

REBUILDING WORKER VOICE IN TODAY'S ECONOMY

REPORT BY **KATE ANDRIAS AND BRISHEN ROGERS**
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ABSTRACT

The unionization rate in the United States has declined precipitously since the early 1980s, and the consequences are clear: Workers have few rights on the job, corporations and wealthy individuals enjoy outsized influence in our politics, economic inequality has skyrocketed, and economic mobility has diminished. There are many causes for the decline in unionization, but an outdated and dysfunctional labor law system is chief among them. In this paper, we argue that in order to reverse these trends—and therefore to encourage a more free, equal, and democratic economy and society—fundamental labor law reform is essential.

In particular, we argue that labor law should be reformed in four ways: (1) to protect all workers, in all segments of the economy; (2) to make it far easier for workers to obtain workplace representation; (3) to provide for sectoral-level bargaining; and (4) to better protect workers' rights to strike, picket, and engage in other concerted action. For each area of reform, we provide a menu of policy options rather than a specific legislative proposal. This is because we do not believe that there is one right approach to labor law reform. We do nevertheless argue that reform efforts should be guided by a single core principle: **Our labor law must guarantee *all* workers a voice in their workplaces, in the broader economy, and in our democracy.**



Introduction

The precipitous decline of labor unions over the last few decades has had devastating consequences for American workers. Precarious work—work without good pay, steady hours, or decent opportunities for advancement—defines life for most Americans. Wage increases no longer track productivity gains, allowing managers and investors to capture a far greater share of corporate profits than they did in the mid-20th century. Inequality is at record levels, nearly as high as it was during the Gilded Age.

Lacking strong unions, workers also have declining power in the political arena. Numerous studies demonstrate that elected and administrative officials at every level of government are disproportionately responsive to economic elites and corporations. Austerity policies are one consequence: At both the federal and state level, with a few notable exceptions, programs that benefit ordinary Americans have been starved of funding, leaving public schools short on teachers and infrastructure crumbling. Meanwhile, state legislatures and the federal judiciary have accelerated their assault on labor through right-to-work laws, attacks on bargaining rights, and limitations on concerted legal action.

But the picture is not all bleak. Demands for fundamental, structural change in the American political economy are mounting. Problems of inequality are capturing greater attention from progressive political leaders, as well as from new constituencies, like mainstream economists and leaders of the technology sector. More important, perhaps, workers are organizing in significant numbers in “blue” and “red” states alike, signaling that they have had enough with the status quo. The recent teacher strikes in West Virginia, Arizona, Colorado, and Oklahoma have taken direct aim at austerity politics, demanding not just fair wages and good benefits but also adequate education funding and a more progressive tax code. Along with traditional unions, newer worker organizations—such as the Fight for \$15, Restaurant Opportunities Center, Domestic Worker Alliance, and National Guestworkers Alliance—have successfully raised minimum wages in cities and states, won critical reforms in local and state workplace law, and brought widespread public attention to low-wage workers’ struggles. Meanwhile, graduate students, university lecturers, journalists, and airline workers have all had recent successes in joining unions.

These growing movements are inspiring and promising. But they also highlight the limits of *existing* labor law to protect workers’ rights to organize, much less to ensure workers a voice in our political economy. Domestic workers, farmworkers, and public sector workers in many states have no collective bargaining rights at all, nor do they have a legally protected right to strike. And even workers who *do* have collective bargaining rights face tremendous obstacles to winning a union. Indeed, because of the many weaknesses of labor law, unions



have been unable to organize many workers within today’s most important economic sectors, including retail, fast food, the “gig economy,” and hospitality—despite the fact that most workers report viewing unions favorably and would like to change their working conditions. The result is a political economy that is both undemocratic and deeply unequal, with an American middle class that is shrinking rapidly.

This all underscores the need for fundamental labor law reform...but what might that reform look like? While both of us have written about this topic in the past, we do not think there is a single right answer. But we do believe reform efforts should be guided by a core principle: **Our labor law must guarantee all workers a voice in their workplaces, in the broader economy, and in our democracy.** Only by empowering workers at all three levels can democracy, freedom, and a measure of equality in both the workplace and the political economy be achieved.

To that end, at least four core changes to labor law are necessary:

1. Labor law should provide rights to all workers, in all economic sectors.

Current labor law does not cover or fails to protect far too many workers. This includes whole sectors of the economy, such as domestic and agricultural work, as well as workers classified as independent contractors, low-level supervisors, and employees of many religious institutions. In practice, employees of subcontractors, temp agencies, and franchisees are also effectively unprotected. Extending the basic protections of labor law to all workers is not just important in its own right, but is also a necessary prerequisite to more substantial reforms.

Several specific changes to existing law are warranted. For example, domestic and agricultural workers should be granted the same fundamental labor rights as other workers. Current statutory definitions of employment should be expanded to ensure that firms owe duties to workers over whom they hold economic power, including many who are now classified as independent contractors. And the test for “joint employment” should be expanded so that it takes greater account of power relationships in modern supply chains.

2. Labor law should protect and promote workplace unionization.

Our labor law makes it far too difficult for workers to organize unions in their own workplaces and firms, leaving the vast majority with no collective voice at work. Employers have countless lawful tools to resist unionization, such as requiring employees to attend anti-union meetings during work hours while excluding union representatives from their premises. When employers do violate the law, moreover, the National Labor Relations Board has weak remedial powers and employers are subject to few penalties.



Scholars and advocates have explored these problems for decades now. The fact that workplace organizing is a matter of longstanding concern does not, however, make it any less essential for rebuilding a fair and inclusive economy and democracy. Historically and today, robust workplace organizations have been the foundation for sectoral bargaining systems—and for worker voice in the broader society.

Some of the solutions here are straightforward. To provide workers a real voice at work, labor law must not allow employers' property rights to outweigh workers' fundamental rights to join a union. Labor law should require employers to provide unions equal access to workers, should enable workers to unionize without an election if a majority of them has demonstrated its support through other board-verified mechanisms, and should levy greater penalties on employers who violate the law. Policymakers should also consider broader reforms to permit minority or non-exclusive unions, implement default unionism and/or automatic elections, or require mandatory workplace committees.

3. Labor law should encourage sectoral-level bargaining.

Unlike many other industrialized nations, our labor law channels bargaining to the firm level or even the enterprise level—not to the level of industrial sectors. Sectoral bargaining is far more effective than enterprise bargaining at raising wages and reducing inequality, particularly when workers are spread out among many small workplaces. Sectoral bargaining can also greatly enhance workers' voice in the political economy. Any system of sectoral bargaining should nevertheless supplement, rather than replace, our existing system of worksite organization and representation.

Congress could encourage sectoral bargaining in two distinct ways. First, it could empower the Department of Labor (DOL) to set wages and other minimum terms at the sectoral level following consultation with workers and employers. Second, it could empower worker organizations to organize, collectively bargain, and strike at the sectoral level, expanding on rights that exist but are difficult to exercise under the current National Labor Relations Act.

4. Labor law should protect workers' fundamental rights to strike, picket, and engage in other concerted action.

Our labor law does not effectively protect workers' fundamental rights to picket and strike, or to engage in other forms of free expression and protest. For example, employers can hire permanent replacements when workers engage in an economic strike; the nature and timing of picketing is severely limited; and workers are restricted from engaging in cross-employer concerted action, leaving worker organizations with fewer rights of expression than other civil society groups.



The law must be reformed so that it actually fulfills its promise to protect concerted (i.e., collective) action. To that end, Congress should make clear that employers are allowed to hire only temporary replacements; it should repeal the broad restrictions on secondary boycotts; and it should expand protections for peaceful picketing, strikes, and other forms of collective action. It should also make clear that the right to engage in concerted action cannot be waived by mandatory individual arbitration agreements.

* * *

We discuss these issues in more detail below, showing how each relates to the broader goals of ensuring workers a voice at work, in the economy, and in our democracy. Rather than offering a legislative blueprint, we outline a range of possible reform ideas. Some of our proposals would require comprehensive statutory change, others would require more technical amendments to the National Labor Relations Act (NLRA or “the Act”), and still others could be accomplished by the National Labor Relations Board (NLRB or “the Board”) or the courts within the existing statutory framework.

To be sure, it is unlikely that this vision could be achieved in the near term. Historically, progressive reform in labor law has occurred only when workers organize in large numbers and insist on change, not least because many in the business community reject the very notion of organized worker voice and will strongly resist progressive reforms. Moreover, counterarguments exist to many of the proposals we describe—and they, too, deserve consideration, more than can be offered in the space of this short report. At the same time, we believe that confining discussions to immediately achievable reforms, or to those issues on which consensus is certain, would be a mistake. As progressive lawmakers and organizations consider how to ensure a more fair and equal political economy, we believe it is crucial to think broadly and systematically about fundamental labor law reform.

An “Overview” section, below, further elaborates and defends our core principle and its relationship to fundamental values of democracy, freedom, and equality. Parts 1 through 4 then discuss the four specific ways in which our labor law falls short and outline possible reforms.



