International Labor Organization No Date, "Freedom of association," https://www.ilo.org/topics-and-sectors/freedom-association#:~:text=Freedom%20of%20association%20,a%20free%20and%20open%20society

Freedom of Association

The right of workers and employers to form and join organizations of their own choosing is an integral part of a free and open society. In many cases, these organizations have played a significant role in their countries’ democratic transformation. From advising governments on labour legislation to providing education and training for trade unions and employer groups, the ILO is regularly engaged in promoting freedom of association.

The ILO’s Committee on Freedom of Association was set up in 1951 to examine violations of workers’ and employers’ organizing rights. The committee is tripartite and handles complaints in ILO Member States whether or not they have ratified freedom of association conventions. Through the Committee on Freedom of Association and other supervisory mechanisms, the ILO has frequently defended rights of trade unions and employers’ organizations.

#### The freedom of association encompasses the right of the group to take collective action to pursue the interests of its members

LaborLab No Date, "Your right to unionize is protected by the U.S. Constitution," LaborLab, https://laborlab.us/resource/your\_right\_to\_unionize\_is\_protected\_by\_the\_u\_s\_constitution/#:~:text=The%C2%A0First%20Amendment%C2%A0of%20the%20Constitution%2C%20which,related%20activities

The right to unionize your workplace isn’t just protected by the National Labor Relations Act — it’s protected by the U.S. Constitution.

The First Amendment of the Constitution, which guarantees the freedom of speech, assembly, and petition, also guarantees freedom of association and is recognized by U.S. courts as a fundamental right. The freedom of association encompasses the right of the group to take collective action to pursue the interests of its members. For this obvious reason, the constitutionally protected freedom of association includes unionization and union-related activities.

Additionally, the freedom of association for the advancement of shared values is inseparable from “liberty” assured by the Due Process Clause of the Fourteenth Amendment.

When politicians make it harder to join a union and employers use union-busting tactics, they’re not just violating federal law, they’re infringing on our constitutional right to unionize. Period.

### Workplace Governance

#### Workplace governance refers to mechanisms, union or non-union, in which employees can exercise voice and aggregate their work-related interests. It is extremely broad.

Jeffrey Haydu 98, Emeritus Professor of Sociology at University of California San Diego, researcher in social movements, food and labor movements, cross-national analysis of alternative agriculture movements, "Workplace Governance, Class Formation, and the New Institutionalism," Mobilization: An International Quarterly, vol. 3, no. 1, 03/01/1998, pp. 69–88, https://doi.org/10.17813/maiq.3.1.d02181512n452402

I use the term "workplace governance" broadly and neutrally to refer to mechanisms, union or nonunion, through which employees can exercise voice and aggregate interests on the job. These may involve little more than suggestion boxes or the promise that the boss's door is always open. But they may also provide for employee delegates to articulate concerns and consult with management on issues ranging from water coolers to quality control and wage incentives. There may also be recognized rules and procedures for workplace bargaining that set forth employees' right to submit grievances or appeal adverse decisions; identify the proper steps for checking abuses by supervisors; and stipulate the qualifications and constituencies of employee representatives entitled to negotiate changes in wages or working conditions. These mechanisms of workplace governance vary widely, and so does their relationship (if any) to institutions for representation and bargaining outside the workplace (Edwards 1993; Selznick 1969; Berenbeim 1980; Milton 1970). The general claim here is that workplace governance is another arena in which grass-roots leadership may be selected, constituencies structured, and broader or narrower collectivities formed.

#### This usage is common to historical institutionalists.

Étienne Cantin 4, PhD Candidate, Department of Political Science, York University, Toronto, Canada, "The Contentious Politics of Industrial Democracy: Organised Labour and the Invention of Liberal Workplace Governance in the United States, c. 1916-1935," 2004, https://cpsa-acsp.ca/papers-2004/Cantin.pdf

There is no argument, however, about the basic contours of the institutions of workplace governance that emerged out of the industrial conflicts and political upheavals of the period between the mid-1930s and the late 1940s. If we follow historical institutionalists in using the term workplace governance broadly and neutrally to refer to the institutionalised social processes through which employees can exercise voice and aggregate interests on the job,1 it is indeed possible to highlight the emergence of a distinctively American institutional regime of workplace governance out of the contingent sociopolitical struggles and processes of class formation of that period. Unlike European systems of industry-wide bargaining, this American regime—which David Brody has aptly called ‘workplace contractualism’—is characterised by the fact that plant-level contracts would regulate working conditions and job practices in detail, leaving factory managers little leeway for improvisation; the shop-floor rights of industrial workers would thus be specified rather than left undefined; the social process of specification of those rights would take the form of collective bargaining and take a contractual form; moreover, the contractual rights so achieved would be enforced through a formal grievance procedure, specified in the contract, with arbitration by a third party normally being the final and binding step. Historical institutionalists tend to agree that the locus of this institutional system of workplace contractualism was the mass-production sector of capitalist industry where, in spite of some degree of variability between industries and companies within industries, it would have been experienced in a rather uniform fashion from roughly the late 1940s to the late 1960s.2

#### The term includes codetermination.

Simon Jäger et al. 22, Jäger is Assistant Professor of Economics at MIT; Noy is Predoctoral Research Fellow at MIT; Schoefer is Assistant Professor of Economics at UC Berkeley, "Codetermination and power in the workplace," Economic Policy Institute, 03/23/2022, https://www.epi.org/unequalpower/publications/codetermination-and-power-in-the-workplace/#:~:text=giving%20workers%20formal%20rights%20to,elected%20representatives.%20These

This latter perspective has motivated recent proposals to boost worker power by giving workers formal rights to participate in workplace governance. In 2018, the Reward Work Act and the Accountable Capitalism Act, proposed by Democratic senators, included provisions that would require large companies to allocate 33–40% of the seats on their boards to worker-elected representatives. These proposals emulate the German model of “board-level codetermination,” which originated in the aftermath of World War II and has since spread to many European countries, including Austria, Denmark, Finland, Norway, and Sweden. In addition, the German model of “shop-floor codetermination” through elected works councils has received widespread attention in the past several years, in part due to the widely covered 2014 and 2019 unionization drives at Volkswagen’s Chattanooga, Tennessee, plant (Liebman 2017; Silvia 2018, 2020).

Other papers in this volume examine the effects on labor market outcomes of specific restrictions on firm decision-making, e.g., in the areas of wage-setting (minimum wages) or the determination of other job characteristics (safety or flexibility regulations). This paper examines the impact of codetermination laws—broader interventions that restructure firms’ internal authority structures by integrating workers into decision-making.

American corporate law has historically been hostile to such arrangements, which impinge on owners’ or managers’ exclusive discretion. In 1981, a landmark U.S. Supreme Court ruling narrowed the scope of unions’ bargaining rights, citing “an employer’s need for unencumbered decision-making” (Harlin 1982). The Chamber of Commerce’s amicus curiae brief in the same case asserted that decisions about aspects of workplace governance apart from wages, hours, and working conditions “are uniquely the central burdens and prerogatives of management…. They are matters over which the collective bargaining process is unlikely to be useful, but likely to be obstructive or destructive.”1

#### It is the set of formal and informal institutions whose function is to allocate control rights within firms.

Filippo Belloc et al. 22, Belloc is from the Department of Economics and Statistics, University of Siena, Italy; Burdin is from Leeds University Business School, University of Leeds, United Kingdom; Cattani is from the Department of Legal Studies, University of Bologna, Italy; Ellis is an Independent Researcher, United Kingdom; Landini is from the Department of Economics and Management, University of Parma, Italy, "Coevolution of job automation risk and workplace governance," Research Policy, vol. 51, no. 3, 04/01/2022, p. 104441, https://www.sciencedirect.com/science/article/abs/pii/S004873332100233X

In this paper, we study the organizational drivers of automation risk by focusing on the interplay between job design and workplace governance. We define workplace governance as the set of formal and informal institutions whose function is to allocate control rights within firms. Among such institutions we focus on the role of employee representation (ER), referred to as the institutionalized channel for employee voice through which workers can influence work organization and employment-related issues at the workplace level (e.g. unions, works councils, consultative committees).

### Sectoral Bargaining

#### Sectoral bargaining provides union coverage for most workers within a sector.

David Madland 24, Senior Fellow and Senior Adviser to the American Worker Project at American Progress, Ph.D. in Government from Georgetown University, Best Dissertation Award from Labor and Employment Relations Association, Author of "Re-Union" and "Hollowed Out", "Sectoral Bargaining Can Support High Union Membership," Center for American Progress, 05/30/2024, https://www.americanprogress.org/article/sectoral-bargaining-can-support-high-union-membership/#:~:text=Sectoral%20bargaining%20is%20a%20type,bargain%20above%20at%20their%20worksite

Sectoral bargaining is a type of collective bargaining that provides union contract coverage for most or all workers in a particular sector. Depending on how sectoral bargaining is structured, it is sometimes known as broad-based, multiemployer, national, or industrywide bargaining. It typically operates in conjunction with workplace-level bargaining, setting sectorwide standards that workers can seek to bargain above at their worksite.

### Secondary Actions

#### Secondary strikes are solidarity strikes that attempt to improve leverage at other workplaces.

Joe Burns 10, veteran union negotiator and labor lawyer, author of Strike Back and Reviving the Strike, "Secondary Strikes Are Primary to Labor's Revival," Labor Notes, 11/04/2010, https://labornotes.org/2010/11/secondary-strikes-are-primary-labor%E2%80%99s-revival#:~:text=In%20contrast%2C%20labor%E2%80%99s%20traditional%20forms,wide%20strikes

Solidarity is the heart and soul of unionism—the only force capable of confronting power and privilege in society. To revive unionism, we must recover labor’s long-lost tools of workplace-based solidarity.

Today, union activists join each other’s picket lines and hold fundraisers for striking workers. While important, these acts of solidarity are largely conducted away from the workplace.

In contrast, labor’s traditional forms of workplace-based solidarity allowed workers to join across employers and even industries to confront bosses. Such tactics included secondary strikes and industry-wide strikes.

What’s a secondary strike? Say workers at a small auto parts plant in Indiana walked out. If they enlisted the support of the Teamsters to refuse to transport the parts, the United Auto Workers to refuse to assemble a car with the parts, and employees of car dealerships to refuse to sell the cars, their power would be multiplied. The original strike would be a primary strike and the others would all be secondary strikes.

In the past, solidarity tactics allowed workers to hit employers at multiple points in the production and distribution chain. By impeding the flow of supplies into a plant, unions pressured the employer to settle a strike or recognize the union. Similarly, secondary boycotts pressured retailers to stop selling struck goods.

Solidarity tactics expanded the site of the conflict, allowing workers to confront employers as a class. Many of the strikes we know from history, like the 1912 Lawrence Bread and Roses textile workers’ strike or the huge postwar steel strikes, are great and historic precisely because they involved tens of thousands of workers across entire industries.

#### The key aspect is participation by workers not directly involved in a labor dispute.

Justia No Date, “Secondary Strike,” https://dictionary.justia.com/secondary-strike#:~:text=It's%20a%20type%20of%20strike,secondary%20strike%22%20in%20a%20sentence

secondary strike

Definition of "secondary strike"

It's a type of strike where workers, who are not directly involved in a labor dispute, stop work in support of other striking workers

#### Secondary strikes are a component of the PRO Act.

National Law Review 21, "Labor Law Reform On the Horizon: Ten Things to Watch Under the PRO Act," The National Law Review, 2/16/2021, https://natlawreview.com/article/labor-law-reform-horizon-ten-things-to-watch-under-pro-act

“Secondary” Strikes and Boycotts Will Be Fair Game

In order to maintain economic peace and stability, as well as fairness in labor disputes, the NLRA has long prohibited “secondary” strikes and boycotts against third party employers and contractors. Under these “secondary” rules, unions are required to direct their strikes and economic actions at the “primary” employer whose employees they represent. Indeed, it is unlawful for unions to picket and boycott “secondary” employers, such as contractors, vendors, and other businesses, in order to exert bargaining pressure on the primary.

The PRO Act would legalize “secondary” strikes and boycotts. This no-holds-barred approach will mean that neutral “innocent bystander” employers, such as vendors, suppliers, and neighboring businesses, who have nothing to do with a particular labor dispute, can be picketed and boycotted by unions in order to exact bargaining demands from employers from completely different companies. This means that under the PRO Act, even if your employees did not choose to be represented by a union, you could find your business subject to strikes and boycotts without any way to protect your business.

#### The broader term in this area is secondary action. It’s effectively synonymous with secondary strike but slightly more encompassing.

Oxford Reference No Date, “Secondary Action,” https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100451106

secondary action

Quick Reference

Is industrial action by a trade union that is directed against employers other than the one with which the union is in dispute. The aim is to disrupt the primary employer's business and exert pressure by spreading the action to other companies located in the same industry or along the primary employer's supply chain. Secondary action can take various forms, such as the refusal to handle material or components bought from or being supplied to the primary employer. It might also involve sympathy action by workers in other unions remote from the dispute, as when coal miners strike in support of nurses. In the UK, the Employment Act 1990 rendered all forms of secondary action unlawful, including sympathy action and action directed at the primary employer's customers and suppliers. This significantly weakens the right to strike and effectively confines lawful strike activity to the individual enterprise or a group of associated enterprises.

#### Secondary action is the phrase used by the NLRA.

National Labor Relations Board 97, "Basic Guide to the National Labor Relations Act: General Principles of Law Under the Statute and Procedures of the National Labor Relations Board," U.S. Government Printing Office, 1997, https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf

Subparagraph (B)—Prohibited object: Compelling recognition of an uncertified union. Section 8(b)(4)(B) also prohibits secondary action to compel an employer to recognize or bargain with a union that is not the certified representative of its employees. If a union takes action described in clause (i) or (ii) against a secondary employer, and the union’s object is recognition by the primary employer, the union commits an unfair labor practice under this section. To establish that the union has an object of recognition, a specific demand by the union for recognition need not be shown; a demand for a contract, which implies recognition or at least bargaining, is enough to establish an 8(b)(4)(B) object.

### Codetermination

#### Codetermination refers to the participation of labor with management in determining business policy.

Merriam Webster No Date, “Codetermination,” https://www.merriam-webster.com/dictionary/codetermination#:~:text=CODETERMINATION%20Definition%20%26%20Meaning%20,management%20in%20determining%20business%20policy

codetermination

noun

co·​de·​ter·​mi·​na·​tion ˌkō-di-ˌtər-mə-ˈnā-shən

: the participation of labor with management in determining business policy

#### Workers must be able to vote for representatives on corporate boards.

POLYAS No Date, https://www.polyas.com/election-glossary/codetermination

Codetermination

Codetermination is a system of corporate governance under which employees of an organization can vote for representatives on its board of directors. By enabling employees to be represented on the board of directors alongside shareholders, the system of codetermination can help reduce conflict in the workplace between employers and workers as the latter is able to participate in managing the company.

Whilst not being as prevalent in the English-speaking world, codetermination is a widespread practice in continental Europe, particularly in Germany.

The German System

German companies have a two-tier board of directors structure consisting of:

a supervisory board – sets the company’s agenda and elects the management board

a management board – looks after the daily operations of the company

In companies consisting of over 500 workers, one-third of the supervisory board must be elected by the workers themselves. Moreover, in companies made up of over 2,000 workers, half of the supervisory board must represent employees. However, the chairperson of the supervisory board is always appointed by shareholders.

Codetermination in the UK and US

Worker participation in management is not a legal requirement for companies in the UK or the US, although it can occur on a voluntary basis. However, codetermination was a hot topic in the UK during the 1970s. The Labour government of the day made proposals for its implementation, however, any plans were subsequently abandoned by the Thatcher-led Conservative Government which usurped Labour at the 1979 general election and remained in power until 1997.

### Right to Work

#### Right to work laws establish that workers may be employed without paying union dues.

NCSL 23, “What is Right-to-Work?” 12/19/23, https://www.ncsl.org/labor-and-employment/right-to-work-resources#:~:text=What%20is%20Right

What is Right-to-Work?

In short, the phrase “right to work” refers to an employee’s ability to work for an employer without joining a union or paying agency fees for representation.

#### Right to work establishes conditions for being hired. Right to work states do not require union membership as a condition of employment.

Mesch Clark Rothschild LLP No Date, "Getting Your Terms Right: 'Right to Work' -vs- 'At-Will Employment'," MCR Attorneys, https://mcrazlaw.com/getting-your-terms-right-right-to-work-vs-at-will-employment/

Getting Your Terms Right: “Right to Work” -vs- “At-Will Employment”

“This is a right-to-work state and I’ll fire whoever I want for whatever reason I want.” The problem with this statement that employers often make is that “right-to-work” laws involve employee rights during an employment relationship, particularly in the context of labor unions. The “employment at-will” doctrine is what governs employer and employee rights in terminating an employment relationship. Many people wrongfully use the term “right-to-work” interchangeably with the phrase “employment at-will” because they do not understand the difference.

The right-to-work doctrine, originally established in the National Labor Relations Act (NLRA) of 1935, gives employees the option to refrain from engaging in collective activity such as labor organizing and union representation. A right-to-work state is a state that does not require union membership as a condition of employment. In other states, a person applying for a job where the employees are unionized could be required to join the union as a requirement of being hired. Because Arizona is a right-to-work state, employees are not required to be members of a union or pay union dues.

#### It is worth noting that this term is anti-union propaganda and not an actual legal term. It seems like people use the term to refer to a fairly stable set of policies but it may be worth finding an alternative.

Andrew Baker & Travis West 20, Baker and West are attorneys at Beeson, Tayer & Bodine, "'Right to Work' Laws and Impact on Unionization," Labor Relations, Professional Perspective, Bloomberg Law, 09/01/2020, https://www.bloomberglaw.com/external/document/X8JDHS0O000000/labor-relations-professional-perspective-right-to-work-laws-and-

The term “right to work” doesn't exist in the law. It's a phrase invented by anti-union advocates to shield from the public what “right to work” laws actually accomplish. These laws allow employees to receive full union representation while paying nothing for the service, leading to the problem of “free riders” within bargaining units. This article reviews the history of “right to work” laws, legal challenges to them, their effects on unionization, and how unions can still survive.

So-called right to work laws allow workers in a unionized workplace to opt out of paying union dues, thus eroding the union's financial standing and its bargaining and political power. The effort to enact “right to work” laws began in the early 1940s, when Vance Muse, a conservative activist from Texas, started the “right-to-work” movement. By the end of 1947, 11 states, most of them in the South, had passed “right to work” laws.

Under the National Labor Relations Act, unions have a legal obligation to fairly represent every employee in the recognized bargaining unit, regardless of whether the employee is a member of the union. Thus, it has historically been part-and-parcel of a union's effective representation of a bargaining unit to insist that all employees pay their fair share of the cost of union representation. Indeed, Section 8(a)(3) of the NLRA includes a clause that expressly provides for this: [N]othing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization … to require as a condition of employment membership therein … in the appropriate collective-bargaining unit covered by such agreement ….

The U.S. Supreme Court in 1963 “whittled” the Section 8(a)(3) membership obligation to its “financial core,” ruling that it is only the obligation to pay union dues that the NLRA may constitutionally compel, not actual membership in a union. NLRB v. GM, 373 U.S. 734.

In June 1947, Congress passed the Taft-Hartley Act over President Harry Truman's veto. Taft-Hartley, also known as the Labor Management Relations Act, made significant modifications to the NLRA, including the addition of Section 14(b)—the clause authorizing state “right to work” laws to evade the membership obligation portion of the NLRA. Section 14(b) provides: Nothing in this Act shall be construed as authorizing the execution of or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Thus, the effect of a state “right to work” law passed pursuant to Section 14(b) is to prevent unions from collecting representation fees from employees the union is obligated to represent. Further, the National Labor Relations Board has made clear that unions have a legal obligation to fully represent nonmembers employed in a “right to work” state, even though the employee doesn't pay a nickel to the union. IAM, Local Union No. 697 (The H.O. Canfield Rubber Company of Virginia, Inc.), 223 N.L.R.B. 832 (1976).

### At-Will Employment

#### At will employment means employment can be terminated for any reason except an illegal one.

National Conference of State Legislatures 8, "At-Will Employment - Overview," National Conference of State Legislatures, 04/15/2008, https://www.ncsl.org/labor-and-employment/at-will-employment-overview

I. The At-Will Presumption

Employment relationships are presumed to be “at-will” in all U.S. states except Montana. The U.S. is one of a handful of countries where employment is predominantly at-will. Most countries throughout the world allow employers to dismiss employees only for cause. Some reasons given for our retention of the at-will presumption include respect for freedom of contract, employer deference, and the belief that both employers and employees favor an at-will employment relationship over job security.

At-Will Defined

At-will means that an employer can terminate an employee at any time for any reason, except an illegal one, or for no reason without incurring legal liability. Likewise, an employee is free to leave a job at any time for any or no reason with no adverse legal consequences.

At-will also means that an employer can change the terms of the employment relationship with no notice and no consequences. For example, an employer can alter wages, terminate benefits, or reduce paid time off. In its unadulterated form, the U.S. at-will rule leaves employees vulnerable to arbitrary and sudden dismissal, a limited or on-call work schedule depending on the employer’s needs, and unannounced cuts in pay and benefits.

### Job Guarantee

#### A jobs guarantee requires the job to be given by the US government

Ryan Bhandari 19, Former Economic Senior Policy Advisor at Third Way, "What Is the 'Federal Jobs Guarantee' and What Are People Saying About It?," Third Way, 03/25/2019, https://www.thirdway.org/memo/what-is-the-federal-jobs-guarantee-and-what-are-people-saying-about-it

What is the federal jobs guarantee?

A federal jobs guarantee is as simple as it sounds on the surface: everyone in the country will be guaranteed a job by the US government should they desire one. There are two versions right now gaining attention. One plan is written by academics Mark Paul, Sandy Darity, and Darrick Hamilton. The other was written by Pavlina Tcherneva. In general, these plans promise:

Guaranteed jobs in infrastructure repair, ecological restoration, caregiving, and community development projects.

Benefits like health insurance, paid sick leave/vacation, and retirement plans.

Control for state and local governments that will decide which kinds of jobs to create.

A reduced uptake of welfare programs and unemployment insurance as well as decreased criminal justice costs.

The key difference between the two plans is the minimum wage for the new jobs. The Tcherneva plan establishes a $15 minimum wage and the Paul et al. plan calls for an $11.80 minimum wage for all federally guaranteed jobs. Yet, both have the same underlying goal: Permanently solve the problem of involuntary unemployment by making the federal government the employer of last resort.

#### A jobs guarantee requires the job to be managed by the government

Thomas O'Neil 20, Brown Political Review writer, "Radical or Reasonable? The Case for a Federal Jobs Guarantee," Brown Political Review, 12/29/2020, https://brownpoliticalreview.org/2020/12/radical-or-reasonable-the-case-for-a-federal-jobs-guarantee/

Now, what is a federal jobs guarantee (FJG)? In essence, each and every American is guaranteed a job managed by the government. These jobs range from infrastructure construction and maintenance to community development projects. Along with these employment opportunities comes the benefits expected of a decent job: health insurance, paid leave, and investment plans for retirement. Plans vary, but popular propositions recommend a bureaucratic structure that matches people to jobs needed at the state and local levels – prioritizing the needs and desires of communities in determining production.

#### A jobs guarantee must be provided to every person who wants one

Deirdre Shelly 21, Sunrise Movement Author, "What is A Federal Jobs Guarantee?," Sunrise Movement, 03/05/2021, https://www.sunrisemovement.org/theory-of-change/what-is-a-federal-jobs-guarantee/

What is a job guarantee?

The job guarantee is a federal government program to provide a good job to every person who wants one.

The job guarantee is a long-pursued goal of the American progressive tradition. In the 1940s, labor unions in the Congress of Industrial Organizations (CIO) demanded a job guarantee. Franklin D. Roosevelt supported the right to a job in his never-realized “Second Bill of Rights.” Later, the 1963 March on Washington demanded a jobs guarantee alongside civil rights, understanding that economic justice was a core component of the fight for racial justice. Coretta Scott King went on to lead a grassroots movement for a job guarantee after her husband’s death.

## Evidence Appendix

### List of Past Labor Topics

1931-1932

RESOLVED: That Congress should enact legislation providing for centralized control of industry.

1936-1937

RESOLVED: That Congress should be empowered to fix minimum wages and maximum hours for industry.

1937-1938

RESOLVED: That the National Labor Relations Board should be empowered to enforce arbitration of all industrial disputes.

1941-1942

RESOLVED: That the Federal Government should regulate by law all labor unions in the United States.

1944-1945

RESOLVED: That the Federal Government should enact legislation requiring compulsory arbitration of all labor disputes.

1951-1952

RESOLVED: “That the federal government should adopt a permanent program of wage and price control.”

1952-1953

RESOLVED: “That the Congress of the United States should enact a compulsory fair employment practices law.”

1955-1956

RESOLVED: “That the nonagricultural industries should guarantee their employees an annual wage.”

1957-1958

RESOLVED: “That the requirement of membership in a labor organization as a condition of employment should be illegal.”

### Aff---UQ

#### Labor law is one of the few areas of Trump-era stability. Progressive laws have no chance under a Republican Congress, and Trump’s NLRB will certainly not be a friend to workers. But the broad framework of the NLRA is unlikely to be politically unraveled (bracketing judicial invalidation of the NLRB under the Major Questions Doctrine).

Jason Vazquez 25, staff attorney at the International Brotherhood of Teamsters, Harvard Law School graduate (2023), "How Trump Could Disable the NLRB," OnLabor, 1/7/2025, https://onlabor.org/how-trump-could-disable-the-nlrb/

Although is difficult to predict what a second Trump administration may augur for the broader political economy, at least one thing is almost certain: in the near future — perhaps sooner than anticipated — Donald Trump’s appointees will recapture control of the National Labor Relations Board (“NLRB”). There is little doubt the corporate attorneys Trump is all but guaranteed to nominate to lead the agency will swiftly move to dismantle the Biden Board’s prounion legacy and, in the traditional Republican fashion, reshape national labor policy in management’s favor. As corporate interests begin to signal an appetite for foundational assaults on the Board’s regulatory capacity, however, the specter that that the incoming administration may pursue more novel, even radical antiregulatory measures looms. These may include, as some have speculated, outright refusing to appoint members to the NLRB. Although such a strategy would hamstring labor law enforcement and prove extraordinarily difficult to challenge in court, it is not clear that, all told, it would ultimately inure to management’s benefit.

In terms of litigation, legally contesting a President’s failure to name NLRB replacements would likely prove all but impossible. The NRLA empowers the President to make appointments to the Board but nowhere compels him to do so. Indeed, President Biden has somewhat controversially left a seat conventionally occupied by a Republican member vacant for nearly two years. Nor would the Administrative Procedure Act, the transsubstantive statute governing federal agencies’ adjudicatory and regulatory activities, offer relief here. Although the APA in principle authorizes judicial review of an executive branch “failure to act,” in practice the availability of such a challenge is largely illusory. While cautioning that an agency may not completely “abdicat[e] its statutory responsibilities,” the Supreme Court has made clear the APA does not empower the judiciary to “enter general orders compelling compliance with broad statutory mandates.” (And again, the President is not even statutorily mandated to nominate Board members.) More conclusively, the Court has announced categorically that the APA does not contemplate judicial review of presidential policymaking.

The President’s conduct remains subject to constitutional constraints even in the absence of statutory remedies. Yet no realistic avenue exists to contest a failure to nominate on constitutional grounds. Although a challenge under the Constitution’s Appointment Clause is theoretically available, the Clause, even tabling thorny questions concerning standing, confers virtually unbridled discretion on the President with respect to the nomination of executive officers. And while disabling an agency from carrying out its statutory charge may contravene the President’s constitutional obligation to faithfully execute the laws, not all constitutional transgressions are necessarily justiciable or redressable. The Supreme Court has declared that seeking to vindicate “the public interest in Government observance of the Constitution and laws” does not constitute an independent basis for litigation, and Congress has not provided a statutory cause of action, either explicitly or implicitly, to enforce the Take Care Clause.

In short, there is little doubt Trump could disable the NLRB if he were inclined to do — and such a move would likely preclude enforcement of federal labor law. The Supreme Court has held that absent a lawfully appointed quorum — at least three members under Section 3(b) — the NLRB may not exercise its powers. And since Congress vested the Board with exclusive jurisdiction to administer the NLRA, courts are largely deprived of authority to adjudicate violations of the Act. Consequently, if the NLRB were disabled, no legal mechanism would exist to challenge, prevent, or redress unfair labor practices. The upshot, then, is that President could effectively nullify the NLRA, and eliminate all the rights, protections, and obligations it creates, without any legislative action, or even so much as a notice-and-comment proceeding.

To be sure, certain caselaw signals that the courts might be disposed to assert jurisdiction if the Board were incapacitated. The Supreme Court has remarked, for instance, that “[i]n the absence of any available administrative remedy,” statutory rights which would otherwise be ”sacrificed or obliterated” are presumptively of judicial cognizance. This strand of jurisprudence is inapposite in the imagined context, however, for it rests on the presumption that where Congress fails to specify a mode of enforcement, it “intended the statutory provisions governing the general jurisdiction of [federal] courts to control.” Here, in contrast, Congress plainly intended to establish an exclusive remedial avenue for labor law violations, a pathway which would be rendered temporarily unavailable by virtue of the Board’s quorum-induced incapacitation. It is doubtful the doctrine could be faithfully extended to encompass such a situation. After all, congressional intent remains the linchpin — it is “for Congress to determine how the rights which it creates shall be enforced,” and in enacting the NLRA, the Supreme Court has concluded, “Congress intended for the Board,” not the courts, “to exercise exclusive jurisdiction in this area.”

Still, given the uncertainty, it is not clear that Trump — or the corporate interests shaping his agenda — would consider this course of action a prudent one. At first blush, eliminating the Board would appear to benefit management in obvious ways; after all, the NLRA safeguards basic labor organizing rights, and if it were unenforceable, employers would be unleashed to deploy all manner of unlawful unionbusting tactics. Unions, on the other hand, would remain burdened by the Act’s most oppressive stricture, since the statute authorizes private actions to remedy secondary activity.

As a practical matter, however, the corporate sector has little evident incentive to ignite the firestorm that incapacitating the agency would surely precipitate. Given working people’s overwhelming support for organized labor, elevating the political salience of unions with such a cynically antilabor move may not prove a sound strategy. Employers have managed to exploit the prevailing labor law regime to such a remarkable extent, after all, that a world in which the NLRA is inoperative may not differ dramatically from the one we presently inhabit. Indeed, the contemporary fissured economy has structurally rendered Section 7’s essential protections all but obsolete for sweeping swaths of the workforce, and the Board’s existing remedial arsenal is so impotent that even covered employers deliberately and systematically transgress the law. Moreover, disabling the NLRB would merely suspend, not extinguish, employers’ liability for unfair labor practices, for a changed administration could enforce charges filed during the Board’s period of incapacity. Lastly, it remains an open question whether in such a world the NLRA’s comprehensive preemption regime would continue to bar prolabor legislation at the subfederal level. All told, then, management planners may regard it as more advantageous to inconspicuously unravel the Biden Board’s prounion initiatives, and continue to slowly strangle organized labor, than to deactivate the NLRB’s authority in such a provocative manner.

Perhaps for these reasons, Trump and his corporate allies have so far displayed no discernible interest in disabling the NLRB. Still, such a strategy remains within the realm of possibility. Many of Trump’s most intimate advisers are staunchly committed to radically dismantling regulatory power in general and viscerally hostile to the Board in particular. And the move would not be entirely unprecedented; Trump took similar action during his first term with respect to the Merit Services Protection Board, an agency designed to protect the federal civil service. Ultimately, incapacitating the NLRB would merely represent an acceleration of the trend toward “structural deregulation” that scholars have identified with alarm in recent years, a strategy Trump embraced more aggressively than any of his predecessors. Perhaps, for better or worse, it is a reality for which the labor movement ought not find itself wholly unprepared.

#### Labor is collapsing. Impact uniqueness is working in the right direction.

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For the last year, the news has been filled with stories of worker activism.

Headlines announce unprecedented union victories at Amazon.com Inc., Starbucks Corp., Apple Inc., Chipotle Mexican Grill Inc. and Trader Joe’s Co., along with successful strikes in industries as diverse as farm equipment, fast food and tech. And then there’s the new Gallup poll of American attitudes about unions, which reveals the highest level of support for unions ever — greater than 70%.

So it probably came as a surprise when the U.S. Department of Labor reported last week that union membership levels have actually declined over the last year and are now at their lowest level ever — 6% in the private sector.

There’s an important puzzle here: How can support for unions be at its highest level ever and union membership be at the lowest level ever recorded in the U.S.? How can we continue to witness heroic worker efforts to form unions in industries once thought unorganizable, when actual unionization rates continue to plummet?

To state the obvious, what we are seeing is a massive disconnect between what Americans want when it comes to unionization and what Americans are actually able to achieve. What is less obvious is the source of this disconnect. Although the reasons for this divergence are varied, we think the primary explanation is law.

Labor law — the National Labor Relations Act in particular — is meant to serve as the transmission belt between what workers want when it comes to unionization and what workers get. In simple terms, the NLRA establishes the process through which workers decide whether to have a union or not. The law sets the ground rules for discussion and debate among workers, and between management and employees, about the union question.

The law also establishes the process for casting votes. The law then sets up the rules for collective bargaining in those instances when workers vote to unionize. And, of course, the law polices the rules it establishes: imposing sanctions against rule violators so that the law on the ground actually tracks the law on the books.

But U.S. labor law is a complete disaster, failing at every step to fulfill its primary mission of translating workers’ preferences into workplace realities. The failures begin at the outset of the process, in deciding which workers will get to vote on unionizing.

Part of the issue here is that the law excludes large swaths of the labor force — domestic workers, agricultural workers and independent contractors — from the right to choose a union. And with respect to the workers who are covered, the law requires them to form unions worksite by worksite by worksite, imposing the often-Sisyphean task of running hundreds of campaigns to unionize a single large employer.

The law also undermines workers’ ability to talk to each other about whether they want a union or not. Instead of facilitating honest discussion among the people who will vote on unionization, the law allows management to ban nearly all union talk between employees at work while at the same time giving managers nearly unfettered discretion to use work time to convey a constant barrage of anti-union messages.

Moreover, even if workers would like to hear the pro-union side from a union representative or even a reply to management’s anti-union messaging, the law grants workers no right to speak to such union reps at the place where the unionization decision matters most — the workplace.

All of this pales in comparison to what is probably the law’s biggest failure — actually protecting workers who support unions from employer retaliation.

For example, while it’s supposedly an unfair labor practice for an employer to fire a worker for supporting a unionization drive, one in five workers who takes the lead role in a union campaign gets fired for doing that. We’ve seen this play out in the Amazon and Starbucks campaigns dozens of times.

How does the law enable such lawbreaking? A big part of the story is the paltry remedies available for violations. An employer who fires the lead union supporters in a campaign can quash that campaign effectively, by instilling fear of discharge in all the workers who might otherwise support the union. What does it cost the employer to illegally fire a few key workers? Very little — usually just a fraction of the fired workers’ regular wages. There are no fines or penalties so no deterrents.

Finally, in those cases where workers — through near heroism in the face of this kind of employer retaliation — succeed in choosing a union, the law makes it exceedingly difficult for them to successfully bargain a first collective agreement.

Again, a lot of the problem lies with the law’s laughably weak remedies. The only remedy currently available when employers fail to bargain in good faith is an order telling them to bargain in good faith. Again, no fines, no penalties and no deterrents. The absurdity of this remedial scheme is obvious on its face.

Put simply, while labor law is supposed to be a transmission belt for worker preferences, in reality, it constitutes a nearly insurmountable set of roadblocks. Rather than giving workers tools to discuss, debate and decide freely on unionization, the law gives employers powerful mechanisms to block workers from getting what they want.

Against the background of such a perversely designed labor law, the disconnect between record-high levels of support for unions and record-low levels of unionization begins to make all too much sense.

Having seen how law contributes to the divergence between preferences and reality, the solution is clear. We need a new labor law, one that actually works as a transmission belt and not as a roadblock.It wouldn’t be that hard to design — just let workers organize free from employer intimidation on the scale and at the scope they choose and create real incentives for the parties to reach an agreement.

The more pressing problem is the political will to enact a law that gives American workers what they want: the right to unionize. Until that political will exists, we will continue to live in a world where working people do not get what they want, or what they deserve.

### Aff---Adv---Automation

#### Unions will decide how automation is governed.

Aurelia Glass 24, Policy Analyst at American Progress, M.A. International Economics and Finance, B.S. Engineering Mechanics and Economics, "Unions Give Workers a Voice Over How AI Affects Their Jobs," American Progress, 5/16/2024, https://www.americanprogress.org/article/unions-give-workers-a-voice-over-how-ai-affects-their-jobs/

Introduction and summary

As policymakers seek solutions to the current and future impacts of artificial intelligence (AI) on workers across the country, workers themselves are using their union bargaining power to negotiate contract provisions that prevent the elimination of jobs, place limits on surveillance and algorithmic management, and enable workers to benefit from productivity boosts offered by AI tools.1

AI and machine learning technologies2 are being used in new ways to automate nonroutine tasks, from writing code and human-sounding text to managing schedules, promising an increase in productivity for some workers. Nevertheless, many workers are understandably nervous that they will be denied the benefits of AI technology. Even as worker productivity increased over the past several decades, those gains went “everywhere but the paychecks of the bottom 80% of workers,” according to research from the Economic Policy Institute.3 For many workers, AI further threatens to automate parts or all of their jobs or worsen conditions by replacing human decision-making with algorithmic management driven by data harvested via invasive surveillance. Sam Altman, CEO of ChatGPT developer OpenAI, predicts “jobs are definitely going to go away, full stop.”4

While policymakers can take advantage of existing worker protections to ensure the use of AI in the workplace benefits workers and consider additional legislative steps, the examples set by unions make clear that policymakers also must complement these protections by strengthening the right to join a union and bargain collectively. Existing law can be applied in a way that protects workers from some of the potential harms of the use of AI in the workplace and hiring. Jennifer Abruzzo, general counsel of the National Labor Relations Board (NLRB), argued in a 2022 memo on electronic hiring and algorithmic management that many of the AI technologies used by employers are already illegal under settled law and urged the board to adopt a framework for protecting employees from surveillance and algorithmic management that interferes with protected activity.5 The Equal Employment Opportunity Commission issued technical assistance in 2021 on compliance with the Americans with Disabilities Act6 and algorithmic decision-making tools in hiring and employment as part of a larger algorithmic fairness initiative.7 Across the Biden administration, policymakers can further consider how existing law already regulates the use of AI.

Policymakers in Congress and the administration must center workers’ needs in their response to the use and development of AI8 through measures that strengthen workers’ right to come together in unions; ensure AI augments, rather than replaces, workers; prepare the workforce for AI adoption; and help meet the needs of workers who are displaced.9 Lawmakers in Congress are advocating for bills—such as the Stop Spying Bosses Act and the No Robot Bosses Act—that would protect workers from certain threats from AI. These policies should complement bills that strengthen unions, including the Protecting the Right to Organize (PRO) Act, which would stiffen penalties for union busting and enhance protections for workers trying to organize their colleagues,10 and the Public Service Freedom to Negotiate Act, which proposes strengthening organizing rights in the public sector.11

A comprehensive policy covering AI in the workplace would combine legislation to regulate novel uses of AI that harm workers, enforcement of existing law against uses of AI that already run afoul of existing employee protections, and stronger rights to organize a union and collectively bargain. Workers in some of the nation’s largest unions have worked tirelessly to negotiate over the uses of new technologies and set an example for how other unions can bargain over AI, but policymakers must open the door for more workers to advocate for themselves over how they can reap the promised benefits of AI.

Unions prevent workers from being replaced

In some industries where AI’s deployment threatens to replace workers, unions are winning control over the ways employers can use AI technology and how employees should be compensated. In late 2023, casino workers in Las Vegas represented by the Culinary Workers Union achieved a new contract that included a severance package of $2,000 for each year the employee worked if the employee’s role was eliminated due to “technology or AI.”14 AI was a contentious issue for workers in two of the largest and most highly publicized strikes in 2023: the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA)15 strike of actors and the Writers Guild of America (WGA)16 strike of writers. Both unions negotiated contract resolutions with the Alliance of Motion Picture and Television Producers (AMPTP) to address the risks AI posed to workers.

SAG-AFTRA

The contract SAG-AFTRA members ratified with the AMPTP in December 2023 covers television, streaming, and theatrical productions and has extensive language on AI and its use in producing digital replicas that look like real actors.

The SAG-AFTRA agreement defines an “Employment-Based Digital Replica” as a digital performance produced in “connection with employment on a motion picture” and “with the performer’s physical participation … for the purpose of portraying the performer in photography or sound track in which the performer did not actually perform.”26 This means producers making a movie can scan an actor’s performance, then use an AI-generated version of the actor to shoot a scene that actor was not present for, but the contract does not give producers carte blanche to use it however they want without paying the actor. Not only is the worker’s consent required, with a “reasonably specific description of the intended use” of the digital copy, but the worker is also entitled to their “pro rata daily rate or the minimum rate, whichever is higher, for the number of production days that Producer determines the performer would have been required to work had the performer instead performed those scene(s) in person,” along with residuals. These provisions mean the technology cannot be used to scan an actor and then use that digital likeness for free however the producers want without consent from and compensation for the actor.

The agreement also states that the technology cannot be used to create digital copies of an actor for productions that the actor is not already working on. These are called “independently created digital replicas,” which create “the clear impression that the asset is a natural performer whose voice and/or likeness is recognizable as the voice and/or likeness of an identifiable natural performer.” They, too, require consent with a specific description of its use, bargaining, and compensation.

Finally, actors negotiated compensation for and asserted control over using generative AI tools to create new performances by using old ones. Producers have to give “[n]otice to Union and an opportunity to bargain in good faith over appropriate consideration, if any, if a Synthetic Performer is used in place of a performer who would have been engaged under this Agreement in a human role”—making it harder for producers to simply use synthetic performers as a way to avoid hiring real actors. They also have to bargain with performers to use AI to generate synthetic performers that share some distinctive facial features with performers.

WGA

The contract agreed on by the WGA with the AMPTP in September 2023 amends the previous contract between writers and producers with an additional article, Article 72, that deals entirely with AI.27 The article makes clear that writing created by AI or generative AI cannot be “considered literary material” under WGA contracts. “Literary material” is the work product writers produce, so under the contract, the output of AI is not a substitute for the work of actual WGA writers.28 Section C of Article 72 goes further to cover situations where writers are hired to use AI-generated content “as the basis for writing literary material” and ensures that writers are still entitled to the payment, credit, and appropriate rights for their work that they would have enjoyed without AI involvement. The article further states that producers “may not require, as a condition of employment, that a writer use a GAI [generative AI] program which generates written material that would otherwise be ‘literary material’ … if written by a writer” and notes this would prevent, for example, a production company from forcing a writer to use ChatGPT to complete their work.

The contract reflects the “uncertain and rapidly developing” legal landscape around AI, and under it, “Each Company agrees to meet with the Guild during the term of this Agreement at least semi-annually at the request of the Guild and subject to appropriate confidentiality agreements to discuss and review information related to the Company’s use and intended use of GAI [generative AI] in motion picture development and production,” giving workers control over how AI use develops in the future. By establishing strong baseline standards to meet the current needs of workers and lay the groundwork for future negotiations, the contract offers an example for how workers can protect their needs in negotiating over AI.

Unions bargain over surveillance

AI-powered tools need vast datasets to function. Employers can harvest these data through invasive surveillance of workers, while AI companies may simultaneously gather even more information by processing large amounts of data automatically. If an employer plans to implement an AI-powered tool in its workplace, it may need data unique to its particular warehouses, trucks, or employee laptops. Employers may gather those data by tracking workers via means such as cameras and microphones,29 now powered by AI,30 as well as by monitoring work laptops issued to employees.31

The problem of employee surveillance is nothing new, and unions have been addressing workers’ concerns for decades since surveillance is not only invasive to workers’ privacy and a detriment to job quality but also a core part of the union-busting toolkit.32 The NLRB ruled as early as 1997 that the use of hidden surveillance cameras is a mandatory point on which employers must bargain with unions.33 The Communications Workers of America (CWA) has long negotiated over the use of surveillance in call centers, as many workers feared surveillance could be used against them to initiate disciplinary proceedings. Over the past 30 years, CWA contracts with AT&T, Verizon, Lumen/CenturyLink, and other telecommunications companies have placed limits on how many calls can be monitored, prevented recorded calls from being used to punish employees, and ensured call monitoring is used only to offer feedback for workers and to help train them.34

Today, surveillance continues to harm workers and poses a renewed threat to workers’ ability to come together in unions.35 Efficient AI-enabled processing of bulk data from sensors such as cameras allows more widespread use of surveillance in the workplace, reducing workers’ privacy and harming job quality.36 For example, workers have alleged that Amazon uses its data to calculate abstract performance metrics37 for its warehouse workers that place pressure on employees to overwork themselves and contribute to high rates of injury, stress, and taking unpaid leave,38 creating what one group of researchers called a “corporate police state.”39 In response to this, Amazon said it has made progress in improving warehouse safety, does not use camera technology in its warehouses to monitor employees, and offers workers multiple methods for reporting safety concerns.40 Workers have also alleged that Amazon monitors employee communications for labor organizing efforts,41 and journalists have detailed Amazon’s surveillance of private Facebook groups used by workers.42 The NLRB ordered the unsuccessful 2021 union vote at an Amazon warehouse in Bessemer, Alabama, to be rerun after a regional director of the NRLB found that Amazon “created the impression of surveillance” during the mail voting process.43

At the same time, Amazon workers who advocate for unions see unions as a means of addressing workplace surveillance, especially the use of surveillance and automated systems in disciplining employees. Chris Smalls, a former Amazon warehouse employee and the organizer who led a successful unionization vote at Amazon’s Staten Island warehouse in 2022, cited an algorithm-driven employee monitoring system as “one of the big reasons people want to unionize” in 2021, asking “Who wants to be surveilled all day? It’s not prison. It’s work.”44 Joshua Brewer, who helped organize the unsuccessful 2021 union vote at the Amazon, similarly said when asked about one reason why many workers want a union: “The workers answer to a lot of robotic information systems that deliver their discipline, and they have no say in it.”45

The Guardian reports that surveilling calls remains common at call centers,46 which unions have argued worsens job quality.47 Other industries are experimenting with new forms of surveillance. Hospitals have tracked nurses via a range of technologies including sensor badges that monitor when they wash their hands,48 and Uber has long tracked drivers via their smartphones, using the data to develop algorithms for predicting driver performance, for the purpose of increasing safety.49 The use of surveillance to curtail organizing is such a risk for workers that the NLRB general counsel issued a memo in 2022 urging the NLRB to recognize the threat that surveillance poses to worker organizing.50

The harms posed by surveillance can be mitigated through collective bargaining. In 2022, UPS began to refit its trucks with surveillance cameras that monitor drivers inside their trucks and can continually record and stream data.51 This surveillance increased pressure on workers and interfered with their ability to complete their work in a manageable way, including sorting packages in extreme summer heat. Drivers voiced frustration over the company’s choice to install new surveillance features in their vehicles while it refused to install air conditioning, with one driver alleging “surveillance and discipline are used to make us work faster.”52

The agreement the Teamsters reached with UPS in 2023 after their nationwide strike curtails the use of surveillance in trucks and prevents the potential replacement of workers with automated technology.53 Article 6, Section 6 of the contract covers tracking and surveillance technologies and their use in discipline. The protections are strong and guarantee that human managers are involved at every step of the process, ensuring, “No employee shall be disciplined based solely upon information received from GPS, telematics, or any successor system that similarly tracks or surveils an employee’s movements unless they engage in dishonesty.” Dishonesty explicitly does not alone consist of a “driver’s failure to accurately recall what is reflected by the technology,” and UPS “must confirm by direct observation or other corroborating evidence” behaviors that could result in firing or discipline, preventing tracking technologies from being the sole witness to alleged violations and giving workers a layer of human protection to ensure technology is being used fairly in the disciplinary process. Workers also cannot be warned about infractions based on tracking systems without first having a “verbal counseling session” about that infraction. Surveillance cameras for recording audio and video inside a vehicle cab are banned, and cameras that face outside the vehicle also cannot be used for discipline. These provisions alleviate the burden that surveillance places on workers to overperform in order to avoid being disciplined based on tracking or surveillance technology without human involvement.

Article 6, Section 4 establishes a committee between UPS and the Teamsters to review planned technological changes, which are defined under expansive language to include “any meaningful change in equipment or materials which results in a meaningful change in the work, wages, hours, or working conditions of any classification of employees in the bargaining unit or diminishes the number of workers in any classification of employees in the bargaining unit.” Under the agreement, UPS also agreed to notify the union well in advance of plans to implement any change that falls under this definition and to strike agreements with the union about the change being introduced. Furthermore, “If a technological change creates new work that replaces, enhances or modifies bargaining unit work, bargaining unit employees will perform that new or modified work,” ensuring workplace changes through technological advancement do not cut Teamsters out of the workplace altogether.54

Unions can help when workers have problems with AI management

For decades, employers have experimented with tools that offload management decisions such as scheduling and performance evaluation to automated systems. More recently, AI has enabled powerful automated management systems that sometimes conflict with workers’ ability to manage themselves or make decisions that workers do not understand or find unfair. Collective bargaining has enabled many workers to negotiate solutions that introduce a human element when needed and preserve the autonomy of individual workers on the job.

AI management

AI has increasingly been implemented to assign tasks, schedule workers, and evaluate performance, by offering a way to monitor performance metrics and needs in real time and assign work accordingly.55 Past uses of statistical and computational algorithms, however, have shown that optimizing for narrow productivity targets can harm workers.56

AI management of workers can strip workers’ power to manage the workload themselves. Housekeepers at a hotel that implemented algorithmic management of room-cleaning assignments described how the app-based management solution prevented workers from efficiently managing their own flows, denied them access to necessary information that would have made their jobs easier in deciding how to complete necessary room-cleaning work, and placed a higher workload on workers, all of which can negatively affect worker well-being.57 Academic research so far has found that algorithmic management of platform workers—that is, employees whose work is managed by smart technologies—can increase pressure on workers while making their income, workload, and scheduling less predictable and harder to manage.58 Higher stress and lower worker well-being can themselves negatively affect productivity as well, undermining the original goal of increasing productivity through algorithmic management.59

While the machine learning technologies now becoming mainstream may seem novel, the use of inscrutable algorithms for management, including hiring and firing, is not. Forty-four states and Washington, D.C., had implemented “value-added models” by 201560 to evaluate a teacher’s “value” to student academic achievement based on statistical analysis of student performance on standardized test scores.61 The models are difficult for nonstatisticians to understand, meaning teachers often could not get clear explanations as to why they failed the algorithm’s test. As the American Statistical Association warned in 2014,62 it was necessary to have “high-level statistical expertise” to “develop the models and interpret their [the models’] results,” which mirrors concerns today that AI is too difficult to explain.63 Despite this, some school districts used these models to make decisions about firing teachers. The District of Columbia Public Schools’ (DCPS) teacher evaluation system, IMPACT, introduced in 2009, resulted in DCPS Chancellor Michelle Rhee firing hundreds of teachers64—and a 2021 DCPS review found IMPACT had “disparate outcomes between white teachers and teachers of color.”65 The Education Value-Added Assessment System, implemented by the Houston Independent School District starting in 2007, resulted in 221 teachers’ contracts not being renewed by the school district in 2011.66 Seven teachers and their union, the Houston Federation of Teachers, sued the school district, and in 2017, the district agreed to stop using the system’s scores to terminate teachers unless the teachers could test or challenge the score independently.67

Driver deactivation

Today, many drivers for ride-sharing apps such as Uber and Lyft have suffered “deactivations,” made via algorithm, whereby drivers cannot accept new rides using the apps they rely on as a source of income.68 A 2023 survey of 810 drivers for Uber and Lyft in California found that 66 percent of drivers were deactivated at some point by one or both of the companies, and 30 percent of surveyed drivers who were deactivated report being given no explanation by either Uber or Lyft.69 The automated and opaque system powering deactivations results in workers being terminated without an easy-to-understand explanation.70

To combat this, ride-sharing drivers in Seattle organized Drivers Union, an association to help them advocate collectively for protections at the state, local, and industry levels.71 Because American labor unions must organize on a workplace-by-workplace basis, many workers, including app-based platform workers, cannot organize via a traditional NLRB-certified election. Instead, drivers pushed for better policies from their state and local lawmakers.72

In 2021, Seattle implemented a Transport Network Company Driver Deactivation Rights Ordinance,73 which established a panel that allowed drivers to appeal their termination to a government-run workers board with representation from the state-regulated and Drivers Union-operated Driver Resource Center.74 The center was highly effective at helping drivers retain their jobs, with drivers getting their deactivations overturned in 80 percent of cases with Driver Resource Center representation, based on a study of more than 1,400 cases.75

Drivers also advocated for a state law that came into effect across Washington state in 2023,76 guaranteeing minimum wages and paid sick time and workers’ compensation as well as expanding deactivation protections to cover the entire state.77 Drivers Union used this law as a foundation to reach a termination agreement with Uber in 2023,78 under which drivers who lose access for three or more days can file an appeal through the Driver Resource Center and, if no resolution is reached in 30 days, require the company to show just cause for the termination.79

Workers can act as partners in introducing AI to the workplace

While certain uses of AI technology can directly harm workers, it also promises productivity benefits, and unions empower workers to make sure they can share in the benefits. Although many workers are anxious about the introduction of AI into the workplace, some workers are hopeful that the technology can automate many of the repetitive, taxing, or undesirable tasks of their jobs and effectively ensure that work time is better spent.80 A 2023 survey by the Organization for Economic Cooperation and Development (OECD) found that a majority of manufacturing and financial services workers say AI has had a positive impact on their performance and mental health.81

Nevertheless, there is a risk that productivity benefits accrue only to employers, particularly if they find they need fewer workers to complete tasks and start laying off employees or “deskilling,” or lowering the skill level needed for existing jobs, in order to pay less.82 The 2023 OECD study also found that more than 40 percent of workers in manufacturing and financial services expect AI to lower their wages within a decade.83

Last year, several major unions and labor organizations won a seat at the table for workers in determining the future of the development and use of AI in their workplaces. In December 2023, the AFL-CIO and Microsoft created a platform for worker input into AI design and a dialogue over public policy to set guardrails for AI deployment.84 The CWA, which represents workers in industries with AI exposure such as game development and AI development itself, has developed bargaining principles for making sure AI works for its workers.85 Using these principles and building on their neutrality agreement with Microsoft, CWA workers at Microsoft video game subsidiary ZeniMax Media reached a tentative agreement86 that commits ZeniMax to provide notice about AI implementation while ensuring that its use of these tools boosts productivity and satisfaction without harming workers.87 Similarly, workers at the Financial Times editorial branch FT Specialist unionized with WGA East and ratified a contract that requires FT Specialist to “discuss in advance the introduction of any new technology,” and the union can bargain over the effects of these changes.88

Conclusion

Technological change affecting working conditions is nothing new, and amid bringing new AI technologies to the workplace, unions give workers a powerful tool for ensuring AI benefits workers rather than making their jobs worse or leaving them without a job. Many researchers100 and labor unions are highlighting the need for unions to play a key role101 in negotiating the development and introduction of new technology into the workplace. Unfortunately, federal labor law makes joining a union far harder than it needs to be, denying many workers a voice on the job. Because of this, policymakers should take a comprehensive approach to AI that includes empowering workers to speak up on the job while ensuring they enjoy the benefits of AI technology in the workplace. Empowering workers to join unions via policies that strengthen the right to organize, such as the Protecting the Right to Organize Act, will enable more workers to use collective bargaining to advocate for themselves over the use of new technologies in the workplace.

#### AI will fundamentally restructure the future of work.

John Cassidy 25, Staff Writer at The New Yorker, Author of "How Markets Fail" and "Dot.Con", Degrees from Oxford, Columbia, and New York Universities, "How to Survive the A.I. Revolution," The New Yorker, 04/14/2025, https://www.newyorker.com/magazine/2025/04/21/how-to-survive-the-ai-revolution

As alarm about artificial intelligence has gone global, so has a fascination with the Luddites. The British podcast “The Ned Ludd Radio Hour” describes itself as “your weekly dose of tech skepticism, cynicism, and absurdism.” Kindred themes are explored in the podcast “This Machine Kills,” co-hosted by the social theorist Jathan Sadowski, whose new book, “The Mechanic and the Luddite,” argues that the fetishization of A.I. and other digital technologies obscures their role in disciplining labor and reinforcing a profit-driven system. “Luddites want technology—the future—to work for all of us,” he told the Guardian.

The technology journalist Brian Merchant makes a similar case in “Blood in the Machine: The Origins of the Rebellion Against Big Tech” (2023). Blending a vivid account of the original Luddites with an indictment of contemporary tech giants like Amazon and Uber, Merchant portrays the current wave of automation as part of a centuries-long struggle over labor and power. “Working people are staring down entrepreneurs, tech monopolies, and venture capital firms that are hunting for new forms of labor-saving tech—be it AI, robotics, or software automation—to replace them,” Merchant writes. “They are again faced with losing their jobs to the machine.”

Warnings about A.I.’s impact on employment have been amplified by studies predicting mass job displacement, including in white-collar fields once thought immune to automation. A widely cited McKinsey report, updated in 2024, estimates that technologies like generative A.I. “have the potential to automate work activities that absorb up to 70 percent of employees’ time today.” An earlier Goldman Sachs analysis projected that generative A.I. could put the equivalent of three hundred million full-time jobs at risk worldwide. One profession already seeing steep losses is computer programming, at which A.I. has proved especially adept; U.S.-government data indicate that more than a quarter of all programming jobs have disappeared in the past two years.

For a time, the standard economic view of A.I. was more optimistic. Historically, economists have associated major technological breakthroughs—such as the steam engine and electrification—with productivity growth that, in the long term, raises living standards. In “The Second Machine Age” (2014), the M.I.T. economists Erik Brynjolfsson and Andrew McAfee argued that A.I. and robotics could play a role akin to that of the steam engine: “The key building blocks are already in place for digital technologies to be as important and transformational to society and the economy.”

At that time, generative A.I. was still in its infancy. But, in an article published in May, 2023, about six months after OpenAI released ChatGPT to the public, Brynjolfsson and his colleagues Martin Baily and Anton Korinek described how one of them had used the chatbot to accelerate research: after he entered a few plain-English prompts, “the system was able to provide a suitable economic model, draft code to run the model, and produce potential titles for the work. By the end of the morning, he had achieved a week’s worth of progress on his research.”

Raising economists’ productivity might not significantly affect the broader world, but the authors highlighted potential benefits across multiple disciplines, including mechanical engineering, materials science, chemistry, and robotics. “If cognitive workers are more efficient, they will accelerate technical progress and thereby boost the rate of productivity growth—in perpetuity,” they wrote. Their paper included a chart showing how A.I. could potentially double labor productivity and G.D.P. within twenty years under an optimistic scenario.

The economists acknowledged that a “bigger pie does not automatically mean everyone benefits evenly, or at all,” and cited studies on A.I.’s automation potential. Still, drawing lessons from previous technological transformations, they suggested that displaced workers would eventually find new employment: “Job destruction has always been offset by job creation.”

Recently, however, some prominent economists have offered darker perspectives. Daron Acemoglu, an M.I.T. economist and a Nobel laureate, told MIT News in December that A.I. was being used “too much for automation and not enough for providing expertise and information to workers.” In a subsequent article, he acknowledged A.I.’s potential to improve decision-making and productivity, but warned that it would be detrimental if it “ceaselessly eliminates tasks and jobs; overcentralizes information and discourages human inquiry and experiential learning; empowers a few companies to rule over our lives; and creates a two-tier society with vast inequalities and status differences.” In such a scenario, A.I. “may even destroy democracy and human civilization as we know it,” Acemoglu cautioned. “I fear this is the direction we are heading in.”

The Luddites grasped an essential truth: the factory system threatened their artisanal economy and livelihoods. This transformation was most dramatic in cotton manufacturing, as exemplified by Murrays’ Mills, in Manchester’s Ancoats neighborhood—a vast operation with eight-story buildings, steam engines, and more than twelve hundred workers. Visitors flocked to see the complex, which represented the new economy of its day.

Cotton manufacturing involved two stages: spinning fibres into yarn, then weaving yarn into fabric. Inventors like Richard Arkwright and James Hargreaves had mechanized spinning with various contraptions, but weaving initially remained too complex to automate. This technological imbalance actually increased demand for hand-loom weavers, whose numbers grew in Britain from thirty-seven thousand to two hundred and eight thousand between 1780 and 1812. Until about 1800, these weavers, many of whom worked from their homes, enjoyed rising incomes.

It was a temporary reprieve. In 1785, Edmund Cartwright patented a power loom, and though it was initially difficult to use, some Lancashire mill owners began adopting steam-powered versions in the early eighteen-hundreds. This development, combined with slumping global textile demand during the Napoleonic Wars, devastated weavers’ livelihoods. From 1804 to 1810, their incomes plunged by more than forty per cent.

The weavers at first reacted peacefully, despite repressive laws that prohibited labor unions. They gathered a hundred and thirty thousand signatures petitioning Parliament for a minimum wage, which the House of Commons flatly rejected, in 1808. Strikes and riots followed across Lancashire towns. After authorities responded with mass arrests, weavers formed clandestine committees and took secret oaths. Violence escalated in March, 1812, when workers burned a factory in Stockport that had introduced power looms. The following month, crowds attacked a Middleton mill, resulting in three deaths and multiple injuries. When protesters returned the next day, they burned the mill owner’s house after failing to enter the mill. Military confrontations left at least seven more dead.

These Luddite protests merged with broader discontent about wartime economic depression and rising living costs that pushed many workers toward starvation. Food riots erupted across northern England in the spring and summer of 1812. Mill owners received threatening letters, including one from “General Justice” that warned a Stockport businessman, “It is Not our Desire to doo you the Least Injury But We are fully Determined to Destroy Both Dressing Machines and Steam Looms.”

Facing Britain’s tight-knit ruling class and its willingness to deploy state violence, the Luddite movement gradually faded. By 1815, machine breaking had become rare, but the plight of the artisans remained dire. Hand-loom weavers suffered most severely—their wages, after briefly rebounding, collapsed permanently. By 1830, they had fallen by about eighty per cent compared with their levels in 1800. A parliamentary witness described visiting a starving family in a weaving village: “We there found on one side of the fire a very old man, apparently dying, on the other side a young man about eighteen with a child on his knee, whose mother had just died and been buried.” Between 1820 and 1845, the number of weavers plummeted from two hundred and forty thousand to sixty thousand, as many faced destitution.

However short-lived, Luddism was of immense historical significance, because it raised what came to be known as “the social question”—how to maintain the legitimacy of an economic system where workers create value yet remain subjugated to the vagaries of the market and the prerogatives of capitalism. This fundamental challenge would dominate nineteenth-century politics in all industrialized countries. As the historian E. P. Thompson noted six decades ago, in “The Making of the English Working Class,” the Luddites weren’t simply opposing new machinery. They protested “the freedom of the capitalist to destroy the customs of the trade, whether by new machinery, by the factory-system, or by unrestricted competition, beating-down wages, undercutting his rivals, and undermining standards of craftsmanship.”

The Luddites rejected the moral and political authority of a system that had abandoned long-held principles of fairness, quality, and mutual obligation. Under feudalism and mercantile capitalism, Britain’s rigid class structure placed the gentry at the top, merchants and professionals (such as doctors, parsons, and lawyers) in the middle, and the vast majority in the “lower orders.” Yet this social hierarchy was accompanied by labor-market regulations—both formal and informal—that provided some measure of reciprocity. Skilled trades were restricted to those who had undergone apprenticeships, and in times of economic distress local authorities offered unemployed workers and their families “outdoor relief” in the form of food, money, and clothing.

Industrial capitalism, by contrast, ushered in a free-market ideology that emphasized employers’ rights and viewed government intervention—whether in wage regulation or in hiring and firing practices—with suspicion. As Thompson observed, Luddites “saw laissez-faire not as freedom, but as ‘foul Imposition.’ ” They rejected the idea that “one man, or a few men, could engage in practices which brought manifest injury to their fellows.”

Even technology optimists acknowledge that A.I. raises questions similar to those that the Luddites once posed. In a 2022 article in Daedalus, Erik Brynjolfsson argued that today’s key challenge is steering A.I. development toward augmenting the efforts of human workers rather than replacing them. “When AI augments human capabilities, enabling people to do things they never could before, then humans and machines are complements,” he wrote. “Complementarity implies that people remain indispensable for value creation and retain bargaining power in labor markets and political decision-making.”

That’s the hopeful scenario. But when A.I. automates human skills outright, Brynjolfsson warned, “machines become better substitutes for human labor,” while “workers lose economic and political bargaining power, and become increasingly dependent on those who control the technology.” In this environment, tech giants—which own and develop A.I.—accumulate vast wealth and power, while most workers are left without leverage or a path to improving their conditions. Brynjolfsson termed this dystopian outcome “the Turing Trap,” after the computing pioneer Alan Turing.

So how do we increase the odds that A.I. works for us, rather than the other way around? Brynjolfsson, in his Daedalus article, suggested changing the tax system to give businesses more incentive to invest in technology that augments labor rather than replaces it. The problem, he pointed out, is that hiring humans comes with payroll taxes, while income from capital is typically taxed at a lower rate than labor, encouraging investment in machines. Fixing this imbalance, he argued, could nudge businesses toward a more worker-friendly future. But would that be enough to push A.I. in a similar direction? Daron Acemoglu has argued for a more all-encompassing approach. So has a colleague of his at M.I.T., David Autor, who is one of the economists who charted how the so-called China shock—an avalanche of cheap imports from that country—gutted American manufacturing jobs. Lately, Autor has been thinking about A.I.’s social and economic impact.

When I spoke to him, he noted that the Chinese-import wave was devastating but contained: certain industries, like textiles and furniture, were hit hard, but much of the service sector remained untouched. A.I., by contrast, may well seep into nearly every corner of the workforce. “I think there is great opportunity,” Autor said. “I also think there is great risk.”

The opportunity lies in enabling scientific research and boosting productivity, Autor thinks. The biggest danger—and here he agrees with Brynjolfsson and Acemoglu—is that A.I. will take over not only routine tasks but also highly skilled work, eroding the value of human expertise and leaving people to handle whatever the machines can’t. That could mean an economy in which the owners of A.I. systems capture most of the rewards, and the rest of us are left with the scraps. But Autor is not entirely pessimistic. “There’s going to be a long period where there are a lot of A.I. systems acting as sophisticated tools to help us do the work we do,” he said. “We need to design for that world.”

The challenge, then, isn’t just understanding where A.I. is headed—it’s shaping its direction before the choices narrow. As an example of A.I.’s potential to play a socially productive role, Autor pointed to health care, now the largest employment sector in the U.S. If nurse practitioners were supported by well-designed A.I. systems, he said, they could take on a broader range of diagnostic and treatment responsibilities, easing the country’s shortage of M.D.s and lowering health-care costs. Similar opportunities exist in other fields, such as education and law, he argued. “The problem in the economy right now is that much of the most valuable work involves expert decision-making, monopolized by highly educated professionals who aren’t necessarily becoming more productive,” he said. “The result is that everyone pays a lot for education, health care, legal services, and design work. That’s fine for those of us providing these services—we pay high prices, but we also earn high wages. But many people only consume these services. They’re on the losing end.”

If A.I. were designed to augment human expertise rather than replace it, it could promote broader economic gains and reduce inequality by providing opportunities for middle-skill work, Autor said. His great concern, however, is that A.I. is not being developed with this goal in mind. Instead of designing systems that empower human workers in real-world environments—such as urgent-care centers—A.I. developers focus on optimizing performance against narrowly defined data sets. “The fact that a machine performs well on a data set tells you little about how it will function in the real world,” Autor said. “A data set doesn’t walk into a doctor’s office and say it isn’t feeling well.”

He cited a 2023 study showing that certain highly trained radiologists, when using A.I. tools, produced diagnoses that were less accurate, in part because they gave too much weight to inaccurate A.I. results. “The tool itself is very good, yet doctors perform worse with it,” he said. His solution? Government intervention to insure that A.I. systems are tested in real-world conditions, with careful evaluation of their social impact. The broader goal, he argued, should be to enable workers without advanced degrees to take on high-value decision-making tasks. “But that message has to filter all the way down to the question of: How do we benchmark success?” he said. “I think it’s feasible—but it’s not simple.”

One tool the federal government could use to shape A.I.’s development is its buying power. In health care alone, public money accounts for roughly forty per cent of expenditures, through Medicare, Medicaid, and the National Institutes of Health. Education is another sector where government funding exerts significant influence, as the Trump Administration is now demonstrating.

In Autor’s ideal scenario, government agencies would leverage this influence by tying research grants and A.I. procurement to stricter requirements for product development and real-world testing. But this approach faces a major hurdle: in most industries, A.I. development is entirely privately funded, with profit as the primary driver and government directives often viewed as interference. Autor acknowledged the challenge. The internet, he pointed out, was largely shaped by DARPA, the Pentagon’s research arm, which steered its development by supporting open protocols. With A.I., “we have fewer levers than we did with previous technologies,” he said. Still, he remained cautiously optimistic: “There’s a ton of leverage there. I don’t think it is out of our hands.”

On February 27, 1812, the twenty-four-year-old poet George Gordon Byron rose in the House of Lords to deliver his maiden speech. Fresh from a grand tour of the Levant, he had returned to his mother’s home, in Nottinghamshire, where local stocking knitters were smashing machinery in protest of falling wages and joblessness. The attacks were “outrages,” Lord Byron told the assembled peers, but they were driven by “circumstances of the most unparalleled distress,” caused by new knitting frames. Only desperation, he argued, could drive such an “honest and industrious body of the people” to violence. He also mocked the Frame-Breaking Act, which Parliament was then debating, along with its proposed capital punishments. “How will you carry the Bill into effect?” he asked. “Will you erect a gibbet in every field, and hang up men like scarecrows? Or will you proceed . . . by decimation? Place the country under martial law? Depopulate and lay waste all around you?”

Parliament ignored Byron’s warning and responded with repression. It took decades for Britain’s political system to acknowledge the deeper disruptions of industrialization. Eventually, it did—passing a series of Factory Acts that limited working hours and child labor; expanding public education; legalizing labor unions; and, by the early twentieth century, constructing a social safety net that included health and unemployment insurance.

With A.I. advancing at a far faster pace than the textile mechanization of Byron’s era, today’s policymakers will have much less time to respond. The rollout of automated driving systems alone threatens the jobs of an estimated 3.5 million American truck drivers and perhaps two million taxi-drivers, chauffeurs, and rideshare drivers. In a recent paper, Ege Erdil and Matthew Barnett, of the nonprofit research group Epoch AI, warned that such displacement—a “general automation explosion”—could provoke a big public backlash long before A.I. delivers more speculative transformations like rapid economic growth or extended human life spans.

Could we see protests akin to the Luddite attacks—this time targeting server farms instead of knitting frames? And how will the U.S. political system respond? In October, 2023, President Biden issued an executive order on A.I. that laid out broad goals—insuring safety, promoting “responsible innovation,” expanding job training—but offered little in the way of specific policy measures. Now A.I. regulation is in the hands of a President who claims to be both a champion of workers and an expert on automation. “I’ve studied automation and know just about everything there is to know about it,” Donald Trump declared in a December, 2024, social-media post, aligning himself with unionized dockworkers resisting automation at U.S. ports. “The amount of money saved is nowhere near the distress, hurt, and harm it causes for American Workers, in this case, our Longshoremen.” Trump’s Treasury Secretary, Scott Bessent, has said that the Administration’s priorities are job security and wage growth above all else. “The American Dream is not ‘let them eat flat screens,’ ” he said recently. It is “not contingent on cheap baubles” but buttressed on the dignity of work, the promise of a stable job, and the ability to afford a home.

This vision—rooted in economic nationalism and the rhetoric of an industrial-era social contract—stands in stark contrast to the techno-libertarian accelerationism of another key Trump ally. Elon Musk, who has been described as an unelected co-President, has declared that A.I. will eliminate most jobs and that societies will have to adopt a universal basic income (U.B.I.) to compensate. His company xAI has poured billions into developing its own A.I. model, Grok, and, as the de-facto head of Trump’s Department of Government Efficiency, he is pushing an “A.I.-first” strategy for federal agencies.

Yet if A.I. were to render work obsolete, as Musk predicts, the very economic foundation of the Bessent vision would collapse. Where would the tax revenue come from to fund a large-scale U.B.I.? Presumably, it would have to come from A.I. titans like Musk himself—who not only own the technology but also effectively own a lot of politicians, Trump included.

In other words, A.I.-based capitalism, if it is to maintain its political legitimacy, may well have to be accompanied by very high levels of taxation on capital, which would, in effect, socialize the financial returns that the A.I. models generate. Perhaps this was what the A.I. pioneer Geoffrey Hinton was getting at during a recent interview when, on being asked about the economic policies needed to make A.I. work for everybody, he gave a one-word answer: “Socialism.”

In the late nineteenth century, it was the rise of socialism—and, ultimately, the threat of a workers’ revolution—that spurred the German Chancellor Otto von Bismarck to create the world’s first comprehensive social-insurance system, a model that other countries later adopted. Conceivably, a cross-party coalition of embattled professionals—middle managers, computer programmers, copywriters, teachers, doctors, lawyers, and so on—could force a preëmptive or at least a mitigating response to A.I. Right now, though, a coherent A.I. policy seems well-nigh inconceivable. The country is deeply polarized, the Trump Administration is slashing many of the federal agencies that would oversee any comprehensive approach, and the very notion of evidence-based policymaking is under threat.

“We would have handled this challenge better in the nineteen-seventies than we are handling it now—and that’s a very sad statement,” David Autor told me. “Ironically, I have less faith in our ability to manage it today than I would have had when we were a lower-tech society.” It wasn’t an irony he seemed to savor. “This is probably a bad moment for A.I. to appear,” he said. ♦

#### Automation is not going to make work disappear. It only creates new urgency to ensure that workers are at the table.

Juan Sebastian Carbonell 22, teaches sociology at the Université Paris 1 Panthéon-Sorbonne, "No, Automation Isn't Going to Make Work Disappear," Jacobin, 03/28/2022, https://jacobin.com/2022/03/automation-technology-precarity-employment-working-class-logistics

The COVID-19 lockdowns spurred renewed discussion of which jobs are necessary — and how far our societies remain centered around work at all. With the so-called “Great Resignation,” this took the form of a growing refusal to accept working dull jobs for poverty wages. Yet, in many “techno-optimist” accounts, workers’ power to accept or refuse employment is in any case on the decline. They claim that artificial intelligence and automation are bringing an unprecedented wave of redundancy — demanding, in turn, that we find other ways to guarantee citizens a stable income.

But, French labor sociologist Juan Sebastian Carbonell insists, the claim that new technology is replacing the need for a human workforce is shortsighted — and, in fact, a myth as old as capitalism itself. In his new book Le futur du travail, he argues that work is not disappearing but being transformed, with the material consequences of new technology, outsourcing, and subcontracting shaped both by management plans and worker resistance.

Jacobin’s David Broder spoke to Carbonell about the myth of the “great technological replacement,” the resilience of the workforce at a global level, and the bases of class identity in postindustrial economies.

David Broder

Your work resists the idea that we are seeing a “great technological replacement” of human labor. Why is that — and what do self-checkout machines tell us about this?

Juan Sebastian Carbonell

First, because it’s false: the technological replacement isn’t happening. I take the example of self-checkouts, because it was controversial in France in the early 2000s. The CFDT (Confédération française démocratique du travail, French Democratic Confederation of Labor) campaigned against them, saying that they’d be replacing supermarket checkout workers. Trade unions are sometimes themselves the victims of this illusion: the capitalist mythology of a “great replacement” of labor by machines. Yet, twenty years after their introduction, self-checkouts are present in only 57 percent of supermarkets in France, and where they are present, they are in addition to, not instead of, conventional checkouts with human cashiers. They’re also not ever so automatic: there are still cashiers to supervise and help out the customers, though their tasks have changed.

So, the book tries to question this common sense. For me, the problem with the transformation of work today is less that new technologies could eventually replace workers but that they are used to degrade working conditions, keep wages stagnant, and mount a major flexibilization of working time.

David Broder

You explain that “labor-saving technology” doesn’t remove the need for workers in general but changes the way that work is organized.

Juan Sebastian Carbonell

When you look at the concrete effects of new technology in work, you immediately see consequences that cannot be reduced to “replacement” alone. There is a substitution of specific tasks, which does not get rid of the jobs entirely.

Management’s goal can also be to deskill the workforce, so one worker is more easily replaced with another. This is linked with Harry Braverman’s thesis on the degradation of work in the twentieth century, which continues in the twenty-first. It says that when management introduces new technology, it does so to increase its control over the work process. I saw this a lot in the auto industry when they introduced so-called “digital manufacturing” in assembly plants: as one technician put it, the aim is that anybody can do anything in the workplace. Another important — albeit not necessarily deliberate — result is that you also need a reskilling of workers: some new machines will need programmers and maintenance workers, and this also means something of a transformation of skills within the workforce.

For example, in the context of the so-called Fourth Industrial Revolution and digital manufacturing, we are also seeing the appearance of data scientists inside factories. It’s still difficult to know how many jobs this represents. But sometimes you do need to hire different kinds of workers to do different kinds of things in the changing labor process.

This deskilling also brings an intensification of the work process. This simply means more work for fewer people with the same skills, during the same work time — something that is very common in the dynamics of technological change.

A further important consequence — usually overlooked by researchers, journalists, or so-called experts on new technology — is increased control and surveillance in the workplace. Management can more easily, for example, follow workers with GPS and control their movements, as in the case of couriers and delivery personnel.

I use the example of the Daily Telegraph, where management introduced motion sensors so that they knew whether workers were in front of their computers. You see this also in industry, again with the introduction of digital manufacturing, for instance by registering the moment that the machine stops running, so management knows if workers took a longer break. More generally, the use of data in manufacturing has the consequence of rendering the work process more transparent to the eyes of management. It thus knows when machines are being used, to what intensity, when are they going to break, when or how are they being used, and so on. MES (manufacturing execution system) software allows it to centralize all this information and have a clearer view of the work process. The apologists for the new technologies present this as progress, but they don’t talk about its negative effects on workers.

David Broder

You tell us that some defenders of the “great technological replacement” thesis admit that previous waves of technological innovation reorganized rather than replaced the workforce, but insist that with the Fourth Industrial Revolution and artificial intelligence, this changes. To give a concrete example, I’ll save time on writing up this interview by using an AI-transcription service, but it’ll still take hours for me to edit the results. So, what actually is different?

Juan Sebastian Carbonell

Experts and futurologists are conscious that past waves of automation have not brought about the end of work. So, they try to see what is specific about the new wave of automation today. And they say that it’s going to bring a further, final rupture in capitalism, finally bringing work to an end.

The title of my book, Le futur du travail, has a double meaning in French: the debates on the future of work refer to the future, but for me they resemble the past. I emphasize the continuities between past waves of automation and the current one, saying that robotization and software in factories and offices had more or less the same consequences as the introduction, for example, of digital technologies in the factory or of AI today.

While AI is presented as the technology that is going to put an end to white-collar as well as blue-collar work, it is still very limited in its uses and potentials. The programmer still has a central role not only in the creation but also in the day-to-day running of the AI: they provide its architecture, its learning method, the data that feed it, and so on. So, we’re a long way from a technology that functions entirely autonomously. Some researchers talk about AI as a general-purpose technology, meaning that it’s a technology whose uses are becoming more widespread but whose consequences are still to be determined. But they will be so general that they’ll probably just create as many jobs as they’ll contribute to destroying. More specifically, artificial intelligence is not independent of workers, programmers, and developers working on this software.

So, behind the apparent novelty of these new technologies that are presented as a major disruption to capitalism, actually, there is the same continuity, the same logics of substitution, deskilling, and intensification of control. For example, translation software will replace some elements of translators’ work but could also make some specialties more valuable.

David Broder

I’d like to turn to the idea of “labor society.” As you tell us, overall employment levels haven’t dropped away, especially since the “full-employment” era included such a high nonactive population, for instance in domestic work. But nonetheless, it is widely claimed that the world of work is now so fragmented that it is impossible to speak of the common condition of “being a worker,” often characterized in terms of a now-bygone Fordist era. Your work challenges this view. Why?

Juan Sebastian Carbonell

I try to historicize the discussion on the overwhelming precarity in today’s workforce, saying it is not necessarily so new but partly a product of the feminization of the workforce. If there has been a rise in unemployment in France (1 percent in 1968 to 10 percent in 2015), it is also because there is a drop in the “inactive” population, mainly women (who were domestic workers), who dropped from 27 percent in 1968 to 11.5 percent in 2015. If there was full employment during the “Trente Glorieuses” — the three decades after 1945 — it was also because the nonemployment rate (i.e., those neither employed nor seeking paid work) was high.

In a sense, precarity has been functional to capitalism since its beginning: what was new in the postwar era was the idea that capitalists would need, and work toward having, a more stable workforce. I try to develop this idea in the book. Even forms of work such as Uber and self-employment on digital platforms are not new. Self-employment mediated by other people has always existed in capitalism: I give the example of coal miners in turn-of-the-century France, who worked in a system like Uberization, where some were hired not by the bosses or directly by the mine but by middlemen, called “butties,” who paid them by the cartload — something Émile Zola describes in Germinal. The difference today is that this middleman is an impersonal digital platform.

So, I’m trying to say that this common experience of work never really existed. In the debate in France, there’s a phrase I like: “The working class is no longer what it never was.” It never was this person hired on a stable job, working 9-to-5 as Dolly Parton put it.

More generally, I tried to say that labor remains central, in two ways, despite the changes. The first is that it remains the main way in which society produces and reproduces itself. And it remains central, also, in a social way. It remains central in the sense that work is also a social order incarnated in the wage-labor form and also in social representations, which give work its centrality in the life of individuals. Today, despite claims of generalized precarity, permanent employment is the norm in France: 75.2 percent of the whole workforce is employed on a permanent contract.

What changes with COVID is that in these representations, where work remains central, work is no longer idealized. With the “Great Resignation,” we see that people are more disillusioned with working conditions, with wages, and with work flexibility today. But looking at the number of resignations, at least in France, they have risen only because they are catching up with resignations that otherwise would have happened during the lockdowns, and because when there is growth, when accumulation begins again, there is more internal job mobility. For example, in France in late 2021, there was more hiring than resignations, while hiring on permanent contracts currently exceeds pre-COVID levels in late 2019.

David Broder

You say that “deindustrialization is everywhere except the statistics,” especially outside of Western Europe. To take a major European industrial power like Italy, there is an experience of a couple of generations — roughly bounded by World War II and the 1980s, that saw the reemergence, rise, and fall of the labor movement — followed by large-scale deindustrialization and outsourcing, even if some important industries remain. Clearly, these combined factors provide a material basis for the narration of the “death of the working class.” But looking beyond the Global North, how real is this, and how far is this even a dominant discourse?

Juan Sebastian Carbonell

The “death of the working class” is an interesting question because one of the main reasons instigating the discourse on the end of work is deindustrialization and the end of blue-collar workers. What this misses is the globalization of value chains, the regionalization of industries, and the fact that — to take one prominent industry — there are today more auto workers worldwide than there were thirty years ago: far fewer in Italy, France, or the UK, but far more in China, India, and Latin America. Employment in the auto sector rose worldwide by 35 percent between 2007 and 2017. Take China, where employment in the sector rose 68 percent, to roughly 5 million workers in 2017, or Mexico, where employment doubled during the same period. At the same time, employment in the auto industry in France declined from 280,000 to 190,000 in the same period. That’s without taking into account the emergence of a battery value chain, whose effects on industrial employment are to be determined.

So, the “death of the working class” discourse is a Global North narrative, blind to the economic transformations of world capitalism. I use the theoretical framework of Beverly J. Silver, who says that capital faces two opposing forces. The first is the profitability crisis: capital searches for new countries where the labor force is cheaper, and new industries where it can invest, to counter the tendency of the rate of profit to fall. The second force is working-class organization. That’s why it always seeks out “disciplined” and “peaceful” working classes in Global South countries. But it also creates the same contradictions in these other countries. So, while it invests in creating new industries and new working classes in other countries, it also creates new labor conflicts and demands.

In this sense, alongside the deindustrialization of Northern countries, there is an industrialization of Southern and Eastern ones. Slovakia has more production of vehicles per person than any other country in Europe. Then, in northwestern Europe, you have a tendency also to create new hubs of industrial workers; in the book I give the example of logistics, which is one of the fastest-growing sectors of industrial work in the rich countries. There is a small boom in the number of workers in this sector, where jobs are usually manual, very unskilled, and very poorly paid. In France, you have now 800,000 blue-collar workers in logistical hubs in the peripheries of big cities. One can also think of the UPS Worldport in Louisville, Kentucky, with 20,000 employees. This again reflects the idea that where capital invests, labor conflicts emerge. You have seen this in France, and you have seen this in northern Italy, where there was a wave of strikes by migrant workers in logistical hubs. That is a direct consequence of this development of logistics as an industrial sector, as was the auto industry a few years ago.

Alessandro Delfanti said that Amazon is the new Fiat. I’m not sure if I entirely agree with that, because Fiat, now Stellantis, still exists. But the configuration of the workforce is somewhat similar. It means that there are young, unskilled, migrant, poorly paid, and highly concentrated workers in these new logistical hubs. And this is an explosive cocktail in a certain sense for the organization of the working class, and it could be a possible source of renewal also for the labor movement today.

David Broder

When we think of Fiat Mirafiori or Renault at Boulogne-Billancourt — historic “red fortresses” of organized labor — their significance wasn’t just the number of workers they employed or even the supply chains attached to them but also a certain symbolic importance as “national champions” and centers of industrial modernity that the workers battled to control. Today, there are bigger economic sectors that employ more people (e.g., tourism in Italy), but they don’t seem to have the same aggregating role, as a possible focus of class identity or vision of where power in society lies.

Juan Sebastian Carbonell

Yes, I see, and there are autonomists who say that “power is logistic, block everything!” and thus the logistics sector has a strategic importance in worker organization and overthrowing capitalism, if only we built stronger, non-bureaucratic, et cetera unions there. I think this is both true and untrue. Logistics has the particularity that you can’t easily do offshoring, simply because of how it works. At the same time, you have a real deindustrialization of Western Europe and the rich countries in general.

But when you look back at the history of the workers’ movement, you see that some sectors that were at the forefront were not necessarily more concentrated or strategic. Erik Olin Wright distinguishes associational power — the power that comes from the collective organization of workers — and structural power, which comes from the location of workers in the capitalist economy. The leading role wasn’t always played by the ones able to stop the whole economy from running.

I take the example of mid-nineteenth-century France, where shoemakers were the most subversive workers: they had a strong associational power and were extremely organized. It is estimated that 4 percent of the people arrested for resisting Louis-Napoleon Bonaparte’s coup d’état in 1851 were shoemakers. They also created one of the first trade unions in Paris, in 1866. And many of the elected officials of the Paris Commune were also shoemakers, including Auguste Serraillier, who was informing Karl Marx about the events unfolding in Paris.

This leads me to the fact that, for example, platform workers don’t necessarily have the same structural power as, say, logistical workers, but there are similar dynamics of capital investment, work, and concentration. They have also been at the forefront of many struggles in France, in Italy, in Germany, and so on and the renewal of part of the workers’ movement in Western Europe. That is why I say that in these new sectors you find not only the same logics of capitalism in the organization of work but also the same logics of conflict.

David Broder

In your book, you relativize the real extent of Uberization but also cast the “platform economy” more as a pro-market fantasy than a viable economic model. Often, we see politicians dazzled by the idea that digital platforms are somehow not quite real and not bound by the “old” regulations, and in this sense they are a Trojan Horse for undermining labor conditions. But you also point to some material limits to this model’s expansion.

Juan Sebastian Carbonell

Yes, the first thing is to understand in relative terms the numerical importance of work for digital platforms. There are widely varying estimates: in France, between 1 and 6 percent of the population. There is a particular status called “microemployment” — not all the self-employed, and not including professionals who have their own firms like doctors and lawyers, but people that work, among other things, for digital platforms — and this only represents 2.8 percent of the total workforce. So, I wanted to first note the reality of these numbers.

Then, there are the material limits. The first is the problem capitalists have in establishing a reliable workforce. With this kind of work organization in digital platforms, sometimes working conditions are so bad that workers will not be loyal to the platform — for it also isn’t loyal to the workers. So, you have a lot of turnover, sometimes creating a problem in terms of the continuity of service.

The other problem is what Marx refers to as an anti-economic consumption of the workforce, from the point of view of capital: because working conditions are so bad, workers are extremely tired, and turnover is very high. For instance, some Uber drivers are doing up to sixty hours a week. This creates conditions in which the workforce is exhausted, again creating these problems of continuity of service.

The last problem is viability of this economic model. Take Uber: it’s not economically viable, except in certain very big cities like London, Paris, and New York, and in general, it loses a lot of money. This is also the case with Deliveroo.

This means some digital platforms in fact heavily depend on public subsidies. In France, there is a platform for domestic services like housecleaning, hairdressers, and sports coaches, called Wecasa. The state subsidizes clients for certain services, like housecleaning or childcare, to make it economically viable. If not, the platform couldn’t possibly pay workers sufficient incomes. So, they also can be attracted to it, in competition with other existing domestic services platforms, because it is artificially kept afloat by the state.

David Broder

It would seem, though, that while some of those workers could push back against these conditions by demanding recognition as employees — for instance, in Uber or Deliveroo — unionization would be a harder challenge when it comes to, say, Fiverr, when the job tasks are so divided up as to destroy the professional identity.

Juan Sebastian Carbonell

I see what you mean, though in the book I talk about the example of microworkers for Amazon Mechanical Turk (MTurk). This is the most fragmented workforce you can imagine: people working for a few minutes at a time for a digital platform, going “click, click,” in a completely anonymous way on the internet. But despite this extreme fragmentation, some have managed to organize not exactly in unions but in forms that resemble the “fraternal societies” that existed in nineteenth-century England. This was done also through the digital tools that capitalism has given us, turned against their masters in a certain way — using, for example, the forums that Amazon put online. They began discussing among themselves, saying we need to do this or that.

It’s funny because it really resembles the way in which workers used to think in the early nineteenth century, saying, for example, “We should write letters to Jeff Bezos saying, this is our situation, you need to change this situation. Could we be paid more? Could you make more transparent the way salaries are determined?” and so on. So, they created this association around their demands. Then Amazon closed down the forum, so they decided instead to organize outside of Amazon and create their own cooperative, which has a more transparent way of functioning, which was one of the main criticisms of MTurk.

David Broder

As you refer to there, a theme of the book is that technology doesn’t simply produce negative outcomes — there’s a struggle over the effects, in which the technology is itself a tool. But what good examples can we point to where unions or workers’ organizations have been proactive in outlining how technological advance might be used in a socially useful way?

Juan Sebastian Carbonell

I’d struggle to think of any example of a workers’ organization that has put forward an original idea regarding technology, except the ones I mentioned of unions being skeptical about these new technologies. Indeed, workers are usually right to be skeptical about them, because when they’re implemented they have the negative consequences I described.

Thirty years before the CFDT ran this campaign against self-checkout machines, they did an inquiry with sociologists and published a book, very important at the time, called Les Dégâts du progrès (The Damage Progress Brings). It was a very interesting reflection on the use of technology in the workplace, basically saying that, of course, technologies are bad for workers when they are in the hands of the bosses, but they could be something different.

This is the idea I try to defend in the book. Technologies are not themselves emancipatory, as when they are in the bosses’ hands, they are part of the subordination of workers. But if technologies are accompanied by an emancipatory political project, they can have the exact reverse effect. This is why I ask why unions don’t demand public investment in bettering working conditions through new technologies in the workplace. When I talk to workers in the car factories where I’ve done research, they said of course they’re not fundamentally against new technologies if they free them from this or that physical task.

But the problem is, historically, the Left and the workers’ movement have demanded that automation mean the reduction of working hours. This demand is no longer enough: for reducing working hours has been systematically accompanied by the flexibilization of working time. In France, the thirty-five-hour week was seen positively by unions, but the scholarly literature argues that bosses used it to make jobs more flexible and intensify the workload, since it was calculated as an average over the course of a year, meaning that sometimes workers were doing six or seven days a week and furloughed at other times, creating an impossible situation for their families. People who call for a thirty-two-hour week haven’t properly taken stock of what happened with the thirty-five-hour week.

#### Labor should get to set a seat at the table when setting the terms of automation.

Alex N. Press 24, staff writer at Jacobin who covers labor organizing, "US Unions Take on Artificial Intelligence," Jacobin, 11/08/2024, https://jacobin.com/2024/11/union-contracts-artificial-intelligence-workers/

When Boston University graduate students went on strike in April, Stan Sclaroff, the university’s dean of arts and sciences, sent faculty an email with suggestions for keeping their classes on track. As Inside Higher Ed reported, the dean’s “creative” solutions included combining discussion sections, alternative assignments, and using “generative AI tools like ChatGPT.” Professors, the dean wrote, could use the technology to “give feedback or facilitate ‘discussion’ on readings or assignments.”

Sclaroff’s suggestion that artificial intelligence (AI) could handle struck work provoked an outcry from grad students and faculty, with Service Employees International Union (SEIU) Local 509, which represents the grad students, stating, “We are extremely disappointed by the university’s suggestion that the use of AI could even begin to substitute the hard work that graduate workers pour into mentoring students, facilitating discussions and teaching.” The union told Inside Higher Ed that they hoped the administration would reconsider the suggestion and instead “focus on properly compensating the people who do the work that is crucial in keeping the university running.” The university soon backtracked, claiming, “Neither Dean Sclaroff nor Boston University believe that AI can replace its graduate student teaching assistants, and the assertion that we plan to do so is patently false.”

Since ChatGPT launched in November 2022, educators are just one of many workers now confronted with emerging technology wielded by management as a threat. Across the United States, AI has occasioned all manner of anxieties. It’s not just AI’s environmental impacts, discriminatory biases, or privacy risks: according to one study from Ernst & Young, a consulting firm, some 75 percent of workers are concerned AI will make certain jobs obsolete, with 65 percent worried about AI replacing their job. An Axios-Morning consult poll found that while regulation of the new technology is not a top priority, some half of Americans worry that AI will replace either their job or those of their loved ones.

There’s reason for concern. Despite AI’s potential for liberating workers from tedious tasks and grunt work — proofreading, drafting standard-operating procedures, coding data, identifying images, and much more — in the hands of employers, the technology is already being used to replace workers and undermine their bargaining power. Tech companies often employ low-paid workers in the Global South to correct AI’s mistakes, raising the question of just how “artificial” the technology really is. Reliable numbers are hard to come by as employers seek to avoid outcry from replacing workers with AI, but according to data from outplacement firm Challenger, Gray, & Christmas, an estimated minimum of 4,000 US workers lost their jobs to AI last year. As AI pioneer Mustafa Suleyman recently put it, “Left completely to the market and to their own devices, [AI tools are] fundamentally labor-replacing.” Dean Sclaroff was merely making explicit a dynamic that already exists, and in a mind-boggling variety of industries. Everywhere one looks, workers are confronting AI not as a means of reducing the tedium of their work, but as a boon to managerial power.

Take the fast-food industry. In 2019, Nation’s Restaurant News was already calling the technology the “biggest tech trend” in quick-serve restaurants (QSRs), where experiments with AI are underway in both the front of the house (servers, bartenders, hosts) and back (busboys, cooks, dishwashers). Companies have been adapting conversational AI for drive-through windows for years (with occasionally disastrous results shared on social media), but as the publication noted, “the trend has now reached a fever pitch, and more and more limited-service chains are replacing humans with AI drive-thru workers.” The list of chains experimenting with the technology either for drive-through or online ordering include Wendy’s, IHOP, CKE Restaurants, White Castle, Del Taco, Panera, McDonald’s, and Sonic. Some restaurant owners are dreaming of automated servers for sit-down dining; while robot servers are a rarity in the United States, in China, Pizza Hut already has some one thousand of them.

Those are just customer-facing roles. In the back of the house, QSRs are toying with deploying AI for inventory management, food safety, and worker scheduling, while a few are testing robots that can prepare hamburgers and turn out tortilla chips. The tight labor market of recent years has led employers to search for alternatives to paying workers the higher compensation that they can now command, hoping AI might be the latest labor-saving technological investment that can boost long-run profits.

That process may already be unfolding at UPS. Earlier this year, the company announced that it plans to lay off 12,000, the largest layoffs in the company’s history. According to CEO Carol Tomé, the cuts, which will primarily affect management-level employees rather than the company’s unionized workers, were in part made possible by AI. She cited the example of the technology allowing salespeople to put together proposals without having to ask pricing experts for guidance as one way AI can reduce the logistics giant’s headcount.