OVERVIEW: WORKER VOICE— DEMOCRACY, FREEDOM, AND EQUALITY

The National Labor Relations Act of 1935 aimed to do a few things: to protect workers’ rights to unionize, to grant them more bargaining power against employers, and to encourage unionization and collective bargaining as a means of limiting ruinous industrial conflict.¹ But both the labor movement and the Act’s drafters had much broader ambitions. In pressing for the NLRA, unionists sought to advance fundamental rights promised by the Constitution—they sought to guarantee “effective freedom” and equality for workers.² Senator Robert Wagner, the Act’s author, similarly argued that “the struggle for a voice in industry, through the process of collective bargaining, is at the heart of the struggle for the preservation of political as well as economic democracy in America.”³ Unionists and progressive legislators recognized that only with collective empowerment could democracy, freedom, and a measure of equality in both the enterprise and in the polity be achieved.⁴ Their point still holds true, and it is reflected in the core principle we offer: *that our labor law must grant all workers a voice in their workplaces, in the broader economy, and in our democracy.*

Worker voice is important for several reasons. Like democracy itself, worker voice is valuable for its own sake. The decisions that affect workers’ lives take place at three levels—in the workplace or firm, in the economy, and within government—so workers need and deserve a voice in all three of those settings. Worker voice is also important because of its social effects. For example, worker voice can encourage a more productive and efficient workforce and more harmonious relationships between workers and management.⁵ Most importantly for our purposes, worker voice encourages economic and political equality.

From the late 1930s through the late 1960s, our labor law did a reasonably good job of protecting worker voice at all three levels, at least in the manufacturing sectors of the economy. When tens of thousands of workers labored alongside one another in a single factory and could shut down that factory through a strike, they could unionize and exert power under the NLRA system. Plus, when a small handful of unionized companies

¹ See Preamble to the National Labor Relations Act, 29 U.S.C. § 151 (2018).

² See James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941 (1997).

³ Robert F. Wagner, *The Ideal Industrial State—As Wagner Sees It*, N.Y. TIMES MAG. (May 9, 1937). While Senator Wagner’s immediate concern was fascist threat, his vision about the relationship between workplace democracy and political democracy was far broader. See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379 (1993).

⁴ See Barenberg, *supra* note 3.

⁵ E.g., RICHARD B. FREEMAN AND JAMES L. MEDOFF, *WHAT DO UNIONS DO?* (1984).



dominated industrial sectors—as the “Big Three” (Ford, General Motors, and Chrysler) did in automobile production—unions were able to set basic terms at the sectoral level. As a result, workers shared in productivity gains and kept executive compensation in check. The unions that resulted became enormously influential in the political sphere. There, they acted both to set “rules of the game” for employment, such as wage and hour and workplace safety laws, and to establish and defend public policies that benefitted the working- and middle-class more broadly, such as high-quality public education, social services, housing, and health care.

To be clear, this industrial relations system was far from perfect. Among other weaknesses, it excluded important sectors of the economy populated largely by women and people of color. But without a doubt the rise of unions led to greater economic equality and a more open opportunity structure for all Americans. Conversely, the decline of unions has led to less economic equality and less social mobility.⁶ The decline of unions has also contributed to our unequal political system: Numerous studies today illustrate that policymakers are disproportionately responsive to economic elites.⁷

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Unions’ decline can be explained in part by the steady erosion of the NLRA’s worker protections over the years. In the early years of the Act, companies secured favorable rulings from the courts, as well as a major revision to the statute in 1947 that substantially limited workers’ power.⁸ Ever since, organized business interests have blocked worker-friendly reforms. Moreover, in numerous important disputes about the meaning of the Act, employers convinced the Board and courts to rule in their favor and to limit unions’ and workers’ power.

⁶ JAKE ROSENFELD, WHAT UNIONS NO LONGER DO (2014); see also Henry S. Farber, Daniel Herbst, Ilyana Kuziemko & Suresh Naidu, *Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data*. NBER Working Paper No. 24587 (May 2018) (showing that African Americans benefitted disproportionately from higher unionization rates from the early 1940s until the 1970s).

⁷ See, e.g., Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 POLITICS & SOCIETY 152 (2010); LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 2, 285 (2008); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 79-81, 157-58 (2012); ROSENFELD, *supra* note 6, at 170-81; KAY LEHMAN SCHLOZMAN ET AL., UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY 69-95 (2012); Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 J. CONST. L. 419, 436-56 (2015).

⁸ Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 141 (2018) (amending the National Labor Relations Act of 1935).



At the same time, companies restructured to reduce union power and worker wages. They moved operations to southern states and overseas, leaving unionized workers to compete with low-wage, non-union workers in a race to the bottom. Companies also shed unionized jobs to non-union subcontractors, and reorganized their operations in ways that allowed them to avoid NLRA duties.⁹ Modern production is characterized by global supply chains, multiple levels of contracting, and widespread use of independent contractors, franchise relationships, and other non-traditional and fissured forms of employment.¹⁰ As a result, workers' immediate employers may have little or no power to set their wages. In addition, many of today's most vulnerable workers are not in large factories but in smaller or scattered workplaces; some, such as delivery and ride-share drivers or home care providers, work alone and rarely if ever meet their coworkers. This makes organizing and collective action extraordinarily difficult.

Against this background, labor law today falls short in at least four critical ways.

First, labor law denies coverage or effective coverage to far too many workers. It excludes independent contractors, who putatively make up much of the “gig” economy, as well as whole sectors of the economy like domestic and agricultural work—sectors constituted in large part by women and people of color.¹¹ It fails to protect even low-level supervisors, and therefore excludes many professional employees, who make up a large portion of today's workforce. It excludes public sector workers, who rely on state-level protections that vary considerably, and it grants limited remedies to immigrant workers. The Act also has historically been read to impose obligations on employers only with respect to their traditional employees, allowing businesses to evade duties to other workers over whom they exercise power. And under the Supreme Court's recent decision in *Epic Systems*, employers can also deny non-union workers the right to engage in concerted legal action, by forcing them to sign mandatory arbitration agreements with class action waivers.¹² The result is that many of today's most vulnerable workers are either formally excluded from the NLRA or have no real rights under it.

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⁹ On the relationship between labor law and economic restructuring, see, e.g., Kate Andrias, *The New Labor Law*, 126 YALE L. J. 2, 25-27 (2016); KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 290 (2004). On capital flight, see, e.g., JAMES C. COBB, THE SELLING OF THE SOUTH: THE SOUTHERN CRUSADE FOR INDUSTRIAL DEVELOPMENT, 1936-1990 (1993); JEFFERSON COWIE, CAPITAL MOVES: RCA'S SEVENTY-YEAR QUEST FOR CHEAP LABOR (1999).

¹⁰ DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 10 (2014).

¹¹ National Labor Relations Act § 2(3), 29 U.S.C. § 152(3).

¹² *Epic Systems Corp. v. Lewis*, 584 U.S. ___ (2018).



Second, as long discussed by labor experts, unionization is unduly difficult under current law. The default rule in the United States is no union and employment-at-will, meaning workers have no collective voice at work and can be fired for any reason or no reason at all (save for a few prohibited grounds, like discrimination on the basis of a protected characteristic). If and when workers begin to organize, employers have numerous tools at their disposal to resist unionization. They can tell their employees that unionization will harm the company; require workers to listen to anti-union speeches; exclude union organizers from the worksite; and close down their businesses following unionization—all without running afoul of the law. What’s worse, when employers do violate the law—for example, by threatening or firing workers who seek to unionize—the NLRB’s remedies are quite weak. As a result, organizing a union is extraordinarily hard, and most workers have no collective representation at all.

Third, unlike most democratic, industrialized nations, U.S. labor law fails to provide for sectoral bargaining—i.e., U.S. law fails to enable unions to negotiate over basic terms of employment at the industrial or sectoral level. Instead, U.S. law channels bargaining to the enterprise level.¹³ While enterprise bargaining has always been problematic, it is especially so following the economic transformations of the last few decades, which have left many workers in small worksites rather than large factories, and which have encouraged intense product market competition in many sectors. The result is that even unionized workers in the United States today are frequently atomized and weak, undermining their voice at the workplace and denying them much voice at all in the economy or political system.

Finally, the law on worker expression and collective action fails to effectively protect worker voice at every level. Workers face severe limitations on the right to strike even against their immediate employers. Plus, since the Taft-Hartley amendments of 1947, the law has significantly limited the ability of employees to engage in cross-employer industrial action and even to engage in action against firms with power over their immediate employers. Also since Taft-Hartley, workers have very limited rights to take class-wide collective action and collective action around political or legislative issues.

In short, the existing system of labor law fails to give workers a voice at work, in the economy, or in our democracy. In our view, remedying these weaknesses of labor law should be a top priority for progressive lawmakers and organizations. In particular, progressives should push for a new and expansive system of sectoral bargaining, as well as reforms that guarantee all workers real rights to unionize, to strike, and to take other concerted action.

¹³ See Andrias, *supra* note 9; Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1397 (1971); Joel Rogers, *Divide and Conquer: Further “Reflections on the Distinctive Character of American Labor Relations,”* 1990 WIS. L. REV. 1, 1 (1990).



Such an effort would not just benefit newly unionized workers; it would also strengthen the progressive movement. With strong worker organizations as institutional partners, progressives would be far better positioned to pass ambitious social programs and reforms, including universal pre-K and child care, Medicare for all, progressive tax and fiscal policy, and even “breakthrough” reforms, such as a federal job guarantee¹⁴ or steps toward a universal basic income.¹⁵ Unions may also be able to counteract some of the harms associated with employer monopsony, which has become an acute concern of progressives.¹⁶ Rebuilding a more fair and equal political economy will be a long-term project, with many components. But fundamental labor law reform must be central to that effort.

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Before moving into our analysis and proposals, we should mention an important cross-cutting issue: the scope of labor law preemption. Many of the potential reforms outlined below may be easier to design and implement at the state level, but states’ powers to encourage private sector organizing and collective bargaining are extremely limited.¹⁷ We are hesitant to endorse wholesale repeal of existing preemption doctrine because of the risk that individual states will undermine rather than bolster workers’ rights. Nevertheless, we believe that Congress should consider enabling state reforms that increase workers’ rights to organize, bargain, and engage in concerted activity—but not state reforms that undermine such rights. How precisely to draft such statutory language is beyond the scope of this paper.¹⁸

¹⁴ MARK PAUL, WILLIAM DARITY, JR., AND DARRICK HAMILTON, THE FEDERAL JOB GUARANTEE – A POLICY TO ACHIEVE PERMANENT FULL EMPLOYMENT, CENTER ON BUDGET AND POLICY PRIORITIES (Mar. 9, 2018).

¹⁵ E.g. ANDREW STERN (WITH LEE KRAVITZ), RAISING THE FLOOR: HOW A UNIVERSAL BASIC INCOME CAN RENEW OUR DEMOCRACY AND REBUILD THE AMERICAN DREAM (2016); CHRIS HUGHES, FAIR SHOT: RETHINKING INEQUALITY AND HOW WE EARN (2018).

¹⁶ E.g., MARSHALL STEINBAUM, A MISSING LINK: THE ROLE OF ANTITRUST LAW IN RECTIFYING EMPLOYER POWER IN OUR HIGH-PROFIT, LOW-WAGE ECONOMY, ROOSEVELT INSTITUTE WHITE PAPER (Apr. 16, 2018).

¹⁷ Labor preemption comes in three basic forms: “Garmon” preemption of state regulations of conduct protected or prohibited under the NLRA, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); “Machinists” preemption of state efforts to regulate conduct that Congress left unregulated in the NLRA, *Lodge 76, Int’l Ass’n of Machinists v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132 (1976); and Section 301 preemption of state law claims that cannot be resolved without interpreting a collective bargaining agreement, see *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), 29 U.S.C. § 185(a) (2018) (codifying Section 301 of the Labor Management Relations Act of 1947).

¹⁸ At a minimum, though, Congress should repeal the existing statutory provision that allows states to weaken unions by mandating open shops. See 29 U.S.C. § 164(b) (2018).



SECTION 1

PROVIDE RIGHTS TO ALL WORKERS, IN ALL SECTORS OF THE ECONOMY

Tens of millions of workers in the United States are entirely excluded from labor law's protections. Some of these exclusions date to the original NLRA, while others were added in subsequent years. Yet, whatever their origin, the function of the exclusions is to deny such workers a federally protected right to collective voice at work and in the political economy.

Agricultural and domestic work. Like many other New Deal era statutes, the 1935 Wagner Act represented a compromise with Jim Crow and its system of legally sanctioned racial hierarchy.¹⁹ The Act thus failed to protect what were then predominantly African American occupations: agricultural work and domestic work. Today, these occupations remain low-wage and populated by vulnerable workers, frequently women, immigrants, and people of color. The scope of the exclusion is significant: More than one million agricultural workers and two million domestic workers lack protection under the NLRA, as well as under most other federal employment law.²⁰ In some jurisdictions, states have stepped in to protect excluded workers, though many worker advocates feel those protections are far too weak, and farmworkers remain one of the most economically disadvantaged groups.²¹ Indeed, agricultural workers in some areas report that corporal punishment, violence, and even forced labor remain common.²² Domestic workers often describe similar abuses. Innovative organizing by the National Domestic Workers Alliance and other domestic worker organizations has resulted in some improvements in conditions, as well as law reform in some states. But domestic workers remain some of the most vulnerable and exploited workers in the country.²³

“Supervisors” and “managers.” In 1947, Congress also added supervisors to the list of

¹⁹ IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* (2013); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 76-79 (1999).

²⁰ 29 U.S.C. § 152(3) (2018). See HEIDI SHIERHOLZ, ECON. POLICY INST., *LOW WAGES AND SCANT BENEFITS LEAVE MANY IN-HOME WORKERS UNABLE TO MAKE ENDS MEET 4* (Nov. 25, 2013), <https://www.epi.org/files/2013/bp369-in-home-workers-shierholz.pdf>.

²¹ California and Arizona, for example, have created labor boards to handle unfair labor practices of farmworkers. But farmworker union organizers report that many of the problems that plague the NLRB system, such as employer threats, discriminatory discharges, years of delay, and weak remedies, also afflict California's Agricultural Labor Relations Act and Agricultural Labor Relations Board under state law. Worse, observers conclude that the Arizona law openly favors growers. See LANCE COMPA, HUMAN RIGHTS WATCH, *UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS* 234 (2004).

²² See Coalition of Immokalee Workers, *Anti-Slavery Program* (last visited May 24, 2018), <http://ciw-online.org/slavery/>.

²³ LINDA BURNHAM & NIK THEODORE, NATIONAL DOMESTIC WORKERS ALLIANCE, *HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC WORK* (2012), .



exclusions in the NLRA.²⁴ The Supreme Court subsequently made clear that “managers” were excluded as well.²⁵ Yet, while an exclusion for individuals with real supervisory and managerial power may be defensible, the exclusions in practice have been extended to include workers who do not manage or supervise in the common-sense meaning of those terms, including many professional workers whom the NLRA expressly protects. For example, although university professors confront problems with pay, benefits, workload, and other working conditions and rarely engage in core managerial functions of a university, most of them lack any protection under the NLRA, at least as the Board and Court have traditionally applied the law.²⁶ Similarly, many nurses are now deemed supervisors because they assign tasks to nursing assistants. Employers are thus able to structure work assignments in ways that remove workers from the protection of the Act, without giving those workers any real power over business decisions.²⁷

Students, employees of religious institutions, and immigrant workers. Employers have, at least during certain time periods, successfully convinced the Board to exempt from coverage graduate-student teachers, despite the absence of statutory basis for such exclusions. Under these rulings, thousands of graduate students who teach and research in exchange for compensation from universities have been denied basic labor rights. The Supreme Court has also denied protection to employees of religious institutions, even those whose work has little relation to the religious mission of their institutions.²⁸ And it has denied irregular immigrant workers certain critical remedies under the law, even while recognizing they are covered by the law’s protections.²⁹

Public employees. Another group of workers frequently denied labor rights is public employees. Though public sector workers are covered by most federal antidiscrimination and wage laws, they are exempt from the NLRA. Beginning in the 1950s and 60s, numerous U.S. states enacted their own public employee labor law systems, giving public sector employees the right to bargain over terms and conditions of employment.³⁰ More recently, several states restructured their homecare programs so that home health aides would be jointly employed by the state and individual recipients and would have the right to organize and bargain.³¹ But others rejected the notion of labor rights and prohibited collective

²⁴ NLRA §§ 2(3), 2(11).

²⁵ NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

²⁶ See NLRB v. Yeshiva Univ., 444 U.S. 672 (1980); Compa, *supra* note 21, at 30. *But see* Pacific Lutheran University, 361 NLRB Nov. 157 (2014) (committing to placing more weight on faculty role in managerial decisions that affect university as a whole before deeming them managers).

²⁷ NLRB v. Ky. River Cmty. Care Inc., 532 U.S. 706 (2001); NLRB v. Healthcare & Ret. Corp., 511 U.S. 571 (1994); Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006).

²⁸ NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979). This report does not address sovereign Indian nations, which are outside of the NLRB’s jurisdiction. NLRA § 2(2).

²⁹ Hoffman Plastics Compounds v. NLRB, 535 U.S. 137 (2002).

³⁰ See JOSEPH SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900-1962 (2017); MILLA SANES & JOHN SCHMITT, CTR. FOR ECON. & POLICY RESEARCH, REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES (2014), <http://cepr.net/documents/state-public-cb-2014-03.pdf>.



bargaining for all public sector workers. Moreover, in the last few years, several states that once permitted public sector bargaining—including Wisconsin, Indiana, and Michigan—have eliminated many of the rights previously conveyed to public employees. Meanwhile, most states prohibit strikes by public sector workers.³² Furthermore, while federal government employees are allowed to form unions, they are denied the right to bargain collectively over salaries and benefits and are prohibited from striking.

Finally, in a sweeping decision that overturned decades of precedent, the Supreme Court recently dealt a further blow to public sector workers. In *Janus v. AFSCME*, the Court held that even states that would like to have strong unions among their public sector workers are prohibited from requiring non-members who are covered by a collective bargaining agreement to pay their fair share of administering it.³³

Independent contractors. In the 1947 Taft-Hartley Act, Congress abrogated prior rulings by the Board and the Supreme Court that had embraced the right of some independent contractors to organize. That is, the Court had affirmed the importance of labor rights for workers whose employers classified them as independent contractors, but whose “economic facts” functionally rendered them workers.³⁴ According to the Board and Court in the early cases, the definition of “employee” under the NLRA should be read broadly to achieve the statute’s purposes of protecting workers’ right to organize and equalizing bargaining power. Employers objected, and in response, Congress amended the law to deny protection to workers who meet the common law definition of independent contractor.³⁵ Over time, employers increasingly exploited that exemption.³⁶ Public attention has focused on the millions of Americans who make a living by stringing together part-time or one-time “gigs” in the “on-demand” or “platform economy.”³⁷ But independent contracting is common outside the platform economy as well: One recent study estimates that as many as 30 percent of employers across industries misclassify some employees as independent contractors.³⁸

In addition to being excluded from labor law, independent contractors frequently have no statutory rights to minimum wages, overtime pay, compensation for injuries sustained on the job, unemployment insurance, or protection against discrimination. Critically, independent contractors are not only excluded from labor law’s protections, they are also

³¹ See EILEEN BORIS & JENNIFER KLEIN, *CARING FOR AMERICA: HOME HEALTH WORKERS IN THE SHADOW OF THE WELFARE STATE* (2012); *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (Kagan, J., dissenting).