This year, the meat-packing industry’s annual Meat Conference featured a panel titled “The Use and Application of Artificial Intelligence: How to Make this Advanced Technology Work for Your Business.” According to the organization, the presentation aimed to “provide industry stakeholders with insights on how data application can deliver operational improvements, like enhanced efficiencies and a more reliable supply chain, while also better predicting shopper habits and needs.”

As with any new technology, it’s difficult to cut through the hype around AI, such as OpenAI CEO Sam Altman’s claim that AI will become “the most powerful technology humanity has yet invented” or former Google chief business officer Mo Gawdat’s boast that “We’re creating God.” Tech companies have an interest in exaggerating AI’s capabilities. Silicon Valley executives have long insisted that autonomous vehicles would replace truck drivers, but they have hardly done so. Instead, truckers are being transformed into appendages of technology, forced to drive under the watchful eye of surveillance technologies that monitor and control them rather than render them obsolete.

AI is likewise being used to monitor workers, a dynamic dramatically on display in the growing use of technology by Aware, an AI firm specializing in analyzing employee text messages and emails. The company told CNBC that employers including Walmart, Delta, T-Mobile, Chevron, and Starbucks are now using its tools to monitor employees’ messages on Slack, Zoom, and other workplace-applications. Aware describes its product as a means of analyzing employee sentiment and toxicity; it isn’t hard to imagine how it might aid employers hoping to halt worker organizing. Rather than replacing them outright, AI’s biggest threat may be as an innovation in management technologies, with workers governed by decisions made by algorithms while simultaneously surveilled by other algorithms.

“A lot of this becomes thought crime,” Jutta Williams, cofounder of Humane Intelligence, told CNBC of AI employee surveillance technology. “This is treating people like inventory in a way I’ve not seen.”

In an AI-centric future, we are sure to see some jobs, both skilled and unskilled, replaced by automation: educators, fast-food workers, warehouse workers, software engineers, graphic designers, writers, and even lawyers are all on the chopping block. The technology will create new jobs as well: tending to the algorithms, producing them, fixing their mistakes. Microsoft CEO Brad Smith has said that the goal of AI is to “‘boost the productivity of workers, [reduce] the drudgery in jobs’, and translates those efficiency gains in higher standards of living,” but many jobs will be made much more onerous and less fulfilling, as workers are forced to coexist with AI, correcting its errors and reworking its output.

To understand the scope of AI’s potential impact, look at the numbers. Investment in AI is rapidly accelerating, and employers across industries (as well as financial analysts) are enamored with its possibilities. A 2022 study found that the amount of computing power used to train AI systems has been doubling every six months over the past decade.

Cognitive workers are a particular target, as generative AI systems are being trained to create computer code, write sentences and emails, summarize articles, brainstorm ideas, and translate languages. (Research by OpenAI, the company behind ChatGPT, states that language-learning models [LLMs] could affect 80 percent of the US workforce in some capacity — perhaps an overstatement, given the company’s interest in promoting its products, but also a sign of the extent of the company’s ambition.) An emerging consensus suggests that AI’s productivity effects will be significant, with changes already evident at call centers as the technology is deployed to answer common questions, route customers to agents, and generate phone-call transcripts.

AI is fueling change in American workplaces, and that change is coming fast. Government regulations, however, are lagging. President Joe Biden issued an executive order on AI in October 2023 which states that “as AI creates new jobs and industries, all workers need a seat at the table, including through collective bargaining.” Biden directed federal agencies to “develop principles and best practices to mitigate the harms and maximize the benefits of AI for workers by addressing job displacement; labor standards; workplace equity, health, and safety; and data collection,” a means of “providing guidance to prevent employers from undercompensating workers, evaluating job applications unfairly, or impinging on workers’ ability to organize.”

But as agencies develop such standards, AI’s rollout continues, and with union density at 10 percent overall and a ghastly 6 percent in the private sector in 2023, it is doing so while the overwhelming majority of workers don’t have the seat at the table of which Biden’s order speaks. The PRO Act, a labor-law reform package that would make union organizing far easier, remains stalled in Congress, and that means they aren’t likely to get one anytime soon. The result? Those workers who do have unions are left to battle AI’s anti-worker impacts on their own.

Unions Take on AI

The class war over AI entered the mainstream last year. When workers across the entertainment industry went on strike, constraining film studios’ use of the technology was a top priority. For the 11,500 striking screenwriters and television writers in the Writers Guild of America (WGA) and the 160,000 striking actors and performers in the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), the threat was imminent. In Hollywood, tales abound of producers wanting performers to scan their likeness or voice for possible future use. During the strike, actors told me of their fears that digital versions of themselves could be made to say and do things they never would have, with audiences unable to tell the difference. Writers worried they might become mere adjuncts to AI-written plots or scripts, hired to punch up a story produced by a technology that itself is trained on writers’ former work (a dynamic that itself raises legal questions, given authors’ copyright claims).

Indeed, the threat AI poses to performers is playing out dramatically in a dispute between actress Scarlett Johansson and OpenAI. The company is launching an automated voice assistant, and according to Johansson, Sam Altman, the company’s CEO, asked her last year if she would lend her voice to the tool (Johansson played a disembodied AI voice in Spike Jonze’s Her, which Altman has said is his favorite movie). She declined, but when the tool launched, it sounded remarkably similar to her anyway, a move that she said “shocked” and “angered” her.

“In a time when we are all grappling with deepfakes and the protection of our own likeness, our own work, our own identities, I believe these are questions that deserve absolute clarity,” Johansson said of the dispute. “I look forward to resolution in the form of transparency and the passage of appropriate legislation to help ensure that individual rights are protected.” Following Johansson’s statement, OpenAI announced it would remove the voice from the tool, though the company claims the voice is not an imitation of the star but rather comes from a different professional actress using her natural speaking voice.

It is precisely this theft of one’s self, the possibility of losing control over one’s voice or likeness, which motivated writers and actors to stay out on the picket lines. The contracts they won secured a preliminary goal: creating a framework of regulations and standards for its use, contractual mandates by which film studios and producers must abide.

After 148 days on strike, WGA members ratified a contract which stipulates that AI is not a person, and thus, its output cannot be considered “literary material.” A company can still furnish a writer with AI-generated material and ask them to work from it, but this cannot affect either the writer’s compensation or credits, a specification that reduces companies’ incentives to use AI in the first place. Per the contract, a company also cannot require a writer to use generative AI themselves, be it ChatGPT or any other program.

The SAG-AFTRA contract, ratified after 118 days on strike, offers more extensive AI rules than the writers’ agreement, reflecting the fact that the technology has already affected members. Studios are now required to obtain performers’ consent before a “digital replica” or their voice or likeness can be created or used; when it is used, they must compensate performers at a rate similar to what performers would receive if they were on set themselves.

Film-industry workers aren’t the only ones bargaining over AI. In November 2023, Las Vegas hospitality workers, members of the Culinary union, secured expanded technology rights, including retraining for those with jobs altered or replaced by AI. Journalists are yet another front line: while the New York Times is suing OpenAI and Microsoft for copyright infringement, claiming that the newspaper’s articles were used to train the technology, other publishers, including Vox Media, News Corp (publisher of the Wall Street Journal), the Atlantic, and the Financial Times have inked deals with OpenAI, and a range of publications are experimenting with AI-generated articles. Accordingly, both the WGA and the NewsGuild, the country’s two biggest unions for journalists, have demanded protections from AI in writing. The Financial Times Guild, a WGA-East shop, was the first to win the right to bargain over the effects of newly introduced technology like AI. According to David Isenberg, who covers the Securities and Exchange Commission for FT Specialist, the company wanted to limit workers’ rights to merely discussing changes rather than having a mandate to bargain over them, but members insisted on the legal obligations of a right to bargain and their first contract, ratified last summer, includes that language.

The Communications Workers of America (CWA), the NewsGuild’s parent union, recently established principles for AI in the workplace: accountability, proactive bargaining, and early and meaningful worker input. As CWA not only represents journalists, but workers in call centers, telecommunications, and tech — the Alphabet Workers Union-CWA includes members who work on AI systems at Google and other Alphabet, Inc. companies — the union is well-positioned to establish standards worth adopting across the labor movement.

“AI has the potential to build prosperity and unleash human creativity, but only if it works for working people,” CWA president Claude Cummings Jr said in a statement announcing the AI principles. “We are taking a member-first approach and demanding that working Americans have a voice, guaranteed by their union contract, in how AI shapes the future of work.” The union’s organizing at Microsoft itself, where it represents hundreds of quality-assurance workers at subsidiary ZeniMax Media, a video game holding company, offers one example of what these statements look like in practice.

The International Brotherhood of Teamsters has made similar statements, with the New York State Conference of Teamsters testifying that “any type of artificial intelligence must be regulated to protect the public by requiring safe operation and meaningfully address what many, including the Teamsters, view as a potentially catastrophic impact on the American workforce.” The union singled out autonomous vehicles as a threat to their members, though the recently ratified UPS contract, despite securing major wins, does not halt the company from acquiring a fleet of autonomous vehicles.

“Bring workers in early in the process,” American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) president Liz Shuler said in December 2023. “Use our expertise to brainstorm, develop and implement new ideas.” The labor federation has been advocating for a seat at the table in AI’s rollout and is also pushing for worker input in the production of the technology itself, what Shuler calls a “co-creation process.” Those aims are reflected in a recent partnership between the AFL-CIO and Microsoft, which includes a mechanism for labor to share insights and concerns with those developing the technology at the company, as well as a plan for the parties to formulate joint policy recommendations (the agreement also mandates Microsoft remain neutral if any of its workers organize).

There are other experiments in worker input too: for instance, the labor federation’s Technology Institute has had union bus drivers offer their perspectives on self-driving buses, resulting in a white paper by Carnegie Mellon University professors who realized that the technology would complicate operators’ jobs. The white paper also noted that “self-driving technology is no substitute for the more human part of what bus operators do in attending to passenger needs (say, assisting an elderly person) and looking out for passenger safety.”

A few years ago, Shuler and a delegation of UNITE HERE members visited Carnegie Mellon University, a technology powerhouse, to better understand AI. A faculty member demonstrated a “cutting-edge cutting board that was able to measure how fast someone sliced vegetables, as well as the quality of their motion.” As Shuler told the publication, “It was easy to see we were basically one step away from having the technology cut the vegetables.”

Stop AI or Tame It?

When SAG-AFTRA leadership announced the details of the union’s tentative agreement with the studios last year, some actors (and even a few of the union’s board members) weren’t satisfied with the protections against AI and urged members to vote against ratification. The contract allows for exceptions to its AI compensation and consent requirements, such as when an actor’s digital replica is used for “comment, criticism, scholarship, satire or parody,” an ambiguous and potentially broad carveout. Others objected to countenancing the use of AI at all, arguing that the technology is an unambiguous threat to current and future members, and the union’s role should be to oppose it, full stop.

It was an early instance of a debate that will continue to play out as employers’ adoption of AI continues: Should unions try to stop AI, or merely secure a say in its use and maybe development? Can unions’ efforts to keep the technology at bay neutralize its anti-worker effects, assuaging the fear of job loss that keeps so many workers up at night? Or are the SAG-AFTRA critics right, and if there ever were a chance to produce AI that benefited society at large rather than a minority of employers and workers, it has long gone?

This is far from the first time that labor leaders have been at pains to state that they aren’t against technology for fear of being painted as opposing progress itself, but it may well be a pipe dream to imagine that workers can influence AI to have a liberatory rather than deleterious effect on our lives. Even bracketing the technology’s risks beyond the workplace, wherever one looks, AI is wielded as a means of controlling workers, managing and surveilling them, and yes, maybe one day, replacing them. This technology is not “introduced” to the workplace; it is imposed.

As unionized workers fight to secure defensive measures against such managerial impositions in their contracts, they must use those experiences as a springboard and testing grounds for legislative and regulatory fixes. If AI threatens a mind-boggling array of workers, it also unites them, offering a shared enemy against which the labor movement can and should face down. That can’t happen a moment too soon: nonunion workers are depending on it.

### Aff---Adv---Democracy

#### Strong unions are necessary for democracy, even compared to all other possible reforms.

David Madland 21, Senior Fellow and Strategic Director of the American Worker Project at the Center for American Progress, author of Hollowed Out, "Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States," ILR Press, an imprint of Cornell University Press, 2021

Similarly, strengthening America’s democracy so that government takes more direction from the interests of regular citizens will also require a stronger labor movement. Labor is by no means the only pro-democracy policy necessary. Improvements in campaign finance and voting policies are clearly needed too. But these kinds of democratic reforms would be more likely to achieve their goals if they were complemented by stronger unions and a new labor system.

Healthy democracies generally do not give the wealthy so many ways to spend their money to influence politics, nor do they make voting as difficult or as biased against certain groups of people as the current US political system does. Clearly, reforms will need to reduce the influence of the wealthy—including increased disclosure of contributions, amplification of small contributions, and limits or outright bans on some contributions. Democratic reforms will also need to make it easier and fairer for citizens to participate in the political process by getting rid of restrictive voter identification laws that systematically discriminate against people of color and the young, by making voter registration easier or automatic, and by limiting gerrymandering. Other more dramatic changes may even be necessary, such as ending the Senate filibuster, fixing the unrepresentative electoral college, and even checking an increasingly partisan Supreme Court.

Changing the formal rules of the game would make US elections fairer and thus make it more likely that the government would respond in line with the views and wishes of its citizens. But these kinds of changes have clear limitations, since a fairer system does not automatically translate into the will of the people being carried out.

Campaign finance and voting reforms only address a small part of the process of converting the public’s will into policy. There are many elements of the election and governing process that would not be particularly affected by these kinds of changes. Among the many factors before an election even happens include who chooses to run for office, what issues they campaign on, what issues the media choose to focus on, and what issues people hear about and understand. Then there is the question of whether people are able to and chose to vote. The period after the election is just as important or even more so. There are many question to be answered during governing. What policies will elected officials choose to prioritize? Will they follow through on their promises? What vested interests will support or oppose their efforts? What issues will the media discuss? What issues will resonate with the public? Will the public take action to support or oppose a governmental policy? Will the policy be implemented, funded, and enforced?

In order to have a fair shot at influencing each of these stages, the public needs to be organized, engaged, and have an advocate on the inside working for their interests. The wealthy and the powerful certainly do.

At some level, democracy is a contest between people and money. And if the people are not organized, money will always win. This is true even if policies are enacted to limit the influence of money. If the rich cannot give directly to candidates, they will just do more indirect giving. They will increasingly coerce their workers’ political activities, spend even more on issue ads and lobbyists, buy more newspapers, TV stations and internet companies, buy additional centers at universities and think tanks, offer more jobs to their former regulators, pay for increasingly extravagant vacations for judges, and hire additional lawyers to contest every policy they do not like. They will use the political structures that are open to them, and they will try even more to frame and limit debates, not just engage in the day-today political battles.128

The wealthy can have some degree of influence on their own because they can pay legions to do their bidding. But the public needs to be organized to have an impact on who runs for office, what issues candidates focus on during the election and in office, and how the laws are actually implemented and enforced. Most people cannot become super-citizens tracking every governmental action, and they do not want to.129 Even if they did, they would not have much influence doing so on their own. Most people want and need an organization to help mobilize them at key times and to represent their interests in behind-the-scenes negotiations.

Put differently, democracy has an organization and representation problem. Democracy needs all interests to be effectively organized and represented, but without a strong labor movement, workers are likely to be severely under-organized and underrepresented. While it is theoretically possible that many kinds of groups could organize the public around a broad set of economic and democratic issues, experience has shown that labor is the only organization with the scale and the mission to do so. Labor cannot be the only group organizing and involving citizens in the democratic process and fighting for their interests behind the scenes—other organizations like the PTA, Shriners, Sierra Club, and American Legion matter too. But labor is by far the most important. A healthy civil society is necessary for democracy to work properly, and labor unions are a critical part of civil society. Not surprisingly, research shows that strong unions make government more transparent, effective, and responsive to citizens.130

There is also an even deeper problem limiting the effectiveness of democratic reforms: they do little to strengthen the middle class and reduce extreme economic inequality. To be truly effective, democratic reforms need to reduce extreme economic inequality. The more economically unequal a society is, the more the rich will have the ability and incentives to rig the system. Campaign finance and voting reforms can make the rules of the game fairer, but they have a hard time making the power of the players more equal.

At a more abstract level, labor is an essential part of the checks and balances that allow capitalistic democratic governments to function properly. Labor unions can limit the extremes of capitalism from pushing democratic capitalistic systems toward authoritarian rule. And they can limit governments from intruding so much in private business that the system becomes communistic or otherwise destroys the freedoms offered by capitalism. Labor has different interests and spheres of influence than does government or business and can prevent either one from gaining too much power.

#### Now more than ever, we need labor anti-fascism.

Bill Fletcher Jr. 24, Talk Show Host and Writer, Activist, Trade Unionist, Author of "The Man Who Changed Colors" and "The Man Who Fell From the Sky", "Labor Now Needs to Be an Anti-Fascist Movement," In These Times, 11/08/2024, https://inthesetimes.com/article/trump-maga-labor-fascism

The election has proven to be a disaster not only for the Democratic Party, but for progressives more generally. Republicans have the Presidency, the Senate, the Supreme Court and, likely, the House of Representatives.

The fundamental issues at play are inflation, revanchism, racism and misogyny, and MAGA forces have begun what they believe to be their final offensive against everything on the Left.

Vice President Kamala Harris ran an amazing campaign considering it only started in August. She galvanized much of a base that had, by that time, become especially lethargic. She reached out to build a broad front to oppose former President Donald Trump. But she also made two crucial mistakes.

The first was not permitting a Palestinian speaker at the Democratic National Convention and, further, not making greater efforts to distance herself from President Joe Biden’s nearly unequivocal support of Israel.

The second is that she failed to address, at least successfully, the anguish felt by so many because of inflation. (It would have helped to remind voters of the collapse of the economy during the Pandemic.)

Running for election during a period of inflation can be a nearly impossible hill to climb. The only way I imagine Harris could have handled these issues around inflation better are by speaking directly to voters’ pain, and by explaining how the economy collapsed when the pandemic hit in 2020 and the disasters surrounding the supply chain. It was a lost opportunity to address what polls — prior to and after the election — indicated was upper most on voters’ minds.

But Left and progressive forces need to address much more than the economy, in particular that so many people across the country have internalized revanchism, racism and misogyny.

Revanchism, a term more often used in Europe than in the United States, is the politics of revenge, resentment and the desire to regain what someone believes has been taken from them. Trump played to this and stoked it.

Related to revanchism has been the rabid and open racism and sexism that was articulated by Trump and his running mate, JD Vance. Take the allegations that Haitian immigrants and refugees were eating cats and dogs in Ohio. Not only was there a failure of such false allegations to split the campaign, but even when Trump and Vance admitted they were lying, this meant nothing to the base.

The Trump — Vance victory is a victory of MAGA Republicanism. It is the victory of a fascist ticket that seeks to undermine constitutional democracy and introduce a different sort of state, something that the late French — Greek Marxist theorist Nicos Poulantzas would identify as an exceptional state.

They wish to develop a state that is arbitrary and barbaric — that remains capitalist. One question now is whether Trump will turn on various members of the capitalist class who have stood against him.

This moment is equivalent to the aftermath of a massive invasion, and the Left needs to wrestle with which sorts of responses are necessary. Here are a few suggestions:

Begin thinking about building systems of protection for those who will be attacked, e.g., migrants and political dissenters. Build systems of self-defense.

Build broad fronts to oppose the far-Right. This means building formal and informal united fronts to oppose efforts by the far-Right to undermine constitutional democracy.

Build resistance to the war on women and queer folks. This includes defending the right of women to control their own bodies. It also means defending LGBTQ+ populations that are under continuous physical threats at the hands of the far Right.

Build a new voting rights struggle that includes challenging how elections are funded, improving the ease with which people can register and vote, and efforts to stop voter intimidation.

Build an internationalist framework for challenging right-wing authoritarianism including taking stands against Israel’s genocidal war against Palestinians, supporting Ukraine in the face of Russian aggression, and opposing U.S. foreign policy that supports dictatorships, aggression and interference.

Move organized labor to the point that it becomes a conscious anti-fascist movement, including significant member education about right-wing populism and fascism and by building coalitions at the local, regional and national levels to oppose the far-Right.

There is much more to be done. We can take a couple of days to mourn, but then we have to rock and roll.

The election result was not what most of us expected or hoped for, but it is the result that we have received. While there appears to have been clear acts of voter suppression, both prior to and during the election, at this time there exists insufficient evidence to bring about a change in the results.

Our challenge is to continue to assess the election and its results, and then develop a theory of the counteroffensive that must be undertaken against the harbingers of barbarism.

Complacency and defeat are not options!

### Aff---Mech---At-Will Employment

#### At will employment makes it impossible to overcome dictatorial workplace tendencies.

Tiffany Cabán & Tony Rosario 24, Cabán is a former candidate for Queens district attorney and a national organizer with the Working Families Party; Rosario is the lead organizer Teamsters Local 804, "At-Will Employment Must End. Our Civil Rights Depend on It," The Nation, 09/26/2024, https://www.thenation.com/article/politics/at-will-employment-new-york-city/

The harassment started when Tiffany Jade Munroe’s coworkers found out she was transgender. Then she was fired from her warehouse job with no explanation and no warning. And there was nothing she could do: In New York, it is almost always legal to fire a worker with no reason and no recourse. This is known as at-will employment.

You might be asking: Isn’t discrimination in hiring and firing illegal under the Civil Rights Act? It is. So why have so many New Yorkers—one in four women and one in 10 men, to be exact—endured sexual harassment at work to avoid being disciplined or fired? And if they did speak up, why were so many of them (one in seven) fired or disciplined for speaking up about workplace concerns?

What happened to Munroe is not an outlier. At-will employment allows discrimination to run rampant in the workplace. If employers don’t need to provide a legitimate reason (or any reason) for a firing and there are few mechanisms for recourse, anti-discrimination laws like the Civil Rights Act are incredibly difficult to enforce.

Luckily, there is a solution that has already been tested on the fast-food industry and is supported by 79 percent of New Yorkers: the Secure Jobs Act.

Int 909, also known as the Secure Jobs Act, would end at-will employment and expand the labor rights that were granted to NYC’s fast-food workers in 2020, and which are already held by many union workers, to all workers in New York City. If this bill became law, it would be a major shift in American labor law.

At-will employment does not exist in almost any other country. Montana, with its population of 1 million, has banned at-will employment, and now it’s time for a city of 8 million to follow, proving that in rural and urban areas around the country, every job can and should be a secure job. New York can become the first big city in the US to require all employers to give workers advance notice of termination and a written explanation of their firing, as well as the opportunity to appeal termination decisions and be reinstated.

Under at-will employment, many workers are afraid to speak up about unsafe conditions or come together with their coworkers for fear of being fired. Union members are protected from unjust firings by provisions in their contracts, but most working Americans are forced to live under the constant threat of being fired for any reason, or no reason at all, with no warning, explanation, and recourse.

The power of organized labor comes from one essential value: solidarity. For any of us to be free and dignified, we must all be. If ending at-will employment is good for union members, it is good for all workers.

In New York, half of all working New Yorkers are one or two paychecks away from losing the ability to pay rent, afford medicine, food, or childcare. Every working New Yorker—every working American—deserves job security and peace of mind, not vulnerability and precarity.

The Secure Jobs Act flips the burden of proof in workplace discrimination and retaliation cases. Instead of requiring the worker to explain their firing, the Secure Jobs Act would place the responsibility on the employer to show that there was a good reason for the firing.

In the fast-food industry, these protections are already working: In July of 2021, Austin Locke, a Starbucks barista and union organizer, was fired unfairly. In March 2023, Austin was reinstated and received $21,000 in back pay because the City of New York had his back. Every New Yorker—in every industry—deserves that level of job security.

While the overwhelming majority of New Yorkers support ending at-will employment, massive corporations like Amazon are leading the fight against it. They’re hiding behind the very mom-and-pop businesses that they’re squeezing out of existence, saying new labor protections would result in waves of storefront closures. That is exactly the line that fast-food corporations pushed before the same protections were applied to them in 2020. And guess what: The closures they fearmongered about never happened.

Ending at-will employment does not threaten small businesses. Owners will still be able to lay workers off in times of economic hardship or terminate the job of any worker who violates policies or fails to fulfill the terms of their contract—each of which qualifies as a valid reason for termination under the Secure Jobs Act.

Ending at-will employment is a crucial missing piece for making our civil rights laws enforceable. It will strengthen the labor movement by creating an environment where workers can more readily come together and speak up. Everyone should have a stable job they can count on and enough security to plan their life. As elected officials and labor leaders, we’re ready to rewrite the rules so that every job is a secure job.

#### Just cause for all is a meaningful progressive demand.

Moshe Marvit & Shaun Richman 18, Marvit is affiliated with New Labor Forum; Richman is affiliated with New Labor Forum, "The Case for 'A Right to Your Job' Campaign," New Labor Forum, vol. 27, no. 3, 09/01/2018, pp. 14-18, https://www.jstor.org/stable/26503646

It is time for the labor movement to campaign for a “Right to Your Job” law.

With anti-union Republicans in control of Washington, this might not seem like the best time to think and plan about workers’ rights. But to surrender to a mere survival mentality would be a mistake. We are on the verge of a major opportunity for labor renewal.

Among congressional Democrats, there is a growing recognition that a strong labor movement is vital to building a constituency for progressive change, and that delivering tangible wins for workers is vital to gaining and maintaining office. As one small example, the official labor bill that the Senate Democrats are currently offering is essentially a repeal of Taft-Hartley.1 This could be opposition theatrics, of course, but we believe something deeper is at play.

. . . Rep. Keith Ellison’s draft bill, . . . would amend the Fair Labor Standards Act of 1938 to make just cause the legal standard of employment . . .

A better example is a draft bill by Rep. Keith Ellison—as of this writing not yet introduced–which would amend the Fair Labor Standards Act of 1938 to make “just cause” the legal standard of employment and is at once a deeply radical and eminently sensible proposal. That it is a dead letter in a Republican-dominated Congress should not discourage us. Rather, we should press to keep it on the agenda and make it a battleground.

Thus, legitimized by actual federal legislation, a campaign to win just cause as a “Right to Your Job” law in blue states and rebel cities would strongly contrast with and make the false term right to work ring hollow. There would also be a neat symmetry, as “Right to Your Job” is most winnable in non–“right to work” states.

Explained simply, “just cause” is the principle that an employee can be fired only for a legitimate, serious, work-performance reason.

Just cause puts the onus on the employer to prove that a termination was for a valid work-performance-related reason . . .

“Just cause” empowers workers to have a voice. It gives them the power to say, “No.” “No” to requests that fall outside of a job description, to unwanted sexual advances or jokes, to an employer’s demand that the worker lobby the government on its behalf.2 It gives workers the right to engage in free speech outside the workplace, to flip off the president, to attend a protest, and to engage in all manner of non-work-related speech, without risking their jobs. Just cause puts the onus on the employer to prove that a termination was for a valid work-performance-related reason and not—as a worker would have to prove today—that it was based on one of the few improper reasons contained in the law, such as racial discrimination, retaliation for blowing the whistle on inappropriate or unfair working conditions, or some public policy exception.

That makes the campaign for just cause a natural complement to the #MeToo movement. Women are overrepresented in the service sector, where they may be subject to more demands that fall well outside their job description (if there even is a clear job description). Much of this comes in forms of emotional labor—where supervisors, customers, and clients alike expect female workers to fill roles analogous to surrogate moms, daughters, and wives. Furthermore, in every one of the most common occupations for women, they are paid less on average than their male counterparts.3 Women who request equitable pay increases know they are inviting undue scrutiny or new “duties as assigned” in retaliation. Women also experience sexual harassment in the workplace at alarming rates. A major 2016 Equal Employment Opportunity Commission report found that 25 to 85 percent of women experience sexual harassment in the workplace.4 This range is so broad because workers are not empowered to say anything. Just cause laws would permit workers to speak up, without having to make the impossible choice of demanding fairness and dignity or risking their livelihoods. (See “Beyond #MeToo” in this issue.)

The “Right to Your Job” law also makes sense as a defensive strategy for Black Lives Matter and Antifa (anti-Facist) organizers, who are currently vulnerable to targeted far-right attacks aimed at getting those organizers fired for their activism from the day jobs that are unrelated to their non-workplace endeavors. Because arbitrary termination is the boss’ greatest weapon, “just cause” can serve as the rule that protects all other rights at work.

The labor movement must make common cause with these newly enlivened movements in the workplace. “Just cause” for all makes sense as a progressive coalition demand.

This could be a winning issue in blue states with a political culture of ballot initiatives. We saw in 2016 that when paycheck issues and workers’ rights are put on the ballot, voters support those initiatives and often come out to vote for down-ballot Democrats in greater numbers.

The At-Will Doctrine and Faulty Judge-Made Law

The alternative to “just cause” is the current mess of affairs euphemistically referred to as the “at-will” employment doctrine. “At will” is based on the false concept that because employees have the freedom to quit their job at any time, the employer should have the right to fire them at any time, for good cause, bad cause, or no cause. This formulation does not recognize that a worker’s right to quit stems from the Constitutional protections against involuntary servitude, while the employer’s right to fire does not stem from any fundamental right. Furthermore, “at-will” does not recognize the huge imbalance inherent in the employment relationship, where a worker who leaves his or her job rarely puts the entire enterprise at risk of failure, but an employer who fires a worker can cause that worker to lose his or her health insurance, home, and livelihood. Most workers who do not have an individual or collective contract find themselves as “at will” employees.

Some may question whether workers will rally to win employment rights that many mistakenly believe they already have. To the extent that that is true, naming and blaming the “at will” doctrine must be taken up by the newly invigorated socialist left as a popular education project.5 In some ways, that would be a return to our roots.

“At will” is entirely a judge-made law, and it has been unpopular with workers’ movements from the start. Early on in our nation’s history, judges imported the doctrine from English common law. This coincided with the Industrial Revolution breaking up the traditional relationship between master craftsmen and their journeymen and apprentices. It ensured that the new class of capitalists had no obligations to displaced workers.

Most workers who do not have an individual or collective contract find themselves as “at will” employees.

Earlier generations of the labor movement resisted the “at-will” doctrine and fought for employment rights for all workers. That changed with the advent of the National Labor Relations Act in 1935.

Basing employment rights—along with retirement, health insurance, and pay standards—on the enterprise-level of contract bargaining was an accident of history, and one that places U.S. workers well outside the norms of employment standards around the globe. It worked—on its own terms—for a few decades. But it is increasingly clear that the system is breaking down under a sustained corporate assault and unions’ continued fidelity to the model of a bygone era that is part of the trap we find ourselves in.

. . . [M]any union leaders and organizers might have a slight preference for retaining “at-will” to drive more unrepresented workers to organize for a union contract . . .

With “just cause” routinely negotiated into collective bargaining agreements, unions evolved to accept that job security is something a worker only gets for being in a union. Even today, many union leaders and organizers might have a slight preference for retaining “at-will” to drive more unrepresented workers to organize for a union contract at their place of work. Although that might have made sense in the 1950s, it is a completely counterproductive strategy in an era where union rights are under attack and employers routinely fire union activists to chill new organizing campaigns as well as subcontract and offshore jobs to avoid the reach of union contracts. The logic of this approach is also dangerous, as it could easily be used to argue against an increased minimum wage, universal health care, or a slew of other issues that would make all workers’ lives better.

“Just Cause” as a New Tool for New Organizing

As a practical matter, “Right to Your Job” laws would open up new pathways to organizing.

In a “just cause” legal environment, employers would have a self-interest in professionalizing their human resources department to avoid lawsuits and maintain discipline. Many companies would wisely institute forms of progressive discipline to document that underperforming employees were informed and counseled on areas of needed improvement before a “just” termination. Some might even institute an internal appeals process.

A worker who receives a warning that his or her job is in peril might reasonably want to contest a write-up and seek help and representation. This provides unions with an opportunity for a new model of representation and membership growth. Unions could offer unrepresented workers an at-large membership for a reasonable fee. Unions could offer telephone or in-person counseling.

If the “grievant” works at a company that the union is interested in organizing, providing onsite representation could be a good way to make inroads with other workers. More generally, providing such services would provide workers who have no experience with unions a positive view of them.

The United Teachers of New Orleans (UTNO) re-established collective bargaining through such a strategy in 2014. Infamously, of course, the city fired all of its teachers in the wake of Hurricane Katrina in 2005 and methodically replaced most of the district with charter schools.6 But some schools retained forms of tenure in the rule books. The employers tended to evade it through a strategy of churning both the workforce and the “portfolio” of charter management organizations.

However, at the historically elite high schools that were converted to charters, many of the former teachers were rehired and retained long enough to re-achieve tenure. When Benjamin Franklin High School moved to terminate a popular Latin teacher, UTNO represented him at a school board hearing and successfully saved his job. Before the school year was over, a rank-and-file organizing committee had signed up 90 percent of their colleagues for the union and successfully pressed the school board for voluntary union recognition.

Contrast that with what happens these days when an unrepresented worker whose job is in peril calls most local unions for help. The worker is most often told “They’re allowed to do that” and “We can’t help you,” and the union usually writes off the shop as an organizing prospect, because how can you start a campaign with a worker who is about to get fired?

The ability to contest a termination through mediation, arbitration, or lawsuits would also create a proliferation of worker/union-side labor lawyers. This is important because despite the common disdain for attorneys, especially those who advertise their services, the availability and outreach by attorneys can serve an important educational function for workers who may not know their rights at work. Think of it as Better Call Saul, with more of a social justice focus. The increase of lawyers who represent workers can also create a virtuous cycle, where there becomes an increase in judges who understand worker issues and thereby change the law to make it more worker-friendly.

Why Now?

For decades, unions have watched in frustration as badly needed labor law reforms have died under Democratic administrations and Democratic congressional majorities. As a result, we have understandably tended to lower our legislative ambitions. To take advantage of this moment, unions, workers centers, alt-labor organizations, and workers’ rights advocates of various stripes need to take the opposite approach from what we did for the doomed Employee Free Choice Act (EFCA). Rather than try to cobble together a consensus around a small tweak of the National Labor Relations Act (NLRA), we need to vastly expand our list of reform proposals and think way beyond the bounds of the NLRA. We need to promote legislative change that protects and empowers all workers to vindicate their rights on the job, to have a voice, and to form a union and collectively bargain.

We have a rare opportunity to move big, bold ideas at the federal level. These can serve as trial balloons for what issues should be at stake in 2020 and beyond. They can also help spur and encourage state- and local-level campaigns to win them sooner.

“Just cause” employment legislation7 should be high on the progressive community’s shortlist of demands.

We are in a unique moment. After decades of unions losing members and power, that regrettable trend is now widely recognized as a political crisis. Simultaneously, there is a resurgent left and a broad-based grassroots movement, and a Democratic Party hungry to reclaim it. It would be a mistake to tiptoe around the edges of labor law, only hoping that if we advocate modest reform, it might survive business opposition and Senate filibuster. The more minor and esoteric the reform, the more difficult it is to build broad-based coalitions to fight for it.

A “just cause” employment campaign would not only serve the disparate goals of various workers’ rights groups, but it also carries the possibility of changing perceptions about employment and the employer. The more workers begin to experience and feel a right to their jobs, the more they can imagine what’s possible in the workplace. And, with the protections of “just cause,” the more workers can act on it without danger of losing their jobs.

We do not propose this as a silver bullet to reverse labor’s sagging fortunes. Rather, we advocate the development of a bold and broad list of demands for workers’ rights. We would also suggest sectoral wage boards (see On the Contrary: “The Time Has Come for Sectoral Bargaining” in this issue), outlawing noncompete clauses (see Organized Money: “A Not-So Free Market in Bad Jobs” in this issue), and forced arbitration clauses, the criminalization of wage theft as some of the other items to be considered—along with a comprehensive repeal of the Taft-Hartley Act and modernization of the NLRA.

But the demand for “Right to Your Job” is both overdue and timely. It is compelling and easily understandable, and contains within it the potential for widespread appeal. It is a demand that is worthy of unions who still consider labor to be a “movement.”

#### At will employment is part of the legacy of slavery.

Rebecca Dixon 21, President and Chief Executive Officer of NELP, national leader in federal workers' rights advocacy, expert in Occupational Segregation, Program Management, Unemployment Insurance, and Workplace Equity, "Hear Us: Cities Are Working to End Another Legacy of Slavery — 'At Will' Employment," Next City, 10/19/2021, https://www.nelp.org/cities-are-working-to-end-another-legacy-of-slavery-at-will-employment/

In the United States, most workers can be fired from their jobs for almost any reason or for no reason at all, due to a 150-year-old legal doctrine known as “at will” employment, which remains the law in 49 states. Under at-will employment, it’s perfectly legal for employers to fire workers without a fair process, advance notice, or a legitimate reason.

These unjust firings are remarkably common, jeopardizing the economic security of workers of all races but especially that of people of color. One in two U.S. workers (47% of workers overall, 50% of Black workers, and 52% of Latinx workers) have been unfairly or arbitrarily fired at some point in their lives.

While this is considered business as usual in the U.S., it is not tolerated in most other industrialized countries. The difference between the United States and a majority of European nations, Japan, Mexico, Australia, and other countries that prohibit unfair firings, is slavery — our nation’s original oppression and the foundation upon which many of today’s injustices were built.

Out of Slavery’s Soil

The at-will employment doctrine — which dictates that employers can legally fire workers without warning or explanation — was never voted on or decided through any democratic legislative process. Instead, over the course of several decades, conservative judges across the country — eventually including the U.S. Supreme Court — sided with railroad companies and other proponents of at-will employment. They imposed the doctrine through judicial rulings in the decades following the passage of the 13th Amendment, which banned slavery and most forms of servitude.

Tracing the at-will doctrine’s history reveals that it grew out of the soil of slavery and servitude and was cemented in the legal system as a product of industrialists’ efforts to repress worker organizing.

After the 13th Amendment became law in 1865, employers sought new ways to exercise power over workers, including formerly enslaved Black people and bonded immigrant laborers. Some freedmen were fired for simply demanding to be paid what they were owed, for example, while others were fired for attempting to vote or for voting against their boss’s interests.

Railroad companies — which, up until then, had relied on various systems of servitude for their labor — were among the biggest employers during this period and had an outsized role in the backlash against the 13th Amendment and Reconstruction efforts to empower workers.

Proponents of the at-will doctrine couched their arguments in relation to the 13th Amendment, arguing that if workers had the “right to quit” without restrictions, employers should have a “right to fire” without reason or explanation. But as legal historian Lea Vandervelde explains, these arguments represented a perversion of Congressional intent:

“Throughout [the Congressional discussions during Reconstruction] no one articulated that this anti-subordinating constitutional protection — the right to quit — entailed a reciprocal right permitting masters the freedom to discharge workers at will… Yet, a mere decade later, the concept that these two rights were connected was used to bootstrap vulnerable workers’ fundamental constitutional rights into a claim that the employer could fire employees at will.”

Limiting Worker Power

The at-will doctrine came of age as a legal norm during the period of labor unrest in the half-century following the Civil War. Railroad companies and judges friendly to their interests sought to use the doctrine to limit the growing power of organized railroad workers, who staged large multi-racial labor uprisings around the country in the struggle to define what “free labor” should mean in the post-slavery context.

The at-will doctrine eventually made its way to the Supreme Court. In Adair v. United States (1908) and Coppage v. Kansas (1915), the Court considered whether the railroads could fire workers for membership in pro-worker organizations. Both decisions relied on the false equivalence that a manager’s ability to fire employees at will was akin to an employee’s ability to quit at will.

In these cases, we see how the practice of slavery and servitude shaped conservative courts’ logic, forcing the people organizing for better working conditions to contend with an inherently biased and racist legal system. It’s a prime example of how the legacy of slavery and its aftermath continued to have ripple effects on generations of workers attempting to exercise power on the job.

Enabling Precarity

A century and a half later, at-will employment still functions as a tool to disempower workers, especially Black and Brown workers.

Many Americans understand precarity to be a side effect of “bad jobs,” such as the Amazon warehouse jobs that have received so much publicity. But the at-will system is what enables this kind of precarity and enshrines it for nearly all U.S. jobs; it compounds the outsized power employers hold over workers on the job and in our economy overall.

The effects of at-will employment are manifold and hurt all workers. But because it reinforces existing power imbalances, at-will employment particularly hurts those who have the least power in the labor market and are most often segregated into dangerous and lower-paying jobs: predominantly Black and Latinx workers.

Today, workers of color in general face higher rates of wage theft and unsafe workplaces. But because at-will employment heightens fears of retaliation, Black and Latinx workers are less likely to speak up about workplace concerns or injustices. Indeed, Black workers are more than twice as likely as white workers to have seen possible retaliation by their employer. And although now we have laws meant to protect workers facing on-the-job racism or mistreatment, the current system undermines enforcement of those laws, making workers of color more susceptible to discrimination at work.

Movement for Change

“Just cause” protections offer a strong alternative. Under just-cause doctrine, employers must demonstrate a real reason for discharge, such as job performance or company downsizing due to economic hardship. They’re required to give employees fair warning, adequate training, and a chance to improve before firing them. Employers must also apply disciplinary policies fairly and consistently, and they must provide severance pay to all discharged workers.

These stipulations might sound like common sense or basic consideration, but they’re a giant departure from at-will employment. Predictably, just-cause protections are enormously popular with voters. In a February 2021 poll, 71% of voters in battleground congressional districts — including 67% of Republican voters — supported just-cause laws.

For the first time in decades, we’re seeing momentum to replace at-will employment with just-cause protections, which has been especially strong at the local level. Thanks to labor and community organizing led primarily by Black and Brown workers, Philadelphia and New York City recently enacted just-cause legislation for targeted industries — for the car-parking and fast-food industries, respectively. And this past spring, Illinois lawmakers — in partnership with worker centers and allies in the Stable Jobs Now Coalition — introduced the Secure Jobs Act, a just-cause bill that would extend protections to all workers in the state.

City by city and industry by industry, workers are demanding a better way to work and live. It’s time to replace at-will employment — and rectify the ugly history it carries — with a more just system that puts power back into the hands of working people.

#### Another way of phrasing this plank would be just cause protections for firings.

National Employment Law Project 24, "Adopt 'Just Cause' Job Protections Against Unfair Firings: A New Paradigm: Just Cause Protections," National Employment Law Project, https://www.nelp.org/explore-the-issues/worker-power/just-cause/

A New Paradigm: Just Cause Protections

In a good-jobs economy, all workers should be protected against arbitrary and unfair terminations. Such protections are called “just cause” job protections, and they are the employment law standard in much of the rest of the world.

What Are ‘Just Cause’ Job Protections?

Employers are required to provide workers with fair notice of any performance issues and give workers the opportunity to address those issues before firing them.

Employers must provide a fair process and show a good reason for discharging a worker.

Workers who are terminated are entitled to severance pay.

Most Workers in the U.S. Lack ‘Just Cause’ Job Protections

Today, most workers in the U.S. lack protections from arbitrary, abrupt, or unfair discharges. Absent having just cause provisions in a union or employment contract, workers can be fired or laid off at any time for any reason—or for no reason at all—and without any warning.

The U.S. is unique among wealthy, industrialized countries in allowing employers to fire workers abruptly, without warning or a good cause. This “at will” employment system traces its roots to post–Civil War white employer backlash after the abolition of slavery, forced labor, and debt bondage in the U.S.

‘At Will’ System Wreaks Havoc on the Lives of Workers and Their Families

Abrupt and unfair firings can result in extreme financial hardship for workers and their families who are suddenly left with bills and rent to pay but without a paycheck or severance pay. And they hurt Black, Latinx, and immigrant workers the most, since they are more likely than white workers to face longer periods of unemployment after a job loss and have less savings or family wealth to fall back on.

‘At Will’ System Makes It Easy for Employers to Retaliate Against Workers

The at-will system also makes it easy for employers to retaliate against workers who speak up about concerns such as health and safety hazards, harassment, discrimination, and wage theft. There are laws on the books that prohibit employers from retaliating against workers who speak up and insist on their rights. But when workers can be fired for any reason or no reason at all, the laws are hard to enforce.

Proving that a discharge was retaliatory is very difficult—and all but impossible for most workers, who cannot afford to hire a lawyer to help them.

By requiring employers to show good reasons for discharges, just cause policies give workers better protection from being fired for speaking up about workplace concerns.

Workers Are Organizing to End Unfair Firings

A growing movement is calling for the adoption of just cause laws that would end unfair firings and require employers to provide advance notice, a good reason, and a fair process for any termination.

For the first time in decades, workers are organizing to replace the at-will employment system with just cause job protections.

Fast-food workers in New York City have been at the forefront of this movement, successfully campaigning to enact a local law prohibiting unfair and abrupt firings in their industry. Challenged in court by business lobby groups, the law has been upheld by federal district and appeals courts.

In 2019, parking lot workers in Philadelphia won the right to fight unfair firings with a local just cause law.

Journalists at publications including The New Yorker and The New York Times’ Wirecutter have won just cause protections in their union contracts.

Rideshare drivers in Seattle and then statewide in Washington won legislation protecting them against unfair terminations.

Now, the Secure Jobs NYC coalition is campaigning for a bill to protect all workers in New York City from unfair firings.

And, in Illinois, the Stable Jobs Now campaign is organizing support for a statewide just cause law.

How Pervasive and Harmful Are Abrupt and Unfair Firings in the U.S.?

A nationwide survey conducted in 2022 by NELP and YouGov shows how widespread abrupt and unfair firings are for U.S. workers and how harmful their effects are for workers and their families.

Among the key findings:

40% of U.S. workers have been fired or let go at some point in their lives.

69% of workers who have been terminated were given no reason or an unfair reason.

72% of workers who’ve been fired were given no warning or chance to improve.

66% of workers who were terminated received no severance pay.

41% of U.S. workers have only enough savings to cover one month’s expenses if they lost their job.

53% of Black workers have only enough savings to cover one month’s expenses.

The survey shows that workers’ fear of being fired causes many to accept poor working conditions.

35% of U.S. workers have worked under hazardous or unhealthy conditions to avoid being fired.

44% have endured verbal abuse or hostility from a supervisor to avoid being disciplined or fired.

57% have worked unwanted overtime to avoid being fired.

What Key Protections Are Needed in Just Cause Laws?

The following should be among the core provisions of effective just cause legislation:

Require the employer to show a good reason for discharging a worker.

Clarify that certain reasons are protected activities and not grounds for discharge.

Provide fair notice to workers of performance issues and the opportunity to address them before being discharged.

Provide equal coverage for temp and staffing employees.

Protect against extreme surveillance and electronic monitoring.

Guarantee severance pay to all workers who are discharged.

Protect gig workers against “deactivation” without just cause.

Provide strong remedies and relief, including the right to reinstatement, money damages, and additional employer penalties.

Ensure that just cause protections can be enforced before judges and juries—regardless of forced arbitration requirements and class or collective action waivers.

For a full description of the key measures that should be included in effective just cause laws, read the policy recommendations in NELP’s Just Cause Survey Report.

Just Cause Job Protection Policies are Broadly Popular Across the Political Spectrum

Our 2022 national survey showed that 66% of U.S. workers support just cause policies, including:

61% of Republicans

66% of Democrats

72% of Independents

#### Just cause for termination builds on international precedent.

Irene Tung & Paul K. Sonn 22, Tung is Senior Researcher and Policy Analyst at NELP, PhD in economic geography; Sonn is State Policy Program Director at National Employment Law Project, Director of NELP Action Fund, Former Founder and Co-Director of Economic Justice Project at NYU Brennan Center for Justice, Former Assistant Counsel at NAACP Legal Defense Fund, Lecturer in Law at Columbia Law School, "Fired with No Reason, No Warning, No Severance: The Case for Replacing At-Will Employment with a Just Cause Standard," Report, 12/16/2022, https://www.nelp.org/insights-research/fired-with-no-reason-no-warning-no-severance-the-case-for-replacing-at-will-employment-with-a-just-cause-standard/

Executive Summary

Workers across the economy—from fast food employees to journalists—are protesting employers who fire them without either advance notice, a good reason for doing so, a fair process, or even severance pay. A new nationwide survey of 1,849 adults in the U.S. workforce by the National Employment Law Project (NELP) and YouGov documents just how widespread unfair and abrupt firings are for U.S. workers and how harmful the impact is for workers and their families. Survey results also show that the threat of losing a job causes many to accept abusive or illegal working conditions. Finally, the survey finds strong support among workers across the political spectrum for greater job security protections.

Key findings from the survey include the following:

More than two out of three workers who have been discharged received no reason or an unfair reason for the termination, and three out of four received no warning before discharge.

Just one in three discharged workers receives severance pay. At the same time, more than 40 percent of currently employed workers—including more than half of Black workers—have only enough savings to cover one month or less of expenses if they were fired today.

Half of all workers have been subject to electronic monitoring at work, and a majority have tolerated poor and often illegal working conditions due to concern about being fired for complaining.

Two-thirds of workers support the adoption of “just cause” laws that would ensure workers receive a good reason and a fair process before losing their jobs. By a similar two-thirds margin, they support guaranteeing severance pay for all workers who are discharged.

The context for the new survey is the reality that almost everywhere in the United States, employees may be fired without a good reason, advance notice, or severance pay. This default rule, known as “at will” employment, can wreak havoc on the lives of workers and their families, when the paycheck they depend on is there one day and gone the next.

Workers in the new gig economy face similar hazards. The giant app corporations that employ rideshare drivers and delivery workers frequently “deactivate” employees—effectively ending their ability to work—without advance notice, explanation, or a fair process. This leaves workers with bills to pay, including lease and insurance payments for their work vehicles, but no source of ongoing income.

At-will employment also makes it easy for employers to retaliate against workers who speak up about concerns such as health and safety hazards, harassment, discrimination, and wage theft. In theory, laws prohibit employers from retaliating against workers who speak up and insist on their rights. But when workers can be fired for any reason or no reason at all, proving that a discharge was retaliatory is very difficult—and all but impossible for the majority of workers who cannot afford to hire a lawyer to help them. Because just cause protections “flip the script” by requiring employers to provide good reasons for discharges, they give workers more effective protection from being fired when speaking up about workplace concerns.

This new survey comes at a time when workers are organizing to replace at-will employment with a just cause standard. In 2019, parking lot workers in Philadelphia won the right to fight unfair firings with a just cause law.[1] In 2020, fast food employees in New York City won similar protections.[2] Workers in unions have continued to fight for just cause in their contracts. In recent years, journalists at publications ranging from the New Yorker to the New York Times’ Wirecutter to BuzzFeed have successfully fought for and won just cause protections in their union contracts.[3] And rideshare drivers won new legislation—first in Seattle and then in Washington statewide—protecting them against unfair terminations.[4]

Meanwhile, just cause is the employment law standard in much of the rest of the world and in most of the world’s other wealthy countries, including the United Kingdom, Ireland, Australia, Germany, and Japan. They all require employers to provide workers with a good reason and a fair process before terminating them.[5]

Amidst growing evidence of the harms caused by unfair firings—and growing public support for action to end them—federal, state, and local leaders should join with worker organizations to replicate and expand the new just cause laws to protect workers in all industries across the country.

#### Just cause provisions help to push back against unfair discipline.

Robert M. Schwartz 19, Union attorney, "Using 'Just Cause' to Defend Against Unfair Discipline," Labor Notes, 01/15/2019, https://labornotes.org/2019/01/using-just-cause-defend-against-unfair-discipline

The principle of “just cause” is the keystone of the collective bargaining agreement. By imposing rigorous qualifications for discipline, the just-cause standard protects everyone in the union.

If an employer could fire workers for trivial or manufactured reasons, it could easily rid itself of militant officers, stewards, and rank and filers.

A typical just-cause provision reads, “No employee will be disciplined or discharged except for just cause.” Some agreements use “good cause,” “proper cause,” “reasonable cause,” or simply “cause.” Labor arbitrators usually say such terms are equivalent to just cause.

Newly minted supervisors sometimes assume that just cause is an easy criterion to satisfy. On its face, it only appears to require a legitimate reason for taking action. Years of advocacy, however, have helped to mold the standard into a formidable bulwark.

Among its accepted requirements: employers must publicize rules, enforce them consistently, follow due process, treat employees alike, act on substantial and credible evidence, apply graduated penalties, and consider mitigating and extenuating circumstances.

Just-cause protection marks a sharp dividing line between union and nonunion or “at-will” workers. With few exceptions, employers may not dismiss union workers unless they engage in egregious or repeated misconduct.

On the other hand, employers can fire at-will employees for “good cause, for no cause, or even for cause morally wrong.” An at-will employee can be discharged for a single mistake, an argument with a supervisor, an unintentional violation, off-duty conduct, or even for reasons that are patently false.

Since the 1960s many unions have relied on a checklist developed by arbitrator Carroll Daugherty known as “the seven tests of just cause.” Unfortunately, the Daugherty tests do not accurately reflect the way arbitrators currently decide cases. It was time to rethink the seven tests.

That’s why I undertook a review of more than 15,000 awards by labor arbitrators. The results are laid out in my book Just Cause: A Union Guide to Winning Discipline Cases, now available in a newly updated second edition. I found wide agreement among arbitrators on the following basic principles:

[BOX BEGINS]

Just Cause for All?

Many countries protect nonunion employees against unfair dismissal. England, France, Ireland, Germany, Japan, and Italy are among those that require all employers to prove just or good cause.

In the U.S., campaigns for “Just Cause for All” laws have been pursued at the state level. Organizers often cite recommendations by the International Labor Organization (an agency of the United Nations) and the Uniform Law Commission, which promotes uniformity of law among the states.

Montana was an early success. A 1987 statute gives at-will employees the right to sue for lost pay if discharged without “good cause.” It has, however, no reinstatement provision.

Just Cause for All campaigns allow union and nonunion workers to fight together for fairness and job protection. Email justcauseforall@gmail.com for more information.

[BOX ENDS]

#### Neg teams can argue that this is a feature that should be provided by markets.

Stewart J. Schwab 1, Professor of Law, Cornell Law School, "Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?," Indiana Law Journal, vol. 76, no. 1, Article 3, Winter 2001, https://www.repository.law.indiana.edu/ilj/vol76/iss1/3

A. Just-Cause Protection

As workers become more adaptable and flexible, the need and desire to stay with one firm will lessen. It will become a more common occurrence for workers to shift jobs. One important consequence of this is that the momentum behind just-cause protection for all workers will fade. Just-cause protection is critical only when the incumbent job is clearly better for the worker than other jobs. A worker suffers less damage from being terminated from a particular job that, with higher turnover, he probably would have left in a few years anyway.

On the other side, employers will increasingly resistjust-cause protection. As more highly skilled, educated workers dominate the workplace, employers will have greater difficulty in distinguishing consummate performances from mediocre performances by workers. Clear rules of workplace performance are harder to determine. With telecommuting, even the requirement that a good worker shows up on time becomes less obvious. Imagination, adaptability, and foresight are matters of degree. Verifying before a court that a worker does not meet the standards of performance (which is what a just-cause system requires employers to do) will become more difficult in the workplace of the future.

In the future then, just-cause protection will benefit workers less and will cost employers more. We will see less erosion of the at-will doctrine from common-law courts, and the state legislatures will be unlikely to adopt ajust-cause statutory regime along the lines of the Model Employment Termination Act.3

If this prediction is correct, then the United States will remain an outlier in the industrialized world, which uniformly forbids employers from terminating workers without just cause. What about the idea that globalization causes a convergence of standards? In the case of grounds for termination of employment, I predict that the rest of the world will move more towards the United States, rather than vice versa (although I do not predict the adoption of the at-will model elsewhere; that would be too extreme a development). Unemployment rates in the United States are significantly below most other industrialized countries, and have been since the 1980s.31 Europeans are looking for ways to make their labor markets more flexible,3 2 and the best way to do so is to give employers more latitude in terminating workers.

Just-cause advocates in the United States have long had difficulty explaining why, ifjust cause is a benefit that workers value highly, so few nonunion workplaces offer it.33 If workers value job protection, a firm could gain a competitive advantage by offering it in return for a lower wage. Why does the market not provide this benefit? In the global era, advocates of employment laws will increasingly be called upon to give an answer along these lines, for fear that otherwise the law would put firms at a competitive disadvantage.

One explanation is that an asymmetric-information problem exists. If a single fu-m offered just-cause protection, it would attract two types of workers: good workers who happen to value just cause highly for reasons unrelated to job performance; and bad workers who fear being dismissed under at-will standards. If it cannot screen out the bad type of worker, the firm will be at a competitive disadvantage.34 Thus, the explanation goes, workers value just-cause protections by more than it would cost employers to provide, if only employers could determine who are high-cost users of the protection. The mandatoryjust-cause protection will solve this market failure and thus improve the competitive position of American employers.

While this explanation is of the form that increasingly is needed to justify regulation, in this case it rings hollow.35 The cure of mandating just cause for all seems worse than the asymmetric-information disease. Most just-cause advocates recognize this, and continue with fairness-based arguments for just cause.36

### Aff---Mech---Federalism

#### A variety of preemption doctrines operate within labor law. While any aff in this area would likely require federal action to undo preemption, creative affirmatives could couple state and federal action and make arguments about vertical distribution of labor lawmaking power.

Clean Slate for Worker Power 21, Project of Harvard Law School's Labor and Worklife Program, "Overcoming Federal Preemption: How to Spur Innovation at the State and Local Level," Harvard Law School Labor and Worklife Program, 05/01/2021, https://clje.law.harvard.edu/app/uploads/2022/12/Clean-Slate-Overcoming-Federal-Preemption.pdf

While the National Labor Relations Act (NLRA, or “the Act”) is generally silent on preemption, decades of court decisions have created multiple federal preemption doctrines.1 Together, these doctrines have effectively hampered states and localities from passing innovative laws that expand the ability of workers to engage in collective action to improve their wages, benefits, and working conditions.2 Giving states and localities the freedom to innovate in certain areas would improve the ability of workers to engage in concerted action. Similar to other areas of labor and employment law, federal law should be a floor—not a ceiling—for the protection of labor rights.3

COVID-19 has exposed the existing fissures in our economy and made it clear that income inequality, the lack of a safety net, and insecurity in our labor market have left far too many workers behind. The lack of unionization amongst U.S. workers and an archaic federal labor law hamper workers’ ability to organize while at the same time prohibit state and local action. The result is that innovation has happened in spite of, rather than because of, labor law.4

Over the last several years, and accelerating during the Trump administration, worker rights advocates have moved toward a period of experimentation in workers’ rights at the state and local level. Numerous states and local governments have increased their minimum wages,5 passed collective bargaining laws for domestic and agricultural workers outside of the NLRA’s purview, and passed paid sick and paid caregiving laws.6 But unlike other areas of worker life, innovation on the labor front remains hampered by strict NLRA preemption, solidified over— and in fact created by—decades of Supreme Court law. While new rules permitting state and local innovation are critical, they must be carefully crafted to enhance, not diminish, collective action and collective bargaining rights.

#### One approach would change federal law such that it provides a floor, not a ceiling, for labor protection.

Clean Slate for Worker Power 21, Project of Harvard Law School's Labor and Worklife Program, "Overcoming Federal Preemption: How to Spur Innovation at the State and Local Level," Harvard Law School Labor and Worklife Program, 05/01/2021, https://clje.law.harvard.edu/app/uploads/2022/12/Clean-Slate-Overcoming-Federal-Preemption.pdf

Reforming labor law to allow for state and local action is necessary to ensure that innovation continues and to prevent future labor reform from becoming “ossified” at one point in time. But the labor movement has suffered decades of unrelenting attacks from corporate interests and, oftentimes, the courts. A new preemption scheme must recalibrate labor law so that it cannot be used to undermine existing collective bargaining rights that employees presently enjoy, particularly in regions of the country less conducive to organizing or to enacting more protective legislation.

In Clean Slate for Worker Power: Building a Just Economy and Democracy, 28 the authors noted that the problem of ossification is a danger, even with a reimagined labor law. To solve for this, rather than occupy the entire field, federal labor law should serve as a floor—much like in other contexts of worker protection laws—allowing state and local governments to expand or better protect the right to engage in collective bargaining and concerted activity. The Clean Slate report noted the challenge of setting a standard that ensured that state or local laws did not in fact diminish collective rights under a new standard. Unlike, for instance, in the context of the Fair Labor Standards Act (FLSA), where one can easily determine if a state or local law sets a minimum wage higher than the federal floor, determining a metric for measuring the quality of a collective right is more challenging.

This paper delves deeper into this challenge, proposing potential options for allowing state and local innovation while ensuring that federal law acts as a floor and protects collective rights. Given the judicially developed federal law on preemption, and given that the Supreme Court is unlikely to loosen preemption rules in the near term, all of these options require federal legislation.

A LABOR FLOOR: NO PREEMPTION IF STATE OR LOCAL LAW ARE BOTH MORE PROTECTIVE OF CORE NLRA PROTECTIONS AND SUFFICIENTLY PROTECTIVE OF EXISTING COLLECTIVE BARGAINING RELATIONSHIPS OR RIGHTS

To determine an NLRA “floor,” we must first examine the core rights that the NLRA protects. As stated in Section 1, the NLRA’s policy is to eliminate obstructions to the free flow of commerce by encouraging collective bargaining, the freedom of association, self-organization, and the ability to designate the representative of one’s choosing for the purpose of negotiating the terms and conditions of employment or other mutual aid or protection.29 That policy is embodied in Section 7 of the NLRA,30 which protects three main rights:

1. the right to self-organize or form, join, or assist a labor organization;

2. the right to bargain collectively through the representative of one’s choosing; and

3. the right to engage in concerted activity for the purpose of collective bargaining or other mutual aid and protection.31

While the Taft-Hartley Act added “right to refrain” language into Section 7 of the Act,32 Section 7 was not intended to change the Act’s overall policy. Notably, Congress reenacted its declaration of policy in Title I of Taft-Hartley without the “right to refrain” language,33 indicating its reconfirmation of the original policy.34 Moreover, the 1959 Labor-Management Reporting and Disclosure Act (LMRDA),35 in restating the policy of the NLRA, also omitted the “right to refrain” language, thereby confirming that the negative right stated in Taft-Hartley was not meant to dilute the rights to organize and engage in collective bargaining but was limited to regulating union conduct, tying to the newly enacted Section 8(b) provision.36 Thus, this Taft-Hartley language did not alter the Wagner Act’s original policy.

A new law establishing that federal law is a floor, not a ceiling, should protect the three, core NLRA rights, but it must also explicitly recognize that state and local law cannot be used to undermine existing collective bargaining relationships. Otherwise, any new preemption law could have the effect of worsening, rather than improving, collective bargaining power. Since the Wagner Act was passed, the unionization rate drastically spiked and then plummeted, from 10.8 percent in 193537 to a high of 33.4 percent in 1945, with a steady decline after 1959, the year the LMRDA was passed, to 10.8 percent in 2020.38 A new preemption framework should not be subject to manipulation to pass laws to reduce unionization using the specious argument that such laws promote employee free choice.

Thus, in addition to being “more protective” of rights protected under the NLRA, the law must also be “sufficiently protective” of existing collective bargaining relationships and agreements. While this standard may seem subject to manipulation at first blush, the standard can have a strong definition tied to it that would provide meaning and clarity. This additional language will serve the Act’s purpose of maintaining industrial peace; will help ensure that this recalibration of labor law serves to promote, not decrease, unionization rates; and will help prevent antiunion lawmakers from attempting to pass laws that are purportedly in the name of employee free choice but that actually seek to undermine collective bargaining.

For example, a law requiring unionized employees to affirmatively vote every year on whether they wish to remain represented by their union would arguably promote the right to be represented by the representative of one’s choosing, but it would clearly not be “sufficiently protective” of existing collective bargaining relationships. Similarly, a state may try to pass a law eliminating or shrinking the voluntary recognition bar, which places certain limitations on how soon a petition can be filed after voluntary recognition; while a state may attempt to argue that such a law promotes employees choosing their own bargaining representative, such laws would clearly not be sufficiently protective of existing collective bargaining relationships.

This two-part standard has several benefits:

● By grounding the NLRA floor in the core rights protected by the NLRA, federal courts are clearly guided on how to interpret the new law.

● The proposal ensures that there is a mechanism to protect existing collective bargaining relationships and agreements. By separating the “more protective” standard for rights grounded in the NLRA from the “sufficiently protective” standard for existing collective bargaining relationships and agreements, the law can properly recalibrate the NLRA to recognize the unequal bargaining power that exists today between labor and management. Any recalibration of labor law must recognize the attempts that will be made to undermine collective bargaining and existing relationships.

Using this general two-part standard, more detailed options are explored below.

OPTION 1: Establish a Department of Labor precertification process to determine whether the law is “sufficiently protective” before it can be effective, unless it falls within a category of “presumptively compliant” laws.

In order to provide an additional safeguard for ensuring that the new preemption scheme was not used to subvert existing collective bargaining relationships, the Department of Labor (DOL) could be required to pre-certify a law as “sufficiently protective” of existing collective bargaining relationships. The DOL plays this role in other contexts, including Section 13(c) of the Federal Transit Act,39 which requires the Secretary of Labor to certify “fair and equitable” transit labor protections in connection with Federal Transit Administration (FTA) grants awarded to public transit agencies.40

To prevent state and local governments from having to pre-certify legislation with the DOL on laws that are obviously more protective than the NLRA and sufficiently protective of existing collective bargaining agreements and relationships, the law could delineate presumptively lawful areas for state innovation that do not need to undergo the DOL precertification process. Potential areas for precertification are discussed in greater detail below.

Unions and other aggrieved parties can still challenge a law as preempted in court—even if the DOL certifies it—on two grounds: first, that the law is not “more protective” than federal law; and second, that the law is not “sufficiently protective” of existing collective bargaining relationships.

Clean Slate, as it is so named, proposed several other reforms to a labor regime, including a new sectoral bargaining regime that would be administered by a new agency within the DOL. If preemption becomes a floor, rather than an absolute, without a full Clean Slate agenda, lawmakers should consider creating a new agency within the DOL to administer the “sufficiently protective” test. The Office of Labor-Management Standards (OLMS)41 is a part of the LMRDA of 1959, which created election, oversight, and fiscal responsibility processes over labor organizations. Since the focus of the agency is on the enforcement of laws regulating unions, the mission of the agency is not amenable to regulating the “sufficiently protective” standard.42

Rooted in these principles, a new statute could provide:

(a) Nothing in the Act shall prohibit a state or local government from passing laws concerning areas regulated by the National Labor Relations Act so long as such laws are:

(1) more protective of: the right to self-organize or form, join, or assist a labor organization; the right to bargain collectively through the representative of one’s choosing; and/or the right to engage in concerted activity for the purpose of collective bargaining or other mutual aid and protection, such as striking or picketing; and

(2) sufficiently protective of existing collective bargaining relationships and agreements.

(b) In order to ensure that laws are sufficiently protective of existing collective bargaining relationships or agreements, any state or local government which, at any time, seeks to enact a labor law other than those presumptively compliant laws set forth in (c) shall submit a state or local plan to the Secretary of Labor for a determination on whether a law is sufficiently protective of existing collective bargaining relationships and agreements. The Secretary shall approve the plan submitted by a state or locality under subsection (b), or any modification thereof, if such plan in their judgement, does not:

(1) interfere with or potentially interfere with employees’ existing relationship with their chosen bargaining representative; and

(2) interfere with or potentially interfere with the rights and benefits of employees under existing collective bargaining agreements.

(c) A law is presumed not to be preempted, and need not undergo the Department of Labor certification process, if it regulates one of the following areas: [A list of potential areas that are presumptively compliant is discussed below in the “Alternative Under Any Option” section.]

The pros of adding the DOL into this process for areas that are not presumptively compliant include:

● The DOL is only adjudicating on the issue of whether a law interferes with existing collective bargaining agreements, over which it both has some expertise and has a mission aligned with developing additional expertise. The DOL is not making the overall NLRA preemption decision focused on Sections 7, 8, and 10 of the Act, over which it has more limited expertise. Thus, this proposal does not put the DOL in the position of certifying that a law complies or does not comply with the NLRA, which it does not enforce.

● This helps ensure that lawmakers hostile to unions cannot quickly enact laws that undercut collective bargaining. The DOL process, in essence, serves as an extra safeguard before enactment.

The negatives of this proposal include:

● The process of requiring DOL certification in areas other than those presumptively compliant will still be burdensome for state and local governments and may hinder the passage of laws.

● The DOL certification process is a bit unusual in this context; other situations requiring DOL precertification generally have grant funding attached to them. For instance, when federal funds are used to acquire, improve, or operate a mass transit system (public transportation),43 federal law requires “protective arrangements” to protect the interests of mass transit employees,44 with OLMS responsible for the certification process. While the Occupational Safety and Health (OSH) Act does provide a good model for precertification without grant funding, state OSH laws are taking over from a federal scheme, which makes the precertification process more compelling. This preemption scheme is not geared toward mini state NLRAs, although it would not preclude them.

● A DOL hostile to unions could use the certification process (and any accompanying regulatory scheme) to undermine unions and state innovation or to stall these efforts. Even worse, a state seeking to undermine existing collective bargaining relationships could send their proposal to a hostile DOL, which then certifies them as sufficiently protective. Even if later challenged in court, it could lead to the negative development of case law.

OPTION 2: Federal courts enforce the entire standard, without DOL precertification.

As noted above, the DOL precertification process could have drawbacks, particularly during an administration hostile to labor rights, where the DOL could use the process to delay state and local innovation and rubber stamp laws hostile to collective bargaining. In lieu of the DOL, federal courts could apply the “presumptively compliant” test. If applied by a federal court, a state or local government would not need to pre-certify a law before applicability, enabling the law to become effective more quickly. And parties could still challenge problematic laws by seeking a temporary restraining order or other immediate relief.

The language of the statute would provide that federal courts enforce the “sufficiently protective” standard, leaving the DOL out of the process:

(a) Nothing in the Act shall prohibit a state or local government from passing laws concerning areas regulated by the National Labor Relations Act so long as such laws are:

(1) more protective of the right to organize or join a labor union, the right to bargain collectively through the representative of one’s choosing, and/or the right to engage in concerted activity, such as striking or picketing; and

(2) sufficiently protective of existing collective bargaining relationships and agreements.

(b) A law is deemed sufficiently protective of existing collective bargaining relationship and agreements so long as it does not:

(1) interfere with or potentially interfere with employees’ relationship with their chosen bargaining representative; and

(2) interfere with or potentially interfere with the rights and benefits of employees under existing collective bargaining agreements.

(c) A law is presumed not to be preempted if it regulates one of the following areas: [A list of potential areas for presumptively compliant is discussed below in the “Alternative Under Any Option” section.]

This proposal has several benefits:

● The statute includes a “sufficiently protective” standard, but a labor-hostile DOL could not use the process to delay pro-labor laws from going into effect.

● If a state passed an anti-labor law, such as a law requiring employees to vote on union representation annually, unions or advocates could go straight to federal court and seek an injunction against such a law going into effect without having to wait for a DOL decision.

Potential drawbacks include:

● The DOL process provides a safeguard against anti-labor state and local laws quickly going into effect. A proposed law that the DOL fails to certify could still be challenged in court, but a judge may provide deference to a DOL decision, leading to the negative development of case law.

● This process leaves much discretion to federal courts. With the present makeup of the judicial bench, this proposal could lead to the negative development of the law in this area.

Under this option, the law could provide that the DOL or the NLRB will issue regulations providing further explanation of the standard within a prescribed time period after passage.

This proposal has the benefits of allowing a federal agency to provide more expertise and clarity in a tricky area of preemption while not creating a precertification process that could serve to delay innovative laws from becoming effective.

OPTION 3: Rather than leading with the new federal floor, a law could prescribe specific areas where states and localities would be permitted to regulate and include a “catch-all” for laws that otherwise meet the federal floor standard.

Attempting to define a “floor” in labor law is more challenging than in the FLSA context because the NLRA is an integrated and complicated statutory scheme. Because of this, there will always be some unknowns as to how courts interpret a law providing for state and local innovation even with language that attempts to establish only a “floor,” particularly given the present makeup of the judiciary.

Rather than attempting to define a “floor” at the outset, a law establishing a labor law floor could prescribe a defined set of areas where state and local laws would not be preempted and include a defined “catch-all” at the end. This list of issues where the NLRA could no longer preempt state or local law is further discussed below, but how the “catch-all” is written effectively becomes the floor.

Statutory language could read:

(a) Nothing in the Act or any other law shall limit a state or local entity from enacting or enforcing laws that:

(1) [list explicit areas no longer preempted]; or

(2) are otherwise more protective of the right to self-organize or form, join, or assist a labor organization; to bargain collectively through the representative of one’s choosing; and/or to engage in concerted activity for the purpose of collective bargaining or other mutual aid and protection, such as striking or picketing; and

(3) are sufficiently protective of existing collective bargaining relationships and agreements.

(b) A law is deemed sufficiently protective so long as it does not:

(1) interfere with or potentially interfere with employees’ relationship with their chosen bargaining representative; or

(2) interfere with or potentially interfere with the rights and benefits of employees under existing collective bargaining agreements;

This proposal might substantively be the same as Option 2, but the emphasis on delineating areas that are no longer preempted may provide more clarity in the area most likely subject to state and local innovation while still permitting state and local innovation through the enumeration of the floor as a catch-all.

THE ALTERNATIVE UNDER ANY OPTION: DEFINING ISSUES THAT ARE PRESUMPTIVELY NO LONGER PREEMPTED

Under any scenario, providing a list of issues that are presumptively compliant with the twopart test will facilitate the application of the law and appropriately encourage states and local governments to innovate in appropriate areas. There are numerous issues that could potentially be enumerated as presumptively permissible for state and local action. To promote continued innovation, other issues would be subject to the test set forth above. Those issues could include the following:

Impose a supplemental sanction on or prohibit the state or locality from doing business with an employer that has been determined to violate the NLRA

Explicitly authorizing state or local governments to provide for penalties or damages would fill a major gap in NLRA law. Even if the PRO Act passes, state and local action in this area could still provide innovative solutions to deter unlawful discrimination and unlawful refusals to bargain. In Wisconsin Department of Industry v. Gould Inc., 45 the Supreme Court struck down a Wisconsin law that prohibited the state from purchasing goods and services from employers that were three-time NLRA violators because it imposed a “supplemental sanction” that conflicted with the NLRA’s “integrated scheme or regulation.”46 This addition would directly address Gould.

In addition to a scheme like in Gould, this language would also permit states to impose other sanctions for employers that are determined to violate the NLRA. States could, for instance, impose an additional penalty on an employer that violates the NLRA before it will do business with that employer.

Expand collective bargaining coverage and protections to those not covered under the NLRA

By expanding coverage to the broad swaths of individuals not covered by the NLRA (e.g., certain individuals defined as supervisors under the NLRA, students, farmworkers, independent contractors, and domestic workers) a state or local law could fill major gaps in NLRA coverage. While the PRO Act addresses joint employment and misclassification, it does not address other major gaps in NLRA coverage and still leaves some of the most vulnerable workers unprotected. A new scheme on preemption should make it clear that states and localities are free to innovate on separate schemes of coverage.

Indeed, states already have authority in many instances to pass legislation for workers not covered under the NLRA. Courts have held that states can pass labor laws governing exempt workers—namely agricultural and domestic workers, independent contractors, and public sector employees—without confronting the preemption doctrine.47 And several states have laws protecting farmworkers.48

Expanding coverage would also provide needed clarity for independent contractors, where states and localities have been innovating in establishing wage boards.49

Allow for the use of alternative procedures for demonstrating majority support, including electronic means

While an employer can presently agree with a union that majority status is established through means other than an NLRA election, an employer can presently still demand an NLRB election. Current election law process allows for employers to significantly delay elections by, for instance, filing objections to the proposed bargaining unit.50 Studies have shown that employers commit more unfair labor practices the longer the delay between the filing of a petition and an election.51 Delaying elections is in fact a strategy for anti-union employers so that they can run an anti-union campaign, during which many commit unfair labor practices. By allowing states and localities to legislate in this area (e.g., permitting unions to show majority status by, for instance, obtaining signed authorization cards or electronic means of showing support), state and local governments can rectify perhaps the most significant barrier to organizing today.

This reform could be limited to allowing for such alternative means of showing support only when there is no existing union representing a bargaining unit, which would ensure that this reform is not utilized to undermine existing collective bargaining relationships.

Significantly, the PRO Act does not address this major gap in NLRA law.

Provide for the expansion of workers on corporate boards

Under U.S. law, workers have no voice in corporate decisions, and shareholders are generally considered the only stakeholder, all of which contributes to expanding economic inequality.52 While unionization is a key factor for increasing worker power and well-being, unions do not bargain over how a corporation is run.53 Under Section 8(d) of the NLRA, employers must bargain with the union in good faith only “with respect to wages, hours[,] and other terms and conditions of employment.”54 As the Supreme Court stated in First National Maintenance Corp. v. NLRB, 55 “Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union’s members are employed.”56 Experimentation at the state level with worker representation on corporate boards will build on successful labormanagement collaborations and help build a body of evidence for a successful model.

While having workers on corporate boards is probably lawful under Section 8(a)(2),57 this provision would provide clarity on this issue.

Place restrictions on the permanent replacement of striking workers or the use of offensive lockouts

The NLRA generally permits employers to replace striking workers and to engage in offensive lockouts, diminishing workers’ ability to exercise their economic powers. For years, states and local governments have attempted to regulate in this area but with mixed results.58 The Seventh Circuit, for instance, has held that “the state’s effort to make the hiring of replacement workers a crime is so starkly incompatible with federal labor law, which prevails under the Constitution’s Supremacy Clause, that we do not understand how a responsible state legislature could pass, a responsible Governor sign, or any responsible state official contemplate enforcing such legislation.”59

This proposal is covered by the PRO Act and is therefore not necessary if the PRO Act passes. Given that more than 30 states have, at some point, passed such strikebreaker laws,60 a new preemption scheme should clarify that states and localities can regulate in this high-impact area.

Regulate or ban employer “captive audience” meetings

On February 7, 2020, the NLRB sued the State of Oregon in federal court, seeking a declaratory judgment to invalidate a state statute that protects employees who refuse to attend lawful compulsory meetings held by employers during organizing campaigns from adverse employment action.61 These meetings, referred to as “captive audience” meetings, are workplace meetings that employees are compelled to attend where the employer expresses anti-union views. According to the NLRB, Oregon’s statute is preempted under Garmon. 62 While the district court ruled in October that the NLRB lacked standing to bring the suit, the NLRB refiled its suit in November 2020, this time alleging a more specific injury.63

Given the General Counsel’s attempts to preempt this area of state action, the inclusion of captive audience meetings is critical to protect state action in this area. The PRO Act would ban captive audience meetings. Thus, this reform is not necessary if the PRO Act is passed.

Provide for enhanced access rules for unions and worker representatives for those seeking to organize unions where there is no collective bargaining representative

While the PRO Act provides employees with fair access to employers’ electronic communication systems, it does not address labor’s access to employers’ premises during an organizing campaign. State or local action in this area will balance the playing field without infringing on the NLRA scheme. While the PRO Act provides for some access, access rules could always be enhanced at the state and local level. Thus, a provision on access would allow for continual state and local innovation.

Provide for enhanced labor standards related to wages, hours of work, and/or benefits

Federal preemption law has prohibited state and local governments from providing enhanced legal standards if it is determined to interfere with the economic forces that labor or management can employ in reaching an agreement. Field preemption has even been used to stop states from passing laws that improve working conditions for all workers (not just unionized workers) in an area because of their applicability and potential beneficial effect to unionized workers. In 520 South Michigan Avenue Associates, Ltd. v. Shannon, 64 the Seventh Circuit found a statute providing for paid breaks, meals, and room for breaks was preempted under the NLRA even though it was a general statute that applied regardless of unionization.65 The Court reasoned that while the law facially affected union and nonunion employees equally, it did not constitute a genuine minimum labor standard because it only effectually regulated one county (Cook County) based on the size of applicability;66 it was a stringent law, which a union would have a hard time obtaining in negotiations. And in Chamber of Commerce v. Bragdon, 67 the Chamber of Commerce sued a California county and county officials, challenging an ordinance that required employers to pay “prevailing wages” to employees on private construction projects costing over $500,000.68 The Ninth Circuit held that the ordinance was preempted, reasoning that it was much more invasive than laws of general applicability on employment standards that had been upheld.69

State and local governments should have the ability to enact labor-neutral, progressive employment policy regarding wages and terms and conditions of employment. This expansion of Machinists to these laws of general applicability have effectively undermined progressive, union-neutral policies because of their perceived effect on potential union negotiations.

Facilitate collective bargaining across an industry

With union density under 11 percent, unions today often lack the power to engage in multi-employer bargaining, nor is the U.S. system set up for such a regime. Broader-based bargaining—whether by sector, supply chain, industry, or region—can help strengthen worker power in a variety of ways, including by providing broad compensation floors covering most workers while still encouraging enterprise-level bargaining to occur that accounts for different union strategies, workplaces, and bargaining and/or power dynamics.70

Sectoral bargaining should be presumptively lawful with certain conditions (e.g., members have to be elected by workers, and employer interference with the elections must be prohibited); if there is a union in the workplace, the union can nominate people for the council; and no actions of the council can conflict with any provisions of a collective bargaining agreement.

Regulate employer’s use of state or local funds to attempt to defeat union organizing campaigns

In Chamber of Commerce v. Brown, 71 the Supreme Court held that a California statute prohibiting grant recipients and private employers receiving more than $10,000 in state program funds in any year from using such funds “to assist, promote, or deter union organizing” was unconstitutional.72 The Supreme Court reasoned that the law was preempted under Machinists because it regulated within “a zone protected and reserved for market freedom.”73 Because California plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition, California could not indirectly regulate such conduct by imposing spending restrictions on the use of state funds.

Similarly in Healthcare Ass’n of New York State v. Cuomo, 74 a New York law that prohibited an employer from using state funds and facilities for the purpose of influencing employees to support or to oppose unionization, and that prohibited an employer from seeking to influence employees to support or oppose unionization while those employees are performing work on a state contract, was preempted under Machinists. 75 The district court cited the proposition from Brown that “it is not permissible for a State to use its spending power to advance an interest that—even if legitimate in the absence of the NLRA—frustrates the comprehensive federal scheme established by that Act.”76

Providing that states and localities have the power not to use their own funds to support antiunion efforts would provide a high-impact manner for states to promote progressive labor relations at the state and local level.

Condition state funding on labor peace or neutrality agreements

State and local jurisdictions have explored requiring bidders through procurement processes to enter what are called “labor peace agreements” as a condition of operating under their state licenses or performing under their state contracts. Labor peace agreements often require neutrality, requiring an employer to remain neutral during the organizing campaign, and they sometimes provide more substantive access and other provisions.

Restricting the expenditure of state and local funding on defeating union organizing and requiring contractors to abide by labor peace or neutrality agreements are effective tools in building worker power, but they have faced successful court preemption challenges. In Metropolitan Milwaukee Ass’n of Commerce v. Milwaukee County, 77 the Court found the labor peace agreement required for contractors transporting and providing other services to elderly and disabled citizens to be preempted, reasoning that the City had contractual remedies for service interruptions that demonstrated that the ordinance was an attempt to substitute the County’s labor relations views for that of the NLRA.78 The Court distinguished labor peace agreements from PLAs, which were “tried and true.”79 Thus, a new preemption scheme must make it clear that states and localities can use their purchasing power to promote labor peace agreements.

Consider an employer’s prior unfair labor practices in the award of public funds

The Supreme Court has broadly interpreted the state and local prohibition on regulatory activity. In Gould, 80 the Court held that Wisconsin’s policy of refusing to purchase goods and services from three-time NLRA violators was preempted under Garmon because it imposed a “supplemental sanction” that conflicted with the NLRA’s “integrated scheme of regulation.”81 While Wisconsin claimed that its debarment statute was “an exercise of the State’s spending power rather than its regulatory power,” the Court dismissed this as “a distinction without a difference.”82 “[T]he point of the statute [was] to deter labor law violations,” and “for all practical purposes” the spending restriction was “tantamount to regulation.”83 Wisconsin’s choice “to use its spending power rather than its police power d[id] not significantly lessen the inherent potential for conflict” between the state and federal schemes; hence the statute was preempted.84 And in the Golden State Transit Corp. v. City of Los Angeles cases,85 the Court held that the city council could not condition the renewal of an employer’s taxicab operating license on the employer’s resolution of a labor dispute with its employees.86

Permitting states and localities to utilize their spending power to discourage employers from violating labor laws would positively affect U.S. labor rights.

CONCLUSION

The extensive, judicially created preemption doctrines have deployed labor law in a manner that was never intended by Congress in its passing of the National Labor Relations Act. And the Supreme Court has missed opportunity after opportunity to reassess and readjust. Just as in other areas of worker protection law, states and localities can and should be leading, trying new models, experimenting, and passing laws that rebalance the equation, so that workers get a fair deal. So long as a new preemption scheme provides a well-enumerated floor, we can experiment without creating a race to the bottom.

### Aff---Mech---Federal Workers

#### Right to strike for federal workers is a necessary response to the plundering of the administrative state.

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Federal law prohibits public sector workers from striking and also makes it difficult for private sector workers to fight for better wages and working conditions. Change is needed.

Elon Musk and his Department of Government Efficiency (DOGE) are engaged in a largely unprecedented attack on the federal workforce. They are attempting to lay off thousands of “probationary” employees who lack full civil service protections and are allegedly waging a campaign of intimidation, seemingly to force those they can’t fire to forfeit their rights by quitting. Federal courts are beginning to intervene, with one judge ordering the reinstatement of over 24,000 fired probationary workers, but Musk and the Trump administration remain hell-bent on gutting public services.

Musk’s attacks on federal employees should be understood as part of the Trump administration's broader plan to turn the public sector into a tool for private profit, paving the way for tax cuts for corporations and billionaires. Look no further than mass layoffs at the IRS, aimed at sabotaging the agency’s enforcement capacity and making it easier for rich tax cheats to evade detection.

Federal workers are bravely fighting back. They have filed numerous lawsuits and risked their livelihoods by staging protests and blowing the whistle on DOGE’s actions. However, they are fighting with one hand tied behind their back. Unlike workers in the private sector, federal employees are prohibited from going on strike to defend their rights. While some restrictions on the right to strike for government workers who deliver essential services are permissible, this blanket prohibition runs counter to international human rights and labor standards. But workers risk losing their jobs if they ignore it.

The sad state of US labor protections isn’t just a problem for federal workers. Those impacted by DOGE face unique restrictions on their ability to resist, but across the entire US economy, workers lack the tools to effectively fight against low wages and dehumanizing working conditions. Dedicated employees across the federal government keep critical public services working and help us achieve our common goals, but fundamentally, federal employees are workers — nurses, scientists, delivery drivers, accountants. Like workers everywhere, they have had to fight for their rights, and as history illustrates, struggles for labor rights in both the public and private sector are intertwined.

The 1981 Air Traffic Controllers Strike and the Linked Fates of Public and Private Sector Workers

Previous attacks on federal employees have emboldened private sector companies to take similar anti-worker actions. In 1981, when over 11,000 federal air traffic controllers walked off the job to demand better pay and hours, President Reagan responded by firing every striking controller and banning them from federal employment for life. This strikebreaking action reverberated throughout the entire economy. It helped normalize aggressive anti-union tactics in the private sector, contributing to a decline in strike activity and union density that continues to this day.

Reagan’s mass firing of striking controllers helped cement the practice of “permanently replacing” striking workers across the private sector. Unlike with temporary replacements, when companies hire permanent strikebreakers, striking workers are not guaranteed their job back even after a strike ends. While the tactic has been legal since the 1930s, it was largely considered taboo before the 1980s. But with the public defeat of the air traffic controllers’ union, employers felt empowered to use permanent replacements to crush strikes with impunity. In the 1970s, just one in 66 major strikes saw companies resort to permanent replacements. In the decade following the 1981 strike, this rate skyrocketed to one in seven.

The ability to effectively fire striking workers is a powerful tool to defeat strikes and intimidate workers seeking to assert their rights. As the following chart shows, the number of strikes plummeted throughout the 1980s, and remains low to this day.

Withholding labor is perhaps the most powerful tactic workers have to increase wages and improve working conditions. The eight-hour workday, prohibitions on child labor, and the ability of public sector workers to unionize were all won in the wake of massive strikes. But the increased brazenness of strikebreaking across the economy has reversed some of these gains. The decline in strikes in the public and private sectors — and the broader erosion of organized labor’s bargaining power — is reflected in rising inequality and increased precarity, especially for low-wage and marginalized workers.

The US is virtually alone in allowing striking workers to lose their job, but this is just one example of how federal labor law’s extreme restrictions on the right to strike put a thumb on the scale for companies. The US is also one of just a handful of countries that flatly prohibits “sympathy strikes.” This type of strike involves workers at one company protesting the actions of a separate employer, a form of solidarity that has enabled workers to win concessions from even the most powerful companies. The employer-biased labor laws in the US are not just uncommon; they are a violation of international labor standards. In Oxfam’s ranking of worker organizing protections across 38 economically developed countries, the US ranked sixth from the bottom.

The Attack on Federal Workers Shows the Need for Labor Law Reform

Just as Reagan’s aggressive response to the air traffic controller strike impacted workers throughout the economy, the impact of the current assault on workers’ rights by DOGE will not be confined to federal employees. Others have noted how, by attempting to lay off thousands of workers and undermining agencies’ operations, the Trump administration’s actions mirror those of private equity. We should all fear the tactics of worker intimidation and counterproductive cost-cutting spreading throughout the economy.

Whether used by DOGE or a private company, the ultimate aim of anti-labor tactics is the same: profit for an ultra-wealthy few at the expense of everyone else. Musk and his fellow billionaires all stand to profit as the federal government is weakened or sold off. The attacks on federal workers are part of a larger inequality-fueling agenda, which will see ordinary workers everywhere pay for monopoly profits and tax cuts for billionaires and big corporations.

If there is good news in these bleak times, it’s that workers are already fighting back against Trump and Musk’s self-serving agenda. Their actions are a reminder of the power of organizing and of the urgent task of removing legal restraints on workers’ ability to fight for democracy and a more equal future. Proposals like the Protecting the Right to Organize (PRO) Act aim to do just that by banning the use of permanent replacements and making it easier for workers to unionize. However, the PRO Act would only apply to the private sector. We should also remove unfair restrictions on the right to strike for government workers, enabling them to not only fight for their rights but also for the future of public services.

### Aff---Mech---Codetermination

#### There have been many recent high-profile proposals for worker codetermination.

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In recent years, there has been considerable concern over the treatment and pay of workers in large corporations within the United States ("U.S."). This has generated enough concern that bills have been introduced to the Senate to fundamentally change the way corporations interact with their employees, evidenced most recently by Senator Elizabeth Warren's Accountable Capitalism Act and Senator Bernie Sanders' STOP BEZOS Act. These acts sought to force large corporations within the U.S. to make unprecedented concessions to employees, respectively giving employees two-fifths of the seats on corporate boards and requiring that large corporations pay for the cost of any social-welfare programs their employees use due to insufficient wages.' Even members of executive suites have begun questioning the orthodox view that shareholder-maximization is the central tenant of corporate governance, with over 181 leaders of some of the world's largest companies, many of them American companies, signing onto a vague statement on August 19, 2019, that sought to place the interests of stakeholders, such as employees and customers, above the traditional shareholder-only model of corporate goalsetting. 2 While these acts are unlikely to pass in the U.S.'s current political climate, and the recent statement certainly seems more aspirational than a binding commitment to change, it is clear that concerns about corporate treatment of employees (especially vis-Avis shareholders and management) are serious enough that Congress and business executives are interested in alternative systems of corporate governance to benefit American workers.

#### Works councils and co-determination meaningfully democratize corporate governance.

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Going well beyond traditional labor law reforms, some people support policies that would require firms to create works councils and put workers on the boards of corporations. These changes would be helpful and should happen. They are compatible with and complimentary to the agenda highlighted in this book, but they are not a replacement or substitute for it.

Works councils can create a collaborative setting for workers to help resolve issues on the job and give workers an additional way to discuss workplace issues among themselves and with managers. This can enhance the internal democracy of corporations and make a firm run better and be more productive.80 Works councils could even create organizing opportunities and lead to greater unionization. But, on their own, works councils will not do much to raise wages or reduce inequality because they are intended to be a place to discuss almost any issue except compensation. (Similar points can be made about related proposals, such as the creation of independent labor monitors at each workplace.)

Works councils are legally prohibited from discussing wages, which means they are not set up to address America’s problems with wage stagnation and inequality. Without broader-based bargaining, works councils would resemble a very weak version of the current enterprisebased bargaining system. If there is no other forum to do so, workers would try to find ways to get around the ban and in effect use works councils as a place to engage in enterprise-style collective bargaining—though with even less power and rights. This is unlikely to be effective in raising compensation, and it can channel conflict back into the worksite, which threatens to undermine the collaborative aspects of works councils. As one study put it, “In establishments covered by collective bargaining agreements works councils are more likely to be engaged in productivity-enhancing activities and less engaged in rent seeking activities than their counterparts in uncovered firms.”81 In other words, without broader-based bargaining raising wages and channeling conflict outside the workplace, works councils are unlikely to function in a collaborative, productivity-enhancing manner. 82 Worse, in places where unions do not exist or do not have sufficient power, works councils would likely be dominated by employers. To function properly, works councils depend on higher-level collective bargaining and strong unions.

Granting worker representation on corporate boards can help ensure that firms are run more democratically and could have a modest impact on wages and economic inequality. Board-level representation policies enable workers to have input on significant decisions that affect the direction of a firm, such as how much to outsource production and the creation of strategies to develop employees’skills. The policy can ensure that the needs and interests of workers—who often have a long-term commitment to a firm and community—are given a voice on par with shareholders, many of whom only have a short-term interest.83 Research indicates that board-level representation for workers can constrain CEO pay, reduce economic inequality, and improve job stability—and has the potential to do so in a way that is compatible with strong firm performance.84

#### Advocates argue that codetermination protects workers, would be suitable for the United States, and can serve as a jumping off point for a participatory economy.

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The principle of shareholder primacy dominates corporate law in the United States. Not only do shareholders form the sole voting group within the corporate republic, but they can also demand that the business be run to further their interests alone. Indeed, under the current norms of corporate governance, failure to maximize shareholder wealth is a violation of a board’s fiduciary duties. Stakeholder theory—in which corporate leaders are expected to consider the interests of all participants in the enterprise—has long served as a foil to shareholder primacy, but despite its good intentions has never coalesced into a coherent approach that would meaningfully change the structure of corporate power.

If we are to correct the deep-rooted power imbalances within our economic institutions, we need to go to the source—the governance of corporations—and adopt more equitable arrangements. Luckily, there is a solution hiding in plain sight. While widely ignored in the United States, codetermination is a time-tested, theoretically sound approach to corporate governance with an impressive track record in many other countries. As such, it deserves a spot on the agenda for progressive economic reform to facilitate a more equal, more participatory economy.

A Thriving Tradition

Codetermination is premised on the sharing of governance power between workers and investors at the highest levels. Perhaps most importantly, this system empowers employees to elect some portion of the company’s board of directors. While codetermination has served as a stable and equitable foundation for corporate governance in many European countries, Germany is the most well-known example, blending a strong union movement, local works councils, and supervisory codetermination. Under German corporate law, larger corporations are required to allow workers to choose either a third or half of the seats on their supervisory boards.

Recent empirical research has demonstrated some of the strengths of codetermination as a method of governance. As one might expect, employees are better protected under codetermination, with higher wages and stronger job security. But German workers also have taken steps to cut their own pay during downturns in order to preserve jobs. This willingness to sacrifice in the interest of the collective is one reason that the German economy was able to endure the 2008 Financial Crisis better than most countries (including our own). There is, moreover, no evidence that codetermination negatively impacts other stakeholders, such as shareholders, creditors, and the environment—in fact, codetermined firms have generally offered stronger long-term protections for these groups.

Despite this impressive record, codetermination has not gained much traction in U.S. academic or policy circles. When the law and economics takeover of corporate law scholarship was first underway, codetermination was seen as more of a threat and treated as such. Compared with shareholder primacy, codetermination was seen as kludgy, wasteful, and vaguely corrupt. Shared governance, it was claimed, muddled the clarity of the exclusive shareholder franchise, which enabled the corporation to focus single-mindedly on shareholder wealth maximization. Under law and economic principles, if worker participation in governance were truly better, firms would adopt it voluntarily. “It is questionable,” said Roberta Romano in The Genius of American Corporate Law, “whether such worker representation provisions enhance shareholder value. If they did, one would expect U.S. states and firms to opt for such arrangements.” In their (in)famous 2001 essay “The End of History for Corporate Law,” Henry Hansmann and Reinier Kraakman cast codetermination as the defeated competitor for global corporate law dominance. Sizing up the state of play, they wrote: “The growing view today is that meaningful direct worker voting participation in corporate affairs tends to produce inefficient decisions, paralysis, or weak boards, and that these costs are likely to exceed any potential benefits that worker participation might bring.” In the most melodramatic version of the conflict, Michael Jensen and William Meckling predicted that codetermination would either disappear, bowing to the supremacy of shareholder primacy, or it would grind economies to a halt like Tito’s Yugoslavia (their words), with “fairly complete, if not total, state ownership of the productive assets in the economy.”