³² Sanes & Schmitt, *supra* note 30 (collecting statutes).

³³ *Janus v. AFSCME*, ___ S.Ct. ___ (2018).

³⁴ *NLRB v. Hearst Publ’ns, Inc.* 322 U.S. 111 (1944).

³⁵ NLRA § 2(3).

³⁶ Andrias, *supra* note 9, at 22-24.

³⁷ REBECCA SMITH & SARAH LEBERSTEIN, NAT’L EMP’T LAW PROJECT, *RIGHTS ON DEMAND: ENSURING WORKPLACE STANDARDS AND WORKER SECURITY IN THE ON-DEMAND ECONOMY* (2015), .

³⁸ *Id.* at 3.



widely understood to be prohibited by antitrust law from organizing.³⁹ Indeed, recent state laws that enable putative independent contractors like ride-share drivers to organize have been challenged as violating federal antitrust law.⁴⁰

Employees of subcontractors, temporary agencies, and franchisees. Finally, many employees are covered under the Act but lack effective rights to unionize because their employer has little effective power over their working conditions. Economist and former Department of Labor (DOL) official David Weil has shown that millions of employees today are in such “fissured” work arrangements.⁴¹ One important form of fissuring is *subcontracting*, which occurs when companies hire labor through temporary agencies or contractors. Though the agency or contractor legally employs such workers, user firms often have more power to set their working conditions. Another is *franchising*, in which franchisors lease their intellectual property or brands to independently owned business in fast food, retail, and other sectors. Again, franchisors may hold substantial power over working conditions, but they disclaim any legal responsibilities toward franchisees’ workers. Franchising exemplifies the problems posed by enterprise bargaining, since each franchise has to be unionized and bargained with one-by-one unless joint-employment can be demonstrated; yet crucial elements of workers’ experience are out of the control of the franchisees with whom they would bargain. Like independent contracting, fissuring is not new, but it appears to be a growing proportion of work relationships, particularly in the low-wage labor market.⁴²

³⁹ See, e.g., Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for “Dependent Contractors,”* 26 BERKELEY J. EMP. & LAB. L. 143, 168-74 (2005); Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 977-79 (2016).

⁴⁰ The Ninth Circuit recently concluded that a Seattle ordinance was preempted by federal antitrust law, but the court explained how the state of Washington could enable a similar statute that would survive review. See U.S. Chamber of Commerce v. City of Seattle, No. 17-35640, 2018 WL 2169057 (9th Cir. May 11, 2018) (holding that Seattle Ordinance 124968, which provided for collective bargaining and rate setting for drivers of hired cars, including Uber cars, was preempted by the Sherman Act because the State of Washington had not clearly articulated and affirmatively expressed a state policy authorizing private parties to price-fix the fees that for-hire drivers pay to companies like Uber or Lyft in exchange for ride-referral services, nor did the statute meet the active-supervision requirement for state-action immunity); see also Marshall I. Steinbaum, *Antitrust Implications of Labor Platforms*, CPI ANTITRUST CHRONICLE (May 2018), <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/05/CPI-Steinbaum.pdf>; Kate Andrias, *Social Bargaining in States and Cities: Toward a More Egalitarian and Democratic Workplace Law*, HARV. L. & POL’Y REV. ONLINE (2018), <http://harvardlpr.com/wp-content/uploads/2018/01/Andrias-Social.pdf>.

⁴¹ See generally WEIL, *supra* note 10; BRISHEN ROGERS, AM. CONSTITUTIONAL SOC’Y, REDEFINING EMPLOYMENT FOR THE MODERN ECONOMY (2016), https://www.acslaw.org/sites/default/files/Redefining_Employment_for_the_Modern_Economy.pdf. The misclassification of employees as independent contractors discussed immediately above is one form of fissuring, since legally speaking, an independent contractor is an independent business. Relatedly, companies sometimes require that individual workers form sole proprietorships or even franchises, such that they have no legal employer. David Weil, *Lots of Employees Get Misclassified as Independent Contractors. Here’s Why It Matters*, HARV. BUS. REV. (July 5, 2017), <https://hbr.org/2017/07/lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters>.

⁴² The latest Bureau of Labor Statistics (BLS) data on contingent and alternative employment arrangements actually found a decline in independent contracting compared to 2005. Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements*, <https://www.bls.gov/news.release/conemp.toc.htm> (last visited June 20, 2018). But the survey asked only about individuals’ main source of income, and therefore it did not account for workers who work as independent contractors to earn extra money on the side. The BLS survey also did not necessarily capture the full extent of subcontracted work due to methodological difficulties. Annette Bernhardt, *Making Sense of the New Government Data on Contingent Work*, NOTEWORTHY – THE JOURNAL BLOG, (June 10, 2018), at <https://blog.usejournal.com/making-sense-of-the-new-government-data-on-contingent-work-97209bb0c615>.



SOLUTIONS

Basic labor law protections for all workers are an essential foundation for more ambitious reforms. In short, labor law needs to protect all workers. For some excluded workers, the solution is straightforward. Domestic workers and agricultural workers should be granted the same fundamental labor rights as other workers. Just as autoworkers have the right to collectively bargain over their wages, benefits, and working conditions, or to engage in concerted action to improve those conditions, so too should domestic workers and farmworkers.⁴³ Congress should also make clear that irregular immigrants are entitled to full legal remedies, and that the term “employee” should be interpreted broadly, encompassing low-level or occasional supervisors, professionals who have input into managerial decisions but who are not primarily managers, and workers who are simultaneously students.

Basic labor law protections for all workers are an essential foundation for more ambitious reforms.

Public sector workers should also be guaranteed the right to form unions and to engage in collective bargaining. The best way to achieve such protections would be through state law reform, as federal regulation of state and local government workers implicates a host of constitutional and federalism issues. But absent state reform, it is worth considering whether federal law ought to protect public sector workers, much as it does with respect to wage and hour and antidiscrimination law, especially when those workers are not performing traditional state functions. For example, health care workers, childcare workers, and other social service providers mostly perform the same tasks whether they are employed in the public or the private sector, so there are compelling arguments that states should not be able to deny them collective bargaining rights.

Ensuring voice to independent contractors and other fissured workers is a more complex challenge, but the goal of reform is clear: Congress should ensure that firms have duties toward workers over whom they hold significant economic power.⁴⁴ This could be done in various ways. Congress could specify that individual workers who are classified

⁴³ Given the nature of domestic work, the enterprise-based bargaining model of the current NLRA would be a poor fit. For domestic workers, the sectoral bargaining reforms discussed below are particularly important.

⁴⁴ Alongside such reforms, Congress should consider enabling employers and unions in some “gig” economy sectors to enter into “pre-hire” collective bargaining agreements on the same terms as employers and unions in the construction sector. See 29 U.S.C. 158(f) (2018). Such agreements are essential in construction because workers move among short-term jobs often, just like gig economy workers. Congress may also want to consider whether reforms are necessary to encourage gig economy firms to provide benefits such as health care coverage. See Sara Horowitz, *Why Portable Benefits Should be a Priority in the New Economy*, FAST COMPANY (Dec. 18, 2015).



as independent contractors still have the right to organize and bargain collectively.⁴⁵ Alternatively, Congress could adopt a version of the “ABC” test that some states use for employment status.⁴⁶ Under that test, workers are presumed to be employees, and the employer can rebut that presumption only by showing (a) that it does not exert control over the workers; (b) that the work performed is outside the usual scope of the employer’s business; and (c) that the worker is engaged in an independent trade, occupation, or business.⁴⁷

To ensure voice for employees of subcontractors and franchisees, Congress may need to broaden the test for “joint employment” under the NLRA, so that it takes greater account of the economic relationship between a worker and a putative joint employer.⁴⁸ Congress may also want to single out highly fissured industries for special treatment.⁴⁹ Some of the industries of greatest concern today are not difficult to spot: they include fast food and other restaurants, hotels/motels, and other hospitality, construction, building services, manufacturing, and franchised retail. Congress could take notice of persistent enforcement

⁴⁵ We say *individual* independent contractors because the field of independent contractors includes bona fide independent businesses of all sizes, many of which have many employees of their own. Independent businesses with multiple employees should not be entitled to NLRA coverage, nor to an antitrust exemption, though their individual workers should be.

⁴⁶ As an intermediate option, Congress could define “to employ” under the NLRA as “to suffer or permit to work,” which is the definition under the Fair Labor Standards Act. 29 U.S.C. § 203(g) (2018). The Supreme Court has remarked on that provision’s “striking breadth,” noting that it “stretches the meaning of ‘employee’ to cover some parties” who would be classified as independent contractors under the common law agency test. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992). Courts in FLSA cases have interpreted the provision broadly, asking whether workers are economically dependent upon putative employers. See *The Application of the Fair Labor Standards Act’s “Suffer or Permit” Standard in the Identification of Employees Who Are Misclassified as Independent Contractors*, Administrator’s Interpretation No. 2015-1 at 3 (Dep’t of Labor July 15, 2015) (summarizing FLSA’s purposive definition of employment). This more purposive approach is broadly similar to how the Supreme Court approached the question in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), overturned by Congress in the Taft-Hartley Act.

⁴⁷ The California Supreme Court recently adopted the ABC test for purposes of a key state employment statute. *Dynamex Operations W. v. Superior Court of L.A. Cty.*, 416 P.3d 1 (Cal. 2018). See also *Workplace Democracy Act*, S. 2810, 115th Cong. (2018) (proposing “ABC” test for employment under NLRA).

⁴⁸ The NLRB’s test for joint employment is in flux. The Obama NLRB reinstated a more worker-friendly test for joint employment in *Browning-Ferris Industries of California (“BFI II”)*, 62 NLRB No. 186 (2015). Under that test, two firms are joint employers of a given set of workers when (a) they are both common law employers of those workers, and (b) “the putative joint employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining.” Such control, the Board clarified, need not be exercised directly or immediately, and may even be held in reserve. The Trump board overturned BFI II in *Hy-Brand Industrial Contractors*, 365 NLRB No. 156 (2017), but that decision was vacated after the NLRB’s Inspector General held that one member should have recused himself from the case due to a conflict of interest. *Board Vacates Hy-Brand Decision*, NLRB OFFICE OF PUBLIC AFFAIRS (Feb. 26, 2018), <https://www.nlr.gov/news-outreach/news-story/board-vacates-hy-brand-decision>. In our view, the BFI II test was itself a bit narrow, since it required an initial finding of common law employment, and the common law test for employment is unduly narrow. A broader “economic realities” test or a sui generis test that examined the economic relationship between principal and contractor or franchisor and franchisee seems more appropriate in this case.

⁴⁹ The Department of Labor has taken this approach in the past, targeting certain sectors for “strategic enforcement” to ensure the best use of scarce resources. See Alana Semuels, *The Future of the Department of Labor Under Trump*, THE ATLANTIC, (Mar. 6, 2017) (noting that DOL devoted 50 percent of its resources to targeted enforcement by the end of the Obama era); DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT, A REPORT TO THE WAGE AND HOUR DIVISION (2010), <https://www.dol.gov/whd/resources/strategicEnforcement.pdf>.



challenges in such sectors, while also delegating power to the DOL or NLRB⁵⁰ to identify additional industries that meet specific statutory criteria in the future.⁵¹

Finally, we note that many of the other reforms discussed in this report, including repealing prohibitions on secondary boycotts and enabling sectoral bargaining, would further minimize problems of fissuring, since those reforms aim to expand the scope of organizing and bargaining across formal employment divides.⁵²

SECTION 2

PROTECT AND PROMOTE WORKPLACE UNIONIZATION

As discussed above, voice in the workplace is essential if workers are going to exercise voice in the economy and our democracy, as well as over their daily terms and conditions at work. Unfortunately, there is a broad and longstanding consensus among labor law scholars and practicing labor lawyers that even for workers who are protected by the NLRA, the NLRB-supervised elections process does not adequately protect employees' rights to unionize.⁵³ That failure is a primary cause behind the long-running decline in private sector unionization from a high of almost 35 percent in the 1950s, to less than 7 percent today—despite the fact that, in surveys, most American workers say they would like to belong to a

⁵⁰ For example, a significant disparity in size or economic resources between two firms might reasonably be evidence of a power imbalance that should lead to a finding of joint employment, as could evidence that a user firm has bid down a contract for labor services to a particular level. We take no position on which economic facts should lead to a finding of employment or joint employment. We merely wish to argue that the NLRB should be *allowed* and *encouraged* to research such matters and to develop administrative guidance and regulations that take economic facts into account. Section 4(a) of the Act prohibits the Board from “appointing individuals for the purpose ... [of] economic analysis.” 29 U.S.C. 154(a) (2018). See Hiba Hafiz, *The Red-Scare Relic that Holds Back Smart Labor Policy*, N.Y. TIMES (May 1, 2018) (noting that 4(a) was added to eliminate the NLRB’s Division of Economic Research, and that repealing 4(a) would allow the Board to bring economic evidence to bear on questions of joint employment, and on the likely effect of proposed rule changes).

⁵¹ The appropriate approach may vary by sector. For example, in fast food and retail franchisors, it may be optimal to statutorily define corporate parents as the employers or joint employers of franchisees’ workers. In other sectors, such as construction and building services, it may be best to define general contractors or building managers as the statutory employer of whatever workers perform particular tasks on site. Compare *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 690 (1951) (general contractor on construction site is not the employer of its subcontractor’s workers, even though it at times supervised subcontractor’s workers).

⁵² See Andrias, *supra* note 9.

⁵³ See, e.g., Paul Weiler, *Promises to Keep: Securing Workers Rights To Self-Organization Under the National Labor Relations Act*, 96 HARV. L. REV. 1769 (1983); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1537 (2002); Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655 (2010).



union.⁵⁴ Moreover, unlike in most other industrial democracies, U.S. law does not mandate consultation or bargaining in the absence of a union, nor does it give workers representation on corporate boards.⁵⁵ As a result, most workers have no collective voice in the terms and conditions of their work. Indeed, they frequently have few rights at work at all.

One way that the NLRB-supervised elections process falls short is by giving employers legal rights to resist unionization. The Supreme Court has repeatedly privileged employer property and managerial rights over workers' right to organize, undermining the very rights that the NLRA was designed to protect. Employers can require employees to attend meetings during working time, on pain of termination, at which they campaign against unionization. Unions have no comparable right to hold union-organizing meetings at work. In fact, employers may, in almost all instances, ban union organizers from talking to workers on employer property, even excluding them from publicly accessible parking lots.⁵⁷

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In addition, although the law prohibits employers from threatening, disciplining, or firing workers for unionizing, employers may make “predictions” about the negative effects of unionizing—predictions that feel a lot like threats to workers who lack job protection.⁵⁸ For example, employers can predict that unionization will force the closure of the company; that employees may lose existing benefits in collective bargaining; and that if workers strike, the employer may permanently replace them.⁵⁹ Even when workers demonstrate

⁵⁴ See RICHARD B. FREEMAN, ECON. POLICY INST., DO WORKERS STILL WANT UNIONS? MORE THAN EVER (2007), <http://www.sharedprosperity.org/bp182/bp182.pdf> (finding that the majority of non-union workers would vote for a union if they could); see also Shiva Maniam, *Most Americans See Labor Unions, Corporations Favorably* PEW RESEARCH CTR. (Jan. 30, 2017), <http://www.pewresearch.org/fact-tank/2017/01/30/most-americans-see-labor-unions-corporations-favorably/> (finding that 60 percent of Americans had favorable view of unions).

⁵⁵ In many European countries, workers have consultative rights around certain issues at the workplace or firm level regardless of unionization. See *generally* European Worker Participation Competence Center, Workplace Participation (Across Europe), <http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Workplace-Representation2> (last visited July 5, 2018).

⁵⁶ See *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953) (holding that captive audience meetings are prohibited only if held within 24 hours of an election).

⁵⁷ *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

⁵⁸ See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (holding that NLRB can order bargaining where severe employer unfair labor practices have made a fair election impossible).

⁵⁹ The Court in *Gissel* sought to distinguish “threats” from “predictions” that were “carefully phrased on the basis of objective fact.” The distinction has proven extremely difficult to apply in practice. See ROBERT A. GORMAN & MATTHEW W. FINKIN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 177-188 (2d. ed. 2004) (collecting cases).



overwhelming and reliable support for a union, the employer can insist on a hearing and an election, dragging the process out for months.⁶⁰ And, in many cases, employers can actually shut down their businesses in response to unionization.⁶¹

The problem is not just what employers are legally permitted to do under the law, however. The NLRB's weak remedial powers and time-consuming processes enable motivated employers to *violate* the law with virtual impunity. Workers who seek to unionize bear a substantial risk of being unlawfully terminated in retaliation, and wrongfully terminated workers can face a years-long battle to reclaim their jobs.⁶² If they succeed, the typical remedy is only reinstatement with back pay—minus any wages earned in the meantime.⁶³ That is, unlike many other employment statutes, the NLRA has been interpreted to deny or inhibit compensatory, liquidated, or punitive damages.⁶⁴ As a result, rational employers will often treat the limited damages available as a “tax” well worth paying to avoid unionization. Recognizing how easy it is to be fired for unionizing, many workers make the rational decision not to organize.

The extreme difficulty of organizing a union under current law is problematic for several reasons. It leaves most workers without any voice on the job, belying any promise of workplace democracy. It thwarts workers' freedom to join civil society organizations, undermining core freedoms of association and speech. And it contributes substantially to economic inequality, as it renders workers unable to bargain collectively with their employers or to counterbalance corporate power in the broader political economy.

SOLUTIONS WITHIN THE CURRENT NLRA MODEL

Limiting employers' ability to resist unionization. In general, employers' property rights should not be permitted to outweigh workers' fundamental rights to join a union. Congress and the NLRB could correct the imbalance in the law in several ways. They could grant union organizers and workers organizing with a union reasonable access to the workplace for purposes of speaking to workers; require employers to give unions access to employee lists and contact information, including emails, at an earlier stage in the organizing process; restrict employers' ability to compel worker attendance at anti-union meetings; mandate

⁶⁰ See ROBERT A. GORMAN, MATTHEW FINKIN, & TIMOTHY P. GLYNN, COX & BOK'S LABOR LAW 81-87 (16th ed. 2016) (summarizing current elections process, criticisms of it, and proposals for reform).

⁶¹ *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

⁶² See Sachs, *supra* note 53 at 684-85 (summarizing empirical evidence on incidence of retaliatory terminations, and their effect on union campaigns).

⁶³ *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (workers terminated in retaliation for union activity must mitigate their losses by finding other jobs).

⁶⁴ *Consolidated Edison v. NLRB*, 305 U.S. 197, 236 (1938) (Board's powers are “remedial, not punitive”). See also Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2694-6 (2008) (discussing remedial failures of NLRB regime).



equal time for union meetings; and subject employers' campaigning about unionization to more scrutiny, given its tendency to undermine employee free choice.