Some forty years later, Jensen and Meckling’s prediction looks laughable, as codetermination seems, if anything, more firmly ensconced in the global economy. More to the point, there are a number of reasons why corporations in the United States may not voluntarily adopt codetermination. Since shareholders currently call the shots, they may resist codetermination if they think, rightly or wrongly, that they would lose out (even if their losses would be outweighed by gains to others). There may also be collective action problems that would disadvantage an adopting firm in relation to its competitors. And, finally, current systems of corporate law and ownership structures are so deeply embedded in existing businesses (and the people who run them) that they may be resistant to change. For these reasons, the impetus to shift to codetermination may very well need to come from outside the corporation.

On the legislative landscape, no state has seriously considered a codetermined system since Massachusetts enacted a voluntary statute in 1919 (that’s still on the books). But there are signs of change. At the federal level, Senators Elizabeth Warren and Tammy Baldwin have both introduced national codetermination legislation, and Senator Bernie Sanders defended the system against the absurd charge of “communism” from former NYC Mayor (and billionaire) Michael Bloomberg during a 2020 Presidential debate. The failures of the existing paradigm rooted in shareholder primacy are becoming clear across the board: massive income inequality, dislocated multinational firms acting without accountability, alienation from work, and a disregard for anything beyond shareholder returns.

Claiming Corporate Power for Workers

It is time to consider a systemic overhaul for corporate governance. While stakeholder theory asks shareholders and their representatives to consider a broader set of interests, it leaves our current corporate governance machine untouched. If we want to reform corporate governance in a meaningful way, we need to change the underlying power structure. Changing the academic and public conversations would be an important first step.

To bring codetermination into the fold as a viable approach to corporate structure, legal scholarship must break out of the assumption that shareholder primacy is the only available framework. Classes in Corporations and Business Associations need to discuss codetermination alongside such favorites as Dodge v. Ford and eBay v. Newmark. And scholars should build upon the work of Kent Greenfield, Lenore Palladino, Brett McDonnell, and Ewan McGaughey, each of whom has significantly moved the conversation forward. More broadly, we need more faculty and students—from law, political science, economics, public policy, and political economy—to ask about, pay attention to, and seek out research on worker participation in corporate governance.

Progressive policymakers should include codetermination in their collections of economic reforms. To be sure, there are important questions about the potential for the system in the absence of certain institutional and economic conditions, such as robust union representation, sectoral bargaining, and works councils. But the inverse may also be true—the rest of the worker-power infrastructure may need codetermination to remain viable. Without worker participation in governance, companies can and do lobby for anti-worker legislation, discourage workers from joining unions, permanently replace striking workers in the interests of their shareholder polity, and view workers as simply an input into the production function. The relationship between codetermination and other forms of worker power mustn’t paralyze us into inaction; instead, we should use a belt-and-suspenders approach. Codetermination may well be a necessary precondition to a fairer economy, a balanced political system, and a healthier environment for collective bargaining.

For most Americans, the term “codetermination” is likely an unfamiliar one, and it may at first seem confusing and foreign. But the underlying idea that workers should have a voice in their workplace is very popular. Corporate consolidation in all sectors, the loss of local businesses, and the growing imposition of managerial algorithms have eroded workers’ connections to their firms and fostered a sense of loss and alienation. We need a role for workers—a meaningful role—in the running of the enterprises for which they sacrifice so much. It is a critical step on our path to a better future.

#### But there are strong arguments that board representation fails on its own. Strong unions are necessary to achieve the benefits of co-determination.

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Still, strong unions are key to making board-level representation work because they help train, educate, and inform worker board members. Without this support, worker board members are unlikely to have the skills and background to read balance sheets, understand corporate finance, or know what is happening in other divisions of the company, among other issues.

It also seems unlikely that that board-level representation on its own would significantly raise wages. Some studies on firms with board-level representation find that they pay only modestly higher wages than otherwise comparable firms or have even lower wages.85 A particularly revealing study, based on a legal change in Germany that created a quasiexperiment by abolishing worker-elected directors in certain firms and permanently preserved their presence in others, found that board-level representation does not significantly raise wages.86 More generally, in Germany—the country with perhaps the most robust board-level representation policies in the world, where workers comprise 50 percent of the advisory board members of large firms—wages have stagnated over recent decades, and inequality has risen. Relatively little has changed with Germany’s board-level representation laws since 1994. In contrast, the decline of union density and the weakening of industry-wide bargaining in Germany over recent decades are key factors in the country’s struggles with slow wage growth and rising inequality. 87

Even the ability of board-level representation to improve democracy is somewhat limited. The point of board membership is to improve the democratic governance of the firm, and it will certainly help with that. Still, a more democratic firm structure may not be as pro-worker as some may hope. The background of worker board members suggests that they may take into account a greater variety of interests in their decisions than other board members, but worker board members must look out for the best interests of the firm—not the best interests of society—and thus their decisions may not be wildly different from traditional board members. The firm is still capitalistic, and the board members’ role is still to maximize profits and the value of their firm.

Importantly, board-level representation does not do much to translate a more democratic firm structure into political power for workers. As a result, it would not do that much to make the country’s political democracy responsive to the people. While worker board members would likely be able to limit a firm’s anti-worker political activity, they would struggle to drive a positive political agenda for the country’s workers. They could not create or fund a pro-worker organization, as the board members representing capital would simply veto them. Still, there is some modest evidence that democracy inside the firm—such as board-level representation provides— can improve the political capabilities of citizens and make them more active.88 But this is a kind of individual power rather than the kind of organizational power necessary to engage in sustained political fights.

#### Workplace democracy can be used to organize for climate action. This is currently considered outside the bounds of legitimate labor actions.

Anjali Katta 25, student at Harvard Law School, "Labor in Climate Crisis: Union Action for a Cleaner, Greener Future," OnLabor, 4/15/2025, https://onlabor.org/title/

From working in fields during wildfires to working in factories without air conditioning in summer heat, many workers are all too familiar with the harsh realities of the climate crisis. Many responses to the climate crisis, like the Green New Deal, recognize that marginalized people are the most affected and any solution must uplift both people and the planet. While many unions have taken important steps in the right direction, we are yet to see broad, coordinated, actions from the labor movement to address this crisis. With emissions rising faster than ever, corporations scaling back their climate commitments, and federal agencies meant to protect workers and the environment now hostile to these very interests, unions must act with greater urgency. This post will be part of a series exploring how unions are addressing the climate crisis and the obstacles they face. This post focuses on the first question—what are unions currently doing to address climate change?

To answer, I reviewed publicly available information on the largest unions in the U.S and the findings were compiled into a table available here. A note on terminology: I refer to actions addressing the effects of climate change as ‘adaptation actions,’ while actions aimed at combating the broader impacts of climate change are labeled ‘mitigation actions.’

Overview of Actions

Every union researched had some form of climate or Environmental Justice (EJ) action. Most of these actions occurred outside of formal labor relations and were evenly split between external advocacy and internal campaigns, as well as between adaptation and mitigation efforts. Additionally, many unions participated in coalitions, whether issue-based or general membership-based.

Resolutions

Most unions passed a public resolution on climate change or EJ. Unions use resolutions to define their stance on an issue, educate members, and begin integrating policy considerations into action and advocacy. Some resolutions had concrete actions, like SEIU’s resolution that established an international climate and EJ committee. Others passed statements with no specific actions, such as AFSCME’s 2024 resolution, which reaffirmed the union’s commitment to climate advocacy and encouraged affiliates to form EJ committees. Additionally, the level of specificity in these resolutions varied widely—while some unions pushed for concrete GHG reductions, others offered generalized statements of support.

Legislative Advocacy

Unions consistently advocated for mitigation and adaptation legislation and often did so while working in coalitions. While internationals typically supported federal policies, such as OSHA’s new heat standard rule, most union involvement in the legislative process happened at State and local levels. Notable examples include SEIU’s endorsement of New York’s Build Public Renewables Act and IBEW’s support for Illinois’ Clean Energy Jobs Bill. Critically, union-led coalitions have successfully advocated for worker-centered climate policy such as commitments to build more renewables with improved labor standards.

Divestment

Unions also pushed for fossil fuel divestment of their pension funds. These efforts typically targeted large state or city public pension funds, as workers and unions in the private sector have limited influence over how their pensions are invested. Some internationals offered informational resources to help their locals pursue divestment, and some locals joined broader coalitions advocating for this cause. For example, SEIU participated in the campaign to divest San Francisco’s pension fund from fossil fuels, and AFT joined the DivestNY Coalition for the same goal. The success of these campaigns has varied, with some achieving divestment, while others secured disclosure requirements or municipal resolutions urging divestment.

Variation In Union Actions

Actions also varied depending on the relationship between a Union’s industry and climate goals. Public schools don’t directly contribute significant GHG emissions, which allows teachers’ unions more flexibility to advocate for mitigation without alienating their members. In contrast, unions in energy-intensive and high-emitting industries often take different approaches. The United Steel Workers (USW) for example, has strongly supported adaptation actions, such as heat standards, and more softly advocated for mitigation measures like nuclear energy and carbon capture and storage (CCS) technologies. The USW’s support for mitigation technologies aligns with their interests, as these technologies could allow industries of workers they represent to continue operating while reducing emissions. However, these technologies are heavily criticized by climate activists due to their high costs, impracticality, and conflicts with other EJ concerns.

Actions through Formal Labor Relations

As described so far, most climate actions take place outside of formal labor relations, largely due to legal constraints that limit what unions can negotiate. However, some unions have still pursued climate actions through formal labor relations. These actions can be categorized into three areas: organizing workers in climate/energy-related (‘green’) industries, bargaining for climate mitigation, and bargaining for climate adaptation.

Organizing green Industries

A key challenge in the energy transition is the low unionization rates within renewable sectors—around 4% in solar and 6% in wind—and the fact that renewables require fewer workers compared to their fossil fuel counterparts. Organizing and partnering with ‘green’ industry has become a crucial battleground to ensure workers are not left behind. For example, UAW is working to organize non-union electric vehicle companies like Tesla, while IBEW has launched a campaign focused on upskilling clean energy workers.

There have been significant successes when it comes to formal labor victories for workers in ‘green’ industries. In 2023, UAW struck a deal with GM, Ford, and Chrysler to include EV battery-manufacturing workers under the union’s contract—a landmark achievement for auto industry workers. Additionally, UAW now represents workers at renewable energy companies, such as EmPower Solar. USW has partnered with US Wind, a wind energy company, to convert part of a steel mill into an offshore wind facility, with a commitment to hire and train local workers. USW also reached an agreement with Convalt Energy to protect workers from “pressure or intimidation during unionization efforts.” Lastly, the AFL-CIO facilitated a Project Labor Agreement between, Danish wind-turbine manufacturer, Ørsted and the National Building and Construction Trades Union. Broader union-led coalitions have also been able to guarantee high-road labor standards through project labor agreements for state level renewable energy policies.

Adaptation & Mitigation Actions

There are several noteworthy union adaptation and mitigation actions taken through formal labor relations. SEIU Local 26 arguably held the first-ever strike with concrete climate justice demands, successfully securing some demands (see table for specifics). Another SEIU local, made up of hospital workers, organized around a building emissions reduction plan by combining both informal and formal labor strategies in their advocacy. Unions have also pushed for other climate provisions through contract negotiations, such as incentives for public transportation and green work environments, though these demands have been unsuccessful. Adaptation focused demands have found more luck— for example, Teamsters-represented UPS workers successfully bargained for air conditioning units across the entire UPS fleet.

Of these formal labor relations actions, organizing ‘green’ industries and bargaining for adaptation measures will likely be more successful as these actions fall within the ambit of hours, wages, and terms and conditions of employment—mandatory subjects of bargaining. Demands for mitigation, however, likely fall outside this scope. Demanding mitigation, or other social or political ones that go beyond mandatory subjects of bargaining, is often called ‘bargaining for the common good.’ The next post will explore the constraints and tensions unions face when using bargaining for the common good to address the climate crisis.

#### Neg authors are skeptical, arguing that co-determination would achieve little in the US.

Simon Jäger et al. 21, Jäger is Professor of Economics at MIT; Noy is PhD candidate in Economics at MIT; Schoefer is Associate Professor of Economics at UC Berkeley, "What Does Codetermination Do?," ILR Review, vol. 75, no. 4, 12/29/2021, https://doi.org/10.1177/00197939211065727

What Would Codetermination Do in the United States?

The past four years (i.e., 2018–2021) have seen a surge of interest in codetermination among progressive American policymakers, commentators, and academics. Shared governance laws have been viewed as a potential antidote for a perceived decline in the power of workers relative to shareholders and managers within corporations (see, e.g., Liebman 2017; Greenwald, Lettau, and Ludvigson 2018; Hockett et al. 2018; Yglesias 2018; Stansbury and Summers 2020; Strine, Kovvali, and Williams 2021). This perceived deterioration of worker power has motivated policy proposals aimed at expanding or strengthening worker representation, either by reinvigorating American unions or by introducing shared governance arrangements modeled after European codetermination.

Recent Codetermination Proposals

Board-level codetermination provisions are a key element of two pieces of legislation introduced by Democratic senators in 2018—the Reward Work Act, which would require US companies listed on a national stock exchange to adopt one-third board-level worker representation, and the Accountable Capitalism Act, which would require US corporations with more than $1 billion in tax receipts to adopt 40% board-level worker representation. In addition, informal proposals for shop-floor codetermination reforms have circulated recently among American commentators (Liebman 2017; Silvia 2018, 2020; Cass 2020; Strine et al. 2021).

Recent codetermination proposals are not being advanced in isolation: They are part of a broader legislative agenda intended to increase the influence of workers. During the 2020 Democratic primaries, several major candidates (including Joe Biden, Pete Buttigieg, Elizabeth Warren, and Bernie Sanders) announced intentions to explore the introduction of sectoral collective bargaining systems (Vox, October 29, 2019). In 2021, the PRO Act, which would significantly strengthen American unions, passed through the Democrat-controlled House of Representatives (NPR, March 9, 2021). The Nordic context shows that expansions of firm-level union representation can even be combined with codetermination reforms, through the allocation of co-decision-making rights to union representatives.

Advocates of recent codetermination proposals face two practical hurdles. First, any attempt at federal- or state-level shop-floor codetermination legislation would force a much broader conversation about amending Section 8(a)2 of the National Labor Relations Act, which currently stifles any local experimentation with more cooperative forms of shop-floor representation (even if both workers and the employers would support such experimentation; Liebman 2017). The 1994 Dunlop Report, commissioned by the Clinton administration, recommended a partial repeal of Section 8(a)2 in the context of its finding that American workers would appreciate more cooperative avenues for voice in their workplaces (Addison et al. 2001; Befort 2004).

Second, as several commentators emphasize, a long list of important practical questions remain concerning how codetermination would be implemented in the United States (Liebman 2017; Dammann and Eidenmueller 2021; Strine et al. 2021). The European solutions to these practical problems draw indispensably on institutional features of European labor markets, including widespread union representation and broader frameworks of social partnership, that are currently comparatively absent in the United States. We now discuss what the interactions between European codetermination and other European labor market institutions might imply for a potential American version of codetermination.

What Would US Codetermination Look Like? What Would It Do?

Union Representation

The fact that union representation in codetermined European countries is much more extensive than in the United States has several practical implications, as Strine et al. (2021) have emphasized. European codetermination laws typically set up shared governance procedures that explicitly refer to unions at a number of stages (ETUI 2020). First, when legislation prescribes a right to codetermination that workers can voluntarily take up, company-level union representatives are usually responsible for initiating the proceedings that establish codetermination. Second, elections of worker representatives are usually organized by unions. Third, union representatives form a ready pool of candidates. Little precedent exists for how codetermination might be implemented in the United States, where many workplaces lack union representatives or alternative foci of employee organization.

In addition, low union density in the United States means that American codetermination may have either stronger or even weaker impacts than European codetermination, as we described earlier. If the worker voice institutions are substitutes, codetermination may have a larger marginal effect in the United States. This view is hard to square with the history of vigorous union advocacy for codetermination rights. By contrast, union representation may complement codetermination by allowing workers to speak with a unified voice and take full advantage of co-decision-making rights (Doellgast, Holtgrewe, and Deery 2009; Liebman 2017). Consistent with this view, scattered historical experiments with worker participation in the United States inevitably died out when management soured on the arrangements and unions offered no push-back (Hammer, Currall, and Stern 1991), and German works councils in industries where union influence is retreating have struggled to maintain their influence (Müller-Jentsch 1992). Moreover, unions provide an outlet for workers’ adversarial demands or grievances, leaving board-level or shop-floor worker representatives free to cooperate peacefully with employers (Pfeifer 2010).

Sectoral Bargaining

Codetermined European countries have collective bargaining systems that operate primarily at the industry level, whereas bargaining in the United States happens at the company level (if at all). As noted earlier, no evidence has suggested that sectoral bargaining curbs potential wage effects of codetermination. Sectoral bargaining may complement codetermination, however—for example, by outsourcing adversarial bargaining to the industry level, sectoral bargaining may make firm-level labor relations more friendly and conducive to shared governance. American managers are often encouraged to fear and obstruct worker organization (Lafer and Loustaunau 2020), perhaps partly because the costs of unionization are so salient to employers when bargaining happens at the company level.

Labor Regulations

Certain kinds of labor market regulations prominent in European settings may complement shared governance requirements. For example, employment protection legislation may reduce turnover and hence raise trust and enable greater investment in cooperative worker–employer relationships, similar to the model in MacLeod and Nakavachara (2007). In the American environment of at-will employment, employers and workers may struggle to build trust.

Quality of Industrial Relations

A long-standing hypothesis is that the effects of increasing worker power hinge on the pre-existing quality of labor–management relationships (Freeman and Medoff 1984; Kochan and Kimball 2019). In a hostile atmosphere, boosting workers’ authority might simply intensify negative-sum conflict, consistent with negative effects of unionization on firm performance in the United States, at least on average (Lee and Mas 2012; Frandsen 2021). As we mentioned in our discussion on general-equilibrium effects, managers indeed consider labor relations in Germany and the Nordic countries more harmonious and cooperative than in the United States. In addition, foreign employers operating in Germany have much less cooperative relationships with their works councils than domestic employers do (Dill and Jirjahn 2017), and the positive association between works councils and productivity appears to materialize only among domestic employers (Jirjahn and Mueller 2014). These patterns suggest codetermination may have other impacts in the United States, at least in the short term.

Section Conclusion

Given the deep institutional differences, it is difficult to extrapolate from the existing European evidence to the likely effects of American codetermination proposals. One conclusion that is clear from this discussion is that codetermination is not a stand-alone institution. Rather, it is part of a broader institutional and cultural package with other elements that complement codetermination and supply its practical infrastructure. The recent American policy discourse has seen several proposals to introduce other elements of the European package, including stronger union representation and sectoral collective bargaining.

Overall Conclusions

The evidence indicates that the European model of codetermination is neither a panacea for all the problems faced by 21st-century workers, nor a destructive institution that appears obviously inferior to shareholder control. Rather, it is a moderate institution with nonexistent or small positive net effects. Board-level and shop-floor worker representation cause at most small increases in wages, possibly lead to slight increases in job security and satisfaction, and have largely zero or small positive effects on firm performance. These limited effects may reflect limited power conveyed by existing codetermination arrangements, cultures of informal worker–management cooperation, or the influence of other pro-worker institutions. If cultural or institutional features of European labor markets are key to explaining codetermination’s limited impacts, codetermination might have more noticeable effects if introduced in the United States. Important practical complementarities also exist between codetermination and other European labor market institutions.

We suggest a number of promising directions for future work on codetermination. First, it remains an open question whether codetermination arrangements that convey greater power to workers, such as parity board-level representation in Germany, have more substantial positive or negative impacts (Svejnar 1981). Second, beyond a few correlational tests or heterogeneity analyses, a paucity of evidence speaks to the interaction of codetermination with other labor market institutions. Third, we lack estimates of the effects of shared governance on intangible outcomes such as worker alienation or feelings of domination or insecurity. Fourth, although we provide novel country-level event study analyses, a promising avenue for work on aggregate, general-equilibrium effects of codetermination may be to leverage treatment variation at the level of industries or local labor markets.

We close by emphasizing that our article focuses solely on the economic consequences of codetermination. Addison (2009) observed that, perhaps surprisingly, economic considerations have not historically been at the forefront of the German public debate about codetermination. Rather, the conversation has been dominated by non-consequentialist justifications of codetermination rooted in principles of economic democracy and the dignity of work (Budd 2004). Echoing this view of codetermination, in 2001, the German government dismissed concerns that its drafted extension of the Works Council Act would be costly to businesses by declaring:

Democracy is not cost neutral. This principle also applies to democracy at the workplace and to the resulting system of establishment-level codetermination. (As quoted in Addison 2009: 22; see Bundestag 2001)

The idea that democratic political principles should be extended to the realm of private business has recently regained popularity in analytic political philosophy (Anderson 2017; Frega, Herzog, and Neuhäuser 2019; Walters 2021). Elizabeth Anderson writes:

Government is everywhere, not just in the form of the state, but even more pervasively in the workplace. . . . The vast majority [of workers] are subject to private, authoritarian government, not through their own choice, but through laws that have handed nearly all authority to their employers. (Anderson 2017: 70–71)

She adds that, once one recognizes this fact, one is forced to conclude that:

There is no adequate substitute for recognizing workers’ voice in their government. (Anderson 2017: 69)

Quasi-experimental studies of the economic impacts of codetermination do not directly speak to these important non-consequentialist questions. The conclusion suggested by the evidence, however—that codetermination in its current form has limited consequences for core economic outcomes—may shift the focus of the debate to such non-consequentialist arguments.

#### Even if it is abstractly meritorious, neg authors also argue that codetermination is a poor fit for the American corporate environment.

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In this article, I will be looking to the German codetermination system, where employees have considerable control of companies, as an alternative to the American system of shareholder-primacy, with an eye towards determining if American corporate governance law should apply some of the aspects of the German model in America to benefit stakeholders. This paper will ignore the political feasibility of enacting such a system in the U.S., instead focusing on the European (and specifically German experience) to determine the impacts this system has had since its enactment and to determine its feasibility as a means of corporate governance and labor reform given the peculiarities of the American systems of corporate governance and labor protections. This paper will also look towards the cultural feasibility of a codetermination system in a country like the U.S.

It would initially appear that putting significant control of a corporation into the hands of those who do not see a financial benefit from the company's profits would lead to poor performance by these corporations and that this system would generate costs for both shareholders and the corporation itself. Despite this, Germany remains the world's fourth-largest economy and is relatively healthy economically. 3 This implies that, at least in Germany, stakeholder-primacy is not catastrophically damaging to the prosperity of corporations.

While shareholder financial outcomes are generally the gold standard for corporate performance in America, they do not represent the entire story in the shareholder versus stakeholder debate in corporate law. This is because shareholder wealth (while very easy to quantify) does not take into account stakeholder benefits, which are difficult to quantify and represent the entire justification for the codetermination system. 4 Because the balancing of these two sets of benefits is a subjective exercise based on policy preferences, I will attempt to avoid this aspect of the debate on the viability of codetermination in America. Instead, I will focus on whether or not codetermination is even a good fix for problems with American corporate governance, given its success in Germany at solving the sorts of problems experienced in that nation and the underlying reasons for the development of such a system. I will show that stakeholder-focused systems such as German codetermination do not damage shareholder-concerns to an unacceptable degree, while still managing to improve outcomes for stakeholders (namely, workers). Having shown this, the focus of this paper will be on whether such a system can even be made to work in America given the development of its corporate governance regime. Based on my research, the answer to this second inquiry would appear to be in the negative. This is not to say that individual states could not pursue a stakeholder system in their corporate law as an experiment in workers' rights or that the results of implementing such a system would be disastrous to the American understanding of capitalism and corporate governance, but merely that the practical developments in corporate ownership that created the shareholder-primacy and codetermination models are tailored to a specific set of local conditions. Because of this custom-tailoring to local governance conditions, it seems unlikely a codetermination model could be successful in America as it was not designed with the peculiarities of the American corporate environment in mind.

#### They point out that codetermination isn’t as transformative as it sounds.

Simon Jäger et al. 22, Jäger is Assistant Professor of Economics at MIT; Noy is Predoctoral Research Fellow at MIT; Schoefer is Assistant Professor of Economics at UC Berkeley, "Codetermination and power in the workplace," Economic Policy Institute, 03/23/2022, https://www.epi.org/unequalpower/publications/codetermination-and-power-in-the-workplace/

How does codetermination—entitling workers to participate in firm governance, either through membership on company boards or the formation of works councils—affect worker welfare and corporate decision-making?

In 2018, the Reward Work Act and the Accountable Capitalism Act, proposed by Democratic senators, included provisions that would require large companies to allocate 33–40% of the seats on their boards to worker-elected representatives. These proposals emulate the German model of “board-level codetermination,” which originated in the aftermath of World War II and has since spread to many European countries, including Austria, Denmark, Finland, Norway, and Sweden. In addition, the German model of “shop-floor codetermination” through elected works councils has received widespread attention in the past several years, in part due to the widely covered 2014 and 2019 unionization drives at Volkswagen’s Chattanooga, Tennessee, plant.

American corporate law has historically been hostile to such arrangements, which impinge on owners’ or managers’ exclusive discretion. And the academic literature has claimed that involving workers in firm governance impedes efficient decision-making, distorts incentives, and deters capital formation by allowing workers to capture the fruits of investment, ultimately stunting economic growth and leaving both employers and workers worse off. But alternative perspectives in the literature emphasize the potential benefits of codetermination for firms and workers through enhanced trust and information flows. And recent arguments stress that shared governance requirements can mitigate imbalances of power between employers and workers and thereby prevent exploitation.

This paper critically assesses these competing perspectives. We describe the background of existing codetermination laws and ask whether there are successful precedents for proposals to rectify workplace power imbalances through codetermination reforms. We then ask how contemporary codetermination institutions operate in practice. In which areas of decision-making does codetermination boost workers’ influence, and to what extent? How do worker representatives use their newfound authority? Are shared governance arrangements characterized by adversarial struggles between worker representatives and employers, or by cooperative relationships in which worker representatives and employers work together toward mutually agreeable goals? We draw on surveys, interviews, and case studies to answer these questions, and briefly survey the existing quantitative evidence on the economic impacts of codetermination.

We conclude that, historically, codetermination reforms have not been a key stand-alone vehicle for increasing worker power and have instead been intended to supplement core frameworks of union representation and centralized collective bargaining. Contemporary codetermination arrangements mostly function as amicable venues for workers and employers to share information and perspectives and for workers to shape decisions about immediate working conditions. For example, board-level codetermination creates two-way knowledge flows, giving employers a more intimate understanding of company operations and the desires of workers, and giving workers financial and strategic information that may inform collective bargaining strategies. However, the presence of worker representatives on company boards does not substantially shift high-level decision-making; workers usually occupy a minority of seats and therefore lack the ability to outvote shareholders, and often worker representatives defer to shareholder representatives in recognition of the fact that workers benefit when the company performs well. Shop-floor codetermination gives workers some control over decisions about hours and amenities, but (apart from, e.g., German works councils) little control over wage-setting or layoff decisions. One notable exception is that worker representatives’ influence may grow during economic downturns, when qualitative evidence suggests the representatives sometimes play an important role in negotiating wage or hour cuts that prevent layoffs.

Probably reflecting the limited authority conveyed by most existing codetermination arrangements, the quantitative evidence suggests that both board-level and shop-floor codetermination have mostly zero or slight positive impacts on worker and firm outcomes.

On the worker side, minority board-level representation does not affect wages, but it may slightly increase job security and subjective job satisfaction; on the firm side, it has zero or small positive effects on productivity, capital intensity, and profitability. Relatively weak forms of shop-floor codetermination have similarly slight effects on both worker and firm outcomes, while stronger shop-floor codetermination arrangements (which allocate broader and more substantive powers to worker representatives) may slightly boost wages, reduce within-firm earnings inequalities, and raise job security (possibly at the expense of nonincumbent workers). Strong forms of shop-floor codetermination do not appear to worsen firm performance, and may even increase productivity, but there is still a dearth of credible quasi-experimental evidence on the effects of these arrangements, so we are hesitant to make confident pronouncements.

Our overall conclusion is that most existing codetermination arrangements are relatively weak and have, at most, incremental positive effects. This conclusion leaves us unable to decisively confirm or reject the important claim, implicit in American corporate law, that employers must retain exclusive discretion over firm governance or else economic performance will suffer. On the one hand, the existing evidence shows it is possible to involve workers in workplace decision-making in ways that, if anything, weakly improve firm performance while also plausibly benefiting workers. However, the representation arrangements for which we possess the most credible evidence do not involve very substantial restrictions on employer discretion. Causal evidence on the economic performance effects of shared governance arrangements that more substantively limit employer discretion—such as powerful German works councils or parity codetermination in German iron, coal, and steel sector firms—remains scarce. In sum, codetermination laws may perform valuable functions even if they do not substantially affect the balance of power in workplaces.

#### It may be a poor fit for US corporations, undermining the foundations of corporate governance.

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VI. THE COSTS OF CODETERMINATION

Codetermination has costs as well as benefits. These costs are bound to arise in any country that adopts mandatory codetermination. However, as shown below, they are likely to be much greater in the United States than they are in Germany. As a consequence, and taking into account that any benefits of codetermination would be significantly smaller in the United States than in Germany, the economic case for introducing mandatory codetermination in the United States is extremely weak.

A. The Functioning of the Board

One of the core challenges of mandatory codetermination is that it guarantees divided loyalties within the board: the shareholder representatives know that they must please the shareholders to get reelected, whereas the worker representatives know that their reelection depends on keeping employees satisfied.134 These different perspectives can make it harder for boards to work constructively towards the same end.135

Of course, there now exists a rich literature emphasizing the benefits of diverse boards. In particular, having directors with different experiences and viewpoints can, in principle, avoid problems like groupthink and thereby improve decisionmaking.136 Against this background, skeptics may be tempted to dismiss our reasoning by arguing that it ignores the benefits of viewpoint diversity. However, this objection would misunderstand our argument. We do not question the value of board diversity. Instead, we would like to point out that corporations can reap the benefits of diversity without the downside of having directors with fundamentally different goals.137

The beneficiaries of a less functional board might be a corporation’s managers. If employee representatives and shareholder representatives on the board cannot agree on goals, strategies, or supervisory measures, managers are likely to gain more leeway in pursuing self-interested actions to the detriment of both shareholders and employees. Agency costs in the form of managerial opportunism are the probable result.138 For example, as the intensity with which boards monitor managers declines, managers may exploit their discretion to shirk or to waste corporate resources on unprofitable “pet projects”139 or “empire-building.”140

The rise and fall of cumulative voting illustrates the importance of board collegiality.141 Cumulative voting can help minority shareholders elect some of their representatives to the board.142 Despite the potential salutary effect of minority shareholder representation on monitoring,143 and even though minority and majority shareholders typically share the basic goal of maximizing shareholder wealth,144 practitioners viewed the resulting board composition as so detrimental to collegiality145 that state lawmakers and corporate charters have largely turned their backs on it.146 This modern practice finds support in more recent empirical studies, which provide evidence that cumulative voting reduces firm value.147 Cumulative voting rules are very different from codetermination. However, the lesson from cumulative voting is that board collegiality needs to be taken seriously when considering codetermination’s potential costs.

Of course, the problem that mandatory codetermination may undermine board collegiality is not limited to the United States. It exists in Germany, as well.148 But German corporate law provides for a two-tier board structure and charges the managing board, rather than the supervisory board, with the day-to-day management of the company.149 In addition, unlike the supervisory board, the managing board is not subject to mandatory codetermination requirements.150 Perhaps for this reason employee and shareholder directors often work together relatively smoothly.151

B. Removal of Directors

One of the most obvious problems in corporate law is the agency conflict between directors and the corporation. Directors are fiduciaries who are supposed to act in the best interest of the corporation.152 Traditionally, that has meant that directors are supposed to act in the best interest of shareholders.153 In a stakeholder model, it means that directors must act in the best interests of multiple constituencies.154 In either case the problem is the same: directors may be tempted to put their own interests ahead of those that they are meant to serve. For example, directors may use their influence to obtain excessive salaries,155 to engage in empire-building,156 or to entrench themselves in office,157 thereby preventing the corporation from getting better managers.

Corporate law and private ordering offer various ways in which corporations can minimize agency costs. These include performance-based compensation,158 an active market for corporate control,159 and active monitoring by institutional investors.160 Shareholders can also discipline directors through the threat of removal.161 Admittedly, Delaware law allows corporations to blunt that threat by classifying (“staggering”) boards. On a classified board, shareholders can remove directors only for cause,162 and among publicly-traded corporations, classified boards used to be the rule rather than the exception.163 Recently, however, shareholders have pushed back against the proliferation of classified boards. As Marcel Kahan and Ed Rock have shown, between 2003 and 2009 the percentage of S&P 100 corporations with classified boards declined from forty-four percent to sixteen percent.164 There are good reasons why shareholders dislike classified boards. A substantial number of empirical studies have examined the impact of classified boards and found that they tend to reduce firm value.165

Against this background, the question arises whether codetermination facilitates the removal of directors or makes it more difficult. Germany’s 1976 Codetermination Act allows for the removal of employee representatives on the supervisory board but requires a three-fourths majority of the employees to vote in favor of removal.166 However, the difficulty of removing an incompetent board member may not be excessively harmful because the supervisory board is not entrusted with the day-to-day management of the corporation.

Neither Sanders’s nor Warren’s proposal mentions the removal of employee representatives,167 but any procedure allowing for removal will be clumsy. The decision must be left to the employees, or else their right to elect representatives would be undermined. But employees would face the same collective action problem that shareholders do when it comes to informed voting. Crucially, while the existence of institutional investors greatly reduces the collective action problem for shareholders,168 this solution is unavailable to employees, assuming that if the United States were to introduce codetermination, each shareholder would only be given one vote.

In sum, it seems likely that mandatory codetermination would make the removal of employee directors very difficult, and because of America’s single-tier board structure, this problem would be much more severe in the United States than it is in Germany.

C. Bankruptcy Governance

Mandatory codetermination might also have a significant impact on “bankruptcy governance,”169 complicating decisionmaking processes especially in Chapter 11 restructurings in the United States.

The starting principle for both U.S. and German corporate bankruptcy laws is creditor governance.170 Key decisions, such as the approval of a restructuring plan, require the consent of a majority of the creditors.171 This protects the parties with money on the line. As the new residual claimants on the distressed corporation’s income stream, creditors should have a decisive say on the use of the corporation’s assets post-bankruptcy.

Codetermination on corporate boards complicates bankruptcy governance. On the one hand, one could argue that employee involvement in the strategic decision-making of a corporation is especially important in bankruptcy. After all, it is not only the creditors’ money that is at stake but also the employees’ jobs. Difficult decisions about the future of the distressed firm should be put on a broad foundation, if possible. On the other hand, bankruptcy requires swift decisionmaking and action. Firms lose value while subject to a bankruptcy process day-by-day,172 and codetermination inevitably slows down decisionmaking.173

Thus, under German bankruptcy law, the codetermination scheme that applies outside bankruptcy does not apply in court-supervised bankruptcy proceedings. Typically, even in going concern sales an insolvency administrator receives the powers to manage the distressed firm’s assets that—outside bankruptcy—the management and the supervisory board would exercise.174 German bankruptcy law has Debtor-inPossession (DIP) proceedings similar to the United States.175 However, these are rarely used. In the period from March 2012 to March 2017, less than 3.5% of all corporate insolvency proceedings were DIP proceedings.176 Hence, codetermination on corporate boards is practically irrelevant in German corporate restructurings, allowing the insolvency administrator to take swift decisions.

The adoption of either the Sanders or the Warren proposal would shift U.S. bankruptcy law and practice away from its current framework.177 Chapter 11 corporate restructurings are almost always DIP proceedings.178 Thus, in principle, the governance system that applies outside bankruptcy continues to apply in bankruptcy.179 With respect to codetermination, this means that the debtor’s deliberation on a restructuring plan would be fraught with difficult discussions between shareholder and employee representatives. For example, shareholder and employee representatives typically have very different views on the necessity, size and timing of layoffs, the sale or closure of certain business units, and more. These differences inevitably will complicate and delay decision on a restructuring plan, creating additional transaction and opportunity costs. This would be a significant downside of the codetermination regime were it introduced in the United States.

Of course, bankruptcy practice in the United States could change. For example, more creditors might move to appoint a trustee under 11 U.S.C. § 1104(a), and courts might be more open to such motions. Similarly, the 11 U.S.C. § 1107(a) duties of a DIP as a trustee might discipline conflicts between different corporate stakeholder groups. But these developments would not undo the significant structural differences between the German and the U.S. bankruptcy system, and they would only reduce, not eliminate, the frictions created by introducing codetermination to the governance of large U.S corporations.180

D. The Market for Corporate Control

Codetermination may also weaken the market for corporate control. The threat of hostile takeovers is an important mechanism to prevent managerial opportunism.181 However, mergers also come with the prospect of workforce reductions,182 which means that employee representatives are likely to oppose them.183 This is consistent with the experience in Germany, where commentators generally view codetermination as an obstacle to the market for corporate control.184

Of course, such opposition can be efficiency-enhancing to the extent that a merger’s externalities affecting the target firm’s employees outweigh benefits to the firm’s shareholders. However, we know of no empirical evidence showing that this is typically the case.185 More importantly, assuming that employee representatives seek to maximize their chances of reelection, there is no reason to believe that they will take into account the benefits accruing to shareholders when deciding whether to oppose a merger. Rather, as long as the merger threatens to reduce employment, a self-interested employee representative is likely to vote against it even when the benefits to shareholders outweigh the costs to employees.

In principle, this conflict of interest exists in Germany and the United States. However, there are compelling reasons to think that opposition to takeovers is a lesser problem in Germany. The main reason is that, traditionally, there have been very few hostile takeovers in Germany. A 2017 study that examined all German takeovers between 1981 and 2010 in which the acquirer was a public company identified only five hostile takeovers in total.186 The same study showed that the overall level of takeover activity was quite low. Between 1981 and 2010, there were 338 acquisitions in total, and in 2010, the most recent year included in the study, the authors found a total of eight mergers.187

Of course, these numbers could be higher if it were not for codetermination. However, there are many other obstacles to an active takeover market in Germany. For example, even though share ownership is now more dispersed in Germany than it was even twenty years ago, many public corporations still have shareholders with ownership stakes exceeding twenty-five percent.188 That makes hostile takeovers quite difficult.189 In other words, while Germany’s codetermination regime may render hostile takeovers more challenging, it is not clear that the number of hostile takeovers would be much higher in its absence. Herein lies a major difference between Germany and the United States. The United States has a particularly vigorous market for corporate control and stands to lose much more from imposing codetermination.190 Between 1981 and 2010, the United States saw 60,244 mergers in which the acquirer and the target were public companies.191

E. Mandatory Corporate Law

One of the less obvious costs of codetermination lies in the need to reduce the flexibility of corporate law to prevent regulatory arbitrage. Corporations may seek to find some way around the mandatory codetermination rules; therefore, lawmakers need to adopt additional mandatory rules to prevent circumvention of the codetermination regime. This problem exists in both Germany and the United States. However, the costs of adding mandatory law are likely to be much higher in the United States than they are in Germany.

#### It would hurt innovation and firm dynamism.

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F. Risk-Taking

Codetermination law also discourages certain types of risktaking. This incentive can be troublesome for any country, but it promises to be particularly daunting for the United States. That is because the United States economy relies particularly heavily on radical innovation and hence on risk-taking. Accordingly, it has more to lose from a corporate governance mechanism such as codetermination, which discourages risktaking.239

1. Codetermination and Risk-Taking

It is a well-established principle in corporate finance that, given efficient capital markets, a corporation seeking to maximize shareholder wealth should choose the most profitable investment—defined as the investment with the highest net present value—regardless of the investmentspecific or firm-specific risk involved.240 The reason is that shareholders can easily eliminate investment- and firmspecific risks by diversifying their investments across firms.241 Hence, rational shareholders will be unwilling to accept lower profits in exchange for lower firm-specific risk. Why pay for a reduction in firm- or investment-specific risk by accepting lower profits if the shareholders themselves can eliminate the risks costlessly by diversification?

Employees, on the other hand, are in a different situation. They cannot protect themselves against firm-specific risks easily.242 In the famous words of Branko Horvat, “[t]he owner can spread the risks by acquiring a diversified portfolio of shares, while the worker has just . . . one job.”243 If the firm goes bankrupt, employees who lose their jobs may not easily find adequate new employment.244 The reasons are myriad. For example, an employee may have invested heavily in firmspecific expertise that is without value to other firms.245 Some employees may find it difficult to move because of their family.246 And of course, potential employers may have insufficient information about job applicants and may, therefore, refrain from offering them positions and salaries commensurate with the value they can add.247

Given that employees suffer disproportionately if a firm goes bankrupt yet stand to reap only a small fraction of the upside if the firm does particularly well,248 one cannot fault employees for caring about the risks inherent in the firm’s investments.249 Specifically, employees will want their firm to refrain from making investments risky enough to jeopardize the survival of the firm. Codetermination ensures that employees’ attitudes toward risk influence the decisionmaking process at the board level.250 Employee representatives who desire reelection hardly will want to jeopardize their prospects by agreeing to investments that workers oppose. Thus, it is reasonable to think that employee representatives generally will try to prevent corporate boards from “betting the farm.” The empirical evidence is consistent with this narrative: German firms with paritycodetermination, as opposed to one-third codetermination, show lower idiosyncratic risk and more stable cash flows.251

2. Risk-Taking and Radical Innovation as a U.S. Specialty

Making firm-jeopardizing investments is not the only way to foster innovation. The economic literature distinguishes between different types of innovation;252 one common distinction is between incremental and radical innovation.253 Incremental innovation “build[s] on what is already there”254 while radical innovation brings fundamental change and “create[s] new industries, products, or markets.”255 Unsurprisingly, radical innovation is associated with greater risk-taking.256

Institutional and legal structures influence the type of innovation at which each country excels. Some countries have liberal market economies (LMEs), in which “firms coordinate their activities primarily via hierarchies and competitive market arrangements.”257 Other countries have coordinated market economies (CMEs), in which “firms depend more heavily on non-market relationships to coordinate their endeavors with other actors and to construct their core competencies.”258 Both theoretical considerations and the available empirical evidence suggest that, relatively, CMEs tend to be better at incremental innovation, whereas LMEs are better at radical innovation.259

In this typology, the United States is an LME,260 whereas Germany is either a CME261 or, in more recent literature, a combination of both types.262 Moreover, in line with the general findings on the relationship between economy and innovation type, the United States relies more on radical innovation, whereas Germany by and large focuses more on incremental innovation:

Germany specializes in technological developments that are just the reverse of those in the USA. . . . Firms in Germany have been more active innovators in fields predominantly characterized by incremental innovation, including mechanical engineering, product handling, transport, consumer durables, and machine tools, while firms in the United States innovate disproportionately in fields where radical innovation is important, such as medical engineering, biotechnology, semiconductors, and telecommunications.263

Other studies in economic and financial literature also are broadly consistent with the view that the U.S. economy specializes in risk-taking and radical innovation. Compared to other countries, the United States has a very active environment for startups,264 which ought to facilitate radical innovation. Furthermore, the United States has the most developed capital market in the world and is thus able to infuse new firms with massive amounts of capital quickly.265

Moreover, there is substantial evidence that risk-taking is more prevalent in the United States than in other countries. For example, a 2008 study of risk-taking at the firm level in thirty-nine different countries found that, on average, risktaking is highest in the United States and Canada, and much lower in Germany.266 In this context, it is also worth noting that firms in the United States, on average, face a higher probability of bankruptcy than firms in stakeholder countries such as Germany,267 a finding that is consistent with the assumption that U.S. companies take more risks.

Finally, it stands to reason that the sheer size of the U.S. economy puts the United States in a particularly good position to weather the potential downside of high-risk investments at the firm level. For small countries, the loss of even a single firm can be devastating. For example, before its decline, the Finnish mobile phone producer Nokia contributed about four percentage points to the country’s total GDP.268 By contrast, the U.S. economy is large enough to withstand the collapse of even large firms.269 The implosion of Enron, for example, had tragic consequences for its employees, many of whom also owned Enron stock,270 but Enron’s employees accounted for only a tiny fraction of the U.S. workforce.271 Admittedly, Germany is hardly at the other end of the spectrum. Currently, Germany is the fourth-largest economy in the world,272 and its industrial giants occupy fields ranging from car manufacturing (BMW, Daimler, Volkswagen) to machinery (Siemens, KION), software (SAP), and pharmaceuticals (Bayer, Boehringer-Ingelheim, Merck). But this does not change the fact that the German economy is far smaller than that of the United States.

#### Neg authors argue that codetermination reduces firm value.

Marc Eulerich et al. 23, Eulerich and Fligge are from University of Duisburg-Essen; Imdieke is from University of Notre Dame, "Does Codetermination Reduce Shareholder Value? Board-Level Employee Representation, Firm Value, Performance, and Rent-Seeking Behavior," Journal of International Accounting Research, vol. XX, no. XX, MONTH YEAR, pp. 1–24, DOI: 10.2308/JIAR-2022-055

I n recent years, domestic and foreign economies have increasingly shifted focus from the shareholder model to the stakeholder model of corporate governance. In particular, there has been increased focus on the role of firm employees in corporate governance. In the United States (U.S.), Senators Elizabeth Warren and Bernie Sanders proposed giving employees the right to elect 40 to 45 percent of a company’s board members. These senators cited the “successful approach in Germany,” where typically one-half of a firm’s supervisory board consists of employee representatives (Sanders 2020; Warren 2018). Dammann and Eidenmuller (2021) € state that Warren and Sanders capture the spirit of the times and refer to a statement signed by 181 Chief Executive Officers who committed to leading their companies “for the benefit of all stakeholders” (Business Roundtable 2019). Thus, discussion regarding the extent to which employees should participate in firm decision-making has escalated in the U.S. (Emba 2018; Fox 2018; Holmberg 2019; Stein 2019; Vogel 2019).1

In this study, we use a sample of codetermined firms (i.e., firms with employee representation on corporate boards) from Germany to examine the association between codetermination levels and shareholder value. Despite its potential impact on corporate governance and performance, codetermination is rarely analyzed due to data constraints and empirical identification issues, leading Chyz, Eulerich, Fligge, and Romney (2023) to describe codetermination as a “black box.”

Opponents of codetermination argue that the consideration of employee interests reduces shareholder value due to employee payroll incentives, risk aversion, and side-contracting with the board (Alchian and Demsetz 1972; Atanassov and Kim 2009; Bertrand and Mullainathan 2003; Cronqvist, Heyman, Nilsson, Svaleryd, and Vlachos 2009; Dammann and Eidenmuller 2021 € ; Fauver and Fuerst 2006; Gleason, Kieback, Thomsen, and Watrin 2021; Pagano and Volpin 2005). In contrast, advocates of codetermination highlight employee ability to reduce agency problems and increase transparency (Balsmeier, Bermig, and Dilger 2013; Fauver and Fuerst 2006; Petry 2018). Studies examining whether and how codetermination impacts shareholder value reflect this complexity, yielding mixed results (Balsmeier et al. 2013; Fauver and Fuerst 2006; Gorton and Schmid 2004; Gregoric and Rapp 2019; Kim, Maug, and Schneider 2018; Petry 2018). Moreover, methodological issues call into question the inferences from these studies. In particular, prior research employs the proportion of employee representatives on the board, which is determined by law and dependent on the overall number of company employees, as a proxy for codetermination. Thus, this measure is influenced by firm size.

A contribution of our study is the use of the codetermination index (CDI) to analyze the effects of heterogeneous aspects of codetermination on shareholder value. The CDI was developed with input from experts and practitioners and validated by members of the Hans Bockler Foundation, which is part of the Confederation of German Trade Unions € (Scholz and Vitols 2019). Prior literature assumes that codetermined firms are homogeneous and typically relies on binary variables to measure codetermination, which leads to binary conclusions about whether codetermination is good or bad. However, several important voluntary aspects of codetermination vary across codetermined firms. We apply the index values from the CDI to firm-year observations in our study. Aside from identifying whether heterogeneous aspects of codetermination affect shareholder value, the CDI allows us to analyze differences between codetermined firms (other than the proportion of employee representatives) that have not been studied in prior research.

We analyze a sample of 1,606 codetermined German firm-year observations from 2006 through 2017. Because U.S. politicians frequently refer to the German system of codetermination, understanding the effect of codetermination in Germany should be of interest to regulators in both countries. Our results suggest that a higher CDI (i.e., a higher level of codetermination) is associated with lower firm value. Specifically, we find that a one standard deviation increase in the CDI reduces market-to-equity (market-to-book) by 7.78 (6.94) percent. We also analyze the effect of codetermination on firm performance because a firm’s valuation should reflect its current performance and investor expectations of future performance. Based on our finding that codetermination reduces firm value, we expect codetermination to reduce profitability and growth. However, we do not find evidence that codetermination reduces firm performance.

A negative effect of codetermination on firm value without a corresponding negative effect on firm performance might suggest that investor reactions to codetermination are not justified. However, employee payroll maximization incentives could result in a shift in the distribution of earnings via salary to employees at the expense of dividends to shareholders. Consistent with this explanation, we find that a one standard deviation increase in the CDI decreases the likelihood of a dividend distribution by 8.73 percent and dividends paid-to-sales by 48.94 percent. Thus, the negative market response to codetermination can be at least partially explained by a decrease in the distribution of earnings to shareholders. Because a one standard deviation in the CDI is associated with an increase in salaries to employees of 14.71 percent and an increase in number of employees-to-sales of 20.00 percent without a corresponding decrease in firm performance, we also find evidence of an increase in productivity that is in line with prior research (FitzRoy and Kraft 2005; Renaud 2007).

Furthermore, we separate the CDI into its individual components to analyze which components most affect performance. We find the strongest results for the number and type of employee representatives, employees serving as vice chair, and the extent of employee representation on board committees. Finally, we analyze whether endogeneity affects our inferences by using an instrumental variable approach and performing a Durbin-Wu-Hausman test. Our inferences continue to hold.

### Aff---Mech---Job Guarantee

#### Full employment policies are labor policies that guarantee employment. They protect workers. But many argue that full employment policies are insufficient, and would work best alongside collective bargaining.

David Madland 21, Senior Fellow and Strategic Director of the American Worker Project at the Center for American Progress, author of Hollowed Out, "Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States," ILR Press, an imprint of Cornell University Press, 2021

Technological change likely also increases the need for policies to create additional jobs. In the midst of the COVID-19 recession, the need for more jobs was clear, with unemployment in 2020 reaching levels higher than at any point since the Great Depression. Still, lack of jobs has been a longstanding problem. Over much of the past several decades the US economy has had a hard time creating enough jobs for most people who want them and has only rarely been at full employment.106 Labor markets may have been quite tight in 2018 and 2019, but for much of recent decades they have not been. Additional disruption from automation is likely to make this employment problem worse.

Policies to create jobs and promote full employment, such as greater public investments in roads, bridges, child care, and education, or even a “green New Deal” or a jobs guarantee, where the federal government is the employer of last resort, would help to increase employment as well as raise wages and reduce inequality. Promoting full employment provides a great deal of help for those who would otherwise have been unemployed and also benefits those who are already employed. When labor markets are tight and employers have to compete for workers, pay generally increases for most workers. During the late 1990s, for example, when labor markets were very tight, the incomes of high-, middle- and low-income workers increased relatively rapidly and at similar rates. Tight labor markets also make it easier for workers to assert their rights, as the fear of getting fired is lessened when other jobs are available.

Still, full employment policies have clear limitations. While full employment policies are not expected to do much to help promote the democratic responsiveness of government, they can even struggle to raise wages. Tight labor markets provide the most benefits for workers who are willing and able to shop for a new employer. But not every worker wants to threaten to quit in order to receive a pay raise, and not every employer preemptively raises wages to avoid losing employees. Further, some employers dominate local labor markets with monopsony power and limit labor market competition and thus suppress wage levels.

Another problem for full employment policies is that there are signs that a tight labor market may no longer put as much pressure on wages as it used to—likely because the power of workers has been so diminished over recent decades. During 2017, the unemployment rate in the United States was about as low as it had been in over 50 years, yet wages remained stagnant, barely increasing much faster than inflation. It is true that the unemployment rate is not the ideal indicator of labor market tightness, because there are many people who have given up looking for work and are not counted in this measure. It is also possible that wages could increase if labor markets reach an extremely tight level. Indeed, in 2018 and 2019 the unemployment rate continued to fall, and growth for median wages did pick up—but to well below the levels of the late 1990s.107

The fact that wages did not rise rapidly during periods of record low unemployment suggests that full employment policies are not enough. So does the fact that wages for men without college educations have actually decreased since the early 1970s—in spite of several periods of very tight labor markets.108 In addition, evidence from other countries also suggests that tight labor markets may do less for wages than they used to. Over recent years, Canada, Britain, and Australia have all had slow wage growth during periods of relatively low unemployment rates.109

Importantly, not only can policies to support full employment faces challenges during good economic times, they will also have an especially hard time raising wages when the underlying private-sector economy remains below full employment. During a period of weak economic growth, the wage for government-supported employment will become the floor that private employers need only match. This is particularly true for the most robust full employment policy—a jobs guarantee, where the number of government-created jobs will increase dramatically during economic downturns.110 Thus, when the underlying economy is not running at full blast, full employment policies will largely serve to raise wages to the governmental minimum.

A new labor system could compensate for some of the weaknesses of full employment policies and make the policy work better. Unions and collective bargaining can help give power to workers in the democratic process as well as raise wages when the private-sector economy is not extremely tight. Collective bargaining also ensures that when private-sector labor markets are tight, this tightness translates more evenly and directly to real workplace improvements. (Elements of the new labor system, such as prevailing wage-style extension, could be part of any jobs program and provide a kickstart toward full implementation.)

#### The job guarantee is defended as a proposal for full employment and price stability.

Pavlina R. Tcherneva 24, Bard College and Economic Democracy Initiative, "The job guarantee: MMT's proposal for full employment and price stability," Working Paper, No. 1060, Levy Economics Institute of Bard College, Annandale-on-Hudson, NY, 2024, https://www.econstor.eu/bitstream/10419/309158/1/1910791652.pdf

A STRUCTURAL POLICY, NOT JUST A JOBS PROGRAM

The Job Guarantee is a structural macroeconomic policy that secures full employment and price stability, while addressing the inequities already embedded in the labor market, including the large social and economic costs of unemployment. It is important to make the case for the Job Guarantee, even if the NAIRU were abandoned as a policy guide, because the convention (even among laborfriendly economists) is to define ‘full employment’ as some positive level of involuntary unemployment. This is because conventional policy approaches simply cannot deliver jobs for all.6 And, even when they aim for low levels of unemployment, they continue to work through the highly-unequal existing labor market mechanisms.

The Job Guarantee is a game-changer for the economy and the most vulnerable workers. It is well understood that official statistics do not capture the true levels of unemployment – especially those experienced by people of color, with disabilities, caregivers, veterans, or in regions of ongoing economic distress. Indeed, the labor market is not a fair game and structural inequities in hiring are exacerbated by the fact that there are not enough employment opportunities for all.

As the COIVID experience showed (Cajner et al. 2020), job losses are not experienced equally either: the lower the wage – the higher the job losses and the slower the recovery in lost payrolls. This is true for garden-variety recessions too. Job losses among low wage workers, who have the least capacity (savings or other assets) to weather a recession, occur earlier, longer and are proportionately greater than those for people at the high end of the income distribution (Tcherneva 2012).

The perennial threat of unemployment is a powerful force of reproducing inequities in the labor market, denying certain workers employment opportunities, eroding wages and benefits for those who work, and growing the precariat. The Job Guarantee helps secure decent employment for all, and especially for the most disenfranchised groups and people facing systemic barriers to employment.

STRUCTURAL FEATURES

Just like the shortest distance between two points is a straight line, the fastest way to eliminate unemployment is to hire the unemployed directly. The Job Guarantee does not eradicate unemployment through stimulus checks, tax cuts, subsidies or incentives, training, education, or other aggregate supply or aggregate demand management policies. Neither does it rely on progrowth policies that run the economy ‘hot’, worsen income inequality, and stimulate extractive and environmentally destructive investments. It is a net new job creation program, that hires those seeking employment directly, in areas of social and environmental need. It creates employment on demand or what Minsky (1986) called an infinitely elastic demand for labor. The Job Guarantee is not a ‘depression solution’ or ‘workfare’ either; it is permanent and voluntary and there are no requirements for participation in exchange for some other benefit. It is an additional program in the landscape of income and training support programs for the unemployed. Since millions of people look for living wage jobs unsuccessfully even during economic expansions, the program aims to ensure that enough employment opportunities are available. The Job Guarantee is not a replacement for any other social assistance or unemployment insurance and there is no requirement for participation.

By design, the Job Guarantee is a bottom-up policy. While it provides an employment safety-net to all, it will benefit those at the bottom of the income distribution in particular. By contrast, top-down, progrowth, pro-investment policies tend to increase demand for the highly-educated, highly-paid and, often, already-employed workers. Top-down policies focus on closing the output gap and tolerate jobless recoveries, while bottom-up policies aim to close the labor demand gap and produce job-led growth (Tcherneva 2011a).

As noted, a critical macroeconomic feature of the Job Guarantee is that it replaces the NAIRU, or the unemployed buffer stock, with an employed buffer stock. In recessions, workers who are laid off from the private sector would find employment opportunities in the Job Guarantee and, should they choose to take them, government spending on hiring would expand in a countercyclical fashion, generating a job-led recovery by design. When private sector demand for workers is restored, private firms would attract them away from the Job Guarantee with better pay and additional benefits. Government spending would automatically shrink, offsetting any inflationary pressures that may emerge from the increased private sector labor demand and spending. The key here is that government spending on the Job Guarantee program is not the source of inflation. Instead, it is a damper on deflationary and inflationary pressures that occur in the private economy.

Such a countercyclical employment mechanism is necessary for a market economy, whose perennial feature is the business cycle, and where jobs are dependably the first casualties of those changes. In the U.S., 80 percent of total employment is created in the private for-profit sector, whereas non-profits, states and localities, and the federal government employ the remaining 20 percent, but it is the private sector that experiences the greatest employment volatility. Yet, experience has shown that countries which have achieved tight full employment over the business cycle, either via industrial and lifetime employment policies (as in postwar Japan) or employer-of-last-resort policies (as in postwar Sweden), do not have the same large fluctuation in overall unemployment. With a Job Guarantee in place, labor markets would be more stable and the program would not have to expand and contract as dramatically as unemployment currently does. Put differently, an economy that has an employment buffer stock is far more stable than one with an unemployment buffer stock. Forstater (1998) has argued that the Job Guarantee would operate with loose labor markets. This does not mean that employment in the Job Guarantee program would fluctuate dramatically; instead, it means that labor flows across sectors would be driven by abundant employment opportunities and not under duress due to job scarcity and economic insecurity.

Another macroeconomic feature of the Job Guarantee is that it establishes a price anchor and a benchmark for all wages in the economy (Mitchell 1998). As workers would be hired by private employers at a premium above the Job Guarantee wage, the latter becomes the effective minimum wage. While many countries have minimum wage laws, they are not fully effective wage floors, because the wage of the person who seeks but fails to find employment at that wage would still be zero. In other words, working people need both a wage standard (a minimum wage - benefit package) and the guarantee of an available employment opportunity. It is worth noting that the Job Guarantee would secure that labor floor, even if Congress fails to amend the minimum wage law (which is long overdue)7 , but the disruptive effects on the private sector would be minimized if the two policies were passed in tandem.

In the present proposal, the Job Guarantee wage is fixed but not indexed to inflation, to avoid creating an automatic wage-price inflation mechanism. This proposal favors one fixed based wage (as opposed to tiered wages) to enhance price stability and prevent competition for workers between the public and private sectors across the wage spectrum. The structural innovation of the policy is to provide an opt-out for workers in poverty paying private sector jobs. To maintain the wage floor at a living level and ensure that workers capture productivity gains, Job Guarantee legislation should require statutory review of the wage-benefit package and mandate increases lockstep with productivity. At the time of this writing (2021), the proposed Job Guarantee wage is consistent with legislative efforts across the U.S. to raise the minimum wage to $15/hr. This level, however, may soon be inadequate to keep a family of four with two working adults above poverty, and the proposal would need to be revised.

To sum up, the price stabilization features of the program include, 1) a base wage which is anchored at the living wage level, increased periodically lockstep with productivity gains, but not indexed to inflation; 2) a countercyclical spending mechanism that expands in recessions and shrinks in expansions, 3) spending on hiring that is always at the ‘right level’, and not more or less than what is necessary to employ the unemployed, 4) full employment without relying on general ‘stimulative’ aggregate demand policies, which tend to bid up the prices of already employed resources, including high wage workers, 5) an increase in both demand (from the purchasing power of the newly employed) and supply (public goods production), 6) an increase in supply associated with creating the highest primary, secondary, and tertiary effects, compared to other job creation policies, 7) a reduction in existing social and financial costs of unemployment and various anti-poverty measures, and 8) a method for building capacity that alleviates any inflationary pressures across sectors (e.g., providing school bus drivers during a pandemic shortage or deckhands at busy ports).

This proposal is also complementary to but distinct from Keynes’s proposal of the broader socialization of investment (Keynes 1964[1936]: 378). Keynes argued that two-thirds to threefourths of total investment can be carried out by public or semi-public bodies or influenced by government with a long-term investment program. Such an approach would considerably reduce the overall volatility in investment, and by extension – of unemployment. However, in and of itself, it would not guarantee tight full employment, which according to Keynes was a cardinal measure for evaluating fiscal policy effectiveness. Even with a broader socialization of investment, Keynes considered it important to achieve full employment via an on-the-spot employment program that “takes the contract to the worker” in distressed areas (Tcherneva 2011b). The Job Guarantee is that program. As the proposal herein emphasizes, it is an additional employment relief program and not a replacement for ongoing prevailing-wage public sector work that is part of the broader socialization of investment. The greater the employment in the traditional public sector and the greater the socialization of investment, the smaller the Job Guarantee would be.

#### Job guarantees can be a tool of green transition.

Giuliano Toshiro Yajima 25, "Beyond Job Guarantee: The Employer of Last Resort Program as a Tool to Promote the Energy Transition," Review of Political Economy, vol. 37, no. 1, 2025, pp. 21-52, https://doi.org/10.1080/09538259.2022.2156221

1. Introduction

The current health and economic crisis has revived the debate on fiscal policy as a major tool for stabilization and long-term goals. The massive surge in unemployment, due to the economic disruption of the lockdown measures, has increased the interest on policies that target employment directly instead of trying to achieve it via a general ‘demand push’. At the same time, monetary authorities around the world, in the wake of this new normal, have renewed their provision of liquidity to support fiscal agencies, even to the point of permanently modifying their mandate to pursue the employment target, as in the case of the Federal Reserve (Powell Citation2020) or to directly finance extra government spending, as in the case of the Bank of England (Bank of England Citation2020). As a matter of fact, the response of the European Union to both in terms of both fiscal and monetary policy has been partially unsatisfactory, considering both the timing, the initial contradictory stance pursued by the European Central Bank (ECB) with respect to sovereign rate differentials, and in the limited scope of some backstops. Consider, for instance, the Support to mitigate Unemployment Risks in an Emergency (SURE) initiative, supporting EU member states in the emergency provision of short-term work programs. Although useful in preserving employment losses, a traditional cash-transfer approach appears to be inadequate given the structural dimension assumed by the current recession. One of the alternative proposals currently under debate is the Job Guarantee (JG), as a part of a more comprehensive policy package titled the Green New Deal (GND) aiming at both the environmental and social transformation of the US economy. Under such a policy, the government should act as an ‘employer of last resort’ (ELR), by offering a job to everyone who is able and wants to work and cannot find a job in the private sector. This proposal, originally developed by Minsky (Citation1965, Citation1968, Citation1994), has received a number of criticisms, in particular regarding (i) the impact on both the government budget and debt (Aspromourgos Citation2000; Sawyer Citation2003); (ii) the prevailing full-employment equilibrium wage rate once the program is implemented (Seccareccia Citation2004); and (iii) the implications for external balances (current and trade account), especially when this policy is implemented in a small, open economy (Epstein Citation2019; Vernengo and Perez Caldentey Citation2020). Some criticism may be leveled at the GND version of the JG, such as (i) the ability of workers to perform all tasks related to the environmental projects; (ii) the impact on aggregate demand from a reduction in energy consumption; and (iii) the underestimation of the rebound effect (Sorrell et al. Citation2007; Vivanco, Kemp, and van der Voet Citation2016). It is our belief that these two sets of criticisms can be properly addressed without ‘throwing the baby out with the bathwater’. As a matter of fact, we argue that a careful design of a program of direct employment and public provision by the state — tackling both low and highly skilled workers, as proposed by Colacchio and Forges Davanzati Citation2020 — can have permanent effects and promote the structural transformation of the economy, while pursuing the twin targets of full employment and environmental sustainability. In this design, a critical role can be played by public investment, in order to offset the reduction in both revenue and employment in the energy sector. Starting from this point, we develop a multisectoral stock-flow consistent (SFC) model inspired by the work of Godin (Citation2013) and Sawyer and Passarella (Citation2021) in order to study the long-run effect of the implementation of a green JG program.

The article is structured as follows: Section One illustrates the main principles of the ELR and its recent development in the context of the GND proposal, as well as its main criticisms. The accounting framework and model equations are introduced in Section Two, while Section Three describes the different scenarios performed. Section Four describes the results from the simulation and Section Five summarizes our main findings.

2. The ELR and the Green New Deal

The problem of financing ambitious fiscal programs, in particular those aiming at shaping the long-run productive structure of an economy, has always been at the core of economic theory. In recent years, within the academic community, a body of literature known as ‘modern money theory’ (hereafter, MMT) (Cucignatto Citation2021; Mitchell, Wray, and Watts Citation2019; Mosler Citation1997; Wray Citation2015; Wray et al. Citation1998) has revived some concepts revolving around the ‘state theory of money’, from the name of the seminal work of Knapp (Citation1924).Footnote1 According to MMT, a modern state would never technically go bankrupt, as it would possess the ultimate weapon to redeem all contracts, which is its unit of account established by law. From this consideration, a number of conclusions can be drawn: first, taxes do not play any role in financing government expenditure, as the latter comes forth as a result of a simple ‘fiat’ of the State; rather, their purpose is (i) to create demand for money by households and consequently make them search for the means to obtain the latter to extinguish their fiscal obligations, and (ii) to draw excessive expenditure from the system, thus avoiding excessive inflation. In a typically Keynesian way, an MMT scholar would say: ‘expenditure first’. Second, if unemployment persists over time, this should be read as a result of insufficient government expenditure in the system, as households would continue to search for money to pay taxes but ultimately not be able to find it — again, following the Keynesian notion of involuntary unemployment. Third, if the Treasury is to avoid a recession or the destruction of productive capacity (both in terms of physical and human capital), the solution is to counterbalance decisions made by the private sector, escaping the ‘paradox of thrift’ and guaranteeing a level of expenditure consistent with full employment — an approach to public finance which the Russian-born Keynesian economist Abba Lerner (Citation1943, Citation1947) called ‘functional’. Fourth, precisely in order to employ all capacity, the State should act as an ELR by offering a job paid with a wage that will become the minimum wage in the labor market, rather than seeking to stimulate demand by offering subsidies, which could well provoke the economy to fall ahead of the full employment target. This minimum wage would become the inflationary anchor of the economy, as private sector workers would take part in (drop out of) buffer stock employment (BSE) during the downward (upward) phases of the cycle (Mitchell Citation1998). This ‘job guarantee’ (JG) proposal was developed by Hyman Minsky (Citation1965, Citation1968, Citation1994), who saw it as a necessary counterpart of the Federal Reserve’s role as ‘lender of last resort’ (LLR) in financial markets in order to ‘stabilize an unstable economy’ (Minsky Citation2008). Several MMT scholars — some of them reunited in the Levy Institute of Bard College, NY — owe their inspiration to the works of Minsky, in particular his analysis of the US financial system and for having documented how the US consolidated government (Treasury + Federal Reserve) was able to exercise effective control of the latter, both directly (through LLR interventions) and indirectly (through strict regulative interventions).

For both its intellectual legacy, and its relevant body of literature, MMT has participated in the progressive debate since the Great Financial Crisis of 2008, both in the US and the EU — in the latter, especially right after the sovereign debt crisis. In recent years, it has regained momentum both in academic and policy circles as it has increasingly intertwined with the GND, a set policy proposal to foster the transition away from carbon fossil fuels, increase energy efficiency and promote both environmental and social sustainability (Cucignatto Citation2021; Nersisyan and Wray Citation2021). In the version put forward by the Levy Institute (Wray et al. Citation2018), a backbone of this strategy will be represented by an ambitious ELR program targeting the labor force with below-average skills and labor-intensive vacancies. Given the properties of these jobs, they will be devoted only to a subset of the GND projects, such as care services, small construction and retrofitting interventions (Nersisyan and Wray Citation2019). Nonetheless, it is argued that for a net annual impact on the federal government’s budget of roughly $400 billion per year over 10 years, there will be a boost to GDP of $560 billion annually and to employment of 19 million new workers (of which more than a fifth will be created in the private sector). These figures are grounded in the fact that these wages will constitute a direct addition to aggregate demand, as they will be immediately spent on consumption goods. The authors estimate that inflation will increase only marginally in the steady state (0.09%), after a short-lived spike (0.74%) right after implementation of the program. Finally, the ELR should affect both the quantity and quality of the labor force, as the increased labor demand in the economy would force hidden or disguised unemployment to shrink, while workers employed in the program would improve their productivity by receiving training. In fact, Nersisyan and Wray (Citation2019) argue that a JG represents both a cost (in terms of wages) and a source of resources (as it provides a workforce for a vast array of GND projects).

Since its early formulations, the ELR has received a number of criticisms from both an orthodox and non-orthodox standpoint. The latter are of particular interest, as they have been proposed by scholars sharing the same intellectual roots. Post-Keynesian authors such as Moore (Citation1988) and Lavoie (Citation2013) basically agree with the process of money creation described by Wray (Citation2004) and the fundamental role played by the government in shaping the monetary and income circuit (Keynes Citation1978), although they also emphasize that credit is not purely a creature of the state (Graziani Citation2003; Rochon et al. Citation2003). The JG proposal has met with far less consensus among these scholars. Their critical assessments cover three areas: first, the fact that the program may not be sustainable in terms of its impact on both the government budget and debt (Aspromourgos Citation2000; Sawyer Citation2003), as the interest rate burden (the share of interest payments on total tax revenues) will rise. A second area of criticism has been proposed on the microeconomic assumptions behind the description of the behavior of the labor market once the JG is enacted. Mitchell (Citation1998) and Mitchell, Wray, and Watts (Citation2019) argue that the mechanism of the BSE establishes a non-accelerating inflation buffer employment ratio (NAIBER), which differs from the mainstream non-accelerating inflation rate of unemployment (NAIRU) as it seeks to control inflation via quantity (rather than price) adjustments. However, Kriesler and Halevi (Citation2016) and Levrero (Citation2019) stress that the NAIBER may transpire to be higher than the NAIRU because of the increase in workers’ bargaining power as they target a higher nominal wage. Seccareccia (Citation2004) shares this view based on the shape of the labor supply curve with respect to the average real wage, which is seen as upward sloping with a varying slope. This implies that the prevailing full-employment equilibrium real wage once the program is implemented could be very low and similar to that prevailing in developing economies (Seccareccia Citation2004). A third area of criticism regards the implications for external balances (current and trade account), especially when this policy is implemented in a small, open economy (Epstein Citation2019; Prates Citation2020; Vernengo and Perez Caldentey Citation2020). Apart from the key international reserve currencies (the US dollar, the euro and the yen), virtually all countries face this constraint, to different degrees (Kaltenbrunner Citation2018; Kaltenbrunner and Painceira Citation2015). On top of that, emerging economies are technologically dependent on imported intermediate inputs, as their productive matrix presents several ‘holes’ in some critical sectors (Cimoli Citation1988; Ocampo, Rada, and Taylor Citation2009; Prebisch Citation1949). This means that, in order to either repay previous debt commitments or import items manufactured abroad, a small country should obtain foreign currency first, in a sense mirroring the process through which money is legally forced on the public by a sovereign state.Footnote2 As for the GND version of the ELR, to the best of our knowledge far fewer issues have been raised, perhaps because this JG program would be just one of a bunch of measures within this policy. Nevertheless, three critiques can be identified: first, it is not clear how the JG workforce would be able to perform activities that may be radically different from those of previous employment — especially if these jobs are of a short-term nature. Hence, the effect on labor productivity may be milder than expected, although it will still remain positive as long-term unemployment will be eliminated. Second, the GND would require drastically reducing the importance of ‘brown’ sectors by cutting both government and household expenditure on non-renewable energy. However, subtracting them from the estimated costs of the various renewable energy and energy efficiency proposals, as in Nersisyan and Wray (Citation2021), may be misleading. Although fossil fuels do represent an invoice for some agents in the economy (and definitely a cost for the environment), they are also a source of income, at the very least, for utility and utility-linked sectors. Even assuming small multiplier effects of current expenditure on non-renewables on the economy — due for instance to the monopolistic features of these industries — the negative consequences from the reduction of a component of aggregate demand would still affect a subset of households and firms. The net balance may still be positive in a ‘greener’ steady state as the new energy sectors would display higher multipliers and with a close to zero carbon footprint. However, the analysis of the traverse from one equilibrium to another should not be dismissed. Finally, the proponents of the GND do not seem to be aware of the ‘rebounding’ effect (Sorrell et al. Citation2007; Vivanco, Kemp, and van der Voet Citation2016), that is, the increase in energy consumption following improvement in energy efficiency. It may be interpreted either as a change in micro-behavior and, more specifically, an increase in the propensity to consume energy resulting from the improvement of fuel efficiency — echoing Lucas’ (Citation1976) critique — or a macro-adjustment stimulated by cost-saving technical changes in energy production which have a positive effect on output and energy demand — in accordance with a long-lasting tradition dating back to Jevons (Citation1865) and Malthus (Citation1872) . To sum up, the Levy version of the GND strategy, while offering a very intriguing plan to reshape the economy in a more sustainable pattern, does not take into account some of the structural modifications that this strategy brings about in an economy with complex interactions. The simulation exercise developed in the next section is meant to deal with both the standard critiques of the JG raised in the literature and the points raised by the GND strategy.

#### Job guarantees are criticized on the right and the left due to implementation difficulties and political difficulties.

Fred Block 24, Research Professor of Sociology at UC Davis, influential follower of Karl Polanyi, leading economic and political sociologist, "The Problem With a Job Guarantee," Dissent, vol. 71, no. 3, Fall 2024, University of Pennsylvania Press, https://muse.jhu.edu/pub/56/article/938797#bio\_bio01

The time has come to abandon a political proposal that the left has advanced in Europe and the United States for almost 200 years: that the government should guarantee a job to everyone who is looking for work. While the goal of durably tightening the labor market is important, a federal job guarantee is a bad strategy for achieving that objective.

The demand dates back to at least 1848, when the early socialist Louis Blanc persuaded France’s provisional revolutionary government to establish public workshops that would provide employment to anyone looking for work. While the plan was not implemented effectively, the demand for government-created jobs for the unemployed became a part of many left-wing wish lists. It was in the platform of the U.S. Social Democratic Party in 1900, and the Unemployed Councils in the 1930s agitated for government-funded public works to pay the unemployed union wages. President Franklin D. Roosevelt responded to this pressure by establishing the Works Progress Administration (WPA), the Civilian Conservation Corps (CCC), and other employment programs.

As the Second World War ended, there was widespread fear in the United States that mass unemployment would return. The labor movement and its allies fought to pass full employment legislation that would guarantee jobs to everyone who wanted to work. The Employment Act of 1946 was passed after extended debate, but it kept only a rhetorical commitment to full employment.

This drama was repeated in the 1970s, when organized labor and civil rights leadership mobilized to pass a federal job guarantee as proposed by Augustus Hawkins in the House and Hubert Humphrey in the Senate. The legislation approved in 1978 was once again watered down to eliminate an actual federal job guarantee.

The idea of a federal job guarantee lives on today. It was included in the proposal for a Green New Deal that Alexandria Ocasio-Cortez and her colleagues submitted to Congress in 2019, and it was also advanced by Bernie Sanders in his 2016 and 2020 presidential campaigns. The demand has [End Page 97] been pushed by advocates of modern monetary theory and embraced by a number of African-American leaders. As recently as February 2024, Congresswoman Ayanna Pressley offered a resolution in support of a federal job guarantee in honor of Black History Month.

Advocates for a job guarantee have persistently argued that unemployment and competition for scarce jobs fuel conflict between white workers and workers of color, both native-born and immigrant. Employers exploit these tensions to weaken or defeat worker organizing, and right-wing politicians have won elections by mobilizing racist and anti-immigrant anxieties.

If the government provided a decent job to everyone looking for work by managing a bank of job openings that would expand and contract in response to private-sector openings, the labor market would always be tight. Competition for decent jobs would be greatly reduced. It would be far easier to build solidarity among workers across ethnic and racial divides, and a more unified working class could win victories in both the workplace and the political arena.

Advocates often claim that a single piece of enabling legislation could effectively execute a job guarantee. The proposal also polls well: a 2019 Harris poll found that 42 percent of a national sample somewhat support and 36 percent strongly support a federal job guarantee.

These factors make a job guarantee seem like a realistic political demand. But appearances are deceptive. In reality, it would be difficult to implement, and its political popularity is illusory. Many of its supporters believe that society owes nothing to those who are not earning a wage. It would also be extremely difficult to win because it creates unified and militant opposition from businesses of all sizes. There are better strategies for creating and sustaining a tight labor market.

Implementation Problems

In pre-industrial England, the basic unit of local government was the parish, which encompassed anywhere from a few hundred people to more than 100,000. Under the Elizabethan Poor Law, each parish was obligated to care for the indigent and the unemployed. One technique used in rural parishes was the roundsman system, in which crews of unemployed men traveled through area farms to provide whatever work farm owners needed. The roundsmen received some combination of cash relief from the parish and payment from the farmer as long as they showed up regularly to provide the required labor. In some cases, the labor of the unemployed was sold at auction to the farmer who offered the highest price.

Neither the unemployed nor the farmers were enthusiastic about this early form of a job guarantee. For the unemployed, receiving some income was obviously preferable to the possibility of starvation. However, this work offered little opportunity for either stability or promotion. Sometimes a [End Page 98] roundsman impressed his employer enough to be offered a regular job, but that was hardly the norm.

In turn, farmers often complained that the roundsmen were lazy and did work of poor quality. This is hardly surprising; work effort is linked to the promise of continued employment, and roundsmen knew they would likely work for a different farmer soon. They had no incentive to work hard, especially since their compensation was generally well below the payment for regular farm workers. It was like the old Soviet joke about low-wage work: “They pretend to pay us, and we pretend to work.”

While the roundsmen system was eliminated by the New Poor Law of 1834, similar programs have persisted to the present day. “Workfare” is the current term for programs that make income assistance contingent on the recipient showing up to do some kind of labor. The most extreme version of workfare occurs in prisons, where incarcerated people make license plates, do laundry, or prepare meals, for example. In federal prisons and most state prisons, incarcerated workers are paid far less than workers on the outside. In 2023, California proposed raising the minimum hourly compensation for prison laborers from 8 cents per hour to 16 cents. Those filling the most skilled jobs would be raised from 37 cents to 74 cents. Meanwhile, California’s statewide minimum wage is $16 an hour.

Workfare programs for those who have not been convicted of crimes are not as extreme, but they are generally designed to punish those enrolled. Such programs assume that the people in need of public assistance do not have the skills required to land a regular job. They are imagined to lack punctuality, self-discipline, and respect for authority; workfare assignments are intended to remedy this by requiring recipients to show up on time and obediently fulfill what are typically unpleasant work tasks, often for well below the minimum wage. Unsurprisingly, these workfare programs have been plagued with racism and misogyny.

Workfare supporters usually embrace what Margaret Somers has called “market justice,” or the belief that the market produces inherently just outcomes. They argue that those who have great wealth are being rewarded for hard work and self-discipline—even if their wealth was inherited—and that those in poverty have ended up there because of some personal failing that has prevented them from earning enough to join the middle class. It follows that, for those of this ilk, the poor must learn self-discipline and ambition, and workfare can teach the skills required to make people self-sufficient.

However, while workfare is often proposed as the solution for those left behind in poverty, it is rarely implemented on any significant scale. Work-fare was emphasized in the Personal Responsibility and Work Opportunity Reconciliation Act passed under Bill Clinton in 1996, but by 2002 there were only 40,000 welfare recipients in the entire country enrolled in work-fare jobs. The obstacle is that workfare is expensive, especially compared to [End Page 99] sending small amounts of public assistance to those who qualify. Workfare requires a high staff-to-client ratio precisely because of its focus on discipline. For every ten or twelve workfare employees, there must be a supervisor who can assure that their charges are actually working, and supervisors must be paid enough that they will not join their charges in slacking off. These supervisors, in turn, must themselves be supervised by even more highly compensated managers.

Advocates for a government job guarantee generally despise workfare. They oppose substandard compensation in government-provided jobs, arguing that employees should be paid union wages. However, even the most successful government jobs programs, such as the WPA, have typically paid well below prevailing wages in the private sector.

The WPA itself did not aspire to hire all of the unemployed. Its peak employment of 3.3 million was reached in 1938, when 10 million people remained on the unemployment rolls. Some analysts have argued that the program operated as a kind of safety valve to contain radicalism by hiring the most militant and talented among the unemployed. Moreover, the severity and duration of mass unemployment meant that the WPA could hire skilled managers to supervise multiyear construction projects. Many WPA workers received meaningful assignments in which they could learn or practice important skills.

Recently proposed federal job guarantee programs would not be able to emulate the WPA’s successes because they are intended to operate countercyclically. The number of public-sector jobs would reach its highest level at the bottom of the business cycle and its lowest level at the top. In such a program, the number of guaranteed jobs would expand and contract, because reliance on public-sector jobs when the private sector needs labor would produce inflationary pressure in an overly tight labor market along with an intense political offensive from businesses to shut down the guarantee program.

Organizing an accordion-like job guarantee also presents severe logistical challenges. As of July 2024, the number of people counted as unemployed in the United States is 7.2 million. If we assume that half of this is short-term unemployment that will be resolved relatively quickly, then the guarantee would need to provide 3.6 million jobs. However, if the economy went into recession and the unemployment rate climbed to 8 percent, the number of jobs needed might easily double to 7.2 million or even more. In The Case for a Job Guarantee (2020), Pavlina R. Tcherneva suggests that the guarantee might have to provide as many as 15.4 million jobs.

That variability would make implementation very difficult. Many of the guaranteed jobs need to be nonessential so that there would be minimal disruption as the program contracts when private demand for labor increases. Take the most recent large-scale experiment with public-service employment in the United States, which was established by the [End Page 100] Comprehensive Employment and Training Act (CETA) during Jimmy Carter’s presidency: the number of people employed by the program reached a peak of 750,000 in 1978, but many of those jobs, including maintenance of public parks and buildings, involved very little skill development and resembled jobs in workfare programs.

Proposals for a job guarantee leave unanswered the question of who will create these millions of nonessential jobs. This could not be done from Washington, D.C., without creating a new federal entity with offices in all fifty states. Advocates usually propose that the federal government would provide the funds, but state and local governments working with nonprofit organizations would be responsible for creating jobs. However, state and local governments have been struggling with fiscal crises for the last fifty years; employment in these levels of government is lower today than it was in 2008, despite population growth. These offices simply do not have the staff needed to create and oversee millions of new nonessential jobs. Even if the federal government were willing and able to fund additional capacity, it would take years to set up the staffing required to run such a program.

If the administrative capacity were created, it would still be unclear what those jobs might be. Proponents often point to unmet social needs—such as care for children, the poor, the disabled, and the elderly—as well as environmental protection. These needs are certainly pressing, but they should not be met by a cast of temporary workers who might soon return to private employment. Would the staff-to-client ratio in child-care centers and nursing homes fluctuate with the demand for labor in the private sector?

Finally, there is the question of how to manage the contraction of public-sector jobs when private demand for labor starts to increase. Would the number of people on the public rolls simply be reduced from month to month, or would public-sector managers wait for individuals to find higher paying private-sector jobs? In the first case, what rule would be used to determine the order in which people would be laid off?

Ideological Problems

Theorists of social change have argued that movements should fight for reforms that have the potential to mobilize people to demand further reforms. There are two aspects to this potential: the first is whether the initial reform empowers people to push further demands, and the second is whether the initial reform challenges the ideology that legitimates the injustices of the existing order. While the federal job guarantee might pass the first test, it does not pass the second.

If a job guarantee were implemented and the labor market became substantially and continuously tighter, the power of working people relative to managers would increase. Union campaigns would have better chances of succeeding, since employees would have less fear of unemployment. [End Page 101] Additionally, the tighter labor market would likely make it easier to forge coalitions among workers across ethnic and racial lines.

However, a job guarantee does not challenge the dominant ideas that underpin the vast income and wealth inequality in our economy. The concept of a job guarantee conforms to the biblical injunction “that any would not work, neither should he eat.” A job guarantee does not defy the deeply rooted assumption that the unemployed are responsible for their own failure to find work and are thus undeserving of any support.

Market society rests on the idea that labor is a commodity, like steel or wheat, whose price is determined through the interplay of supply and demand. A job guarantee does not upend this idea; rather, it asserts that the government has a responsibility to assure that supply and demand for the labor commodity are balanced by acting as the employer of last resort.

Some claim that the job guarantee decommodifies work because, once implemented, employment would not depend on profitability and working people would be protected from unemployment. But as Gøsta Esping-Andersen argues in his classic study The Three Worlds of Welfare Capitalism, decommodification concerns the income that people can command when they are not working. Accordingly, he examines the relative generosity of unemployment insurance, pensions, and sickness benefits to assess the extent to which labor has been decommodified. In other words, decommodification is achieved when workers are protected from the pressures to earn a paycheck, not when their paycheck is guaranteed.

Human beings should not be treated like bushels of wheat or tons of steel. Seeing workers as commodities allows both governments and employers to deny that human beings depend on complex networks of caregiving both for themselves and for subsequent generations. The denial of this reality is the foundation for the systematic underfunding of care services for everyone, from infancy to old age.

At the same time, the insistence that labor is just another commodity undergirds the largely unconstrained authority of managers in the workplace. Commodities do not have a voice in how workplaces are run. The prevailing legal rule that employees can be fired on arbitrary or capricious grounds is rooted in this belief that labor is just another commodity. The fight for a government job guarantee does not help make the case that private-sector workplaces should be democratized, or that people like Elon Musk and Jeff Bezos accumulating hundreds of billions of dollars is unjust.

Political Problems

Both at the end of the Second World War and in the late 1970s, a broad political alliance mobilized for a federal job guarantee and ultimately won nothing more than rhetorical concessions—despite the labor movement being much stronger then than it is today. The demand unified and [End Page 102] mobilized the business class. Virtually every business, from the smallest to the largest, opposes the idea of the government guaranteeing a job for everyone who is out of work. Business owners believe that a job guarantee would shrink the pool of people who apply for job openings, making it harder to fill vacant positions; weaken managerial authority, because employees would have less fear of losing their jobs; produce inflation from an overtight labor market; and necessitate higher taxes to finance it.

In this way, the job guarantee differs from other reformist demands that create divisions in the business community. Many larger firms, for example, tend to sit out battles over raising the minimum wage, since many of their employees already earn more than the minimum. Additionally, a higher minimum wage might result in more customers who can afford their products and reduce the threat of losing market share to firms that compete by paying the lowest possible wages. Some firms also tend to gain from the expansion of government benefit programs. Farmers, for example, have historically supported the food stamp program, because it increases demand for agricultural products. The nursing home industry lobbies to protect Medicaid funding, since the program covers costs for close to 60 percent of nursing home residents.

Whenever possible, it is more strategic to fight for demands that divide the business class rather than those that unify and mobilize it. This recognition is, perhaps, the reason that the demand for government job guarantees is considerably less popular on the left in Europe today than it is in the United States. Unions and left parties in Europe have the same interest as their U.S. counterparts in tightening the labor market, but they have employed strategies that do not produce such intense business resistance. They have, for example, won pension policies that are considerably more generous than Social Security, which allow individuals to receive the maximum benefit at an earlier age.

Many European nations have also embraced active labor market policies that require considerable funds to retrain displaced workers. Such programs can gain significant business support because they reduce costs for industries that need employees with particular skills. In 2021, the United States spent 0.04 percent of its GDP on such policies. France and Germany, in contrast, each spent more than ten times that level, while Ireland, New Zealand, and the Netherlands each spent more than 1 percent of GDP.

If the U.S. actors who fought unsuccessfully for the job guarantee in the 1940s and 1970s had devoted their efforts to other demands, they could likely have won significant concessions that would have tightened the labor market. Instead, on two separate occasions, they spent a huge amount of political capital to receive next to nothing.

To be fair, the campaign in the 1970s did produce a small material concession: CETA, which, as noted earlier, employed 750,000 people in 1978. However, bad publicity about the highly decentralized program’s lax [End Page 103] management practices eroded congressional support for the effort, and it was soon terminated by the Reagan administration. Poor implementation of the job guarantee could kill it quickly, even after it becomes law.

Alternatives

None of the drawbacks of a federal job guarantee invalidate the goal of building working-class power through full employment. But the flaws of a federal job guarantee suggest that we need to pursue other means to accomplish this goal.

In a number of European countries, public-sector employment represents more than 25 percent of total employment, while public employment in the United States makes up only about 15 percent of total employment. Increasing public employment in the United States to just 20 percent would yield 8 million new jobs—more than the 7.2 million unemployed as of July 2024.

Local and state governments have been hollowed out by decades of fiscal crisis; if the federal government shared billions of dollars of tax revenue with state and local governments, the labor market would tighten. This is not a utopian demand: such a program was in place in the United States between 1972 and 1986. The amount transferred each year was less than $10 billion, but with additional tax revenues, hundreds of billions could be redistributed. With a new revenue-sharing program, state and local governments could increase permanent employment for librarians, teachers, construction workers, and maintenance workers.

Revenue sharing could also expand federal support for the care economy, from child care to programs for the elderly. Such spending is urgently needed, since care jobs tend to be poorly paid and care facilities are typically understaffed, resulting in low-quality care. Funding for this purpose was included in early versions of the Build Back Better legislation in 2022 but did not survive debates in the Senate. This funding could further tighten the labor market by creating millions of well-paying care jobs.

Other expedients include significant expansion of government-funded job training programs that develop real skills. Additionally, existing employment could be more broadly shared by shortening the work week and the work year and instituting a sabbatical system that would allow midlife employees to take paid leave for six months. There should also be greater availability of low-cost loans to finance the creation and expansion of small businesses, nonprofits, and cooperatives.

The government could also reduce unemployment during economic downturns by emulating a German program that uses unemployment funds to compensate for shorter work hours. Under this program, a factory worker’s hours would be cut by 30 percent, for example, but the government payment would reduce the worker’s income by only 10 percent. This [End Page 104] mechanism allowed Germany to avoid mass unemployment during the global financial crisis.

In addition, the federal government could create a permanent civilian conservation corps that would provide two-year jobs to improve national parks and build climate resilience, in cooperation with state and local governments. During economic downturns, this effort could be ramped up to employ more people. Similarly, the capacity of job training programs could also be increased when unemployment rises.

These other strategies for tightening the labor market will face stiff resistance from conservatives and much of the business community. But they all have the great advantage that partial victories can be won. The federal job guarantee, in contrast, is functionally an all-or-nothing proposition. In the fight for these other demands, it would be possible to win concessions that make a real difference in people’s lives and create a foundation for further struggles. Moreover, revenue sharing for state and local governments, as well as central government support for care services, challenge the idea of market justice by insisting that the government must meet some of people’s needs.

The job guarantee holds an important place in the history of the left. But we don’t need to continue repeating the demand for national workshops to put the unemployed to work 176 years after revolutionary French workers proposed the idea. A durably tight labor market is an important goal, but it is an illusion to believe that a government job guarantee is an effective short cut to achieve that end.

### Aff---Mech---Right to Work

#### Right to work laws destroy the working class.

Timothy Noah 23, Staff Writer at The New Republic, Author of "The Great Divergence: America's Growing Inequality Crisis and What We Can Do About It", "How State Right-to-Work Laws Screw the Working Class," The New Republic, 09/13/2023, https://newrepublic.com/article/175533/right-to-work-laws-screw-working-class

Last March, when Michigan became the first state in 58 years to repeal a right-to-work law, it was yet another sign that public support for labor unions is on the rise. During the past couple of years, unions’ public approval ratings have been higher than in half a century. Now a new study by two economists for the Federal Reserve Board presents what may be the most comprehensive case ever that right-to-work laws beggar union and nonunion workers alike.

A right-to-work law is a state law that bars unions from collecting fees from union nonmembers to cover their share of collective bargaining costs. In a union shop, union nonmembers are covered by the same contract as union members and have the same rights. Right-to-work laws therefore give a worker a strong economic incentive to quit the union and become a free rider. The result is, typically, shrinking union membership. One recent study of five states that went right-to-work starting in 2012 found that unionization rates there fell 4 percent and that in highly unionized industries, union density was nearly 20 percent lower in right-to-work states than in other states. This is why business organizations almost always favor right-to-work laws.

During the past decade, right-to-work has been on a roll. States were barred by federal statute from passing right-to-work laws until passage (over President Harry Truman’s veto) of the anti-union Taft-Hartley Act in 1947. Through the 1950s, 18 states, mostly in the conservative strongholds of the South and the West, passed right-to-work laws. After that, the spread of right-to-work slowed to a trickle, but it picked up again after 2010 as Republicans expanded their reach into state legislatures. The first state to pass such a law was Indiana, which had previously repealed its earlier right-to-work statute in 1965 and was the last one to do so before Michigan. In 2012, Indiana reinstated right-to-work. Today, 27 states are right-to-work.

In 2018, the Supreme Court’s ruling in Janus v. AFSCME Council 31 effectively compelled all unions that represent government workers to operate on a right-to-work basis. This was potentially a heavy blow to the labor movement because membership is five times greater in public-sector unions (33 percent) than in private-sector unions (6 percent). But thus far public employee union membership has remained surprisingly steady—a sign, perhaps, that government unions have more resolve than private-sector unions.

Now the tide may be turning. Michigan’s reversal on right-to-work followed passage last November of a state constitutional amendment barring the state legislature from imposing right-to-work. In 1965, the same year Indiana repealed right-to-work, unions’ approval rating was 71 percent. After that it went into steep decline, bottoming out at 48 percent in 2009. But then it began to climb, reaching 71 percent again in 2022 and ticking down to a still very impressive 67 percent this year.

Intriguingly, unions’ image started to improve right around the time Republican state legislatures stepped up their efforts to kill off labor unions, not only through right-to-work legislation but also through other state laws passed in Wisconsin and elsewhere. Wisconsin Governor Scott Walker, with a $20 million war chest, briefly looked unbeatable in the 2016 Republican primaries. But his kill-the-unions message proved far more popular with Republican donors than with Republican voters, and Walker was out of the race well before Donald Trump entered it. Candidate Trump signaled to union workers that he was on their side, but President Trump was every bit as hostile to labor as Walker would have been, and he supported legislation to impose right-to-work rules nationwide. President Joe Biden, by contrast, supports the Protecting the Right to Organize, or PRO, Act, which, among other things, would eliminate state right-to-work laws, restoring the status quo before Taft-Hartley.

The new Fed study does an excellent job explaining the damage done to workers by right-to-work laws. According to the Fed report, previous studies of whether right-to-work lowered wages came to contradictory conclusions (even though it’s well established that union workers outearn nonunion workers). But the Fed study concludes that right-to-work lowers wages, on average, by $1,900, or 4 percent of the average wage. (Another report, also released this month, reaches basically the same conclusion.)

But the Fed report doesn’t stop by reporting pay disparities; it broadens the question to other measures of economic well-being. Workers in right-to-work states are less likely than workers in other states to receive a promotion, even though they’re more likely to ask for one. Workers in right-to-work states are likelier to quit (though marginally less likely to get laid off), a useful indicator of confidence about finding another job. Workers in right-to-work states are less likely to get health insurance through work. They’re also less likely to own a credit card, less likely to have a good credit rating, and less likely to report that they’re handling their finances comfortably.