Limiting delay. Workers who want to unionize should not have to wait years to achieve their goals, all the while battered by employer threats and anti-union campaigning. To that end, Congress and the NLRB could return to the rule that employers are required to recognize workers' unions without an election, if a majority has demonstrated its support through other Board-verified mechanisms, such as authorization cards.⁶⁵ Alternately, Congress could revise the NLRB's representation process to ensure quick elections, codifying and expanding the rule promulgated by the Obama-era Board.⁶⁶ And they could ensure that employers cannot delay bargaining pending years of court appeal, by making clear that the obligation to bargain runs from the certification of a union and delay is subject to sanction.

Bolstering the NLRB's remedial powers and creating private rights of action. Finally, the NLRB's relatively weak remedial powers and processes should be strengthened. For example, like many other administrative agencies, the NLRB should be granted power to impose compensatory, liquidated, and punitive damages. The NLRB could also be directed to seek injunctive relief against certain forms of employer coercion that are particularly harmful to employee free choice, and it could be required to order employers to bargain with unions, absent an election due to employer violations, more frequently than it does now.⁶⁷ Congress could also enable newly organized workers to opt in to an interest arbitration process under which a neutral arbitrator would impose a first contract, even before appeals are final.⁶⁸ Finally, Congress could give workers a private right of action against employer unfair labor practices, providing workers the ability to sue employers in court, rather than relying on the NLRB to prosecute violations.⁶⁹ To assist with government enforcement, Congress could also create a private attorney general statute, authorizing aggrieved employees to file lawsuits to recover civil penalties on behalf of themselves, other employees, and the government itself. And Congress could correct the Supreme Court's mistaken arbitration jurisprudence by making clear that employers cannot require mandatory arbitration agreements with concerted action waivers.

⁶⁵ See Employee Free Choice Act of 2007, S. 1041, 110th Cong. (2007) (proposing card check recognition process).

⁶⁶ In 2011, the NLRB completed a rulemaking process designed to speed up the elections process. The rules were eventually invalidated by a federal court, which held that the NLRB lacked a proper quorum at the time. *Chamber of Commerce v. NLRB*, 879 F. Supp. 2d 18 (D.D.C. 2012). On December 15, 2014, however, after further public comment, the Board published a new rule that simplified representation-case procedures, increased transparency in union elections, and eliminated unnecessary litigation. 79 Fed. Reg. 74,308 (Dec. 15, 2014). Though the new rule's changes to election procedures were modest, the rule has been successful in streamlining the process and allowing employees to vote in a timelier fashion. The Trump Board is now considering rescinding the rule. See Celine McNicholas & Marni von Wilpert, *EPI Comment on the National Relations Board's Updated Election Rule* (Apr. 16, 2018), <https://www.epi.org/publication/epi-comment-on-the-national-labor-relations-boards-updated-election-rule/> (analyzing efficacy of 2014 election rule).

⁶⁷ See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

⁶⁸ See Workplace Democracy Act, S. 2810, 115th Cong. (2018) (proposing that parties be able to trigger mediation and interest arbitration if they cannot reach agreement). The same language appeared in the Employee Free Choice Act of 2007, S. 1041, 110th Cong. (2007).

⁶⁹ Richard D. Kahlenberg and Moshe Marvit, *Why the Right to Form a Union Should Be a Civil Right*, WASH. POST (Aug. 31, 2012).



SOLUTIONS THAT MOVE BEYOND THE CURRENT MODEL

Given the myriad difficulties workers face in organizing today, it is also worth considering more ambitious and far-reaching reforms. The decision whether to pursue any of these options could only be made after more deliberation and input from affected communities. But given that the existing NLRA regime has failed to protect workers' rights to organize, and given the centrality of worker voice to a more fair and equal society, we believe that other means of encouraging workplace representation are worth serious consideration.

Encouraging minority or non-exclusive unions. Under the NLRA, a union can only gain NLRB certification as the bargaining representative of workers in a given bargaining unit once it demonstrates that it enjoys majority support among those workers.⁷⁰ And once a union gains representative status it becomes the *exclusive* bargaining agent for all workers in the bargaining unit. Under current practice, the NLRB will not order an employer to bargain with a union that has never had majority support, even if the employer's unfair labor practices prevented it from gaining a majority.⁷¹ Meanwhile, an employer who *does* bargain with a non-majority union runs the risk of unfair labor practice charges from non-members or from another union.⁷² This has led a number of scholars to argue that the NLRB should recognize and encourage bargaining between employers and unions that represent only a minority of their workers.⁷³

But minority bargaining could also carry some costs for workers, especially if not carefully designed. For example, employers faced with organizing drives from two different unions might begin bargaining with one as a minority union, undermining employees' freedom of choice. Or employers might preemptively bargain with a friendly minority union in order to head off pressure from a more democratic and aggressive union. Competition among unions might also work to divide workers and weaken each union. For these reasons, any move to minority unionism would need to be carefully designed and adopted as part of a broader reform strategy, such as one that increases worker bargaining rights at the sectoral level.

Default unionism and/or automatic elections. Another option to foster worker voice would be to reverse the default rule of non-unionism at the workplace level. For example, Congress could mandate that all covered workers have collective representation in

⁷⁰ 29 U.S.C. 159(a) (2018).

⁷¹ First Legal Support Services, 342 NLRB 350 (2004).

⁷² ILGWU v. NLRB ("Bernhard-Altman"), 366 U.S. 731 (1961).

⁷³ E.g., CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE (2005); Catherine L. Fisk & Xenia Tashlitsky, *Imagine a World Where Employers are Required to Bargain with Minority Unions*, 27 J. LAB. & EMP. L. 1 (2011).



appropriate bargaining units unless they decide, by majority vote, not to have collective bargaining. This idea may sound quite radical, but prominent scholars have noted its potential desirability numerous times.⁷⁴ As with minority unionism, default unionism could have many benefits for workers, including of course higher rates of union representation. Any system of default unionism would nevertheless need to be designed carefully so as to ensure that employees retain freedom of choice. An intermediate reform here could be to schedule union elections at regular intervals in all covered workplaces, coupled with reforms discussed above that minimize employer interference, so that workers would be able to choose on a regular basis whether to unionize.⁷⁵

Mandatory workplace committees. A final possible reform would mandate democratic structures within workplaces, but would not mandate collective bargaining, at least as typically understood in the U.S. Many European countries mandate “works councils,” which are firm- or worksite-level organizations with rights to consult over local policy issues, but generally without rights to take industrial action or to negotiate over economic issues. The merits of such bodies were well mooted in the academic literature in the 1980s and 1990s.⁷⁶ Works councils provide a channel through which workers and management can communicate and coordinate on questions of workplace policy, which can foster greater productivity and collaboration. Councils can also assist in unionization efforts or bolster union strength under some circumstances. Today, works councils could provide a platform for employers and workers to consult around issues like work rules, employee handbook provisions, scheduling policies, drug testing policies, social media policies and the like.

Such bodies are generally unlawful in non-union workplaces under the NLRA,⁷⁷ due to a provision of the NLRA that prohibits employer-dominated unions. The labor movement has long feared that reform of that provision would undermine union strength. This is a serious concern, especially given evidence that works councils tend to benefit workers the most when they already enjoy union representation. Reform to encourage or mandate works councils may nevertheless be appropriate if enacted alongside reforms that make it significantly easier for workers to unionize or that grant unions power to negotiate for all workers on a sectoral basis.

⁷⁴ See, e.g., Sachs, *supra* note 53 at 660; Cass R. Sunstein, *Symposium: Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 106 (2001). See also Samuel Estreicher, “Easy In, Easy Out”: A Future for U.S. Workplace Representation, 98 MINN. L. REV. 1615, 1615 (2014) (proposing system in which union elections “would, over time, become automatic”).

⁷⁵ Andrew Strom, *Why Not Hold Union Representation Elections on a Regular Schedule*, ONLABOR.ORG (Nov. 1, 2017); Michael Oswalt, *Automatic Elections*, 4 U.C. IRVINE L. REV. 801 (2014); Brishen Rogers, *Libertarian Corporatism is Not an Oxymoron*, 94 TEXAS L. REV. 1623 (2016).

⁷⁶ See *generally* WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS (Joel Rogers and Wolfgang Streeck, eds., 1995), full text available at <https://econpapers.repec.org/bookchap/nbrnberbk/roge95-1.htm>.

⁷⁷ 29 U.S.C. 158(a)(2) (2018); *Electromation, Inc.* 309 NLRB 990 (1992).



SECTION 3

PROVIDE FOR SECTORAL-LEVEL BARGAINING

As an increasing number of scholars and commentators have recently argued, worksite- or firm-based bargaining is often insufficient to protect workers' interests and to redress problems of economic and political inequality.⁷⁸ Today, many low-wage workers are employed by continental-scale corporations, many of which have hundreds or even thousands of locations, or by contractors or suppliers to such corporations. As a result, even unionized workers can end up atomized: They have a collective voice in one worksite, or within one firm, but that is not enough to give them an effective voice in negotiations with their employers—let alone in the broader economy.