Will the PRO Act ever pass? It’s sobering to contemplate that the last time public approval for labor unions was 71 percent, in 1965, President Lyndon Johnson also had a public approval rating of 71 percent. Before the year was out, Johnson would sign into law a string of Great Society programs, including the Voting Rights Act; the law creating Medicare and Medicaid; the law creating the National Endowment for the Arts and the National Endowment for the Humanities; the Elementary and Secondary Education Act, which for the first time committed the federal government to large-scale funding for K-12 public schools; and the Immigration and Nationality Act, which reversed a half-century of nativist restrictions on immigration. It was the most astonishing string of domestic policy achievements since President Franklin Roosevelt’s New Deal, and it’s never been matched since.

Even so, Johnson didn’t sign into law his variation on the PRO Act, which would have (among other things) eliminated state right-to-work laws. Johnson’s labor bill cleared the House but was stopped in the Senate by a filibuster led by Senator Everett Dirksen of Illinois, the Republican minority leader often remembered warmly as a conservative friend of civil rights. He was not a conservative friend of labor rights, and in this instance, he made common cause with the same Southern Democrats who opposed civil rights. “You wouldn’t do that to me,” Johnson told Dirksen. But he did.

There’s no chance that the Voting Rights Act, Medicare, Medicaid, the National Endowments of the Arts and the Humanities, the Elementary and Secondary Education Act, and especially the Immigration and Nationality Act could clear Congress if they came up for a vote today. And there’s little chance that the PRO Act can clear this Senate because Senators Kyrsten Sinema, an independent, and Mark Kelly, a Democrat, of Arizona, will likely oppose it. (Surprisingly, Senator Joe Manchin, the West Virginia Democrat, has signed onto the PRO Act.) But if the tangible benefits of passing the PRO Act can be made clearer to voters, and especially to the working-class voters whom Democrats are struggling to corral, perhaps the impossible will become possible. If it happens under President Joe Biden, the forty-sixth president will be able to say he achieved what LBJ couldn’t, even during liberalism’s last golden age.

#### Only repealing Taft-Hartley can restore union power.

Michael Hiltzik 19, Columnist at Los Angeles Times, Pulitzer Prize winner, Author of "Iron Empires" and "The Golden State", "Los Angeles Times columnist Michael Hiltzik," Los Angeles Times, 10/29/2019, https://www.latimes.com/business/story/2019-10-29/repeal-the-taft-hartley-act

Labor advocates and critics alike can debate the reasons for the decline of union membership in America over the last seven decades, but one event gets the nod from both sides as a major obstacle to union organizing. It’s the passage in 1947 of the Taft-Hartley Act.

“Taft-Hartley was devastating to labor,” the former (and reformed) union-buster Martin Jay Levitt wrote in 1993. In labor relations, he observed, management always had the upper hand. But after Taft-Hartley, “the bosses could once again wage their war with near impunity.”

So it’s understandable that the two most progressive candidates running for the Democratic nomination for president, Sens. Bernie Sanders of Vermont and Elizabeth Warren of Massachusetts, have called for repeal of sections of the act.

But have they gone far enough? Veteran union strategist Rich Yeselson thinks not. Instead of piecemeal revision or repeal of some provisions of Taft-Hartley, he says, “why not just shoot the moon: Get rid of this awful law!”

Taft-Hartley was the product of three threads in American politics of the late ‘40s that became braided together. One was the red scare, which became directed at unions such as the CIO that had relied on communist organizers to do unionizing work on factory floors.

Another was the burgeoning influence of corporate managements, especially after Republicans took over the House and Senate in 1946, the first time the party controlled both chambers of Congress in 18 years.

The third was a public backlash to a wave of postwar strikes, including a general strike in Oakland in December 1946. The Oakland strike was an “almost unprecedented demonstration of worker power,” labor historian Erik Loomis has written.

But it also raised the hackles of voters in regions where union representation was not strong — such as outside the industrial heartland and Northeast. An estimated 14% of all workers had participated in postwar strikes, which made the wave of labor unrest appear to be virtually universal.

Even liberal Democrats weren’t above riding the anti-union wave. One was Lyndon Johnson, who attacked Coke Stevenson, his opponent in his 1948 campaign for the Senate, for being beholden to unions — while he himself “courted CIO support behind the scenes,” Loomis noted.

Harry Truman vetoed the Taft-Hartley Act, but as a Democratic President he was outgunned. Congress overrode his veto with large margins, and the fate of the union movement was sealed.

It’s certainly true that union leaders deserve some of the blame for the long-term decline of organized labor, as do fundamental changes in the nature of work and employment in the U.S. over the last 70 years. But Taft-Hartley set the groundwork for that decline in myriad ways.

After Ronald Reagan scored his victory over the Professional Air Traffic Controllers Organization, or PATCO, by firing its striking members in 1981, employers followed his lead by instituting an era of unexampled hostility to organized labor. Taft-Hartley provided them with the playbook.

“Taft-Hartley led to the ‘union-busting’ that started in the 1960s,” labor lawyer Thomas Geoghegan wrote in this 1991 book, “Which Side Are You On? Trying to Be for Labor When It’s Flat on Its Back.” In its wake, “a new ‘profession’ of labor consultants began to convince employers that they could violate the Wagner Act [the National Labor Relations Act of 1935], fire workers at will, fire them deliberately for exercising their legal rights, and nothing would happen.” (Emphasis his.)

Let’s see how this worked.

The best-known provision of Taft-Hartley may be its section 14(b), which allows states to enact “right-to-work” laws that prohibit contracts requiring union membership as a condition of employment. Right-to-work laws have been enthusiastically embraced by 27 states, including the entire Southeast.

Pro-business groups such as the U.S. Chamber of Commerce praise these laws as fostering higher job growth and personal income than in states without them; studies by labor-friendly organizations assert that average wages and benefits are lower in those states. Evidence from both camps does suggest, in any case, that right-to-work states generally had lower rates of union membership even before their enactment, and faster declines in membership afterwards.

The limits of the trend to more right-to-work legislation may have been reached, however. Missouri voters overwhelmingly rejected a right-to-work law at the polls last year.

The spread of right-to-work laws led to the emergence of the free-rider problem, in which nonunion members benefit greatly from union contract negotiations and enforcement of contract provisions, but don’t have to pay dues to support that work. The National Right to Work Committee, a leading promoter of these laws, has ties to the Koch network, though it describes itself as “a coalition of 2.8 million workers, small business owners and freedom-loving Americans.”

Other provisions of Taft-Hartley are equally damaging to unionization efforts. It prohibited mass picketing, sit-down strikes and (more vaguely) secondary boycotts, in which unions take aim at suppliers or customers of their primary target.

The law allowed employers to stage “captive meetings,” mandatory gatherings in which they plied their employees with anti-union propaganda. The National Labor Relations Board in 1946 had barred such meetings on the grounds the economic dependence of the workers on their bosses made them inherently coercive and therefore an unfair labor practice by their very nature. Taft-Hartley overturned the NLRB ruling and awarded managements a so-called free speech exemption that vastly improved their chances of prevailing in union elections.

Taft-Hartley also significantly complicated the process of certifying unions as representatives of workers. Previously, the NLRB could certify a union if a majority of workers signed authorization cards, a provision known as “card check.” The law wiped out card checks, substituting a process that, as Geoghegan wrote, required “hearings, campaign periods, secret-ballot elections, and sometimes more hearings, before a union could be recognized.” Organized labor has lobbied for the restoration of card check for years, including via the proposed Employee Free Choice Act, but without success.

The law also tightened the definition of “supervisor,” removing the eligibility for unionization from a sizable and influential cadre of workers. “Corporate managers and their allies in Congress viewed an alliance of unionized workers with unionized supervisors as ... a grave challenge,” Yeselson observes. Taft-Hartley nullifed the challenge. The law also defined independent contractors as non-employees and therefore ineligible to join unions, setting up a conflict that has mushroomed into the gig-worker vs. employees controversies of today.

Sanders and Warren, to be fair, have turned their sights on repealing the most noxious provisions of Taft-Hartley. Both are in favor of restoring the card check process. Both favor outlawing right-to-work laws and “captive audience” meetings staged by management. They endorse restoring the right to secondary boycotts, although as Yeselson reports, the prohibition in Taft-Hartley is murky enough to have allowed at least some union activities that might be considered to fall within the definition.

Both also call for addressing the Taft-Hartley restriction on unionization of supervisors, although Yeselson criticizes Warren for merely advocating a limitation on the definition, a step he argues would perpetuate battles over who is or isn’t a supervisor that complicates organizing efforts.

But both candidates arguably have missed a bet by focusing on these provisions as though they exist in individual silos, rather than being part and parcel of the most far-reaching attack on unions ever staged by Congress. It’s important for the candidates to lay out the particulars of their pro-labor platforms, but it might also be easier to wrap them all together in a single theme: For the health and livelihoods of rank-and-file workers from coast to coast, the goal should be to wipe the entire Taft-Hartley Act off the face of the Earth. By the way, every single Democratic candidate for president should sign the pledge.

#### The NLRA should be interpreted to prohibit right to work laws.

Andrew Strom 24, union lawyer based in New York City, adjunct professor at Brooklyn Law School, "Aren't We Supposed to Have One National Labor Policy?," OnLabor, 6/3/2024, https://onlabor.org/arent-we-supposed-to-have-one-national-labor-policy/

The United States Constitution provides that the “Laws of the United States… shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.” What this is supposed to mean is that when Congress enacts a law, it is binding on all fifty states. When it comes to labor relations in the private sector, Congress long ago enacted the National Labor Relations Act (NLRA), which declares “the policy of the United States to … encourage[e] the practice and procedure of collective bargaining.” So, why was it okay for six Southern Governors to issue a statement threatening auto workers that unionizing would put their jobs in jeopardy – the kind of statement that would clearly be illegal if made directly by an employer?

For years, states across the South have been trying to lure businesses to locate there by referring to themselves by the misleading term “right-to-work” states. These so-called “right-to-work” laws, which now exist in twenty-six states, prohibit unions and employers from entering into agreements that require workers represented by unions from paying fair share fees to cover the cost of representation. The laws by themselves do not make it harder to organize, and the workers in these states enjoy the same federally protected right to organize and bargain collectively as workers in other states. Nevertheless, Southern politicians have long pointed to these laws as a signal that unions are not welcome in their State. When she was governor of South Carolina, Nikki Haley declared, “We discourage any companies that have unions from wanting to come to South Carolina because we don’t want to taint the water.” Georgia’s economic development website sells the State to businesses by proclaiming that if businesses relocate there “you’ll also be doing business in an employment-at-will and right-to-work state with low unionization.” One policy analyst at a right-wing think tank has candidly explained that businesses are drawn to states with these laws because they “tend to lower union presence,” and “this is positive because higher levels of unionization drive up costs.” Lamar Alexander, a former Governor of Tennessee once asserted “if we don’t have right to work laws, those [manufacturing] jobs are going to be in Mexico.”

Curiously, the provision in the NLRA that has been relied upon to authorize these laws is actually quite narrow. In 1947, as part of the Taft-Hartley Act, a Republican Congress added Section 14(b) to the NLRA, creating an exception to our uniform federal labor policy. That provision states that nothing in the NLRA “shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.” The NLRB and the courts have disregarded the plain text of this provision to hold that States may not only prohibit agreements that require membership in a union, but they may further prohibit agreements that require the payment of any representation fee to a union. In a 1963 case, Retail Clerks Int’l. Assn, Local 1625 v. Schermerhorn, the Supreme Court addressed a situation where a collective bargaining agreement provided that employees who did not wish to join the union would be required to pay a service fee to the union that was the exact same amount as union dues. The Court held that the agreement was the “practical equivalent” of an agreement requiring membership in the union because it imposed the only membership obligation enforceable under the Act – the obligation to pay dues.

In 1980, the NLRB addressed the question left open by Schermerhorn, and held that Section 14(b) authorizes states to prohibit agreements that require the payment of any representation fee whatsoever to a union. A divided D.C. Circuit panel affirmed the Board’s decision over a strong dissent from Judge Abner Mikva. As Judge Mikva wrote, “[p]lain meaning has its limitations, but it must count for something…. There is no suggestion whatsoever in the legislative history that a worker who pays a fee for services rendered by the union thereby becomes a ‘member’ of the union. In any other context, such a proposition would be facially absurd.”

As a result of this misinterpretation of Section 14(b), unions in the South have long faced a serious free rider problem. And these “right-to-shirk” laws are part of a vicious cycle. The laws were passed in the first instance because unions were weak in these states. But, the existence of these laws has likely discouraged unions from committing resources to try to organize more workers in these states. And, the limited presence of union members has emboldened politicians to engage in harsh anti-union rhetoric that likely further discourages unionization. To return to the statement by the six Republican governors opposing the UAW’s organizing, even though telling workers “unionization would certainly put our states’ jobs in jeopardy” certainly looks like a threat, the NLRB lacks authority to regulate the speech of government officials, so unless the governors were acting as the agents of the auto makers, the NLRB would not have occasion to decide whether the statement should be viewed as a prediction rather than a threat.

Congress enacted the NLRA based on its finding that in the absence of collective bargaining the inequality of bargaining power between employers and workers “depress[es] wage rates and the purchasing power of wage earners.” Yet, Southern states often seek to attract business by bragging about how low unionization rates in their states have depressed wages. For instance, Oklahoma’s economic development website features a chart showing how average wages in Oklahoma are lower than the national average for twelve different occupational categories. We tend to take these kinds of appeals for granted, but it should be shocking to see a state be so open about undermining federal policy.

If the current Supreme Court had the opportunity to rule on the meaning of Section 14(b), it would be interesting to see how all of the self-proclaimed textualists on the Court would justify a ruling that an agreement requiring the payment of any fee to a union is the same as an agreement requiring membership in that union. Yet, I’m confident that six Justices would find a way to reach that result. If the United States truly were committed to “encouraging the practice and procedure of collective bargaining,” I have a long list of suggestions to further that goal, starting with passage of the PRO Act, but at a minimum, we should stop letting individual states directly undermine that policy.

#### Neg authors argue that right to work laws have considerable economic benefits.

Matthew Lilley 23, Visiting Research Scholar at Duke University, PhD, "Workers, Wages, and Economic Mobility: The Long-Run Effects of Right-to-Work Laws," Manhattan Institute, 9/28/23, https://manhattan.institute/article/long-run-effects-of-right-to-work-laws

Results and Discussion

To conduct this research, we first must verify that the demographics of RTW and non-RTW border counties are highly similar. Using county-level aggregates from the 1970–2010 Decennial Censuses and the American Community Survey (ACS), we found that differences in demographics, education, and marital status in our sample are nonexistent or very small in magnitude.[24] This means that our selected border counties are ideal for this analysis. Our major findings are elaborated below; for more information and results of the regression analysis, see the Appendix to this brief. For even further discussion, see our original paper.

Manufacturing Employment Outcomes

In the context of RTW laws, manufacturing employment is especially ripe for study because manufacturing is particularly exposed to the threat of unionization and has historically had higher union coverage rates than most other industries. With this industry, we can test the theoretical prediction that RTW leads to higher employment in union-exposed industries.

We consider two outcomes. First, consistent with theory and the seminal finding of Thomas Holmes,[25] there is a large increase in manufacturing activity when crossing from an “antibusiness” state to a “probusiness” state: we find a 3.23-percentage-point increase in the manufacturing share of employment on the RTW side of the border.[26] This difference is substantial, equivalent to a 28% increase in manufacturing employment in RTW counties relative to their non-RTW neighbors.[27]

Labor-Market Outcomes

Second, we want to know whether locations with RTW experience stronger labor-market outcomes than their non-RTW neighbors, or whether higher manufacturing employment simply crowds out other industries. For example, it could be the case that the difference in manufacturing employment is merely the result of local employers sorting themselves across the RTW border, based on how at risk of unionization they perceive themselves to be. Firms that perceive a higher risk of unionization would move to the RTW side of the border, increasing demand for workers in those industries. This demand could then simply crowd out firms with a low perceived risk of unionization, which would locate on the non-RTW side. Alternatively, the increased presence of manufacturing could have positive spillovers onto the broader local economy, yielding increased total employment.

We measure the impact of RTW on aggregate employment in two ways: first, by location of workplace; and second, by location of residence. Data from the Quarterly Census of Employment and Wages (QCEW) allow us to measure whether RTW regions are greater sources of employment; and data from the Local Area Unemployment Statistics (LAUS) provide insight on who benefits from those additional jobs.

We find that more jobs are located in RTW areas, with the employment-to-population ratio 3.51 percentage points higher than non-RTW counties, when measured by workplace location.[28] When measured by residence location, the employment-to-population ratio is 1.58 percentage points higher in the RTW border counties. This suggests a substantial portion of the increase in job availability in RTW counties accrues to residents of the RTW border county. Our analysis confirms that the gap between the two estimates is explained by net commuting behavior—some of the additional jobs in RTW areas are obtained by residents of non-RTW areas who commute to obtain a better job.[29]

Since some of the additional jobs in RTW counties flow to residents of the county, we undertake a closer examination of the effects of RTW on resident labor-market outcomes in order to gain insight regarding which individuals benefit. Intuitively, if RTW increases make it easier to find employment, we would expect this to have particularly strong effects for people on the margins of the formal job sector who have below-average employment prospects.

To investigate this, we supplement our county analysis with 2010 Census Public Use Microdata Areas (PUMAs; geographic areas that in rural areas are typically larger than counties), which are available in ACS. We analogously construct all the pairs of adjacent PUMAs that had different RTW status as of 2010 (Figure 3).[30] In this test, we find that residents of RTW areas have higher employment and labor participation rates, and lower probability of unemployment, in both the county and PUMA samples.[31]

We consider two specific at-risk population subgroups to test whether the effects of RTW on labor-market outcomes are magnified for people at high risk of nonemployment. First, people with disabilities often face barriers to holding formal employment. A substantial literature[32] establishes that the national unemployment rate and Social Security Disability Insurance (SSDI) payouts are positively correlated. I.e., disability insurance is being treated as a substitute for unemployment benefits. If RTW counties yield stronger labor markets for their residents, we might also expect them to have notably fewer SSDI recipients. Our analysis confirmed this: we find that there is a 0.34-percentage-point lower rate of SSDI receipt in RTW counties.

Second, there has been a marked decline in employment for prime working-age males in recent decades.[33] We find that long-term joblessness (nonemployment for 12 months or longer) for prime-age males is markedly lower in RTW locations. In fact, the estimated effects of RTW amount to a 19% reduction in long-term male joblessness.

Labor Compensation Outcomes

How does RTW affect wages and other measures of labor compensation? Contrary to claims by unions, we find that average weekly wages for workers in RTW counties are $27.97 higher, on average, using data from QCEW. When we adjust the estimates so that we are only comparing wages across locations while holding industry fixed (because different subindustries have different average wages and locations differ in their industry composition), this differential is reduced by approximately one-quarter.

Focusing on the disproportionately union-exposed manufacturing industry, we are unable to detect any meaningful difference in wages between RTW and non-RTW locations. The ACS microdata allow us to test whether these mean effects mask important differences across the wage distribution, using the sample of border PUMAs. Our analysis found that wages are higher at the bottom (10th percentile) and middle (median) of the distribution in RTW areas, but we observed no clear difference between RTW and non-RTW at the top (90th percentile). This is broadly consistent with the prediction discussed above of lower wages being required in the nonunion sector in non-RTW locations in order to induce firms to absorb surplus labor displaced from unionized firms.

An important consideration is that differences in wages may be offset by nonwage compensation, like health insurance and retirement savings programs. While the generosity of such benefits is beyond our ability to measure, our analysis was unable to detect any meaningful effect of RTW laws on whether individuals possess health insurance. A second possibility is that differences in wages may be compensation for greater work effort. Indeed, some of the raw difference in wages in the PUMA sample can be explained by the estimated additional 0.49 hours worked per week by individuals employed in RTW locations.

Because nonwage compensation is difficult to measure, these patterns need to be interpreted with caution. But it is also important to note what we do not find. RTW opponents often employ cross-sectional analysis to claim that RTW substantially reduces wages and benefits like health insurance for nonunionized workers.[34] In our border-pairs sample, where location characteristics (such as cost of living) and both unobservable and observable demographic characteristics are plausibly closely balanced, we detect no such pattern.

Population Growth and Migration Outcomes

The results discussed so far point to RTW counties having superior and more desirable labor-market outcomes. Better labor markets would presumably bring increased net migration to RTW states. One way to measure this is to analyze population growth.[35] Using the Census Bureau’s extensive time series of population data, we obtain difference-in-differences estimates[36] of the effect of RTW on population, setting 1940 as the base year.[37]

Prior to the passage of the Taft-Hartley Act in 1947, counties that subsequently became RTW had similar population growth as their non-RTW neighbors. But beginning almost immediately afterward, it appears that the population of RTW counties began to grow more rapidly than their non-RTW neighbors (Figure 4). Between 1940 and 2010, we estimate a 19.1% increase in population of RTW counties, relative to their non-RTW neighbors.

Social, Poverty, and Economic Mobility Outcomes

Turning to the question of whether these differences in economic outcomes bring about differences in social outcomes, we focus on two socioeconomic measures: poverty rates and intergenerational mobility. Of particular interest is whether the combination of these stronger labor markets and weaker union presence in RTW locations improves or hinders social well-being and opportunities for future generations.

We first consider the relative poverty rates between RTW and non-RTW border counties. It turns out that RTW counties have clear advantages. Perhaps unsurprisingly—given the improved probability of employment and slightly higher wage levels found in RTW counties—the overall poverty rate is 1.41 percentage points lower in RTW counties. Even larger differences are found for households with children. Childhood poverty rates are 2.29 percentage points lower in RTW counties, while the difference is slightly larger, at 2.43 percentage points, in families with children aged 5–17. On both measures, this amounts to approximately a 10% proportional decline in poverty—substantial improvements in outcomes for those at the bottom of the socioeconomic distribution.[38]

The last outcome that we examine is economic mobility across generations. The bottom line is that RTW status improves the economic status of future generations. Using data from Opportunity Insights, a data project out of Harvard University, we look at how the rate of mobility of children into the top quintile of family income, as measured during adulthood in 2014–15, varies by the RTW status of the county in which they were born.[39] Considering the raw share of children from each county who end up in the top quintile as adults, we find that it is 1.68 percentage points higher in RTW than in non-RTW border counties.[40]

Given the previous results showing that RTW counties have higher employment rates and higher average wages, this difference may be driven at least in part by differences in the relative income of parents. To avoid this problem, we analyze the rate of mobility into the top income quintile for children who grew up in families at given positions in the national household income distribution. Importantly, we find that the positive effect of RTW is concentrated among children from lower parental-income levels. Children whose parents were in the 25th percentile experienced a 1.66-percentage-point increase in the probability of reaching the top income quintile. By contrast, the estimated effect on children born to parents at the 75th percentile is small and insignificant. In other words, the poorest children get the biggest benefit from RTW status when it comes to economic mobility.

Consistent with our previous results, it appears that RTW has beneficial effects for individuals at the bottom of the socioeconomic distribution but has little effect at the top. Whatever benefits unions may bring to their members, this pattern of results suggests that RTW particularly benefits individuals who may otherwise be priced out of the labor market when unions set above-market-clearing wages.

Conclusion

Unions and their advocates typically decry right-to-work laws, arguing that they lead to worse wages and other outcomes for workers, while downplaying the potential beneficial effects of attracting businesses and encouraging them to make investments. Our research suggests that these criticisms are misplaced. Few people dispute that RTW laws are indeed bad for union coffers, because the laws allow workers to avoid paying for union representation that they do not want. But our findings suggest that, contrary to union claims, RTW laws benefit workers by creating stronger labor markets and yielding higher employment without reducing wages. Through these stronger labor markets, RTW laws play an important social role by reducing poverty rates and increasing upward socioeconomic mobility. Notably, our results consistently suggest that the individuals at the bottom of the socioeconomic distribution, who risk being priced out of the labor market when unions set above-market wages, benefit the most from RTW laws. Unions may benefit their members, but our results suggest that this comes at a heavy cost to many of the low-skilled workers they claim to champion.

In recent years, lawmakers in several non-RTW states, including Missouri, New Hampshire, and Ohio, have considered introducing RTW laws. Amid competing claims from union and business lobbyists, our findings shed light on the likely benefits that these states could, in time, bring to their economies—especially their manufacturing sectors—and their workers, by doing so. For the last 75 years, workers have been taking notice—commuting and moving with their feet. Politicians might consider taking notice, too.

#### Broad objections to unionization apply to Taft-Hartley repeal.

Matthew Lilley 23, PhD is a visiting research scholar at Duke University, "UAW Strike's Lesson: Protect the Right Not to Join a Union," RealClearPolicy, 11/21/2023, https://www.realclearpolicy.com/2023/11/21/the\_uaw\_strikes\_lesson\_protect\_the\_right\_not\_to\_join\_a\_union\_994316.html

The conclusion of the United Auto Workers strike in Detroit might seem as if the union has successfully brought the US auto industry to its knees. The reality, however, is that the “Big Three” automakers at the center of it all—GM, Ford, and Stellantis—have a shrinking hold on the auto market, thanks to competition from factories in states with sensible protections for non-unionized workers called Right-to-Work (RTW) laws. Unions and their allies regularly claim RTW measures hurt workers and wages, but new data shows protecting the right not to join a union produces key economic and social benefits.

RTW laws merely protect workers from having to pay money to a union they do not wish to join or else be fired. Nonetheless, unions deride RTW as the “right to work for less” and argue that it limits the rights of workers to unionize. That’s false – workers can join a union if they want, though protection against being forced to subsidize unions does seem to result in lower levels of unionization across the economy in states with RTW laws.

Unions also maintain that RTW forces unions to allow non-members (often called “scabs”) to freeload by receiving benefits which the union negotiates without paying for union membership. The reality is that unions choose to represent non-members—allowing them to act as ‘exclusive representative’ of all workers—while US labor law dictates they are perfectly free not to do so.

But unions don’t merely claim that they secure higher wages for members; they regularly contend that they raise wages for non-union workers, and that RTW decreases wages for everyone. They point to lower average wages in RTW states than in forced-dues states, while business lobbies respond that RTW increases business investment and causes RTW states to have greater job creation and faster income growth. An impasse thus arises because both sides’ data share a glaring problem: they compare RTW states like Arizona and Tennessee to places like New York City and San Francisco, ignoring major differences such as cost of living, historical economic development, and demographics.

Accordingly, a new Manhattan Institute report investigates the real effect RTW laws have on workers and society by compare neighboring counties in different states, one with RTW laws and the other without. Unlike Manhattan and Memphis, neighboring counties are highly similar places with similar populations. This creates hundreds of small ‘natural experiments’ that are spread across the United States, allowing the long-run impacts of RTW laws on a wide range of economic outcomes to be measured.

The results suggest that RTW laws produce substantial economic benefits for workers, through stronger labor markets, and for society writ large, through improved socioeconomic outcomes, especially for at-risk families. They also suggest that RTW laws lead to a large increase in manufacturing employment, and that this flows into improved labor market outcomes for residents including higher rates of employment and lower long-term joblessness. In turn, these stronger labor markets appear to have driven greater in-migration. And notably, contrary to union claims , the study fails to find any evidence that RTW reduces wages or overall compensation on average.

This is not actually surprising. While unions can raise member wages, common sense dictates that this leads to higher prices for consumers and causes unionized firms to make fewer job-creating investments and hire fewer workers. No wonder the rapid expansion of non-union car production in RTW states has caused the Big Three market share to collapse from 67% in 1999 to 39% today. In non-RTW states with more unions, this leaves more individuals trying to find jobs with the remaining employers, likely driving down wages for non-union workers if not pricing some people out of the labor market completely.

Higher union wages might sound great for some, but not for those they effectively render unemployed. Consistent with this, despite unions claiming to be the champions of the downtrodden, the results suggest the benefits of RTW are particularly strong for the least well-off.

Perhaps most notably, the results indicate RTW laws lead to improved social outcomes: the RTW sample has 10% lower rates of childhood poverty and substantially higher upward income mobility for people who grew up in the bottom quarter of the socioeconomic distribution.

Unions aren’t charities – they exist to benefit their workers, not everyone in society. But this doesn’t justify lying. Perhaps it’s time they updated their anti-RTW rhetoric: “RTW: probably bad for us and our members, good for the other 94%.”

#### Neg authors also argue that right to work states do not have lower wages.

Christopher C. Douglas 24, Professor of Economics at University of Michigan-Flint, Ph.D. in Economics from Michigan State University, B.S. in Electrical Engineering and Economics from Michigan Technological University, "Right-to-Work States Do Not Have Lower Wages," Mackinac Center for Public Policy, 12/20/2024, https://www.mackinac.org/s2024-11?utm\_source=hs\_email&utm\_medium=email#executive-summary

Conclusion

When examining the impact right-to-work laws might have on average wages in a state, it is important to conduct an apples-to-apples comparison. Because states differ in numerous ways, we must account for these differences to isolate as much as possible the effect of having a right-to-work law. Including state fixed effects into a regression neutralizes many of these differences and compares states’ average wages as if the presence of right-to-work laws were the only difference between them. Failing to control for state-level differences makes the comparison between states apples-to-oranges, and it is impossible to determine if wage differences are due to these laws or one of the other uncontrolled-for differences.

When state fixed effects are used to conduct a more apples-to-apples comparison of the relationship between right-to-work laws and average wages in the states, I find that right-to-work states have slightly higher (nearly 2%) average wages than their counterparts.

Despite being based on the same data, this conclusion contrasts significantly with the results presented in a 2015 Economic Policy Institute report. Gould and Kimball find a large and negative impact of these laws on wages. But they fail to control for most state-level differences. When more of these state fixed effects are included in a similar model, based on the same data, I find that right-to-work laws are modestly but positively associated with higher average wages.

### Aff---Mech---Scope

#### NLRA protections should be expanded to agriculture workers, but this is quite controversial.

Jaclyn Reilly 13, "Agricultural Laborers: Their Inability to Unionize Under the National Labor Relations Act," Penn State Law, 7/8/2013, https://pennstatelaw.psu.edu/\_file/aglaw/Publications\_Library/Agricultural\_Laborers.pdf

Since the enactment of the National Labor Relations Act (NLRA), agricultural laborers have been excluded form its protection to organize workers and form unions for the purpose of collectively bargaining with employers. Employees who engage in collective bargaining are able to band together to bargain with employers for better wages, a safer working environment, fringe benefits and other terms and conditions of employment.1 The NLRA protects this bargaining process and the parties involved.

Agricultural laborers are one of only two classes of workers excluded from the protection of the NLRA.2 Although agricultural laborers are not protected under the NLRA because of their exclusion from the definition of “employee,” there is no mention that agricultural laborers are forbidden from forming unions.3 But without the protection offered by the NLRA, farmers do not have to recognize the union nor will they face any consequences in failing to so recognize in contrast with employers in other industries.4 This lack of protection leads to agricultural laborers not forming unions because of the backlash they could face from employers without any recourse to protect themselves from retaliatory practices or the general refusal of employers to bargain.5

While agricultural laborers have been excluded from the NLRA since the beginning, there are many reasons why this should no longer be so. First, these are marginalized workers subject to harsh working conditions and treatment and were the type of workers Congress intended to protect. 6 Second, agriculture is changing. The industry is no longer made up of only small family farms with few laborers outside the family working in the fields; rather, much of the food today comes from large vertically integrated companies who are more closely akin to industrial companies than small family farms.7 Third, the low wages and hazardous working conditions agricultural laborers are exposed to could be rectified through the use of a bargaining agent who could negotiate with employers for higher wages and greater safety standards. Lastly, farmers are granted the right to form associations to strengthen their position in the market.8 Granting farmers freedom of association while denying that same right to agricultural laborers seems a gross injustice that can only be resolved by allowing agricultural laborers to organize. If agricultural laborers were included under the NLRA, several problems may arise that would need to be addressed. Most notably, the competition created in the agricultural industry due to relaxed standards in immigration laws and the need for greater enforcement of those laws.

Unions have been met with great opposition in most industries and agriculture has not proven to be any different. Farmers do not want unions in their fields, the most important reason being that unions go on strike. Harvesting crops is very time sensitive and crops are perishable, if unions go on strike both farmers and the public could be adversely affected.9 Another reason farmers oppose unionization is because in many instances farmers hire independent contractors to provide laborers to work in their fields and if unions were present, farmers would have to pay a greater premium to these independent contractors supplying the labor.

#### Independent contractors, or gig workers, are also not covered by the NLRA. There are many opportunities for expanded protection.

CLJE:Lab 24, "Building Worker Power in Cities & States: Workers Excluded from the NLRA," Section 2, 09/01/2024, https://clje.law.harvard.edu/publication/building-worker-power-in-cities-states/workers-excluded-from-the-nlra/

Background

The NLRA has been criticized for excluding large categories of workers, some of whom are those most in need of labor law protections. The statute explicitly excludes public employees,1 supervisors, agricultural workers, domestic workers, independent contractors, employees covered by the Railway Labor Act, and “any individual employed by his parent or spouse.”2 Numerous other workers are partially or completely excluded from the Act’s coverage, including rehabilitation workers, incarcerated workers, and certain student workers. And while immigration status by itself does not preclude coverage under the Act, undocumented workers are not entitled to all of its remedies.

State and local legislation can serve as an important vehicle to partially remedy these deficits. In fact, several state and local governments have already attempted to provide collective rights to workers excluded from the NLRA. However, much more can still be done. And while federal labor law preemption and antitrust law present some challenges for greater coverage, many of those challenges can be overcome.

Objective of State Intervention

Most workers excluded by the NLRA have no collective bargaining rights at all, and many are particularly vulnerable workers who could greatly benefit from the power that collective bargaining provides. Even where states have clear authority to grant labor rights, few have taken action to fill in the gaps. For example, several states ban bargaining altogether for public sector workers, many states do not require districts to bargain with majority unions, and 33 states ban public-sector strikes.3 For farmworkers, only 14 states provide for collective bargaining rights at all, and some of these states eliminate or limit the right to strike or picket.

Watch: In March 2024, CLJE hosted an roundtable with Mary Kay Henry (SEIU) and women representing the childcare, homecare, and rideshare industries, who shared testimonies on how they overcame challenges to organizing.

States can enact legislation to provide collective bargaining rights for workers excluded from the NLRA. When covering excluded workers, state and local governments can experiment with labor laws that differ from the NLRA model, such as adopting sectoral bargaining systems, providing for majority sign-up, or requiring first contract arbitration.

Preemption Risk

Whether state and local governments can provide collective bargaining rights for a group of workers depends on three questions. The first two concern labor law preemption; the third concerns other forms of federal preemption. First, are the workers actually excluded from coverage of the NLRA? Second, did Congress intend to allow for state or local regulation of the workers’ collective bargaining rights, or did Congress intend to deny the workers’ right to collective bargaining entirely? Third, is state and local provision of collective rights for these workers foreclosed by any other federal law regime, such as immigration or antitrust law?

Workers outside the NLRA can be sorted into four categories, each with its own preemption risk:

Clearly Not Preempted: Public Sector, Domestic, and Agricultural Workers

These workers are clearly excluded from the NLRA’s definition of “employee.” Courts have thus uniformly held that states and localities are free to implement their own laws providing collective rights to these workers.4

Clearly Preempted: Supervisors and Undocumented Workers

State and local labor laws purporting to provide collective bargaining rights to supervisory workers are completely preempted. Courts have inferred a congressional judgment to preclude any labor rights for supervisors in order to avoid putting them “in the position of serving two masters with opposed interests.”5

Meanwhile, workers lacking work authorization are not entitled to the full protections of the NLRA given that two of the Act’s most crucial remedies, the backpay and reinstatement awards, do not apply to them. States generally cannot fill in this gap by providing for backpay or reinstatement awards because such provisions would be preempted by the Immigration Reform and Control Act of 1986 (IRCA).6 Some exceptions apply – for instance, California allows for limited backpay remedies for violations of state employment laws that extend protections to undocumented workers.7

Preemption Unclear: Student, Rehabilitation, Incarcerated, and Workfare Workers

For these workers, the possibility of state and local labor law coverage is largely unsettled. Most are likely outside the NLRA’s coverage under National Labor Relations Board precedents. But unlike groups of workers expressly excluded from the Act’s coverage, neither the Board nor the courts have clarified whether Congress intended to preclude state and local labor law for these workers.

States and cities can resolve some of this uncertainty by petitioning the Board for an advisory opinion (under § 102.98 of the Board’s Rules and Regulations) as to whether a given class of workers is covered by the NLRA. However, even when the Board has opined — as it has in the case of medical interns8 — courts may not necessarily defer to the Board’s judgment about the scope of the NLRA’s preemptive effect.

States Not Preempted, Cities Sometimes Preempted: Independent Contractors

State or local labor laws covering independent contractors must be analyzed separately due to antitrust law. Such laws are not preempted by the NLRA.

Federal antitrust law has often been applied to prevent independent contractors from acting collectively, considering this to be illegal collusion.9 Since the emergence of the gig economy, however, some have argued that gig workers fall within antitrust law’s “labor” exemption.10 Furthermore, states are completely immune from antitrust liability and can provide collective rights to independent contractors if they actively supervise the contractors’ bargaining process and can disapprove of bargaining that results in anticompetitive practices.11 Municipal governments can avoid antitrust scrutiny by either receiving state authorization to regulate independent contractors’ collective bargaining (low preemption risk) or restricting collective bargaining rights to preclude bargaining over wages to avoid allegations of price-fixing (medium preemption risk).

Options for State or Local Action

I. Broad Collective Bargaining Rights Modeled on the NLRA

As noted earlier, state constitutions can be used to establish labor rights for excluded workers. Alternatively, collective bargaining rights can be provided by statute. In either case, state collective bargaining laws could automatically cover any workers excluded from federal labor law. For example, the New York State Employment Relations Act provides collective bargaining rights to all private-sector workers in the state unless the NLRB determines that they are covered by the NLRA. States can also extend collective bargaining rights modeled on the NLRA to particular categories of excluded workers, such as agricultural workers, domestic workers, or independent contractors (subject to the preemption questions above).

II. Collective Rights Stronger Than the NLRA

States and local governments can turn a major downside of federal labor law — its exclusion of large groups of vulnerable workers — into an opportunity by providing collective rights that improve on the deficits of the NLRA.

Public Sector Workers: Many of the innovative features adopted for public sector collective bargaining are addressed in Section I above. Another interesting provision in several public sector bargaining laws is interest-based bargaining and first contract arbitration. Often facilitated by mediators, interest-based bargaining provides an alternative to traditional, positional forms of bargaining by promoting a collaborative, trust-based approach to negotiating contracts. Under a system of interest arbitration applied to first contracts, employers are obligated to start the collective bargaining process within 10 days of receiving a written notice from the union and have 90 days to negotiate a contract before either side may request mediation and arbitration. These provisions are critical to ensuring that public sector workers covered by such laws reach effective collective bargaining agreements, addressing the challenge that many workers face under the NLRA in reaching first contracts.

Agricultural Workers: Fourteen states extend collective bargaining rights to agricultural workers.12 California’s statute departs from the NLRA model in significant ways that make organizing workers easier. California’s Agricultural Labor Relations Act (ALRA) explicitly allows workers to unionize through majority card check recognition, permits unions to engage in secondary consumer boycotts, and more generally gives its labor board the power to depart from NLRA precedent whenever necessary to further state labor policy.13

Ride-Hail Drivers: In 2016, Seattle passed an ordinance providing ride-hail workers with collective bargaining rights.14 The ordinance was later amended to limit bargaining to working conditions, rather than wages, to avoid potential antitrust challenges. Notwithstanding this limitation, the ordinance requires ride-hailing, ride-sharing, or taxi companies to supply drivers’ names and contact information to unions wishing to contact them about organizing. The ordinance also provides for interest arbitration in the case of impasse, gives the city veto power over approval of collective bargaining agreements, and allows for public hearings on the substance of those agreements.

In the intervening years, a number of states have experimented with legislation to extend collective bargaining rights to ride-hail drivers. In 2024, Massachusetts passed a ballot initiative creating a sectoral bargaining system for ride-hail drivers in the state.15 The new law requires companies like Uber and Lyft to negotiate as a group with any union that represents at least 25% of drivers. Once an agreement is reached, all drivers with more than 100 trips completed in the previous quarter would be entitled to vote on whether to approve the agreement. If approved, the agreement would go to the Massachusetts Secretary of Labor for a fairness check. If the parties could not reach an agreement, an arbitrator would step in and devise fair terms to submit to drivers for a vote.

Legislating new forms of collective bargaining for ride-hail drivers raises concerns regarding the companies’ misclassification of these drivers as independent contractors. With careful drafting and coordination with unions, enforcement authorities, and other organizations advocating for drivers’ proper classification as employees, state policymakers can experiment with legislating new rights for drivers without precluding proper classification actions.

Domestic Workers: Led by organizations representing low-wage and immigrant workers, such as the National Domestic Workers Alliance, a number of states have enacted Domestic Workers Bills of Rights in order to extend basic protections to workers excluded from the NLRA and many other labor standards provisions. Domestic Workers Bills of Rights have passed in 10 states, two major cities, and Washington, D.C. Protections included in these laws are the rights to:16

Fair wage and overtime pay

Rest breaks

Written agreements

Freedom from discrimination and harassment

Safe work conditions

Privacy for in-home workers

Days of rest

Paid leave

#### This area is frequently discussed as an issue of misclassification.

Julia H. Weaver 21, J.D. Candidate, University of Georgia School of Law; A.B., University of Georgia, "Two Sides of the Same Coin: Examining the Misclassification of Workers as Independent Contractors," Georgia Law Review, Vol. 55, No. 3, Article 8, 2021

Under current National Labor Relations Board interpretations of the National Labor Relations Act, employers may only be punished for misclassifying their employees as independent contractors if a separate violation of the NLRA is present. As the U.S. economy increasingly focuses on gig work, millions of workers are affected by misclassification, which results in lower pay and fewer employment protections. Misclassification also strips the government of billions of dollars in tax revenue.

The NLRB considered the issue of making the misclassification of employees a standalone violation of Section 8(a)(1) of the NLRA in the case Velox Express, Inc., yet it declined to do so. This decision is not in accord with the realities of the modern gig economy and the changing nature of the workplace. This Note argues that the NLRB should find that standalone violations of Section 8(a)(1) of the NLRA exist when employers misclassify workers as independent contractors rather than as employees. Misclassification benefits employers while substantially harming employees. Employers who misclassify their workers should face the repercussions of an NLRA violation each time they misclassify a worker. This standalone violation would further Congress’s stated purposes for the NLRA and would provide gig workers with protections associated with the employment relationship.

### Aff---Mech---Sectoral Bargaining

#### Unions need to be actively supported, not merely permitted. Collective bargaining is a public goods problem that cannot be addressed without abandoning voluntary participation and enterprise-level bargaining.

David Madland 21, Senior Fellow and Strategic Director of the American Worker Project at the Center for American Progress, author of Hollowed Out, "Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States," ILR Press, an imprint of Cornell University Press, 2021

Unions Decline without Active Support

If unions do so much good—strengthening the middle class, reducing inequality, and making democracy work—why are they in such sharp decline in the United States and much of the world? Why have US unions gone from representing roughly one-third of all workers in the 1950s to just 10 percent in 2019 and only 6 percent in the private sector? Why have unions suffered major decreases in countries ranging from Britain and Australia to Germany and the Netherlands?

The main answer is that in recent decades government policies have made it difficult for unions, particularly in the United States but in many other countries too. Because of the nature of what unions provide (a public service that benefits society) and what they do (challenge employer power), unions need a supportive policy environment. If public policy is merely indifferent to unions, they will struggle. When public policy places barriers in front of unions, sharp decline is almost inevitable. This is especially true as the economy has changed in ways that make organizing and bargaining collectively more difficult.

Unions can be thought of as what economists refer to as a public good— which means a good or service that does not get depleted if more people use it and whose benefits are not exclusive.1 Public goods have “positive externalities,” meaning that many people benefit from their provision, not just those directly paying or providing the service. As a result, public goods suffer from a collective action problem—where people can free ride and benefit from the efforts of others to provide the public good.2 When a group needs to act collectively to provide a public good, individuals have an incentive to free ride on the efforts of others in the group.

The classic examples of public goods are things like lighthouses, clean air, and official statistics. Public goods are inherently under-provided by the market because it is difficult to privately charge everyone in society who benefits from them. In order for a society to have the optimal amount of a public good, the government usually must directly provide it or else provide incentives for others to provide it.

Unions have many attributes of public goods. The standards unions set do not get used up if additional people benefit from them but rather remain available for others to use—just as official statistics can be used at the same time by academics and businesses. It is also difficult to exclude people from all of the societal benefits unions provide, such as higher wages, lower economic inequality, and political empowerment and advocacy for workers.

With unions, sometimes people think only about part of the free-rider problem—and worry that, for example, under “right-to-work” laws, workers who work at a particular worksite can directly benefit from a particular contract without paying for the costs of negotiating and enforcing it. Getting rid of right-to-work laws by requiring that all workers at a worksite covered by a collective bargaining agreement pay “fair share fees” can address a component of the free-rider problem. But it would be virtually impossible, as well as counterproductive, to exclude people from other benefits that unions provide, such as a stronger democracy and higher standards for workers at nonunion firms.

When thought of in the broadest terms, the free-rider problem, the collective action problem, and the public good problem are the same. All get at the idea that unions and collective bargaining provide services that have wide benefits, yet many workers and members of the public can receive these benefits without paying for them. This means that unless public policy promotes unions and collective bargaining, there will inherently be less of them than is optimal.

In addition, unions—unlike many other public interest organizations—are built to challenge the power of employers, which means unions often face strong opposition that can limit their ability to recruit members. Unions challenge employers’ ability to pay whatever the market will let them, to exert unquestioned authority about how to run a workplace, and to have their preferred policies enacted without opposition. As a result, employers have incentives to oppose unions, and, in a capitalist society, they have significant power to do so. Employers often pressure workers to not join a union at their workplace, and they commonly seek to turn public opinion against unions as well as work to change laws to make unionization more difficult. Certainly, unions can provide benefits to employers, and some employers are quite supportive of labor unions and collective bargaining.3 But employers do not like their power to be challenged and thus generally oppose unions unless they are forced to deal with them. As Walmart’s former CEO once said about his opposition to unions, “We like driving the car and we’re not going to give the steering wheel to anyone but us.”4

In recent decades, the economic environment has become more difficult for unions, compounding the permanent problems that unions face delivering a public good that challenges the power of employers. Increased global trade places US workers in more direct competition with workers in other countries, including those with minimal or no labor standards, and allows employers greater power to move work or threaten to exit and avoid dealing with a union. Rapid technology change has also facilitated outsourcing and restructuring even of white-collar jobs, which further strengthens the hand of large businesses and undermines the power of unions.5 In addition, increased financialization has created an even greater focus on short-term results. All these changes have helped capital become increasingly mobile and powerful, and they have further tilted the playing field against unions.6

As a result of all these challenges—the public goods problem and the disproportionate and growing power of employers—unions will struggle to achieve their optimal societal levels without well-crafted public policies that encourage workers to join them. Unfortunately, US labor policy is not wellcrafted but rather is structured in ways that are designed to weaken unions. This structural tilt against unions has occurred because of active policy choices and what political scientists call “drift”—the failure to update policy to reflect new realities, such as increased employer opposition and contracting out.7

US law makes it very hard for workers to form a union if management resists. If workers want to join a union, they first have to sign a card. If a majority of workers at a worksite sign cards, their employer can choose to recognize the union. More likely, the employer will require an election process that resembles that of sham elections in less democratic countries.8 The process allows employers to, among other things, force workers to attend antiunion meetings and subject workers to one-on-one discussions about the union with their direct supervisor. 9 Penalties for employers that break the law and, for example, fire a worker who supports the union are laughably weak. There are no fines; only back pay minus interim earnings is required. In fact, owners sometimes refer to these meager payments as the cost of their “hunting license.”10 Employers illegally fire workers in about one-third of union organizing efforts, and over half of employers threaten to close the worksite if workers unionize.11 The potential costs to workers under the current system are great, and many are simply unwilling to take the risk, especially because in the United States workers rely on their employers not just for wages but also for health and retirement benefits to a far greater degree than workers in most other countries.

When a company violates the law, less than one-tenth of organizing drives achieve a first contract.12 If workers are able to make it through the gauntlet and unionize and sign a contract with an employer, in more than half of US states that are “right-to-work,” unions face the narrow free-rider problem described above, in which workers can benefit from the contract without paying for the costs of negotiating and enforcing it.13 Because the law is so stacked against workers forming a union, organized labor has increasingly tried to avoid the existing legal framework—for example, using economic pressure to encourage firms to allow workers to join unions through “card check” sign-up or other more favorable processes than guaranteed by law, though unions rarely have the power to achieve this goal.14

Enterprise-level collective bargaining also exacerbates employer opposition. Under enterprise bargaining, if a firm or unit in a firm is unionized, employers will face increased labor costs compared to their nonunion competitors, which creates a strong incentive to oppose unions. Higher-level bargaining tends to equalize labor costs across competitors and thus lessens incentives for employer opposition.

Compounding the problem of increased employer opposition due to higher labor costs, employers under worksite-by-worksite bargaining have additional opportunities to resist union efforts. Enterprise bargaining allows employers ways to avoid unions and collective bargaining by outsourcing and shifting their business strategy. Employers can, for example, contract out a line of work to another firm, close an entire worksite or line of business (possibly restarting something similar without unionized workers), or restructure work so that it is done by independent contractors without union rights.15 Indeed, enterprise bargaining provides financial incentives for firms to take these actions. Even when these actions are done for reasons that have nothing to do with union avoidance, the impact can still undermine unions and collective bargaining. Unions are either outright prevented from operating or have little ability to improve working conditions because they are now bargaining with a very small employer with no market power and have a hard time bargaining with the dominant players. In contrast, higher-level collective bargaining takes away the incentive and limits the opportunities for employer exit from collective bargaining—since, for example, all workers in an industry are covered, no matter who their employer is or how the firm is structured.

#### This is an intrinsic result of the NLRA structure. Voluntary recruitment turns unions into a “rat in the wheel.”

David Madland 21, Senior Fellow and Strategic Director of the American Worker Project at the Center for American Progress, author of Hollowed Out, "Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States," ILR Press, an imprint of Cornell University Press, 2021

Yet there is very little evidence that in the current environment unions can grow in meaningful ways solely through their own efforts. American unions may have been slow to respond to the decline in union density several decades ago and have not always adopted the most effective organizing tactics, but they have now tried almost every strategy possible and have become quite good and inventive at doing so. They have tried direct action and consumer strategies. They have engaged the community and other businesses. They have pursued corporate campaigns as well as digital strategies. As one study put it, “Unions have devoted more energy, resources, and creativity to organizing over the last thirty years than most people (even inside the labor movement) realize.”61 In fact, union organizing in the United States is now seen as the model that unions in other countries seek to emulate.62

It is hard to imagine that doing more of the same will produce dramatically different results. In the current environment, even good organizing—whether it is focused on social movement unionism, business unionism, online or mobile organizing, or any other strategy—does not do enough. The National Labor Relations Act structure is a “rat in a wheel” system, according to Larry Mishel, distinguished fellow at the Economic Policy Institute, because it continually forces unions to expend great effort organizing workers just to stay in the same place.63 In the current system, as new firms and new sectors of the economy are created, they are not covered by union contracts. And unionized firms can contract out, relocate, spin off identical new, nonunion firms, and otherwise slip outside union coverage. This means unions must constantly engage in organizing on a massive scale just to stave off decline. As a study that considered the costs and difficulties of organizing found, “the prospects are dim for a reversal of the downward spiral of labor unions based on increased organizing activity.”64

#### There is subset diversity in this area. Sectoral bargaining can be partial and oportunistic.

Cynthia Estlund 24, Crystal Eastman Professor of Law at the New York University School of Law, "Part III: Some Questions about Sectoral Co-Regulation and Its Future," OnLabor, 5/23/2024, https://onlabor.org/iii-some-questions-about-sectoral-co-regulation-and-its-future/

Questions about sectoral co-regulation abound. First, there’s the question of how to define a “sector”—e.g., along product market or labor market lines: A hospital janitor can be both a health care worker and a maintenance worker. The puzzle of overlapping sectors might loom large if we envisioned an economy-wide system of sectoral labor standards. But we don’t. Sectoral standards can be partial and, again, opportunistic. Sectoral bargaining happens, where it does, when workers share common interests, and a union organizes enough of them to put economic clout behind employee demands. Sectoral co-regulation similarly requires a reasonably cohesive and organized group of workers—like fast-food workers in New York and California—to create an effective political demand for higher standards.

Another question concerns the geographic scope of sectoral standards. Political and legal constraints point toward state or local sectoral standards; and those can be sustainable where the product market in a sector is local or regional—as with health care, hospitality, and domestic work, for example. Higher sectoral standards (like higher collectively-bargained wages and benefits) are more constrained in sectors like manufacturing where product markets are national or even global, or like brick-and-mortar retail where online substitutes are increasingly available.

#### Sectoral bargaining is a controversial reform that aims to address the deficiencies in firm-level negotiation. There is a strong argument that sectoral bargaining is necessary for labor law to enable reductions in inequality.

David Madland 21, Senior Fellow and Strategic Director of the American Worker Project at the Center for American Progress, author of Hollowed Out, "Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States," ILR Press, an imprint of Cornell University Press, 2021

Bargaining that occurs above the firm level also helps support union membership, but by itself it is clearly not enough for high and stable membership.65 As discussed previously, this type of bargaining reduces employer opposition, which makes it easier for unions to organize workers. Yet, because all workers in a sector are covered whether they are members or not, bargaining above firm level also increases the incentive for workers to free ride and benefit from union membership without paying for it. Thus, sectoral bargaining exerts mixed pressures on union membership. So even though countries with sectoral bargaining generally have higher membership than enterprise countries, they can still struggle for membership. Indeed, over recent decades, union density has declined significantly in countries like Germany and the Netherlands, where there is sectoral bargaining, and in France union density is even lower than it is in the United States.

Whether workers have the right to strike is also essential for the strength of any union movement, but, as with the other policies, the ability to strike is not a sufficient condition for high membership. Strikes are a vital basis of power for unions and thus affect whether workers think joining could actually help improve conditions. Indeed, the ability for workers to use a wide variety of economic weapons undergirds the impressive union achievements in places like Scandinavia. Strike rights are also a basic human right in international conventions.66 Still, some countries with relatively strong strike rights have relatively modest union density, such as the Netherlands, with 17 percent density, and some countries where strikes are frequent have very low density, such France, at around 8 percent.67 Further, countries like Australia in the mid-twentieth century had high union membership of roughly 50 percent with limited strike rights.68

All told, there are a range of policies that can help support unions. The Ghent system, worksite access, the ability to charge agency fees, higher-level collective bargaining, and having basic rights all help unions. The Ghent system is critical to sustaining high union density with the incentives, access, and stamp of approval it provides unions, but no single policy, not even Ghent, is enough to overcome the structural disadvantages unions face. A combination of policies is required to really strengthen labor. Policy must provide multiple ways and multiple reasons for workers to join unions. Workers join unions for selective benefits and because of cultural norms and solidarity, as well as because they have frequent contact with the union inside and outside the workplace and see it delivering benefits. Policies that provide a broadly supportive environment are necessary to strengthen unions because they give workers more reasons to join and make unions less reliant on any one motivation. Labor policies that seek to provide a “mix of social norms and individual benefits provide the incentives for individuals to incur the costs of providing public goods,” as law professors Catherine Fisk and Martin Malin, professors explain.69

In summary, unions face a number of structural disadvantages to achieving adequate membership and require a favorable policy environment that provides workers with multiple reasons to join unions in order to thrive.

The Importance of Higher-Level Bargaining

While it is important to have policies that support union membership, it is also critical for policy to support broad-based bargaining, as can be seen in table 1 presented later in this chapter. Enterprise bargaining does many things to help workers. But workplace-level bargaining works best in a system that emphasizes higher-level bargaining. As this section will explain, broad-based bargaining, compared to workplace bargaining alone, leads to much greater coverage, significantly lower inequality, and higher productivity. Broad-based bargaining is also particularly well suited to the modern economy.

The simplest reason that a system with higher-level bargaining is better than one with only enterprise bargaining is because it leads to more workers being covered by the terms of a union contract.70 With higher-level bargaining, most or all workers in an industry or sector are covered, not merely those who work in an enterprise or division of an enterprise that is unionized. Greater coverage by union contracts in turn means that wages are higher for more workers and economic inequality lower. When coverage is widespread, high standards can be maintained and improved upon, rather than continually undercut by low-road competitors.

The basic logic of higher-level bargaining leading to greater coverage and thus higher wages and less inequality is pretty simple. Still, explaining a bit more of the mechanisms at work can help clarify why higher-level bargaining would be so valuable in the United States. Higher-level bargaining helps spread the gains of more powerful workers to those with less market power. All types of collective bargaining increase the power of workers, but enterprise bargaining does less to broaden the achievements of powerful workers to include others. Workplace-level bargaining can help spread gains to other workers, but this is largely through an indirect “threat” effect of other employers weighing whether they should raise wages in order to limit their workers’ interest in forming a union. In contrast, higher-level bargaining spreads bargaining coverage more evenly and completely. Higher-level bargaining can also provide a way to cover workers who would otherwise struggle to bargain with their employers—while enterprise bargaining often leaves little recourse for workers without much market power. Finally, higher-level bargaining can help give unions a structural kind of power to bargain that complements the market power unions derive from density. In this way, higher-level bargaining can help compensate for any modest declines in union density and market power and maintain relatively stable coverage.

Workers can have some degree of market power for a number of reasons— for example, when they are particularly skilled and hard to replace; working on a time-sensitive, highly profitable or capital-intensive project, in which any kind of disruption would be very costly; or from a favored demographic group, such as white men. Similarly, the ability of workers to collectively negotiate with their employer is affected by a number of factors, including the capacity of the direct employer to pay, whether the industry is comprised of stable employers or small, fly-by-night operations, and whether workers are classified as independent contractors and legally barred from collective bargaining.

Enterprise bargaining can and often does work quite well for certain types of workers, particularly those who can potentially disrupt employer profits and are employed in a manner that is conducive to bargaining.71 A group of workers at a massive, capital-intensive factory, for example, would have the potential to cause costly delays if they went on strike and thus often have the necessary leverage to bring their employer to the bargaining table. In addition, at factories and other capital-intensive worksites, labor is a relatively small portion of the cost of overall production and thus employer opposition to increased labor costs is diminished, making organizing somewhat easier. In cases where workers have power at a particular worksite, enterprise bargaining can provide significant benefits to workers—possibly even greater benefits than these workers would achieve under higher-level bargaining. Indeed, for some workers who currently have great influence at their worksite, sectoral bargaining can lead to less power and smaller wage increases. Under broad-based bargaining, these powerful workers’ gains are constrained by what other workers can obtain and what the broader economy can sustain.

But enterprise bargaining does not work very well for those with less power and a less favorable industry structure. And even workers with greater worksite power need to worry that their employer can find ways to escape enterprise-level bargaining.

Indeed, in today’s economy, enterprise bargaining does not work well for most workers. Many workers are essentially interchangeable. In addition, as service employment increasingly dominates the economy, worksites are smaller and less capital-intensive. Some firms may have gotten much larger over recent decades, but the actual worksites where workers spend their days have gotten smaller and more fungible.72 The work of call center workers, building janitors, fast food workers, gig workers, truck drivers, and most types of workers today can be easily moved or replaced with minimal disruption to the firm. Moreover, even if the workers are not easily replaced, they are often subcontractors of subcontractors and thus struggle to negotiate with the person who actually has the ability to increase their wages. Even the prototypical powerful factory worker discussed above often has far less power today than one did several decades ago. Globalization, technological change, and corporate organization has made it easier for companies to move factories, spread out their supply chains so they are less reliant on one factory, and even staff the factory with temp workers who are designed to be easily replaceable.

Broader-based bargaining would help ensure that all workers could be covered by collectively bargained agreements and that those with similar skills would receive similar pay. Not only would the same construction worker using similar skills receive similar pay no matter the type of project they were working on, but also janitors, home care workers, and other similarly disadvantaged workers would actually have a forum in which to bargain collectively. Not surprisingly, research shows that higher-level bargaining leads to much greater coverage for people employed by small firms and who work part-time or have other kinds of nonstandard employment.73

The classic examples of countries with higher-level bargaining include Sweden, Denmark, and to a lesser extent Germany, but most advanced countries have had significant experience with this kind of bargaining at some point in their history, including the United States, as well as other Englishspeaking countries such as Britain and Australia. There are many reasons that some countries have broad-based bargaining and others rely heavily on worksite bargaining. The choices of unions and employers are important, but policy plays a vital role.74 Indeed, the degree of higher-level bargaining a country engages in is often the direct result of policy choices, as in the decisions of a number of countries, including Portugal, Spain, Israel, Australia, and Britain to move away from higher-level bargaining, and in the decisions of Norway and Uruguay to increase the centralization of bargaining.75 It is also important to note that countries that have broad-based bargaining tend to do most of their bargaining at this level, but they also often engage in some bargaining that happens at the firm level or below, and there is usually some give and take between the levels of bargaining.76

The basic results of higher-level bargaining leading to greater coverage can be seen in a variety of ways. At the simplest level, a quick look at the bargaining coverage of countries around the world shows that value of higher-level bargaining. All of the countries with near universal coverage, including not just Scandinavian countries but also places like Austria and Belgium, engage in multi-employer bargaining. Further, with higher-level bargaining and structures that effectively extend union contracts to similarly placed workers, extremely high union density is not always required to achieve relatively high coverage rates. Germany, with less than 20 percent union membership, covers roughly half of workers, and the Netherlands covers around three-fourths of workers with density that is even lower than in Germany. 77

More sophisticated analysis leads to the same conclusion that higher-level bargaining produces higher coverage by collectively bargained agreements.78 While enterprise bargaining can occasionally lead to high coverage when density is very high, research shows that most of the time enterprise bargaining leads to low coverage. Only broader-based bargaining consistently produces high levels of coverage by union agreements. As the researchers at the OECD explain, “collective bargaining coverage is high and stable only in countries where multi-employer agreements (i.e. at sector or national level) are negotiated.”79

Critically, higher-level bargaining coverage leads to better results for workers. Indeed, the importance of sectoral bargaining for reducing inequality is hard to overstate.

It is pretty easy to see that countries with higher-level bargaining and high coverage—such as Denmark, Sweden, Belgium, France, and the Netherlands —tend to have relatively low levels of inequality. But research that compares countries over time and controls for a variety of other economic and political factors also finds that higher-level bargaining leads to lower economic inequality. As one study put it, “the most important factor in explaining pay dispersion is the level of wage-setting.”80 In fact, a review of more than a hundred different studies concluded that “the most robust result is that countries with a high level of bargaining coordination tend to have a more compressed wage distribution.”81

Studies with different approaches also come to the same conclusion. Only a few countries have moved toward higher-level bargaining in recent decades, but those that did saw significant reductions in inequality. 82 When Norway, for example, moved to a more centralized bargaining system in the late 1980s, pay distribution became more equal, even though other economic trends were pushing toward greater inequality. 83 Similarly, in the early 2000s Uruguay reinstituted a wage board system to negotiate industry-wide standards, and it took steps to increase union density, which helped lead to significant wage increases and reductions in inequality. 84 In contrast, a number of countries, including Australia, New Zealand, Britain, and Israel, moved toward lower-level bargaining. Before-and-after studies of these countries show that moving from higher-level bargaining toward more enterprise-level bargaining increased inequality. 85 Indeed, even Germany, with its strong tradition of unions as well as works councils and workers on corporate boards, has struggled with wage stagnation and rising inequality over the past two decades as its sectoral bargaining system has weakened.86 Compared to the United States, Germany’s sectoral bargaining is still quite strong and its inequality low. But as Germany has moved away from sectoral bargaining, inequality has risen sharply, and wage growth has been quite slow, despite productivity gains. Germany’s neighbor France has had productivity growth over recent decades similar to Germany but much higher wage growth and lower inequality, in part because it has maintained a more centralized bargaining structure.87

Research on higher-level bargaining in the United States also indicates that it was helpful in reducing earnings inequality, especially when it was more widespread.88 A telling US research project found that various forms of higher-level bargaining (including multi-firm bargaining, region-wide pattern bargaining, and industry-wide pattern bargaining) were able to raise wages and spread the gains throughout local labor markets and industries from 1957 to 1979 but had far less ability to do so after 1980, as unions weakened and broader-based bargaining became rarer. The authors of the study, professors Thomas Kochan and Christine Riordan, explain that the weakening of broadbased bargaining structures were at the “root” of the increase in inequality. 89

Broader-based bargaining also tends to provide significant benefits to women and people of color. Because higher-level bargaining leads to a greater percentage of workers being covered by a collective bargaining agreement, more workers get pay raises and have their pay set based on measurable standards, which limits the opportunity for discrimination. Broadbased bargaining also structures negotiations to be about all workers, not just unionized workers at a particular worksite, which makes bargaining more inclusive and more able to tackle issues of racism and sexism. It can also provide greater opportunity to address leave policy and less obvious drivers of pay gaps. And, critically, broad-based bargaining helps workers in jobs with the least market power get covered by a union contract.90 These workers are often women and people of color. Finally, higher-level bargaining reduces economic inequality in society more than enterprise bargaining, and the smaller the overall pay distribution in society, the smaller the pay differences tend to be between men and women and between whites and other races.91

Unsurprisingly, the international research finds that bargaining at higher levels generally reduces pay gaps more than firm-level bargaining does.92 Similarly, the more limited evidence on wage setting that occurs above the firm level in the United States also shows that it is quite effective at reducing gender and racial pay gaps. For example, one analysis found that the income gap between white and black construction workers would be roughly 7 percentage points smaller if a state without a prevailing wage law instituted such a law. 93 As discussed previously, prevailing wage laws require that government contractors pay the wage that prevails in the market—often set by unionized firms—and are analogous to laws in other countries that extend the pay scales of union contracts to nonunion firms. Research also shows that US public-sector pay scales and bargaining as well as minimum wage laws lead to smaller gender and racial pay gaps.94 Public-sector wage setting and minimum wage laws are methods of pay setting that occur above the workplace level and are therefore somewhat analogous to broad-based collective bargaining.

While the research suggests that bargaining above firm level is particularly effective at reducing gender and racial pay gaps, it is important to note that it is not a panacea. Some counties with sectoral bargaining, such as Austria, still have relatively high pay gaps, indicating that bargaining partners must consider gender and racial equity at the bargaining table and take care not to extend preexisting societal inequities by setting compensation standards that disadvantage industries and occupations where women and racial minorities are overrepresented.95

#### Sectoral bargaining is also arguably a boon for productivity. Enterprise bargaining undermines incentives for workforce training and forces adversarialism in labor dispute resolution. Broad-based bargaining can overcome these deficiencies.

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Boosting Productivity

Not only does broad-based bargaining lead to greater coverage, and thus higher wages for most workers, as well as less economic inequality and smaller pay gaps, these gains do not cause significant economic harm. Indeed, the more unions are able to represent all workers, the more positive their overall economic impact is likely to be.

There are a number of theoretical reasons to expect that higher-level bargaining would increase productivity and thus help the overall economy. First, broad-based bargaining would raise wages for more workers, and higher wages help reduce turnover and encourage innovation.96 Moreover, similar pay for similar work—a key goal of higher-level bargaining—enables a more efficient allocation of resources, which speeds up the movement of labor and capital from low- to high-productivity activities.97 Put another way, similar pay for similar work forces companies to compete based on productivity improvements, not squeezing workers. By making the rationale for pay increases clearer and more transparent—such as by identifying measurable skills—higher-level bargaining may be particularly motivational for workers who seek to advance their careers and can reduce discrimination even more than firm-level bargaining. Further, broad-based bargaining also creates an opportunity for workplace organizations like works councils, which provide a forum to discuss work processes and have been shown to increase productivity. 98 In addition, by elevating some conflict about pay scales to outside the firm, higher-level collective bargaining can enable greater collaboration in the workplace.99 Collaboration between workers and management is often key to improving production processes. Finally, broadbased bargaining can also promote worker training by minimizing the employees’ financial incentives to leave firms once they are trained and creating an opportunity for well-designed training systems.100 These latter two—reducing conflict and promoting training—merit additional explanation.

One of the most important factors in determining the economic impact of unions is the quality of the relationship between labor and management— whether it is collaborative or conflictual.101 Unfortunately, the US system is geared toward producing more conflict than it needs to. The highly conflictual and deeply flawed union election process is one important reason why the US labor relations system is so conflictual. But even more critical is that enterprise bargaining creates additional incentives for managers to oppose unions and can push unions and managers to act in ways that may not be in the best interests of the firm or all its workers.

From the management perspective, enterprise bargaining means that if a firm or unit in a firm is unionized, employers will face higher labor costs than their nonunion competitors. Moreover, managers have to negotiate over the way work is conducted in this unit, while their competitors will not. This makes many managers view unions as a threat to their company and ability to manage and feel that nonunion firms have cost and discretionary advantages. Given these incentives and beliefs, it is not surprising that many US firms vigorously oppose their workers unionizing and retain an adversarial approach if their workers do unionize.102

From the worker perspective, enterprise bargaining means that although unions may care about a broad group of workers, the law pushes them to bargain for only the particular group of workers they represent rather than negotiating to improve conditions for all workers in an industry or a region.103 The ability of unions to represent a broad group of workers is further limited because current law prevents many kinds of workers from joining unions and allows employers to evade unions by shifting the form of their business.

When unions had high membership rates, they could indirectly raise wages for workers outside a particular unit, but, as they weaken, they have far less ability to do so. Now every wage increase or benefit improvement that a small group of unionized workers in a particular unit in a particular firm achieves makes them more and more different from the nonunion workers around them. This means that unions must worry constantly that management will seek other, cheaper workers to work for them. As a result, unions have incentives to create rules that ensure that work is done by their members rather than in the manner that makes the most economic sense, as well as to approach management in a defensive posture, fearful that business decisions have nefarious motivations.

Of course, there are many exceptions to this negative picture. High-road productive labor-management relationships are clearly possible in our current system—think Costco, Southwest Airlines, and Kaiser Permanente, among many others.104 But they are the exception, not the rule, because the incentives are stacked against collaborative relationships.

Enterprise-level bargaining also makes it hard to develop a top-notch workforce training system. The United States does too little workforce training, and the training we do is often not very good and does not always lead to a good job. Employers, who pay for the majority of workforce training, spend significantly less than they used to and have pared back internal career ladders.105 Governments have also pulled back, mirroring broader trends of disinvestment in public goods like infrastructure.106 As a result, the United States spends less on workforce training than other rich countries—and the gap is growing as other countries increase their investments.107 Too often training is firm-specific, fostering skills that are not necessarily valuable to other employers. Worse, some training that individuals seek on their own produces credentials that are not particularly valuable to any employer. One need not look further than the for-profit college industry for countless examples of programs that produce little labor market value but put students deep into debt.108 All told, the average skills of the US workforce are in the middle of the pack of economically advanced countries and well below those of the highest-ranking countries.109

Enterprise-level bargaining contributes to problems in the US training system in several ways.110 It helps lead to widely varying labor costs across firms, which means that executives at firms that train workers worry that they will fail to recoup productivity gains because their newly trained workers will be hired away by higher-paying competitors. This leads to less investment than is optimal because employers have an incentive to poach workers from other firms rather than train their own. In other words, under enterprise bargaining, firms have an incentive to underinvest in training. This is especially true as jobs that once were part of a central firm are increasingly contracted out, outsourced, franchised, or reclassified to independent contractor status.

Further, the enterprise-level bargaining structure is not well suited to providing a forum to discuss regional or industry training needs. In contrast, broader-based bargaining naturally brings together groups of employers and workers, providing an opportunity to discuss the broader needs of the industry. This is especially important for small- and medium-sized employers that may not be large enough to create training programs on their own. The training programs in the United States that that operate on a sectoral level or across several sectors lead to good results for participants.111 But this kind of training—where training is broad-based and leads to a good job—is relatively rare in the United States and quite hard to create without broad-based bargaining.

Macroeconomic research also suggests that broad-based bargaining and greater union density would increase productivity. For example, research on Organisation for Economic Co-operation and Development (OECD) countries by the British economists Guy Vernon and Mark Rogers find that greater union density promotes productivity growth in those countries with higher-level bargaining.112 Similarly, a review of the literature by the economists Toke Aidt and Zafiris Tzannatos found support for the assertion that countries with “coordinated bargaining systems,” similar to those proposed in this book, “on average, achieve better economic outcomes.”113 In addition, there is a host of research finding that higher-level bargaining generally does not lead to harmful macroeconomic impacts, such as higher unemployment. If anything, higher-level bargaining reduces unemployment.114

Another way to understand the broad economic impacts of labor policy is to look at trade data, which can provide some insight into the overall competitiveness of an economy. Of the OECD countries that have large trade surpluses—such as Germany, the Netherlands, Sweden, and Denmark—the majority have higher-level bargaining and relatively strong labor movements, while those with trade deficits, including the United States and Britain, tend to have enterprise-based bargaining systems and weaker labor movements.115 While many factors affect trade and overall economic performance, and thus simple cross-country comparisons deserve healthy skepticism, it is clear that countries with higher-level bargaining are among the most internationally competitive, while countries with policies like those of the United States are currently struggling. The fact that countries with sectoral bargaining are among the most competitive in the world suggests at the least that higherlevel bargaining is compatible with a highly competitive economy. These comparisons also show that broad-based bargaining is unlikely to prevent good trade performance.

That higher-level bargaining is likely to promote higher productivity across the economy is important because, in the long run, higher standards of living for workers depend on higher productivity. Productivity gains by themselves do not automatically translate into higher wages, as the United States has experienced. For decades, workers’ wages have lagged far behind productivity gains, indicating that economy can support significantly higher compensation for workers even without additional productivity gains. Still, over any significant length of time, higher productivity is a necessary condition for higher wages. Making more with the same or less is what enables material conditions to improve.

Higher-level bargaining has several other positive attributes worth noting. It is cheaper and easier to administer for unions and employers because similar contracts cover a range of employers, and thus fewer lawyers are needed to negotiate and enforce them. Higher-level bargaining can also help bring out the most public-spirited elements in unions. Representing most or all workers encourages unions to see themselves as acting for the welfare of all workers and helps others to seem them in this light, while enterprise bargaining gives more fodder to detractors dismissing unions as just another interest group.

#### Sectoral co-regulation is a twist on the theme, combining justifications for sector-wide organizing with worker governance.

Cynthia L. Estlund 23, New York University School of Law, "Sectoral Solutions that Work: The Case for Sectoral Co-Regulation," Chicago-Kent Law Review, vol. 98, 06/30/2023, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4498546

The pathologies of barely regulated labor markets and bare-knuckled labor conflict in early twentieth-century America gave way in the New Deal to two dominant policy strategies in the labor sphere: enterprise-based collective bargaining and jurisdiction-wide minimum labor standards. Both strategies sought to democratize workplace governance, though in two different senses: One sought to democratize internal workplace governance through collective representation, and the other used democratic political processes to assert social control over some aspects of work. The two strategies were meant to complement each other in more practical ways as well: Collective bargaining was supposed to empower workers in the more productive firms and sectors to negotiate collectively for higher wages and working conditions, backed by tools of peaceful collective self-help. Minimum standards were meant to set an across-the-board floor on some basic terms and conditions of work, both to set a firm baseline for collective bargaining and to protect workers who were not expected to be able to organize and bargain collectively.1 For the mostly white and male workers in the leading sectors of a growing national economy, this two-part strategy worked quite well for several decades. Although unionization never reached a majority of the private sector workforce, union-bargained wages, benefits, and protections raised the bar across much of the economy and contributed to growing prosperity and declining economic inequality.2

Since the mid-twentieth century, collective bargaining has virtually collapsed in the private sector, where union density has hovered around six percent for over a decade.3 That fraction has not budged despite a recent flurry of labor organizing4 and the highest level of public approval of labor unions in several decades.5 The decline of private sector unionization has a slew of causes, including management hostility and an arsenal of anti-union strategies that are not effectively constrained by the labor laws, as well as globalization, deregulation, and deindustrialization.6 Even if it were possible, after a half-century of failed efforts, to enact labor law reforms that bolstered the availability of enterprise-based collective bargaining, that system is unlikely to regain a dominant role in workplace governance.

With the near-demise of collective bargaining, most private sector workers must now fend for themselves at work, armed with their own highly variable market power and, for those with relatively little of that, the jurisdiction-wide floor of basic rights and minimum standards. To be sure, since the New Deal that legal floor has been raised in many places by state and local lawmaking, and now includes other working conditions like safety and some individual rights, especially against discrimination. Even so, the existing jurisdictional patchwork of minimum standards is a far cry from what collective bargaining was able to achieve in its heyday. While workers with sought-after skills—say, those in the top decile of the labor market—have done very well since the 1970s, workers below that level, and especially those without higher education or advanced skills, have captured a steadily declining share of national income and economic growth.7 That decline, and the accompanying stagnation of incomes, is projected to continue in coming decades (notwithstanding a temporary boost from recent labor shortages and COVID relief programs).8

In the face of these trends, some labor scholars and advocates in recent years are calling for a turn to sectoral bargaining—that is, bargaining between unions representing workers in a particular industry or occupation, on the one hand, and employer associations, on the other, with results that are binding across the employer association or even (where legislation so provides) across the entire industry or occupation.9 Sectoral bargaining, where it exists, has some crucial advantages over enterprise-based collective bargaining; in particular, it muffles the downward pressure that product market competition between enterprises puts on labor costs. But there are several roadblocks on the path to real sectoral bargaining in the United States. First, given federal labor preemption, any sectoral bargaining framework would have to come from Congress, where labor law reform has gone to die over the past half-century. Second, it is doubtful that sectoral bargaining can get off the ground without higher union density and labor organizations that are broadly representative of workers. Third, even if sectoral bargaining were possible, it is unclear whether it is a solution to the problem of workers’ waning bargaining power. Sectoral bargaining might be more of a mirage than a viable path forward in today’s United States.

More promising responses to those challenging economic trends might start instead from the regulatory side of the bargaining-regulation dichotomy. While bargaining strategies aim to aggregate workers’ own bargaining power, regulatory strategies put state power behind workers’ interests. Crucially, some regulatory strategies also aspire to afford a meaningful voice to workers. The idea of what I have elsewhere called “co-regulation” is to inject some of the strengths of union representation and collective bargaining into regulatory strategies in the labor field.10 Co-regulation straddles labor law and employment law as those fields are conventionally defined. Still, the promise of co-regulation is limited within the context of jurisdiction-wide labor standards—whether federal, state, or local—which are constrained by what is sustainable in the least productive sectors of the relevant labor market. That least-common-denominator problem is most evident in debates over minimum wage levels.11

Here I will explore an emerging architectural innovation to the edifice of labor and employment law—one that can supplement existing strategies for elevating terms and conditions of work at the lower strata of the labor market. As shown graphically below, sectoral co-regulation operates at the intersection of both mid-points identified above—that is, at the sectoral level (in between jurisdiction-wide and enterprise levels), and in the co-regulatory middle-ground between collective bargaining and conventional regulation.

Sectoral co-regulation is not a substitute for either enterprise-based bargaining or across-the-board rights and standards. But alongside those approaches, wider use of sectoral co-regulation could fill part of the gap left by the decline of enterprise-based bargaining by affording workers and their organizations a meaningful role in devising and enforcing higher-than-minimum sectoral standards. Indeed, sectoral co-regulation might complement more conventional strategies. It could facilitate union organizing and collective bargaining in some sectors by muffling labor-cost-based competition; and it could help to demonstrate the viability of higher jurisdiction-wide labor standards.

#### International examples illustrate that sectoral bargaining increases union membership.

David Madland 24, Senior Fellow at the Center for American Progress Action Fund, "Sectoral Bargaining Can Support High Union Membership," OnLabor, 6/6/2024, https://onlabor.org/sectoral-bargaining-can-support-high-union-membership/

Collective bargaining systems that promote sectoral bargaining as well as workplace-level bargaining have much greater union contract coverage compared to purely workplace-level bargaining systems. But some union allies worry that promoting sectoral bargaining could reduce union membership because it can create a free-rider problem, whereby similarly placed workers are covered by a union contract whether they are members or not.

Yet, there is little evidence that sectoral bargaining hinders union membership. Rather, as I highlight in a new Center for American Progress report, sectoral bargaining can — and typically does — support high union membership.

Sectoral bargaining creates processes that encourage union membership — and these pro-union forces are generally more powerful than the free-rider problem it fosters.

Under sectoral bargaining systems, employers face similar labor costs whether their workers are unionized or not. As a result, employers have less incentive to fight their workers’ efforts to unionize, which can make organizing workers easier. The level playing field also protects unionized workers and high union standards from being undercut by low-paying companies.

In addition, sectoral bargaining provides new recruitment opportunities for unions with workers that they already have a connection to because they are covered by a union agreement.

Furthermore, workers still have incentives to unionize to have greater voice and power in negotiations. Though the incentive to organize in order to influence bargaining that occurs at the sectoral level may be more attenuated than in worksite-only systems, worksite bargaining in sectoral systems can address shop-specific concerns. Integrating sectoral and worksite-level bargaining creates strong incentives for workers to stay engaged and participate in the union.

Finally, sectoral systems typically include additional policies that are critical to supporting high union membership such as strong worker rights, union access to worksites, and the Ghent system, where unions help deliver governmental benefits to their members.

That sectoral bargaining systems can overcome the free-rider problem and support high union membership is born out in real world examples. Indeed, the three main ways to study the impact of sectoral bargaining on union density—before and after analysis of policy change in particular countries, cross-country comparisons, and case studies of organizing campaigns—all point in the same direction.

For example, labor union membership significantly increased when Uruguay revitalized sectoral bargaining. In contrast, after New Zealand, Australia, and Britain severely weakened or eliminated sectoral bargaining they experienced sharp reductions in union membership.

Broader cross-country research tells a similar story that sectoral bargaining supports high union membership. Jelle Visser, a professor at the University of Amsterdam, studied union membership in European countries over several decades and found that greater bargaining centralization (with sectoral bargaining more centralized than worksite bargaining) has a “significant, positive and robust impact” on union membership.

Columbia University’s Bruce Western found that more centralized bargaining was one of three institutional conditions “essential for union growth” in a study of economically advanced countries since 1950. Magnus B. Rasmussen, professor at the University of South Eastern Norway, studied 35 countries over recent decades, as well as a smaller sample of 12 advanced countries from 1911 to 2000, to find that sectoral bargaining is more “conducive” to growth in union membership than worksite-only bargaining.

Studies found that sectoral systems were especially likely to produce higher union membership for workers in jobs that are “inherently hard to organize,” such as those with many small employers or heavily contracted, fissured industries.

Not surprisingly, the seven countries with the highest union membership in the OECD—Iceland, Sweden, Finland, Denmark, Norway, Belgium, and Italy—all have sectoral systems. In contrast, the six countries with the lowest union membership in the OECD – United States, Turkey, Colombia, Hungary, Lithuania, and Estonia — all have primarily workplace bargaining.

To be sure, there are some countries with sectoral bargaining and low union membership – most notably France, with 11 percent membership. But France has an unusual system that hinders membership – and is not a model the United States should emulate to boost union density.

In the French system, unions have little need to recruit members. Unions receive most of their funding from the government and employers rather than member dues. Furthermore, union bargaining power does not depend on membership: Unions gain the ability to bargain based on the support they receive in special workplace elections for employee representatives, which means unions do not need many members to negotiate with employers. In addition, French workers — whether they are members or not– receive virtually all rights and benefits of union contracts. This creates a greater free rider problem than in other sectoral systems, as other types of sectoral systems extend only some elements of union contracts to nonmembers—such as wages, but not all benefits or on-the-job protections.

Case studies of union organizing campaigns also indicate that sectoral bargaining can facilitate worker organizing and membership.

For example, Amazon workers in Italy took several strike actions—including a massive systemwide strike in March 2021—in part to get Amazon to fully comply with national sectoral agreements for similar workers. These strikes were critical in helping achieve a historic contract with Amazon. The contract is helpful for union recruitment because it allows unions to communicate with workers through the company’s systems.

Similarly, workers have organized around sectoral issues in the United States — even in sectoral standard setting systems that fall short of sectoral bargaining and thus should create less of a push for collective action. A review of sectoral minimum wages by the Institute for Research on Labor and Employment at U.C. Berkeley found that unions “continued to grow membership in locations covered by the policies in subsequent years.” They found, for example, that union density for large hotels in Santa Monica, California, went from 0 percent to 70 percent under a sectoral minimum wage. In Nevada, home-care workers unionized several employers as an outgrowth of their efforts around a sectoral standards board.

The cases of Amazon workers in Italy and organizing campaigns in several U.S. cities and states show that the structures of sectoral bargaining systems can motivate workers and help them succeed. In these cases, workers organized around sectoral issues, rather than free riding, and the sectoral systems helped workers achieve their goals and motivated further organizing. In these cases, there was also often an interplay between workplace and sectoral organizing, with efforts at both levels supporting the other.

In short, the research shows that sectoral bargaining generally supports high union membership. Sectoral bargaining can encourage worker engagement and make their efforts more likely to succeed, creating a virtuous circle that boosts union membership.

Policies to promote sectoral bargaining in the United States should be advanced together with other reforms because sectoral bargaining best fosters union membership when it operates in conjunction with workplace bargaining as well as grassroots organizing and other pro-union policies such as strong worker rights, union access to workers, and policies that incentivize membership.

#### One alternative approach uses unions as an institutional channel to provide unemployment insurance. Such an approach is arguably insufficient.

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The Ghent system has been perhaps the most important policy to maintain high and stable membership, especially over recent decades as the economy has shifted in ways that make organizing workers especially difficult. While the Ghent system provides a strong incentive for membership, it is not enough to renew unions by itself. Under the Ghent system, unions help deliver unemployment insurance, a benefit that is subsidized by the government, as is done in countries such as Belgium, Denmark, Sweden, and Iceland. This increases membership for a number of reasons: workers have an incentive to join unions to receive the benefit, unions have regular access to workers outside the conflictual workplace, and unions are seen as helping workers and sanctioned by government to do so.55 Research shows that the Ghent system is essential to obtaining very high union density, and countries with the Ghent system, particularly Belgium and Iceland, have been virtually alone in maintaining density over recent years.56 Estimates suggest that the Ghent system boosts union density by around 20 percentage points—or roughly the typical difference in density between Sweden, which has Ghent, and its neighbor Norway, which does not, and much of the difference between Belgium, which has Ghent, and the Netherlands, which does not.57 Further evidence of the value of providing incentives for membership through the Ghent system is that some countries with the system, such as Sweden and Finland, have recently taken steps to make union-provided unemployment insurance more expensive and thus less attractive, which has slightly reduced density. 58

Still, the Ghent system is not a panacea. Even in Ghent countries, the level of union density at a worksite is important in determining whether workers join.59 This strongly suggests that workers need to feel a social connection to their union as well as have a financial incentive to join. In addition, countries with the Ghent system and strong unions also have numerous other policies that support unions. In Belgium, for example, the government provides strong supports for centralized collective bargaining, individual worksites have works councils, and unions have important rights in working with works councils.60 Swedish unions have strong strike rights, rights to information, and the ability to get leave time from their employer, and legislated workplace standards provide the unions flexibility for negotiation.61

#### Workers’ boards are another potential alternative.

David Madland 21, Senior Fellow and Strategic Director of the American Worker Project at the Center for American Progress, author of Hollowed Out, "Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States," ILR Press, an imprint of Cornell University Press, 2021

Most of the remaining third of the labor market would be covered by workers’ boards. These boards may not count as true collective bargaining coverage because the government is involved in the negotiations, but they still collectively set standards. This collective wage-setting process will provide binding minimum standards in sectors and occupations where job quality has historically been low, such as in domestic work, fast food, and retail—and ensure that no company can escape coverage in the new system.

#### Failure to take collectivism seriously undermines labor law’s protection of collective rather than only individual rights. Labor law can reconcile collective with individual interest.

Lisa Rodgers 24, Associate Professor of Law at University of Leicester, Deputy Director of DL LLM Employment Law course, "Relationality and Collective Personhood," Labour Law and the Person: An Agenda for Social Justice, Bristol University Press, 2024, pp. 101-126

This is all very well, but we are still in the realm of the social and the political here. These are arguments that collective action is important socially and politically, and so should be given extra weight if we are to achieve social goals. The problem has always been that this does not give collective action or actors access to the normative, moral weight associated with legal subjectivity. This is the problematic that Lord Wedderburn identified when he suggested that there is ‘little or no knowledge of the dignity that informs collective mutual endeavour in the free association of men and women in society and at work’.100 There is no collectivist morality in the individualist humanity principle. Indeed, a ‘collective’ morality would be viewed as antithetical to liberal beliefs around autonomy. A collective morality suggests that individuals are not free to formulate or pursue their own goals outside of the collective. This runs counter to the ideal of autonomy at the heart of liberalism, which depends on an absence of coercion and on the imposition of individual will. A ‘collective morality’ strikes of totalitarianism which implies the absence of autonomy, reason, and independence among its members:

But within the organisational framework of [totalitarianism], so long as it holds together, the fanaticized members can be reached by neither experience nor argument; identification with the movement and total conformism seem to have destroyed the very capacity for experience, even if it be as extreme as torture or the fear of death.101

It is argued here that it is possible to attach morality to collective action without abandoning a commitment to personal autonomy. That is, autonomy remains an ‘ultimate value’ but that value becomes differently constituted, and with different implications for law. This differential constitution involves recognizing the ‘relationality’ of individual values. The example here will be a reflection on the transformative nature of ‘relational autonomy’ given the centrality of autonomy to thinking about collective rights.102 The argument proceeds that the traditional liberal model which relies on the universality and completeness of autonomy as the ultimate defining characteristic of humanity is deeply flawed. This view of autonomy is exclusionary and serves to reinforce existing power relations by excising social experience from human nature. This social experience goes beyond the recognition of the social situatedness of autonomous practice. Rather, autonomy itself relies on social experience for its own creation, and autonomy is constantly made and remade through this experience. Individual ‘selves’, their identities and their capacities, are not comprehensible in isolation from their relationships.103 On a relational view, the persons whose rights and well-being are at stake are constituted by their relationships such that it is only in the context of those relationships that it is possible to define those capabilities, define and protect their rights, or promote their well-being.104 On this view, the collective is not simply a potential threat to individuals, but it is constitutive of individuals and a source of their autonomy. Thus, the objective (of law) is to find the optimal relation between the individual and the collective, and the forms and scope of collective activity that will foster it.

On this view, relational autonomy is a more ‘human’ version of autonomy and has a greater potential for supporting social justice than traditional autonomy claims. Relational autonomy is more ‘human’ in that it recognizes the empirical reality that autonomy is partial and often incomplete. Individuals can appear to exercise ‘autonomy’ in certain aspects of their life and in some decisions but not in others.105 Workers in employment relationships can be ‘controlled’ or constrained in certain areas of work, while having considerable freedom and discretion in others. Autonomy is also a process and a state of becoming: people must develop and sustain the capacity for finding their own law, and the task is to understand what structures of power, patterns of relationship, and person practices foster that capacity.106 Both of these elements underlie the importance of ‘autonomy’ for social justice. Autonomy implies a process of ‘creative interaction’ because autonomy is a process which is both individually engineered and socially mediated. That creative interaction implies the possibility of not only personal development and empowerment but also social transformation: the possibility of ‘new engagement, breaking or transforming received patterns, giving rise to and acting on one’s own distinctive perceptions, insights and forms of engagement’.107 In autonomy there is the potential for action and disruption which is essential for social justice.

The moral salience of relational autonomy could be used to bolster claims for collective rights. Using the relational autonomy approach might make it easier to push back against the moral ascendancy of ‘freedom of contract’ in freedom of association cases. It could also underscore an expansive interpretation of status classifications for the purpose of individual access to trade union representation in the workplace. The ability to access these constitutive relationships is central for the forming of personal autonomy in the relational sense. There are further possibilities for the relational autonomy approach. This approach could constitute a starting point for a rethinking of the current interaction between contractual doctrine and collective agreements, and open the door for a greater role for trade unions in enforcing contractual terms.108 Most of all, it gives the judiciary access to normative reasons for the support of ‘collectivist’ outcomes through the law without compromising the central commitment to personal autonomy. Indeed, there is the possibility on this approach of a greater coincidence between ‘individualist’ and ‘collectivist’ outcomes for workers.

There is a note of caution to sound here. In the work environment, trade unions can be important vehicles for the construction of personal autonomy in the relational sense. They are, broadly speaking, collectivities of workers who aim to improve the terms and conditions under which workers have to work. However, trade unions have not always been and are not always helpful in fostering relational autonomy among all workers. Unions have been guilty of prioritizing the needs of certain groups or deprioritizing certain member interests on the basis that they are ‘individual’ rather than collective problems. For example, Crain explains that trade unions in the US have tended to accept the judicial division between ‘collective’ economic rights on the one hand and individual rights to be free from discrimination on the other. This has prevented action on key issues that contribute to women’s economic subordination; namely, occupational segregation by sex, associated pay inequalities, and sexual harassment.109 Ultimately the relationality scheme requires that collective organizations also reflect on the ways in which their laws or norms foster personal autonomy in the relational sense.110 It is also cognizant that relationships are not always constructive, but are always constitutive. It remains the case that questions of rights are best analysed in terms of how they structure relationships, because this is more likely to present solutions which come closer to social justice (for workers).

6. Conclusion

Individualism has tended to dominate the intellectual ground where the theorization of legal personhood is concerned. This can be explained on the basis of the easy intellectual link between the values of individualism on the one hand and individual rights on the other. Individualism promotes autonomy, rationality, and independence as its central values, and these are the same values which underlie the liberal legal subject. On the other hand, the values of collectivism are group-based. In terms of labour, collectivism is concerned with group loyalties, and the opportunities of workers to organize together in protection of their occupational (class) interests and against organizational exploitation in a pluralist democracy. Under this scheme, the link between collectivism and collective rights is more difficult.

Fundamentally, there tends to be a scepticism towards the law in the furtherance of collective aims or a belief that true change will only come about through non-legal action. So, while it is clear (to individualists) that individual rights further the aims of individualism, it is not always clear that collective rights further the aims of collectivism.111 Indeed, the aims and commitment of ‘collectivists’ tend to reach beyond the law and towards political solutions (which may then have repercussions for legal regulation):

For labour law this must inevitably mean – like it or not – in conventional terms an era of intense politicisation. Assumptions are no longer freely shared. The game has been moved off the old board and no player can have his bid heard, let alone capture the lead, who is shy about casting his principles to ‘stand the hazard of the die’.112

This tends to mean that collectivists do not consider deeply the nature of personhood. This is considered to be outside of the collectivist domain and/ or of little value in the furtherance of their cause. This is a real problem because it means that collectivist ideals and collective action can be dismissed as less fundamental and/or pressing than individualist concerns. Individualists speak to the fundamental liberal concerns around individual well-being whereas collectivists attempt to subvert individual well-being through the promotion of the group over the individual. This problematic has led some labour lawyers to reassert individualism as the moral foundation not just of individual rights but also of collective rights. For example, Bogg argues that the ‘humanistic principle’ – namely, the furtherance of individual wellbeing – could legitimately form the basis of both individual and collective rights. However, this only serves to reinforce the individualist/collectivist divide. Rather, if there is to be any rapprochement between individualism and collectivism there needs to be a consideration of whether personhood itself has relational or collective elements. It needs to be considered whether legal subjectivity could incorporate ‘relational autonomy’ and whether, in doing so, the aims of labour law and the needs of labour are more completely realized.

### Aff---Mech---Secondary Actions

#### The Taft-Hartley amendments to the NLRA prohibited secondary boycotts.

Alvin Velazquez 25, Associate Professor of Law, Indiana University Maurer School of Law, "The Death of Labor Law and the Rebirth of the Labor Movement," Legal Studies Research Paper Series, Research Paper Number 543, 2025, SSRN

C. The Remaining Challenge of Secondary Boycotts

Even though organized labor could use a potential Supreme Court decision gutting the NLRA to facilitate state-level experimentation bolstered by the NLGA, there are aspects of the NLRA that do not disappear simply because the Court declares that Congress did not properly delegate the ability to regulate labor in commerce to the Board. Most significant is the prohibition of secondary boycotts.258 As defined in Wex, “[s]econdary boycotts refer to boycotting actions taken against an organization or company that does business with another organization with whom the primary dispute exists. Secondary boycotts mainly arise in labor disputes where a labor organization or other entity unsuccessfully boycotts an employer, and in order to increase pressure, the groups pressure suppliers or buyers to discontinue business with the employer.”259

Historically, secondary boycotts were extremely effective tools for organized labor to obtain major concessions from employers at the bargaining table because the secondary would prevail over the primary entity with a labor dispute to settle the conflict.260 Congress enacted the ban as part of the Taft-Hartley amendments to the Act in 1947.261 Not only did Congress prescribe conducting or participating in a secondary boycott, but also inciting it.262 As discussed above, the Board is the only entity under the Wagner Act to bring forth complaints to prevent unfair labor practices and is deeply intertwined into the NLRA. That changed in 1959 when Congress granted damages and injunctive relief to anyone injured by a secondary boycott with the ability to bring a direct claim in federal court.263 Congress passed the Taft-Hartley amendments to the Act as a check on the power that unions had acquired, including through use of the secondary boycott. Upon Congressional passage of those amendments, labor scholars criticized the ban on secondary boycotts as being an improper infringement of speech and in violation of the First Amendment.264

That Congress wrested part of labor regulation from the Board and placed it with private parties and the federal courts in a reversal of policy has a major implication for this Article.265 As much leeway as the NLGA gives unions to engage in peaceful actions free from the threat of injunction, the NLGA’s provisions do not allow labor organizations to escape financial liability for engaging in secondary activities even if the Court eliminated the Act.266 States, for example, may pass their own prohibitions against secondary boycotts in the absence of a federal act prohibiting them, and several states in fact already have such prohibitions. The Court could conceivably hold that private actors could bring a secondary boycott action against a union. Even though the justification for the existence of the secondary boycott as a check on labor power post elimination of the NLRA, a court or a state legislature could continue endorsing its viability as a legal claim. Unions could consider bringing a renewed first amendment challenges to overturn the prohibition on secondary boycotts. Nonetheless, until those legal challenges are resolved union will have to manage their activities and mitigate the risk of becoming bankrupt from intentional tort claims that are non-dischargeable in bankruptcy, such as secondary boycotts.267

Some objectors to this proposal will argue that the secondary boycott prohibition presents a problem for organized labor in a post-NLRA world.268 That is true, but it was also problem for the pre-NLRA world. The only way to fix that problem is through congressional action as the PRO Act bill does.269 The benefits of the proposal set forth in this Article still outweigh the risks, and the next Part will explain why.

#### Permitting secondary strikes is necessary for labor revival.

Joe Burns 10, veteran union negotiator and labor lawyer, author of Strike Back and Reviving the Strike, "Secondary Strikes Are Primary to Labor's Revival," Labor Notes, 11/04/2010, https://labornotes.org/2010/11/secondary-strikes-are-primary-labor%E2%80%99s-revival#:~:text=In%20contrast%2C%20labor%E2%80%99s%20traditional%20forms,wide%20strikes

Solidarity is the heart and soul of unionism—the only force capable of confronting power and privilege in society. To revive unionism, we must recover labor’s long-lost tools of workplace-based solidarity.

Today, union activists join each other’s picket lines and hold fundraisers for striking workers. While important, these acts of solidarity are largely conducted away from the workplace.

In contrast, labor’s traditional forms of workplace-based solidarity allowed workers to join across employers and even industries to confront bosses. Such tactics included secondary strikes and industry-wide strikes.

What’s a secondary strike? Say workers at a small auto parts plant in Indiana walked out. If they enlisted the support of the Teamsters to refuse to transport the parts, the United Auto Workers to refuse to assemble a car with the parts, and employees of car dealerships to refuse to sell the cars, their power would be multiplied. The original strike would be a primary strike and the others would all be secondary strikes.

In the past, solidarity tactics allowed workers to hit employers at multiple points in the production and distribution chain. By impeding the flow of supplies into a plant, unions pressured the employer to settle a strike or recognize the union. Similarly, secondary boycotts pressured retailers to stop selling struck goods.

Solidarity tactics expanded the site of the conflict, allowing workers to confront employers as a class. Many of the strikes we know from history, like the 1912 Lawrence Bread and Roses textile workers’ strike or the huge postwar steel strikes, are great and historic precisely because they involved tens of thousands of workers across entire industries.

More recently, the UPS strike of 1997 involved 200,000 Teamster drivers and loaders and captured the imagination of union and non-union alike.

OUTLAWING SOLIDARITY

From the earliest days of unions, workers understood the need to unite with others in their industry to seek common standards. Otherwise, workers winning wage increases at one company would be undercut by other companies that failed to match the raises.

Thus in the 1940s through the 1970s, unions negotiated industry-wide or pattern agreements, at times covering hundreds of thousands of workers. Along with this broad scope of bargaining came major confrontations between workers and employers.

But in the 1980s, in the face of a deep recession and a legal system hostile to solidarity, and with unions failing to mount effective strikes, the patterns and therefore union standards began to crumble. As this publication argued earlier this year, “After a 30-year employer onslaught, national patterns have been largely devastated or have become top-down conduits for concessions.”

Today, the most powerful forms of solidarity are outlawed. Secondary strikes and workers’ refusal to handle goods from struck plants were banned by the Taft-Hartley Act in 1947. The Landrum-Griffin Act in 1959 closed a loophole unions had used in the 1950s, in which the union would negotiate “hot cargo clauses” where the employer agreed not to use struck goods.

At a deeper level, modern labor law forces unions to bargain with individual employers rather than establish standards on an industry basis. Over the decades since the passage of the National Labor Relations Act in 1935, the Supreme Court tightened the noose on industry-wide tactics.

The court allowed employers to unilaterally opt out of multi-employer bargaining and made it an unfair labor practice for a union to insist on such bargaining. So by the 1980s, employers wishing to break free from pattern agreements had the law on their side.

To be clear, the downfall of solidarity cannot be attributed solely to legal factors. Unions willingly agreed to no-strike clauses. Over the years, many focused on just the needs of their own members, failing to embrace a social unionism that looked out for the interests of all workers. In the 1980s and afterwards, unions often failed to defend their pattern agreements, allowing special deals for particular “troubled” employers until the pattern was no more.

And union officials all too often squashed rank-and-file attempts to join together across bargaining units, even at the same employer. So, for example, striking meatpackers at Hormel in the mid-1980s were attacked by the United Food and Commercial Workers International for attempting to expand picket lines beyond the Austin, Minnesota, plant.

GOING AFTER THE BIG GUYS

The best current demonstration of the power of secondary activity comes from farmworkers. The Coalition of Immokalee Workers in Florida forced Taco Bell and other huge corporations to increase pay for tomato pickers in their supply chains.

Rather than target the subcontracting growers, CIW pressured the major corporations that purchase the farm produce—companies whose financial interest in the dispute is relatively indirect.

CIW’s work shows the power of an industry-wide approach. Targeting individual growers would not have succeeded, because a grower paying higher wages would not have been able to get Taco Bell to buy its products.

CIW mirrored SEIU’s successful Justice for Janitors campaigns of the 1990s, which made life difficult for all levels of the contracting chain, including the end-users of janitorial services as well as workers’ immediate employers, and sought industry-wide agreements in a city.

For almost 30 years, most union activists have tried to ignore the fact that restrictions on solidarity hamstring our movement. We’ve been told that organizing new members and conducting corporate campaigns can revive the labor movement. It’s not working.

REDISCOVERING POWER

Last month, rank-and-file longshore workers provided a rare example of workplace-based solidarity in action. Fresh Del Monte Produce transferred work from a union pier in Philadelphia to a non-union facility, threatening 300 longshore jobs.

To spread their fight to a much bigger site, rank-and-file workers from Philadelphia set up picket lines at the major New York/New Jersey ports. Workers there honored the picket lines for two days—despite an injunction from a federal judge and the opposition of their international union.

After two days, Del Monte promised to negotiate and workers pulled the picket lines. Workers rediscovered a real sense of collective power, but anemic follow-through from the International means the Philadelphia local is looking at a long fight to win back their work.

Still, workplace-based solidarity and expanding the dispute were crucial. The Philly workers pulled their natural allies, other longshore workers concerned about non-union ports, into the dispute. They made other corporations—all those trying to ship goods into New York or New Jersey—feel pain as well, by tying up shipping for two days.

Longshore workers occupy a strategic spot in the U.S. economy. Their struggle illustrates why workplace-based solidarity is outlawed—precisely because it is so effective.

Reviving solidarity will not be easy. Labor law forbids it. It goes against a union culture based on bargaining with individual employers. Reviving solidarity will require new ways of thinking and, perhaps, new forms of workers organization.

But the labor movement has little choice. As AFL-CIO President Richard Trumka noted in the early 1990s, unions need “their only true weapon—the right to strike. Without that weapon, organized labor in America will soon cease to exist.”

#### Neg teams will argue that secondary strike undermines labor peace.

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In today’s politics, agreement is a rare beast. So it’s notable when it shows up. And recently, a budding consensus has emerged over labor policy. On the left and right, policymakers have converged on the idea that labor law has failed. These policymakers say that even though labor unions enjoy historic levels of popularity, they represent a historically small percentage of workers. So clearly, union organizing is too hard. The law throws up too many roadblocks between people’s desire for a union and their actually getting one. And that means labor law needs to change.

But this line of thinking misses labor law’s point. Yes, labor law does promote collective bargaining, and thus unions. But it promotes those things only as a means to an end. Its lodestar has never been union membership, but rather labor peace. And measured by that standard, it has been wildly successful: it has given us the most peaceful labor market in living memory. So before rushing to change it, policymakers should stop to consider how, through a century of trial and error, labor law finally achieved its original goal.

Labor Peace and the Wagner Act

At its core, labor law is about strikes. It was born in the early 20th century, when labor relations were much more tumultuous than they are today. The period had seen a rash of widespread and often violent work stoppages, many of which spilled over state borders. For example, in 1886, the Pullman railroad strike shut down rail traffic across large swaths of the country. Striking workers clashed with Pinkerton strike breakers and even federal troops, resulting in millions of dollars in property damage and more than thirty deaths. Similar strikes hit the coal industry in 1902, the steel industry in 1919, the railroad industry (again) in 1922, and the textile industry in 1934. Labor disputes were common, widespread, and economically devastating.

That kind of strife loomed in the minds of lawmakers when they passed the 1935 Wagner Act. The Wager Act was justified as a way to protect interstate commerce. It aimed to keep the channels of commerce open by preventing industrial conflict. And it proposed to do that mainly by promoting collective bargaining. Its theory was that industrial strife stemmed from two sources: employee dissatisfaction and employer intransigence. Employees suffered from low wages, poor working conditions, and unresponsive managers. Worse, they had no peaceful way to express their discontent. If they wanted their employers to listen, they had few choices but to walk off the job. The Wagner Act aimed to give them another option. It gave them a legal right to designate a bargaining agent—i.e., to join a union. It then required the employer to bargain with that union. And by forcing the parties to bargain, it aimed to funnel disputes into more peaceful channels.

To be sure, lawmakers didn’t think bargaining would solve all disputes. The Wagner Act didn’t require parties to agree on any particular term—or to agree at all. It only required them to bargain in good faith. And it recognized, at least tacitly, that even good-faith bargaining would sometimes fail. So besides giving employees a right to unionize, it also gave them the right to strike. That right was new: until then, many strikes had been illegal under state and even federal law. But still, lawmakers thought that legal protection wouldn’t necessarily lead to more strife. Strikes would be a backstop, rather than a replacement, for peaceful negotiation.

Judged on those terms, the Wagner Act failed. On one hand, the law did boost union membership: in the five years after it was passed, union density more than doubled, rising from 8.5% to 18.2%. But on the other hand, it didn’t dawn a new era of labor peace. To the contrary, it triggered a strike wave. In 1933, there were 753 reported strikes involving 297,000 workers. Over the next six years, those figures rose to an average of 2,541 strikes involving about 1.18 million workers. The next five years saw even more surges, rising to an average of 3,514 strikes involving 1.5 million workers. And in 1946, nearly one out of every ten workers walked off the job.

The causes of these strikes were complex. Some were caused by pent-up demands. Union leaders had put off calls for wage and benefit increases during World War II, but with the war winding down, they were no longer willing to wait. At the same time, millions of American soldiers were being discharged and returning to work. This surge in available workers scrambled the labor market. Tensions were high, and some strikes were perhaps inevitable.

Still, greater union densities almost surely contributed to the problem. By 1946, 34.5% of nonagricultural workers belonged to a union. And those unions were key to organizing strikes. Indeed, many strikes were possible only with sophisticated coordination. Some were “sympathy” strikes, called by one union to support the demands of another. Others were “jurisdictional” disputes: fights between two or more unions over a single group of workers. And still others were secondary boycotts: efforts to exert maximum pressure on a single employer by coordinating boycotts up and down the supply chain. All of these tactics spread labor disputes beyond the immediate employer-union fight. They could shut down not just one employer, or even one group of employers, but whole economic segments. And standing in the center of the spreading chaos was a growing and powerful labor movement.

A New Strategy: The Taft-Hartley Act

This chaos sparked a political backlash. In 1946, Republicans campaigned heavily against labor unions, riding the slogan, “Had enough?” And as it turned out, many Americans had. Voters handed the GOP a 55-seat gain in the House and its first majority since 1930. Republicans then leveraged their newfound power to push through labor-law reform: the 1947 Taft-Hartley Act.

Taft-Hartley reshaped labor law almost entirely to unions’ detriment. To start, it banned “union shop” agreements, which made union membership a condition of employment. It also allowed states to pass “right to work” laws, which gave employees the right to opt out of union representation. And maybe most important, it banned some of unions’ most powerful economic weapons, including certain kinds of secondary boycotts.

Combined, these changes helped trigger a decades-long decline in union membership. Membership peaked in 1952, when unions represented about 35% of nonagricultural workers. (Strikes also peaked that year, with 470 major work stoppages involving 2.7 million workers.) But from there, membership fell steadily. By the early 1980s, union density had fallen to about 21%. By the 1990s, it had plunged into the teens. And by the 2020s, it hit just 10%, less than one third of its height.

Even that number doesn’t tell the full story. The decline in overall union membership was offset by increases in public sector union membership, which operates under a different legal structure. By contrast, in the private sector, where Taft-Hartley had its biggest impact, union membership rates fell to six percent. So today, unions represent a smaller slice of the private-sector workforce than they did when the Wagner Act was passed.

But at the same time, labor markets steadily became more peaceful. In 1960, there were 270 major work stoppages. By 1980, that number fell to 187. Ten years later, there were only 44 work stoppages. That number fell to 39 in 2000 and 11 in 2010. By 2020, there were only 8 major work stoppages—less than two percent of the 1952 peak. So just as unions started their long decline, so did industrial strife. The two dried up in tandem.

Labor Peace without Labor Unions?

Today, unions bemoan Taft-Hartley’s effects on organizing. They argue that right-to-work laws effectively legalize “free riding.” They also lament that Taft-Hartley allowed employers to campaign vocally against unionization. And they mourn the loss some of their best economic weapons. They blame these changes for declining unionization and reduced rates of collective bargaining. In short, they say, Taft-Hartley broke labor unions.

To be sure, Taft-Hartley probably caused some of the decline. While correlation is not causation, it’s hard to ignore the temporal link. Unions started disappearing shortly after the law was passed, and its reforms had the predictable effect of slowing union organizing. But by the same token, it’s just as hard to ignore the link between declining union densities and work stoppages. The story of the Wagner Act was rising unionism alongside surging industrial strife. And the story of the Taft-Hartley Act has been a decline in both.

Therein lies the irony. The Wagner Act was passed to promote labor peace. It aimed to keep commerce flowing by promoting collective bargaining, and thus unionism. Taft-Hartley reversed one part of that policy: it helped make unionism, and thus collective bargaining, less common. But by doing so, it finally achieved labor law’s original goal. The labor market today is more peaceful than at any time in the last century. And that peace owes in large part to the relative scarcity of unions.

That lesson is worth keeping in mind in contemporary debates. Today, voices on both sides of the aisle laud the benefits of unionism. They speak of unions as vehicles of workplace democracy—a productive way for workers to express their collective discontent. But unions have not always funneled discontent through peaceful channels: when given too much power, they have disrupted the avenues of commerce. And while that kind of disruption may seem remote today, its remoteness is a credit to labor law’s success. As Ruth Bader Ginsburg once wrote, albeit in a different context, discarding labor law because we have labor peace would be like “throwing away your umbrella in a rainstorm because you are not getting wet.”

### Neg---DA---Competitiveness / Economy

#### Union power hurts corporate competitiveness. This ultimately harms workers while decreasing economic vitality.

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The United States Department of Labor released a report last week that chronicled the continued decline of the American labor movement in 2019. In our boom economy, more than 2.1 million new jobs were added to the market last year, but the number of unionized workers fell by 170,000. The percentage of union workers, both public and private, fell from 10.5 percent to 10.3 percent, or roughly 14.6 million workers out of 141.7 million. The percentage of unionized workers dipped even lower in the private sector, from about 20 percent in 1983 to 6.2 percent of workers in 2019, a far cry from the 35 percent union membership high mark last seen in 1954. Decline was lower in the public sector, where just over one-third of workers are union members, as a modest increase in state government employees partially offset somewhat larger declines in federal and local unionized workers.

This continued trend has elicited howls of protest from union supporters who, of course, want to see an increase in union membership. It has also led several Democratic presidential candidates to make calls to reconfigure labor law. Bernie Sanders wants to double union membership and give federal workers the right to strike, as well as ban at-will contracts of employment, so that any dismissal could be subject to litigation under a “for cause” standard. Not to be outdone, Elizabeth Warren wants to make it illegal for firms to hire permanent replacements for striking workers. They are joined by Pete Buttigieg in demanding a change in federal labor law so that states may no longer pass right-to-work laws that insulate workers from the requirement to pay union dues in unionized firms. All of these new devices are proven job killers.

The arguments in favor of unions are also coming from some unexpected sources in academia, where a conservative case has been put forward on the ground that an increase in union membership is needed to combat job insecurity and economic inequality.

All of these pro-union critiques miss the basic point that the decline of union power is good news, not bad. That conclusion is driven not by some insidious effort to stifle the welfare of workers, but by the simple and profound point that the greatest protection for workers lies in a competitive economy that opens up more doors than it closes. The only way to achieve that result is by slashing the various restrictions that prevent job formation, as Justin Haskins of the Heartland Institute notes in a recent article at The Hill. The central economic insight is that jobs get created only when there is the prospect of gains from trade. Those gains in turn are maximized by cutting the multitude of regulations and taxes that do nothing more than shrink overall wealth by directing social resources to less productive ends.

President Trump is no master of transaction-cost economics, and he has erred in using tariffs as an impediment to foreign trade. But give the devil his due, for on the domestic front he has repealed more regulations than he has imposed and lowered overall tax rates, especially at the corporate level.

During the 2016 election, President Obama chided Trump by saying: “He just says, ‘Well, I’m going to negotiate a better deal.’ Well, what, how exactly are you going to negotiate that? What magic wand do you have? And usually the answer is, he doesn’t have an answer.” This snarky remark reveals Obama’s own economic blindness. The gains in question don’t come from any “negotiations.” And they don’t require any “magic wand.” They come from unilateral government decisions that allow for private parties on both sides of a transaction to negotiate better deals for themselves.

True to standard classical liberal principles, the market has responded to lower transaction costs with improvements that Obama, as President, could only have dreamed of creating. Overall job growth was 5.53 million jobs between 2007 and 2017. But new job creation has exceeded 7 million in the first three years of the Trump administration. In addition, the sharp decline in manufacturing jobs that started in the late Clinton years and which continued throughout the Obama years has also been reversed. Over 480,000 manufacturing jobs have been added to the economy since Trump took office, compared to the 300,000 manufacturing jobs lost in the eight years under Obama.

Happily, the distribution of these jobs has been widespread, causing drops in Hispanic and African unemployment levels to 3.9 percent and 5.5. percent respectively, both new lows. Basic neoclassical theory predicts that regulatory burdens hit lowest paid workers the hardest. Hence, the removal of those burdens gives added pop to their opportunities and to the economy at large.

Trump’s domestic labor performance is even better than these numbers suggest. Too many state-level initiatives hurt employment, like raising the minimum wage or imposing foolish legislation such as California’s Assembly Bill 5, which takes aim at the gig economy. The surest way to improve the situation is to repeal these regulations en masse. But progressive prescriptions to strengthen unions cut in exactly the wrong direction.

Unions are monopoly institutions that raise wages through collective bargaining, not productivity improvements. The ensuing higher labor costs, higher costs of negotiating collective bargaining agreements, and higher labor market uncertainty all undercut the gains to union workers just as they magnify losses to nonunion employers, as well as to the shareholders, suppliers, and customers of these unionized firms. They also increase the risk of market disruption from strikes, lockouts, or firm bankruptcies whenever unions or employers overplay their hands in negotiation. These net losses in capital values reduce the pension fund values of unionized and nonunionized workers alike.

Employers are right to oppose unionization by any means within the law, because any gains for union workers come at the expense of everyone else. Of course, the best way for employers to proceed would be to seek efficiency gains by encouraging employee input into workplace operations—firms are quite willing to pay for good suggestions that lower cost or raise output. But such direct communications between workers and management are blocked by Section 8(a)(2) the National Labor Relations Act (NLRA), which mandates strict separation between workers and firms. This lowers overall productivity and often prevents entry-level employees from rising through the ranks.

So what then could justify this inefficient provision? One common argument is that unions help reduce the level of income inequality by offering union members a high living wage, as seen in the golden age of the 1950s. But that argument misfires on several fronts. Those high union wages could not survive in the face of foreign competition or new nonunionized firms. The only way a union can provide gains for its members is to extract some fraction of the profits that firms enjoy when they hold monopoly positions.

When tariff barriers are lowered and domestic markets are deregulated, as with the airlines and telecommunications industries, the size of union gains go down. Thus the sharp decline in union membership from 35 percent in both 1945 and 1954 to about 15 percent in 1985 led to no substantial increase in the fraction of wealth earned by the top 10 percent of the economy during that period. However, the income share of the top ten percent rose to about 40 percent over the next 15 years as union membership fell to below 10 percent by 2000.

But don’t be fooled—that 5 percent change in union membership cannot drive widespread inequality for the entire population, which is also affected by a rise in the knowledge economy as well as a general aging of the population. The far more powerful distributive effects are likely to be those from nonunion workers whose job prospects within a given firm have been compromised by higher wages to union workers.

It is even less clear that the proposals of progressives like Sanders, Warren, and Buttigieg to revamp the labor rules would reverse the decline of unions. Not only is the American labor market more competitive, but the work place is no longer dominated by large industrial assembly lines where workers remain in their same position for years. Today, workforces are far more heterogeneous and labor turnover is far higher. It is therefore much more difficult for a union to organize a common front among workers with divergent interests.

Employers, too, have become much more adept at resisting unionization in ways that no set of labor laws can capture. It is no accident that plants are built in states like Tennessee and Mississippi, and that facilities are designed in ways to make it more difficult to picket or shut down. None of these defensive maneuvers would be necessary if, as I have long advocated, firms could post notices announcing that they will not hire union members, as they could do before the passage of the NLRA.

Such changes to further weaken unions won’t happen all at once. But turning the clock back to increase union power is not the answer. It will only cripple the very workers whom those actions are intended to help.

#### Others point out that union-induced inflation can subvert even progressive policy priorities like addressing homelessness.

California YIMBY 24, "When Wages Prevail: Assessing the Cost of Construction," California YIMBY, 2024, https://cayimby.org/blog/when-wages-prevail-assessing-the-cost-of-construction/

In California, legislation to streamline housing production and to fund the construction of deed-restricted affordable housing often requires builders to pay “prevailing wages” to the construction workers who work on the resulting project. These requirements are based on the idea that streamlined and affordable housing should create well-paying construction jobs for union workers.

The tradeoff: paying higher wages can often raise construction costs. However, determining how much higher construction costs are with prevailing wage requirements is difficult, because almost all real estate development financial data is private.

In Low Income Housing Tax Credit Construction Costs: An Analysis of Prevailing Wages, the UC Berkeley Terner Center leverages public data from Low Income Housing Tax Credit (LIHTC) applications to quantify the construction cost difference between prevailing wage and non-prevailing wage subsidized housing projects.

Key Takeaways

Per-unit construction costs for new-construction projects that paid prevailing wages are approximately $94,000 higher than for projects that did not.

Per-unit costs for rehabilitation projects that pay prevailing wages are about $48,000 higher than for projects that did not.

Leaving out high- and low-cost projects (like those in the Bay Area and in rural parts of the state), the prevailing wage price premium averages about $83,000 per unit.

The Low Income Housing Tax Credit is the largest federal funding source for deed-restricted affordable housing, awarding $107 million to California projects in 2023. Funding is highly competitive; and the application requires nonprofit developers to submit detailed financial information about their projects, including expected land, development, and construction costs.

The LIHTC application data, which is shared publicly, is useful because it includes a wide variety of project types: rehabilitation and new construction; buildings in urban and rural areas; projects for seniors, families, and special needs populations; and, critically, projects that pay prevailing wages, and projects that don’t.

The researchers used application data from 859 projects that built or rehabilitated 75,400 subsidized homes between 2020 and 2023. Eighty percent of the applications were for new construction; and 53 percent of the projects paid prevailing wages.

To account for differences between different types of projects in different regions, and isolate the effect of wage requirements, the researchers conducted linear regressions to make “apples to apples” comparisons of like projects.

They found that prevailing wage requirements increased construction costs by on average $94,000 per home for new construction and $48,000 per home for rehabilitation. Leaving out highest and lowest-cost projects, they found that prevailing wages raised construction costs by about $83,000 per home.

LIHTC application data is not perfect: these applications include expected construction costs, rather than actual costs; and the researchers encourage future analysis using actual construction costs.

#### More specifically, some view worker control over automation as a downside that interferes with necessary economic modernization.

Kevin O'Marah 25, Co-Founder at Zero100, former Director at Amazon, former Chief Content Officer at SCM World, former Senior Research Fellow at Stanford Global Supply Chain Management Forum, former Group Vice President at Gartner, MBA from Stanford University Graduate School of Business, MSc from University of Oxford, "Unions Are Fighting a Losing Battle with Automation," The Signal, 1/14/2025, https://zero100.com/unions-are-fighting-a-losing-battle-with-automation/

Last week, the International Longshoremen’s Association (ILA) reached an agreement with port operators to avert another strike at US East Coast ports. The central issue was automation eliminating dockworker jobs. For ILA members who had already secured a strike-driven 60% pay increase back in the fall, it’s a clear win. But for the US economy, it may prove to be a pyrrhic victory.

Extortion Works… For a While

According to a joint statement issued by the ILA and United States Maritime Alliance, the agreement is a win-win that “protects current ILA jobs and establishes a framework for implementing technologies that will create more jobs while modernizing East and Gulf coast ports.” By striking, first in the middle of peak import season and then again just weeks before Inauguration Day, the ILA has managed to lock in a future where many current dockworkers will make $200,000 or more per year while also adding headcount.

Both President Joe Biden and President-elect Donald Trump saw political advantage in supporting the strikers. Employers, meanwhile, worried about losing volume to West Coast ports in the short term and shippers’ trust in the long term, also caved.

Give the union credit: It knows how to play hardball. Unfortunately, the US is still miles behind Europe, Asia, and the Middle East in automating port operations, and this agreement only adds to the cost and complexity of trying to catch up with Singapore, Rotterdam, and Dubai.

How, in a time of rising tariffs, can shippers resist strategies that reduce dependence on US ports for inbound supply or outbound market access? Industrial policies and technology are already driving supply chain localization. This new ILA-USMA agreement could see import-export volumes falling faster than lagging US port automation can catch up.

Be Careful What You Wish For: A Teamsters Tale

Back in July 2023, UPS announced a deal with the Teamsters union that would pay up to $170,000 annual compensation for drivers. Management agreed to pony up for workers with a stranglehold on their ability to serve customers while hoping to make up for these higher costs with labor-saving automation in their network of warehouses. In the 18 months since that deal was signed, the company has eliminated thousands of jobs across the US, including many in warehouses in Oklahoma, Colorado, Connecticut, and Maryland, among others.

The most recent announcement in Portland, Oregon is a planned temporary shutdown meant to allow the installation of new automation. Union officials in the region didn’t respond to questions from The Oregonian on the story, but a Teamsters national vice president in Texas did comment, saying, “Automation is a real thing. There’s only so much we can do to stop progress.”

He went on to say that sorting machines need care and maintenance and the union had the opportunity to push for a contract guaranteeing long-time employees the chance to train for those roles.

Sadly, the win for drivers is coming not only at the expense of warehouse workers but also UPS shareholders, who have seen stock drop by 34% while the S&P 500 has risen 27% between July 2023 and today. Most of this loss in enterprise value is due to falling parcel volumes, but the rich deal struck with drivers no doubt reduces management’s choices when dealing with a tightly competitive market.

Automation and Productivity Beat Job Preservation

The friction between unions and automation arises whenever technology is intended to improve productivity, which, at least initially, means fewer people are needed for the same output. As political entities, unions resist anything that makes their membership decline, even if it will make everyone better off.

Old-school job demarcation rules successfully preserved jobs through the 1970s, with total union membership in the US peaking at 21 million in 1979. Unfortunately, this peak coincided with high inflation, high unemployment, and interest rates that stalled growth. In the UK, a similar but even darker version of this dynamic is still remembered as the "Winter of Discontent," when strikes crippled the country.

The bottom line is that automation, which increases productivity, expands the economy. Unions may grab a bigger slice of the pie for their members, but unless the pie keeps growing, it comes at the expense of others.

#### Others view it as an opportunity to negotiate mutually beneficial automation outcomes, but argue that this requires union power.

Adi Gaskell 24, Director at The Horizons Tracker, Innovation researcher and writer, Advisor to European Institute of Innovation & Technology, Columnist for Forbes, "Automation May Reduce Unionized Work, And That's Bad For Everyone," 11/27/2024, https://adigaskell.org/2024/11/27/automation-may-reduce-unionized-work-and-thats-bad-for-everyone/

A defining characteristic of labor markets around the world has been the decline in trade union membership. Despite things like collective bargaining being fundamental to the social model in many countries, union membership has been in gradual decline throughout the world.

A recent study from Bocconi University highlights how unionization rates have declined from around 30% to barely over 10% in the last few decades. The declining membership undermines their attempts at collective bargaining, which matters when it comes to ensuring automation works for all concerned.

Declining membership

The researchers analyzed union membership across a number of European countries over a 20-year period. The results show a clear downward trend, with Italy’s union membership rates approaching those of less unionized countries like France. There are big differences between regions and sectors: union membership ranges from 25% in Trentino-Alto Adige to 7% in Liguria, and from 27% in public education to 6% among domestic workers.

So, what’s causing this steady decline? The researchers argue that the twin factors of automation and globalization have had a big impact on employment in areas, such as manufacturing, where union membership has historically been stronger.

“Besides, entire sectors that have developed thanks to technology, think of gig economy activities, did not exist until a few years ago, and as a result unions are practically absent,” the researchers explain.

They argue that technology is increasingly important in the production process, and this is resulting in a decline in the importance of labor. So, with fewer of the workers that remain in a union, the ability of unions to protect the lot of workers diminishes.

“A strong union is important to protect social cohesion in the face of structural changes in society,” they continue. “Our data tell us that the unionization rate is falling: if this trend is not reversed, Italy risks the lowest levels of union participation in Europe.”

Why unions matter

The importance of unions when it comes to automation was reaffirmed by a second study, from the London School of Economics, which explored the role they can play when companies invest in technology and automation.

The researcher examined the link between the rate of cooperative institutions and the rate of roboticization in industry across 25 OECD countries. Cooperative institutions, such as works councils and sector organizations, aim to balance collective gain and fair distribution. For example, they help with bargaining between capital and labor.

One might think that more of these organizations would slow down automation in industry. However, the study found that they actually promote more industrial automation while also ensuring fairer outcomes for workers.

Getting win-win outcomes

The author says that rates of robot adoption across Europe varies considerably, despite similar levels of economic advancement. In the likes of Germany, for instance, adoption is much higher than in the likes of the UK.

Traditionally, this difference has been explained away by the role institutions, such as trade unions, play in managing industrial relations. It’s a narrative in which the interests of labor and capital are opposed, with unions therefore slowing the pace of automation. An alternative narrative is that high rates of unionization increase the cost of labor and encourage firms to invest in technology instead.

The study found that neither of these narratives is entirely the case, and that high rates of unionization can help to ensure that investments in automation are done in a way that benefits managers and employees alike. This was because the interests of employers and employees were more complementary than previously thought.

Investing in skills

Strong unionization also has benefits in terms of reflecting a willingness of employees to invest time and energy in retraining, which can help them maximize the potential of the new technology.

Previous research has highlighted how company investment in automation tends to result in more, rather than less, employment as those firms grow and therefore increase headcount accordingly. This nonetheless requires a period of transition, however, and this is where unions come into their own.

They can help to ensure that the costs and benefits of automation are spread more equitably between employers and employees. For instance, firms with work councils have often provided employees with guarantees that no redundancies will result from the investment in automation, which in turn makes employees more interested in the benefits that accrue from automation in terms of productivity-linked wage rises.

Sharing the gains

The study suggests that workers in cooperative environments are more likely to share new technologies with management. This cooperation leads to better training and adaptation to new technology, ensuring that workers can effectively use it, which maximizes the firm’s return on investment.

These benefits also appear at a macro level, where collaborative policies help automation thrive. This indicates that automation can benefit both employers and employees when cooperative structures are in place.

This contrasts with more liberal economies, like the U.K. and U.S., where increased automation is often linked to a declining share of economic gains for workers.

Many fears about automation and robotics center on job disruption. The research challenges the idea that conflict is inevitable and shows that automation can benefit workers as well as owners.

#### Aff teams will argue in response that union power enables supply side abundance.

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Ezra Klein argues in his recent op-ed (and at greater length in his compelling new book with Derek Thompson) that a central problem facing Democrats is the crisis of scarcity. According to Klein, the places where Democrats govern are unaffordable because rules and political cultures constrain production and provision of housing, public transit, childcare, clean energy, and other valuable goods and services—and ultimately hobble effective government. He contends we can solve the pressing problems facing Americans—and offer a retort to Elon Musk and Donald Trump—with a new policy and politics of “abundance.” Abundance, as Klein describes it, is a political movement of supply: Instead of focusing on the (re)distribution of scarce existing resources, politicians should focus on expanding supply.

We agree that abundance is a worthy goal for the progressive movement, as is the project of reforming government to ensure it is delivering goods quickly and effectively.

But in order to be effective, abundance policy must benefit and build power for working- and middle-class Americans rather than enriching and empowering concentrated economic interests and generating a populist backlash that undermines democracy.

In particular, as two scholars of labor and American political economy, we seek to highlight the role that unions—workers’ best instrument for building collective economic and political voice—can play in the abundance movement.

At present, proponents of abundance are divided in their views of organized labor. Klein acknowledges that unions are not necessarily opposed to an abundance agenda. For example, he has stressed that Pennsylvania Governor Josh Shapiro’s remarkably rapid rebuilding of I-95 used union labor, noting “[t]here’s nothing about unions doing projects that means they can’t be done fast.” However, a number of other abundance proponents have suggested that unions and labor-related policies are obstacles to greater production, construction, and robust state capacity. These critics argue that unions raise the costs of housing by insisting on the use of union labor for construction; oppose transitions to clean energy because of their representation of unionized workers in fossil fuel industries; and delay government action with bureaucratic processes that make it hard to hire and fire workers at will.

What is missing from the abundance debates thus far is a recognition of the positive role that unions can play as a partner in achieving abundance, as well as a reckoning with the trade-offs involved in weaking labor power in the pursuit of abundance.

Organized labor can advance abundance in several ways.

We draw attention to three here.

First, unions can facilitate faster construction on large-scale projects through the provision of skilled labor throughout a project. This function is critical as labor shortages are one important source of delays in construction. An evaluation by the US Department of Labor found that the use of unionized labor helped to prevent shortages of skilled construction labor for New York City schools. More recently, during the labor shortages throughout the COVID-19 pandemic, unionized contractors reported fewer issues in filling open specialized craft positions than nonunion contractors.

Second, unions can help create the political will for abundance by forming coalitions to lobby the government to expand production or construction. In states across the country, building trade unions are helping to train their workers in construction for the clean energy transition, such as building and assembling wind turbines. In turn, those unions are joining with climate advocates and clean energy firms to expand state targets for clean energy production. Fostering more of these joint coalitions could help unlock further production in other sectors, such as health care, childcare, or public transportation.

Third, engaging unions—and other civic organizations—in the process of crafting abundance policy can help ensure the efficacy and the democratic legitimacy of the projects. That is, when workers are at the table, the policy outputs are more likely to serve the needs of working people and to have political buy-in of diverse communities. One way to provide workers a seat at the table is through “tripartite” administrative structures that bring representatives of workers, employers, and the public together on councils or committees that help set policy and then implement it.

The tradition of tripartism in the United States is weaker than in other rich democracies, especially in Northern Europe. But where we have tried tripartism in this country, it has often produced better outcomes for all. During World War II, for example, the United States engaged in wartime tripartite bargaining between unions, wartime supply manufacturers, and government through the National War Labor Board. The deals struck between the actors ensured continuous wartime production around the clock with access to skilled labor, and enabled more labor peace than would have been present without the deals. They also buoyed union membership, which in turn helped increase the wages, benefits, and collective voice of workers, strengthening the economy and democracy during the postwar period. More recent examples underscore that when labor is involved in policymaking, it can contribute shop floor expertise that makes production of goods and services more efficient and effective. In one powerful example, unionized nurses were able to bring their expertise to speed up implementation of health IT investments such as electronic health records relative to nonunion nurses.

What makes unions especially important vehicles for building participation into government decisions is their internally democratic structure. Unlike other civic groups that may be “bodiless heads”—professional staffs with no mass constituency to hold them accountable—unions, by definition and by law, are democratically run membership organizations. At their best, they aggregate and represent the views of millions of workers. In this way, union involvement in the policy process increases the democratic legitimacy of the process, and avoids the problem abundance proponents highlight of individual citizens or professional advocacy groups capturing and stymieing government decisions.

Unions' relationship to abundance is not monolithic.

The role that unions play in supporting an abundance agenda is likely to vary by sector and by the presence of unions with varying organizational cultures, structures, and incentives. We acknowledge the resistance to the clean energy transition, for example, among some unions representing traditional automobile manufacturing workers and extractive industry workers, as well as labor opposition to technological automation and trade. But that resistance comes in part from a history of policy that prioritized corporate profit over workers’ interests, facilitating significant capital flight and failing to ensure adequate job quality and replacement in the face of technological adoption. Such resistance can likely be mitigated by an abundance policy that does not make the same mistakes.

In addition, we anticipate that unions are more likely to be partners in an abundance agenda when they represent broader constituencies of workers across industries and occupations—and thus are more attuned to the costs of scarcity. With this in mind, we believe that the reforms proposed by some labor scholars and advocates, such as complementing workplace bargaining with more sector- or region-based organizing and bargaining, could also help align unions with an abundance approach. This is especially true to the extent that stronger sectoral or regional organizing and bargaining approaches for the American labor movement could support more tripartite policymaking.

On net, the evidence suggests that unions can be important partners in securing more—and better—production of goods and services while also ensuring that the distribution of economic gains is shared equitably across workers and while giving working- and middle-class Americans a stronger political voice. This brings us to our last concern with the abundance framework.

Ultimately, the neglect of labor by those who urge abundance is indicative of a broader problem.

The discourse to date has often obscured the potential trade-offs involved between the abundance agenda and the health of the broader American political economy. Concerns about the distribution of income and wealth or the responsiveness of government to working-class citizens barely make an appearance in most abundance discussions. The focus instead is on growing aggregate wealth and supply.

Likewise, the failure of many abundance advocates to grapple with labor is indicative of a broader neglect of the political economy of policymaking—namely, the role that organized economic interests representing economic elites play in exploiting veto points across levels of governance and the ability of organized workers to serve as a countervailing force to that influence. More frequently, the focus of the abundance movement is on simply eliminating veto points—such as environmental reviews or public comment periods—rather than building representative, countervailing power that can channel the views of working-class Americans into the policy process.

Economic policy that ignores concerns about economic and political power threatens the health of a multiracial, egalitarian democracy.

It also is bad for abundance on its own terms. Any effort to expand production of scarce resources over a sustained period of time will require supportive political coalitions, of which labor can often play an important role. In contrast, if policymakers pursue an abundance agenda without attention to the economic and political voice of workers, they are more likely to produce populist backlashes that undermine economic growth and democracy. Policies that create more jobs without regard to whether they are good jobs—or, worse, policies that suppress labor standards—are likely to leave important swaths of workers with grievances they may funnel into populist movements.

To be sure, additional research is needed to better inform policymakers’ understanding of the trade-offs and complementarities between labor and the abundance agenda and to help inform precisely how labor can best be engaged. For example, how might sectoral approaches explored by an increasing number of localities and states be directed toward abundance aims? But the goal must be an abundance agenda that serves working people—not the economic and political elites who have already gained so much power over government. For that, we need to build in mechanisms for workers to exercise power over the policymaking process and to benefit from abundance projects.

### Neg---DA---Major Questions Doctrine

#### The NLRA will currently be struck down on MQD or non-delegation grounds.

Alvin Velazquez 25, Associate Professor of Law, Indiana University Maurer School of Law, "The Death of Labor Law and the Rebirth of the Labor Movement," Legal Studies Research Paper Series, Research Paper Number 543, 2025, SSRN

This Article opens by making the descriptive argument that there are two viable administrative law doctrines for eliminating or otherwise undermining the NLRA: (1) a facial challenge to the NLRA under the Major Questions Doctrine (MQD) and (2) a non-delegation doctrine challenge be as applied to the manner in which the NLRA structures the process for removing ALJ’s from their position. This Article focuses on these doctrines because they are the most relevant for purposes of applying the severability clause. The Supreme Court’s recent decisions in other major administrative law decisions such as Loper-Bright v. Raimondo31 and SEC v. Jarkesy32 have important implications for labor law, but do not appear to provide a basis for setting aside the whole act as the Article will argue in this section.

The term MQD applies when an agency asserts authority of “economic and political significance” the Court instructs lower courts to “hesitate before concluding that Congress meant to confer such authority.”33Companies such as Amazon, SpaceX, and Starbucks are pursuing these theories to challenge the actions of the NLRB with some success. For example, SpaceX brought a lawsuit against the NLRB in the Western District of Texas.34 In that case, SpaceX sought to enjoin the Board from enforcing the NLRA. SpaceX’s basis for relief rested on its allegation that the Board’s use of ALJs violated the Constitution because the President cannot remove them.35 The court sided with SpaceX and enjoined the Board from prosecuting those cases. Moreover, the court ruled that the Board is not severable from the rest of the NLRA because it saw no way of severing the unconstitutional parts of the law and leave it in a viable state.36 Courts in other circuits have refused to give merit to these claims, thus setting up a potential circuit split. If these and other companies win their substantive challenges on the basis of removal power, then courts will have to deal with the severability clause in fashioning relief.

If the Court invalidates the NLRA on the basis that it violates the Commerce Clause of the Constitution, then the applicability of the severability clause to the relief it grants remains moot. The Court dealt with a facial challenge to the NLRA on the basis that Congress did not have the power under the Commerce Clause in NLRB v. Jones & Laughlin. 37 Even though some commentators have called for the Court to revisit that case, no parties have brought a challenge to the NLRA at the time of this writing.38 Instead, most of the challenges attempting to question the constitutionality of the NLRA are using the Court’s expanded administrative law doctrines, starting with the MQD.39

A. Striking Down the Entire NLRA Through the Major Questions Doctrine

The MQD presents an avenue through which the Court could strike down the NLRA. The Supreme Court first articulated the MQD in FDA v. Brown & Williamson Tobacco Corp.40 In that case, the Court held that Congress had not delegated authority to regulate tobacco products to the FDA. In the Court’s view, if Congress had meant for the FDA to regulate such a major portion of the economy with a unique political history, it would have.41 Even though at least one scholar has called the Court’s opinion as engaging in “reductio ad absurdum”, 42 the Court viewed a degree of common sense guiding its decision as “to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.”43 Court has expanded its use of the MQD in recent cases from a limitation on Chevron to a broad clear statement rule.44 In West Virginia v. EPA, the Court expanded on its understanding of the MQD explaining that “in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us ‘reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to ‘clear congressional authorization’ for the power it claims.”45 As Nicholas Almendares has observed, “[t]he key factors…seem to be: economic significance, political significance, and how it squares with previous agency practice.”46

While several scholars have examined or considered the MQD ,47 the non-delegation doctrine,48 and the separation of powers doctrines,49 this Article asks “what if” the Court applied the MQD to the NLRA? What effect would different doctrinal turns have on the backlash or organizing that could ensue? Several administrative law scholars have criticized or raised serious concerns about the Court’s development and application of the MQD, as well as the effects that such challenges could have on labor law.50 For example, Gould colorfully observed the NLRB is the only game in town for getting employers to negotiate with their workers51 Other labor commentators have noted that the Court’s MQD could spell the beginning of labor deregulation and negatively impact the balance between the NLRB’s authority and the courts relationship with it.52

In “The National Labor Relations Act, the Major Questions Doctrine, and Labor Peace in the Modern Workplace,” Fred B. Jacob takes the opposite position. Jacob contends that despite certain parties’ “flirtations” with the MQD, it does not pose a serious threat to the Board’s continued ability to operate. He instead argues that Congress created the Board to deal with significant labor policy issues.53 That may be right, but as he observes in a later article, the doctrine is now becoming a black hole that may also swallow the judiciary’s ability to act in the absence of guard rails.54

If Jacob is correct, and others have agreed with his description of the MQD’s effect,55 then a natural outcome is that labor law may get swallowed by this doctrinal black hole.56 Jacob notes that “[F]or older statutes with broad empowering language, finding “clear congressional authorization” is, by design, a high bar, as several Justices have candidly acknowledged.”57 That is especially the case with the NLRA. The NLRA has broad language that provides the Board with a flexible set of tools to make important doctrinal changes to its jurisprudence that will assist it with encouraging the process of collective bargaining.58 For example, “[t]he Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . .”59 That language is broad, and the conduct that is prohibited under 29 U.S.C. § 158 is similarly broad.60

It would be easy for the Court to find a lack of delegation by Congress to the Board, especially if the NLRB interprets the parts of the NLRA defining coverage to new economic industries.61 For example, the NLRA is silent concerning whether gig-drivers are independent contractors,62 yet up to 16% of Americans have used gig platforms for income, which is significantly higher than the 6% of workers belonging to a union in the United States.63 Under an expansionist view, the Court could easily rule that the Board has no authority for deciding whether platform workers are excluded or included under the NLRA if the NLRB were to extend its holding in Atlanta Opera to ride share drivers. The Court could reason that Congress needs to address this matter of major economic significance and not leave it to an agency to decide such questions. Of course, cogent arguments exist against this interpretation. This Article’s point is that an MQD to a specific agency action acts as a challenge to the whole NLRA due to the interlocking nature of the Board’s powers with its enforcement powers.64 Moreover, the severability language does not somehow change the nature of this challenge or save some parts of the NLRA from the others. It is not like the Court would be able to rely on the legislative history here. Congress did not consider whether legal challenges would separate the Board. It assumed that any challenge would be to the NLRA’s whole.65

The Court may have ideological reasons to supplement doctrinal reasons for expanding the black hole that is the MQD to undermine the NLRA. The Court has shown a penchant for reversing decades-long precedents when it touches on labor policy that favors union interests.66 In recent years, the Court has reversed well-settled precedent concerning the legality of fair share fees in the public sector as well created a new category of state government workers.67 The Court has also ruled against the Board when it has sought to apply its statutory authority to arbitration agreements.68 Additionally, the Court also changed the long-standing, lenient standard for granting a labor injunction in unfair labor practice charges with the stricter standard used in standard civil cases.69 In many ways, the Court’s penchant for overturning labor law precedents mirrors its penchant for overturning reproductive rights.70 However, there is an important distinction between those bodies of law for purposes of analyzing the scope of the issue and the nature of counter-mobilization. The Court’s decision in Dobbs was sweeping. It bluntly reversed prior precedent of a major right that was at the crosshairs of major partisan disagreement. The blunt nature of that decision lead to a major and swift backlash and mobilization by the tens of millions of people whom the Court affected.71 In contrast, the Court did not feel a working-class backlash in those numbers when it issued its anti-union decisions. That is partially because the cases coming up to the Court involve relatively narrow issues that, on their face, affected a union’s finances. It is harder for unions and their allies to mobilize on narrow issues of union finance that workers do not immediately feel the impact of. These dynamics incentivize the Court to accept a challenge to the NLRA.

From the perspective of developing a movement toward labor law reform, the application of the MQD in the manner described above could create what Goldfield noted as a “labor insurgency.”72 In many ways, a Court decision coupled with increasing inequality and financial precarity in the United States could create conditions for replicating not only labor organizing, but the terrible side effect of industrial unrest.73 That is because, from a messaging standpoint, a majority of the Supreme Court would be sending two important, and simple, messages to the public. The first message would be that the Court truly does not care about collective organizations or collective rights as a method for vindicating workplace claims. Justices Alito, Thomas, and to a lesser extent Gorsuch have written strongly worded opinions in which they have made their hostility to organized labor very clear. Ridding of the NLRA in such a wholesale way would simply make that hostility complete and plain.74 The second message is that the Court would implicitly communicate workers’ need to demand a new labor law. Revoking the NLRA in such a wholesale manner opens up the possibility of insurgency at the state, local, and national levels. It removes preemption as a barrier to state- and local-level labor innovation.75 In many ways, it just makes sloganeering easier as unions plan for a May Day 2028 general strike by providing a simple message for organizers to focus on—give workers back their union rights.76

B. Constitutional Challenges to the Board’s Use of ALJs

While the MQD provides one viable avenue for constitutional avoidance as well as a basis for the Court to set aside the NLRA, the more likely avenue would be for the Court to rule that the NLRA’s removal protection for members of the Board and the ALJs violates the Constitution under the unitary executive theory.77 Sunstein and Vermeule call the unitary executive theory a “bracingly simple idea.”78 In their view, “Article II, section 1 of the U.S. Constitution vests the executive power in “a president of the United States. Those words do not seem ambiguous. Under the Constitution, the President, and no one else, has executive power. The executive is therefore “unitary.”79 In further summarizing the theory, Shane observes that “[t]he unitary executive theory rests on two foundational premises. The first is that the President, constitutionally speaking, is a oneperson executive branch…[the] second is that, in vesting “the executive power” in “a president,” the Constitution gave the President the entirety of the government’s executive power— not “some of the executive power, but all of the executive power…”80

The Court’s recent cases application of the unitary executive theory leaves a cloud over the continued viability of the National Labor Relations Board. The President recently attempted to employ a strong conception of the unitary executive theory to remove NLRB Member Gwynne Wilcox before her term expired. The district court enjoined the action on the basis that the Supreme Court’s decision in 1935 in Humphrey’s Executor remains good law. In its view, the Court would have to reverse it for the lower court to apply a different standard.81 That is because the Court in Humphrey’s Executor that multi-member quasi-judicial bodies are an exception to the president’s removal powers.82 The Court has recently been distinguishing the holding in Humphrey’s Executor and finding that independent agencies must be politically accountable to the President and the executive branch under the unitary executive theory.83 The real question is for how long will Humphrey’s Executor remain good law.

Wilcox’s removal along with Space X’s challenge to the use of ALJs tee up a case in which the Court could extend visit the application of the unitary executive theory to the NLRB. Specifically, the Court could use such a challenge to extend its decisions in Free Enterprise Fund v. Public Company Accounting Oversight Board, Seila Law and Collins v. Yellen to hold that the NLRB’s termination protections for both its members and ALJs are unconstitutional. In the Free Enterprise Fund case, the Court held that structures that laws setting up two layers of protection from being fired by the President for inferior officers violated the Constitution.84 In Seila Law, the Court held that Article II of the Constitution vests the entire executive power in the President and that Congress could not insulate the director of the Consumer Financial Protection Bureau from removal.85 That case contained significant discussion of Humphrey’s Executor and created a cloud over its continuing viability, but applied the severability provision to avoid ruling that the entire CFPB was unconstitutional.86 Similarly, the Court held the Housing and Economic Recovery Act of 2008 violated the separation of powers in Collins v Yellen. 87 The Court held that Congress could not include a for-cause removal clause that would restrain the President’s ability to remove the director of the Federal Housing Finance Agency from office.88

It is worth going explaining the NLRB’s structure a bit to understand the threat that the Court’s decisions in Seila Law and Collins v. Yellen present to the NLRB. Congress vested the Board with the power to prevent unfair labor practice charges.89 The NLRA provides for the Board to work with ALJs who take evidence and make recommendations for the Board to consider.90 The Board consists of five members and can only be removed for malfeasance by the President. The Board is independent and does not serve at the pleasure of the President.91 As of 2023, the Board employs thirty-six ALJs. The ALJs handle most of the agency’s trial work, leaving the Board members with the responsibility of adjudicating appeals from ALJ decisions and making declarations of national labor policy.92 ALJs can only be removed for good cause as determined by the Merit Service Protection Board, whose members may only be removed by the President for malfeasance.93

There is a high likelihood that the Court will need to grant certiorari due to a bubbling circuit split and the Court’s expansion of the unitary executive theory. On the one hand, it appears that the federal district courts in the District of Columbia and Western District of Texas are finding the NLRA’s use of ALJs as suffering from constitutional infirmities. On the other hand, some district and circuit courts of appeal are refusing to take the bait. The court hearing Wilcox’s challenge to her determination did not take the bait. Similarly, the Federal District Court for the Western District of Pennsylvania did not either. It ruled: “While PG’s positions are not outlandish by contemporary standards, this Court declines its invitation to ignore nearly a century’s worth of settled jurisprudence. . . . Although respect for stare decisis appears less ‘in vogue’ as of late, there is something to be said for tradition.”94

Even though there is a brewing circuit split, this Article will delve into the nature of the decisions arising in the Federal District Court for the Western District of Texas and the District of Columbia because, in those cases, the courts sided with employers. The fact that the courts sided with the employers sets up the question of remedies The question of remedies is more than hypothetical. The D.C. Circuit and the Fifth Circuit will have to grapple with them due to decisions in the lower courts. For example, SpaceX’s filed suit against the NLRB rests on the theory that the NLRB’s administrative law judges are too far removed from the President’s ability to terminate them.95 The federal district court applied the Fifth Circuit’s ruling in SEC v. Jarseky holding that the SEC’s ALJ structure violated the Constitution’s “take care” clause.96 Since the NLRB’s ALJ structure mirrored that of the SEC, the court had no problem finding that it was bound under Fifth Circuit precedent to hold that the NLRA also violated the Constitution. The court concluded that “Congress clearly intended to protect the NLRB from the volatility of the political machine and allow consistent adjudication of employee rights provided by the NLRA. However, Congress is not permitted to ‘interfere with the President’s exercise of the executive power and his constitutionally appointed duty to take care that the laws be faithfully executed under Article II.’”97 The court sided with SpaceX and enjoined the Board from prosecuting several unfair labor practice charges against it.98

The severability issue is a key one that the Western District of Texas was willing to take on in SpaceX’s lawsuit against the NLRB. The court ruled that the Board and its use of ALJs is not severable from the rest of the NLRA. It saw no way of severing the unconstitutional parts of the law that could leave the NLRA in a viable state.99 The court also observed how the ALJ refused to address the question of its own authority to issue a ruling. Instead, the ALJ punted the issue to the Board. That is the right call. As an Article I agency, the Board does not have the power to engage in judicial review of its own constitutionality. Indeed, as an ALJ recently noted, it would be strange for an ALJ to rule that Congress improperly delegated authority to it100 or strike down a rule on the basis that the agency did not have the authority to do so.101 These are questions that are for the courts to determine.

Similarly, the court in VHS v. NLRB ruled that the NLRA’s use of ALJs violates the unitary executive structure that the framers of the Constitution designed.102 In doing so, the court relied on the Supreme Court’s ruling in Free Enterprise Fund v. Public Company Accounting Oversight Board to find that the Board’s ALJs have arguably three layers of tenure protection because the President would have to convince the Merit Service Protection Board and the National Labor Relations Board to fire them, and only for malfeasance or cause.103 The court decided that the removal restriction did not actually inflict harm, however, and provided limited relief by holding that ALJs are at-will employees of the NLRB. Thus, they had only one layer of protection between them and the President’s removal authority.104

The court in VHS arrived at a different result concerning the ability to indirectly sever the ALJs from the NLRB. In that case, the court did not apply the NLRA’s severability provision as the court in SpaceX did. Instead, the court in VHS applied the principle of severability to the Administrative Procedures Act (APA) even though the APA does not contain one. The court found that it could easily sever the removal protections for ALJs contained in a federal personnel statute from the rest of the APA. Now that this Article has explained how the NRLA is susceptible to challenges under the MQD and Unitary Executive Theory, it will set out an analysis concerning remedies through examining the severability clause.

C. The Stakes Surrounding a Severability Analysis

Severability has a major impact on the future of the NLRA and the labor movement. From a doctrinal perspective, the Court’s application of the NLRA’s clause in shaping a remedy will have a significant impact in shaping the strategies available to organized labor in a post-NLRA world. There is a high likelihood that the Supreme Court could grant certiorari given that federal courts in the Fifth Circuit are arriving at different outcomes than federal courts in other circuits.105 Additionally, lower courts have already arrived at different substantive outcomes regarding whether tenure protections for ALJs have a larger effect on the statutes that they help administer. The Court will have to resolve that issue as well.

If the Court decides to take up the question of whether the Board either (1) is exercising jurisdiction over major questions (implicating the MQD) that Congress has not granted, or (2) used improperly appointed administrative law judges (ALJs) whose appointment is constitutionally infirm either for reasons cited in the Court’s decision, then the Court will have to address the severability clause in shaping one of two possible remedies. The Court could curtail the use of ALJs and sever the NLRA’s language concerning ALJs from the statute. That would effectively render the Board a zombie agency—unable to function. In the alternative, the Court could find that it is impossible to sever the ALJs from the rest of the NLRA. Estlund observes that “[i]t is not for the Supreme Court to start pulling pillars and beams out of the existing structure, heedless of the harm to its overall integrity, at the risk of bringing the roof down on the heads of the millions of workers who still find shelter there,”106 The Western District of Texas moved in that exact direction by issuing a preliminary injunction.

To begin, the severability clause states:

If any provision of this subchapter, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this subchapter, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.107

Why does severability matter? If the Court takes a narrow view of severability and insists that the NRLA must live on with a hampered Board, it creates a “walker” type of agency from the Walking Dead against Congress’s intent of the 1930s that exists but has no powers to actually enforce labor law despite being intimately intertwined with the purposes of the Act.108 Additionally, applying severability in a way that preserves the NLRA without a functioning Board would allow courts to shut down the ability of states to innovate on labor relation matters through the continued existence of the preemption doctrine.109 In doing so, the federal courts would be in danger of recreating the same conditions that led to the courtpacking crisis of the 1930s.110 Workers would feel that they have no option other than engaging in disruption, civil disobedience, and strikes to get what they want from the federal government since states would not be able to provide the relief workers want. Additionally, the Court would essentially be deputizing the federal courts to adjudicate labor disputes such as the government did during the injunction era, but without the ability to actually enjoin peaceful labor disputes due to the application of the Norris LaGuardia Act.111

This is a problem for those interested in solving labor inequality because, as Andrias and Sachs observe, ”more localized disruptive tactics can move state and local governments to act.”112 They additionally note that that this is because ”[i]f a social-movement organization lacks the political power to secure organizing enabling legislation from the federal government through ordinary channels or disruptive activity; the organization might redirect its legislative to a state or local jurisdiction where the political conditions allow it to win a substantively similar or analogous statute.”113 The ability to channel insurgent energy to organizing in states versus seeking it in Congress to obtain relief is a key part of ensuring labor peace in the United States. Andrias and Sachs explain that the lack of a filibuster mechanism at the state level and that some states have single party control makes passing of this type of legislation more viable.114 If the Court rules that the Act is not severability, then state options do not become viable.

As argued below, the Western District of Texas, and not the District Court for the District of Columbia, reached the right conclusion given the course it chose on the merits. Despite the import of this loss for the Board, there is an upshot to the Western District’s ruling in SpaceX. If the Supreme Court follows the district court’s example and rules that the Board is severable from the rest of the NLRA, then states would not be foreclosed from engaging in labor law regulation or experimentation.115 Additionally, the NLRA’s limitations on recognitional picketing would remain in place if the severability language were interpreted narrowly.116

The next Subsections will explain how the NLRA’s history and the Court’s severability jurisprudence would lead the Supreme Court into having to set aside the entire Act in the event that it holds either that Congress did not delegate its power to regulate parts of the economy to the Board in a constitutionally valid matter, or if it holds that the Board’s use of ALJs is constitutionally infirm as the Western District in Texas did. The result should not change because having an NRLA with no Board has no historical or legal precedent. The next section explains why.

D. Lacking Historical Precedent of an NLRA Without a Board

If the Court rules that the Board is somehow constitutionally infirmed ninety years after Congress passed the underlying legislation, then historical developments leading to the NLRA would counsel in favor of declaring the whole Act unconstitutional despite the existence of the severability clause.

The evolution of labor law in favor of groups seeking collective bargaining rights in the United States occurs in punctuated equilibriums in which stasis is broken in response to labor-related unrest. For example, in response to brewing labor unrest in the 1930s, Congress passed laws such as the National Industrial Recovery Act (NIRA) that contained language protecting the right of workers to organize into unions. The NIRA included language that encouraged workers to organize into unions; it stated that “Employees shall have 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.”117 The problem was that the NIRA had a voluntary regime that led organizers to tell workers that Roosevelt wanted them to join a union.118 Additionally, the NIRA had no enforcement mechanism for requiring employers to negotiate with unions. It provided incentives for employers to do so, but those positive incentives did not encourage employers to stand down in their resistance. Eventually, the Supreme Court struck down the NIRA.119 However, the Court’s recalcitrance did nothing to stop workplace organizing and in fact created more industrial unrest.

To fix this enforcement problem and seek industrial peace, Congress enacted the NLRA. The Act required that the Board certify appropriate bargaining units.120 It also empowered the Board to issue bargaining orders requiring employers to bargain in good faith with the workers’ chosen representative.121 The Act did not give the Board the power to require parties to arrive at a certain contract; instead, the Board has the power only to require that parties must bargain with one another.122 The drafters of the Act anticipated that employers would file suit challenging it and used the U.S. Constitution’s Commerce Clause as the source of authority for passing the Act.123

In response, the Chamber of Commerce advised its members not to heed the law because it was unconstitutional. Several employers brought suit confident that the Supreme Court would vindicate their position that Congress had improperly regulated commerce.124 Employers thought that the Court would support them even though Roosevelt was attempting to pressure the Court through a court-packing plan in which he proposed adding another justice for each one over seventy. Ultimately, the Supreme Court failed to vindicate the confidence that employers had in it. In the “switch in time that saved nine,” the Court sustained a challenge to the NLRA’s constitutionality as a proper exercise of Congress’s power under the Commerce Clause.125 The Act ushered in which union membership significantly increased and industrial unrest decreased.

The above history suggests that the Court should proceed with caution in applying the NLRA’s strong severability provision, which is unlike the SpaceX court’s application. Leaving the Act with a Board that is unable to enforce the Act resets modern day labor relations into the same legal posture as before the Act, when America was in the throes of massive labor unrest, and before the pro-employer Taft-Hartley Act passed.126 That labor unrest waxed when America did not have a functioning labor board— and waned when it did—highlights an important correlation. It suggests that Congress’s endowment of a labor board with enforcement powers played a major part in cooling labor unrest because it gave workers a means to organize into unions.127 Leaving the Board inoperative does not make sense in light of this history, not only because of the unrest it could cause, but because Congress clearly granted the Board with enforcement mechanisms to correct for past policy missteps.

Additionally, if Congress did not have the ability to regulate commerce through ensuring labor peace, then by extension it could not delegate that power to the Board. The congressional history is silent on discussions about which sections would live on, and which sections would invite the Court’s scrutiny. That may have been because Senator Wagner, the primary drafter of the NLRA, was preparing for the Court to rule that the Act exceeded Congress’s commerce power, in which case the Court would set aside the whole statute.

The legislative history behind the severability clause also supports the conclusion that it does not make historic sense to separate the Board from the rest of the Act. Senator Wagner anticipated that employers would bring lawsuits forward to defeat the Act. Despite his and other concerns about potential legal challenges, there was little discussion in the congressional record about the effect of the severability language in any anticipated challenge because Congress anticipated that the most effective challenges would come under the Commerce Clause. In fact, the legislative record contains statements from Wagner that the severability clause was meant to be simple boilerplate, and little more.128

The severability clause played no role in early challenges to the current labor law regime. Both the NIRA and the NLRA had severability clauses from the beginning.129 The Court paid the clauses no mind in Schecter Poultry or in NLRB v. Jones & Laughlin Steel Corp. 130 Instead, the Court focused on labor peace. In other words, the nature of the severability language did not bar the Court from considering Commerce Clause challenges in anything less than a similarly sweeping matter. As Fred Jacob noted when speaking about the effect of the major questions doctrine, “If the new major questions doctrine prevents the NLRB from exercising the powers Congress conferred upon it to help quell the current spate of labor unrest, the Supreme Court will have undermined legislative intent and economic stability in one fell swoop.”131 Jacob’s observation resonates with the history of the Act, but he also argued that the MQD does not make jurisprudential sense, writ large. In the next Subsection, this Article will turn to explaining how using the MQD to simply get rid of the Board, but not the rest of the statute, makes little sense in light of the NLRA’s design and severability language.

E. Lack of Legal Precedent of the NLRA Without a Board

The aphorism that “history repeats itself” might come to mind if the Court chooses to apply the non-delegation or separation of powers doctrines in a manner that leaves the Board inert. However, the new legal theories that employers are using to render the Board inert might lead to a different way of phrasing that aphorism. While history may repeat itself, the present legal claim rhymes with previous generations of legal claims. That is especially true when observing how the Supreme Court’s actions provide an avenue for new claims on issues that were previously resolved. By way of example, the current constitutional challenges to the Board’s use of ALJs, and to its very existence, appeared to have been resolved in Humphrey’s Executor132 and implicitly in the Jones & Laughlin Steel133 cases. A Court decision that applies the MQD to the severability clause leaves only one option for relief—striking down the entire NLRA. As explained above, Congress empowered the Board to handle broad questions of macroeconomic import. The NLRA does so through the use of broad, generalized grants in power. Those grants in power, however, have two functional limits: The Board can only issue make-whole remedies and bargaining orders. Additionally, the Board requires the agency to go to an Article III court to obtain enforcement of its order. Despite these functional limitations, the Court applying a broad conception of the MQD will notice that the Board’s powers apply throughout the whole economy and with few congressional guardrails on how the Board can regulate within its massive sphere of influence. The NLRA’s weak remedies are unlikely to convince the Court to separate the sphere of the Board’s influence from the depth of the agency’s influence in that sphere (as expressed through the remedies it can deploy). The sphere of the Board’s influence over the economy means that separating it from its operating mechanisms and remedies provisions makes severability unfeasible in the event of a challenge on the basis that the NLRA violates the MQD.

Even though there is question as to whether the operation of the severability clause would require the Board to operate without ALJs, the application of the severability clause would require the Court to strike down the entire statute for many of the same reasons outlined in the above Subsection. SpaceX mainly focused on whether the Board’s ALJs were too separated from being removable by the President.134 Functionally speaking, the use of ALJs is key to how the Board carries its statutory mandate of encouraging collective bargaining.135 If the Board were required to hear all cases itself, it would be unable to do so due to the sheer volume. It would have to do the work of thirty-six ALJs,136 including fact-finding, managing discovery disputes, holding status conferences, and other duties. It would grind the apparatus for certifying bargaining unit petitions and unfair labor practices to a halt.

However, in this scenario there is another doctrinal consideration to bear in mind. To remove ALJs would be to simply declare the unconstitutionality of the Board, but in a different way. This is especially true because the Board, unlike other agencies such as the SEC, is barred from bringing general claims to district court.137 The SEC, for example, can bring securities fraud claims under Rule 10b-5 before its administrative law judges, or it could go straight to court to bring such a claim.138 In contrast, the Board cannot. It has a very limited ability to go to district courts to apply for enforcement order under 10(e) and injunctions under 10(j) of the NLRA. By requiring the Board to be a first order trier of fact while Congress has already limited its ability to seek court relief, the Act leaves the Board in a situation in which it cannot functionally achieve much. The place of the ALJs within the Board’s framework, which Congress designed, leaves them inseparable from the rest of the Act. If taken to its logical extreme, the court in SpaceX essentially purports that the Board cannot ever enforce the law. Doctrinally, it leaves the actual Board with the ability to hear cases, but without the ability to rely on a cadre of administrative law judges. The history of the severability clause, the Act’s inoperability if severable, and Congress’s intent in enacting the Wagner Act all indicate that Congress would have preferred for the whole Act to be struck down instead of for it to be severable in this circumstance.139

The Court’s severability analysis in Seila does not obviate this outcome. The Court in Seila “found a set of unconstitutional removal provisions severable even in the absence of an express severability clause because the surviving provisions were capable of “functioning independently” and “nothing in the statute's text or historical context [made] it evident that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will.”140 That is not the case with the NLRB. The history of the NLRA demonstrates otherwise. Congress’s key fix after the Court struck down the NIRA was to create an independent labor board with actual enforcement powers.141 The statutory language demonstrates as much. The NLRA calls for a Board that is separate from the President and bi-partisan.142 That design feature of the Board was a key meant to preserve and mirror the careful balance of interest between workers and management that Congress was attempting to preserve. In that way, the NLRB’s design balancing political interests between two dominant political parties mirrors the balance between labor and management interests. The NLRA’s allocation of Board power was meant to achieve industrial peace by mediating the interests of disparate political parties and their interests as it touches on labor/management relations. In that way, the history of the NLRB’s enactment makes it distinguishable from the CFPB director’s position in Seila Law.

The extended discussion on severability is warranted because the stakes concerning the applicability of the severability clause are high. If the Court were to rule that the use of ALJs by the Board is illegal as a violation of non-delegation but applies the severability clause to strike the use of ALJs from the Act, then the Court would be giving the illusion of protecting the right to collective action without the substance of doing so. A split result like this would send a subtle message that the Court does not care for these rights but will keep in place a zombie agency to give the appearance of an agency that functions. It would also leave the NLRA in place along with the preemption doctrines. Finally, it could blunt the insurgency that traditionally has preceded major labor victories in the United States. That is because messaging around complex administrative law subjects is significantly less exciting than simply saying that the government no longer recognizes a workers’ union. Additionally, it would force those who want to amend the Act to go to Congress for relief. For purposes of this Article, this application demonstrates how the remedies that arise out of administrative law can affect labor law outcomes and the dialectic between movementbased organizing and law. The next Part will examine how labor organized in a pre-NLRA world to obtain the NLRA. After providing historical context for the passage of the NLRA, this Article will turn to examining the legal tools available for organizing workers for organizing workers in a world in which the Supreme Court has struck down the NLRA.

II. THE PAYOFFS OF WORKER INSURGENCY

The Supreme Court’s potential dismantling of the NLRA creates the most viable approach for labor law reform by creating the conditions for a social movement that fuels the creation of state- and local-level collective bargaining laws143 or reinvigorates the use of long dormant state level labor organizing laws.144 Organizing from below using those state and local laws could serve as the basis for a new national labor law in much the same way that the Court’s defeat of the NIRA galvanized organizing.145 Longtime labor scholar Catherine Fisk observed that “[b]y now it borders on cliché to note the similarities between 2020 and 1918, 1930, and 1968. Yet the comparisons are useful if they serve as a guide to legal reforms that will complete the unfinished business of the progressive movements of the past.”146 For the purposes of this Article a social movement is:

[A] deliberate collective endeavor to promote change in any direction and by any means, not excluding violence, illegality, revolution or withdrawal into “utopian” community . . . A social movement must evince a minimal degree of organization, though this may range from a loose, informal or partial level of organization to the highly institutionalized and bureaucratized movement and the corporate group . . . A social movement’s commitment to change and the raison d’étre of its organization are founded upon the conscious volition, normative commitment to the movement’s aims or beliefs, and active participation on the part of the followers or members.147

Even though labor law grew out of a social movement, its history and relationship with the legal order is messy and dialectical in nature.148 In the United States, organized labor and management have traditionally been locked in a sort of Hegelian dialectic149 in which the parties only come to truth through expressing economic and political power. At first, judges frequently enjoined the activities of labor organizations for being criminal conspiracies. When Congress passed the Sherman Act in 1890 to provide tools to break up mergers that restrained competition, employers used the new law to file lawsuits against labor unions who were colluding with workers seeking to restrain wages from competition. By and large, courts agreed with employers, as employers won twelve of the first thirteen successful lawsuits that came against labor unions under the Sherman Act. In 1914, Congress passed the Clayton Act, which declared that “[t]he labor of a human being is not a commodity or article of commerce.”150 It also prohibited courts from enjoining peaceful labor activity under the Sherman Act.151

Courts did not get the message. As the Supreme Court acknowledged, courts narrowly interpreted the Clayton Act to enjoin peaceful labor activity.152 This dynamic, among others, caused the labor movement to experience what ex-Supreme Court Justice Felix Frankfurter called “government by injunction”—a period in which judges regularly enjoined peaceful labor action, and governors deployed national guards to enforce the injunctions.153 The most aggressive of these injunctions led unions and their members to engage in semi-outlawry in response, which proved a significant challenge for unions.154 As trade unionists were trying to reach respectability, the injunctions created the perception that they were outlaws instead of organizers.155 The struggle between labor and management led to the proliferation of “semi-outlawry” acts.156 These acts occur when workers engage in measures, in support of worker organizing, that are technically illegal but clearly nonviolent. These events led Congress to respond with the Norris LaGuardia Act (NLGA) in 1932, which stripped federal courts of the necessary jurisdiction to issue injunctions against peaceful labor activity.157 Workers to this day continue to engage in semi-outlawry. A recent example of semi-outlawry occurred during the Red for Ed campaign as public-school teachers went on strikes in violation of “no-strike” public sector bargaining laws in 2019. In that case, teachers in several states went on strikes that local unions had no sanctioned. They demanded not only higher pay, but also funding increases for to support classroom activity.

### Neg---DA---Movements

#### Labor law needs to be destroyed so that it can be remade.

Alvin Velazquez 25, Associate Professor of Law, Indiana University Maurer School of Law, "The Death of Labor Law and the Rebirth of the Labor Movement," Legal Studies Research Paper Series, Research Paper Number 543, 2025, SSRN

Unions are enjoying a resurgence in popularity even though their members make up just six percent of the private-sector workforce.2 More people than ever want to join a union but cannot due to employer resistance to union representation process, leading to a union representation gap.3 Inequality in the United States is hovering around similar levels as it was in the period leading up to the Great Depression.4 Even though unions are winning more of their elections than they previously have, obtaining a first collective bargaining agreement (CBA) from an employer remains a perilous journey.5 Chris Smalls found that out the hard way. Amazon fired him, but he came back as the driving force behind the Amazon Labor Union. Despite successfully winning a union organizing drive at a Staten Island Amazon facility, the members of his union have not entered into a collective bargaining agreement almost 2 years later.6 It is this dynamic that led several leading labor law scholars and eminent practitioners to collaborate with the Harvard Center for Labor and a Just Economy and issue a highly influential report called the “Clean Slate for Worker Power Project” which set out numerous suggestions for fixing labor law’s ills.7 The project is comprehensive and features a number of bold elements, but the literature on labor law has not discussed how to arrive at a clean slate. This Article seeks to fill that hole in the literature by pointing to the Supreme Court’s (Court) recent administrative law cases and engaging in the following thought exercise--could labor law’s death at the hands of the Major Questions Doctrine (MQD) or a constitutional challenge spark the fire that fuels its revitalization? Could a Court decision do what Congress has failed to do since 1935—reform the National Labor Relations Act and open a pathway for millions of workers to organize into unions? Spoiler alert:

The answer is yes.

The central thesis of this paper is that the Supreme Court dismantling the National Labor Relations Act (NLRA) would create a viable approach to labor law reform. Striking down the NLRA would generate the conditions for strife, disruption, and a new labor insurgency that can fuel demands for state and local officials to enact collective bargaining free from the preemptive effect of the National Labor Relations Act.8 In essence, the Court could reform labor law in ways that Congress has failed since 1935. The Supreme Court acting as the agent for returning federal labor law to a primitive state would provide the labor movement with a viable path for obtaining stronger labor protections for unionizing than are possible under the current regime because 1) courts are barred by the Norris-LaGuardia Act from enjoining peaceful labor activism, and 2) states are free from the shackles of preemption to enforce strong labor laws. Currently, only six percent of the workforce is represented by a union, but according to a 2022 White House Report on Worker Organizing, over fiftytwo percent of non-union workers (sixty million) would vote for a union if they could.9 In other words, there is a major union representation gap between how many workers are union members and how many want union representation.10 That union representation gap exists even in states with high percentage of union membership in the workforce such as Hawai’i (25.6%) and New York (20.6%). If even these states could make it easier for those workers who want to join a union but cannot, it would make union membership available to millions of people in the State of New York alone.11 This Article also examines the role that the severability clause plays in the NLRA’s destruction and the path to worker organizing available after its destruction.12 It argues that the Supreme Court must contend with that clause in applying the Major Questions Doctrine and any constitutional challenges to the Board’s structure. Even though the application of severability is typically a narrow and technical legal question, in this case it serves a major gating function in determining the tactics that are available to workers seeking to form unions.

This Article sits at the intersection of current developments in administrative law, labor law, labor history, and social movements. The analysis builds off the work of Fisk and Reddy who rightly observed that labor is a social movement “with a long history of shaping law and being shaped by it in turn”13 and several scholarly works exploring theories for building countervailing power14 and the role of strife in labor relations.15 This Article takes no normative position on the Court’s administrative law rulings or whether labor should advocate for the Supreme Court to render the NLRA unconstitutional on its face. But it presents a silver lining to administrative and labor law scholars who have raised concerns with the Court’s rewrite of administrative law field16 by showing that the Court could serve as a catalyst for a series of (most likely) unfortunate events as well as fervent organizing opportunities.17 In that respect, dismantling the

NLRA to successfully reform labor law embodies the observation that worker power reached its zenith “before [it was] organized into unions” as demonstrated by the strikes, demonstrations, and actions that took place during the worst parts of the Depression.18 Additionally, even employer advocates are concerned about returning to primitive labor law. For example, longtime employer lawyer Roger King recently cautioned that employers should not seek the dismantling of the NLRA because doing so would benefit workers and undermine labor peace. He observed that if the Supreme Court somehow ruled that the NLRA was unconstitutional, then “[w]e’ll have the law of the jungle, the law of the streets.”19

The Court ruling that the administrative apparatus of the NLRA is unconstitutional would leave a vacuum in labor law, and anger over the death of collective bargaining rights would be widespread. The labor movement and its allies could channel this anger, alongside the deepening inequality in this country, and their remaining resources, to galvanize a new social movement.20 With enough of a movement, labor could sway discourse from the dead letters of the NLRA to a more moral framework that allows labor to bargain for the common good.21 Labor could consider using the death of the NLRA to “grand bargain” of labor law22 as part of a general strike that unions such as the United Auto Workers have declared for May 1, 2028.23

The stakes at play in the NLRA’s death are high, and the path to resurrection is fraught. As Irving Bernstein explains, “[a] handful of years bears a special quality in American labor history. There occurred at these times strikes and social upheavals of extraordinary importance, drama, and violence which ripped the cloak of civilized decorum from society, leaving exposed naked class conflict.”24 The concentration of wealth is the same today as it was in what Bernstein calls “The Turbulent Years.” The United States is in a period of pre-insurgency due to high income inequality.25 A strong labor movement in the United States could significantly reduce inequality and the risk of anti-government insurgency.26 While the amelioration of poverty has a strong moral dimension that informs policy,27income inequality in the United States should concern even the most apolitically minded. That is because high rates of inequality suppress the demand for goods and services amongst wide swaths of the population. This suppression in turn harms economic growth.28 Economic inequality also serves as a basis for fomenting the kind of class-based upheaval masking as political upheaval that currently exists in the United States as inflation continues to disproportionately impact those on the lowest end of the economic spectrum.

#### A true revolution in labor law requires insurgency. From this perspective, the labor movement can only benefit from NLRA strike-down.

Alvin Velazquez 25, Associate Professor of Law, Indiana University Maurer School of Law, "The Death of Labor Law and the Rebirth of the Labor Movement," Legal Studies Research Paper Series, Research Paper Number 543, 2025, SSRN

A. Worker Insurgency’s Legal Impact Through the 1930s

Traditional accounts of why unions in the United States during the Gilded Age were not as militant as their European counterparts purport that U.S. unions were erroneously steeped in favor of individualism’s appeal.158 In reality, workers in the United States had developed a class-based and craft-based militancy. For example, Samuel Gompers and the Knights of Labor were interested in forming labor unions with a social justice orientation informed by socialist principles. Gompers’s move to “simple unionism,” or unionism that focused only on economic contractual conditions between an employer and a minimalist set of politics, resulted from running headlong into fierce employer opposition and seeking a way to ensure the labor movement’s success. In that way, Gompers’s move to simple unionism was pragmatic, but it was not the original intent for his organization.159

As much as Gompers and other trade unionists may have tried to flee from the appearance of “semi-outlawry” in fighting for the legitimacy of the labor movement, Congress decided to act when labor insurgency activity reached a nadir and caused an existential threat to recovery economic efforts. Labor’s history in the years leading to the NLRA were filled with insurgent-like conditions and industrial violence in which company security guards and local law enforcement were beating organizing workers and sending them to prison.160 The events that pre-dated and led to Congress’s enactment of the NLRA were in response to worker insurgency.161 As Goldfield states: “Labor influence was central to the structure of the political situation in 1934 and 1935, both because of the growing strength of its insurgent and disruptive activities and because of the growing strength of highly organized radicalism.”162 In response to these types of activities, Congress first passed the Norris La-Guardia Act (NLGA). That law barred federal courts from issuing injunctions against peaceful labor activity. Congress built on the NLGA when it enacted the National Industry Recovery Act (NIRA).163 Section 7(a) of the NIRA provided that, for business to participate, employers would have to grant “the right to organize and bargain collectively through representatives of their own choosing . . . .”164 When that opened the floodgates of organizing, workers found themselves frustrated at the lack of enforceable mechanisms in the NIRA.165 Additionally, the Supreme Court nullified Title I of the NIRA on May 27, 1935, leaving workers who wanted to join a union frustrated but also continually engaging in self-organizing.166

At that moment, then-President Roosevelt was forming policies to bring the United States out of the throes of the Great Depression.167 He was battling the effects of high inequality and its correlation for fostering authoritarian movements.168 During that period, the United States was lurching dangerously close to authoritarianism. Authoritarian figures like Huey Long and his “share the wealth” campaign rose to prominence and challenged Franklin Roosevelt’s grip on power from the political left.169 Not to be outdone, business leaders on the political right schemed to install a what the Washington Post characterized as a “dictator”—retired Major General Smedley Butler—as part of the “Wall St. Putsch.”170 These forces required Roosevelt to find a middle ground. Labor leaders like thenPresident of the United Mine Workers John Lewis presented that middle ground. Lewis testified at a Senate hearing in 1935 that “American labor . . . stand[s] between the rapacity of the robber barons of industry of America and the lustful rage of the communists, who would lay waste to our traditions and our constitutions with fire and sword.”171 In other words, he was navigating between two polarizing forces who had different solutions for combatting inequality at that time.

Neither side completely won, and instead labor and capital arrived at an accord. Congress passed the NLRA only a few months after the Supreme Court rejected the NIRA.172 The NLRA carried over Section 7(a) of the NIRA, but the NLRA added sections that (1) created the National Labor Relations Board, and (2) imbued the Board with enforcement powers.173 Roosevelt signing the NLRA constituted a major high point for organized labor. Immediately after signing the NLRA, labor organized millions of workers and eventually reached a union density of 40% or more in the transportation, building trades, mining, and clothing trades fields. The density of workers organized in those sectors was at or around 10% before passage.174 But not everyone lived happily ever after. Even though the Supreme Court blessed the NLRA as a legitimate exercise of Congress’s powers under the Commerce Clause, it took years of organizing for the NLRA to really become “the law.” As Karl Klare observed, “The Act ‘became law’ only when employers were forced to obey its command by the imaginative, courageous, and concerted efforts of countless unheralded workers. This was one of the rare instances in which the common people, often heedless of the advice of their own leaders, seized control of their destinies and genuinely altered the course of American history.”175 Even with the NLRA in operation, “semi-outlawry” still exists, and the next Section will reflect on what “semi-outlawry” looks like in today’s context.

B. Worker Insurgency’s Role in Recent Pay Raises

Throughout approximately the last ten years, workers have demonstrated an aptitude for engaging in insurgency-like tactics that resemble the semi-outlawry that occurred in the 1930s. As Reddy observes, strikes are really protests mediated by considerations of the political economy.176 Strikes, even when illegal, serve an expression of “the labor movement and the polity.”177 In other words, strikes as both political and economic actions can be successful even if they cut against the legal regime.178

The “Red for Ed” strikes that occurred in politically conservative states in 2018 are evidence that workers were willing to go on strike even when doing so was illegal under the states’ bargaining laws.179 In that way, the strikes were an insurgency tactic that demanded not only better working conditions for teachers, but more resources for ensuring classroom success in spite of a prohibition on striking.180 Reddy also examines the strikes that occurred in the aftermath of the Black Lives Matter movement, in which NBA players went on a wildcat strike, as evidence that there are normative issues for which workers are willing to put themselves at risk.181 The current uptick in organizing and increasing labor militancy reflects a potential turning point in labor management relations.182 There is reason to think that Gen Z could be the generation to see the fruits of a renewed labor movement. Duff observes in his paper “Of Courage, Tumult, and the Smash Mouth Truth” that “no labor movement is possible until workers understand and accept the inevitability of labor-management conflict.”183 Certain demographic descriptions of Gen Z in the workplace indicate that the generation would engage in strike activity or workplace conflict even if the Supreme Court were to gut the NLRA.184 For example, a recent Forbes article notes that Gen Z values businesses that balance corporate responsibility, social responsibility, and environmental stewardship.185 Compared to many preceding generations, Gen Z has the most favorable view of unions, even though many of them have not been in a union.186 Gen Z is especially eager to win unions at their workplaces.187 They have also shown an aptitude for engaging in activism in a very different way from previous generations.188 Only time will tell how their aptitude for engaging in activism will respond to the Court’s anticipated rolling back of labor rights and whether it will match any of the activism that occurred after Dobbs189. But one thing is sure: The Court’s interpretation of the NLRA’s severability clause will affect the response of labor and its Gen Z allies in workplaces like Starbucks. Depending on how the Court rules, striking down the NLRA may create a disconnect between the legal legitimacy and the social legitimacy of such a decision in the low-wage workplace, similar to the Lochner era.190 The disconnect between the two could fuel support for a new labor law.191

The real question for whether Gen Z can reach their activist potential rests on two factors that Piven and Cloward identify, and one that Andrias and Sachs identify. Will Gen Z organize and engage in disruption of the workplace in a way that causes governments to respond with legislation that provides workplace concessions?192 In their essay “The Chicken-and Egg of Law and Organizing,” Andrias and Sachs see law and organizing working synergistically to the democratic project.193 They make the descriptive claim that there are three routes to solving the problem of whether law spurs organizing, or organizing spurs changes in law:194 disruption, the use of state and local law, and judicial action.195

For disruption to have success, labor organizations must be willing to commit resources to organizing workers who have grievances and are ready to take pro-active demonstrable action, and then shift those resources to other states as they gain power in one.196 The reality is that organizing takes resources and plannings. For example, “Local 32BJ allocates between 20 and 30 percent of its budget to organizing. For the last five years, this is around $15 million a year.”197 If the Court strikes down the NLRA as described above, then it will force organized labor into a difficult choice between conserving its resources or spending massively on organizing workers in an uncertain environment using a stream of income that may run out as collective bargaining agreements expire. Organized labor in America has endured two schisms around the issue of committing resources to organizing. The first occurred in 1935 when John Lewis founded the Congress of Industrial Organizations (CIO) in response to the American Federation of Labor’s (AFL) refusal to commit resources to organizing unskilled workers.198 The second came in 2005 when several unions believed that the AFL-CIO was not doing enough to organize new workers.199 Labor should make a massive investment in organizing should the Supreme Court strike down the NLRA to support organizing either through already existing state organizing laws or seeking the enactment of local laws that would not have otherwise been possible due to the preemptive effect of the NLRA. The next part goes into detail exploring those mechanisms.

III. LABOR’S POST-NLRA RELIANCE ON THE NORRIS-LAGUARDIA ACT

The elimination of the NLRA as outlined above will leave labor in a pre-Act situation that will resemble what King called “the law of the jungle” and Justice Oliver Wendell Holmes observed as the “power of combination”, but with some new tools that labor did not fully utilize in the 1930s.200 Specifically, the Court striking down the Act entirely and lifting preemption can create stronger conditions for organizing workers immediately under long dormant labor laws that U.S. territories as well as blue and red states have on their books.201 For example, Puerto Rico’s Constitution bluntly states: “Persons employed by private businesses… shall have the right to organize and to bargain collectively with their employers through representatives of their own free choosing in order to promote their welfare.”202 In the absence of NLRA preemption, residents of Puerto Rico would enjoy a constitutional right to collectively bargain. It is not alone. Union dense states such as Illinois have such terms, and lowunion density and politically states including Missouri and Florida would as well.203 The potential for union growth would be significant. In 2024, only 234,000 workers, or 8.6% of the workforce, were members of a union in the state of Missouri, out of a total of 2.734 million total participants in the workforce.204 However, if Missouri’s protections go into effect after the Court strikes down the NLRA, then even a 10% increase in membership would significantly improve organized labor’s ability to build strength. The existence of more favorable laws from the past will not build worker power though. For these laws to provide an avenue for worker organizing, unions will need to prepare. As Sachs observes, the “preconditions for mobilization are common across multiple approaches to social movements.” Sachs contends that unionization is feasible under certain pre-conditions.205

The Court striking down the NLRA may make mobilization more feasible rather than difficult for two other reasons. First, Dobbs has engendered a resistance in even more conservative states for stemming the decision’s effects. Dobbs demonstrates that even on abortion, an issue sharply dividing the United States, mobilizing at the state level can affect a movement in a short period of time. In comparison, wage raises and improving employment remain highly popular with the overwhelming majority of Americans.206 Second, the Court’s decision would tear down the wall that preemption created around labor law and thus remove both objective and subjective barriers to a wage- and employment-based social movement.

While the tearing down of preemption would create a situation in which pre-existing state laws concerning collective bargaining would go into effect and allow states to innovate a situation in which the NLRA no longer exists will force organized labor to experiment by stretching its available tools to survive much like organized labor did in the pre-Act period. Literature chronicling the rise and fall of social movements suggests that even devastating court losses do not mean defeat of the movement; rather, the literature suggests that organizers must engage in repeated attempts to achieve their goals.207 Beckwith states that, for movements to recover from devastating defeats, “[f]raming actual defeat as a positive outcome involves recasting the aims of the defeated actors and valorizing their defense.”208 The existence of state laws that would go into effect once the Court strikes down the NLRA provides a plausible way to frame defeat into a positive outcome.

It is easy to construct a narrative of valor from these experiences, but this Article’s message is different. This Part recasts the aims of the defeated actors and encourages them to use the tools they still have available for constructing either “countervailing power”209 or, alternatively, a social movement to inform the reconstruction of labor unions and their relationship to capital.210 Strife is an unfortunate, but key component of labor law and labor organizing, and courts have been quelling labor strife and its role for an expanded understanding of labor peace.211 Duff aptly states that “[o]nly the passion engendered by [vigorous union] campaigns will produce a labor movement capable of developing and executing tumultuous economic weapons. . . . The potential for the creation of tumult is the sine qua non of a bona fide labor law.”212 LeClercq draws on movement theory to explain how strife starts in the workplace, and she joins Sachs and Rogers in noting that law changes the risk calculations for individual workers. The stronger the law is, the more likely workers are to act.213 LeClercq further argues for using a doctrinal framework to accommodate strife within modern labor law, including in nonunionized settings.214

The negative of this insight regarding risk is true as well. If law is too weak, then workers are likely to rebel against it and mobilize once they realize they believe they have nothing to lose. Similarly, if labor organizations such as unions have nothing to lose, then they too have plenty of incentive to act. Additionally, mobilizing youth is key to successful nonviolent movements.215 Polls concerning Gen Z demonstrate that they are less attached to the workplace as a source of identity than other generations.216 Moreover the Court striking down the NLRA may incentivize unions to change their tactics and their expenditure of organization resources because the NLRA will no longer inhibit actions such as peaceful recognitional picketing, and possibly secondary boycotts.217

These organizations may need to explore whether, in such a world, they are reformist institutions or, paradoxically, both reformist and disruptive institutions. Certainly, organized labor will need to experiment. Samuel Gompers found that the simple unionism approach worked best during decades before the NLRA passed due to the aggressive use of injunctions and crippling financial judgements against labor.218 Organizers may find that a different model of labor organizing works best for their location and the particular industry that they are willing to organize, and that they may have to develop a new playbook for handling repercussions like bankruptcies should employers sue them.219

Over the years, employers have found various ways to stifle worker rights under the NLRA, and labor law has become ossified due to removal from democratic renewal processes.220 Labor history shows that destroying only the processes by which organizing energy is channeled appears the only way to stifle rights. If the “Red for Ed” teachers movement demonstrated anything, it is that workers will strike even if it is illegal.221Organized labor cannot call for the end of labor law due to the fiduciary duties that unions owe to all of their members222 and due to their own bureaucratic imperatives.223 The hammer strike must come quickly from the outside to provoke a crisis and a proportionate response224—in this case, the Supreme Court’s application of doctrines that are undoing the regulatory state may serve quite nicely.

In reality, unions will have to use what Oswalt defines as “improvisational techniques” to compel their employers to come to the table and bargain.225 The next subsections explores two potentials: (1) that the Norris-LaGuardia Act latently protects labor insurgency and recognitional picketing; and (2) that states can craft creative labor protections for workers in response to labor insurgency.

A. The Norris La-Guardia's Protections of Labor Insurgency

The most important of the protections that organized labor and workers will have available post-NLRA is the Norris LaGuardia Act (NLGA). Michael Duff describes that “[a]ggressively ousting federal courts from labor disputes altogether was the legislative motive behind passage of the [NLGA].”226 Congress’s passage of the NLGA was in response to the trend of courts in the early part of the 20th century entering injunctions to quell peaceful labor strikes and pickets. The NLGA states that

[n]o court of the United States, as defined in this chapter, shall have the jurisdiction to issue an restraining order to temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.227

The NLGA bars federal courts from enjoining private sector employees from peacefully engaging in picketing, leafletting, and strikes in labor disputes.228 The NLGA also outlaws “yellow dog” contracts, or agreements for employment in exchange for waiving any rights to collective bargaining. Its policy is to allow workers the full freedom to associate and self-organize to negotiate the terms and conditions of employment.229 Most importantly, the NLGA bars courts from enjoining the refusal to work or peaceably assemble, or “[a]dvising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified . . . .”230 The NLGA leaves employers with the ability to seek damages for strikes but does not allow them to stop strikes from happening.231

Organized labor may want to use the NLGA to keep courts away from it given the makeup of the current Supreme Court and its antipathy toward organized labor issues. In a recent blog post about the NLGA by the Law and Political Economy Blog, David Boehm and Lynn Ta provide language that appears to support the thesis of this Article, but they appear to hold less hope in the NGLA’s power. They are also concerned about what the Supreme Court may do in light of constitutional challenges to the NLRA. They caution that:

We should not, however, overstate its power: Norris-LaGuardia is ultimately an indirect law that advances only negative rights, prohibiting judicial interference with a worker’s “freedom of labor.” As scholars have argued in the housing rights context, workers will have greater power when they operate against a background of roust, universal protections that lend more substance to “freedom of labor,” protections that exceed the safeguards in the NLRA and that are tied to the fundamentality of this right. For now, however, workers must wield the power they have. 232

The authors correctly point out that the NLGA will take on significant importance in a post-NLRA world, but they have doubts about whether worker power within the current context of the NLRA is a sufficient impetus to cause labor reform. The Fight for $15 and a Union campaign fought to expand union rights.233 Despite the campaign’s incredible success in changing the national conversation regarding the minimum wage, it did not lead to Congress or a state passing a new collective bargaining law.234

If history is any indicator, a new national labor insurgency will need to occur to provoke a congressional response or state action, especially in light of a Court ruling gutting the NLRA. The first part of the road to insurgent success lies in the use of the NLGA to avoid federal court injunctions. The power of the NLGA not only prevents federal courts from using the injunction to quell peaceful labor actions, nonviolent insurgency tactics, or semi-outlawry, but it also allows labor to use tactics, such as recognitional picketing, that the NLRA has circumscribed. Recognition picketing is when unions engage in picketing to coerce employers to recognize them as collective bargaining agents.235 If the NLRA is set aside, then unions can engage in recognitional picketing free of federal court interference and receive the protection of the NLGA so long as the picketing remains peaceful. In addition to the NLGA, organizers can seek to influence state and local government action, which the next Section examines.