In contrast, sectoral bargaining gives workers power to negotiate at the sectoral level—for example, among all fast food workers, all retail workers, all hotel/motel workers, all janitors—either nationally or in a given geographic region. A variety of such systems exist in Europe, and a variety has been established in the United States in the past. But they are extremely difficult to effectuate under the current NLRA regime.⁷⁹

THE POLICY CASE FOR SECTORAL BARGAINING

There are several powerful arguments for sectoral bargaining. The first is distributional: In the absence of uniform standards, companies often compete to keep labor costs down, whether by setting wages at a low level, skirting legal obligations, or avoiding unionization. Setting standards at the sectoral level eliminates this collective action problem by taking distributional conflict outside the firm. Companies can then compete on other grounds, including productivity and quality.⁸⁰

⁷⁸ See Andrias, *supra* note 9; William E. Forbath and Brishen Rogers, *New Workers, A New Type of Labor Law For a New Type of Worker*, N.Y. TIMES (Sept. 4, 2017); DAVID MADLAND, THE FUTURE OF WORKER VOICE AND POWER, CENTER FOR AMERICAN PROGRESS (October 2016); Rogers, *supra* note 75; David Rolf, *Toward a 21st Century Labor Movement*, AM. PROSPECT (Apr. 18, 2016). For an earlier account, see Rogers, *supra* note 13.

⁷⁹ See Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, YALE L. J. (forthcoming 2019) (discussing history of wage boards in United States); Andrias, *supra* note 9 (discussing European models of sectoral bargaining); Rogers, *supra* note 13 (outlining how firm- and worksite-level bargaining creates perverse incentives for both unions and firms). We recognize, of course, that it is impossible to import foreign models into the U.S. context wholesale. See Clyde Summers, *Workers Participation in the United States and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. OF COMP. L. 367, 367 (1980) (“Comparisons in labor law require comparisons of the institutional and social contexts in which the legal rules operate, and this is of unbounded difficulty.”). But foreign approaches can inform newly developing sectoral systems rooted in American commitments and movements. See Andrias, *supra* note 9.

⁸⁰ MADLAND, *supra* note 78.



The second argument is rooted in democratic commitments. Under current law, non-unionized workers typically have no way to participate in decisions around wages and benefits or other questions important to their daily lives. And even unionized workers are outmatched against continental-scale corporations, which means that the lack of a sectoral or social bargaining mechanism undermines worker voice at the local level, as well as in the political economy more generally. New legal mechanisms that enable worker organizations to exert power at the sectoral level can begin to remedy this democratic deficit.

The third argument is administrative. Federal and state minimum standards laws are fairly blunt tools, as they impose identical obligations on nearly all covered companies. Moreover, even though the minimum wage is a popular policy, getting Congress to revise the Fair Labor Standards Act (FLSA) is a major task. Devolving the power to set wages and other basic standards at the sectoral level to an administrative body, or encouraging sectoral-level collective bargaining, can help ensure that wages keep pace with inflation and public demands, with appropriate variation along sectoral and geographic lines. Moreover, given increasing industry concentration in many sectors, a relatively small number of sectoral arrangements, covering a relatively small number of apex firms and their first-tier suppliers, could substantially improve working conditions for many workers.

Unfortunately, this is simply not the labor law that we have. Granted, such bargaining is not foreign to our history. “Pattern bargaining” in the automotive sector amounted to a form of de facto sectoral bargaining, as the United Auto Workers would press each of the “Big Three” auto firms to adopt the same contract terms. “Jobbers agreements” in the mid-century garment sector likewise set terms across the sector, though they were largely limited to the New York City area. The Teamsters’ National Master Freight Agreement once covered nearly the entire long-haul trucking industry. Numerous construction unions have used multi-employer and multi-worksites bargaining frameworks. And more recently, the Service Employees International Union has built robust multi-employer bargaining units of janitors within various major cities or even states.⁸¹

Such efforts have nevertheless been the exception rather than the rule. Our labor law encourages bargaining at the firm level or even the enterprise level. For example, the NLRA specifies that in each case, an appropriate bargaining unit “shall be the employer unit, craft

⁸¹ See Andrias, *supra* note 9, at 19-20, 46-47 (discussing these models and difficulty of replicating them). See also NELSON LICHTENSTEIN, *THE MOST DANGEROUS MAN IN DETROIT* 271-98 (1995) (describing UAW pattern bargaining); Mark Anner, Jennifer Bair & Jeremy Blasi, *Learning from the Past: The Relevance of Twentieth-Century New York Jobbers’ Agreements for Twenty-First-Century Global Supply Chains*, in *ACHIEVING WORKERS’ RIGHTS IN THE GLOBAL ECONOMY* 239 (Richard P. Appelbaum & Nelson Lichtenstein eds., 2013) (describing jobbers’ agreements negotiated among workers, garment manufacturers, and purchasers in the U.S. garment sector in the early- and mid-twentieth century); CATHERINE FISK, *WRITING FOR HIRE: UNIONS, HOLLYWOOD, AND MADISON AVENUE* (2016) (describing industry-wide bargaining in Hollywood); Catherine L. Fisk et al., *Union Representation of Immigrant Janitors in Southern California: Economic and Legal Challenges*, in *ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA* 199, 199 (Ruth Milkman ed., 2000).



unit, plant unit, or subdivision thereof.”⁸² Moreover, the NLRB certifies multi-employer units only when all parties consent; unions cannot strike over a demand for multi-employer bargaining.⁸³ And building majority support within individual firms that can then be merged into a multi-employer unit is extremely difficult under current law, for reasons discussed above.

PRINCIPLES AND DESIGN ELEMENTS FOR SECTORAL REFORMS IN THE UNITED STATES

Any system of sectoral bargaining should supplement rather than replace worksite organization and representation. This is because while sectoral bargaining helps address problems of economic and political inequality, it does not provide workers a voice at their particular workplace. Moreover, sectoral bargaining structures have historically emerged as a consequence of unions’ power. Once those structures are established and legally recognized, of course, the legal rights enjoyed by unions become a source of worker power in their own right. But the simple establishment of a sectoral process will not significantly alter the balance of power between employers and unions. Only worker organizing, ideally assisted by more worker-friendly labor laws and government support of bargaining, can do that.

There are nevertheless different ways to combine sectoral bargaining and worksite organization. For example, a new sectoral system could be layered on top of existing bargaining relationships, or sectoral bargaining could be combined with some of the more far-reaching reforms for worksite representation discussed in Part 2 of this report. The following are among the issues that any system would need to address:

A process for defining sectoral bargaining units, and therefore defining which firms and workers have rights and duties to participate in bargaining. This process would involve some difficult line-drawing at times, but that makes it classically suited for an administrative agency that can collect public testimony and develop expertise about the relevant industries. There are several important subsidiary questions here. One is the definition of industry or sector, particularly in light of fissured work relationships. Another is the geographic scope of bargaining, i.e., whether it will take place at the national level, the state level, the local level, or some combination of the three. A third issue is whether bargaining units would be defined ex ante by an administrative agency, or whether they would be defined only on a petition for representation from a worker organization.

⁸² 29 U.S.C. 159(b) (2018).

⁸³ Kroger Co., 148 NLRB 569 (1964). See generally, MARK BARENBERG, ROOSEVELT INST., WIDENING THE SCOPE OF WORKER ORGANIZING: LEGAL REFORMS TO FACILITATE MULTI-EMPLOYER ORGANIZING, BARGAINING, AND STRIKING (2015), <http://rooseveltinstitute.org/wp-content/uploads/2015/10/Widening-the-Scope-of-Worker-Organizing.pdf>.



A process for allocating bargaining rights to worker organizations and employer organizations—and a process for union funding. A sectoral bargaining process needs to make clear who has the right to bargain or set wages and benefits—i.e., which worker organizations, which employer organizations. Any system would need to ensure fair representation of workers and employers in the given sector. With respect to worker representation, the rules governing unions' access to workers would need to be revised significantly to make organizing at the sectoral level realistic. For example, it may make sense to give unions that have a demonstrated level of support within a sector reasonable access to workers, both through access to employers' physical property and by giving unions contact lists for workers. A new sectoral process might also allocate rights based on a different principle than exclusive representation. Proportional representation would be one option, for example, though that may create political challenges between unions. A host of similar questions would need to be considered with regard to employer representation. Finally, the question of how to fund unions' activities in a sectoral or social bargaining structure would need to be addressed.⁸⁴

Ground rules for the bargaining process. Here, there are at least three subsidiary questions. First, what will be legitimate topics of bargaining? Many European countries set economic terms at the sectoral level while leaving work rules and management policies to be negotiated at the local level. That division of responsibility may make sense in the United States, assuming that sectoral bargaining is combined with reforms that enable local organization, as discussed in Part 1. Second, what remedies would be available for failure to bargain in good faith? Congress might grant the NLRB the power to order damages or to order the parties to enter mediation or interest arbitration, or Congress might decide to leave agreement to the balance of economic weapons. Third, what is the role of the state in the process? There is a continuum of possibilities here. At one end, the state is basically an outsider that simply polices unlawful acts by the parties; at the other end, it is a party to a tripartite process, and it retains ultimate decision-making power.

Coverage and enforcement of sectoral standards. Finally, Congress and the NLRB, or other agencies, would need to determine which employers and employees are covered by a new set of standards and how to enforce those standards. If standards were set administratively, the first challenge would be less acute, but lawmakers would still need to determine whether workers would have private rights of action and whether unions would play a role in enforcement. Sectoral collective bargaining agreements would present more complicated issues. Regarding coverage, once a significant number of employers within a sector have signed on, it would be best to bind non-signatory employers, yet that is not possible under standard contract law doctrines. To resolve this problem, an agency could be empowered to apply prevailing standards throughout the industry via administrative rulemaking, or

⁸⁴ See Andrias, *supra* note 9, at 95-97 (discussing alternative funding mechanisms for unions engaged in sectoral or social bargaining).



Congress could follow a process akin to European “extension” laws, through a form of fast-track legislation. Regarding enforcement of sectoral agreements, unions and workers are their own best advocates. Many enforcement challenges can therefore be solved through reforms to enable worker organizing and concerted action, such as those discussed elsewhere in this report.