#### The benefits of long-term insurgency outweigh the short-term costs of NLRA elimination.

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IV. LONG-TERM INSURGENCY BENEFITS VS. THE SHORT-TERM RISKS OF ELIMINATING THE NLRA

This Part argues that the long-term benefits of allowing the Court to destroy the NLRA outweigh the significant risks that the proposal carries from a tactical standpoint. This Part also responds to potential arguments that objectors may raise. The significant literature proposing changes to labor law generally assume that the current NLRA serves as unions’ bargaining baseline. Some scholars even weigh the costs in terms of legislative bargaining.270 Several articles examine how social movements lead to legal reform, including labor law reform.271 Indeed, it is better for labor to negotiate when it has something to negotiate with.

The problem is that these approaches mirror what labor unions see in bankruptcy. As Andrew Dawson has pointed out, management at bankrupt firms treat unions as agents from which to extract concessions.272 That is because unions have something to lose in bankruptcy, and capital can use the potent weapon of setting aside collective bargaining agreements.273 If unions have nothing from which to negotiate legislatively, unions and their allies have a great incentive to engage in insurgency and to do so creatively. As things currently stand, unions in the private sector have very little to bargain with. Despite excitement concerning recent organizing drives at Amazon, Trader Joes, and other companies, the reality is that organized labor represents only six percent of the private sector workforce and ten percent of the workforce overall.274 Additionally, organized labor’s excitement concerning some of the decisions coming out of the NLRB such as the General Counsels more aggressively seeking to enjoin unfair labor practices under Section 10(j) of the Act, or the Board’s decision in Cemex, may wain if the Republican Party wins and installs its own Board members.275 The General Counsel’s role, which formed after the Wagner Act and would not be swept away in my hypothetical case, may nonetheless become perfunctory. In other words, labor will still be in a difficult position if the political winds seesaw in a direction that is against its interest.

The following Sections will explore potential objections. This Part echoes Catherine Fisk’s call to be clear-eyed about the role of law in leaving the work of prior progressive movements—such as the labor and civil rights movements—undone.276 The caution this Part takes goes somewhat in the opposite direction of those movements. This Part cannot overstate the role of a social movement or insurgency in changing law.277 Even though there are dozens of potential objections to this proposal, this Article will focus on three types of objections. First, that the Court’s potential action will fail to spark insurgency or backlash. Second, even if the Court sparks a movement, that Congress will fail to act on it. Third and finally, even if the Court’s actions spark a movement, and Congress perhaps acts on it, that change will come too late because unions would have died in the interim.

A. Failure to Spark a Counter-Insurgency

The first and most serious objection is that the Court’s proposed hamstringing of the Board will fail to spark an effective counter-insurgency, especially in the short-term. Brishen Rogers notes that organizing is less about aggregating preferences and is instead a disruptive and emotionally charged collective action.278 Several objectors might argue that looking to the 1930s as a model for how labor unrest could lead to labor law reform is misguided and dangerous because the historical and political factors for disruption to succeed are uncommon.279 Even though inequality in the United States mirrors the 1930s, an objector might argue that the economic situation during the Great Depression was so dire that even business interests understood that they had to acquiesce to collective bargaining for the United States to avoid falling into communism.280 To use Rogers’s language, people today will not be angry enough to actually go out and organize.281

This argument has significant weight. The Depression elevated language about class consciousness into everyday vernacular. Bernstein describes how 1856 work stoppages took place in 1934 as an “eruption.”282 In comparison, the Department of Labor tracked 33 strikes and stoppages in 2023,283 which was a twenty-three-year high.284 Even though Gen Z may have a less deferential attitude to the workplace than previous generations and be more open to activism, critics may argue they are not in position to capitalize on an organizing moment. Additionally, the situation in the United States is not so dire as to make a labor-based insurgency seem like an effective route to seek reform because Americans are materially better off today than in the 1930’s.

The above objection seems to posit a question of timing to take action as well as support Gen Z. What sparks a movement and a moment can be unpredictable. Even if the Court’s decision on the Board’s constitutional viability does not spark a movement in the short term, it will add fuel to the fire for major labor reform in the United States in the medium to long term. It is true that the central proposal in this Article places faith in Gen Z to act, and implicitly on millennials and Gen Xers to support Gen Z.285 However, recent events have demonstrated that workers are willing to engage in insurgency even when the law constrains them or threatens them with sanctions. For example, the Red for Ed campaign demonstrated a situation in which professional workers struck and engaged in an insurgency without union sanction. In that case, teachers in several conservative states were threatened with losing their jobs for walking out, and yet they did so despite not making hunger-inducing wages.286 In other words, the financial situation is already bad enough for white-collar workers that they are willing to risk their jobs for a potential raise. That campaign led to legislative settlements in the form of legislatively mandated pay raises, and it demonstrated that teachers were willing to defy statutorily imposed legal constraints.

In a similar way, members of Gen Z (on both political sides) have shown a penchant for engaging in protests and seeking to use collective action to make wage demands at companies like Trader Joe’s, Chipotle, and Amazon. They have engaged in what Michael Oswalt has called “improvisational unionization.”287 He observes that the messy tactics undergirding improvisational unionization can be useful for forwarding labor law reform.288 His observations, though in the context of union sponsored campaigns, match occurrences in the unorganized or newly organizing workplace because campaigns such as Amazon’s received little support from nationally established unions. In fact, it was only after four years of campaigning for a first contract that the self-organized Amazon Labor Union (ALU) finally affiliated with the Teamsters. Unions such as the ALU have been organizing at these companies despite incredible difficulties with obtaining first contracts that exist under the current legal regime. These organizing campaigns occurred on their own under “hot shop” conditions with little investment (at first) from organized labor, demonstrates that these workers have considered the risks and still decided to move forward with taking workplace action without institutional support.

Such bold action gives hope that, even if the Supreme Court takes away the Board, labor will channel movement energy because inequality is growing amongst all races. In turn, that means that at some point, growing inequality may cause further labor insurgency because the Court’s decision would weaken one of the proven bulwarks of the fight against inequality— labor unions. As Reverend Barber points out, discussion of who is poor used to focus on African American and Latino communities. He concentrates on how working-class white communities also suffer under the yolk of poverty. College educated workers, however, are also finding that higher education is no longer an automatic ticket to middle class comfort.289 One only need to think about how the deployment of generative artificial intelligence tools has already transformed and will continue to transform the white-collar workplace.290 The threat of AI turned unions that the public perceived as business unions into organizing forces who were willing to engage in disruptive tactics for 148 days!291 Additionally, one might consider how adjunct professors understand that reality.292 Overall, the widespread growth of poverty creates the potential for new coalitions that can break through some of the culture war fog that is currently dividing the working class.

B. Congress’s Failure to Act in Response to Counter-Insurgency

The second major objection that someone may raise is that Congress may refuse to act even in the face of nationwide insurgency. Congress’s inability to timely fund the government in recent years demonstrates that its ability to function orderly is in question.293 However, convincing Congress to pass labor law reform has been especially difficult even with a strong, and near filibuster-proof, Democratic majority. Labor has long traveled on its own Boulevard of Broken Dreams.294 One stop on that road is the Employee Free Choice Act (EFCA),295 which Congress failed to pass in 2008 when President Obama took office with a near filibuster-proof Democratic majority in the Senate and a strong majority in the House of Representatives.296 Instead, several Democrats refused to support key parts of the bill.297 The Obama administration moved up the Affordable Care Act in the legislative queue and passed that Act instead. EFCA languished, and organized labor operatives felt like the administration had forgotten them.298 That was not the only time Democrats failed to achieve labor reform. Former President Jimmy Carter failed to support organized labor when a filibuster threatened a similarly structured labor reform.299 In more recent times, labor advocates have called for passage of the Protect the Right to Organize (PRO) Act and that too has seen no congressional movement.300

The potential objector who raises this concern could go further. They could raise the argument that an insurgency-based approach may fail to move Congress into action on labor issues. Specifically they could emphasize that lawmakers regularly pass laws that improve the lives of workers but do not build up organized labor’s institutional interests.301 Indeed, the objectors might even point to the “Fight for $15 and a Union” campaign as an example.302 During that campaign, commentators pointed out that workers mobilized successfully for $15, but the “and a Union” part of the campaign failed because union density remained on current trends.303 States passed a rash of wage increases. At the beginning of the campaign, seeking a $15 minimum wage seemed absurd to many. However, the $15 minimum wage is now part of the national conversation around the minimum wage, and several states including California, Connecticut, and Washington have passed minimum wages at or in excess of $15 dollars an hour.304 Washington, D.C., Chicago, New York, and Portland are some of the cities that have increased their minimum wage to $15 as well.305 Finally, an objector might point out that workers are willing to mobilize for a minimum wage, but not for a union when they have a pay raise in hand. If a state can give the relief that workers are seeking, then (1) where would the energy for a major social movement come from, and (2) why would Congress bother acting on a hot-topic issue that lines up along partisan divides when a state could dissipate it?

The answer to this objection lies in how inequality can spur action. While minimum wage increases certainly alleviate the poverty of low-wage workers, increases do not provide a long-term solution to the rampant inequality and related social unrest existing in the United States. As Charlotte Garden points out regarding union representation and its salutary effect on protecting democracy, “[f]irst, union representation helps reduce economic inequality, which is important because economic inequality undermines democracy. Second, unions increase workers’ abilities to have their voices heard and preferred policies enacted.” In contrast, episodic responses to episodic organizing around the minimum wage do not meet these objectives.306

Unions can overcome objectors who raise this objection in another way—by focusing on how they give voice to voiceless workers. Part of President Trump’s support is from formerly union, formerly middle-class workers who have lost their status. These supporters have especially raised their discontent and, as Theda Skocpol shows, joined gun clubs and other clubs when they lost their union and their jobs. These are people who remember the benefit that came with a union job.307 However, low-wage workers look at the few people with unionized jobs with a sense of jealousy. That trend will continue. A report by The Pew Charitable Trusts demonstrates that middle-class income increases have lagged behind those at the very top.308 These facts track also with the United States’ growing Gini coefficient, which is an important index that tracks inequality. The collective memory of the United States is such that people know that unions were synonymous with the middle class, and recent populist candidates failed to deliver policies that would protect them.309 Workers currently want to join a union; they just do not know how to do that or fully understand all of the tools that employers have on hand to suppress unionization.310

But there is an additional point to make here. If this Article is correct that the Supreme Court would have to destroy the entire NLRA due to the Act’s broad language and interlocking structure, then it does not matter that Congress could act, as the Court’s actions would open a road of possibilities at the state level to channel the energy of a social movement. In an NLRB-less world, the states would be able to legislate without fear of NLRB preemption.311 States could, for example, pass their own workplace organizing laws in response to local mobilizations.312 Additionally, due to the NLGA’s protections, workers could engage in recognitional picketing at their employers without restraint as long as the pickets are peaceful, though they would have to continue working around any potential secondary boycott risks.313

In many ways, insurgency could lead to a rebirth of state-based labor law including local (city or state) sectoral bargaining ordinances, wage boards, and insurgent behavior in traditionally right-to-work states.314 This outcome would help position unions not only to regain strength at the local level, but also to serve as institutions that could save democracy at the local and state levels.

C. Organized Labor’s Death While Waiting for Government Action

Even though an objector may argue that the Supreme Court setting aside the NLRA raises serious questions about how long labor can survive without regulatory clarity and the financing that comes from a stable stream of dues dollars, the Court’s action could have the effect of incentivizing organized labor to work quickly toward a major march like the proposed May Day 2028 strike. The real question is not whether Congress would act, but rather whether organized labor would adapt its tools to a new reality and use organizing to build worker power. In his forthcoming paper, Michael Oswalt discusses how smaller unions without resources make use of bricolage principles to form resilient unions.315 He defines bricolage as “making due with whatever is at hand.”316 In many ways, this method is how the unions that existed before the New Deal behaved. Unions existed before the Act gave them legal sanction and continued to exist. In other words, history has shown that organized labor can survive and make gains for workers even when there are no regulatory structures governing labor relations.

Another point to highlight is that only 10 percent of the workforce is in a union despite the existence of the NLRA.317 However, one-third of that percentage is in the public sector and therefore not covered by the NLRA, but rather by local, state, and federal labor organizing schemes.318 Additionally, even though there appears to be a boom in union interest, the numbers tell a story of a movement still experiencing decline.319 Public sector unions would be able to weather the storm of a repealed NLRA and could use their base to build worker power in the private sector. Additionally, unlike the unions of pre-NLRA times, the unions of today have several tools that they can use to keep functioning. First, organized unions in the private sector who are covered by unexpired CBAs would not lose the protection of those agreements because they are private agreements. Since most agreements average between three and five years in duration, that alone would provide some time for organized labor to develop new tactics in the midst of a vacuum.320

Next, as discussed above, the unions of today have the benefit of the Norris-LaGuardia Act (NLGA) anti-injunction rule.321 The unions of yesteryear did not get to maximize the benefits of that law before Congress enacted the NIRA and NLRA. The NLGA’s protection of certain types of peaceful strikes and activities from court action provides unions with an opportunity to engage in insurgency at the state level.

Next, as discussed above, states are likely to move in quickly and fill the breach. For example, even though the United States does not have a comprehensive data protection law or artificial intelligence law, federal agencies and the State of California could move to fill the gap if unencumbered by the NLRA’s preemption law.322 This ability alone would allow organized labor to seek labor law reform at the state level equivalent to, if not better than, parallel federal law reforms in a time period before labor peace provisions would cease to be effective.

Finally, while six percent of workers in the private sector are covered by a CBA, thirty-six percent of workers in the public sector are covered by a CBA and are organized under state and local law, not the NLRA.323 That means that a Supreme Court decision cabining off private sector tools for labor organizing would not affect public sector unions organized under local law.

CONCLUSION

This Article builds on a proposal proffered forty years ago by none other than former American Federation of Labor (AFL) President Lane Kirkland. At that time, he called for organized labor to abandon the NLRA. This Article engages in a predictive analysis about what that would look like. In this case, the route toward abandoning labor law quickly runs through the current Supreme Court. This Article outlines how the Court would treat a constitutional challenge to the NLRA’s enforcement apparatus. After predicting that the Court would rule that it is constitutionally infirm, the Article focuses closely on the application of the severability clause. It determines which avenues for labor organizing are available to organized labor and its allies. No matter whether the Court examines the National Labor Relations Act through the Major Question or Non-Delegation Doctrines, it must apply severability clause to fashion a remedy. Functionally, the Court has two choices. It can apply the severability clause to eliminate the Board’s use administrative law judges and leave a “zombie” agency in place, or it could rule that these judges are an integral part of the statute and strike the NLRA down wholesale. The history leading up to the NLRA’s passage and design demonstrate that the law and its enforcement apparatus are inseparable. If the Court rules that the enforcement mechanism—such as through administrative law judges—is constitutionally infirm, then the whole statute must fail as well. The Court could, therefore, reform labor law in ways that Congress has failed by providing other actors, like states, a viable means of enacting labor law change.

Upon making that prediction, this Article then reflects on how labor insurgency held the key to the original enactment of the National Labor Relations Act, and it emphasizes that insurgency will guide the resurrection of the labor movement. Gen Z’s distrust of the current workplace may lead them to take direct action in a situation in which the Court leaves the Board inoperant. No matter what happens, once the Court acts, labor will need to prepare for “a steep, but not impossible uphill climb.”324 Labor and its allies will have to use what’s left of their financial reserves and go for broke if the Court sets aside the NLRA. The events of the 1930s demonstrate that sometimes that energy is synergistic with creating organizing opportunities.325 As Duff observes, he “cannot accept that [workers] will simply sleep through the arrival of a new gilded age. . . . The boss’s overreaching may be on the verge of resolving all ambiguity within the hearts and minds of workers respecting the righteousness of the ends of resistance (i.e. survival and self-defense) and set them on their first steps this century towards honest reflection on the scope and means of resistance.”326

#### Labor movements should take advantage of NLRA strike-down by initiating a process of federalist policy experimentation.

Alvin Velazquez 25, Associate Professor of Law, Indiana University Maurer School of Law, "The Death of Labor Law and the Rebirth of the Labor Movement," Legal Studies Research Paper Series, Research Paper Number 543, 2025, SSRN

B. The Possibilities for State Collective Bargaining Reform

If the Court were to repeal the NLRA, then organized labor and its allies could leverage already existing protections on the books at the state level and push for further innovation without worrying that courts would preempt state and local labor legislation. As noted above, several states already have provisions in their statutes or in their constitutions protecting collective bargaining that would go into effect should the Court strike down the NLRA. However, there would be room for states to further experiment in the absence of preemption, including bargaining at a sectoral level rather than at the company level as NLRA provides.236 Befort observes that “[t]he federal preemption landscape consists of a complex web of rules and precedent, and courts often appear to decide cases on the basis of highly technical distinctions. In short, many perceive the topic of federal preemption as a great mystery to be avoided if at all possible.”237

If the Court interprets the severability clause as discussed in Section I.C, then organized labor and its lawyers can avoid the quagmire that is federal preemption. There are three relevant preemption doctrines for labor law. The Supreme Court has created two of those: Garmon and Machinists preemption.238 In Garmon, the Court held that federal labor law preempts state regulation of core concerns regulated by the NLRA, such as those implicated by Section 7 and Section 8 of the NLRA.239 That doctrine aligns with the arrangement that other federal statutes have with overlapping state regulation. The second doctrine, Machinists, is where the NLRA’s preemption doctrine develops in an especially unusual manner.240 The Court held in that case that the NLRA also preempts all laws regulating what Congress left to economic forces or otherwise did not regulate. The courts have applied Machinists preemption to strike down laws of general applicability providing for paid breaks241 and a California state ban on using the state’s resources to support or oppose union organizing drives.242 The third preemption doctrine is based on Section 301 of the Labor Management Disclosure Act.243 It grants federal courts the jurisdiction to hear contractual disputes between labor and management and requires federal courts to apply federal common law instead of state contractual law to these kinds of disputes.244

The advantage of setting aside federal preemption doctrine for organized labor is that states could then become laboratories of work law and fill in where Congress has not acted. Andrias and Sachs previously noted that engaging in disruptive tactics is much easier at the state level than at the federal level.245

In May 2021, the Harvard Law Clean Slate for Worker Power Project issued a report called “Overcoming Federal Preemption: How to Spur Innovation at the State and Local Level” that succinctly set out what innovations states and localities could implement in the absence of federal labor law preemption or the articulation of a new norm through the PRO Act.246 Those innovations include:

 “[e]xpand[ing] collective bargaining coverage and protections to those not covered under the NLRA,”247

 “[p]rovid[ing] for enhanced labor standards related to wages, hours of work, and/or benefits,”248

 “[r]egulat[ing] employer’s use of state or local funds to attempt to defeat union organizing campaigns,”249 and

 “[c]ondition[ing] state funding on labor peace or neutrality agreements”250

While these remedies certainly help workers seeking to organize into unions, more would be possible under this Article’s analysis because states could not only consider these actions but could actually engage in regulating labor within their own borders. Andrias and Sachs note how “[m]ovement actors translate disruptive capacity into political power that they deploy to secure government concessions.”251 This is especially true at the local government level.252 The possibilities at the local and state level encourage innovation.253

Labor scholars would not have to expand current doctrine but instead think about expanding bargaining protections to wider swatches of the work force. In the case of the gig economy, the change in preemption would allow states to regulate gig company workforces through the imposition of collective bargaining. For example, California could convert its recently formed Fast Food Council into a full collective bargaining regime.254 In Massachusetts, voters will soon consider whether to make gig drivers employees for purposes of a bargaining-like law after efforts to work around bargaining fell short in the legislature. By defining gig workers not as independent contracts but as employees, state law would get around impediments that antitrust law places on gig workers conspiring to bargain.255 Without preemption, Massachusetts lawmakers could simply legislate a bargaining regime for Uber and Lyft drivers through normal mechanisms or ballot referendum.256 Workers could also advocate for state wage boards because, as César F. Rosado Marzán posits, if the NLRA is dismantled and labor politics are disrupted, that could create conditions for the creation of new labor institutions as occurred in Puerto Rico in the 1960’s.257 Although a Court ruling setting aside the NLRA would open new possibilities, such a ruling would also leave certain labor regulations that inhibit union action such as the prohibition on secondary boycotts. This Article now turns to that.

### Neg---DA---Politics / Elections

#### Strong preemption means Congress will have to participate in enacting most affirmatives, even with a ‘United States’ actor. That guarantees strong politics ground: Congress is where labor law goes to die.

Cynthia Estlund 24, Crystal Eastman Professor of Law at the New York University School of Law, "The Case for Sectoral Co-Regulation," OnLabor, 5/21/2024, https://onlabor.org/the-case-for-sectoral-co-regulation/

Now sectoral bargaining is back in fashion among some labor cognoscenti. Given federal labor preemption, however, any sectoral bargaining framework would have to come from Congress, where labor law reform has gone to die over the past half-century. Moreover, sectoral bargaining doesn’t so much build union density and bargaining power as it requires them to get off the ground. In particular, it requires unions that represent a broad swath of workers in the sector. (Another chicken-or-egg problem, it seems.)

#### Electoral and agenda politics arguments will be plentiful and high-quality.

David Madland 21, Senior Fellow and Strategic Director of the American Worker Project at the Center for American Progress, author of Hollowed Out, "Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States," ILR Press, an imprint of Cornell University Press, 2021

Grassroots pressure and large electoral majorities combined with organizational muscle and political champions might be enough for many types of issues to succeed, but labor modernization requires far more. Bold changes that overturn old ways of doing things and challenge powerful vested interests require that enough policy makers support the ideas behind the change.1 The policy needs to be viewed as right for the times—a credible solution to the problem as well as ready to be acted on. Which means that it needs to become something like conventional wisdom among a critical mass of policy elites that a new labor system is necessary to solve America’s economic and political challenges.

The path to gaining an electoral majority, institutional support, and a ripe intellectual climate is rough. But signs indicate that the way is not totally blocked. A pro-union electoral majority could exist in the near future, as the public is as supportive of unions as they have been in quite some time, and grassroots energy is growing. Policy champions could emerge as some key union and nonunion worker organizations have begun working on reform policies. Critically, the framing of debate is becoming more favorable to a new labor policy as the intellectual environment is shifting away from a rigid free-market orthodoxy and has become more open to structural economic changes. A small but growing group of academics, advocates, and politicians has begun to make the case for bold labor law changes, and their efforts appear to be gaining traction. Indeed, support for broad-based bargaining has become almost commonplace among prominent Democratic politicians.

The rest of this chapter discusses in greater depth the politics of enacting a new labor system. It begins by exploring whether there might be other ways that the new labor policy could be enacted—such as by drawing support from some businesses. The chapter then teases out the importance of grassroots energy, political majorities, legislative champions, and the intellectual climate by examining state and local labor reform efforts and the passage of the NLRA. The discussion highlights the political difficulties a new labor system faces as well as the potential that favorable factors could align and enable the new labor system to become law. While passage may be a longshot, success rests heavily on enough people coming to accept the premise of this book—that a new labor system could help successfully address critical challenges in America.

#### Political opposition will drive affirmative teams to increased plan specificity in order to defeat circumvention. But affs will have compelling avenues to push back against circumvention arguments with arguments that go beyond just fiat.

David Madland 21, Senior Fellow and Strategic Director of the American Worker Project at the Center for American Progress, author of Hollowed Out, "Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States," ILR Press, an imprint of Cornell University Press, 2021

Importantly, these factors do not need to stay aligned for very long in order for reform policy to have a lasting impact. If the new labor system is ever able to become law, it is likely that powerful opponents would seek to weaken or undermine its implementation through a variety of strategies, just as they did when the NLRA was passed in 1935. Administrative budgets and regulations would be heavily contested, political supporters targeted, lawsuits filed, studies and news reports on the policy’s supposed harms produced, and new “reform” legislation introduced. These efforts would likely have significant financial backing and after some time would probably succeed in at least watering down the original law. The current pro-business makeup of the courts makes it seem very likely that at least some elements of the new labor system would be undermined.56

Though the Supreme Court famously upheld the constitutionality of the National Labor Relations Act, the law did not even survive a few years without court decisions weakening it. And the law barely existed for a decade before the Taft-Hartley Act significantly altered it. Still, the NLRA shaped America’s economy and democracy for a significant part of the twentieth century. The NLRA led to a sharp increase in union density and coverage and created new rights and a platform for workers to build on for decades even as the law was weakened. Similarly, a new labor system would be able to transform America’s economy and democracy in the twenty-first century even if it only lasted a few years in its purest form. Institutions can have powerful and lasting legacies.

The new labor system could also be more robust than the NLRA in the face of attacks and thus survive longer in a useful form. Once the new system was up and running, some employers might be more willing to defend it because it would help solve problems for them—such as the lack of workforce training and getting undercut by low-road firms. Reform would also more fully integrate unions into public institutions—like workers boards and workforce training—meaning that gutting the law would be more complicated because weakening unions would also weaken programs that deliver broad public benefits.

Thus, the new labor system would lead to transformative changes in America’s economy and democracy if it became law and could succeed at its goals even if opponents were able to weaken it after passage.

While significant obstacles stand in the way of enacting a new labor system, there are a number of favorable trends that suggest it is possible— including growing public support for unions, workers’ increased willingness to engage in direct action, the emergence of some political champions, and a changing intellectual environment that has created an opportunity for debate about labor policy. Indeed, the most important factor favoring the eventual passage of a new labor system is that it would work. As more people realize that labor reform is likely to succeed in addressing some of the country’s biggest challenges, support for it should only continue to grow. More of the public may demand a new labor system, champions may more vocally push for it, and elites may increasingly come to believe in its value.

The United States faces deep and enduring challenges—decades of stagnant wages, near record levels of economic inequality, low levels of social trust, racism, large economic divides across race and gender, and a captured political system that too often does the bidding of wealthy elites while ignoring the public’s interest. As bad as these problems are, they can foster even more significant social breakdown.

Broad-based bargaining and incentives for union membership would increase density and coverage, which would raise wages, reduce inequality, and make government more responsive to the will of the people. These changes would also help limit racial and gender discrimination and foster social trust, as well as create a level playing field for businesses to compete based on innovation. Not only do political science and economic theory indicate that a new labor system would achieve these results, these outcomes have also been demonstrated in the real world in a variety of settings—in countries around the globe, including those most similar to the United States, as well as in US history and in a few pockets of the country today.

The hope of this book is that it can play a role in making bold labor reform more likely by making the case for a new American labor system.

#### It is even presented as an argument for incrementalism. This could support CP strategies based on smaller reforms, or based on state/local experimentation.

David Madland 21, Senior Fellow and Strategic Director of the American Worker Project at the Center for American Progress, author of Hollowed Out, "Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States," ILR Press, an imprint of Cornell University Press, 2021

All told, the path to passing major labor reform is quite narrow. A number of factors must continue to evolve favorably. On-the-ground worker activity will need to increase in intensity. The public will have to elect a supermajority of pro-union policy makers to Congress. The labor movement will need to more fully embrace bold reforms. State and local experimentation will need to provide additional policy successes to build on. Most importantly, the intellectual environment must continue evolving toward recognizing the importance of a new labor system in solving the country’s economic and political problems.

The window of success may be wider for an incremental approach that seeks labor reform first in occupations or sectors where the National Labor Relations Act does not apply, such as for domestic workers or independent contractors, or in industries where the government is already heavily involved, such as health care or education. That is, the path to a new labor system may come through experimentation in quasi-public industries or in sectors that have been excluded from traditional labor and employment law. Even passing a single experiment at the federal level would be quite difficult, but it might not require quite as large political majorities to be enacted. The incremental approach may even help create a track record that helps foster a more supportive intellectual environment. Still, the more incremental approach could mean giving up an opportunity to get more at one time, and it would not avoid the need to eventually reach critical levels of support on the ground, in Congress, with the labor movement, and in the idea environment.

### Neg---CP---Antitrust

#### This topic would see the eternal return of the labor welfare aff from the antitrust topic, this time as a CP.

David Madland 21, Senior Fellow and Strategic Director of the American Worker Project at the Center for American Progress, author of Hollowed Out, "Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States," ILR Press, an imprint of Cornell University Press, 2021

Stronger antitrust enforcement to limit the ability of a few employers to dominate a labor market would help raise workers’ wages, since workers would have greater ability to move between employers and force employers to compete for their skills. Antitrust enforcement can also limit the political power of the largest corporations by breaking them into smaller pieces. Improved antitrust enforcement would be an absolutely vital change.123 Indeed, some research suggests that the growing domination of a few large employers in individual labor markets could be a significant reason why wages are stagnant.124 Yet breaking up large companies and increased antitrust enforcement may have only a relatively modest impact on wages and a limited effect on democracy. This is not just because increased firm concentration explains only a very small percentage of the gap between pay and productivity since 1979, as some research suggests, but also because labor unions are key in translating the potential for higher wages into reality. 125 Indeed, research finds that firms in uncompetitive labor markets have a much easier time restraining wages when unions are weak.126

Wages are unlikely to rapidly increase in a world where workers are dealing with slightly smaller companies facing slightly more competition. And politicians will not suddenly listen to workers instead of companies if firms get a bit smaller. Antitrust legislation and similar policies still leave corporations with far more power than workers in the economy and in democracy. 127 Workers need to be able to bargain for higher wages, and they need to be organized so that politicians are responsive. Corporations may need to be cut down to size, but workers also need to be built up.

### Neg---CP---Mandatory Unionism

#### Mandatory unionism has been considered as an alterantive to more flexible labor law reforms. This would solve union membership through compulsory participation but arguably comes at the cost of workplace democracy.

David Madland 21, Senior Fellow and Strategic Director of the American Worker Project at the Center for American Progress, author of Hollowed Out, "Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States," ILR Press, an imprint of Cornell University Press, 2021

Another kind of bold change to labor law that some have discussed would automatically make all workers members of unions or at least pay dues—a kind of default unionization. These types of proposals would obviously increase union density and boost union finances. There is also a kind of logic to them: all workers benefit from unions, so all workers should join and pay. Still, these kinds of proposals seem outside of the realm of the possible, in that they have not been tried in the United States (and have barely been tried anywhere else). In addition, this kind of reform may not be desirable. It is unclear how workers would react to such a system that compels membership or dues regardless of whether a majority of workers at a worksite want a union. Further, compelling dues payment or membership from all workers could make unions less responsive and accountable to members.89 Even if these kinds of reforms were possible and desirable, there would still be a need to create an attachment between workers and the union so that workers would be willing and able to take the kinds of powerful actions necessary to make collective bargaining and participatory democracy work properly. It is possible that this attachment could come solely from traditional organizing, but this seems unlikely given all the evidence presented in this book suggesting that additional incentives are necessary to encourage membership and create attachments for many workers. Thus, even with a kind of mandatory unionism, additional recruitment platforms and incentives for joining or participating would still have value in helping pull people in to union activities.

### Neg---CP---Minimum Wage

#### Minimum wage approach competes with building labor power. Aff authors argue it is insufficient because it doesn’t change the structure of bargaining over the workplace.

David Madland 21, Senior Fellow and Strategic Director of the American Worker Project at the Center for American Progress, author of Hollowed Out, "Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States," ILR Press, an imprint of Cornell University Press, 2021

While raising the minimum wage would help millions of low-income workers, a single minimum wage delivers far more for those at the bottom of the wage distribution than it does for those toward the middle. Even a minimum wage of $15 per hour would put relatively little pressure on the wages of workers with average or slightly above average earnings.112 The minimum wage needs to be increased, but the new labor system would do more for more workers and complement a higher minimum wage. Workers’ boards would be especially useful for workers that would not be impacted much by even a $15 standard. As the economist Arindrajit Dube argues, “wage boards are much better positioned to deliver gains to middle-wage jobs than a single minimum pay standard.” His rough modeling of wage boards that produce binding standards for about 30 percent of the workforce suggests that such a policy would increase wages for workers whose wages are at the twentieth percentile by 19 percent, by 15 percent for workers at the fortieth percentile, and by 12 percent for workers at the sixtieth percentile.113 And, of course, the dramatic increase in collective bargaining under the new system would also raise wages for middle- and uppermiddle-income earners.

Further, a high minimum wage is unlikely to work very well without stronger unions, nor would workers’ boards. Without strong labor unions, there may not be sufficient political pressure to keep raising standards, and thus the floor might stagnate over time. And, critically, without strong labor unions to enforce minimum standards, it is likely that many, if not most, low-wage employers would violate the law, and thus many workers would not actually receive a legally required high minimum wage.

Wage theft is already rampant in America. It is estimated that workers currently lose over $15 billion per year from minimum wage violations.114 These violations are not just from small, fly-by-night operations but also from many of the largest companies in the country, indicating just how pervasive wage theft is.115 Increasing minimum wage levels would only increase the incentive to cheat. Not only does the current American experience suggest that a higher minimum wage would face significant enforcement challenges, so too does the evidence from Canada, Britain, and especially Australia—which has one of highest minimum wages in the world but weak unions and significant problems with wage theft, as discussed in the preceding chapter. Government enforcement agencies are woefully understaffed, and even a significant increase in funding would not be adequate.116 No amount of government inspectors will ever be able to ensure compliance in every workplace or make workers understand the law and feel comfortable seeking its enforcement. In contrast, strong workplacebased organizations can effectively monitor and police minimum standards and ensure that workers are able to come forward and assert their rights.117 Which means that in order for a high minimum wage to be most effective at raising wages, unions need to be strengthened.

### Neg---CP---NLRA Reform / Enforcement

#### Advocates of transformative labor policy are skeptical of NLRA reform.

David Madland 21, Senior Fellow and Strategic Director of the American Worker Project at the Center for American Progress, author of Hollowed Out, "Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States," ILR Press, an imprint of Cornell University Press, 2021

These same arguments about the difficulty of organizing workers in the current environment would hold true even if the NLRA were tweaked to be more favorable to workers. While policy changes such as card check and getting rid of right-to-work policies are likely to increase union membership, research finds that these kinds of labor law changes are unlikely to raise unionization rates to anywhere near sufficiency. 77 They would certainly help, but there is little evidence to suggest that they would be enough. Estimates from Larry Mishel indicate that to simply maintain private-sector density requires doubling the scale of current organizing, while an increase of just 4 percentage points would necessitate increasing organizing by seven times, leading him to conclude that “[c]hanging the law to facilitate more organizing is insufficient.”78

The research on other countries finds a similar story. Unions in Britain have an easier path to majority support than US unions do, but they are still struggling. Parts of Canada have almost everything that US unionists have traditionally wished for—almost a pre–Taft-Hartley version of the National Labor Relations Act, with secondary boycotts, card check, and no right-towork policies—yet union density is shrinking there too. Unions are in decline even in countries with policies that go well beyond a dream version of the NLRA, such as Germany, with its mandated works councils and board-level representation. In contrast, in countries that have policies designed to encourage union membership, such as through the Ghent system, unions have remained strong. And, of course, countries that encourage broader-based bargaining coverage have been able to maintain much higher coverage than the United States.

Another piece of evidence that suggests that tweaks to the NLRA would not be enough is that the Janus Supreme Court decision (that made the public sector effectively right-to-work) has not been as harmful to union density as many union leaders feared.79 This indicates that right-to-work policies are not as critical as some believed, especially for established unions. Ending right-to-work policies would be helpful but not as helpful as some may have hoped.

As stand-alone solutions, increased organizing and restoring the rights and protections of the original National Labor Relations Act would be insufficient. A better way to think of these actions is as a necessary part of a reform agenda. Organizing workers and disrupting the economy can help to create an impetus for the kinds of policy changes necessary. Organizing will also be important in the new system to pressure employers and the political system to deliver wage and benefit increases. In fact, the US version of a Ghent-like system would be set up to provide incentives to encourage more organizing. Finally, stronger worker rights are also essential to any reform effort because workers cannot engage in any kind of bargaining—let alone broad-based bargaining—if their rights are constantly threatened.

#### The fundamental framework of the NLRB is sound and does not require reform. This card is from the introduction to a book-length treatment of how these reforms might unfold.

Roger C. Hartley 24, Professor of Law at The Catholic University of America, award-winning teacher of constitutional law and labor law, author of four other books including Monumental Harm: Reckoning with Jim Crow Era Confederate Monuments, "Fulfilling the Pledge: Securing Industrial Democracy for American Workers in a Digital Economy," The MIT Press, 2024

As we move beyond the seventy-fifth anniversary of the 1947 Taft-Hartley amendments to the National Labor Relations Act (NLRA), we find that American labor relations law is in shambles. Congress has been unable to enact labor law reform and, due to the US Senate’s filibuster rules, enacting comprehensive labor law reform will continue to be a challenge.1 Without legislative reform, we seem stuck, saddled with widely divergent views regarding our national labor policies and the role of the federal government in labormanagement relations. Vacillation in our labor laws, tilting in either a proworker or a probusiness manner, has become the norm, with the meaning of our labor laws increasingly determined by which party won the most recent presidential election.2

This book addresses the disarray in contemporary American private-sector labor relations law in the context of the digital economy in which contemporary labor law must operate. The chapters that follow confront the fundamental question of whether the pledge of meaningful access to industrial democracy for American workers, first made in 1935 with enactment of the NLRA and later confirmed in the 1947 Taft-Hartley amendments, has become (and perhaps always was) just “an old dog that won’t hunt”—a colloquial expression common in the Ozarks and elsewhere that refers to anything, especially a plan or idea, that won’t work or is destined to fail. “It looks good on paper, but that dog won’t hunt.”3

A Vote for Optimism

The thesis of this book is optimism. To be sure, the NLRA’s 1935 pledge to American workers to provide an effective means to secure collective empowerment and economic democracy remains unfulfilled.4 But it is not too late to keep this pledge.5 Legislative reform can reinvigorate the law in ways that provide workers who desire union representation the ability to obtain it far more readily than is currently possible. In this respect, I dissent from those who argue that in this digital age, “we need to scrap the National Labor Relations Act and start over from a clean slate.”6 The NLRA needs to be reformed, not scrapped. Moreover, such legislative reform is politically feasible if a sufficiently broad-based public constituency for reform can be assembled. And finally, such a constituency can be assembled if Americans are patiently and carefully shown why support for labor law reform is in the national interest. The challenge is to demonstrate in a convincing way that by reinvigorating the practice and procedure of collective bargaining, labor law reform holds the great promise of providing “America’s working people . . . an inclusive and broadly shared economic prosperity [as] promised by the New Deal.”7 Political rhetoric will not suffice. Rather, it will be necessary to clarify, in ways that people can understand, exactly why and how American society will benefit from a rising public clamor for legislative labor law reform.8 What are the pathways for building such a constituency for reform?

#### The problems with the NLRA stem from underenforcement. We should buttress the current labor law framework, not abandon it.

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For the last year, the news has been filled with stories of worker activism.

Headlines announce unprecedented union victories at Amazon.com Inc., Starbucks Corp., Apple Inc., Chipotle Mexican Grill Inc. and Trader Joe’s Co., along with successful strikes in industries as diverse as farm equipment, fast food and tech. And then there’s the new Gallup poll of American attitudes about unions, which reveals the highest level of support for unions ever — greater than 70%.

So it probably came as a surprise when the U.S. Department of Labor reported last week that union membership levels have actually declined over the last year and are now at their lowest level ever — 6% in the private sector.

There’s an important puzzle here: How can support for unions be at its highest level ever and union membership be at the lowest level ever recorded in the U.S.? How can we continue to witness heroic worker efforts to form unions in industries once thought unorganizable, when actual unionization rates continue to plummet?

To state the obvious, what we are seeing is a massive disconnect between what Americans want when it comes to unionization and what Americans are actually able to achieve. What is less obvious is the source of this disconnect. Although the reasons for this divergence are varied, we think the primary explanation is law.

Labor law — the National Labor Relations Act in particular — is meant to serve as the transmission belt between what workers want when it comes to unionization and what workers get. In simple terms, the NLRA establishes the process through which workers decide whether to have a union or not. The law sets the ground rules for discussion and debate among workers, and between management and employees, about the union question.

The law also establishes the process for casting votes. The law then sets up the rules for collective bargaining in those instances when workers vote to unionize. And, of course, the law polices the rules it establishes: imposing sanctions against rule violators so that the law on the ground actually tracks the law on the books.

But U.S. labor law is a complete disaster, failing at every step to fulfill its primary mission of translating workers’ preferences into workplace realities. The failures begin at the outset of the process, in deciding which workers will get to vote on unionizing.

Part of the issue here is that the law excludes large swaths of the labor force — domestic workers, agricultural workers and independent contractors — from the right to choose a union. And with respect to the workers who are covered, the law requires them to form unions worksite by worksite by worksite, imposing the often-Sisyphean task of running hundreds of campaigns to unionize a single large employer.

The law also undermines workers’ ability to talk to each other about whether they want a union or not. Instead of facilitating honest discussion among the people who will vote on unionization, the law allows management to ban nearly all union talk between employees at work while at the same time giving managers nearly unfettered discretion to use work time to convey a constant barrage of anti-union messages.

Moreover, even if workers would like to hear the pro-union side from a union representative or even a reply to management’s anti-union messaging, the law grants workers no right to speak to such union reps at the place where the unionization decision matters most — the workplace.

All of this pales in comparison to what is probably the law’s biggest failure — actually protecting workers who support unions from employer retaliation.

For example, while it’s supposedly an unfair labor practice for an employer to fire a worker for supporting a unionization drive, one in five workers who takes the lead role in a union campaign gets fired for doing that. We’ve seen this play out in the Amazon and Starbucks campaigns dozens of times.

How does the law enable such lawbreaking? A big part of the story is the paltry remedies available for violations. An employer who fires the lead union supporters in a campaign can quash that campaign effectively, by instilling fear of discharge in all the workers who might otherwise support the union. What does it cost the employer to illegally fire a few key workers? Very little — usually just a fraction of the fired workers’ regular wages. There are no fines or penalties so no deterrents.

Finally, in those cases where workers — through near heroism in the face of this kind of employer retaliation — succeed in choosing a union, the law makes it exceedingly difficult for them to successfully bargain a first collective agreement.

Again, a lot of the problem lies with the law’s laughably weak remedies. The only remedy currently available when employers fail to bargain in good faith is an order telling them to bargain in good faith. Again, no fines, no penalties and no deterrents. The absurdity of this remedial scheme is obvious on its face.

Put simply, while labor law is supposed to be a transmission belt for worker preferences, in reality, it constitutes a nearly insurmountable set of roadblocks. Rather than giving workers tools to discuss, debate and decide freely on unionization, the law gives employers powerful mechanisms to block workers from getting what they want.

Against the background of such a perversely designed labor law, the disconnect between record-high levels of support for unions and record-low levels of unionization begins to make all too much sense.

Having seen how law contributes to the divergence between preferences and reality, the solution is clear. We need a new labor law, one that actually works as a transmission belt and not as a roadblock.It wouldn’t be that hard to design — just let workers organize free from employer intimidation on the scale and at the scope they choose and create real incentives for the parties to reach an agreement.

The more pressing problem is the political will to enact a law that gives American workers what they want: the right to unionize. Until that political will exists, we will continue to live in a world where working people do not get what they want, or what they deserve.

### Neg---CP---States

#### The NLRA significantly restricts state labor lawmaking. States and localities have attempted to work around these restrictions with mixed success.

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To fight the economic inequality caused by a widening income gap among American workers, many states, cities, and community-based groups support the adoption of innovative policies at the local level designed to protect and advance workers’ rights. One initiative is a growing nationwide movement for economic justice that seeks to convert low-wage jobs into good jobs with enhanced job security. For example, in the 1990s and early 2000s, labor activists and community groups worked for enactment of living wage ordinances as a strategy for lifting low-wage workers out of poverty. A living wage is a locally mandated wage that is higher than state or federal minimum wage levels, and the living wage ordinance may also mandate or encourage firms to provide health coverage and other benefits to workers. Living wage ordinances typically require private businesses that benefit from public money to pay their workers enough income to raise a family of four above the federal poverty line. A 2002 study of Los Angeles’s living wage ordinance for city employees and contractors suggests that female and Black workers were more likely to be affected by the ordinance since they make up a greater percentage of the public-sector workforce.11 Because living wage ordinances increase pay only for workers employed by businesses that contract or receive assistance from local government, many cities have shifted strategy to address the lowwage-job problem by enacting minimum wage ordinances applicable to all employees. For example, the “Fight for $15” initiative has succeeded in many jurisdictions in setting the minimum wage at fifteen dollars per hour.

Coalitions of workers and activists of color, women, and immigrants are able to successfully advocate for adoption of local minimum wages above the federal minimum because federal law permits localities to set higher minimum wages. But such an explicit authorization in federal law permitting local options to regulate labor relations is the exception. More typically, federal labor law preemption rules sharply curtail local attempts to innovate in the field of labor law. Setting labor policy is nearly exclusively within the domain of the federal government.12 The NLRA does not contain an explicit preemption provision. Courts nevertheless have interpreted its provisions to preempt most state or local legislative, executive, and judicial actions that regulate activity that is arguably protected or prohibited by the NLRA, as well as state or local government regulations that create the risk of “upset[ting] the balance of power between labor and management expressed in our national labor policy” by regulating conduct that Congress intended should “be controlled by the free play of economic forces.”13

Notwithstanding the severe limits set by federal labor preemption rules, community groups and other activists have been successful in finding opportunities for state and local governments to expand and enforce worker rights. Terri Gerstein (2020) has assembled the most complete inventory of such state and local initiatives that have successfully avoided the suffocating constraints of the federal labor preemption rules.14

One way that state and local governments protect workers without transgressing federal labor preemption rules is through greatly expanded involvement of state attorneys general (AGs) and criminal prosecutors (including district attorneys and others) in enforcing and protecting workers’ rights. For example, AGs have created dedicated units that focus on workers’ rights, to wit:15

These units vary in size, as some started with only one attorney, while others are more robustly staffed. They have a variety of names (“workplace rights bureau,” “payroll fraud enforcement unit,” “fair labor section”), but they all represent a commitment by these AGs to devote resources and institutionalize a section within their offices to focus on worker protection. State AGs have brought dozens of civil and criminal cases against predatory and exploitative employers in a range of industries with high rates of violations and workers who are low-wage, immigrants, and/or people of color. . . . They have also taken on specific employer practices, like inappropriate use of non-compete and no poach agreements and payment of wages by payroll cards. Several AGs have brought cases related to misclassification of workers as independent contractors . . . requiring [companies] to change their business practices to classify workers as employees. [Other] AG offices . . . have brought child labor cases. Some offices have pursued joint employer liability. Certain state AGs have also used their criminal jurisdiction to pursue wage theft, payroll fraud, and other violations.

State government and localities also have intervened legislatively to promote worker rights, but with mixed results. The US Supreme Court has applied Machinists preemption principles to bar state regulations where the Court could infer that Congress intended the subject matter to be free from state or municipal regulation. Thus, in Golden State Transit Corp. v. Los Angeles, 16 the Court concluded that the City of Los Angeles was preempted from conditioning the renewal of a taxicab company’s operating license on the company’s settling a labor dispute. By requiring the taxi company to settle to keep operating, the city effectively interfered with the company’s ability to use its economic weapons to resist union bargaining demands. In Chamber of Commerce of United States v. Brown, 17 the Court concluded that California could not prohibit employers who received state funding from using those funds to influence support for or opposition to union organizing because the state thereby interfered with an employer’s NLRA-guaranteed right to express its views on unionization. Milwaukee enacted an ordinance requiring certain employers who contract with the county to enter a “labor peace agreement” with a union seeking to represent the employer’s employees. Although the requirement that the employer become a party to a labor peace agreement did not necessitate employer neutrality, but rather only regulated employer speech by banning the expression of false or misleading information about the union, the Seventh Circuit ruled that the ordinance was preempted by the NLRA.18

The unifying principle is that state and local jurisdictions are barred from influencing “the process by which an employment agreement is reached: matters touching on self-organization and collective bargaining.”19 By contrast, localities are free to enact legislation of general application that sets minimum labor standards for all employees—both union and nonunion. For example, states are free to require that employee health-care plans include certain minimum benefits, although this is a subject that otherwise might have been addressed in collective bargaining.20 The Court also upheld a state law guaranteeing employees a severance payment in the event of a plant closing. As the Court explained, “the NLRA is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining.”21

Some local jurisdictions have adopted worker retention ordinances. Lowwage service workers are frequently displaced from their employment when their employers lose contracts. This can occur, for example, when cities that hire contractors to provide janitorial, security, and other services switch contractors, when private companies such as grocery stores or hotels change ownership, or when building service companies take over service contracts at private establishments.22 Worker retention polices are enacted to create job stability during such transitional periods and thereby protect the welfare of working families.23 The District of Columbia’s Displaced Workers Protection Act (DWPA), enacted in 1994, is an early version and is representative of such a policy.24 It provides that during a ninety-day transition period, employers who take over contracts for providing food, janitorial, maintenance, or nonprofessional health-care services must retain, by seniority, the predecessor employer’s employees who are needed to perform the new contract.25

Employer groups have mounted vigorous labor preemption challenges to these worker retention policies.26 Uniformly, courts have found no preemption, concluding that these are laws of general applicability (applicable to both unionized and nonunion employment relationships), they do not interfere with union organizing or the process of bargaining, and nothing in the Machinists preemption doctrine guarantees employers unfettered hiring freedom.27

In addition, through initiatives by workers and community organizations, often but not always with the involvement of labor unions, localities have enacted stronger laws against the misclassification of workers, particularly in the construction and hotel industries. Moreover, nonprofit organizations, including national networks, “have played a critical role in advocating for a range of new state and local laws,” such as levying penalties for wage theft, banning noncompete agreements for low-wage workers, adding sexual orientation and gender identity to the protected categories under state antidiscrimination laws, and requiring paid sick days and paid family and medical leave. Activists at the community level also have succeeded in lobbying for fair workweek laws. These laws ensure predictable schedules for low-wage workers. Particularly in industries such as retail and restaurants, employees are subjected to widely varying and unpredictable schedules, combined with “on-call” shifts and insufficient work hours, all of which greatly complicate managing child care or second jobs.28

Finally, through a process that Professor Benjamin Sachs (2011) has described as “tripartite lawmaking,” “governments act in areas of law that are entirely unrelated to labor organizing and bargaining but that are of acute interest to employers—areas such as medical malpractice rules, telecommunications policy, and zoning and permitting decisions. These governmental actions, in turn, are exchanged for private contractual agreements through which unions and employers bind themselves to new rules for organizing and bargaining.” These “tripartite political exchanges” produce agreements that set organizing and bargaining rules that differ from those contained in the NLRA but can be enforced as enforceable contractual obligations.29

Innovative Enforcement Strategies

A third strand of the initiatives engaged in by worker activists to reorder labor law outside the basic framework of the NLRA entails innovative strategies by states and localities to deter violations of and compel compliance with existing workplace laws. These strategies take a variety of forms, including state and local workplace enforcement agencies abandoning previous approaches that emphasized reacting to the filing of complaints and instead adopting the enforcement strategy of “being proactive . . . ; focusing resources on key industries with high rates of violations; collaborating closely with community and worker organizations; use of criminal prosecutions; strategic use of publicity; using licensing to drive enforcement; and seeking up-chain joint employer liability,” according to Gerstein (2020).30 For example, a state workplace labor commissioner’s office might proactively investigate or “direct sweeps . . . in collaboration with community partners and fellow government agencies, and target[] businesses with egregious violations.”31

Through community outreach—entering into longstanding relationships with worker and community organizations—state and local agencies are better able to administer this proactive enforcement strategy. Outreach helps inform agencies of chronic violations and unlawful practices and provides agencies improved access to low-wage and immigrant workers, groups that are less likely to seek government assistance on their own. Outreach initiatives can entail funding community-based groups to educate workers regarding their rights under protective labor legislation. Such education might be provided by a nontraditional labor organization known as a “worker center,” which is particularly effective in reaching immigrant workers who might otherwise be afraid of approaching the government for help.32

Strategic communications and publicity by government agencies augment community outreach initiatives, promote compliance, and educate workers. This communication educates workers regarding their rights and employers regarding their obligations. Multilingual websites are particularly useful for reaching the immigrant population. In addition, in jurisdictions that permit a city agency to order the temporary closure (suspension of a business license) of a chronic violator of workers’ rights legislation, the jurisdiction may provide an app that allows the public to learn through their smartphones the reason for the suspension, thereby adding public pressure on the business to become more law abiding.33

As noted in this book, current federal labor law preemption rules greatly hobble localities from doing more to protect workers’ rights. And, of course, only progressive, worker-friendly state and local governments will be motivated to adopt policies that successfully navigate preemption rules to augment the protections of the NLRA. The reality is that in many parts of the county, state and local governments lack the political will, and perhaps the desire, to enact local worker-friendly legislation and to adopt policies that serve as a countervailing force against the growing concentration of corporate power and concomitant quashing of basic labor rights. Only a robust and efficacious national labor policy can ensure the nationwide uniformity required to provide workers a meaningful ability to unionize and, through collective representation, secure an effective countervailing voice in setting their conditions of employment. Legislative reform of the NLRA is not the only strategy to enhance workers’ rights, but it is the vital feature of that strategy.

#### Here is evidence that provides an overview of this issue.

Sadie Basila & Benhamin Sachs 25, Sadie Basila is with the Regulatory Review; Benjamin Sachs is the Kestnbaum Professor of Labor and Industry at Harvard Law School, "Reforming Labor Law," Spotlight | Rights, The Regulatory Review, 3/23/2025, https://www.theregreview.org/2025/03/23/spotlight-reforming-labor-law/

TRR: How can states and local government regulate labor relations in ways that will not be preempted by the NLRA?

Sachs: NLRA preemption, as it currently exists, is remarkably broad and really does choke off much of what states and cities could otherwise do. But there are important exceptions to the rules of preemption. First, as I mentioned above, states and cities are free to regulate the labor relations of workers not covered by the NLRA. Second, states and cities are free to act as market participants and structure labor relations on projects in which they have so-called “proprietary interests” without running afoul of preemption rules.

But I should emphasize another point. We may not have any NLRA preemption in a short while. That is because there are a slew of constitutional challenges to the NRLA working their way through the courts—primarily in the U.S. Court of Appeals for the Fifth Circuit—and if the NLRA is declared unconstitutional, its preemptive effect will likely fall along with the statute itself.

#### Preemption is quite expansive.

Clean Slate for Worker Power 21, Project of Harvard Law School's Labor and Worklife Program, "Overcoming Federal Preemption: How to Spur Innovation at the State and Local Level," Harvard Law School Labor and Worklife Program, 05/01/2021, https://clje.law.harvard.edu/app/uploads/2022/12/Clean-Slate-Overcoming-Federal-Preemption.pdf

BACKGROUND: FEDERAL NLRA PREEMPTION

Federal preemption of labor law rests on 50 years of judicially created doctrine, not on any statutory language in the NLRA or subsequent federal labor legislation nor on any discernible congressional intent.9 Despite the lack of statutory language on preemption, the judicially created jurisprudence is extensive. Indeed, “it would be difficult to find a regime of federal preemption broader than the one grounded in the NLRA.”10

The judiciary has created multiple federal preemption doctrines. Under the Garmon11 preemption, states may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.12 In Garmon, an employer obtained a state injunction against a union for picketing.13 Instead of simply holding that the injunction was invalid because it interfered with federally protected labor rights, the Court created a broad preemption doctrine that covers even arguably protected or prohibited conduct—necessarily more than conduct regulated by the NLRA.14 Since the 1947 Supreme Court decision, Garmon has been riddled with inconsistencies and exceptions.15

The Supreme Court broadened preemption further in Machinists, 16 where the Court held that the NLRA preempts areas intended to be left to “the free play of economic forces.”17 There, an employer brought an unfair labor practice charge against unionized workers for refusing overtime work during contract negotiations.18 The Supreme Court ruled in favor of the union but expanded the Garmon doctrine to hold that Congress intended for certain conduct “to be controlled by the free play of economic forces,”19 and thus not to be regulable by states any more than by the NLRB.”20 Though the union in Machinists, like the union in Garmon, benefitted from the Court’s expansion of federal preemption, the decision has effectively been read to prohibit states and cities from promoting unionization and collective bargaining.21

Following these seminal cases, courts have developed a theory of jurisprudence in preemption cases that distinguishes between states and localities utilizing their purchasing or spending power related to labor relations (which is generally permissible) versus attempting to regulate labor relations (which is generally considered preempted). When a state or local government takes action affecting labor relations that serves its proprietary—as opposed to regulatory— interest, the action is not subject to NLRA preemption. In Boston Harbor, 22 the Supreme Court upheld the City’s action because the project labor agreement (PLA) at issue was tailored to one particular job, the Boston Harbor cleanup project.23 While courts have generally upheld laws promoting a localities’ promotion of PLAs,24 other laws have not fared as well. Machinists has been used to strike down the following: an action by the Los Angeles City Council to deny the renewal of a taxicab franchise unless the cab company settled a labor dispute with its drivers;25 an Illinois statute governing rest breaks and meal periods for hotel attendants in Cook County (enacted during a strike by hotel attendants against a hotel owner);26 and a statute prohibiting “employers that receive state funds from using those funds to ‘assist, promote, or deter union organizing.’”27

#### States should pick up the slack on protections for worker power.

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The Supreme Court has done a lot of big things in the past couple of years – created immunity from prosecution for presidents, rolled back the right to access abortion care and expanded access to guns. But possibly the biggest change the Court has wrought is laying the groundwork to profoundly constrain the ability of our national government to ensure basic protections across a range of contexts: for workers, consumers, the environment, to name just a few examples.

The idea that the federal government should have a significant role in providing a basic level of decency in our lives really began in the New Deal. Campaigning for his first term as president in 1932, Franklin Roosevelt made the case for a federal backstop for our wellbeing. In his stump speech, he argued that the federal government has a “continuous responsibility for human welfare . . . That duty and responsibility the federal government should carry out promptly, fearlessly, and generously.” He made good on that vision, particularly in protecting the economic wellbeing of all Americans. He made the first ever federal minimum wage and overtime law the centerpiece of his New Deal.

Roosevelt set a pattern that has been repeated in the almost 90 years since the New Deal. When it comes to workers’ rights, for example, the pattern has three parts: federal legislation that sets a basic floor for protecting workers’ wellbeing, federal agencies that then fill in and adapt the details of these protections as time goes by, and states that are left to go above and beyond these basic federal levels of protections in most areas. This three-part pattern has proved to be remarkably responsive, dynamic and adaptive. Democratic and Republican administrations alike were tasked with updating regulations and even innovating in the face of new challenges and changing contexts to meet Congress’s original goals, and red states and blue states could choose whether or not to build from the federal floor.

Here’s an example. In 1938, Congress passed the Fair Labor Standards Act, which established the right to a minimum wage and overtime pay. The statute also empowered the U.S. Department of Labor to set rules to define exactly who was entitled to these protections and how to make the necessary calculations of what hours count as work time and how to figure out precisely how much someone has to be paid. In Democratic administrations, DOL tends to take a more expansive view of who is entitled to these protections, and during Republican administrations the agency tends to take a somewhat narrower view. Some states have stepped in from time to time to extend protections even further – as when Washington state enacted rules in 2020 substantially raising the salary a worker must be paid to be exempt from the right to overtime pay.

Over the past few terms, the Supreme Court has upended this system. In a series of cases, the Court has cut the middle step out of the pattern. In cases like West Virginia v. EPA, NFIB v. OSHA, Loper Bright Enterprises v. Raimondo and Corner Post v. Board of Governors of the Federal Reserve System, the Court has imposed such onerous constraints on federal agencies’ authority to interpret laws passed by Congress that the whole system is in danger of collapsing. When it comes to most rulemaking, courts have long deferred agency expertise when the laws Congress passes are ambiguous. But after this term, in applying Loper Bright, courts may find agencies’ interpretations of the laws they enforce to be just “especially informative,” but they have carte blanche to substitute their own judgement despite their lack of expertise. And Corner Post makes it easier for litigants to reopen such challenges against regulations years or decades after they were enacted, holding that the statute of limitations begins anew for every new company subject to a rule. Even the uncertainty – and rush of litigation – unleashed by these cases could have a profound chilling effect on future agency action. With the system’s collapse will come the collapse of federal agencies’ ability to provide that “prompt, fearless and generous” protection for human welfare that we have come to rely on.

But we do not just have to stand around and survey the wreckage. The Court’s kneecapping of the federal government’s ability to govern shifts responsibility to states to fill in the gaps. Instead of playing a supporting role, state governments must now more than ever play a starring role in protecting workers’ rights. There are two priority areas where states have a history of picking up the slack, and can do so again: protecting wages and ensuring safe workplaces.

Let’s start with protecting wages. The good news is that states have a long history of advancing minimum wage laws even before the federal law was passed, and have been the exclusive drivers of minimum wage increases in the 15 years since the last federal increase took effect. A recent report from Oxfam shows that a historically small percentage of American workers rely on the appallingly low federal minimum wage of $7.25 per hour. Instead, states across the country have enacted laws to raise their minimum wages to $15 per hour and above. States need to go further. And as the Biden Administration is running into the Supreme Court’s buzz saw in trying to expand who gets overtime, more states should be using their authority to accomplish this expansion.

Next, more states can pick up the slack in ensuring safe workplaces. The Biden Administration has announced plans to require employers to protect workers from the devastating heat that too many are laboring under as a result of the climate crisis. But industry groups have already vowed to use the new Supreme Court precedent to stop this regulation. Congress gives states the right, however, to have their own programs to protect workers from occupational hazards like heat, and at least five states ranging from California to Minnesota have already enacted such standards. More states need to take advantage of that opportunity so workers don’t have to worry about whether corporate interests will be successful in using the courts to knock out any future federal rule.

This fallback to relying on states to protect workers is not a panacea. To be sure, it is a less-than-perfect substitute. First and most importantly, it is unlikely to be a strategy taken up by red state governors and legislatures. (Florida has gone a step farther and blocked local protections against extreme heat.) That means that too many Americans will continue to bear the impact of the Court’s miserly jurisprudence. Second, it means a shift in resource burdens to the states from the federal government. When states take on these regulatory responsibilities, it costs them money because it isn’t enough to pass laws – those laws have to be enforced. And enforcement is expensive. But the Supreme Court has left too much slack in the system to ignore. Our best hope is for states to pick it up.

#### States solve some, but not all, NLRB scope expansion cases.

CLJE:Lab 25, "Building Worker Power in Cities & States: Workers Excluded from the NLRA," Section 2, 1/2/25, https://clje.law.harvard.edu/publication/building-worker-power-in-cities-states/workers-excluded-from-the-nlra/

Background

The NLRA has been criticized for excluding large categories of workers, some of whom are those most in need of labor law protections. The statute explicitly excludes public employees,1 supervisors, agricultural workers, domestic workers, independent contractors, employees covered by the Railway Labor Act, and “any individual employed by his parent or spouse.”2 Numerous other workers are partially or completely excluded from the Act’s coverage, including rehabilitation workers, incarcerated workers, and certain student workers. And while immigration status by itself does not preclude coverage under the Act, undocumented workers are not entitled to all of its remedies.

State and local legislation can serve as an important vehicle to partially remedy these deficits. In fact, several state and local governments have already attempted to provide collective rights to workers excluded from the NLRA. However, much more can still be done. And while federal labor law preemption and antitrust law present some challenges for greater coverage, many of those challenges can be overcome.

Objective of State Intervention

Most workers excluded by the NLRA have no collective bargaining rights at all, and many are particularly vulnerable workers who could greatly benefit from the power that collective bargaining provides. Even where states have clear authority to grant labor rights, few have taken action to fill in the gaps. For example, several states ban bargaining altogether for public sector workers, many states do not require districts to bargain with majority unions, and 33 states ban public-sector strikes.3 For farmworkers, only 14 states provide for collective bargaining rights at all, and some of these states eliminate or limit the right to strike or picket.

Watch: In March 2024, CLJE hosted an roundtable with Mary Kay Henry (SEIU) and women representing the childcare, homecare, and rideshare industries, who shared testimonies on how they overcame challenges to organizing.

States can enact legislation to provide collective bargaining rights for workers excluded from the NLRA. When covering excluded workers, state and local governments can experiment with labor laws that differ from the NLRA model, such as adopting sectoral bargaining systems, providing for majority sign-up, or requiring first contract arbitration.

Preemption Risk

Whether state and local governments can provide collective bargaining rights for a group of workers depends on three questions. The first two concern labor law preemption; the third concerns other forms of federal preemption. First, are the workers actually excluded from coverage of the NLRA? Second, did Congress intend to allow for state or local regulation of the workers’ collective bargaining rights, or did Congress intend to deny the workers’ right to collective bargaining entirely? Third, is state and local provision of collective rights for these workers foreclosed by any other federal law regime, such as immigration or antitrust law?

Workers outside the NLRA can be sorted into four categories, each with its own preemption risk:

Clearly Not Preempted: Public Sector, Domestic, and Agricultural Workers

These workers are clearly excluded from the NLRA’s definition of “employee.” Courts have thus uniformly held that states and localities are free to implement their own laws providing collective rights to these workers.4

Clearly Preempted: Supervisors and Undocumented Workers

State and local labor laws purporting to provide collective bargaining rights to supervisory workers are completely preempted. Courts have inferred a congressional judgment to preclude any labor rights for supervisors in order to avoid putting them “in the position of serving two masters with opposed interests.”5

Meanwhile, workers lacking work authorization are not entitled to the full protections of the NLRA given that two of the Act’s most crucial remedies, the backpay and reinstatement awards, do not apply to them. States generally cannot fill in this gap by providing for backpay or reinstatement awards because such provisions would be preempted by the Immigration Reform and Control Act of 1986 (IRCA).6 Some exceptions apply – for instance, California allows for limited backpay remedies for violations of state employment laws that extend protections to undocumented workers.7

Preemption Unclear: Student, Rehabilitation, Incarcerated, and Workfare Workers

For these workers, the possibility of state and local labor law coverage is largely unsettled. Most are likely outside the NLRA’s coverage under National Labor Relations Board precedents. But unlike groups of workers expressly excluded from the Act’s coverage, neither the Board nor the courts have clarified whether Congress intended to preclude state and local labor law for these workers.

States and cities can resolve some of this uncertainty by petitioning the Board for an advisory opinion (under § 102.98 of the Board’s Rules and Regulations) as to whether a given class of workers is covered by the NLRA. However, even when the Board has opined — as it has in the case of medical interns8 — courts may not necessarily defer to the Board’s judgment about the scope of the NLRA’s preemptive effect.

States Not Preempted, Cities Sometimes Preempted: Independent Contractors

State or local labor laws covering independent contractors must be analyzed separately due to antitrust law. Such laws are not preempted by the NLRA.

Federal antitrust law has often been applied to prevent independent contractors from acting collectively, considering this to be illegal collusion.9 Since the emergence of the gig economy, however, some have argued that gig workers fall within antitrust law’s “labor” exemption.10 Furthermore, states are completely immune from antitrust liability and can provide collective rights to independent contractors if they actively supervise the contractors’ bargaining process and can disapprove of bargaining that results in anticompetitive practices.11 Municipal governments can avoid antitrust scrutiny by either receiving state authorization to regulate independent contractors’ collective bargaining (low preemption risk) or restricting collective bargaining rights to preclude bargaining over wages to avoid allegations of price-fixing (medium preemption risk).

Options for State or Local Action

I. Broad Collective Bargaining Rights Modeled on the NLRA

As noted earlier, state constitutions can be used to establish labor rights for excluded workers. Alternatively, collective bargaining rights can be provided by statute. In either case, state collective bargaining laws could automatically cover any workers excluded from federal labor law. For example, the New York State Employment Relations Act provides collective bargaining rights to all private-sector workers in the state unless the NLRB determines that they are covered by the NLRA. States can also extend collective bargaining rights modeled on the NLRA to particular categories of excluded workers, such as agricultural workers, domestic workers, or independent contractors (subject to the preemption questions above).

II. Collective Rights Stronger Than the NLRA

States and local governments can turn a major downside of federal labor law — its exclusion of large groups of vulnerable workers — into an opportunity by providing collective rights that improve on the deficits of the NLRA.

Public Sector Workers: Many of the innovative features adopted for public sector collective bargaining are addressed in Section I above. Another interesting provision in several public sector bargaining laws is interest-based bargaining and first contract arbitration. Often facilitated by mediators, interest-based bargaining provides an alternative to traditional, positional forms of bargaining by promoting a collaborative, trust-based approach to negotiating contracts. Under a system of interest arbitration applied to first contracts, employers are obligated to start the collective bargaining process within 10 days of receiving a written notice from the union and have 90 days to negotiate a contract before either side may request mediation and arbitration. These provisions are critical to ensuring that public sector workers covered by such laws reach effective collective bargaining agreements, addressing the challenge that many workers face under the NLRA in reaching first contracts.

Agricultural Workers: Fourteen states extend collective bargaining rights to agricultural workers.12 California’s statute departs from the NLRA model in significant ways that make organizing workers easier. California’s Agricultural Labor Relations Act (ALRA) explicitly allows workers to unionize through majority card check recognition, permits unions to engage in secondary consumer boycotts, and more generally gives its labor board the power to depart from NLRA precedent whenever necessary to further state labor policy.13

Ride-Hail Drivers: In 2016, Seattle passed an ordinance providing ride-hail workers with collective bargaining rights.14 The ordinance was later amended to limit bargaining to working conditions, rather than wages, to avoid potential antitrust challenges. Notwithstanding this limitation, the ordinance requires ride-hailing, ride-sharing, or taxi companies to supply drivers’ names and contact information to unions wishing to contact them about organizing. The ordinance also provides for interest arbitration in the case of impasse, gives the city veto power over approval of collective bargaining agreements, and allows for public hearings on the substance of those agreements.

“In theory, labor law is designed to protect workers’ rights to organize unions and negotiate collective agreements. But our federal labor law does not fulfill this mission. And so, unless and until Congress fixes the National Labor Relations Act, something that is unlikely given the gridlock in Washington, it is up to the states to offer a better alternative to Uber and Lyft drivers.”

Kate Andrias, Sharon Block, and Ben Sachs in The Commonwealth Beacon

In the intervening years, a number of states have experimented with legislation to extend collective bargaining rights to ride-hail drivers. In 2024, Massachusetts passed a ballot initiative creating a sectoral bargaining system for ride-hail drivers in the state.15 The new law requires companies like Uber and Lyft to negotiate as a group with any union that represents at least 25% of drivers. Once an agreement is reached, all drivers with more than 100 trips completed in the previous quarter would be entitled to vote on whether to approve the agreement. If approved, the agreement would go to the Massachusetts Secretary of Labor for a fairness check. If the parties could not reach an agreement, an arbitrator would step in and devise fair terms to submit to drivers for a vote.

Legislating new forms of collective bargaining for ride-hail drivers raises concerns regarding the companies’ misclassification of these drivers as independent contractors. With careful drafting and coordination with unions, enforcement authorities, and other organizations advocating for drivers’ proper classification as employees, state policymakers can experiment with legislating new rights for drivers without precluding proper classification actions.

Domestic Workers: Led by organizations representing low-wage and immigrant workers, such as the National Domestic Workers Alliance, a number of states have enacted Domestic Workers Bills of Rights in order to extend basic protections to workers excluded from the NLRA and many other labor standards provisions. Domestic Workers Bills of Rights have passed in 10 states, two major cities, and Washington, D.C. Protections included in these laws are the rights to:16

Fair wage and overtime pay

Rest breaks

Written agreements

Freedom from discrimination and harassment

Safe work conditions

Privacy for in-home workers

Days of rest

Paid leave

#### There is some flexibility for states to do collective-bargaining-adjacent actions without running afoul of federal preemption. Given that federal preemption requires affs to enlist federal action even for a ‘United States’ aff, the ‘labor law PIC’ serves as a way to preserve a better version of states debates.

Harold Meyerson 23, Editor at Large of The American Prospect, "How to Reform Labor Law," The American Prospect, 9/14/23, https://prospect.org/blogs-and-newsletters/tap/2023-09-14-how-to-reform-labor-law/

The past few weeks have made it hi-def clear how critical government is to both the well-being of workers and their prospects for organizing.

The converse has been clear, of course, for the past 50 years. The failure of the federal government to reform labor law so that workers can’t be fired for trying to unionize has been central to the decline in the share of organized workers from one-third of the private-sector workforce in the mid-20th century to a bare 6 percent today.

This summer, though, semi-demi reforms to labor law have seeped through the cracks of our federal system as a federal agency and a state government have both managed to conform labor law, as best they can, to the spirit and letter of workers’ rights initially encoded in the National Labor Relations Act.

As we’ve reported on extensively at the Prospect, the National Labor Relations Board has issued rulings, upholding the cases brought by its general counsel, that have required employers to recognize their workers’ unions when a demonstrable majority of workers have shown they want to affiliate, and if the employer commits an unfair labor practice in the course of a Board-supervised recognition election. Further cases likely coming before the Board will seek sanctions against employers who refuse to bargain in good faith with their unionized workers, including the Board’s imposition of wage and benefit mandates equal to those at comparable unionized companies. Another case may rule that noncompete clauses that keep workers from seeking other employment also constitute an unfair labor practice for which the Board may prescribe a remedy.

None of these new or possibly-in-the-works rulings actually change labor law in the way that congressional action could, but they do restore some of the penalties employers once had to pay before labor law rules were weakened, and will likely spur more organizing efforts in industries that many unions had written off as unorganizable given the state of the law.

The National Labor Relations Act also preempts states’ ability to enact laws affecting private-sector workers’ right to collective bargaining, but that hasn’t deterred several of the bluest states from tiptoeing up to that line this summer, too. Led by Minnesota, several states have forbidden employers from compelling their employees to attend the anti-union propaganda meetings that companies routinely hold when seeking to kill off organizing efforts. And in just the past week, California has passed laws raising the wages of half a million fast-food workers, extending unemployment insurance to strikers (a move much welcomed by the striking Hollywood guilds), and giving its own legislative staffs collective-bargaining rights. Today, it’s also likely to give major raises to the support staffs at hospitals, clinics, and nursing homes. As well, it has created a fast-food council, where workers will sit opposite employers on a body that can prod state government to address issues of worker safety, the timing of shifts, and the like. It’s not collective bargaining, but it’s close as it can come without running afoul of federal preemption.

In sum, responding to the surging, almost bipartisan support for unions that’s clear from all public polling, and the much higher profile that union support now commands within the Democratic base and the Democratic Party, government agencies and states are moving to fulfill those expectations. Congress remains the laggard; the unrepresentative nature of the Senate remains a huge obstacle. But pro-union governmental initiatives are seeping through the cracks.

### Neg---CP---UBI

#### UBI is an example of a CP that competes with labor law, providing benefits directly instead of through the workplace. Aff deficits focus on the particularities of the workplace.

David Madland 21, Senior Fellow and Strategic Director of the American Worker Project at the Center for American Progress, author of Hollowed Out, "Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States," ILR Press, an imprint of Cornell University Press, 2021

Even the most extreme version of this idea—a universal basic income providing a guaranteed level of income to all Americans, no matter their age, whether they are working or not—does not fully address the country’s wage and inequality challenges, let alone do much for democracy. Some version of a basic income may very well be a good policy. It may be an important complement to many government antipoverty programs and may help provide a modest improvement in the standard of living for poor people and potentially even the middle class. Indeed, the Alaska Permanent Fund’s annual payout (based on oil revenue) of a few hundred to a few thousand dollars to all residents seems to work quite well, though the results from Finland’s recent experiment may not be as positive.98 Still, relying on taxes and transfers to address wage stagnation and extreme inequality suffers from a number of problems.

First, the cost to significantly improve current living standards for most Americans without raising wages is quite large—perhaps impracticably so.99 Consider, for example, the cost to the government of raising middleclass incomes at the pace of productivity, without wage increases. It would require spending more than twice as much every year as is now spent on Social Security to boost household market incomes for the bottom 80 percent of Americans by income to where they would be had they kept pace with productivity growth over the past twenty-five years.100 Social Security is by far the largest existing social program; creating a new program roughly double its size may not be practical. While smaller programs may be more affordable, they would do far less to raise incomes—either maintaining income growth at levels well below productivity growth or only raising incomes for a smaller group, such as the extremely poor.

There are questions about the desirability of creating such a big government program as guaranteed basic income and increasing taxes to the degree necessary to fund it. It would also likely create additional challenges that might not be recognized until the program is up and running. While the experience of Social Security indicates that it is possible for large social programs to work well in the United States, it took decades for Social Security to get to its currents size, and in its early years it provided very few benefits. Social Security did not instantly become the largest government social program but rather evolved over years and years.

Beyond such narrow practical concerns, receiving money or benefits from the government is not actually a wage. Some economists may argue that money is money, and thus a wage and a government benefit are functionally equivalent. At some level it is true that most income is dependent on the governmental structure that enables people to earn a living, and thus there may be less of a distinction than some people claim between a government handout and earned income. But people generally prefer to feel they have earned the money themselves. There is a dignity in earning a living wage that is hard to replace. Doing a job that is valued by society is not just a source of money but can also be a source of pride and placement in the community. A job with a decent wage is a tried and true way for people to feel they are included in society.

Further, the power for workers to earn a living wage creates a different kind of society than one where most people are dependent on government redistribution. It is hard to imagine that a society where some people are extremely wealthy and everyone else depends on a basic income from the government would be as democratic as America currently is, let alone have a true democracy. In this vein, some of the biggest proponents of universal basic income are the superrich of Silicon Valley, who presumably see giving people money less of a challenge to their power and wealth than actually ensuring that workers have adequate power to get paid fairly. Taken to the extreme, a universal basic income that replaces most wage income is akin to a modern version of a feudal society where the peasants depend on the whims of the rich and powerful lords who control government.

Still, for the sake of argument, let’s assume a large basic income program could be the product of a real democratic society and create a high standard of living for most people. In this case, basic income might help foster a more harmonious society and the development of worthwhile values. But it also might not. Mass affluence without work would be a big social experiment. Small-scale experiments with modest sums of money suggest that things might work out fine, but there are many reasons to worry that a large and robust basic income program might not work out—from the deeprooted work ethic to the failures of many other grand social experiments. At a minimum, a massive basic income program would be a big social risk. In contrast, building worker power is reliable and has proven successful at scale.

In total, these concerns suggest that a basic income would be best suited to reducing poverty and modestly improving the living standards of the middle class but less suited to reversing the hollowing out of the middle class or reviving democracy.

To some basic income proponents, these theoretical and practical concerns can be dismissed because, they argue, jobs are disappearing. In the future, there may not be enough work for people, and thus a universal basic income is required, so the story goes. Technology and artificial intelligence will create huge disruptions in the labor market. Indeed, some estimates for the number of jobs that could be lost to technology are huge. Still, a fair amount of research indicates that the disruptions are likely to be significant but more modest—with, for example, the OECD predicting that 10 percent of US jobs are at risk of automation over the next several decades.101

The most pessimistic visions of the future are based on the idea that new kinds of jobs will not be created or will be created very slowly, which is at best a kind of guesswork. So far, the experience every time a disruptive technology comes along suggests that it is likely that new jobs will be created. So too does the potential for humans to create new jobs. As long as there are human wants and needs, it is likely there will be work. Humans can invent work at a staggering rate. Decades ago, few could have predicted that there would be industries based around personal trainers, dog walkers, tech support, bloggers, and data storage salespeople. Of course it is possible that this time will be different and that computers will be better able to do everything humans can do, but most likely there will be new kinds of jobs invented as others are destroyed. Even though technology places a number of current jobs at risk, it does not mean there won’t be any work in the future.102

Still, the basic income proponents are right that something is needed to minimize the human costs of rapid automation. Some relatively small version of a basic income may be an important part of this transition. But the need for additional policies to deal with disruptive technology is also clear. Workers will need protection from invasive technologies, and governments may need to make greater efforts to directly create jobs as well as to ensure that workers financially benefit from new technologies.

Though technological change creates opportunities to make work better, more productive, and higher-paying, technology also provides employers with significant new powers to monitor and control workers, deskill certain jobs, reduce pay, and generally make work worse. This dystopian situation may already exist for some workers. To take the example of just one company, a large retail firm patented in 2016 a cage to put warehouse employees in so they remain out of the way of robots, and the company patented augmented reality glasses in 2017 that can provide workers with real-time instructions on the lenses, as well as allow the company to “detect where a person is at all times and when they have stopped moving.”103 The firm’s warehouse workers reportedly have peed in bottles to save time and avoid the company noticing them taking long breaks.104 There are, of course, many other examples of companies using new technology to closely monitor their workers—for example, by using video cameras to surveil workers, software to monitor workers’ facial expressions and tone of voice, and even injecting microchips inside workers’ bodies.105 A basic income does nothing to address the potential for technology to dehumanize workers and make jobs worse. In contrast, a modernized labor system would enable workers to negotiate with employers and governments about the use and control of technology. Workers need some power to ensure that they actually realize the potential benefits of technology, not just a basic income.

#### UBI fits the logic of poverty reduction and does not build worker power.

Juan Sebastian Carbonell 22, teaches sociology at the Université Paris 1 Panthéon-Sorbonne, "No, Automation Isn't Going to Make Work Disappear," Jacobin, 03/28/2022, https://jacobin.com/2022/03/automation-technology-precarity-employment-working-class-logistics

One proposed solution to the effects of automation is Universal Basic Income (UBI). You reject the claim — the supposed disappearance of work — that often serves as the justification for the demand. But I’d be interested to dig down deeper into why you think the Left should reject the demand. Your book cites Daniel Zamora, who argues that UBI fits the logic of poverty reduction rather than the kind of equality and democratic control exerted by organized workers. But why isn’t a minimum income at least a foundation to build on?

Juan Sebastian Carbonell

The problem with UBI is that it rests on a premise that is normally false. Usually, the defenders of UBI do so either because they believe there is a precariat replacing the proletariat, or because they think that automation will eventually lead to a workless future and so we need a solution for all these people that will be eventually jobless.

But for me, the problems with UBI are more political. The main reason that I draw a lot on Zamora is that this demand narrows the horizons of the Left and the workers’ movement. If it used to demand the abolition of wage work, the abolition of the state, a classless society, the socialization of the means of production, UBI is just a redistributive measure binding the Left within a budgetary calculus.

Then the other problem is that it replaces the collective force of workers, with a personal and individualized — but also anonymous — relationship with the state. That’s why for me UBI is not only a problem but also could be dangerous for the Left, as a solution to the so-called crisis of work today.

### Neg---CP---Upskilling

#### Some authors contest whether labor law reforms are necessary at all, and argue that technological disruption ought to be met through upskilling. Others are skeptical, arguing that upskilling is no guarantee of fair payment.

David Madland 21, Senior Fellow and Strategic Director of the American Worker Project at the Center for American Progress, author of Hollowed Out, "Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States," ILR Press, an imprint of Cornell University Press, 2021

Policies to increase education and skills could help many workers earn higher wages and could boost economic productivity. Still, even under a best-case scenario, a skills-only approach would do relatively little to raise wages in the short term. It would take years, perhaps more than a generation, to significantly increase the overall skill and education levels in the United States—which means that under this approach many Americans would likely suffer through wage stagnation for several more decades on top of the decades they have already suffered.

Worse, even over the long term, a skills-based approach is not likely to be particularly effective without a strong labor movement. There is little reason to expect that education would dramatically increase wages without some form of collective bargaining. While most workers would benefit from additional training, there are limits to how much additional training would be helpful. Workers with college degrees or more have fared relatively well compared with their non-college-graduate counterparts, but even college graduates have seen their wages grow slower than productivity over the past two decades.90 Worse is that training does not always lead to a higher wage—and the returns on training vary widely, particularly by race, gender, and field of study. 91 Even more troubling is that a significant number of jobs simply do not require a college degree or equivalent workforce training. Estimates suggest that roughly one-third of college graduates are working in jobs that do not require a degree.92

In short, skills are no guarantee of higher wages or a good job. Not surprisingly, research finds that an education-only strategy won’t make much of a dent in overall earnings inequality or do much to raise earnings.93 Education will make workers more productive, but, without unions, it is employers and not workers who are most likely to seize those productivity gains.

A new labor system could mitigate the weaknesses of a skills-based approach by helping workers gain the power to negotiate for the higher wages their increased education would merit—as well as by ensuring that all work, no matter the level of education, is paid decently. A reformed labor system could also make skills-based strategies work better. 94 Labor unions could help improve the quality of the training, help workers complete the training, and ensure that it leads to a good job.95 Unions could also ensure that all workers—but especially those with less skills—actually have access to training.96 A new labor system would also help strengthen the incentives for workers to get additional training by ensuring that investments in human capital lead to higher wages and by setting pay scales that foster a clear connection between greater skills and greater pay. Finally, spending much more money on training likely requires workers to have the power to push companies and governments to make greater investments. The new labor system would give labor that necessary power.

### Neg---K---Top

#### Now is key juncture for labor.

Stephen Lerner 25, labor and community organizer, helped found the Bargaining for Common Good network, “For Labor, Caution Is Fatal,” 3/20/25, https://inthesetimes.com/article/trump-musk-labor-take-risks

Labor faces a contradictory, paradoxical moment. On one hand looms an existential threat, on the other an historic opening. Despite an upsurge in recent organizing and strikes, union density has continued its historic decline — from 35% of the private sector in 1955, to 5.9% today, and only 9.9% overall. With the election of Trump and his billionaire backers, buddies and beneficiaries, unions face potential annihilation, as Trump shreds federal sector collective bargaining agreements and Elon Musk and other employers challenge the constitutionality of the National Labor Relations Board itself.

At the same time, the country as a whole is more pro-union than at any time in a half-century. And we can count on Trump and his cronies to make the best case in years for the need for a union resurgence as they cut taxes for themselves, siphon even greater wealth to the super rich, and cut budgets and services to our communities; thereby creating conditions that make a labor resurgence both more attractive and — as counterintuitive as it might sound in this fraught moment — more possible.

What we are witnessing is more than an administration trying to alter the direction of the country. This is the final nail in the coffin of an order that emerged from the Great Depression, the New Deal and World War II. It is vulnerable because it had ceased to protect workers and unions as finance capital reorganized the world around its priorities and inequality bloomed. As this order crumbles, workers and unions must play a leading role in ensuring that what comes next is more durable, just and democratic than what is now falling away around us.

Our goal can’t be to just limit the damage, slow the hemorrhaging and hope the Democrats get elected in 2026 so we can return to the slow and steady decline that labor has long faced under both parties. After all, labor continued to lose density under Biden with the most aggressively pro-union labor board in recent history. Returning to the status quo is both impossible and deeply undesirable. We can’t fall into the trap of defending a failed system; we need to articulate a vision of a country and world worth fighting for. Then we need to back that vision with the resources, strategies and tactics that make it possible for us to win.

Drawing the Right Lessons from History

We can imagine the formidable struggles we will likely face in the months and years ahead by looking back in history. We only need to look as close to home as America’s own segregated Jim Crow South, for example, to get a sense of how a racist, patriarchal, anti-union and authoritarian regime can be constructed within the confines of a nation that calls itself a democracy governed by the rule of law.

What we will find in these parallels is both deeply disturbing and surprisingly hopeful. As challenging as the current situation is, those who went before us faced much worse: chattel slavery; laws that categorized union activity as as a criminal conspiracy; strikes deemed illegal; racial and gender discrimination upheld by the highest courts; employers who hired mercenary armies to fight unions; the violent repression of labor agitators; Gilded Age plutocrats as brazen as Elon Musk in purchasing political power. The list goes on.

Given this dark past, it is not a coincidence that the American union movement was nearly destroyed multiple times. Economic downturns and aggressive employers combined in 1837 and 1873 to wipe out the first two efforts to build a nation union federation. The first durable federation, the American Federation of Labor (AFL), emerged in the 1880s out of the calamitous collapse of another failed effort, the Knights of Labor. And it took the near-destruction of the AFL in the 1920s and 1930s to plant the seeds of labor’s renewal in the form of the Congress of Industrial Organizations (CIO). We can draw hope from the knowledge that the union idea has proven astonishingly resilient despite all of the forces that have been arrayed against it.

But importantly, this history suggests that unions are durable but also cautious organizations, usually averse to risk-taking except when their survival depends on it. Faced with a choice between trying to hold on to what they have amid continuously deteriorating circumstances, as the Knights of Labor attempted to do in the 1880s, or taking the risks necessary to build a new model, as the AFL decided to do in that moment, most unions have opted for caution — until the point when continuing to make that choice was obviously suicidal.

We appear to be rapidly approaching that tipping point. Almost everything that increases workers’ power is already illegal or likely will soon become so. In the public sector, increasing numbers of states will not only cut budgets but also outlaw collective bargaining, as Utah has just done. In the private sector, not only will the National Labor Relations Board be gutted, but corporations will also be emboldened by Trump’s rhetoric (like his call to fire strikers, in a live conversation with Elon Musk) to even more aggressively resist unionization and to break or domesticate existing unions. As it becomes increasingly difficult for unions to hold on to what they have, history suggests they must move aggressively to meet the present challenge or, like the Knights of Labor, be weakened to the point where they cannot even contemplate future resistance.

In the immediate future, most national unions will likely continue a cautious approach. At the outset, few elected national labor leaders will be willing to risk their positions of power and influence on behalf of a resistance that has no guarantee of success. We would be mistaken to expect them to do so, for those whose path to leadership was nurtured in the system now dying before our eyes will naturally be slow to recognize its death. Some will be afraid to ​“poke the bear,” hoping if they lay low they won’t be a focus of attacks. Others will offer only careful opposition, filing lawsuits and the like, fearing huge fines and government legal action if they launch protest strikes or encourage mass civil disobedience. But some who hesitate to lead themselves might be prepared to follow those who lead boldly, and some will be willing to take huge risks and act heroically.

When we look back in history, there are valuable lessons for us in how people organized during times of intense repression. In the pre-World War I era, unions defined themselves as fighting for industrial democracy — arguing you can’t have democracy if you don’t have a say in what happens where you work. To protest restrictions on free speech, the IWW organized mass illegal soapboxing actions that filled the jails. Industry-wide strikes in steel and other sectors, although often unsuccessful, laid the groundwork for the CIO to form industry-wide organizing committees in the 1930s. From there, a combination of strikes and plant occupations, supported by robust community organizing with tenants and others devastated by the Great Depression, led to millions of workers organizing.

How to organize and fight under oppressive circumstances is something that the Civil Rights Movement also teaches us. In 1960, when segregationists were defying Brown v. Board and no political will existed to actually break down Jim Crow segregation and McCarthyite repression, the young activists of the Student Nonviolent Coordinating Committee (SNCC) who put their bodies on the line with sit-ins jump-started movement activism and led to the breakthroughs of the Civil Rights Act and Voting Rights Act. Such strategies and tactics are worth reviving in this moment — alongside the innovative tactics that today’s activists can add to labor’s repertoire if they get the support they need.

Part of SNCC’s brilliance was their power structure analysis. Ella Baker, Bob Moses and other leaders knew that to build and exercise power, you needed to focus on the corporations and local power players that politicians take their marching orders from. SNCC’s research department looked at which corporations were profiting off segregation and propping up politicians. Then SNCC developed strategies and tactics to make these companies pay financial and reputational costs.

We face a terrifying future where the world’s richest man, who was born into a society (South Africa) that created its own brand of Jim Crow, revives and updates America’s apartheid. Elon Musk and the new tech oligarchy promise to create a techno-fascist future where wealth and power are concentrated in the hands of the elites at the expense of workers, women and people of color. We need to follow SNCC’s example and powermap the corporations and elites who are profiting, nationally and locally, from techno-fascism.

We then need to figure out how to make these actors pay a price. The Tesla Takedown actions across the United States and protests in Europe demonstrate that even the world’s richest man can be impacted by mass action — Tesla’s stock price is down 53% this year.

We need to ask: How do we cut off their capital? How do we mobilize unionized workers in these companies toward strikes that demand both better conditions for themselves and for Common Good demands that benefit the broader community? And how do we organize non-union workers in them? We need to disrupt and isolate them, working to cut off pension fund investments, and state and local subsidies. And we need to be ready to use non-violent civil disobedience to maximize the impact.

Imagining an Action Plan

To meet this threat we need a new infrastructure built for struggle — a network of people and organizations that are willing to take risks, including being jailed, in the effort to revive the labor movement and turn back the anti-democratic threat we now face. We do not need another schism among unions or a rival federation. We need an organized network of people and groups who are aligned.

A first step is to select some initial places where local unions and community groups can collaborate on city-wide strikes and mass action like they did in Minnesota in March 2024. In 2025 and 2026, we need to develop the skills and capacity to strike different employers at the same time, with multiple unions, around both workplace demands and broader transformative community-wide demands for housing, pensions, healthcare and other issues that resonate deeply with workers. Moving to city-wide strikes in 2025 and 2026 then sets the stage for lining up contracts and national strikes in 2028.

Even if national unions remain cautious about leading risky action, they and other organizations can and should play a support role in building this infrastructure and working alongside it. They can fund litigation, organize for state and national elections, perfect a narrative that can educate and mobilize public opinion, and more.

But such work alone, while necessary, will be insufficient if participants in the network are unwilling to put their own bodies and organizations on the line just as the members of SNCC did at a crucial moment in the struggle for civil rights. We need to drive a wedge between the elites by demonstrating through disruption of business as usual that attacking workers, immigrants and people of color has a direct economic consequence. We need to make billionaires and corporations feel the pain that they are inflicting on all of us.

In addition to a geographic focus we also need to look at key economic sectors with strong worker organizing, like healthcare, higher education, airports, K-12 schools, logistics and manufacturing. Just as the CIO had auto, steel and other industry-wide organizing committees, we need to form sectoral councils made of unions that include community allies and those impacted by these sectors.

Like the CIO we need to occupy factories when we strike or develop our own innovative 21st century ways of laying our bodies on the gears. We need to look at chokepoints in the economy and develop strategies and tactics to maximize economic impact by focusing on those chokepoints. We could shut down Silicon Valley for a day by blocking exit ramps and intersections. To do this kind of disruption at scale we need to organize and train an army of people willing to take direct action and participate in sit-ins and occupations.

Imagine if in response to ICE raids at airports targeting immigrant workers, key airport workers stayed home for a day because it isn’t safe to work at an airport with ICE there. What if others sat in and blockaded the airport? We already have experience with this, having seen massive spontaneous demonstrations at airports to oppose Trump’s Muslim ban. The message and impact would be clear: You attack us, we will shut the airport in nonviolent protest.

Imagine if students and workers on campuses across the country ran campaigns demanding that university trustees either resign from boards or be kicked off if they are complicit in destroying the very universities they govern. Such complicity might include cozying up to Musk or Trump or Vance, donating to the Trump 2024 campaign, membership in the Heritage Foundation, or any other compromising ties to the architects and executors of dramatic cuts to much-needed research and university funding. And students and university workers could also demand that school endowments stop investing in corporations owned by Musk or anyone who is slashing university budgets.

Imagine public sector workers demanding that the $6 trillion of their pension capital be invested in housing and things that benefit workers — and no longer in corporations that are bad for workers and our communities.

Imagine logistic workers going on strike at Amazon and their allies blocking the highways around the distribution centers, making it impossible for goods to move.

Does this sound fanciful? Not only have unions and social movements done this in the past, they’ve done versions of it in recent history. You don’t need to go back as far as the Great Railroad Strike of 1877 to see how tying up a transit system demonstrates worker power; those of us involved in the Justice for Janitors campaign block bridges into D.C. multiple times in 1990s, effectively shutting down much of the city in a successful effort to win a citywide contract. Nor do you need to go back to Flint in 1937 to see how effective a sit-down strike could be; the UE occupied Republic Windows and Doors during the Great Recession, focusing the nation’s attention on the plight of working people at the dawn of the Obama era. Nor do you need to go back to the March on Washington for Jobs and Freedom in 1963 to see how direct action by a broad coalition can make its presence felt; in 1999 the labor movement joined a wide array of allied groups, including environmentalists, in shutting down Seattle and a meeting of the World Trade Organization. Recreating that ​“Battle of Seattle” direct-action coalition is a real possibility in this moment, for this administration is hell-bent on not only undermining worker power but — with the encouragement of oil and gas interests — trashing environmental standards.

### Neg---K---Anti-Blackness

#### A labor topic will produce deep and interesting debates over the role of working class struggles in racial justice and how to conceptualize Blackness, work, and labor.

Venus Green 25, Gaius Charles Bolin Fellow in the Department of Anthropology and Sociology at the University of Massachusetts Amherst, with Cedric de Leon, Associate Professor of Sociology and Director of the Labor Center at the University of Massachusetts Amherst, “The Ruse of Recognition: Black Labor in the Afterlife of Slavery,” Sociology of Race and Ethnicity, 2025, Volume 11, Number 2, pp. 207-220

In a recent review of Black Reconstruction in America, Moon-Kie Jung (2019) argues that W.E.B. Du Bois misrecognized the enslaved as the “Black worker.” Following Saidiya Hartman (1997) and Orlando Patterson (1982), Jung holds that the constituent elements of slavery—gratuitous violence, natal alienation, and general dishonor— rendered the enslaved socially dead. Because this space of antisociality falls outside the substantive bounds of sociology, Jung urges an “underdiscipline” of “antisociology” to reckon with the anti-Blackness underpinning slavery and its afterlives.

We engage with Jung’s important provocation by widening the aperture beyond Du Bois’s Black Reconstruction to encompass the mainstream scholarship on labor and labor movements. In this, we follow Du Bois’s critical interventions concerning Black life to contemporary Black studies to help explain how anti-Blackness fundamentally structured the trajectory of the post-emancipation labor movement in the United States. The research puzzle of the paper is the following: Given the abolitionism professed by successive labor leaders in the years following the U.S. Civil War, why did the cause of interracial solidarity nevertheless fail to gain traction in postbellum organized labor? Or, to put it in Hartman’s (1997:10) terms, “How does one tell the story of an elusive emancipation and a travestied freedom?”

The existing literature is ill-equipped to address the paradox implicit in this puzzle. Much of the relevant scholarly debate turns on an either/or question: Did organized labor in the United States exclude or protect Black labor? On one side, scholars emphasize unions’ racially exclusionary practices (Brenner, Brenner, and Winslow 2010; Georgakas and Surkin 1998; Glenn 2002; Goldfield 1990; Hunt and Rayside 2000; Iton 2000; Nelson 2002; Roediger 1991). On the other side, scholars have focused on how unions were largely inclusive (Brown and Brueggemann 2006; Cole 2007; Gerteis 2007; Honey 2000, 2007; Isaac and Christiansen 2002; Rosenfeld and Kleykamp 2012; Stepan-Norris and Zeitlin 2003; Zeitlin and Weyher 2001; Zieger 2007). As readers of this scholarship, we are meant to make three inferences. The first is that progressive Whites recognized Black workers as having equal standing with White workers and trade unionists. The second is that U.S. labor history’s protagonists were Whites, while Black people were the passive beneficiaries or victims of Whites. The third is that White progressives’ class analysis of capitalism was fundamentally correct in the sense that capital deploys racism to divide and weaken the working class.

We argue that the foregoing scholarship mistakes progressive trade unionism for a politics of recognition while eliding how the domination under slavery continued to structure Black life after the Civil War. Neither progressive nor conservative White labor reckoned with the unfinished project of Black emancipation and ongoing mechanisms of captivity and slavery. Moreover, the existing scholarship’s formulation of class and interracial solidarity touts examples of racial inclusion that are in fact scenes of Black subjection. As we demonstrate, in the internal politics of postbellum organized labor, White trade unionists pushed a vision of universal emancipation that privileged White labor’s emancipation from incipient industrial capitalism. Whiteness studies demonstrate that White working-class consciousness in the United States was historically constructed by relying on anti-Black anxieties (Du Bois 1935 [2017]; Roediger 1991). Moreover, even during moments when trade unions became pragmatic about including Black labor—a significant move away from outright exclusion—White trade unionists maintained hierarchies of leadership and ideology that marginalized the antiracist demands and voices of Black workers. Laden with the entitlements of Whiteness through the inheritances of chattel slavery, the formulation of “emancipation” for White labor rejected Black people’s unresolved political struggles for Black liberation.

We offer an alternative explanation for the failure of interracial solidarity in the postbellum United States. Drawing on archival and secondary data on the encounter of Black and White labor from Reconstruction to the turn of the twentieth century, we argue that organized labor refused to reckon institutionally with what Hartman (1997, 2008) calls the “nonevent of emancipation” and the “afterlife of slavery” for Black populations. Hartman (1997) understands the nonevent of emancipation to be “insinuated by the perpetuation of the plantation system and the reconfiguration of subjection” (p. 116), finding in her historical analysis of post-emancipation Black life that, “emancipatory discourses of rights, liberty, and equality instigate, transmit, and effect forms of racial domination” (p. 116). We likewise find that postbellum labor failed to grapple with the paradox of Black re-enslavement post-emancipation. As W. E. B. Du Bois ([1935] 2017) poignantly observes of Black Reconstruction, “The slave went free; stood a brief moment in the sun; then moved back again toward slavery” (p. 26). Du Bois’s identification of the structural, psychological, social, and institutional failures of Reconstruction dovetails with Hartman’s (2008) formulation of the “afterlife of slavery,” understood as the persistence of slavery in Black people’s political and material conditions, including “skewed life changes, limited access to health and education, premature death, incarceration, and impoverishment” (p. 6).

We argue that the afterlife of slavery manifests clearly within the history of trade unions, for the latter originated within the political economy of slavery. Enslaved artisans once dominated the skilled trades, and White unions emerged correspondingly to exclude Black labor. Though Black people today are more likely than any other demographic group to join unions and several contemporary unions are Black led, we maintain that some of the first unions were born as anti-Black institutions.

When, after the Civil War, the formerly enslaved began to argue that they were being excluded from unions, White labor undercut those claims in three ways. Archival data reveal that the latter deployed a “successor discourse.” White trade unionists claimed that since the Union’s victory had abolished slavery, addressing White labor’s industrial servitude was the primary struggle. Second, White labor dismissed Black labor’s critique by homogenizing all workers’ experiences, as if European immigrants and the formerly enslaved shared the same condition. Finally, and on other occasions, White labor deployed a discourse of “possession,” maintaining that if White labor did not organize and control Black labor, White workers would be defeated in labor disputes and labor market competition. While this position was a progressive break from the past, it bound the pragmatics of inclusion with the anti-Black logic of captivity. By addressing the research puzzle in this way, the article makes three contributions. First, we disrupt the either/or logic of the debate on interracial solidarity within the sociology of labor, which frames unions as either exclusionary or inclusionary toward Black people. Second, as an alternative, we advance a novel synthesis of Saidiya Hartman and the sparse but important body of work on the sociology of slavery, including that of Du Bois himself. Third, we offer empirical grounding for theories of anti- Blackness in the humanities by using archival data on postbellum White and Black labor relations.

### Neg---K---Capitalism

#### Unions are ineffectual in the face of offshoring and automation. They will not be able to articulate a meaningful alternative unless they undertake class struggle.

Ed Grystar 25, Chair of Western Pennsylvania Coalition for Single Payer Healthcare, 40+ years experience in labor and healthcare justice movements, Former President of Butler County United Labor Council, Experienced union organizer and contract negotiator, "Labor Faces Artificial Intelligence and Outsourcing: Appeasement or Class Struggle?," CounterPunch, 1/24/2025, https://www.counterpunch.org/2025/01/24/labor-faces-artificial-intelligence-and-outsourcing-appeasement-or-class-struggle/

How can the ineffective “partnership” mentality infecting almost all of US unions offer anything but tiny incremental and losing choices to the massive problems of outsourcing and AI?

Two recent articles on AI / automation and outsourcing / immigration offer a glimpse of what faces labor unions and the working class as capital, emboldened by the election of Trump and his alliance with Big Tech, sets up to continue its push on automation, subcontracting, outsourcing, and the importing of foreign labor – despite Trump’s tacit claims to support “American jobs”. Organized labor, which, with the exception of the Teamsters, doubled down on its support for Biden and the Democrats in November and clinging to the lost strategy of labor-management cooperation, now appears more on the backfoot than ever to defend against the onslaught.

At least some union members are waking up to this disconnect. Take the railroad industry for example: in the recent edition of The Highball, official publication of the Railroad Workers United described the automation threat facing rail workers and their unions:

“The problem is lack of will to take on the robotization of transportation when the employers and their government partners who are determined to implement it. We should never ignore real complications. But here’s the simple truth: All of our unions have more than enough information right now to know the material problems and dangers ahead. The big question is when are they going to take that information and put it into action?

Meanwhile, on outsourcing, Trump’s 2024 election victory has created fractures in his Republican coalition as his appointees surprisingly proposed removing certain quotas on H1-B visas, beloved by the tech industry, but currently limited by a competitive lottery and quotas. Bernie Sanders was one of the only Democrats to call out the program’s use in lowering wages in a recent Senate speech. And back in 2015, Sanders made similar comments cautioning the progressive embrace of open borders, it “a right-wing scheme meant to flood the US with cheap labor and depress wages for native-born workers”. In response to this, labor doubled down on Hillary Clinton against Sanders.

Organized labor, especially over the past two decades, has joined with the Democrats with enthusiastic support for immigration, mainly due to the growth of its members in heavily immigrant sectors. But now facing Trump’s simultaneous xenophobic anti-immigrant rhetoric with the GOP’s sudden total embrace of foreign labor via H1Bs, labor has no analysis which balances protecting its existing immigrant members while recognizing the role foreign workers have in wage suppression and preventing unionization. Capital has no interest in dropping the draconian 60-day rule, in which an H1B worker is deported if they’re unable to find a job.

Labor management cooperation: a dying “strategy”

US labor and the nation is littered with the effects of the past decades of deindustrialization as capital offshored and contracted out whole industries, destroying millions of decent jobs and decimating communities into “rust belts.” Almost if not all of these destroyed industries were unionized – but a “labor management partnership” mentality prevented unions from organizing a mass fight back against corporate rule on the job and at the ballot box.

The sacrosanct belief in “management rights” and weak US labor law puts limits on unions to negotiate mostly on the “effects” of massive job losses. And because the top union leadership believes the workers’ interests are similar to that of their “employer,” unions never challenged the power of corporate America to dictate terms on the job and the impact of their unilateral power on their communities. This unchecked corporate power left them unable to offer any popular alternative that would give the workers and public interest a voice in the debate.

And beyond the work-site, the power of organized labor is largely limited to insider lobbying, where labor leaders beg Democrats for support alongside much deeper-pocketed business leaders. Any suggestion of public pressure is cast-aside as it may “compromise our relationship with our political allies”.

Yet these same “allies” could not even get their act together to coordinate the nomination of an ostensibly pro-worker NLRB appointee. This was a huge defeat which occurred under an administration repeatedly called the most pro-labor ever by AFL-CIO leaders.

Is there any sign of change among labor? Can they rise to meet the needs of the day?

Individual unions discussing strategies on bargaining around AI and outsourcing with each employer is a good first step and is critical and necessary. But it needs to be coupled with a real mass public educational campaign led by labor and public allies which tie the current workers’ concerns with the growing public acceptance of unions. This type of activity can be a building block for union organizing and real independent political power.

Without this, labor is not reaching or involving the 90% of unorganized workers who are without any voice and are absolutely necessary to win over.

The question for the rank and file in unions and the unorganized is to realize labor needs to shift gears and develop an independent analysis which fundamentally challenges the corporate domination of the workplace and the political arena. Without this, workers will be disabled, confused, and unable to maximize the power necessary to defend and advance.

Only class struggle unions which educate and mobilize workers and public allies into a powerful force for the public good can meet the challenge of the day.

#### Unions were an instrument of anti-communism during the Cold War. The labor movement will not place class struggle first by default.

Jeff Schuhrke 24, Assistant Professor at Harry Van Arsdale Jr. School of Labor Studies, SUNY Empire State University, labor historian, “Conclusion,” in Blue-Collar Empire: The Untold Story of US Labor's Global Anticommunist Crusade, Verso, 2024, pp. 252-261

This book has attempted to offer new understandings of the fateful decline of US labor in the late twentieth century by examining the AFL-CIO’s extensive international activities during the period. Ostensibly the voice of American workers, the Federation was also one of the country’s most staunchly anticommunist institutions. Instead of uncompromisingly confronting corporate power, organizing against militarism and war, and encouraging genuine union democracy at home and abroad, top labor officials maintained an unwholesome alliance with Washington’s foreign policy apparatus—and occasionally with Corporate America as well —to undermine class-conscious, militant workers’ movements around the world. The result of the AFL-CIObacked Cold War was a world in which workers would have exceedingly little power and an increasingly reckless capitalist class would reign supreme.

In the late 1940s, the onset of the Cold War and the accompanying Red Scare in the United States significantly constrained the labor movement. After several years of dynamic growth and unprecedented success during the New Deal and World War II, US labor was forced back onto the defensive in the more conservative political climate resulting from the Cold War—especially after passage of the anti-union Taft-Hartley Act in 1947.

But it is important to remember that the Cold War did not simply “happen” to organized labor. AFL officials like George Meany were relentlessly demonizing communists and trying to provoke a standoff with the Soviets even before World War II was over, while CIO leaders like Walter Reuther embraced Cold War logic, calculating that it would be most expedient to raid and purge communist-led unions and renounce class struggle in favor of anticommunism and class collaboration. What’s more, labor leaders had already wagered that the best path forward for their unions was one of servility toward the state rather than militant shopfloor struggle.

With the World Federation of Trade Unions, communist and noncommunist labor organizations attempted to build the kind of international unity that might have served as a powerful rebuke to the Cold War, but the AFL and CIO sabotaged this vision. Disagreements over the Marshall Plan between Soviet and Western trade unionists might have doomed international labor unity regardless, but it must be noted that the AFL was already determined to split the WFTU years before the Marshall Plan had ever been conceived. Meanwhile, through the machinations of AFL international agents like Jay Lovestone, Irving Brown, and Serafino Romualdi, labor movements across Western Europe, Latin America, and Asia were intentionally divided along the new Cold War battle lines in the late 1940s and 1950s, in full partnership with the State Department and CIA.

As with the WFTU, some of these splits might well have occurred even without US labor’s meddling due to internal political dynamics within nations and regions, but the AFL and its government partners propped up otherwise small and insignificant splinter labor organizations like France’s Force Ouvrière or Guatemala’s Union of Free Workers, ensuring that divisions would continue and grow more bitter.

Rather than being a hapless victim of Cold War politics, then, American labor encouraged and exacerbated the Cold War. Wanting to see the success of the emerging, US- managed international capitalist order because they believed it would economically benefit their members, AFL and CIO officials essentially made the labor movement an appendage of Washington’s foreign policy apparatus. Meany, who became president of the newly merged AFL-CIO in 1955, was so enthusiastic about this arrangement that he valued partnering with the US government far more than he did partnering with the world’s other anticommunist labor movements in the International Confederation of Free Trade Unions.

In the 1960s, the AFL-CIO further cemented its foreign policy alliance with Washington by creating three USAIDfunded “institutes” to bring anticommunism to the labor movements of the Third World. The first, largest, and most consequential of these institutes—AIFLD—trained hundreds of thousands of Latin American unionists in the ways of conservative business unionism, winning their loyalty through development projects like the construction of lowcost worker housing. Under officials like Romualdi and Bill Doherty, AIFLD and its trainees became important instruments of US imperialism in the region, helping see to it that progressive, democratic leaders like Guyana’s Cheddi Jagan, Brazil’s João Goulart, and the Dominican Republic’s Juan Bosch were pushed out and kept out of power.

In Africa, the AFL-CIO’s Maida Springer offered a different model of international labor solidarity—one that prioritized anticolonialism above defeating leftists at any cost. But the determined anticommunism of her bosses like Meany and Lovestone, along with the paternalistic racism of the ICFTU’s European affiliates, made sure the African labor movement was also divided and thus weakened.

The US war in Vietnam was a crucial turning point in the Cold War. Fought in the name of containing communism and modernizing South Vietnam, the war revealed to much of the American public the brutal and imperial nature of US foreign policy. The war opened new political space to challenge anticommunist orthodoxy in the United States, but Meany and his inner circle would have none of this. Instead of using its economic muscle or close relationship with Washington to call for a swift end to the conflict, the AFL-CIO enthusiastically supported the war, even indirectly participating in it through its aid to South Vietnam’s anticommunist labor leader, Tran Quoc Buu. The formal support of what was then one of the country’s largest mass membership organizations gave Presidents Johnson and Nixon political cover and helped allow the slaughter in Southeast Asia to continue, even as domestic divisions over the war became ever more intense.

Walter Reuther gradually adopted an antiwar position, breaking with Meany and pulling his United Auto Workers, then the AFL-CIO’s largest union, out of the Federation. The AFL-CIO was falling victim to the same type of Cold War fracture it had repeatedly engineered in other countries’ labor movements—and just when global economic forces were shifting out of favor for US industrial workers.

In the wake of the Vietnam War, as more and more details about organized labor’s partnership with the US foreign policy apparatus came to light, the AFL-CIO plowed ahead with its international intrigues, most notoriously in Chile. This only further alienated a younger generation of more progressive rank-and-file union members who already felt that labor leaders were out of touch, undemocratic, and unwilling to fight the growing power of multinational corporations. Meanwhile, amid increasing foreign competition, technological change, and upheavals in international finance, Corporate America moved to protect its profits in the 1970s by outsourcing jobs and offshoring production, accelerating a process of deindustrialization that would gut much of the AFL-CIO’s membership in the proceeding decades.

As new figures like Lane Kirkland and Tom Kahn succeeded Meany and Lovestone, the Federation’s major focus in this period was not organizing new workers or listening to younger members, but joining with neoconservatives in reigniting superpower tensions in the face of détente. The AFL-CIO repeatedly demonstrated that it was an instrument for waging the Cold War first, and a vehicle to advance the lot of the working class second.

Partnering with Ronald Reagan—the most anti-labor US president since before the New Deal—the Federation escalated its anticommunist crusade in the 1980s. With additional government funding through the newly created National Endowment for Democracy (NED), Kirkland and Kahn intervened inside the communist world itself by financially supporting Solidarność in Poland. But when AFLCIO officials went along with Reagan’s violent counterinsurgency policy in Central America, dozens of US union presidents and tens of thousands of rank-and-file members loudly protested.

These union dissidents were driven not only by a concern for the human rights of people in countries like El Salvador and Nicaragua, but also by a fear that Reagan’s efforts to crush progressive movements in Central America would only make it easier for US corporations to move production there. Indeed, by the end of the decade, Cold War anticommunism had given way to neoliberalism’s “race to the bottom,” with multinationals emboldened to move operations to wherever they found workers most exploitable. Celebrating the collapse of world communism, AFL-CIO leadership had no real plan for how to respond to this new geopolitical and economic reality.

For decades, American labor officials had been close partners of the US government in waging the Cold War around the world. While Washington’s foreign policy goals were often realized thanks to this arrangement, US workers ultimately did not benefit. The same federal government that generously gave the AFL-CIO hundreds of millions of dollars to interfere in foreign labor movements—supposedly in the name of “free” trade unionism—did little to promote union freedom at home. The anti-union Taft-Hartley Act was not repealed, labor law was not reformed to make it easier for workers to join unions, the right to strike was not protected, and union jobs were not safeguarded from elimination. Instead, by the Cold War’s conclusion, Washington only made it easier for corporations to exploit workers both at home and abroad by facilitating free trade agreements like NAFTA.

With the creation of the Solidarity Center in place of AIFLD and the other anticommunist foreign institutes in 1997, it appeared to some that the AFL-CIO had finally turned a corner and would now base its international affairs on building genuine working-class unity across the globe. But as political scientist Nelson Bass has pointed out, the idea of combining AIFLD and the other institutes into a single entity seems to have originated not with the AFL-CIO’s “New Voice” leadership, but rather with USAID officials for reasons of bureaucratic efficiency. 1

A 1996 report from the General Accounting Office explained that in response to post–Cold War budget cuts to foreign assistance, “USAID is encouraging the AFL-CIO to consolidate its regional institutes into a new single global institute and to set strategic objectives globally and within specific regions,” which would “conform to USAID’s own efforts to improve oversight of labor programs as well as to manage and allocate in line with agency priorities.” 2 A year later, the Solidarity Center was born.

Three decades later, the Solidarity Center continues to be the AFL-CIO’s face overseas. Active in over sixty countries, the center does commendable work like promoting enforceable safety standards in Bangladeshi garment factories, amplifying the voices of South African domestic workers at the International Labor Organization, bringing together hotel housekeepers from the United States and Cambodia to share stories and strategies, and supporting Mexican auto workers challenging the stranglehold of corrupt union bureaucracies.

But like its predecessor institutes, the Solidarity Center is primarily funded by Washington. Of its nearly $42 million in total support and revenue in 2020, $38.8 million came from federal grants, including $22.6 million from the NED and $14.9 million from USAID. Just $300,000 came from the AFLCIO itself. 3

It remains one of only four of the NED’s core grantees, alongside the respective international wings of the US Chamber of Commerce, Democratic Party, and Republican Party. Funding for the Solidarity Center’s programs has tended to mirror US foreign policy priorities. For example, when President George W. Bush invaded Iraq in 2003, the Solidarity Center simultaneously received $860,000 from the NED for its Middle East programs, up from $292,000 the year before. Or when the socialist Hugo Chávez was elected president of Venezuela in 1999 much to the concern of Washington, the NED’s annual funding for the Solidarity Center’s programs in that country suddenly jumped from $54,289 to $242,926. 4

At a Washington meeting of union officials to discuss labor internationalism in the late 1990s, AFL-CIO international affairs director Barbara Shailor was confronted by Chris Townsend, political action director of the independent United Electrical Workers (UE). Townsend questioned whether the Solidarity Center was really so different from AIFLD and the other old institutes, given its near total reliance on State Department and NED funds and that its employees are required to pass a national security background check by the US government.

“She wasn’t going to argue with a UE guy very long,” Townsend recalled, “so in a huff she told me that, ‘The State Department controls the [Solidarity Center’s] work in the countries that have either oil resources or Islamic insurgencies, and we can have the rest.’ This of course was to assert that the work she was doing was legitimate and that I should somehow recognize that and give her a pass.” Townsend said the AFL-CIO later stopped inviting him to such meetings. 5

The Solidarity Center’s activities in Venezuela have been particularly disturbing. When Chávez was temporarily ousted in a right-wing coup in April 2002, only to quickly return to power after millions took to the streets, journalists and activists uncovered evidence that implicated the Solidarity Center and its Venezuelan client—the CTV (Venezuelan Workers Confederation)—in the attempted overthrow. Representing the more privileged, professional strata of Venezuelan labor, the CTV partnered with business leaders from the Venezuelan Federation of Chambers of Commerce to destabilize the Chávez government, particularly by calling a general strike during the coup and, after the coup failed, an oil industry lockout.

The Solidarity Center gave NED funds to the CTV in the run-up to the coup, but it disavowed the attempted overthrow and claimed the money had gone only to progressive elements within the CTV. AFL-CIO officials said at the time that although they still took funds from the State Department and NED for foreign labor programs, the money came with “no strings or political attachments” and that the Solidarity Center thus operated independently. In the years after the coup attempt, the center continued supporting anti-Chávez groups with money from the NED. 6

Given the history related in this book, US unionists today should, at the very least, take an active interest in the Solidarity Center’s activities, its dependence on government funding, and its close association with the controversial NED. But there is virtually no current discussion about this within the AFL-CIO or its affiliates. That is not especially surprising, considering that the Federation has yet to formally acknowledge or apologize for the significant role it played during the Cold War in dividing labor movements abroad, undermining foreign democracies, and endorsing militarism.

In 2004, however, delegates at the California Labor Federation’s convention—representing 2 million members— passed the “Build Unity and Trust Among Workers Worldwide” resolution. Spearheaded by Fred Hirsch, the unionist who, in the 1970s, had helped expose AIFLD’s role in the Chilean coup, the resolution was the result of a rankand-file effort calling on the AFL-CIO to fully account for its record of hostile overseas interventions and to formally renounce its CIA ties. After passing in California, the resolution was supposed to head to the 2005 national AFLCIO convention in Chicago, but it was effectively killed by the Resolutions Committee before the convention even began. 7

Organized labor around the world should be striving toward the creation of a truly unified working-class movement, dependent on its own collective strength, and dedicated to replacing capitalism with socialism and militarism with peace. While this may seem obvious, it historically has not been the official approach of the AFL-CIO and its affiliated unions, which, at their worst, have assisted the US government around the world in dividing workers, suppressing democracy, waging unjust wars, and foiling progressive movements.

Hope for global labor unity ultimately lies in the ability of trade unionists everywhere to put class solidarity above national allegiance, and to act with their fellow workers, whoever and wherever they may be, for their collective liberation and mutual survival. With the US working class now more “international” than it has ever been—composed of people of a multitude of nationalities, ethnicities, races, religions, languages, and cultures—identifying exactly how to achieve and maintain this kind of class unity, and translate it into effective action, can perhaps begin at home.

If they are to be serious vehicles for strengthening and protecting the working class both at home and abroad in this era of overlapping crises, today’s AFL-CIO and its affiliated unions must adopt the kind of principled labor internationalism that would inevitably bring them into conflict with US foreign policy instead of reflexively serving it. But a labor movement that places class struggle and antiimperialism ahead of deference to Washington’s international designs will not come into being unless workers, both within and outside the AFL-CIO, build it themselves.

#### National labor organization neglects the exploitation of the worldwide workplace.

Martin Bishop 24, Emergency Workplace Organizing Committee, "The Future of Work(ers): Building Collective Power in the Era of Remote Work," 01/12/2024, https://workerorganizing.org/future-of-work-tech-remote-union-7268/

For years, tech companies have advertised the “future of work” as one that is remote, driven by a geographically disparate workforce. The COVID-19 pandemic accelerated this transition into an increasingly distributed workforce. Now more than ever, traditional offices have given way to remote work. And why not? Executives, founders, and venture capitalists have provided countless articles, interviews, and podcasts about this remote and distributed workforce becoming the very future of work itself.

These modern-day robber barons often paint a picture of a utopian, futuristic workplace. Workers can work when, where, and however they want. They can be with their families, travel, work from coffee shops, decide to work mornings or nights, weekdays, or weekends — it’s the ultimate freedom. Employers, no longer in need of a centralized office, can cut out traditional expenses, such as rent and utilities. They can hire workers from anywhere in the world. Skills, expertise and talent are not bound by arbitrary borders on a map. Remote companies are free to hire “the best of the best” from anywhere in the world — so long as they have access and means to afford reliable internet.

Since the COVID-19 pandemic began, this move to remote work has been accelerated. At the height of the pandemic, companies forced jobs from traditional on-site offices to our kitchen tables and couches. While we see some companies currently implementing “return to office” policies, as real estate leases expire and the bosses realize they can outsource and deskill traditionally white-collar office jobs, we will continue to see more and more of the working class working from home. On its surface, this move to remote work seems like a change from which both workers and employers will benefit. However, what’s often left out of these “future of work” conversations and even more crucial for the vast majority of us is the ​future of​ the ​workers themselves.

Even the most progressive companies are not immune from traditional workplace antagonisms. At the end of the day, no matter how lofty a company’s mission statement may be, the bosses and investors are driven by profit. This motive directly conflicts with the workers’ rightful desire for fair compensation, dignity, and a voice in the workplace. As the dust settles and power dynamics between employer and employee are reestablished, this future in which remote and hybrid work is the norm will be​ ripe for exploitation by the bosses of the workers bound by its constraints.

Remote Work and Organizing in Isolation

Organizing a workplace is hindered the moment that the workforce goes remote. Workers lose conversations around the water cooler, on the loading dock, or in the break room. While they may have social meetings over Zoom, they no longer have the in-person happy hour after work to engage in conversation with their colleagues or the coffee break to vent, commiserate, and let off steam.

These may seem like trivial things — and some of us won’t particularly miss happy hours after work — but removing these organic interactions with coworkers also removes opportunities for workers to candidly share how they feel about work, their boss, their workplace, or their industry in general.

Early socialists, workers, and union organizers in the labor movement met at taverns and pubs to discuss working conditions. These conversations laid the foundation for organized labor. These informal and often impromptu discussions are a necessary step in any attempts of worker organizing. Yet most, if not all, of these worker-to-worker interactions in a traditional workplace are removed as soon as a company goes remote.

Many managers and executives pride themselves on having an “open door policy” in which employees are encouraged to share their thoughts with management. Yet even when management is willing to listen, they can — and often will — push public conversations into private, one-to-one conversations. And just in doing that, the workers’ biggest strength — their solidarity in numbers — is gone and fledgling talks of worker organization are easily dismissed well before they can acquire momentum to reach the majority of workers. There’s a reason those early activists met at the tavern without the boss.

More recently, tools like employee engagement surveys have become popular with companies to request feedback from workers in an attempt to quantify employee sentiment. In theory, these surveys allow workers to collectively share their candid and honest feedback about the workplace. On its surface, this may seem like a good thing. And it ​could​ be.

But the intent and usage of tools like employee engagement surveys may be far more insidious than appears at first glance. Using the data acquired through these surveys, companies can find which areas, demographics, or departments of the workforce are most dissatisfied. And they can then stamp out attempts to organize.​ ​In fact, some companies are already doing just that​.

By enforcing usage of company-provided communication platforms and devices, employers are further able to shift the balance of power in their favor. On company platforms, where conversations can be easily monitored and controlled, employees can have their access cut at a moment’s notice. And just like that, they’re disconnected and cut off from their co-workers.

The World Wide Workplace

Karl Marx and Friedrich Engels talked of the reserve army of labor. This term refers to the unemployed and under-employed members of a capitalist society. This reserve army is not an unfortunate side effect of capitalism — its existence is by design. So long as there are job-seekers, employers can leverage the threat of termination and replacement to bring their employees to heel.

When we expand the pool of labor beyond the commutable radius of a workplace through remote work, we exponentially multiply this reserve army of labor. No longer are we pitted against fellow workers in just our local job market, but we’re pitted against each other in a worldwide reserve army of labor. With a finite number of jobs to fill and a rapidly growing pool of labor to pull from, the competition within the job market will grow.

Now that bosses are pulling from a global pool of labor, this will not only affect workers on a local level but increase exploitation worldwide. Hiring practices, potentially under the guise of diversity and inclusion, will be optimized to draw candidates from lower cost-of-living areas through increasingly precarious employment terms. Sites like Upwork and FlexJobs are already trying to become the Uber and Lyft of traditionally “white collar” jobs by replacing good paying, full-time jobs with contract and temporary work. This is the digital equivalent of off-shoring and outsourcing manufacturing jobs.

Employers are already benefiting from and exploiting workers in this distributed workplace. The Bloomberg 2020 presidential campaign hired a firm called ProCom, which ​used prison labor to make campaign phone calls​. ​Corporations in the United States exploit deportees in the Global South​ for their “American-sounding” voices in call centers. How do we ensure employers don’t further exploit those who are most vulnerable in the name of cutting costs?

Automation, Productivity, and Justifying our Existence

This future of work that bosses are selling to us comes with a full benefits package, including the promise of increased productivity. We live in a time in which workers are more productive than ever. Through the advancement of technology and innovation, we have the means to produce basic necessities for every single person on the planet. Yet we don’t. We instead search endlessly for the latest “simple trick” or “workflow hack” to increase our individual productivity. For what purpose?

We need to stop asking how to be more productive and start asking who benefits from our productivity and why. Instead of chasing productivity hacks to justify our individual existence among the reserve army of labor, we need to focus our collective strength on building a future of work that provides for all.

Further, as bosses reduce us to simple metrics, the very tasks those metrics represent may soon become automated or deskilled themselves. And for every task that bosses automate, the less they need for our labor. This should be celebrated. We could all work fewer hours. We could share the burden of providing basic human needs and extend basic necessities to everyone. ​We could free ourselves of the 40-hour workweek.​ We could use this newly found freedom to pursue passions, spend time with family, and contribute to our communities.

Decreased demand for labor ​could​ allow for all workers to remain gainfully employed while working fewer hours. But that will not happen within our current system. This fierce competition for a shrinking number of jobs will be exploited by the bosses to the detriment of the workers. Instead of collectively sharing in the benefits of automation, the deskilling of work will pressure us to work harder and longer hours to meet ever-increasing expectations of output and productivity.

Without a deliberate and collective approach to organizing in this workplace of the future, we will instead be forced to justify our “privilege” to overwork in order to be underpaid by a handful of CEOs. Inequality will continue to increase and all but the venture capitalists, C-level executives, and shareholders will feel the devastating effects of this ever-increasing divide.

Company Cult(ure)

Companies often promote a strong company ​culture that includes a mission statement or list of values that are supposed to guide their decisions. More often, these mission statements are instead used to justify company decisions that are made to the detriment of the worker. If a worker asks for material improvement in their day-to-day job, those demands can be dismissed with a reference to a nebulous mission statement.

Don’t be fooled. Your workplace is not your family. You are expendable to your boss. The employee-employer dynamic has more in common with an abusive relationship than a family. The next time your boss references a company mission statement, ask yourself if the intent is genuine — or if they are trying to dismiss your concerns and guilt you into complacency.

This culture within the tech industry is driven by an idolization of CEOs, “visionaries,” and even the venture capitalists who simply got lucky when they funded the latest shiny app. This idolization is dangerous. It allows individuals to make decisions that impact not only their employees but also the people who use and rely on the products and services they create. This lionization of unelected and unaccountable individuals gives unmitigated power to people who are often not best-suited to make decisions in the best interest of others.

How can a CEO truly know what’s in the best interest of the workers? Or the users of their service? How many “thought leaders” in the tech world were simply in the right place at the right time? How many simply had the privilege and safety net to invest in an idea? An idea that may not have even been theirs to begin with?

Such great power into so few hands directly conflicts with any sense of democracy in the workplace. The CEOs, venture capitalists, and board members reign supreme over the workers. Workers fight amongst themselves for the “right” to work for their glorified oppressors.

“Be wary of great leaders. Hope that there are many, many small leaders.”

—Pete Seeger

We need to stop this idolization and instead start holding these CEOs and venture capitalists accountable for their decisions. ​We need to bring democracy into the workplace through rank-and-file organizing.

Labor Movement 2.0

The future of work is one that could be bright for all of us. We don’t need to accept the dystopian workplace of the future ruled by the bosses. Rather, we must relentlessly reject the status quo handed to us from the top down and harness the unrealized potential we have amongst ourselves. ​We can win the future of work.

We can all work fewer hours while ensuring we all have our basic human needs met. We can free ourselves to pursue life beyond the confines of the workplace as we know it. We can work towards a fair and just workplace that works for all people, everywhere. But in order to get there, and in order to prevent the alternate, darker timeline, we need to organize together and build collective power. Without our brain and muscle not a single wheel can turn, nor can a single line of code be written. ​At the end of the day, we don’t need CEOs. They need us.

It starts small. It starts by talking with your co-workers. It starts with the realization that our strength is in our collective voice and action. It starts with questioning the status quo. It starts with potentially uncomfortable conversations. ​It starts with all of us​. ​We all need to become workplace organizers.

“I am not a Labor Leader; I do not want you to follow me or anyone else; if you are looking for a Moses to lead you out of this capitalist wilderness, you will stay right where you are. I would not lead you into the promised land if I could, because if I led you in, someone else would lead you out. You must use your heads as well as your hands, and get yourself out of your present condition.”

—Eugene V. Debs

We must reject any “future of work” that does not include an equally comprehensive future of workers’ rights and organized labor. This future of work must be driven and democratically decided by us, the workers. All of us are stronger than any of us. But only if we are organized.

Tech Workers Are Fighting Back

No one is coming to save us. We have to do it ourselves. We all have a role to play in this resurgent labor movement. And across the country and around the world, workers are coming to do just that, by organizing for a greater say in their workplace. Workers at Google are building collective power through the Alphabet Workers Union. Tech Workers Union 1010 is supporting campaigns in many workplaces across the country. Here at EWOC, we’re supporting workers in tech and across every industry. And for the first time, Labor Notes will be holding a Tech Organizing Conference in New York City in October.

We’re up against some giants with almost as much money as they have arrogance. But just as the landscape of work itself is changing, so too will the landscape of worker organizing. Across workplaces and across industries, we can learn from and stand with each other. Let’s come together and build a future of work that works for all of us. We have a world to win.

#### But for similar reasons, this area does not fall prey to the classic ‘soft left’ problem where reformists have no answers to the Cap K. Even extremely radical labor advocates oppose wholesale anti-capitalism.

David Madland 21, Senior Fellow and Strategic Director of the American Worker Project at the Center for American Progress, author of Hollowed Out, "Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States," ILR Press, an imprint of Cornell University Press, 2021

Moving beyond the kinds of social democratic reforms discussed in this chapter would not solve America’s problems. Capitalism’s flaws are the source of America’s wage stagnation, extreme inequality, and corrupted democracy, but doing away with capitalism would lead to even worse problems. It would inevitably lead to severe restrictions on economic and political freedoms that are incompatible with democracy, as every example that has been tried from the Soviet Union to Cuba shows. Communism is also not very economically efficient, as it has a hard time spurring long-run productivity increases because it lacks the necessary individual incentives and freedoms. Doing away with democracy but keeping capitalism, as is the current model in places like China and Russia, is not appealing either. Capitalism promotes some kinds of individual freedoms that seemingly are in conflict with repressive regimes, though capitalism and political authoritarianism may prove to be compatible over the long run as they share elements of top-down control.131 But even if capitalism and authoritarianism are compatible, that is a model that few Americans would aspire to.

#### Labor law advocates suggest that law can assist in the social construction of alternatives, even when it is not immediately revolutionary.

Brishen Rogers 23, Rogers is Professor of Law at Georgetown University, J.D. from Harvard Law School, B.A. from University of Virginia, "Data and Democracy at Work: Advanced Information Technologies, Labor Law, and the New Working Class," The MIT Press, 2023, https://doi.org/10.7551/mitpress/11253.001.0001

COVID-19 upended the American economy—but not its class, gender, and racial hierarchies. While the coronavirus did not discriminate based on income or race, exposure, complications, and death skewed heavily along those lines. A major factor in individuals’ total risk was whether they could work remotely, which revealed a longstanding technological class divide. Under social distancing mandates, professionals retreated to their homes or second homes, using new videoconferencing platforms to keep working— designing products, analyzing data, writing legal briefs, coordinating strategies, and so on. This was especially trying for parents who had to care for children as they did their own jobs, and the burdens of childcare fell disproportionately on women. Yet professionals had it comparatively easy. Their relative comforts depended on armies of low-wage workers in a vast service economy, who had to perform their jobs in person. Those workers, who are disproportionately nonwhite, had a very different relationship with technology. Rather than using it to create goods and services or to manage enterprises, those workers were often managed by technology, receiving orders and even official discipline through apps, tablets, and the like.

Many canonical images from the pandemic juxtaposed US companies’ stunning technological sophistication with their workers’ vulnerability. Amazon warehouse staff—who work alongside armies of robots and whose every task is assigned and monitored by artificially intelligent devices— became infected early on because the company did not maintain physical distancing or provide masks in the workplace. Workers at grocery stores and many restaurants faced similar risks of infection even as they were monitored by point-of-sale devices that tracked how long they took to perform certain tasks. The potential scope of the app-based gig economy also came into focus as delivery platforms like Instacart and DoorDash scaled up to meet consumer demand. Their workers needed to enter businesses and homes and interact directly with customers, leaving them at a high risk of infection, and were supervised, demoted, and even fired via smartphone apps.

The pandemic therefore highlighted and exacerbated long-simmering grievances in the US’s economy and society. Many workers simply reached their breaking point and began to protest against dangers and mistreatment. Early in the pandemic, health-care workers who used cutting-edge medical technologies called out their employers’ failure to provide them with adequate safety equipment. Many others followed suit, walking out of warehouses, meatpacking and poultry plants, fast food restaurants, and other businesses, to the point that some believe that COVID sparked a bona fide strike wave.1 As pandemic restrictions began to ease in 2021, many companies struggled to staff back up, especially in the hospitality industry. Some longtime restaurant and hotel workers told reporters that they were unwilling to tolerate such risks again, or they were exhausted after years of physically grueling service work. COVID was the final straw. Then, 2022 saw a major upsurge in worker organizing, including successful unionization drives at numerous Starbucks locations, and at an Amazon warehouse on Staten Island where key worker grievances included lax safety protocols and automated productivity monitoring.2

A decade from now, scholars may view the coronavirus pandemic as the end of an era in the American political economy. That era began in the late 1970s and was defined both by astonishing technological progress and by exponential growth in precarious service jobs. This book argues that those trends—in technological development and in the degradation of work— were completely intertwined, in the sense that companies increasingly used new technologies to limit workers’ power.3 It further argues that our labor laws—that is, the entire complex of US laws constituting and governing work—enabled companies to use technology in that manner.4 Over the same period, companies established broad rights to gather data on workers and their performance, to exclude others from accessing that data, and to use that data to preempt worker organizing. Put more formally, companies have used their legal and technological powers to suppress workers’ associational power, driving down wages and eroding working conditions.5 These long-running developments yielded many of the problems that exploded into the public eye under COVID: low wages, meager benefits, lean staffing, unpredictable schedules, lack of basic safety protocols, and misclassification of employees as independent contractors.

This book also argues that there is a deeper causal logic at work: these technological and legal changes were driven by capital’s demands for high returns in today’s large service sectors. Companies in those sectors often require armies of workers without rare or specialized skills, and they are often plagued by slower productivity growth than their industrial peers. Those companies have maintained profitability in part by using new technologies to limit workers’ power. These trends are global, but this book focuses on the United States, where they are especially pronounced. Finally, this book argues that a more fair and sustainable future of work is possible, but achieving it will require ambitious reforms to democratize the governance of workplaces, workplace data, and the economy.

On that note, as I finalize this book in mid-2022, there is great excitement in labor circles due to the recent victories at Amazon and Starbucks. Those developments may signal the beginnings of a broader ideological and political-economic shift, in which capital loses some influence and legitimacy, and in which workers are able to build substantial associational power and even a cohesive class identity, and perhaps to push for transformative changes to our labor laws. Alternatively, those victories may not have much long-term impact because of entrenched employer resistance or other, more contingent factors. Regardless of how those and other campaigns play out, I hope that the developments discussed in this book help readers and scholars make sense of them in two ways. First, the technological, legal, and political-economic transformations of the last few decades helped to generate the grueling and often alienating working conditions that led many workers to organize in 2022. Second, Amazon, Starbucks, and other companies may aggressively resist further organizing efforts through the legal and technological means that this book discusses.

The rest of this introduction outlines the book’s narrative in more detail, situates it within the literature, and then summarizes the arguments that will be made in subsequent chapters.

Data-Driven Technology, Inductive Knowledge, and Class Power

While this book focuses on recent developments, conflicts over workplace technology and information are not new. For well over a century, workers and companies have fought over the generation and control of workplace information, since both parties recognize that access to information shapes the labor process and the parties’ correlative powers. For example, to unionize or take collective action, workers typically must be able to meet, to discuss common concerns, and to plan together without management’s knowledge or involvement. In that sense, to build associational power, workers need some privacy, meaning some control over informational flows.6 Conversely, companies have long sought to generate, capture, and quantify information about workers and work processes and to use that information to suppress worker mobilization. They can do so directly, by retaliating against worker or union leaders, or indirectly, by designing production systems and processes in ways that deter worker organizing.7

In recent decades, however, companies’ ability to use data to reshape production and class relations has been supercharged by developments in law and in data processing. Regarding the law, companies have pushed on multiple fronts to achieve greater freedom of action vis-à-vis workers and the state. They enjoyed such authority prior to the Great Depression but lost it after the New Deal once workers unionized in large numbers. Companies pressed hard for such freedoms beginning in the 1970s, responding to various economic pressures, including industrial overcapacity.8 As courts and legislatures responded, our labor laws were gradually transformed. Today, those laws treat employment as fundamentally contractual, largely disregarding the background inequalities that affect workers’ and companies’ bargaining power, and treat the enterprise more like the employer’s sovereign property. As argued later in this book, this consolidation of legal power reflects broader trends in the evolution of law over the same period— the era of neoliberalism—when vast swaths of our society were reorganized around idealized visions of market ordering.9

That long-running shift in labor law both facilitated and responded to the maturation of networked information technologies, as well as to broad changes in the class structure. As industrial production declined, service industries became dominant, and many of the nation’s largest employers came to be in fields like retail, food service, logistics, and hospitality. Those companies face different sorts of pressures than their industrial forebears. They need to hire and manage huge armies of service workers in thousands of small worksites rather than in a few huge factories. They also need to oversee immensely complex global and national supply networks. Finally, because it is harder to increase productivity in services than in manufacturing, service-sector companies have very strong incentives to limit labor costs. Successful companies have often used novel surveillance technologies for all those purposes.

Those technologies differ from past means of worker surveillance in several respects, each of which is reflected in their design as well as their use.10 For example, data-driven surveillance can operate over a vast distance, enabling cheaper oversight of massive numbers of workers or huge and farflung supplier networks from corporate headquarters. Those technologies also operate asymmetrically, enabling companies to monitor workers but preventing them from monitoring management in return. Most important, nascent forms of artificial intelligence (AI) operate very differently from human cognition. They analyze very large data pools to discern patterns and draw statistical inferences in ways that humans never could. This leads to a new way of “seeing” or knowing the world that is inductive in character and genuinely different from other forms of productive knowledge. As the sociologist Gary Marx explained in a related context, such techniques enable judgments based not just on the unique individual being surveilled, but on that individual “in relation to statistical averages and aggregate categories.”11 Contemporary AI systems nevertheless have an Achilles heel: they have no sense of the social and real-world contexts for their analyses.12 Those contexts are inescapable in the workplace, and they limit companies’ ability to automate today’s jobs. For the foreseeable future, then, the greater share of workplace AI will likely be dedicated to extending, deepening, and transforming managerial control over workers.

In the United States, the results of these intertwined shifts in law, technology, and class relations are all around us. For example, acting entirely within their rights, companies may closely monitor workers, demand an ever-faster pace of work, and terminate those who complain without giving any reason.13 They may use AI to reshape schedules, physical spaces, and workflow in ways that prevent workers from even speaking with one another, making it more difficult for them to take collective action. Companies may shunt workers outside their corporate boundaries, denying them basic legal protections and rendering many forms of worker collective action illegal, even as they closely supervise those workers’ performance.14 What’s more, companies can take these steps even as they exploit their control over valuable information to build a dominant position within their sectors, giving them structural power over workers, competitors, and even lawmakers. This intensification of surveillance and management is not always intended to erode workers’ associational power—but it often has that effect. Workers are fragmented from one another physically, socially, and legally, even as they are subject to similar forms of centralized control.

Companies can also use new surveillance devices and inductive learning technologies to suppress workers’ organizing efforts actively, directly, and aggressively.15 For example, companies can monitor internal employee message boards using natural language recognition algorithms, spotting keywords that might indicate that a unionization drive is afoot and then retaliating against the ringleaders. Such retaliation is often illegal—and yet companies may be able to launder personnel decisions through new algorithms that obscure their intent from workers and regulators, making enforcement much more difficult.16 There are many reported examples of such efforts today. For example, Amazon in 2020 posted (and then rapidly deleted) a job announcement for “intelligence analysts” who would take such efforts to scale, utilizing worksite data analytics and public data sources to detect “labor organizing threats” against the company.17 Companies may also be able to use new recruiting algorithms to aggregate data on applicants’ employment history with data on their social media posts or consumer behavior, and then screen out workers who are likely to challenge management’s authority.

All of this culminates in today’s labor politics, in which knowledge and control are centralized, surveillance is constant, and line-level workers have little autonomy and no voice on the job. Companies’ power then extends, fractal-like, from the individual workstation, to the worksite, to the supply and distribution chain, and to the broader political economy. Workers must compete with one another for jobs, for desired shifts, or to stay in their employer’s good graces, and therefore face substantial market discipline. As a result, service workers are increasingly a class in a structural sense, occupying similar positions in the division of labor and enduring similar inequities, even if they do not always understand themselves to be a class. Their lack of collective power drives down wages and working conditions, enabling companies to remain profitable and capture the lion’s share of productivity gains. The enormous power disparities in today’s labor market may even have skewed the development of AI itself, encouraging investment in technologies to control and discipline workers. In that sense, new technologies and their associated class politics are central to the political economy of contemporary capitalism.

There are silver linings here. The fact that recent changes in technology and class relations were facilitated and shaped by law—a human creation ultimately subject to democratic revision—suggests that reforms to workplace and data governance could encourage a far better future of work. Such an outcome will require political mobilization, but there are promising signs there as well.18 For one thing, service workers are the paradigmatic so-called essential workers of the COVID era—the ones who make sure that we are all fed, clothed, housed, transported, and cared for. They have enormous latent power, which they have recently begun to exert, as noted previously. Service workers also have a natural community of shared interest with many consumers, including a younger generation unwilling to tolerate an unfair and unsafe future. Together, those groups could push for a more just, equitable, and sustainable political economy.

In this book, several chapters that discuss technical developments and their effects on workers also suggest reforms to address discrete harms. The final chapter then proposes a far more ambitious reallocation of workplace rights and powers. Those proposed reforms draw inspiration from the radical democratic tradition of thought and action, which insists that all major spheres of social action—politics, the economy, and civil society—should be constituted and governed in a democratic fashion.19 In labor law specifically, those reforms aim to make workers’ associational power a legitimate modality of governance once again. Law today encourages employer dominance in many ways—but law can also encourage a different political economy and a different class politics, with a broader and richer sphere of human freedom.

Situating This Book in the Literature

The book sits at the intersection of three bodies of scholarship that illuminate the role of laws and other institutions in shaping contemporary work relationships and longer-term processes of capitalist development.

The first body of literature considers the role of law in political-economic orders and governance. That was a major theme of early-twentieth-century legal realism, which illuminated how legal rules and processes established the terrain on which economic and political action occurred.20 Labor law scholars have often drawn on legal realism to explore how law constitutes and shapes class relations. For example, a number labor law scholars have argued that the New Deal labor regime, by continuing to protect various pre-New Deal employer prerogatives, failed to deliver on the promise of workplace and industrial democracy.21 Others have sought to understand the myriad ways in which labor laws shape workers’ capacities for collective action, and how that collective action can become an autonomous source of legal or quasi-legal authority.22 Still others have elaborated on the relationship among class and other axes of social subordination, including race, gender, and citizenship.23

Another important body of post-realist scholarship is now clustered around the Law and Political Economy (LPE) project and movement.24 That literature is diverse, cutting across subject fields and methodologies, but much of it has extended and updated the realist project of understanding the legal constitution of the political economy.25 Some LPE scholars have focused specifically on the relationship between law and capitalist development outside the labor context, and the book draws extensively from their work.26 Others working in and around LPE have argued that the data revolution is altering workplace privacy practices and compliance with antidiscrimination mandates.27 With important exceptions, however, scholars have said less about the role of new information technologies in class politics specifically, or about those technologies’ relationship to changes in labor law.28

The second body of literature considers the relationship between technology and institutions, including but not limited to the law. This is another immense topic, and the book can’t hope to do justice to all the debates among technology scholars, but several are worth noting. One branch of science and technology studies has illuminated how political and social institutions can shape technological development and deployment, and how technologies in turn can shape political and social institutions.29 Another rich vein of scholarship focuses on how new information technologies facilitate network- or platform-based forms of social organization with distinctive logics and tensions, including tendencies toward monopoly.30 Legal scholars, for their part, have long argued that rights to develop or deploy technology are a crucial source of social and economic power, and that the design of technologies themselves can regulate and shape social behavior.31 As inductive learning technologies have been deployed at scale in the private sector, various legal scholars have traced how they are legally constituted, how companies are using them to reshape relationships with consumers and others in ways that threaten individual privacy, and how they are altering state and administrative processes.32 As noted earlier, this book draws insights from those bodies of work and applies them to the recent evolution of workplace technology and class relations.

The third body of literature focuses on the political economy of work and technology more generally, but it often says less about law and legal processes. This is a theme in various classics of political economy, including work by Adam Smith, Karl Marx, Joseph Schumpeter, and more recently Immanuel Wallerstein.33 One body of contemporary research—in fields including comparative political economy and welfare state studies— illuminates the relationship among workers’ associational power, other institutions, and patterns of development across capitalist economies.34 Another line of research—in heterodox economics, economic sociology, and labor history—focuses more specifically on how workplace technology structures class relations.35 A core insight that cuts across much of that scholarship is that companies may choose technologies that are less productive or efficient than reasonable alternatives, where doing so helps them contain workers’ power and thus capture a higher share of profits.36 While classic works in this tradition were written prior to the emergence of networked information technologies, in recent years sociologists and other social scientists have studied how processes of algorithmic management are proliferating across the economy and exacerbating economic and other inequalities.37

While these literatures diverge in many respects, they all focus on the constitutive role of social institutions in capitalism, whether historically, within nations today, or in comparative cross-national perspective. The book draws from each body of scholarship to develop its own theory of the law and political economy of workplace technology. Its overall argument then pushes forward two now-classic insights from these literatures, which are in tension with one another. The first, common to legal realism and its descendants, is that law is a human creation and can be revised to advance the broader social good. While processes of social change cannot be driven entirely by legal change, legal reforms and processes are central to social orders in modern democratic societies. Moreover, unlike social norms and forms of traditional authority, laws can be contested, questioned, and altered pursuant to intentional deliberative and political processes. The second insight, which is central to radical political economy and heterodox economics, is that capitalism, as an economic and social order, has a deeper logic that is not reducible to the views and aspirations of its denizens and that pervasively shapes the legal order. For example, capitalism encourages intense competition through much of the economy, leading to perpetual changes in technology and to new work structures that erode existing social protections. What’s more, capital’s structural power even in democratic societies may limit the potential scope of democratically motivated efforts to decommodify labor and social goods.

In other words, the book stands both with those who insist that capitalism tends to erode or swamp all opposing normative orders and with those who note that, by acting together, nonelites have frequently limited the power of capital and democratized social and economic life through legal reforms. As shorthand, the book refers to this dynamic as the tension between capitalism and democracy, recognizing that both terms are immensely complex and contested. My hope is that embracing this tension will enable a sober, clear analysis of the crises facing us today, while also generating space to envision a future of work and workplace technology that is far more egalitarian and sustainable than the present.

#### Sectoral approaches do not trade off with class solidarity.

Cynthia Estlund 24, Crystal Eastman Professor of Law at the New York University School of Law, "Part III: Some Questions about Sectoral Co-Regulation and Its Future," OnLabor, 5/23/2024, https://onlabor.org/iii-some-questions-about-sectoral-co-regulation-and-its-future/

One might also worry that sectoral labor standards will detract from efforts to raise the jurisdiction-wide floor, especially for wages. If subgroups of workers with political juice can gain higher wages for themselves, that might deplete the coalition needed to raise minimum wages for the more marginalized workers that remain. Stated differently, drawing organized worker’s activism into sectoral channels might detract from class-wide solidarity. But the tension between particularistic objectives and class-wide solidarity would seem to be even greater in the case of enterprise-based collective bargaining, which focuses worker activism and solidarity on even narrower groups of fellow workers. Fortunately, solidarity is not a zero-sum affair. Moreover, raising sectoral standards might in some cases soften the political ground for, and demonstrate the feasibility of, higher jurisdiction-wide standards.

I don’t mean to dismiss the last two sets of concerns. The two dominant modes of labor standard setting—enterprise-based collective bargaining and jurisdiction-wide minimum standards—might be different enough from each other to limit the competition between them. Sectoral regulation of labor standards in some ways splits the difference between those two dominant modes, and probably poses some greater risk of competition with both of them. But it is largely the advantages of sectoral regulatory strategies relative to those dominant strategies—that is, their ability to deliver significant gains for some groups of unorganized workers—that generate potential competition. The resulting risks seem worth taking if these new strategies allow us to raise labor standards for those left out of our collective bargaining system.

### Neg---K---Degrowth

#### Current labor law is organized around growth and work. Instead, we should reconfigure labor law around post-work and post-growth principles.

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The world is changing constantly, and with it so are perceptions, values, and norms in society, as well as our ideas about what kind of world we would like to live in. This regularly leads to rethinking, reconsidering, and reimagining our ways of living and the institutions that regulate our lives. Particularly since the 2008 financial and economic crisis, calls have been made for alternatives to the economic growth- and profit-driven market economy. This call was reiterated during the Covid-19 pandemic when economic priorities left more room for health concerns and a reflection on what is essential work in society.1 These calls also reflect systemic societal challenges caused by the fear of technical replacement, climate change, demographic change, and rising inequality. All these reflections will affect labour law and a labour law perspective is needed to contribute to them.

In response to these calls and societal challenges, new ideas, or utopias, have gained visibility in the socioeconomic literature. The aim of this book is to engage with two alternative approaches to the current growth- and profit-driven market economy: post-economic growth and post-productive work approaches. Labour Law Utopias: Post-Growth and Post-Productive Work Approaches explores what these alternatives might mean for work in general, its meaning and organization, and labour law in particular. The remainder of this introduction elaborates on utopias in general (what is a utopia, what can its function be for law, and how we use this concept); why there is a need for labour law utopias; and what post-growth and post-productive work approaches entail in this book. The introduction concludes with an overview of the main trends and discussions that can be identified in the chapters for rethinking labour law beyond growth and productivism.

I. Utopias as Idealistic Alternatives

The concept of ‘utopia’ is often used in a historical fictional way.2 These utopias in literary works usually have the purpose of helping the reader to imagine a completely different society, an ideal society, or an ideal way of living. However, a utopia for one person or group can be a dystopia for others. Huxley’s Brave New World is a clear example of this. And Thomas More’s Utopia was an ideal world for everyone who behaves in accordance with the rules as set by More. For good reasons, many utopias remain just an idea on paper. However, many utopias have also left a ‘legacy’. For example, until about the mid-sixteenth century laziness was considered a virtue and the Land of Cocagne something every good citizen would dream of. Thomas More changed this radically. In More’s Utopia, work was considered a virtue: every citizen ought to spend their time in a way that is useful for society. While his utopia was never realized, the idea of work being a virtue still resonates today.3 Beyond being a virtue because it is considered as something that gives an individual person an identity, esteem, and dignity, work is also increasingly appreciated and rewarded based on its mere economic value.

Sometimes a utopia is used to visualize how the world could have been different had a certain path or paradigm been followed. Examples of these are Jurriaan Andriessen’s Eldorica,4 which visualizes an alternative world that considered all the recommendations of the 1972 report of the Club of Rome; and Yanis Varoufakis’ Another Now,5 which sketches a different world based on the idea of what could have been if, in 2008, civil society movements Occupy and Extinction Rebellion had won. By visualizing how things could have been done differently, the aim of these utopias is to facilitate different choices and get on a path towards change. Perhaps this could be considered the most important function of utopias: by imagining how things could be done differently and what kind of world that could lead to, this will make it easier to opt for change.

No matter how you look at utopias, the use of a utopia makes it clear that the goal of the author is to think beyond the existing world and imagine ideal alternatives. As such, the use of a utopia allows us to think beyond the familiar and come up with solutions that would not otherwise have been considered. Langille’s chapter elaborates on the idea of labour law utopias. More generally, the contributions in this book use the idea of utopia as a method to offer forward-looking ideas about what a future world of work that is more human-centred and green may look like and the implications such a world holds for labour law. The future-oriented approaches that are promoted in this book aim to offer alternatives to the economic growth- and profit-driven free market economy. More concretely, this book follows two general approaches: post-growth and post-productive work. These approaches have been chosen because they respond to various important issues for the future of work, and they present serious challenges to labour law. These include environmental concerns and climate change, technological replacement, demographic change, increasing income and wealth inequality, and precariousness in a profit- and productivity-driven economic model.

II. The Need for Labour Law Utopias

With the post-growth and post-productive work approaches, we aim to do what we legal scholars are good at, namely, to ask what the law should or ought to be. This is something that some legal scholars claim to be at the heart of legal scholarship,6 often combined with a positive law approach.7 However, when reviewing labour law research, this ‘how the law should or ought to be’ approach also has its limitations. Overall, labour law research remains fragmented, dogmatically linked to positive law, and it rarely interacts with developments in other scientific fields such as economics and sociology.8

By fragmented, we mean that research in labour law is often focused on one particular problem or niche topic of labour law. This is usually a good thing as such an approach offers profound insights into the problem or topic addressed. This approach also serves practitioners in (labour) law, especially lawyers and judges. For example, since the rise of platform work, many labour law researchers have explored this new form of employment relationship and made suggestions on how to make this triangular contractual relationship fit within the existing and often dogmatic binary ‘either employee or entrepreneur’ system.9 With an increased use of algorithms in the context of work, labour law researchers have also outlined the particular risks of infringements of workers’ rights, such as discrimination and privacy issues, and how those risks could or should be met by existing labour law.10 The research on precariousness, an issue that is continuously challenging labour law, especially since the proliferation of more flexible forms of employment (part-time work, fixed term contracts, temporary work contracts, zero-hour contracts, on-call contracts, but also crowd work via platforms), aims to inform practitioners, but also lawmakers, on how to improve the situation of these workers by pointing out weaknesses in the existing labour law systems and how these could be overcome with adaptations of those labour law systems.11

With this important type of research, labour law researchers fulfil the function of gatekeepers of the legal systems in ensuring that the positive law remains efficient and fair. However, by remaining dogmatically linked to positive labour law, one could ask whether this type of research alone is enough to question the purpose of labour law and its role in defining how we want and need to regulate work in the future. When following arguments that labour law is in crisis—some even claim it is dead12—it is doubtful whether labour law systems have maintained their integrity in terms of its quality and functioning. For Guy Davidov, labour law is not in crisis, however, due to incremental, piecemeal changes that have been made to the system over the course of time, labour law’s purposes and the means to achieve those purposes are no longer aligned.13

Others, like Ruth Dukes and Zoe Adams, argue that labour law is in crisis because the (fragmented) dogmatic studies fail to take into account the reality of the socioeconomic context in which the labour law system operates.14 From these arguments it follows that issues in labour law should be addressed in their wider socioeconomic context, without losing sight of labour law’s purpose. This may be even more the case when a forward-looking approach is taken, after all, without a broader, socioeconomic context to embed these ‘labour law utopias’, they risk remaining utopias forever.

Thus, while taking a forward-looking approach which puts ‘dots on the horizon’, these dots are embedded in the wider socioeconomic horizons of post-growth and post-productive work approaches defined below. These ‘dots’ may give direction to the transition that needs to be made towards new work utopias and their (cor)responding labour laws. The transition to such new work utopias and (cor)responding labour laws is very much worth exploring. However, before transitions can be made, we must have new utopias, these dots on the horizons, and currently, there is a lack of legal contributions on these dots. Therefore, the aim of the chapters in this book is to engage with doctrinal debates on post-growth and post-productive work approaches and their potential impacts on labour law.

III. Post-Growth and Post-Productive Work Approaches

History has seen many utopias. Some were translated into law and practice, at least to some extent, and therewith became socioeconomic paradigms in which work relations were shaped and labour law operated. For example, Soviet socialists and French socialists before them, envisioned a society in which each person was entitled to work and enjoy income security as the basis for economic equality.15 In the second half of the twentieth century, the neoliberal socioeconomic paradigm emerged as a counter-ideology to socialism. Promoted particularly by Hayek and Friedman,16 this neoliberal utopia became the new socioeconomic paradigm since the late twentieth century. It envisions an ideal society in which individuals are free to choose work and are rewarded according to their skills, but also implies human competition for work and a growing economy able to create market jobs.

Although these two utopias seem to be in complete opposition, they share the need to rely on work as a basis for society. And, with a continuous increase in population, this has resulted in policies stimulating the creation of new jobs. States in socialist systems, as well as private companies in neoliberal market systems, have proven to be very creative and inventive in occupying an ever-increasing number of workers.17 As ironically pictured by Bertrand Russell, in Soviet Russia the state designed admirable projects, such as making the White Sea and the northern coasts of Siberia warm, just to occupy people.18 Alternatively, in free market societies, the state endeavours to turn individuals into socialized consumers. André Gorz described how commercial advertisement helped to artificially stimulate consumption (in order to create jobs) by making people consume, not because the products are useful or necessary, but merely as compensation for the hard work they do.19

Currently, the logic of ensuring more and better paid jobs requires economic growth and relies on economic productivity. This logic requires that people become economically productive by training for and taking productive jobs in the labour market, but also that they consume more, a requirement that is unlikely to respect environmental boundaries and the climate. But abandoning, collectively or individually, this economic growth and productive logic is associated with the fear of reducing employment and material security. Although consensus on a work utopia that would work for all in a globalized economy is currently non-existent, alternative economic and work models are gaining visibility. In this edited book, labour law scholars address this growth and productive dilemma by engaging with post-growth and post-productive work approaches, as outlined in the following section. Rather than offering solutions on how to solve the dilemma, the aim of the chapters in this book is to explore new avenues for work and labour law.

A. Post-Growth Approaches

Post-economic growth approaches address and rethink the purpose of economic and human activities. They look beyond increasing consumption, production, and wealth as the main goals of the economy. Since most of the authors advocating a post-growth approach are educated as economists, they first describe how and why targeting economic growth, particularly in terms of GDP growth, is neither sufficient nor beneficial for most people, or even possible within planetary boundaries.20 Some authors then propose new values, such as happiness21 or wellbeing,22 as the main purposes of the economy, while others aim to describe more precisely how to depart from the current growth model. To give a more concrete impression of these approaches, we briefly describe three books that have gained popular attention.

In Less is More, Jason Hickel focuses on the environmental and climate, as well as social, consequences of growth. He argues that the current economic order is leading humanity towards mass extinction. In order to genuinely turn things around, it is necessary to slow down the pace of extraction, production, and waste, and slow down the ‘mad pace of our lives’.23 Hence, we need a ‘degrowth’ policy. He suggests mobilizing behind a global Green New Deal that goes beyond the capitalist parameters and that would reduce world greenhouse gas emissions by half by 2030 and to zero by 2050. Degrowth would entail systematic downscaling of energy and resource use, to create an economy that is in ‘balance with the living world in a safe and equitable way’.24 By ‘equitable’, Hickel means a society where income and resources are distributed more fairly and invested in the public goods that people need to thrive and where people are ‘liberated’ from needless work.25

Kate Raworth’s Doughnut Economics departs from the goal of achieving GDP growth that is traditionally represented by an increasing curb. Instead, Raworth replaces the traditional growth curb by a doughnut to illustrate how economic activities, from local to global, should meet the social foundation of human wellbeing (and not fall inside the hole of the doughnut) within planetary boundaries (the external limit of the doughnut).26 Touching at the core of neoliberal market mechanisms, she rejects the idea of the rational economic man and replaces this by a vision of social and interdependent human beings.27 She also reduces the role of markets. In her pluralistic system, the state, the household, and the commons (see for more information, particularly Chapter 8 by Tomassetti in this book), defined as shareable resources that people choose to use and govern through self-organizing, should be used to provide for human needs besides markets. In contrast to the current model that is based on the idea that we will be able to recover and redistribute after growth, she describes economies that are regenerative and distributive by design.28

Post-Growth by Tim Jackson is less about economic systems than about a definition of social progress and a new storytelling away from consumption and competition, as well as productive work. After presenting economic growth as a myth, including green growth, he suggests that we should strive towards other forms of prosperity, in particular health in all its physical, psychological, social, spiritual, and sexual components.29 And for this, balance, cooperation, and love are needed more than growth, competition, and consumption. His vision of work is much broader than economically productive work and encompasses a re-evaluation of activities, such as care or craft, that offer opportunities to learn, participate, and help build the social world and our place in it.30

The chapters by Ter Haar (Chapter 3, Economic Paradigm Shifts for Labour Law), Zekić (Chapter 4, Labour Law for Degrowth and Meaningful Work), Carelli (Chapter 5, First Lines for an Ecological Labour Law), and Deva and Anand (Chapter 6, A Global South Perspective on Labour Rights and Supply Chains for a Post-Growth World), are mainly based on this post-growth approach.

B. Post-Productive Work Approaches

Altogether, post-growth approaches focus on the economy as a whole and its purpose, but do not yet precisely focus on work, its value and purpose, and organization. It is undeniable that transforming theories of post-growth into practice will require a clear understanding of its consequences on work. Post-productive work approaches focus more specifically on work. They include alternatives to the current work dogma or reliance on economically productive work for individuals and society. Two specific tracks can be distinguished. The post-work approach in the strict sense usually considers work as a form of unnecessary exploitation. Therefore, it looks for avenues to diminish its quantity as much as possible. Historically, a plethora of essays have envisioned societies that are freer from work, notably Paul Lafargue’s Right to be Lazy,31 or Bertrand Russel’s Praise of Idleness.32 More recently ideas are proposed on how technology ownership and redistribution, for example through a basic income, can liberate people from work. Two examples of the latter include Daniel Susskind’s World Without Work33 and Nick Srnicek and Alex Williams’ Postcapitalism and a World Without Work.34

The chapters by De Becker and Claus (Chapter 11, Social Security and the Right to Laziness Beyond just Basic Income) and Gamonal (Chapter 12, Utopia, Power, and Free Labour) are based on this track of post-productive work.

The second track in the post-productive work approach goes beyond questions regarding the quantity of work. The debates focus on the purpose of work and its value for individuals and society. Whereas the current free (labour) market approach pushes individuals to compete for paid work and, thus, to train for the most economically productive and, therefore, remunerative jobs, critiques emerge on the need for more meaningful activities for individuals themselves and society altogether. The object of this approach can be defined as ‘post-productive work’. The debate usually starts with a critique of some highly paid jobs that make neither the individual worker particularly happy or proud, nor the world a better place, as described in David Graeber’s Bullshit Jobs.35 Additionally, there is a strand of literature which is developing the concept of meaningful work, but mainly from the perspective of individuals. This literature goes beyond decent work which is at the heart of the general labour law doctrine.36

Beyond meaningful work for individuals, some authors also discuss the value of work (and activities beyond work) for society beyond producing wealth, or differently put, the social value of work. For instance, Chamberlain’s Undoing Work, Rethinking Community addresses the low social esteem that is attached to unpaid activities and envisions a society, where taking responsibility for the wellbeing of others, not paid work, becomes the way to belong to society.37 However, wellbeing remains undefined.38 Dermine and Dumont have looked more specifically at the role of social law to promote freely chosen ‘(eco)socially useful activities’, containing a whole range of human activities that contribute to the construction of a sustainable society, but that are not valued by the market.39 Bueno’s human economy framework reflects on the waste of human potential when someone would like to do meaningful work for society, but has no individual opportunities to do so and has to take whatever job is available on the market. In his framework, activities are personally meaningful if they are freely chosen and socially meaningful when they contribute to central human needs.40 Finally, Post-Growth Work is a recent example of a book which discusses the value of work in a post-growth logic.41

Chapters that engage mainly with this post-productive work approach are written by Bueno (Chapter 7, Including the Non-Economic Value of Work in Labour Law), Tomassetti (Chapter 8, Labour Law and the Utopia of the Commons), Encinas de Muñagorri (Chapter 9, Labour Law for Care and Wellbeing), and Albin (Chapter 10, Channelling Technologies to Benefit Employees via Labour Law).

#### Labor law supports liberal market economies that protect individual workers’ freedom to choose. It should be reconfigured to serve socioecological purposes.

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B. Socioecological Labour Law

Many chapters in this book discuss the relevance of labour law for the environment and the climate. Labour law has traditionally been detached from questions of the environment and more concerned with providing employment and good working conditions for people. As elaborated by Ter Haar, in general the degrowth approach promotes an economic system in which all human activities, including work, respect the boundaries of the planet. Furthermore, post-growth and post-productive approaches seem to be underpinned by the idea that the interest of the planet should be respected much more in any economic system or society (Ter Haar, Tomassetti).

There seems to be a consensus that respecting the boundaries of the planet will affect production processes and result in lower production volumes. While this is accepted by some as inevitable (Ter Haar, Carelli, Zekić), Deva and Anand warn that this will have a major impact on the global supply chains and possibly hinder the development aspirations of the Global South. To overcome this problem, they introduce a ‘differentiated degrowth’ model, accompanied by a reorientation of corporate purpose, restoration of historical wrongs (including from colonial times), and a universal social protection for people globally.

More strongly related to the role of labour law, Zekić and Carelli in their respective chapters question whether labour law should support the logic of degrowth. More particularly, Zekić considers whether the role of labour law should be altered to foster merely production processes that are environmentally sustainable in the long run. Carelli, though, sketches an ecological labour law which balances the traditional social goals (human dignity, equality) with ecological goals (avoiding planetary cataclysm; respecting planetary boundaries). While none of the ideas presented in this book are mutually exclusive, the challenge is to figure out how to bring them together, especially when going through the transition towards a socioeconomic system that fully operates within the boundaries of the planet and takes into account the needs of society, especially the Global South.

C. The Individual and the Collective/Societal in Labour Law

There is a third underlying theme and discussion in many of the chapters. Labour law should better reconcile and further explore individual and societal interests. On one hand, labour law has a long tradition of providing collective rights to trade unions and mechanisms of collective bargaining, such to counterbalance the power of the employer. On the other hand, labour law is grounded in liberal market economies that protect the individual worker’s freedom to choose work in markets and promote individual autonomy in the workplace. Beyond this current balance in labour law, some chapters further explore alternative forms of workplace democracy (Ter Haar), including through the form of the commons (Tomassetti) and the role that technology could have if it was not only an employer’s property (Albin).

An important question in this book is not if, but how labour law can better reconcile individual and collective or societal interests. In short, how to ensure individual freedom and nevertheless promote collective outcomes for society and the environment? Ter Haar explores the collective and the individual through a change of corporate purpose, namely, to serve the needs of society and to foster the individual talents of their workers at the same time, rather than pursuing economic growth and profits. Bueno addresses further the individual and societal waste of skills when individuals, sometimes highly skilled, would like to do something meaningful for society or the environment, but must take whatever jobs are on the market. He outlines a new role for labour law that consists in reducing this mismatch by increasing individual choices for collectively meaningful work, including care work, as further developed by Encinas de Muñagorri, and reducing individual choice for collectively detrimental jobs offered in the market. De Becker and Claus, on the other hand, seek individual freedom from work by the introduction of a new fundamental right: the right to be lazy, linked to a form of basic income.

What combines the utopian visions presented in this book is the fact that work should no longer only be valued by pure market needs. Its value should also reflect the impact of work on society and the environment, its societal value. More research is needed, though, to work out what this means in terms of labour law. While Bueno and De Becker and Claus tend to be fairly concrete on labour law consequences, their focus on the individual raises questions of how to reconcile this with identifying the value of work in Tomassetti’s utopias of the commons.

### Neg---K---Disability

#### A labor topic strikes a core issue in disability studies regarding the value and meaning of “work.”

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Work is a critical issue in Disability Studies. In/ability to do productive labour has been crucial to definitions of disability in many cultures, past and present. As the 2011 World Health Organization World Report on Disabilities noted, despite the fact that almost all jobs can be performed by disabled people , provided that the work environment is supportive, the employment rates of working-age disabled people fall behind their non-disabled peers in developed and developing countries alike.2 Productivity norms, discrimination and prejudice in the workplace, and disincentives to work produced by benefit systems, all affect disabled people's working lives and opportunities (WHO, 2011: 235).

Barriers that prevent or limit access to paid work determine disabled people's economic and social status, yet studying the relationship between disability and work raises wider issues. The beliefs that work is good for an individual's well-being, and that it helps maintain social order, pre-date industrial capitalism. In the early modern period, these ideas justified punitive measures against 'sturdy beggars' and stimulated the development of hospitals whose purpose was to return the 'sick and lame' to productive usefulness (Borsay, 1998; Turner, 2012). In modern neo-liberal economic systems, work helps to construct a person's identity as an adult, capable person by emphasising a link between income and autonomy. Work is not merely an economic concern; it is a political and cultural factor central to models of citizenship.

Articles in this Special Issue of Disability Studies Quarterly explore the experiences of people with different impairments in a variety of work environments, as well as interrogating the ontological relationship between conceptions of disability and the working body. Several take a historical perspective on disability and work, exploring the changing ways in which the labour of those with disabilities has been used, promoted and hindered, how it has varied over a person's life-course, and how it has been evaluated against work performed by non-disabled people. Since the 1970s, the spread of equality legislation has further encouraged employers to take on disabled workers, and empowered employees to demand reasonable accommodations for their work environments (Rose, 2015: 189). However, through a series of contemporary case studies that range from work programmes for autistic people in Brazil, to hiring practices in Singapore, our authors highlight steps that still need to be taken in order for disabled people to achieve equality of opportunity and treatment.

Taking a disability perspective on work not only exposes to scrutiny the economic mechanisms that have devalued people unable to meet productive standards, and indeed continue to do so, but also allows us to critique the nature of work itself. Articles in this issue bring insights from Critical Disability Studies to ask what is a worker, what counts as 'work', and how these questions are shaped by social class, race, gender and increasingly a posthuman culture of work. Disabled people have undertaken labour that has traditionally been undervalued in capitalist societies – care work, emotional labour, community projects and rehabilitation, for example. Disability thus provides a vantage point from which to critique practices and values that have become normalised in the workplace and neo-liberal ideology.

As Sarah F. Rose has argued, although "disability has often been equated with the inability to do productive work […] rarely has this assumption reflected the lived experiences of people with disabilities" (Rose, 2015: 187). Studies of disability in the medieval and early modern periods have shown that in spite of cultural images of disabled people as beggars popular in these eras, people with impairments were expected to work if possible (Pelling, 1998; Metzler, 2013; Horn and Frohne, 2015). Materialist studies of disability have pointed to a variety of factors that enabled disabled people to remain economically active in pre-industrial societies. The prevalence of piecework and the focus of economic life on the home are seen as allowing people to work at their own pace and permitting greater 'somatic flexibility' in working practices (Gleeson, 1999). Conversely, the advent of industrial capitalism in the eighteenth and nineteenth centuries is held to have undermined this flexibility in various ways. By shifting work from the home to the factory, bringing with it increased mechanisation that placed new emphasis on speed and efficiency and the standardization of working practices, disabled people's ability to sell their labour on the same terms as others was gradually diminished (Oliver and Barnes, 2012). The industrial system 'favoured workers with intact and interchangeable bodies'. Those who did not meet these ideals found themselves increasingly marginalised, even if their exclusion from the industrial workplace was an uneven and incomplete process (Rose, 2015:188). Although the dangers of the industrial workplace led to the passing of laws to compensate injured workers in Britain and the USA, such legislation worked to cast those with existing impairments as expensive liabilities (Rose, 2017; Turner and Blackie forthcoming). At the same time, social policy created the 'disability category' to distinguish those deemed wholly unable to perform productive labour through age or impairment from the rest of the unemployed. It is argued, therefore, that the modern category of 'disability' was created by industrial capitalism and the welfare systems it engendered (Stone, 1984).

While these developments have shaped the experiences of people with impairments in Europe and North America and in developing countries that have copied these economic models (or had them imposed upon them), the nuances of disabled people's experiences of work have not yet received much attention. This Special Issue is inspired by the editors' work on a five-year Wellcome Trust-funded project, Disability and Industrial Society: A Comparative Cultural History of British Coalfields 1780-1948, that has sought to investigate the experiences of workers with impairments via a study of the British coal industry. Mining was crucial to Britain's industrial development, yet was notorious for its high rate of casualties (Benson, 1980). Many injured or diseased mineworkers found their working lives changed after disablement, yet for much of the period there were efforts made by employers and communities to find alternative work for those capable of undertaking some labour. The presence of workers with physical impairments and chronic illnesses in or around Britain's coalmines points to an alternative history of disability and industrialisation – one in which experiences of disabled workers are explored not just in the context of their exclusion from the workforce, but also in terms of their economic contribution. Unpaid work was also essential to the industrial machine, but the gruelling nature of domestic and reproductive labour in the coalfields – largely performed by women – is often overlooked in industrial histories. This unpaid but no less crucial labour also left bodies impaired though often still at work (Jones, 1991).

Disability was also a critical issue in labour relations, as trade unions fought for compensation on the part of their disabled members. Although trade unions have not always been allies of disabled people, the mining unions' work in fighting for compensation for occupational injuries and helping their members gain access to prosthetics, represented a form of political activism to advocate for the interests of disabled workers (Williams-Searle 1999; Curtis and Thompson, 2014). Long before modern disability activists pressed for legal guarantees of access and accommodation in the workplace, visually impaired people in Britain formed their own trade union, the National League of the Blind (established 1899), to campaign against being cast as objects of charity (Reiss, 2015). Bringing a disability perspective to histories of labour and working-class politics sheds new light on class formation and helps us to take the long view on disability activism (Rose, 2005). Critical insights from new research on disability and work, reflecting a range of disciplinary perspectives, inform the articles in this Special Issue, which highlight the diversity of people's experiences in different social and cultural contexts, alongside the common factors that shape outcomes for all.

This Special Issue on Work and Disability emerged from an international symposium on Disability, Work and Representation organised in Swansea as part of the Disability and Industrial Society project. Some of the research written up for this volume was discussed in outline during the symposium, which was followed by an open call for articles. It was clear from the volume of proposals we received in response to the call for papers that work and disability is an important topic across the disciplines. As editors, we were keen to embrace as wide a historical perspective as possible, and to include papers addressing work in different locations and informed by different disciplinary approaches. The essays that follow span a time-period from early modern Germany to contemporary America. There are several contributions from historians, but also from literary and cultural critics, and social scientists.

We bookend the essays with two discussions which deal with urgent contemporary issues related neo-liberal cultures of work. Stuart Murray explores some key ideas about the relationship between work, speed and efficiency. Through a close critical engagement with contemporary novels about the world of Manhattan corporate law and a provocative story about an extra-terrestrial set in Scotland, Murray's essay sets out ways in which a disability perspective can help to unpick the assumptions that underpin neo-liberal work values and environments. For Laura Yakas, in the article that concludes the issue, communities of disabled people such as Michigan psychosocial clubhouses provide locations for rethinking neo-liberal understandings of work. In contrast to the individualism discussed in Murray's essay, Yakas shows how neo-liberal ideas such as work as a pathway to self-fulfilment are revised in a disabled community where the communal aspects of work foster a sense of purpose and togetherness.

Having opened the issue with an essay on contemporary literature and neo-liberal work cultures, the next five essays take a more historical perspective. Contributions by Angela Schattner, Helena Hagge, Erling Häggström Lundevaller and Lotta Vikström, and Alexandra Jones all emphasise the importance of gender in thinking about disability and work. Angela Schattner explores the varied ways in which work featured in the experiences of men and women with impairments in late-medieval and early modern Germany. She finds that social status, gender, degree of impairment and type of work all influenced those experiences and that the same impairments were not necessarily disabling in all cases. The article examines the assumptions, narratives and social expectations that existed in society more broadly and that were reflected and answered in different types of biographical narratives.

Turning to nineteenth-century Sweden, Helena Hagge, Erling Häggström Lundevaller and Lotta Vikström use a collection of digitised parish registers for the Swedish region of Sundsvall to undertake a life-course study of impairment. Utilising the experiences of 8,874 individuals, the article considers the influence of a variety of impairments on the experience of work, marriage and parenthood. They find that such experiences were not influenced by impairment alone but also by particular attitudes towards disabled men and women within the labour market and society more generally.

In her study of British coalfields literature from 1880-1950, Alexandra Jones considers changing representations of the gendered work of caring and the impact of new impairments (resulting from industrial injuries) on marriage relations, including sexuality and intimacy. She argues that while women's domestic labour has generally been ignored in industrial historiography, contemporary male authors represented women's bodies using industrial imagery. The metaphor of the female body as a 'hard-worked machine', the 'breaking' body worn out by years of hard toil in the era before pit-head baths, or the bowed legs and collapsed body of a wife pictured using the imagery of a pit-accident, all suggest that at least some working-class novelists saw 'women's work' as an integral part of working-life in the coalfields.

The position of work in the political programme of General Franco's regime in Spain (1938-1965) is explored in an essay by José Martínez-Pérez. The consequences of the political and medical discourses that put work and productivity at the centre of Spanish domestic policy, and the consequences for the construction of disability, are explored in relation to the health and safety legislation of the time. Demonstrating the construction of a powerful medical model of disability, Martínez-Pérez shows how occupational health was utilised as a form of social control as 'disability was used as a vehicle' to put in place measures 'aimed at disciplining the population as a whole'.

Taking a longer historical view, Jackie Gulland highlights the social, economic, emotional, health and moral value of work in twentieth-century Britain in the context of changing parameters of 'permitted work' in UK disability benefits since 1911. During the early years, a medical paradigm recognised the benefits of allowing some work to aid rehabilitation, although many schemes discouraged disabled people from doing anything that might damage any chance of 'recovery'. This is in contrast to the late twentieth-century shift towards a requirement that welfare claimants do at least some work to retain benefits.

The final three essays provide very different case studies of disabled people's access to or inclusion within the contemporary labour market, in Brazil, Singapore and the United States of America respectively. The article by Valéria Aydos and Helena Fietz on the inclusion of autistic people in the Brazilian labour market notes that the normative neo-liberal model of work helps to construct one's identity as an adult and capable person, linking income and autonomy, and constructing an ideal, model citizen who is independent, self-sufficient, and autonomous. Inspired by a social model of disability, they argue that while not everyone can meet this ideal, recognition of the vulnerability of some people in the workplace is not necessarily to cast them as 'dependent' individuals. They argue for a notion of 'care' that is central to understanding the processes of 'citizenship', and that 'care' for certain types of disabled worker is essential if they are to achieve citizenship.

The moral case for employing disabled people is made in the discussion of 'enclaved spaces' in Singapore by Justin Lee, Mathew Mathews, Wong Fung Shing and Zhuang Kuansong. Interrogating the concept of 'inclusivity', the authors argue that 'enclaved spaces for work serve an important function despite charges of being exclusionary'. Using focus groups and interviews, the article questions the value of basing policy on the 'business case' for employing disabled workers, and consider the idea that a moral case for hiring and creating work-places which support workers with disabilities may have an important role to play in the Singaporean context. These authors, along with Laura Yakas, whose essay was introduced earlier, address the question of how inclusive work environments can be created and sustained.

As the essays in this special issue show, the topic of disability and work is a stimulating one, inviting a diverse range of approaches and subject matter. The articles address and in different ways answer the questions of what is 'work'? What is it for? and illustrate in diverse ways how a disability perspective offers a way to rethink meanings of work.

#### This debate is fresh and evolving in the twenty-first century. The neoliberal postmodern economy establishes a broad condition of immediacy, where work is defined by its speed, productivity, and efficiency. Alternatives might embrace posthuman conceptions of work or abandon the concept of “work” entirely.

Stuart Murray 17, Director of the Leeds Centre for Medical Humanities, "Reading Disability in a Time of Posthuman Work: Speed and Embodiment in Joshua Ferris' The Unnamed and Michael Faber's Under the Skin," Journal of Literary & Cultural Disability Studies, vol. 37, no. 4, 2017

The twenty-first century has seen the consolidation of a neoliberal, post-industrial conception of work that, as many commentators have noted, increasingly revolves around ideas of speed, productivity and efficiency. "We have never experienced such a world", Robert Hassan notes in his study The Empire of Speed: Time and the Acceleration of Politics and Society, "where rapidity – speed – is at the very core of our collective and individual experience" (Hassan 2009, 7-8). Contemporary social formations, he goes on, are marked by an "open-ended form of speed, which means that the rate at which humans communicate and the rates of increase in productivity and efficiency can never be fast enough. In this postmodern economy the rate at which we do things has become the defining factor" (Hassan 2009, 7-8 and 17). Likewise, John Tomlinson, exploring speed in terms of an idea of immediacy in his book The Coming of Speed, maps out the contexts of technology, the media, institutionalization, regulation and the everyday that have combined to produce "a broad condition of immediacy" that establishes "cultural assumptions and expectations of effortlessness, ubiquity and endless delivery in a fast-paced, technologically-replete and telemediated world" (Tomlinson 2007, 158). As both writers show, effortless efficiency, delivered constantly, has become the expectation in many contemporary spheres of activity.

I will explore other critical accounts of speed and its relation to work, but first I want to make an immediate link between the concepts outlined above and formations and understandings of disability. I will claim in this article that it is the particular character of speed and efficiency in the workplace that lends the contemporary moment its power; a unique constellation in which ideas of the human, and increasingly the non-human and posthuman, form complex patterns of meaning – especially in relation to embodiment and cognition – that shape both disabled lives and the perception of the people who live them, frequently in pejorative terms. And, I want to assert, this character and the meanings it collects are thrown into sharp vision by contemporary cultural narratives that explore how disability and work interact. In such narratives, there is both a disability aesthetics, produced from within understandings of disability experience and informed as to its detail, and an aesthetics of disability, symptomatic of wider expressions of disability representations and again often pejorative, that come to the fore in texts that self-consciously seek to explore the nature of human difference. The two positions both overlap and exist in an uneasy tension, and I would stress that I am not reading them as, respectively, expressions of 'authentic' or 'inauthentic' versions of disability. Rather their complications add to Tobin Siebers' deployment of disability aesthetics as "a critical concept that seeks to emphasize the presence of disability in the tradition of aesthetic representation". Siebers claims that, "the acceptance of disability enriches and complicates notions of the aesthetic"; it "enlarges our vision of human variation and difference, and puts forward perspectives that test presuppositions dear to the history of aesthetics" (Siebers 2010, 2-3). If an emphasis on 'presence' and an 'acceptance' can be read as positive, as in Siebers' formation here, we also have to admit that such presence can remain unaccepted, in aesthetic as well as social moments. As we shall see, contemporary disability narratives of work negotiate the space between such positions.

I have argued before that understanding disability experiences by mobilising the forms of aesthetics and critique that originate from within those experiences and their representations, offers a powerful tool in the examination of social and cultural formations (Murray 2008). In this article, I will do so again, looking at two novels - The Unnamed (2010) by Joshua Ferris and Michael Faber's Under the Skin (2000) – that situate issues of disability and posthuman difference within (very different) work settings. The Unnamed investigates work in urban contexts of speed living and the corporate 'hypereconomy' of the legal profession, while Under the Skin explores ideas of a slower cycle of harvesting and production, in which an alien posthuman seeks to define subjectivity and belonging through work centred around bodily difference. In both texts, ideas of a singular and coherent body or self, a humanist 'proveable identity', are critiqued through a creative disability lens and its interrogation of the constitution and consequences of work.

In their formulations of ideas of speed and immediacy, both Hassan and Tomlinson write in the wake of Paul Virilio, whose work since his ground-breaking 1986 text Speed and Politics has connected speed to questions of power and violence and an idea of 'hypermodernism' (James 2001, 29-44). For Virilio, interviewed in 2012, speed's "damage is its success" and "its success is also its damage" (Virilio 2012, 69). His writings outline a world where speed has been at the heart of social and (especially) industrial/technological development; but in the contemporary moment we have hit what he has termed a "wall of acceleration" (Armitage 2001, 97-98) where such 'progress' and linearity is no longer possible. Virilio's work allows us to connect ideas of speed to the emerging space of the posthuman; his claims about the critical point of society chart currents of spatial and technological transformation that align with the kinds of posthuman landscapes described in the writings of Donna Haraway, Katherine Hayles, Rosi Braidotti and other critics working at the vanguard of critical posthumanism. Virilio's exploration of ideas of 'lost dimensions', 'tele-presence' and 'visual machines' maps on to the kinds of post-anthropocentric formations central to what Braidotti has termed "the Posthuman as Becoming-machine", the processes through which the human and non-human interact (Virilio 1991 and 1994; Braidotti 2013, 89-95; see also Haraway 1991, Hayles 1999). In particular, Virilio paints such moments as being constituted of fear and panic; a loss of logic as speed, in effect, becomes impossibly fast.

Virilio's stress on speed's relationship with power and contemporary manifestations of space, like Hassan's characterization of its inherently imperial nature, speaks to its connection to work, an obvious space of power configurations. It is in structures specific to work environments and practices where ideas of efficiency and the speed of productivity in particular accrue vital meaning. In virtual work cultures especially, what Virilio calls the "direct perception of objects, surfaces and volumes" becomes lost, replaced with an "indirect and mediatized reception" that, precisely because of its lack of presence, can be accelerated to produce the kinds of contemporary speed, with the consequent emphasis on immediate efficiency, explored by Hasan and Tomlinson (Virilio 1991, 84). Hasan, for example, cites working in the realm of computer-based temporality as the perfect exemplar of such a notion, where it is "seen as a badge of honor to speak of one's life as existing in the 24/7 society" (Hasan 2009, 23), and Tomlinson cites what he terms the "weak demarcation between 'work' and 'life'" that results because of "the reach of capitalist (or capitalist-inflected) work relations into private life" Tomlinson 2007, 88). The speed of contemporary work, all three writers stress, influences and indeed often regulates core notions of how we have come to define individuals, families, community and society.

It is Jonathan Crary's work that has most recently explored the relationship between culture, speed and work. In 24/7, his excoriating essay on the workings of late capitalism, Crary notes the "expanding, non-stop life-world" of contemporary life is increasingly dominated by a search for perfect, endless production and consumption, or what he calls "a generalized inscription of human life into duration without breaks, defined by a principle of continuous functioning" (Crary 2014, 8). Crary laments the culture of 24/7 work precisely because it seeks to erase what he terms the "shadows and obscurity […] of alternative temporalities". He continues:

A 24/7 world […] is a world identical to itself, a world without the shallowest of pasts, and thus in principle without specters. But the homogeneity of the present is an effect of the fraudulent brightness that presumes to extend everywhere and to preempt any mystery or unknowability (19).

It is the contemporary conception of speed as linear and quantifiable that seeks to erase the kinds of 'mystery' of which Crary writes here; in such formations disability becomes what Alison Kafer has termed part of "a future that bears too many traces of the ills of the present to be desirable". Noting that "how one understands disability in the present determines how one imagines disability in the future", she continues: "In this framework, a future with disability is a future no one wants" (Kafer 2013, 2). As Kafer stresses here with her concentration on futures, disability conceived over time within neoliberal structures is understood to be unendurable.

Such logic positions disability within what is an all too often familiar and stereotypical position. In the introduction to the 'Work and Employment' section of the 2011 World Health Organization World Report on Disability, the authors note that, "working age persons with disabilities experience significantly lower employment rates and much higher unemployment rates than persons without disabilities" (WHO 2011, 235). In exploring this, they go on to outline the misconceptions and processes of discrimination that surround people with disabilities when being considered for work, observing that, "such attitudes may stem from prejudice or from the belief that people with disabilities are less productive than their non-disabled counterparts" (240). In recommending that social attitudes change as much as laws and regulations, the WHO report identifies a need to "instil a belief among the public that people with disabilities can work, given the proper support" (251). In so doing, it identifies the intersection between the kinds of speed economies as outlined by Hassan and Tomlinson and the public perception of the extent to which those with disabilities are seen as 'productive' or 'efficient'. As Katherine Quarmby puts in bluntly in Scapegoat: Why we are failing Disabled People, a study in which she recounts numerous accounts of hate crimes and violence towards disabled people: "Disabled people are not seen as equal citizens. They are seen as a useless burden" (Quarmby 2011, 226); in the context of work, 'burden' takes on a specific dimension. It connects the perception of lack and absence, so common to a majority social view of individuals with disabilities, to levels of productivity that they are understood never to be able to meet. And it then reads the necessity to 'make up' the 'shortfall' that such under-productivity produces, in terms of benefits and allowances that society has to pay to support people deemed unable to contribute effectively.

An idea of the 'underserving poor' is, of course, nothing new, but the contemporary moment reconfigures how such status can be read. Crary argues that elements of life that fall outside the frame of neoliberal work structures suggest "thresholds at which society could define or protect itself" (25). With such thinking in mind, might we claim disability as one such threshold, a liminal space in which we can reconfigure embodied experience and, as a consequence, the boundaries of selfhood? For all that disability might seem to be a collection of positions that is more associated with vulnerability rather than protection, we can read the difference it brings to bodies and minds precisely in terms of new 'definitions' of the personal and social. What Crary terms the "weakness and inadequacy of human time, with its blurred, meandering textures" (29) has no place in configurations of work that see the human body as a biohackable platform.

But we might note that such meanderings can be claimed as critical disability tools, in the ways in which they emphasise the distinctiveness that different bodies and minds produce. Writing on disability aesthetics, Michael Davidson observes that such aesthetics "foregrounds (sic) the extent to which the body becomes thinkable when its totality can no longer be taken for granted, when the social meanings attached to sensory and cognitive values cannot be assumed" (Davidson 2008, 4). Davidson supplies here a critical frame that fits not only the novels I will discuss, but also a wider idea of how disability works to question and destabilise broad social and cultural 'assumptions'. Working in the wake of such a critical positioning, I want to assert that thinking through the optic of a disability-led critique results in positive and productive ways to understand the complexities of the present. As I will show, it is through the processes of such critique that we might better formulate an intersectional critical space in which disability perspectives intersect with ideas of a productive posthumanism, a space that can illuminate a variety of social and cultural moments, those of work included.

While work is a much-discussed and vital category in understanding social experiences of disability, the ways in which it is represented through fictional narratives has received far less attention. This is almost certainly because the link between work and quality of life has been, and continues to be, so important across the disability rights agenda. But a concentration on the social consequences of disability, employment and the nature of work should not be at the expense of our understanding of the ways in which cultural narratives open up and illuminate how disability changes how we see work and what that might mean. As we shall see, the two novels to be examined here offer pwerful insight into work environments precisely because of their disability focus.

Throughout history, those with disabilities have been seen as being unable to contribute to work as effectively as those without, a perception usually read in terms of physical difference or cognitive deficiency. But the kinds of speed economies Hassan and Tomlinson outline present new contexts for our understanding of disability and work. In an internet-based, connected workplace for example, physical impairments may not be as much of a limitation as they were during a period of machine and engineering domination. Indeed, a culture of work acceleration and multiple-project multitasking or, conversely, sustained concentration and single tasking, might seem to welcome the forms of cognitive variation inherent in some neurobehavioural conditions, such as autism. Extending this, the kinds of networked assemblages identified by scholars of the posthuman, with their focus on non-linear, symbiotic and co-evolving existences, also appear to lend themselves towards the inclusion of those with different bodies and minds. When Pramod K Nayar speaks of "the human as a dynamic hybrid", for example, focused "not on borders but on conduits and pathways, not on containment but on leakages, not on stasis but on movements of bodies, information and particles all located within a wider system", there is an apparently easy move to see how such plasticity can incorporate the divergent states disability brings with it, and that work might be one of the locations within which an enabling hybridity might flourish (Nayar 2014, 10). But for the most part the kinds of immediacy demanded by neoliberal regimes lack this broad view of systems. Hassan stresses that it is "constant acceleration" (my emphasis) that is "the defining process of our postmodern, post-Fordist and post-industrial age", and this stress on the constant, the need to always be mobile, responsive and flexible, in fact produces work cultures and structures that – as the bare statistics of the WHO Report testify – are not designed for those with disabilities (Hassan 2009, 19; Avent 2017).

### Neg---K---Law and Political Economy

#### Scholars of “law and political economy” (LPE) have a rich set of ideas that can be applied to modern labor law debates. LPE arguments have been prominent on recent debate topics such as antitrust and climate policy, and they often provide something of a middle ground between the most radical perspectives and the most reformist. In the card below, a legal scholar argues that labor law since the 1930s has prioritized managing unions as legitimate market participants and justified their value on the basis of improvements to the economy writ large. This perspective neglects the more radical claims of economic justice that underlie rank-and-file struggles by workers. If the aff proposes stronger protections for unions on the basis of economic growth and workers’ purchasing power, the neg could easily argue that the judge should endorse those protections, but for alternative justifications---on the basis of the intrinsic right of workers to be free from domination at work rather than the basis of downstream economic benefits.

Diana S. Reddy 23, Law, Economics, and Politics Fellow, UC Berkeley School of Law, “After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions”, March 2023, 132 YALE L. J. 1391

Yet in this Feature, I argue that even in this moment of renewed public interest, the American conversation about unions remains constrained in ways that could impede the political and legal transformations necessary to create a better future for workers. Current levels of support for labor unions remain conditional, tied to arguments about labor's broader societal benefits, but as yet ambivalent about greater freedom for working people as its own social good. In other words, how Americans talk about unions today still overlooks some of the most powerful normative arguments for what they do. This is unsurprising. As I will show, these arguments have been obscured, and purposefully so, for a long time.

In making this claim, I use a law-and-political-economy framework to intervene in contemporary labor-law scholarship.' During an era of union decline, legal scholarship on labor unions has tended to focus on structural issues: declining union density, changing economic conditions, and the technical insufficiencies of labor law.6 It has had much less to say about changes in what people think about unions and why - about the ideational and ideological currents that shape, and are shaped by, material realities. To the extent that this scholarship has discussed economic consciousness and political will, it has treated those phenomena as exogenous to the legal discussion, as politics or culture, but not law.

In contrast, fields such as history, sociology, and political science have paid greater attention to cultural understandings of unions. Paramount among these, labor historian Nelson Lichtenstein has argued that ideas are central to understanding American labor unions and their place within American political economy. 7 Drawing from a cultural-history tradition, he argues that unions have always been engaged in what he calls "the contest of ideas," among their other battles.' In dialogue with corporations, politicians, and other institutional groups and social movements, Lichtenstein argues that unions help shape how people understand the economy and the role of workers and unions within it.' And yet, this scholarship has sometimes left law, as both a source of ideas and a reflection of them, underexplored.

If legal scholarship has focused on law but not ideas, and other fields have focused on ideas but not law, this Feature insists on synthesis. It explores the relationship between law and the contest of ideas. Specifically, it argues that the American conversation about unions has been unduly constrained, in no small part, because of how the law has framed them. During the New Deal, unions were constitutionally categorized as economic actors engaging in commercial activity, and consequently denied recognition as political actors engaging in normative advocacy. 10 I refer to this legal move and all the accommodations that have followed from it as the "law of apolitical economy." I use this term to describe a jurisprudential paradigm that actively minimized the normative stakes of labor unions' statutory purposes in part through categorizing them as "economic" and therefore outside of the bounds of broader claims-making about societal values. I argue that this paradigm still shapes how Americans understand the stakes of labor unions today. The upshot is that even with support for unions currently at a sixty-year high, that support remains insufficiently tied to support for workers as workers.

It was not always this way. In the late 1800s and early 1900s, American unions raged against the inequalities of wage labor, insisting that there was a collective moral imperative to increase worker well-being and worker freedom. They championed ideals of labor republicanism and industrial democracy, and they spoke of fundamental rights under the First, Thirteenth, and Fourteenth Amendments. In so doing, they insisted that the labor question was an inherently political question.

But in the wake of the Great Depression, liberal lawyers and economists prioritized a different kind of justification for what unions do. They framed unions, and laws supporting them, as sound industrial policy, essential to economic recovery. According to then-dominant economic ideas (early pillars of what would later be referred to as Keynesianism), increased worker income meant increased purchasing power and economic growth. Similarly, liberal policymakers argued that a rationalized, legal process for collective bargaining would promote industrial peace, channeling the worker radicalism that had so recently halted production in factories across the country. The Supreme Court adopted these rationales, noting in 1940 that laws supporting worker bargaining power "have an importance which is not less than the interests of those in the business or industry directly concerned.""1 Labor unions served the common good because of their benefits for business, for industry, for the economy writ large, and only by extension thereof, for workers. Labor law was an act of interest convergence, not just radicalism.

The justification of labor law based on a technocratic claim about the relationship between working conditions and the health of the American economy had long-term consequences. Armed with an economic rationale for unions, New Dealers did not merely abandon broader normative justifications, they actively undermined them. The Keynesian compromise which treated economics as science, rather than values, required a concurrent legal accommodation: economic regulation as rational public policy rather than fundamental rights.

The result, what I call the law of apolitical economy, is an ongoing and untenable line-drawing in constitutional law and broader culture that bifurcates economic issues from sociopolitical ones, treating the former as the domain of technocratic decision-making, while reserving the full scope of "normative" argumentation, whether about rights, fairness, democracy, or even just plain old political contestation, for the latter. While it is well-known that fear of Lochner v. New York12 liberty-of-contract principles helped motivate the Carolene Products deconstitutionalization of "regulatory legislation affecting ordinary commercial transactions,"" the impact of this choice on sociolegal understandings of unions remains largely unexplored. As I show herein, one of the primary impacts has been the carving out of unions' statutorily defined role from the material and symbolic benefits of constitutional protection under the First Amendment, and then, over time, from legibility as a social movement.

While labor-law scholars have traced the brokering of the Keynesian compromise, this Feature tells the story of its longer-term consequences. Interrogating the law of apolitical economy is essential to understanding what happened to unions in the late twentieth century. Specifically, it helps explain why the resurgence of neoclassical economic principles in the 1970s was catastrophic for the legitimacy of labor unions. When supply-side economists flipped the Keynesian script, they claimed that corporate productivity, not worker purchasing power, grew the economy and furthered the general welfare. Unions doing what they were statutorily designed to do became rent-seeking at the public's expense. At the same time, unions' ability to respond with broadly resonant normative arguments was hampered by its previous concessions. Rights had become the "master frame" for articulating justice claims, and bread-and-butter unionism was no longer legible in this register. From the 1970s through the early 2000s, union membership plummeted, particularly in the private sector.14 Public support for unions did too.

Faced with a decimated membership and a legitimacy crisis, labor-movement organizations have been forced to reassert the normative stakes of unionization. In the past decade, unions have used what social scientists refer to as "collective action frames" to show that unions further causes with defined normative stakes.15 Breaking with the underpinnings of the National Labor Relations Act (NLRA), these innovative frames tend to decenter unions' benefits for worker majorities. Instead, they emphasize the benefits of organized labor for differently delineated groups: for a populist "people," a 99% linked by a discursively powerful, yet materially tenuous, solidarity; for service recipients, such as students and patients who benefit from "bargaining for the common good"; and for subgroups of marginalized workers underserved by New Deal protections: workers of color, immigrant workers, women workers.16 These frames directly rebuke the neoliberal framing of unions as rent-usurpers. Each depicts labor as a social movement advancing a broader public interest, not just an interest group serving its members.

Perhaps because of this public-facing work, support for labor unions is currently as high as it has been in sixty years. Yet, I suggest that the legacy of the law of apolitical economy still shapes the contemporary conversation. Leading union collective-action frames too often discount the value of unions' primary statutory imperative - allowing workers to come together to improve their working conditions. And drawing from my ongoing empirical work, I argue that notwithstanding currently high levels of public support, the public remains ambivalent about supporting unions' core statutory functions. Rather, at least for some people, public support goes down when unions' benefits to organized workers are emphasized. The normative vision once advanced by unions proclaimed that work was a site of political domination and that workers deserved more freedom, autonomy, and economic security. Lost to the law of apolitical economy, that normative vision may be the hardest one to recreate. But it may also be the most transformative.

This Feature proceeds as follows. Part I sets forth the historical, legal, and conceptual background. Here, I detail the creation of the jurisprudential paradigm I refer to as the law of apolitical economy. In Part II, I argue that there were long-term costs to the law of apolitical economy, for unions and for their vision of justice of work. Part III focuses on the past decade, which I theorize as a pivotal new chapter in the contest of ideas. As unions and their supporters seek to remake the case for unions, the legacy of the law of apolitical economy lives on. Current support for unions, in other words, belies ongoing ambivalence about worker freedom.

Finally, in Part IV, I call for renewed attention to unions' lost normative vision, one which included fundamental rights at work. With its legitimacy tied to the "alchemy of Keynesian economics,"" the labor movement was counseled away from the "alchemy of rights."" Law was mobilized in one social context to construct unions' demands as economic commonsense, just as it was later mobilized to construct other movements' demands as rights. As American progressivism struggles to theorize and implement a politically practicable intersectionality, it is important to continue to deconstruct this purposeful separation in American law between the material and the dignitary, economics, and rights.

#### Public private dyads within work law create varied understandings of race, solidarity, and commerce. Reexamining the development of labor and employment law in this light recovers a crucial point of synergy between Critical Race Theory and Law and Political Economy (LPE) analysis. This topic will facilitate closer study of the link between legal liberal conceptions of commerce and the law's maintenance of racial subordination.

Shirley Lin 23, Assistant Professor of Law, Broo klyn Law School, “Race, Solidarity, and Commerce: Work Law as Privatized Public Law,” Arizona State Law Journal, vol. 55, 2023, p. 848-862

A. Commerce's Temporary "Public" Default The demise of the First Reconstruction suggested that conceptualization of rights in the political and legal thought would remain highly individualistic."5 After decades of financial turmoil, however, popular resistance in the form of endemic strikes and peaceful protest led the public to reconceive of legal rights as collectivist and solidaristic.176

But in the way law creates epistemology, conceptualizing labor "solidarity" within an industrial (market) framework and intentionally omitting race, as the NLRA ultimately did, threatened the democratic project. Would a colorblind approach to workplace solidarity still promote antiracism through public law?"7 By omitting racism as a source of economic insecurity and other forms of social coercion, labor activism did not see an obligation to address status-quo failures in workplace democracy. Would it matter if liberty were defined solely along the lines of class, rather than race? The constitutional crisis of the New Deal would offer important lessons.

When the Great Depression placed our ability to survive in a laissezfaire economy in grave doubt, capitalism faced a crisis of confidence. After the First World War, employer groups and the U.S. Chamber of Commerce attacked interracial working class solidarity through tactics including antiunion ("open shop") drives, in which employer associations partnered with the Ku Klux Klan in efforts to stoke racial resentment among white workers then fearing unemployment.7 "' Stronger regulation of employers gained widespread support in the political branches, albeit through a coalition of common interests.

After Progressive-era reform movements sought to de-commodify labor through Congressional policy, the NLRA set out to protect workers' ability to organize and bargain for better wages, conditions, and to seek transparency in decision-making in the form of a collective bargaining agreement, seen by many as a private "workplace constitution." 7 9 Union leadership in the American Federation of Labor ("AFL") professed the "whole gospel" of the labor movement was "freedom of contract," reflecting a well-placed mistrust in government and courts' injunctions of collective action: workplace strikes.180 By contrast, Lee Pressman, counsel for the Congress of Industrial Organizations ("CIO"), testified in favor of the Act's protections for worker organizing and collective bargaining as not only a means to secure industrial stability but "a desirable end in itself [that] should be protected as such."'8 '

The NLRA ("the Act") is considered one of the most radical pieces of legislation in U.S. history to emerge from the New Deal.i 2 Its watershed status in political theory commands all the more attention to its failure to include a duty of racial nondiscrimination, however.1 83 In fact, the law first introduced "discrimination" into the work law lexicon, but failed to include other anti-discrimination provisions so that vulnerable or poor workers most in need of solidarity were to achieve it without prohibitions against racism.

For years, the NAACP, National Urban League, and ACLU lobbied intensively for the NLRA to bar unions from racially discriminating against its members.1 84 The final statutory language instead simply barred retaliation, i.e., "discrimination" by employer against anyone who engages in solidaristic labor activism in the workplace. 8 5 At passage, the Act ultimately catered to the racism of Southern politicians to ensure passage by carving out agricultural and domestic workers; years later, so did the Fair Labor Standards Act of 1938, for minimum wage, overtime, and anti-retaliation protections.1 86 In a devastating concession toward the slavery economy, workers in these predominantly Black occupations were re-racialized by official intent to deny them federal protections even based upon labor activism and wage guarantees alone.

Legal justification for the NLRA reveals much about the political economic discourse at the time, even amid sustained, working-class uprisings. The Thirteenth Amendment at the time rested upon a broad array of meanings for "slavery," spanning subordinate relationships and material deprivation beyond coercion, to include being "subject to domination and to the arbitrary will of another person."'87 Labor leaders' view that the NLRA should be grounded in the amendment's more progressive anti-slavery obligations ultimately gave way to liberal elite advocates' insistence that Congress stake its legitimacy on the Commerce Clause alone.188

Collective human agency, a positivist norm predating "liberty of contract," became the countervailing liberty that featured prominently in two landmark work law opinions: West Coast Hotel Co. v. Parrish8 9 and NLRB v. Jones & Laughlin Steel Corporation.190 The year 1937 marked the moment in which Roosevelt-era populism chastened the judiciary in its hostility toward laws that advance collective welfare.191 A view of the collective as inherently tied to agency, and reliant upon group solidarity, was an affront to private law argumentation.

In West Coast Hotel, the Court upheld a state law establishing minimum wages and workplace health standards against a hotel's substantive due process challenge.1 92 In a discussion reminiscent of the journeymen bakers' public appeal in Lochner, the Court addressed the employers' freedom of contract argument:

What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded[by the challenged minimum-wage law] is liberty in a social organizationw hich requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.1 93

In one paragraph, Justice Hughes stood substantive due process discourse on its head. Freedom of contract was not a legal principle that could block legislatures from redistributing power or providing for public welfare in the workplace. The "unequal position" of workers collectively rendered them "relatively defenceless [sic] against the denial of a living wage."1 94 Instead, "history and connotation" anchored liberty as a right that belongs to the public, such that workplace group agency-"social organization"-and community interests are inherent to Fourteenth Amendment due process.19 5 By democratic necessity, the workplace was a domain of public interest, and its regulation, public law. An absolutist focus on two parties' theoretical selfinterests was not an interpretation required by the Constitution nor any other source of law.

If it was not already clear that most Americans deemed the marketplace a matter of public concern, solidarity actions through hundreds of labor sitdown strikes signaled ordinary people's views of commerce.1 96 The NLRA, and the National Labor Relations Board it established, proscribed employer intimidation and coercion of workers who undertook self-organization. Two weeks after West Coast Hotel, the Court upheld the Board's authority to regulate labor nationally.'9 7 Between 1935 and 1939, the Board resolved 2,000 strikes, "averted" another 800, and held 2,500 union elections.1 98 In Jones & Laughlin Steel, the Court found the Act to be a valid exercise of the commerce power, rejecting a steelmaker's argument that such expansive labor regulation within a state did not affect interstate commerce.199 Section 7 of the Act protected employees engaged in collective action so that they could together negotiate better terms and working conditions without the threat of retaliatory discharge.200 It thus sought to level the bargaining power between firms and employees by blunting the presumption of at-will employment. The new regulatory apparatus ushered in a tripartite regime: workers, employers, and-via the Board's investigative and adjudicatory functions-the state. 20 1

In response to the steel company's claim that the Act violated substantive due process, the Court declared that the "right to organize" is a "fundamental right." 202 The Jones dissent had invoked that the "right to contract is fundamental" and believed outlawing retaliatory dismissals would disturb the "equality of [this] right" at work.203 The 1937 opinions spurned Lochnerian freedom of contract in revolutionizing (by existing standards) the heuristic of the "public," which legal elites and business interests had-until then artificially compressed. In so doing, however, the New Deal Court reentrenched liberal theory by resting the legitimacy of any public regulation on the presence of significant commercial consequence. 204

The confluence in populist advocacy platforms among the electorate, the presidency, and Congress triggered a one-two, whipsaw effect. From assertions of purely private workplaces and doctrines through the Gilded Age, pent-up demand for public scrutiny of the economy buoyed President Roosevelt's efforts to publicize both the "private" and the "public" by staffing regulation of the employment relationship with administrative agencies and expanding state infrastructure. History, statutory policy, constitutional values, laypeople-all were now normatively aligned, ostensibly for good. Within decades, the double edge of liberalism would threaten to reverse course.

B. The Second Reconstruction: Toward Racial Solidarity in Work Law

Even those sympathetic to worker organizing may be tempted to write off the New Deal as an outlier in populist nation-building, and the NRLA, an offthe-shelf exhibit in early bureaucracy. Its agenda was a true watershed for redeeming trust in the state for public ends, one that could justify a unitary national policy of disciplining private-law claims to wealth.20 5

The NLRB's newly minted apparatus was "one of the broadest grants of power and discretion that Congress had ever entrusted to an administrative agency[.]"20 Over the course of World War II and the Civil Rights era, the number and strength of administrative agencies would vastly expand. But as Klare observed, mainstream labor movements had not sought to reconstitute the market as public during the New Deal, a result they were hard pressed to avoid as corporations' and conservative theorist lashed back against labor post-war.207 Accordingly, courts viewed work law with increasing hostility and inclination toward cabining its publicity. 208

The values of the First Reconstruction could not diffuse into nor transform society, even in a century's time, as long as there remained a right to privately discriminate. Struggles for racial justice reasserted public law claims to the dignity of full citizenship. By default, the guarantees of multiracial democracy would not come from private law, which remained largely untransformed. The Second Reconstruction would again argue that racism threatened to undermine human agency in a democracy, akin to a public menace rather than a private right.209

Defacto systems of Jim Crow, in communities and in unions the NLRB certified at jobsites, also belied claims of workplace democracy. The racism of whites-only unions and segregated locals was pervasive within organized labor, was not deemed unlawful under the NLRA until 1944, and persisted thereafter.2 10 During this time, of the major federations, only the CIO-with its eye on underskilled workers and whole-industry organizing-genuinely embraced a platform of racial inclusion, but it was hard-pressed to enforce its policy at the local level.2

The New Deal's failure to address interpersonal and structural racism, and its explicit carve-out of Black and other minority workers from labor protections,2 made clear that a racially just economy could not be achieved without also addressing employment alongside the denial of voting rights, education, and public accommodations. 213 The public/private divide again dogged legal elites, as President Kennedy fretted over the Civil Rights Act's public accommodations provisions and chose to rely on a "narrow definition of state action."2 1 4

As for legal academe, presenting work law as a bifurcated labor/employment framework risks erasing the movements' painstaking efforts to unify work law and avoid unproductive debates over the primacy of race versus class. Historicizing work law and its challenges with race is a necessary step in overcoming liberal tenets inscribed as "law."2 1 5 Behind the scenes, and at the behest of groups such as the NAACP, NLRB leaders strove to reinterpret labor law consistent with Equal Protection principles years before Title VII anti-discrimination became law.2 16 As recounted in Sophia Lee's bold historiography of these tensions, the NLRB would become the first office among any of the federal branches to articulate a racially unified view of work law.217

Eight years after Brown v. Board of Education,218 Ivory Davis-the leader of an all-Black metal workers' local-challenged a segregationist collective bargaining agreement reached between his employer and the all-white local. 219 The NLRB's first Black member of the Board, Howard Jenkins, and general counsel Stuart Rothman believed that the government could not sanction a union's solidarist practices if the union engaged in racism, under the constitution, by permitting the Board to certify the union as the worksite's representative.22' Through its 1964 decision in Hughes Tool Company, the Board acknowledged that the conception of solidarity that emerged from the New Deal was incomplete and thus unstable. "Racial segregation in membership ... cannot be countenanced by a Federal agency," Hughes Tool declared; under Shelley and Brown, the government could not ratify discrimination.2 ' The Board decertified the racist union, and required all unions that had discriminatory contracts to renegotiate them.2 22 In other words, the state, its expanding administrative structure, and public law were one and agreed that interracial unity was a determinant of state legitimacy. Political balkanization would make similar attempts to harmonize labor law with employment law more difficult. Over time, Board members' views would become more polarized.223 For example, on the question of whether one worker seeking to report discrimination could be considered "concerted" protected conduct, i.e., seeking a public good, rather than engaged in a "selfish" or "personal" act, it would be a half-century after Hughes Tool before the Board answered in the affirmative.2 24 Section 1981's Reconstruction-era law would similarly become susceptible to political football, as the Court would limit it to the formation stage and excise protections during performance of the contract.2 25 (Congress swiftly responded with the 1991 CRA, by adding subsections to Section 1981 for post-formation misconduct. 226)

The need to resurrect our Reconstruction-era legal principles, first by overruling the Civil Rights Cases, returned to the fore as freedom movements resisted its contradictions publicly and physically: through sustained boycotts, marches, and sit-ins.22 The struggle over segregation came to a head with the greater imbrication of daily life with the administrative state. Civil rights activists and interracial coalitions organized mass actions, calling for racially desegregated resources, spaces, and institutions; meanwhile, prominent legal scholars and jurists warned against incursions on freedom of association and personal discretion over who must be invited to one's own "tea party."228

By demanding Congressional and presidential action, the dignitary right of non-discrimination by "private" parties came to be understood by a critical mass within the public as constitutionally required.229 Had not economic meaning been amended, too, during the First Reconstruction? 230 To proponents of liberal racialism, questions of historical accuracy would have been rhetorical as hopes that racial integration-and the expressive benefits of a hard-edged legal prohibition against discrimination-will break down societal transmissions of racism. 23' To be sure, studies of social movements since have documented that frame transformation-the process by which an individual's interpretive authority is replaced with another through experience-is associated with at least two key microstructural and social relational factors. 232 The first factor: network linkages, or "the development of affective ties to other members"; the second: learning through intensive interaction.233 Both component are indispensable to developing interracial solidarity in the workplace; and both can be discouraged through doctrine. Recall that Congress asserted its authority to enact the NLRA solely through the Commerce Clause, which the Court upheld in Jones & Laughlin so as to protect the "fundamental" right to organize. 234 By 1964, out of an abundance of caution, President Kennedy and lawmakers chose to anchor the Civil Rights Act to both the Fourteenth Amendment and the Commerce Clause. This choice arguably reflects concerns about the liberal promise of the administrative state. The Labor Board's Hughes Tool decision had concluded that equal protection was implied in labor law, because the state always occupied an intermediary role; the agency released Hughes Tool on the same day President Johnson signed the CRA.

Would the 1964 CRA resolve once and for all that equal protection required racially unified workplaces? Like Jones & Laughlin, a head-on challenge to private discrimination-here, racist business owners-raised an existential question for liberalism as to the meaning of commerce. Is it a sphere of presumed privacy or an instrumentality that risks malign conduct? White-segregationist plaintiffs immediately sued to invalidate the law under the state-action doctrine, and the Court foundered over the question.235 A majority of the Court answered in the affirmative: Congress validly exercised its power based upon race discrimination's adverse impact on interstate commerce, and the fact that racism's anti-commercial nature was also a "social and moral wrong" could not preclude such a result.23 6 As had been undoubtedly true of the multistate operations of Jones & Laughlin Steel, 237 the motels and restaurants challenged in Heart of Atlanta Motel, Inc. v. United States and Katzenbach v. McClung could not help but have an impact on interstate commerce. 23 The majority's narrower justification would uphold the CRA solely under the Commerce Clause, leaving the Fourteenth Amendment question unresolved. 239 In a concurrence, Justice Douglas argued equal protection alone would have provided sufficient authority, as exclusion from the market was a cudgel against Black communities, suppressing their prosperity by denying movement across states and the dignity of equal accommodation. 20 Joined on this point by Justice Goldberg, who believed both grounds to be sufficient, upholding the CRA under the Fourteenth Amendment was obvious. 24

Widespread opposition to racism appeared to have some effect: Heart of Atlanta publicized the private pedigree of the market, even if the political capital of the concurring justices and mainstream history were not sufficiently persuasive. Were we to momentarily step outside the Court's liberal frame, it would be possible to find meaning within Heart of Atlanta's majority from the standpoint of collective power. If collectivity and solidarity were constitutional features of the economy during the New Deal, equal protection would overlap to the extent that solidarity, as of the Second Reconstruction, must always be interracial to be meaningful. Under classical liberal theory, the split between Heart of Atlanta's majority and the concurrence was simply the same discursive split between the economic and political.242 Unfortunately, Heart of Atlanta's commercial frame may only become further embedded with the rise of law-and-economics concepts and First Amendment claims for religious exemptions in political theory. 243

In its trajectory since the Progressive Era, work law stacked public role after role upon the state, and they have only grown in number and complexity. These roles have come to include policer of private law; 244 high-road (constitutional) actor; 245 market actor; 246 investigator; 2 47 adjudicator; 24 litigator,249 and expert.25 0 Some of these functions are materially distributive and others also redistribute power, all of which are vulnerable to ideological backlash.25 ' Thus, increasingly, some of these functions are susceptible to doing neither.

C. Juristocracy:Privatizingthe Public Law of Work

Modern efforts to privatize work law appeared in the 1970s, coinciding with the rise of legal formalism in adjudication. The latter advanced theories of equivalency of the utmost abstraction, stripping context from adjudication as much as possible. 52 Under our present system of legal liberal theory, private law empowers the U.S. judiciary above all as the ultimate arbiter of "law." 25 3 For decades wide swathes of society, from progressive activists and impact litigators to conservative interests, invested heavily in the state's ability to dispense justice, particularly through courts. Control of America's modern liberal state could thus be wrested through elites' claims to public/private distinctions having normative, determinative meaning.

The antidiscrimination protections movements sought in the Second Reconstruction were mediated through liberal rights frameworks by the time bills were introduced and debated in Congress. As of World War II, mistrust of unions as simply another special interest group and potentially corruptible institution, gained ground in political discourse.254 Conservatives opponents of labor deduced that it would be effective, in the long term, to join civil rights advocates in criticizing racism within labor organizations; doing so legitimized critics and conservatives' own standing, while delegitimizing unions.

As for antidiscrimination law, the decision not to link the 1964 CRA's framework to combat race and other forms of discrimination with NLRA "discrimination" based upon a workers' solidarist activism was emblematic of rightward shifts in the political economy. As Dinner has shown, neoliberalism and Title VII (or at least much of it) share values in common: "the ideal of efficient markets, the notion that the fundamental subject of law is the individual rather than the collective, and the primacy of negative rights enforced by the judiciary." 25

Rather than integrating anti-discrimination into the workplace organizing model and the NLRB, lawmakers could only agree to establish and fund a more modest agency, the Equal Employment Opportunity Commission.257 The agency could investigate claims, but under this new division of labor, Congress expected most discriminatees to individually litigate.25' This new rights architecture shifted the sheer bulk of enforcement costs and resources required onto private individuals and businesses. 2 9 A pro se worker with a complement of work law claims would theoretically have to seek the help of multiple agencies rather than one: the Department of Labor for non-payment of minimum wages and overtime; the NLRB for retaliation against concerted activity; and the EEOC for discrimination based on protected social traits.

Pressed by a militant disability rights movement and bipartisan political coalitions, Congress added a positive-law protection to the antidiscrimination canon: the ADA's accommodations mandate. 6 1 Movement visions of universal inclusion and collective responsibility, however, were largely undermined by the Reagan EEOC's rulemaking: by issuing a regulation that deregulated.26 ' Relying upon individuated bargaining and market logic to remedy structural subordination in the workplace, the EEOC's accommodations rule prescribed private processes that ignored the power disparities inherent to this task.2 62 Despite the market efficiency in doing so, Congress and the executive have largely declined to directly involve the state in dismantling ableism in private workplaces. 263

At this stage, the normative influence of history, statutory policy, constitutional values, and popular will-emerging from the mid-1960s aligned- was in danger of unraveling at all four levels. Our transition from classic to modern liberalism introduced ideological doubts about a virtuous state, particularly after the advent of the Great Society's social safety net i.e., public goods-would be racialized by the right wing, denigrated as the "welfare state."

Ahistorical textualism, Congressional gridlock, juristocracy, and societal polarization laid the groundwork for the Rehnquist and Roberts Courts to undermine collectivity and solidarism in the workplace. In particular, the probusiness outcomes in Janus and Epic Systems were astonishing. 264 As Sam Bagenstos observed, the Roberts Court began a reversion toward Lochnerism under the veil of other constitutional doctrines.2 6' Laws intended to facilitate the right to organize are at risk of being interpreted to further deter activism through work law. In the meantime, organizing continues to draw power from outside the law and institutional structures.2 66

#### These discussions remain contemporary.

Shirley Lin 23, Assistant Professor of Law, Broo klyn Law School, “Race, Solidarity, and Commerce: Work Law as Privatized Public Law,” Arizona State Law Journal, vol. 55, 2023, p. 863-876

1. Amazon Labor Union's Race-Centered Analysis

Amid a wave of unionizing at big retailers, warehouse workers mustered the first elected union within Amazon against the odds. Their efforts focused on reallocating the balance of power within the warehouses, and up through the management hierarchy to address systemic racism. 294 Rather than rely on traditional union models, organizing among current and former employees prioritized interracial solidarity and an independent power analysis of racial hierarchy.295

Amazon's warehouses are notoriously grueling operations hubs within the second largest employer in the United States.296 Their workers face every trial imaginable: racially segregated hiring and promotion practices, inadequate pay, inhumane quotas, understaffing, high injury rates, safety hazards, and lack of pandemic protections in close quarters-i.e., paid sick leave, respect for disability requests, and protective equipment. 297 In the run-up to the April 2021 NLRB election, workers at Amazon's majority-Black Bessemer, Alabama location faced threats, surveillance, and retaliation from supervisors and, not surprisingly, did not succeed.29

Nonetheless, each Amazon warehouse hub reflected its own community dynamic and needs. "Amazonians United is spanking Amazon with the NLRB," according to a dispatch from Amazonians United Chicagoland that same month. 299 And within a year after Bessemer, Amazon Labor Union beat the odds of a victorious union election at the company's 8,000-person Staten Island warehouse.300

The COVID-19 crisis exacerbated the racialized nature of low-paying logistical and service work-industries that have grown in support of the on-demand economy.301 Black, Latinx, 302 and Asian American 303 workers occupied the most physically grueling positions, with high turnover encouraged by Amazon.304 The company refers to those who collect the items to be placed onto conveyor belts and packed into boxes as "pickers," without any hint of irony.305 At the Staten Island warehouse (known as "JFK8"), the grassroots effort was Black-led, and its membership mainly Black and Latinx.30 6

During the pandemic, the tightly interconnected nature of the warehouse's racial hierarchy, economic extraction, dehumanizing levels of physical risk, and disablement 307 led ALU's organizing to center race in its analysis.30 8 Christian Smalls-who is Black-reluctantly launched himself as a leader of COVID safety protests in 2020 for JFK8's workforce. 309 As Smalls shared earlier:

It was a life-or-death situation .... The pandemic was affecting not just Black and brown workers at the company, but Black and brown people as a whole in communities, especially in New York City. We became the epicenter of the world. People were dying here every 15 minutes, and most of the people were Black and brown.310

In response to the protests, a memo circulated to Amazon executives including Jeff Bezos-discussing plans to portray Smalls as "not smart or articulate" and outlined plans to make him "the face" of the entire union/organizing movement. 31' Smalls, who had been denied promotions to higher management despite dozens of applications, set out to build power among his former warehouse coworkers upon hearing about the memo. He camped out at the bus stop outside of the warehouse for more than 300 days and with colleagues "talk[ed] to workers, signing them up" as part of "an independent multiracial, Black-worker-led effort." 312 ALU built interracial solidarity over these eleven months through friendships, building community at the bus stop, and providing mutual aid and sustenance to struggling coworkers in the forms of food, music, and communal heat in the cold. 313

Groups engaged in mutual aid cultivated broad, multidimensional solidarity "because their members' lives are cross-cut by many different experiences of vulnerability," as Dean Spade notes. 314 The sphere of one's solidarity expands through "contact with the complex realities of injustice. "315 Rather than minimizing the complexity of the workers' concerns, ALU embraced it and explicitly related calls for solidarity under a theory of institutional racism. In 2020, Smalls volunteered to represent a Section 1981 class of Black, Latino, and immigrant JFK8 workers on the theory that safety policies were substandard compared with white workers' during COVID, constituting racial discrimination.316

ALU blazed an alternate path, and stands as a race-conscious experiment for the modern labor movement, because its maverick status ostensibly avoided an Emporium Capwell problem: to preserve their ability to direct strategy and tactics, Smalls and fellow warehouse workers sought to form a union independent of organized labor.3 17 The leaders were aware that organizing the JFK8 workforce called for a power analysis centering structural racism head-on, a course rarely pursued by unions.318 Existing law and, as a result, labor organizing under the traditional industrial model, would not have considered Smalls a viable organizer or union president. Nor, under the NLRA, would he have been eligible to represent a bargaining unit or be protected from retaliation as a supervisor: Smalls was an (in-warehouse) "management associate" during the 2020 safety protests until Amazon terminated his employment. 319

A trial court believed that the same principle applied to antidiscrimination law, where doctrine requires proof of similarly situated workers treated differently because of race. Reaching the merits, the court questioned Smalls' ability to compare Amazon's inferior COVID protocols for its mostly- minority warehouse workers to the preferential treatment Amazon's mostly white supervisors received-as evidence of discrimination, because workers and supervisors are not similarly situated.32 0

Smalls's Section 1981 claim, at least, should have provided him the means to speak out against racialized disablement and hierarchy at Amazon, irrespective of the NLRA's carve-out of supervisors. 32 1 But even two levels of federal courts were not convinced. Evidently, his pleadings foregrounded disparities in COVID practices and racially disparate compositions between the entry-level and upper-level managerial workforce, but-even with the Amazon memo to CEO Jeff Bezos savaging Smalls's intelligence-raised nothing intentionally, dispositively "racial"; ironically, the NLRB had taken trial testimony in parallel proceedings and recently ruled that, through its anti- union consultant, Amazon also referred to ALU organizers as "thugs," and "not a serious union drive" but "a Black Lives Matter protest about social injustice" in what it deemed an unlawful "appeal to racial prejudice and derogatory racial stereotyping" during a coercive interrogation in 2021.322 Work law has come far, but not far enough since Reconstruction.

2. Black Lives Matter as Mutual Aid at Whole Foods

The public/private distinctions that courts, lawmakers, and commentators attribute to work law complicates, and thus actively dissuades, broad and intersectional solidarity in conceptualizing a sphere that protects organizing. In another wave of sui generis organizing, non-unionized Whole Foods workers protested racial violence in the hands of law enforcement by wearing insignia stating "Black Lives Matter" at work, linking their concerns to racialized working conditions but also-as the company argues-to "political" concerns outside corporate walls.323

After the May 25, 2020 murder of George Floyd by Minneapolis police officers, Whole Foods workers across the country moved quickly to express solidarity for each other and the Black Lives Matter movement. 324 Instead of the alignment of white/non-white identification and racial concern or "self'- interest typical of the late twentieth century, as proved to be the case in Emporium Capwell, grocery workers of all racial backgrounds expressed solidarity with Black communities.325 They wore and shared BLM face masks, T-shirts, and sneakers "in a show of solidarity" with the movement, "to protest racism and police violence against Blacks[,] and to show support for Black employees."326

Suverino Frith, a Black Whole Foods associate in Cambridge, Massachusetts, began wearing a BLM mask the day after Floyd's death.327 A few weeks later, his white coworker Savannah Kinzer told him that Whole Foods workers in New Hampshire had been sent home for wearing the masks, and that she would organize coworkers to wear them in support of the employees, 328 as well as "Black co-workers, Black customers, [and] Black community members." 329 By late June 2020, at least thirteen employees at the store began wearing masks displaying "Black Lives Matter" regularly. 330 On June 24, 2020, Cambridge store managers told them they had violated a uniform policy-one unenforced until that moment-assigned them disciplinary penalty "points," and sent workers home without pay when they refused to take off their masks.33

"Until we see [racism] as a white person's problem and not a Black issue that white people have to empathize with, racism will persist," Kinzer told reporters the following day.332 Daily thereafter the store sent several workers home without pay if they refused to remove their BLM mask-from the workers' perspective, a "walkout"-and assigned them disciplinary points each time until they reached a fireable level.333 This response prompted further activism as the Cambridge workers' demands by July 2020 included: "freedom for all Whole Foods employees to specifically support black and marginalized lives; back pay for the lost time for protests; the revoking of all demerits for wearing the BLM masks; reinstating [COVID-19] hazard pay[;] ... the ability to raise such issues at work without repercussion; and to make the racial demographics of Whole Foods employment accessible to the public and to make management more diverse." 334

Together, Kinzer, Suverino, and thirty-five others from stores across several states filed charges with the EEOC and NLRB, challenging the company's selective enforcement of the mask policy as race discrimination; retaliation for raising a good-faith Title VII claim; and retaliation for engaging in mutual aid and concerted activity.335 Whole Foods fired Kinzer on July 18, 2020, a mere two hours after she informed her supervisor that she had filed her charges against the company.3 36

The NLRB general counsel took personal note of the precedential potential of these developments. In December 2021, the Board issued a complaint consolidating charges from several dozen Whole Foods workers across ten states.337 At the administrative hearings the following summer, an internal Whole Foods email surfaced in which managers were told that workers could not wear BLM insignia at work because it would "open[] the door for union activity."3 38 The administrative law judge heard weeks of testimony from solidarist workers in cities including Philadelphia, San Francisco, and Washington.33 9 Although a ruling is pending, the manager's email reflects how companies, not simply workers, see past the dogmatism of public/private rules to focus instead on their permeability.

As Whole Foods pressed the argument that it viewed BLM as "political" and "controversial" speech unrelated to workplace conditions, 34 0 its email revealed their true concern that talks about opposing racism in se, and perhaps in particular, opposing anti-Black racism, wouldfoster unionization through solidarist efforts. Was its concern the inverse of Capwell Emporium, in that a racially unified workforce is the most powerful in pressing their demands, economically and morally? Or was it a matter of statistics? Support for a union is highest-at eighty percent-among Black workers (eighty-two percent for Black women workers), seventy-five percent for protection to adversity "because of . .. such individual's race" and the workers, including Kinzer, had not pled facts adequately supporting selective enforcement. 348 The court below was far more skeptical, opining that Title VII "does not protect one's right to associate with a given cause, even a race related one, in the workplace."349

The First Circuit instead left the door open to a Title VII associational theory, in which an employer cannot "disapprove[] of interracial association" as it could be "because of the employee's own race."350 The panel cited Holcomb v. Iona College, in which a white man who alleged he was fired because of his marriage to a black woman was able to tie the discrimination to his race.35' In a Pyrrhic victory, Frith v. Whole Foods Market convinced the First Circuit to join six other courts of appeal in recognizing a theory that analogizes racial animosity toward interracial solidary akin to punishing a race traitor."'

The strategies and racial frames of the Amazon and Whole Foods workers' organizing efforts did not cater to existing protections under liberalist precedent, in which workplaces are presumptively a subset of the private marketplace. If Smalls, Kinzer, and their colleagues were to have conformed strategy around work law's minefields, it would have amounted to the law exerting social control through disincentives. These dynamics became clear once litigation began to protect their advocacy, nonetheless. We turn next to the implications of their experiences as privatized public law.

### Neg---K---Militant Unionism

#### Many organizers and even labor leaders believe that unions might be better off without labor law at all---to return to the “law of the jungle,” where all that matters is the struggle for power between workers and bosses. If the working class intrinsically has more power because their labor is essential to the functioning of capitalism, then a pure power struggle might end up favoring the side of workers. Workers would rely on striking workplaces, shutting down production networks, and rejecting legal constraints in doing so. By contrast, relying on legal means might artificially constrain workers’ power, both because of specific restrictions on tools like strikes as well as a broader ideological orientation towards legal compliance rather than victory over the boss.

Josh Eidelson 12, union organizer, MA in political science, freelance writer, “American Workers: Shackled to Labor Law,” 5/23/12, https://inthesetimes.com/article/american-workers-shackled-to-labor-law

Republicans hate the National Labor Relations Board. But they’re not the only ones. In speeches to workers and testimony in Congress in the ​’80s and ​’90s, then-AFL-CIO President Lane Kirkland repeatedly declared that union members would be better served by ​“the law of the jungle.” Some union presidents agreed, including Richard Trumka, who now heads the AFL-CIO. In 1987, Trumka called for abolishing both the law’s ​“provisions that hamstring labor” and ​“the affirmative protections of labor that it promises but does not deliver.”

In other words, it’s not just Mitt Romney who argues the National Labor Relations Board – which interprets and enforces labor law – does more harm than good.

That’s in part because the National Labor Relations Act (NLRA), as amended by Congress and interpreted by the courts, bans or restricts labor’s most effective tactics. The occupations of workplaces that fueled momentum for the NLRA, passed by Congress in 1935, are now illegal under it. The aggressive strikes – shutting down workplaces or even entire cities – that forged the modern labor movement have largely been replaced with strikes that are essentially symbolic. While anti-choice groups can target Planned Parenthood by pressuring the Komen Foundation not to fund it, and progressives can hurt Rush Limbaugh by calling on advertisers to drop his show, unions face unique legal restrictions on mounting equivalent ​“secondary boycott” campaigns that spread a struggle throughout a supply chain.

Of course, when Republican presidential candidates bash the NLRB, it’s for restricting business, not unions. On paper, the NLRA actually commits the government ​“to promote collective bargaining” and requires most companies to recognize and negotiate with unions that win elections. It made it illegal for companies to spy on, threaten or retaliate against workers for union activism or other ​“concerted activity.”

But reality has proven to be a different story. ​“This labor law is a scam,” says Larry Cohen, president of the Communications Workers of America. ​“It is garbage. … It’s a fucking lie.”

Getting around a failing law

During an organizing drive, managers can legally hold mandatory anti-union meetings in which they predict that unionization would shut down the company. Even when workers win a union election, 52 percent of the time they haven’t won a union contract a year later, because managers can legally sabotage union contract negotiations by refusing to concede anything. If a union contract is in place, once it’s up for re-negotiation managers can legally lock out union members, denying them any work until they accept a worse contract or vote out the union.

And companies don’t restrict themselves to these legal union-busting tactics. In 57 percent of union elections, employers threaten to shut down the worksite. In 34 percent, they fire union activists. When a union activist is illegally fired, it’s difficult to prove that the firing was retaliatory – and even if the government sides with the union, generally the worst that can happen to management is being forced to reinstate the worker with back pay. This process often takes years, which can be more than enough time to quash an organizing campaign. Fred Feinstein, who served under President Clinton as the NLRB’s top prosecutor, says the penalties available against employers ​“don’t provide any deterrence” for companies set on breaking a union.

Efforts to reform this legal imbalance have been failing for decades. Where labor is succeeding, it’s often in spite of or outside of the law, not because of it. Major unions have abandoned government-run elections in favor of ​“comprehensive campaigns” that leverage some combination of worker, consumer, media and political pressure to extract agreements from companies not to terrorize or stonewall. By blocking tracks, spilling grain, and defying a restraining order in Longview, Wash., members of the International Longshore and Warehouse Union (with help from Occupy) beat back a company’s attempt to do their jobs without them. Other labor organizations – like the National Domestic Workers Alliance, or ​“workers’ centers” – are growing and achieving victories through activism without identifying as unions at all.

​“The majority of our work in Justice for Janitors was trying to figure out how to negotiate around the secondary boycott laws,” says Stephen Lerner, the architect of that campaign for the Service Employees International Union. In the Justice for Janitors campaign, labor law restricted the Service Employees union (SEIU) from targeting building owners, even though they – rather than the contractors who technically employed the janitors – were the real decision-makers.

Some of labor’s dramatic victories in recent years have come from organizations that, by choice or necessity, operate outside of the protections and prohibitions of labor law. Longtime farm worker Gerardo Reyes works for one such organization, the Coalition of Immokalee Workers (CIW). The Florida-based group doesn’t identify itself as a union, it doesn’t seek recognition as one by management or by the government, and it doesn’t negotiate union contracts. But CIW has extracted ​“Fair Food” agreements from the growers who directly employ farm workers. CIW has won and defended agreements with the growers by pressuring – and sometimes boycotting – well-known companies at the other end of the supply chain. In February, following a multi-year campaign, CIW achieved an agreement with Trader Joe’s under which the company will only buy tomatoes from growers following ​“Fair Food” rules.

For farm workers under CIW agreements, says Reyes, ​“it is better as it is right now” than it would be under the NLRA. ​“Would we be better off if workers in Florida or in the entire nation were covered? It’s hard to tell, because that’s not our reality … so we just work with what we have.”

A sobering debate

Others argue that stripping away labor law would leave unions far worse off – not because current law removes the need for aggressive worker activism, but because withdrawing the formal protection for union activity would make such activism much harder to pull off.

​“If we took away the NLRA right now,” says Cornell University Labor Education Director Kate Bronfenbrenner, labor ​“would lose the protections that they do have when employers try to break unions.” While harshly critical of the current labor law regime, Bronfenbrenner suggests that labor leaders may use it as a scapegoat in an era of declining unionization. ​“It is not like unions are using the power they have” under current law, says Bronfenbrenner, who thinks labor should aggressively build coalitions, mount anti-corporate campaigns and nurture workplace activism.

Yet the fact is, if a union wanted to test its luck with fewer legal restrictions on strikes and boycotts and no legal right to recognition or negotiations, it could do so right now by legally dissolving itself and re-constituting as something more like the CIW. Historian and New Labor Forum editor-at-large Steve Fraser argues that the downside of the NLRA may be less in the explicit restrictions it enforces than in the way its existence has ​“locked the trade union movement into a juridical way of proceeding” and made it ​“doubt other tactics.”

The law is unlikely to change, argues Lerner, as long as politicians ​“think the consequence of not having labor law reform is there’s no conflict” with the powers that be (both corporate and political). ​“We’re more likely to get labor law reform if we’re out there mass organizing the private sector and demonstrating the need.” To fix the law, he argues, we need conditions like the ones that birthed it: hundreds of thousands of workers pushing against – and beyond – the limits of current law by organizing, occupying or going on strike. It takes ​“ammunition,” says Lerner, ​“to prove … there’s a crisis that needs to be fixed.”

#### Both aff and neg teams taking this position could argue that the appropriate orientation is to “directly challenge labor law as a system of control,” as outlined by the card below. Given the historical hostility of the courts and legal system to workers, using “grassroots labor militancy” to reject the “law’s embrace” may be a better solution for working class power than “undue reliance on the law.”

Joe Burns 15, veteran union negotiator and labor lawyer, “Labor Law Won’t Save Us,” 1/27/15, https://jacobin.com/2015/01/unions-civil-right-strike-joe-burns

The authors should be commended for writing about labor’s crisis and raising important questions about labor’s renewal. Many analysts focus on reporting on particular struggles, but the labor movement needs more innovative tactics like the one Kahlenberg, Marvit, and Geoghegan propose. Critiquing the NLRB and the current state of labor law is also essential. By discussing labor rights as civil rights, the authors elevate union rights as fundamental human rights.

Nonetheless, their approach has numerous shortcomings, chief among them an undue reliance on the law to turn around labor’s fortunes.

Chasing Pipe Dreams

On a practical level, even proponents admit Ellison’s bill is not passing anytime soon. A Republican-controlled Congress, coupled with a Democratic Party with little interest in labor rights, means the chance of getting labor legislation approved is close to zero. More to the point, sixty years of failed labor initiatives — a stretch over which unions were much stronger — leaves little hope that the contemporary labor movement has the leverage to win significant labor law reform.

Even if the legislation were somehow to pass, it would not significantly improve labor’s prospects. The aim of the legislation is fairly narrow, seeking only to outlaw some of the most blatant forms of anti-union discrimination. And there is little reason to believe that judges would allow the same level of scrutiny of labor discrimination that they do with other forms of overt racial or sexual discrimination. Nor should we overstate the effectiveness of the Civil Rights Act in eliminating employment discrimination.

Even worse, the bill stakes labor’s salvation on the federal courts — the graveyard of union rights for more than a century. In the late 1930s, the Supreme Court sanctioned permanent replacement of striking workers and withdrew protection for effective strike tactics such as mass picketing and sit-down strikes. Over the years, judges increasingly tightened the noose around workers, limiting the issues workers could bargain over and tying unions’ hands in dealing with business shenanigans such as subcontracting or capital flight.

Ellison’s legislation leaves untouched these judicially created impediments to union strength, which defang strikes and render collective bargaining virtually meaningless. Relying on reactionary federal courts — or hoping that electing more Democrats will make the judiciary less conservative — is not the answer to labor’s crisis.

With the labor movement on life support, it can’t engage in diversions with little chance of success. Even more troubling, however, are a set of concerns that go to the heart of what type of labor movement we are trying to rebuild.

Is There a Civil Right to Not Be in a Union?

For decades, employers have argued that workers have individual rights that trump the rights of workers acting collectively. This dispute is central to labor history because it touches on the fundamental issue of whether unionism can modify the terms of wage labor. While unionists argued labor is not a commodity, a central tenant of anti-unionism was the right of individual workers to willingly agree to the terms of their exploitation, whether that meant crossing a picket line or refusing to join a union.

In other words, trade unionists acting as a collective entity representing working-class interests prevented individual laborers from enjoying “liberty”: the freedom to sell their individual labor in the market. The alternate conception of labor liberty represented by unionism, in contrast, is rooted in solidarity and the necessity of workers joining together to prevent individual exploitation.

Employers have long been hypocritical champions of individual workers rights. In the modern era, employer groups explicitly adopted the lingo and litigation approach of the Civil Rights Movement. That’s why anti-union groups have names such as the National Right to Work Foundation and the Center for Worker Freedom (the right-wing group spearheading the effort against the United Auto Workers’ unionization drive in Chattanooga, TN). For anti-union employer advocates, labor truly is a civil right —the right of individuals to undercut the collective.

Employers rarely outright oppose union rights. Instead, they’ve created fictitious rights such as the “right to work” — the anti-collective idea that individual workers have a right to freeload by not paying dues — or the “right” of individual workers to scab by crossing picket lines.

This of course begs the question: if workers have a civil right to engage in union activity, do they have a corresponding civil right to refrain from such activity? Once you accept the individualist civil rights logic, it is hard to say they do not.

Yet without collective action there can be no labor movement. Traditional trade union economics asserted that individual workers lacked the right to sell their labor at a price which undercut the collective needs of workers. That, in a nutshell, is the point of unionization.

Labor history can be seen as the heroic attempt of workers to raise the price of their labor above “free market” levels. Mass picketing, sit-down strikes, anti-scab action, closed shops, secondary tactics — all were geared towards preventing individuals from undercutting collectively set labor rates.

Labor Law and Class Struggle

When a new workers’ movement develops, it will be imperative to directly challenge labor law as a system of control, especially the restrictions on effective strike activity. Whether it be industrial workers in the 1930s or public employees in the 1960s, the main action was in the streets, with lawyers and litigation playing a supporting role.

Ideas like “labor as a civil right” unwittingly push labor back into the law’s embrace while keeping its rotten core. ­­­­

This is quite different from the labor movement from the late 1800s through the 1930s, which vocally decried judge-made laws. Even conservative unionists like Samuel Gompers understood from experience that if elite judges were allowed to set labor policy, trade unionism would never flourish. That’s why the union movement spent decades attempting to keep labor issues out of federal courts, the exact opposite of the “labor as a civil right” approach.

Take the 1960s public employee strike wave as an example. This little-known period was one of the greatest examples of mass civil disobedience in the history of US labor. Hundreds of thousands of public employees struck, often openly defying anti-strike laws and judicial injunctions.

A key component of this upsurge was an idea that became widespread among public workers: that restrictions on public employees’ right to strike were illegitimate. The present-day movement should learn from them: attacking labor laws, rather than bolstering them, is the key to reviving unions.

What we also find from studying the 1960s (and indeed from earlier periods of US labor history) is that public workers won the right to bargain and strike by violating labor law. In the face of labor militancy, state legislators legalized bargaining and striking.

This is true of other periods of history as well, such as the passage of the Railway Labor Act after the great Railway Shopmen’s Strike of 1922 or the Wagner Act after the 1934 worker uprisings. The lesson of labor history is thus that if you want labor law reform, focus on developing grassroots labor militancy.

#### Liberal vs militant unionism is a clear point of clash.

Joe Burns 22, veteran union negotiator and labor lawyer, author of Strike Back and Reviving the Strike, "Class Struggle Unionism," 03/02/2022

The Difficulties in Critiquing Labor Liberalism

Some of the most difficult conversations are among friends. Arguing with our enemies is easy, but for those who have worked within unions and other social organizations, we know that dealing with contradictions among the people is one of the most difficult but important things we do. This is especially true when it comes to the critique of labor liberalism.

The labor liberals for decades have occupied the commanding heights of labor theory. Labor liberals hold important positions in many unions, among the labor press, and as labor educators. And frankly, they write a lot —way more than most worker-activists do. Even more important, many of their ideas make sense: of course we need to organize the unorganized, have broad bargaining demands, and take progressive stances on political issues. Because labor liberalism comes out of the left/liberal social movement, they naturally adopt the language of those movements.

And frankly, those who advocate a class struggle approach have not been very good about offering an alternative that makes sense. This is largely due to the lack of an anticapitalist movement in this country. Since the early 1980s, the left in this country has been weak and on the defensive. The labor movement suffered catastrophic setbacks in the 1980s, and other social movements fared little better. Since the 1980s, conservative ideas have ruled, and until recently, socialist ideas were marginalized.

Quite naturally, those who want a better labor movement have gravitated to labor liberal ideas. After all, they offer a seeming alternative to business unionism. The existing labor movement has been bureaucratic and conservative and does not seem to offer much for working people. So, much good work has been done under the banner of labor liberalism.

But times are changing. In the last decade we have seen the Occupy movement, the Wisconsin uprising, the red state teacher revolts, the strike wave of the Chicago teachers and others, and the rise of democratic socialist politicians such as Bernie Sanders and Alexandria Ocasio-Cortez. Many younger folks gravitating to the labor movement are looking for radical ideas. The basis is here for a new type of labor movement. We have the opportunity to move beyond labor liberalism.

One of my favorite organizers in the labor movement, Ellen David Friedman, told me she likes to talk about theory with new activists, explaining they have a choice to pick which framework they want to adopt. It’s time to choose a new framework that goes beyond labor liberalism. It has served its purpose, but we cannot move forward under its banner.

The problem with labor liberalism is not necessarily what it includes but what it does not include. Labor liberalism talks about progressive social issues and a broad approach of representing the working class. But it leaves out many aspects of class struggle unionism such as sharp class-on-class struggle, the fight for the shop floor, union reform, and other elements. After decades of experimenting, it is clear labor liberalism is not up to the challenge that faces us. We need class struggle unionism.

Labor Liberalism versus Class Struggle Unionism

The AFL-CIO during the 1980s was staunchly anticommunist and hostile to traditional class struggle ideas. Those who are newer to the labor movement may be used to a certain openness to left-wing or socialist ideas nowadays, especially with the popularity of politicians such as Sanders and OcasioCortez. But that was not always the case. From the 1950s to the 1980s, there was very little space for open leftists.

When I entered the labor movement in the mid-1980s, the movement was fiercely anticommunist and hostile to outsiders. When I first ran for statewide union office, one of the officers sat me down and said, some folks are saying you’re pink. It took me a bit to realize he was saying I was a socialist. But that was the state of things back then.

Perhaps for that reason, labor liberalism arose as a challenge to business unionism within a very limited framework. As Bill Fletcher and Fernando Gapasin note in Solidarity Divided, “Rather than use potentially inflammatory terms like class struggle unionism—and to influence the tactics of liberal-to-progressive labor leaders—the proponents of the organizing model suggested the existing movement take significant, though limited, steps to promote real change.”1 While this allowed labor liberals to gain influence in labor, it did not provide the basis for a decisive break with business unionism.

In retrospect, labor liberalism was not as much of a break from business unionism as promised. Class struggle unionists value rank-and-file selfliberation, grassroots militancy, and challenges to the labor bureaucracy. But labor liberalism offered instead tightly choreographed workers’ struggles, a dominant role for staff organizers, and an orientation toward passing protective labor legislation.

Labor liberalism required a vilification of traditional unionism from a left/liberal perspective. As labor scholar Stephanie Ross notes, “Social unionism’s consistently positive comparison with ‘stale’ business unionism rests on an idealization of the former, and an overly stark and not-quite accurate dichotomization of the two approaches.”2 In doing so, labor liberalism redefined business unionism, which historically meant unionism that did not challenge the capitalist system.

Instead the concept of business unionism popularized in the 1980s went after only a narrow group—the racist, exclusionary right wing of labor typified by the building trades and the AFL leadership of the time. Although labor liberalism sharply critiques business unionism, the assault has been situated in middle-class progressive theory, with the critique more focused on the exclusionary nature of the AFL and their failure to organize the unorganized. A class struggle perspective would have required an attack on the labor bureaucracy and class collaborationism. Although labor liberals have critiqued right-wing business unionists, it has not been all-out warfare.

In contrast, class struggle unionism and business unionism are mutually exclusive worldviews. While in times of great struggle with employers these viewpoints can coexist temporarily, eventually the two worldviews come into conflict. In the 1910s the IWW was hated by the AFL, which scabbed on IWW strikes. During the 1920s, Communist Party activists were expelled and repressed by the AFL. In the 1930s, although the CIO opened up to the left, this alliance was short-lived and filled with conflict. The AFL and CIO soon declared war on class struggle unionists as part of the redbaiting of the 1940s and 1950s. Class struggle unionism and business unionism are inherently antagonistic.

In contrast, labor liberalism has peacefully coexisted with business unionism for almost thirty years. The reason is simple: labor liberalism does not challenge business unionism.

•  Politically, labor liberalism lines up with the progressive wing of the Democratic Party.

•  On strike strategy, labor liberalism favors controlled actions that don’t risk injunctions that threaten union treasuries.

•  Labor liberalism does not embrace militancy or sharp class-on-class struggle that causes ruptures with the employing class.

•  In structure, labor liberalism is a top-down version of unionism, perhaps even more so than traditional business unionism.

•  The main themes of labor liberalism are compatible with holding union staff jobs.

•  Labor liberalism does not challenge business unionism’s fundamental accommodation with capitalism.

Labor liberalism attempts to straddle between two world-views—class struggle unionism and business unionism. And like many attempts at compromise, it fails. So, the question we must ask is, if labor liberalism is such a challenge to the labor establishment, why has it generated such little conflict?

#### When union institutions are not representative, giving them power only suppresses union radicalism.

Catherine L. Fisk 21, Barbara Nachtrieb Armstrong Professor of Law at the UC Berkeley School of Law, “The Once and Future Countervailing Power of Labor,” Yale Law Journal, 2/3/21, https://www.yalelawjournal.org/forum/the-once-and-future-countervailing-power-of-labor

The ostensible purpose of this legislation was to curb union abuses of power and corruption, and make unions more responsible to their members and to their contracts with employers.43 But an important purpose and effect was also to weaken unions and reduce labor protest. As I have documented elsewhere, the legislation used unions’ institutional power as leverage to reduce their activism by punishing union picketing with crushing damages liability and injunctions.44 This, in turn, required union lawyers to protect the union by counseling against certain forms of protest, reviewing the content, timing, and location of union picket signs and other protest tactics, and even censoring union newspapers.45

B. Political Compromises that Exclude Some from Protection

If the original sin of America was slavery, the original sin of the New Deal was building on the legacy of slavery in the political compromise that got the New Deal passed. To get the votes of legislators from agricultural states, Congress excluded farmworkers and domestic workers from the NLRA right to unionize, which meant that Black and Latinx workers and women disproportionately were excluded.46 The Social Security Act of 1935 likewise disproportionately omitted the jobs dominated by people of color and women from the unemployment and old age insurance systems it created.47 These political choices were possible only because the political parties and the interest group organizations that drafted and lobbied for the legislation did not represent women and people of color. A legal regime like the NLRA that grants power to organizations risks entrenching inequality if the organizations that gain power under the law are not representative, as many unions during the New Deal were not.

A challenge in implementing the Andrias-Sachs proposal is to ensure that the organizations that law supports remain responsive to the diversity of working-class interests. In today’s polarized and highly segmented political culture, no one should underestimate the difficulty of forming broadly inclusive unions. For instance, Whites without a college degree (a common definition of working class) are much more likely to describe themselves as Republicans or conservative than are working class Blacks or Latinx.48 Building a political agenda across the divides of race and ideology is tremendously difficult because race has been used for so long and still is used so effectively to divide the working class.49 Claims of racial justice or racial resentment are powerful appeals in organizing. As long as racial and class oppression exist, racial and class resentment can be stoked, and opponents of change will stoke them.

Unions with diverse membership and leadership are well-suited to organize inclusively along lines of occupational, class, racial, and other identities. As membership organizations committed to principles of solidarity, they are communities in which injustice can be confronted and reconciliation can be cultivated. To ensure that inevitable political compromises in legislation do not unfairly sacrifice the interests of some group, it is essential that the organizations involved in crafting the legislation be diverse and representative of the full swath of America. But the times in which this has been successful are regrettably few.

C. Regulating Countervailing Power

A third lesson from history is that when organizing succeeds and unions build political power for their members, opponents will argue that concentrated political power disserves the public interest. As noted above, the Taft-Hartley Act is one of many examples when working people’s organizations were weakened or destroyed when business organizations and elites regrouped and deployed law to suppress the threat to what they argued was the public interest in “labor peace” or “free movement of commerce” or “property rights.” But one need not go back to the 1940s to find examples of law empowering skeptics of unions, and the fear of union power has crossed political lines.

In Wisconsin in 2010, the Republican legislature eliminated collective-bargaining rights for workers whose unions opposed the candidacy of Scott Walker and preserved bargaining rights for workers—police, prison guards, firefighters—whose unions support Republicans.50 This was political payback, but it was also defended as serving the public interest in reducing labor costs and taxes and making the government more responsive to the people.51 Sometimes the critique of union power is bipartisan. The campaign to reduce collective-bargaining rights of teachers had bipartisan support, for the ostensible reason that teachers’ unions make it too hard to reform education in ways that would serve Black and Brown children.52 Even the Left attacks the concentrated power that a union provides, as seen in current proposals to eliminate or curtail police and prison-guard union rights as obstacles to police reform,53 or because police unionization is said to be associated with an increase in police violence.54

Organizations that have power to influence the regulatory processes designed to ensure they serve the public interest are rarely ones that represent the dispossessed. And when they do, elites label them a threat to capitalism. If unionization and collective bargaining are a privilege only for good workers, rather than a fundamental right, every group of workers who gain power is at risk of being found unworthy because its collective action will be portrayed as inimical to the public welfare.55

D. Transforming a Social Movement into a Sustainable Institution

A fourth cautionary note from history draws from the experiences of the United Farm Workers (UFW) in the 1970s. Enacting even a good law to enable organizing is not enough to build power if a union fails to do the work of balancing its social movement side with its role as an institution that exerts power in the workplace and in the economy.The UFW had secured the enactment of one of the most progressive labor laws in the country; California’s Agricultural Labor Relations Act contains most (but certainly not all) of the five elements of an Andrias-Sachs law.56 Only a few years after the law was enacted, however, the UFW began a downward slide, from which it has yet to recover (at least as measured by membership and collective bargaining agreements).57 In part, that was caused by employer and political opposition—employers managed to get the state to defund the agency and to bog it down with delays.58 And partly it is because of sectarian struggles among labor. The Teamsters, who had never had the slightest interest in organizing farmworkers, swooped in to replace the UFW at many farms. Growers were only too happy to replace the militant UFW with the more accommodating Teamsters.59 But partly it was because the UFW leadership did not aggressively pursue the traditional union sources of power, such as organizing dues-paying members and negotiating and enforcing collective-bargaining agreements. The institutional power the union could exercise through the negotiation and administration of collective agreements required a commitment of resources that some activists and leaders preferred to spend on more organizing, on political action, and on building and maintaining a regional and national movement of Latinx people.

Winning civil-rights or labor legislation does not transform workplaces or neighborhoods or politics if there is no mechanism to make the legal change stick on the ground. Unions as institutions have done this. But when a social movement becomes an institution, as unions did, the challenge is to continue the work of progressive transformation that is an unending project in capitalism.

#### Aff teams can argue that labor legalism is good. Pure direct action is unsustainable. Labor legalism can “lock in” the results of direct political action.

David Madland 21, Senior Fellow and Strategic Director of the American Worker Project at the Center for American Progress, author of Hollowed Out, "Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States," ILR Press, an imprint of Cornell University Press, 2021

Today only relatively few types of grassroots efforts have any real power to disrupt and force companies and politicians to deal with them. The teacher strikes in West Virginia, for example, were successful because of their massive scale—in all fifty-five counties in the state and affecting over 270,000 students.67 They were also successful because of the types of workers involved: schools cannot operate without properly trained teachers. The schools probably would have found a way to operate if only food service workers and janitors had gone on strike. Most employers are likely find a way to make do in the face of direct action, especially since most actions workers would engage in are unlikely to achieve the scale of the West Virginia strikes or involve workers as difficult to replace. Direct action and organizing are more promising for those with some market power, but less so for most workers, particularly those who need help the most. Indeed, this is a significant reason why unions increasingly represent workers with higher levels of education than the overall workforce, rather than workers with less education and power. 68

Further, the teacher strikes in West Virginia and elsewhere also benefited from the supportive decisions of superintendents to cancel school and thus prevent unions and teachers from being fined—indicating that even seemingly independent direct action often benefits from a conducive policy environment.69 A similar point can also be made about the successful joint labor-management training in the construction trades that produces strong member attachment. The independent efforts that forged the joint training are buttressed by a supportive policy environment. Apprenticeships programs registered by the Department of Labor have high standards and monitoring requirements that many nonunion programs do not meet, and prevailing wage laws allow lower pay for registered apprentices, which provides an incentive for businesses to support registered apprenticeship programs.70

Not even the efforts of the US unions most committed to organizing have been able to meaningfully increase density in recent decades. Since 1983, union density has declined in every major private-sector industry, including construction, utilities, manufacturing, transportation, communications, wholesale trade, retail, and finance.71 Similarly, density has fallen sharply in places as varied as Alabama and Alaska, California and Connecticut, Los Angeles and Las Vegas, and New York City and Atlanta, to name just a few places.72 There is not a single state or major city in the country where private-sector density has grown significantly in the past several decades.73 Organizing has not been a particularly successful strategy because the supportive policies are too few and far between.

At a more abstract level, high levels of direct action and organizing are not sustainable over long periods of time. Most workers do not want to be constantly in fight mode and prefer collaborating with their employers.74 They want their efforts to lead to change and then to go back to their normal routines. But fights with employers would likely need to be ongoing without policy change to help balance power more evenly and lock in the results of organizing efforts.75

Unions could also try to pursue greater broader-based bargaining under the current system by changing their organizing tactics, bargaining objectives, and organizational structures.76 Unions certainly can and should start taking some steps on their own to promote multi-employer bargaining. But, as US history and examples from around the world show, significant increases in broader-based bargaining take much stronger unions or a more supportive policy environment (or both). US unions were able to achieve something approaching sectoral bargaining when density approached 100 percent in the auto and steel industries and well over 50 percent in other industries like telecom. Other countries that have a significant amount of broad-based bargaining but relatively modest density, such as the Netherlands, have supportive extension policies.

#### Even if the neg is right, aff teams can argue that a two-fold strategy is required.

Zoe Adams 22, Lecturer in Law at the University of Cambridge, “A structural approach to labour law,” *Cambridge Journal of Economics*, 2022, Volume 46, pp. 447-463

These observations suggest a twofold strategy will be necessary if labour lawyers are to formulate and advance structurally or ontologically informed normative arguments in relation to labour law, and, in turn, if they are to competently challenge, and overcome, the neoliberal critique. The above analysis thus emphasises the importance of critically interrogating why certain theories of social justice appear ‘morally appealing’ to us in certain contexts, and thus why certain practices, or outcomes, appear= so problematic. It forces us to take seriously the ontological basis of the ideologies driving labour market policies, rather than simply dismissing them and offering alternatives. The market only appears as a natural order, and individuals as naturally equal and free, in particular socio-historical conditions, and the role of law and legal discourse in upholding this ‘image’ must not be overlooked (Palermo, 2017). Nor, however, should it be uncritically accepted. Defending labour law policies in the name of the ‘universal’ values of human dignity, freedom and equality, without exploring why these values appear so important to us, and in what conditions, overlooks the role these values themselves play in the reproduction of the relations through which substantive inequalities are systematically reproduced. The task for the labour law scholar should not be to internalise the values that appear desirable or important to us, but to constantly question, and problemetise them; to explore and expose their structural basis, so as to open the door to a more reflexive, situated, normative critique.

In thinking about our shorter term goals, moreover, one of the implications of the structural approach is that it points our attention to the importance of exploring both the underlying structural logics shaping social development and the complexity and contingency of the ways in which those logics manifest in practice. While the structure of capitalism profoundly conditions the sort of social development that can occur, and thus, the sorts of socio-economic outcomes that can be achieved, it does not determine them. Thus, the particular way in which capitalism manifests today, and indeed the legal framework in which its constitutive practices are embedded, was not pre-given. Rather, it was the result of the particular way in which those logics were subjectively interpreted by social actors, and the way in which they responded to those logics in particular conditions, and the longer-term implications of this for how social practices proceeded into the future (Archer, 1995, p. 146); hence the traditional emphasis on the class struggle in shaping capitalism’s, but also law’s, concrete development (Hepple, 2011; Dukes, 2014; Arthurs, 2018). This observation forces us to recognise the contingency of the present, and thus, the potential that exists for a variety of futures to be brought about, depending on how we react today to the structural contexts in which we find ourselves, and the conjunctural conditions which we face. These may be futures within capitalism, changes within capitalism’s necessary structures, but, potentially, futures within such structures that embrace the potential for one day transcending them.

What the analysis of law’s relationship with capitalism emphasises, however, is that labour law cannot be seen as a mechanism with the capacity to change underlying or basic structures. To do so, would be to undermine the structural basis of law, and labour law itself (Lukáks, 1971, p. 264). It can, however, still be seen as a mechanism with the capacity to legitimise and/or destabilise those structures—including law—to foster and facilitate the capacities and capabilities that will be required to overcome those structures, depending on how it is used, and for what purposes. Minimum wage regulations, working time regulations, health and safety protections etc, may not challenge the basic structure of capitalism, therefore, and may indeed undermine attempts to challenge it in the immediate future (by stabilising existing practices), but they will be absolutely vital when it comes to developing the sort of social movements that will be required to transcend those basic structures in practice. Not only this, but, in the same way that the structures of capitalism can manifest concretely in a variety of empirical forms, so too can core labour law protections, functionally necessary for capitalism, be designed, structured and conceived, in a myriad of ways as well—with very different empirical effects Thus, a minimum wage that is payable for work, and which is set at a level that the market can ‘bear’ (a ‘market-clearing’ rate) will indeed simply reinforce the premise that competitive markets can realise just outcomes, and actively promote an image of society in which free competition is an expression of freedom and equality, rather than the process by which it is systematically negated. The law’s enforcement of such measures can even create an impression that, provided such wages are paid, ‘exploitation’ does not exist, exacerbating the inequality of power that exists between capital and labour, by obscuring its structural origins. This is, indeed, the impression one gets from campaigns to provide workers in the gig-economy with minimum wages—that payment of a minimum wage as presently structured will be sufficient to remedy the underlying ‘exploitation’ which such mechanisms target.

In contrast with this, however, a minimum wage conceived in such a way as to ensure a guaranteed weekly income for all labour market participants, irrespective of how much work they are able to access, set at a level that not only reflects average living costs, rather than ‘market value’, but an explicitly political decision about what sort of standard of living workers are deemed to be entitled, can actually go some way towards shaping capitalism’s development, while, simultaneously, problematising the naturalistic image of the market, and the ‘wage’, that the former construction of the minimum wage perpetuates (Adams, 2019; Adams, 2020A). Of course, this form of minimum wage is still limited—it does not address the underlying causes of low pay, because it does not abolish the structures that give rise to the necessity to work for wages—but it does a better job of not only mediating capitalism’s contradictions, but also, of doing so in a way that reveals the limits of law, and which helps to expose and problematise, the legal and political foundations of markets at the same time.

In addition to revealing the scope that exists for shaping the precise form in which capitalism manifests, and indeed, the precise nature of specific labour law institutions, the distinction drawn throughout this article between the basic features of capitalism’s necessary structures, and the precise form in which they manifest in different historical contexts, is also something which we can harness, to think critically about the different ways in which the labour market can be instituted, and legally constructed in practice. Thus, while a labour market may be integral to capitalism, the precise institutional framework in which labour markets are embedded is not predetermined. The precise dynamics of competition, and thus, the degree, if not the existence, of the inequality of power between capital and labour, can be profoundly influenced through the introduction (or not) of various institutions: institutional support for collective bargaining; generous social security rights; comprehensive public-service provision etc. While still supporting the existence and perpetuation of labour market practices, and the underlying structures which give rise to them, such mechanisms can make a real difference to the way in which the tendencies embedded in those structures actually play out, influencing the options available to workers and employers, and the scope and extent, of their capacities for various forms of action. In this way, such measures might not only improve the conditions of life and work within capitalism, but might also help provide the conditions for the sort of political mobilisations and strategies that may one day help us challenge capitalistic structures more directly.

These observations notwithstanding, however, one of the core insights of this article is the importance of taking into account the fact that the success of all such strategies is fundamentally constrained by law’s structural relationship with capitalist social relations. All these proposals engage critically with the structural causes of the problems identified, and attempt to embrace the scope that exists within those structures for change; but gaining political support for such proposals, and translating them into concrete outcomes, will still be constrained by the limits inherent in the nature of law as a social existent. More specifically, all these measures conflict, or can be seen to conflict, with the values and assumptions inherent in labour market practices, and which are perpetuated through law and legal discourse itself, making political opposition to them more likely. So too do they risk being distorted when they are translated into legal language, and thus, may come to be interpreted consistently with the worldview immanent in the law’s social imaginary, distorting their initial ‘design’. This is why the above observations are so important; our task as labour lawyers is not merely to critique society, nor to propose even structurally, or ontologically, informed arguments for reform. Rather, we need to think about what our understanding of capitalism and law implies when it comes to how we do this in practice, about how we might expose the structural limits to the changes for which we ourselves advocate, and the particular way in which these limits are perpetuated through, and manifest in, law. And in doing so, we must self-critically accept the ambiguous, and conflictual nature of our own normative projects, explaining their potential while nonetheless, simultaneously, exposing their limitations.

### Neg---K---Post-Work

#### We must seize power over work, not pursue freedom from work.

Jason Resnikoff 18, lecturer in the Department of History at Columbia University, "The Problem with Post-Work: Work and the Work Ethic as Units of Historical Analysis," International Labor and Working-Class History, no. 94, 10/01/2018, pp. 207–218, doi:10.1017/S0147547918000133

“Work may be a mere source of livelihood, or the most significant part of one’s inner life; it may be experienced as expiation, or as exuberant expression of self; as bounden duty, or as the development of man’s universal nature. Neither love nor hatred of work is inherent in man, or inherent in any given line of work. For work has no intrinsic meaning.”—C. Wright Mills1

“Work means everything to us,” James Livingston writes in the introduction to his recent book, No More Work: Why Full Employment Is A Bad Idea. The meaning of work, what Livingston calls the work ethic, is our problem. “And we’ve believed that, even if it sucks, a job gives meaning, purpose and structure to our everyday lives—at any rate, we’re pretty sure that it gets us out of bed, pays the bills, makes us feel responsible, and keeps us away from daytime TV.” The time for this mode of thinking, we learn, has passed. “These beliefs are no longer plausible,” Livingston says. “In fact, they’ve become ridiculous, because there’s not enough work to go around, and what there is of it won’t pay the bills.”2

This sums up much of what, in the decade since the 2008 Recession, has come to be known as “post-work” criticism. Adherents to this line of thought argue that freedom is not a good job, but instead a condition that exists beyond work. For most people, this argument goes, both waged and unpaid work under contemporary capitalism constitutes a species of servitude. Regardless of the formal political freedoms one might enjoy as a citizen of a modern democracy, the better part of the average working person’s day takes place within vertiginous hierarchies. In the words of Kathi Weeks in The Problem With Work: Feminism, Marxism, Antiwork Politics, and Postwork Imaginaries, perhaps the most learned and insightful of the post-work critics, the workplace “is the site of many of the most palpable and persistent relations of domination and subordination that people confront, even if these are not conventionally perceived as potentially alterable enough to be regarded as properly political matters.”3 We are not free at work, and we work too much. Calls for “full employment,” therefore, fail to address the problem of true liberation and the achievement of a democracy worthy of the name.

To that end, most post-work critics make the same basic demands: shorter hours and a universal basic income. In other words, freedom from work. In many ways, post-work is a return to a more militant vision of workplace politics. It recalls some of the most utopian and imaginative aspects of the labor movement. In its call for shorter hours, it picks up a demand that at one time motivated millions but which has not been taken up seriously in the United States since the end of the Second World War, where economic good governance has become indistinguishable from full employment, mass production, and mass consumption. In advocating for a guaranteed annual income, post-work brings to mind similar demands made by many different thinkers since the end of the nineteenth century, from Autonomist Marxists to Milton Friedman, Paul Lafargue to Bertrand Russell.4 For all these reasons, the post-work analysis is a welcome expansion of the current political imagination, often going so far as to invoke the utility of a frankly utopian political project, as Rutger Bregman does in the title of his recent book, Utopia For Realists: How We Can Build The Ideal World. Bregman’s approach is, in many ways, typical of recent postwork literature. It is polemical but scholarly, and it takes the form of an appeal to industrialized nations that they enact laws providing a universal basic income, shorter working hours, and open national borders.5

These positive policy recommendations, however, coexist in the literature with a worrying tendency stemming from the definition of the word “work,” and the analytical division made by many post-work critics between “work” and something else called “the work ethic,” or—borrowing from Max Weber —the “Protestant ethic.”6 These categories, themselves products of the development of industrial capitalism, are presumed by post-work critics to exist as agents of historical change that we might track through time. Post-work critics ask the old question, why do the oppressed not rebel against their oppressors?7 They answer that the oppressed suffer from an inappropriate set of beliefs; working people have invested “work” with the wrong meaning. Ideology— the work ethic—becomes, in this analysis, a ghost that although incorporeal remains an agent of historical change. Weeks calls this set of beliefs “a haunting,” an “ascetic ethos of work” that “lives on in the spirit of capitalism.”8 James Livingston refers to it as “slave morality,” and a “disease.”9 Rutger Bregman reaches back in time for the classic articulation of this idea, naming the problem as, simply, “false consciousness.”10

At its heart the post-work analysis subscribes to an essentialist definition of the word “work,” relying on a conceptual division between false necessity and true necessity, ideological and material, work ethic and work, mind and body, humanity and nature. It presumes the existence of a fundamental bedrock of human social activity that is immutable. Upon contact with this bedrock, ideology, politics, and contingency end. The authors presume that “work” has a fundamental, transhistorical meaning, which is best summed up as the activity of maintaining survival, a state of existence one can call bare life. Freedom and true human life begin, this argument runs, only once one has escaped bare life, mere nature. The argument comes down to the claim that our “work ethic,” the social meaning we give to the activity of meeting necessity, no longer matches the reality of “work,” which requires less human effort to meet the obligations of maintaining human existence.

In fact, there is no useful historical distinction to be made between work and the work ethic. They are one and the same. C. Wright Mills was right when he argued that work has no intrinsic meaning. Even something as seemingly immutable as the activity of meeting biological necessity is contingent, open to political and cultural negotiation, and thoroughly qualitative. The meaning of work, the contest over the definition of what is truly necessary activity, goes all the way to the bottom.11 It is a pointless task to try to divide necessity from meaning, to say when one is merely achieving necessity, and when one is dealing with social surplus. What might seem like a means to meeting an incontestable necessity is also a social bond and a negotiation within the collective.12 The definition of necessity, even what might appear as biological necessity, is political. It is historical; it changes over time. Rather than divide “true” necessity from false, historians would do better to see the contest over its definition as one of the central grounds of political contest, and therefore, historical change. Rather than rely on the “work”/“work ethic” split to explain history, history must explain this conceptual division.13

This review will consider several recent additions to the post-work discussion to show examples of thinkers who both subscribe to and avoid an analytical division between work and work ethic. While these authors do not make a single uniform argument, I have decided to look at them together in order to discuss certain general tendencies that run through the literature.

Livingston’s No More Work is something between a scholarly analysis and a political manifesto, and in seeking to articulate the post-work thesis as clearly and powerfully as possible, he also most clearly lays bear some of the argument’s central historical problems. He begins by providing a material basis for demanding the end of work. “We have lost our race with the machine,” he writes, “but in doing so we won our freedom from the iron grip of economic necessity.”14 In other words, the global industrial apparatus produces enough to provide for all people and produces it more or less automatically (or, hypothetically, could do so). Livingston is arguing that the survival of the species and the production of society can currently be accomplished without the participation of the vast majority of people, and—should society broadly distribute the fruits of industrial production—this eventuality would constitute liberation. Once we embrace the automatic achievement of “economic necessity,” he concludes, not only will people count themselves free from exploitation, but they will no longer need to take action to maintain their own biological survival.

Here, two different ideas of liberation collapse into one another. The first is liberation from exploitation by other human beings; the second is a kind of freedom from the demands of embodied, biological existence. The presumption is that, like capitalist exploitation, the labor of both the reproduction of society and biological survival are also activities of the unfree. This becomes evident in how Livingston collapses two definitions of “work” into one another. Calling on Karl Marx’s first volume of Capital, he tells us that “Marx was right” to claim, in Livingston’s words, that “the labor process, the metabolic exchange with Nature we call work, was transhistorical.” Still using Marx, Livingston then speaks of the importance of a somewhat more contingent species of work, “purposeful, social labor,” which one may consider the reproduction of society, culture, civilization—in other words, the contingent part of human social life, the political part, the aspect described through the discipline of history.15 When Livingston calls for “no more work,” one assumes he does not in fact want to abolish humanity’s “metabolic exchange with Nature.” But because he does not distinguish between these two conceptions of “work,” technically, that is precisely what he ends up calling for.

Explicit in Livingston’s argument is that a politics of liberation is now possible because the industrial mode of production has finally freed people from the necessity to maintain their own survival. In other words, while in theory the urgency of biological necessity has been reduced, the definition of social necessity lags behind because of the ideological mystification of the work ethic.

Frédéric Lordon’s Willing Slaves of Capital: Spinoza and Marx On Desire16 is especially helpful in understanding why some workers identify with jobs in which they are exploited. Rather than rely on the “work ethic,” or false consciousness as an explanation, Lordon uses the philosophy of Spinoza to argue that the “desire” workers feel is not mere confusion but a real feeling that originates in the immediate circumstances of both the workplace and capitalist society. Although he considers the possibility of freedom from all necessity,17 he prefers to focus on the creation of social conditions that would avoid the possibility that a person’s desire could be captured by another, and so exploited. For Lordon, the problem is not necessity; the problem is exploitation. The solution is “radical democracy,” an organizing principle he calls “recommune.” The principle of radical democracy, he writes, “applies universally to any enterprise conceived as the co-existence and convergence of powers, hence independently of its purpose. Specifically, there are no grounds for exempting the industrial production of goods from this constitutional form.” All participants would be “full partners.” Thus, Lordon says, “the very simple recommunist principle is that what affects everyone should be everyone’s thing.”18

Lordon offers a very useful summary of the “bare life” criticism of the commodification of labor.19 “Bare life,” the idea of an absolute minimum of human biological existence, is itself the product of the development of capitalism. Its origins lie in the commodification of labor. A classic description of this process is the account of the transmutation of peasants tied to the land, with their eviction from the means of survival through the enclosure of the commons, into wage earners. Although a modern-day wage worker may be materially far wealthier than a medieval serf, still through their insuperable connection to the means of production—the land—that serf’s social world was in a certain respect much more secure. While the community as a whole might live far closer to the edge of subsistence, individuals were not subjected to the daily precariousness of the possibility of suddenly suffering eviction from the source of life, what today we call unemployment. Likewise, although the social horizon of the serf was in theory dramatically more circumscribed than the freewheeling wage-worker navigating the labor market in search of a living, nor did the serf live with the daily possibility that they could suddenly fall out of society the way an unemployed wage worker in the early twenty-first century might. Lordon puts it well, calling “bare life” the “original truth about the employment relation: that it is a relation of dependence, a relation between agents in which one holds the conditions for the material reproduction of the other, and that this is the permanent backdrop and the immoveable foundation for anything that unfolds on top of it.”20

Industrialization, the apparatus that produces such magnificent plenty, required for its development the imposition of a daily threat of individual scarcity. It is not the same kind of scarcity that supposedly, according to Bregman, has oppressed the human species for all of history, until now. “For roughly 99% of the world’s history,” he writes, “99% of humanity was poor, hungry, dirty, afraid, stupid, sick, and ugly.”21 Here, humanity’s real enemy is and always has been, evidently, the natural world. Our embodied existence would seem to be the cause of all our woes. “Bare life” becomes the fundamental meaning of work under conditions of capitalism where the vast majority of people have no guaranteed access to life. Liberation would indeed mean escape from this state of constant fear. But scarcity itself is not the result of our embodied being, nor of the existence of any kind of social necessity. It is a quality of capitalism that reduces all questions of necessity from quality to mere quantity. In other words, the meaning of “scarcity” is not a constant over time. Feudal scarcity and industrial scarcity are qualitatively distinct.

A presumption of the fundamental “bare life” definition of work usually presents itself as a discussion of abundance and scarcity. We find this framing in Peter Frase’s Four Futures: Life After Capitalism. 22 (It must be said, Frase performs a service in this book by framing the future as undecided, presenting the possibilities of both utopia and dystopia. He shows the reader the utility of postwork thought in its invitation to see the future as yet still unresolved and, possibly, bringing with it a better world.)

The future faces two challenges, he claims. The first is “automation,” the problem of abundance, or “too much.” The other is global climate change, the problem of scarcity, “too little.”23 He writes of potential futures where necessary activity has been “fully automated”24 or “automated away.”25 Frase argues cogently that depending on who owns the machines, automation may either liberate the majority of humanity or, potentially, lead the rich, once free of the need for human workers, to simply abandon the poor. He also imagines the possibility of a more ideal outcome where “automation” has liberated human beings from Frase’s second definition of work, activity “necessary for the continued existence of our society,”26 liberation that would come in the form of “free time for all.”27

In Frase’s language, automation achieves the completion of activity necessary for “the continued existence of society”—something that is different from activity that is “inherently meaningful.” “It’s important to keep the lights on,” he writes, summarizing with approval Marx’s classic definition of freedom in the third volume of Capital as freedom from the realm of necessity, “and sometimes that takes work—but keeping the lights on is not what makes us human. It is merely a necessity that we can and must transcend if we are to be truly free. Freedom begins where work ends—the realm of freedom is after hours, on the weekend, on vacation, and not at work. And that remains true whether you work for a capitalist boss or a worker-owned cooperative. The space of work is still the realm of necessity and not of freedom.”28 “Keeping the lights on” alone might not make us human, but Frase’s categorical dismissal of the activity of meeting necessity as a non-human practice would seem to reaffirm the humanity/nature division that rules out any pressing biological need as subhuman or animal.

In this argument, the activity of answering economic necessity and the demands that come with embodied existence are essentially fit only for slaves. Any defense of “work” only reveals one’s unfortunate dedication to the mistaken “Protestant ethic.” But it would seem, from this narrative, that until the most recent of industrial innovations it was impossible for everyone even to hope to enjoy real, human freedom because the demands of biology had made slaves out of the vast majority of all people (incidentally this is not too different from the substance of Aristotle’s notorious defense of “natural slavery” in Politics). Freedom, in this analysis, is contingent on a certain kind of wealth, a glut of survival. Precisely how much food this is, how much medicine, how much shelter and from what, how much clothing, how much sleep, how much exercise—we are not told. But clearly it is objective and quantifiable; there can be “too much” or “too little.”

If freedom for some requires the slavery of others, luckily for post-work critics they have theoretical recourse to a new race of natural slaves—automation. “Automation” is a crucial element in the post-work criticism of Livingston, Frase, and Bregman. These authors address the mechanical abolition of human labor with different degrees of nuance. Livingston claims that we have “lost our race with the machine;”29 Bregman, more or less, agrees.30 Frase pays more attention to the struggle for the control of capital, depicting the character of “automation” as open to political negotiation. But even he chooses to assume in his futurist speculations “that technical change tends toward perfect automation.”31 “Automation” might seem to have an obvious definition—the replacement of human effort with machine action—but since the word was coined by managers of the Ford Motor Company in the immediate postwar period, its precise meaning has bedeviled engineers and critics alike. None of these postwork writers is too specific about what machines specifically account for automation, although computers and robots figure prominently. What technocrats have called “automation,” workers have often called “speed up”—the elimination of jobs by speeding up human workers through mechanical means. As one autoworker put it in 1960, “whatever Automation means to management, labor bureaucrat, or engineer, for the production worker it means a return to sweatshop conditions, increased speedup and gearing the man to the machine, instead of the machine to the man.”32 The reports of mid twentieth-century autoworkers would seem to complicate Livingston’s claim that in the postwar period “Automation was particularly effective in autos and steel.”33

Bregman is closer to the mark when he argues that what people call “automation” today places workers in industrialized nations in competition “with billions of working people across the world,” as well as “machines themselves.”34 Even in industrialized economies, changes to the labor process under the name of “automation” often make human labor invisible, rather than eliminating it, depriving it of value rather than substance. For example, “automated” check-out counters in stores still rely on human effort to function: in this case, the effort of the customer. “Automated” telephone switchboards still require human labor to navigate phone directories: the labor belonging to the caller. In both cases, human effort that once was recognized through the form of employment and remuneration now, from the company’s perspective, no longer exists because it no longer appears on their accounts.

Frase’s assumption that all technical change tends towards “perfect automation” reveals an analytical shortcoming of the work/work-ethic divide. This conception of automation only makes sense if one either believes that social necessity is a more-or-less set category, or that it is possible that every new social necessity as it arises will instantly be met by machine action. If one were instead to think of the activity of meeting social necessity as an aspect of politics under constant renegotiation—that is, as an aspect of history—the notion of forever banishing it from political consideration by relegating it to automatic machinery would reveal itself as a patent absurdity.35 The historical contest over the meaning of necessity and the best way to meet it are essentially political. They are the same contest.

In the past, others have called for the same reforms as Livingston, Frase, Bregman, and Weeks. Generally, the demand came out of the labor movement, and it occurred as a renegotiation of the meaning of work that was, simultaneously, a fight over the control of the material labor process. For example, beginning in the nineteenth century the shorter hours movement in the United States was not a work-abolition movement, but one aspect of a larger demand for workers’ control of their workplaces. In the interwar period, workers fought for shorter hours while also demanding higher wages, regular shifts, union recognition, the end of speed ups, and the eviction of Taylorism from the shop. It is hard to tell the story of the American labor movement without mentioning the fight for shorter hours—from the mid-nineteenth century textile mills of New England to the Haymarket demonstrations to the Uprising of the twenty thousand in 1909, workers organized around the promise of less work. The goal of the shorter hours movement, however, was not to degrade the meaning of work. Just the opposite, it was to make it more valuable. Workers wanted less work-time to fetch higher wages; they wanted to have a say over their working conditions—when, where, and what they did, and how they did it.36

Considering the demands workers like these made of their employers, one might conclude that, generally, they wanted to decrease their alienation from work, rather than perfect it. “Making it more valuable,” constituted a re-valorization, a redefinition of what the work meant, and this meaning included a negotiation over the material character of the labor process. Calling this the result of a mistaken ideology, a “slave morality,” confuses more than it clarifies.

To demonstrate this point, let us turn to a pivotal, historical moment for Livingston (and Bregman) and see how the work/work-ethic division explains its causality. Livingston points to the Nixon administration’s seemingly unexpected support of the Family Assistance Program, or FAP, a welfare reform that would have replaced the existing system with something very similar to a guaranteed annual income for poor families with children—that is, the guaranteed annual income that most post-work critics call for. Livingston explains that Nixon came to support a guaranteed annual income because, somehow, he had escaped the power of the work ethic. “That’s the big difference between then and now,” Livingston writes. Politicians today, “unlike the advocates of Nixon’s FAP,” believe in full employment. “More important,” he says, “they believe that work is self-evidently good for us.” Why do modern politicians fail where Nixon—of all people—succeeded? According to Livingston: “The short answer is the great romance of work.”37 But this actually explains very little. Why did the work ethic lose its power over politicians and then regain it? Nor would it explain why in promoting a guaranteed income as a welfare reform in the late 1960s and early 1970s, many women who were mothers and welfare recipients framed their demand in terms of what one might call the “work ethic,” as Johnnie Tillman—an organizer, welfare recipient, and mother— said: “for doing the work we are already doing—child raising and housekeeping.” Or as another organizer put it, “A guaranteed adequate income will recognize work that is not now paid for by society.” If the “Protestant ethic” is the historical causal factor in this story, then we need to explain how the same “bad” idea could somehow manage to cause some people to fight against the principle of a guaranteed income, and others to fight for it.38

Weeks’ The Problem With Work is at its strongest when discussing unpaid work. Grounding her discussion in the theoretical contributions of thinkers such as Selma James, Mariarosa Dalla Costa, and Silvia Federici, she explores the nuances of feminist demands for both the recognition of unpaid work and also the reformation of the character of those activities. Discussing the Wages for Housework movement of the 1970s, Weeks shows how a demand for a revalorization of socially necessary activity can become a means of changing its qualities.

Weeks is not entirely consistent in her definitions of work and work ethic. Still, her study is theoretically nuanced, and she comes to the conclusion that the meaning of work itself, what earlier she seems to call the work ethic, is in fact the problem under discussion. “While the term ‘work’ succeeds in registering the social dimensions of certain practices and thereby rendering them subject to political debate,” she writes, “what counts as work—particularly with regard to unwaged caring practices like parenting—would need to be continually reevaluated.”39 Rather than simple escape, she calls for meaningful and collective negotiation. This continuous reevaluation of the character of social necessity, rather than its calcification in a machine called “automation,” or a demand for the outright abolition of a fixed entity, allows for a definition of freedom that is not mutually exclusive from the possibility of a certain amount of socially necessary activity. And in theory, as Weeks recognizes, if people truly had a meaningful say over what constituted social necessity, they would most likely limit it in both time and space; they would put a frame around it; they would give themselves enough time to be independent of social necessity; they would grant one another a true right to life; and they would make social necessity meaningful on their own terms.

Perhaps the earliest use of the term “post-work” appeared twenty years ago in “The Post-Work Manifesto,” written by Stanley Aronowitz, Dawn Esposito, William DiFazio, and Margaret Yard.40 Unlike several of the more recent post-work critics, the authors of this document, like Weeks, did not call for the abolition of social necessity but its democratization, hoping to limit it in space and time—that is, redefine it. “We favor a universal public service in which all tasks are shared including those that are most unpleasant,” they wrote. If the activity of social necessity were shared, they argued, people would make sure it was not too onerous. Its demands would diminish. Many hands make light work and perhaps machines would make the work even lighter. “These are the requirements of public service in a world of participatory democracy and in which the individual has been liberated from work in a postwork world.”41

While Livingston claims that the time of the labor movement is over, that its advocates are “all unlikely prisoners—or is it guardians—of the Protestant work ethic,”42 these earlier advocates of post-work called for an alliance with labor and other social movements. Similar to the shorter hours movement of the turn of the twentieth century, “the struggle,” they said, “will have to be conducted on the shop floor, in local communities, and in legislatures at all levels.”43 This was a demand for seizing control and sharing both the power and the responsibility. It offered a clear program of cause and effect. It was grounded in history.