Regarding enforcement, the United States has different approaches today for minimum standards established under employment law and for collective bargaining agreements: Employment law is enforced through a combination of administrative investigation and private rights of action, while collective bargaining agreements are generally enforced through private arbitration, with the threat of economic weapons for serious breach. These issues would be complicated in a sectoral system, since unions that enter into agreements may have little local organization among covered employers. And yet administrative enforcement of private agreements could trigger concerns about private delegation of regulatory authority.

A NEW INDUSTRY COMMITTEE SYSTEM

With the principles and design elements outlined above in mind, we explore a few possible means of encouraging sectoral-level bargaining. These are not fully fleshed out proposals, nor are they exclusive options. We discuss them here, however, to highlight the range of possible approaches.

One option would be to set minimum terms at the sectoral level through an administrative process. The United States has done this before. The Fair Labor Standards Act of 1938 created tripartite “industry committees,” populated by representatives of labor, management, and the public, with the power and obligation to raise minimum wages at the sectoral level, up to a statutorily specified target wage.⁸⁵ Those wage boards were constituted and operational for a number of years, but the relevant provision of the FLSA was repealed in 1949 as part of Congress’ retrenchment of the New Deal labor legislation.⁸⁶ A few states, including New York and California, still have the power to constitute such wage boards or industry committees, and New York did so recently for fast food workers.⁸⁷

A new industry committee law could build on the early FLSA practice of mandating the establishment of committees in the largest low-wage sectors, while engaging workers and businesses in the process of administrative decision-making.⁸⁸ Within a reasonable time after passage of enabling legislation, the Department of Labor (DOL) could therefore

⁸⁵ See Andrias, *supra* note 79.

⁸⁶ The other part of that retrenchment, of course, was the Taft-Hartley Act of 1947.

⁸⁷ See Andrias, *supra* note 9, at 83-86.

⁸⁸ Andrias, *supra* note 9; Andrias, *supra* note 79; Madland, *supra* note 78.



identify such sectors and could establish committees. Committees would have equal representation of worker and employer representatives.⁸⁹ Worker seats could be allocated to unions and other membership-based worker organizations active in the sector, proportionate to their representation. Employer seats could be allocated to leading employer associations and firms.

Following the process under the early FLSA, committees could take public and expert testimony, deliberate, and recommend wage and benefit levels to an administrative agency, consistent with clearly defined statutory goals. Those recommendations could vary based on geography or other statutorily determined factors.⁹⁰ The DOL would then assess such recommendations and provide opportunity for public comment. Ultimately, if the recommendations are found to be consistent with the statutory mandate, the DOL would adopt them as regulations, making them binding on all firms within the sector and enforceable through normal administrative processes or private rights of action.⁹¹

Given the extremely low levels of unionization in the private sector today, such a structure could substantially improve wages and working conditions, and it could also give workers more of a voice in economic governance. Wage boards and industry committees are, of course, not collective bargaining processes as we typically understand them, and participating unions would not be certified as bargaining agents for all affected workers. Nevertheless, industry committees would provide a democratic platform for worker organizations and businesses to assist the government in setting fair wages on a sectoral basis. They could serve as a catalyst to other worker-organizing efforts by enabling unions to engage non-union workers in the industry committee process. Depending on how broadly their missions are defined, they could also help facilitate participation by worker organizations in a host of other labor policy decisions—including questions of health care, childcare, paid family leave, and the design and provision of employee benefits systems.⁹²

⁸⁹ The Department of Labor has jurisdiction over the federal Fair Labor Standards Act, while the National Labor Relations Board has jurisdiction of the National Labor Relations Act. The DOL also has a long tradition of administrative rulemaking, while the NLRB tends to make policy through adjudication rather than rulemaking. These factors make the DOL the natural agency to establish an industry committee process, though the NLRB could certainly do so with appropriate resources.

⁹⁰ In this regard, industry committees would function as an “extension” mechanism such as those common in European countries, where administrative agencies can often hold firms within a sector to the terms of dominant collective bargaining agreements within that sector.

⁹¹ As is often the case in labor and employment regulation, it may be sensible to exempt very small firms from sectoral standards.

⁹² See Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 N.C. L. REV. 319 (2012) (discussing unions’ role in benefit administration in various European countries, and its effect on unions’ membership rates and power).



ENCOURAGING PRIVATE SECTORAL BARGAINING

Alternatively, the law could be revised to encourage or mandate sectoral bargaining, or bargaining between unions and all firms within particular industrial sectors. The line between an industry committee process and a bargaining process is fuzzy, to be sure, but while industry committees are more administrative in nature, with the state having the ultimate say over conditions, U.S.-style collective bargaining is more of a private ordering process, in which the parties' tactics at the bargaining table are backed by the threat of strikes, lockouts, and other economic weapons.⁹³

One way to encourage sectoral bargaining would be to make it far easier for unions to build multi-employer bargaining units. As noted above, our law discourages such units in various ways, which limits unions' power even at the firm level. A 2015 Roosevelt Institute white paper by law professor Mark Barenberg proposed a set of comprehensive reforms to bargaining unit determination, so as to encourage various multi-employer bargaining structures.⁹⁴ Those could include multi-employer units that involve both immediate employers and user firms within a supply chain; "hub-and-spoke" units, in which all the suppliers to a lead firm bargain in a unit with that firm; or geographically-defined multi-employer units, such as units of all workers in a sector in a particular metro area. Professor Barenberg also suggests moving beyond the strict majority rule principle, by allowing, for example, a union to gain bargaining rights if it has a majority within a multi-employer unit but not within each individual firm, or even by giving some bargaining rights to non-majority unions.⁹⁵

Alternatively, Congress and the NLRB could establish a sectoral bargaining regime that would be layered atop the existing NLRA bargaining regime. As noted above, a sectoral bargaining system would need a process for determining bargaining units and allocating bargaining rights, ground rules for the bargaining process, and an enforcement mechanism. Because there are a wide variety of possible sectoral bargaining structures, we will focus only on a few particularly important issues.

Allocating bargaining rights. A key question is whether to retain the doctrines of majority rule and exclusive representation for purposes of sectoral bargaining. The advantage of doing so is that unions that can actually build majority support will invariably be stronger and more capable of ensuring a generous collective bargaining agreement. The disadvantage is that getting a majority would be extremely difficult, especially at the

⁹³ This is of course not entirely true under the Railway Labor Act, where the National Mediation Board takes a more active role. And many state public sector labor laws enable mediation or arbitration but limit or prohibit strikes. Such processes nevertheless are more "private" than administrative in the sense that the state seeks generally to encourage collective agreement by policing the bargaining process rather than determining the substantive terms of agreements.

⁹⁴ BARENBERG, *supra* note 83.

⁹⁵ *Id.* at 31-33.



national level. One alternative would be plural unionism. For example, if multiple unions stand for election, and some combination of them get a majority of the votes, they could be permitted to bargain as a coalition. Another approach would be default unionism. For example, Congress might mandate union elections on a regular basis within appropriate sectoral units and then allocate bargaining rights based upon the results.

Defining sectors and bargaining units. As with an industry committee system, the NLRB would need to define appropriate industrial sectors in which bargaining could take place; it could do this either on its own or upon petition from a worker organization. It would also need to decide whether such bargaining would take place at the national, regional, state, or even the metropolitan level. The appropriate unit size will depend, in part, on whether majority rule and exclusive representation are maintained: The more closely Congress hews to those doctrines, the smaller the sectoral units should be. With majority rule and exclusive representation, the best approach may be to begin with localized sectoral bargaining, for example with metropolitan-area units. Those types of bargaining relationships could then feed into regional, state-level, or national-level sectoral bargaining over time. If Congress moves toward plural unionism or default unionism, then regional or national-sized units may be more plausible.

The bargaining process. Congress or the NLRB would also need to identify proper subjects for sectoral bargaining. For example, will unions in such systems be able to bargain over work rules or only around economic matters? Similarly, Congress or the NLRB would need to determine what the parties may do in the event of an impasse. The right to strike is of course absolutely essential if workers are to exert power at any level, and it should be protected in the sectoral context. But to prevent employers from simply going through the motions at the bargaining table, Congress might consider creating a process to set minimum terms in the event of an impasse. This might include interest arbitration, referral of the dispute to a DOL-constituted industry committee, or some similar mechanism. Referral of an agreement to an industry committee would also simplify enforcement if the DOL had the power to review the agreement and make it binding on all parties in the sector.



SECTION 4

PROTECT WORKERS' FUNDAMENTAL RIGHTS TO ENGAGE IN CONCERTED ACTION AND FREE EXPRESSION

The right to picket, protest, and strike is the essence of collective labor activity—and it is protected by international and domestic law. The Universal Declaration of Human Rights (1948) states that “everyone has the right to freedom of peaceful assembly and association” and “everyone has the right to form and to join trade unions for the protection of his interests.”⁹⁶ The International Labor Organization Conventions make clear that employees have the right to strike as a means to promote their collective social and economic interests.⁹⁷ And the text of the NLRA broadly promises to protect the right of employees to engage in concerted action and strikes.⁹⁸ Indeed, the Supreme Court has recognized that the right of concerted action is broad, not limited to unionized employees, and that the rights to picket and strike are at the “core” of that protection.⁹⁹

Yet, despite the broad promise of international and domestic law, in practice, the right to engage in concerted action—and in particular to picket and to strike—is, at best, only weakly protected in the United States.¹⁰⁰

As originally enacted in 1935, the NLRA contained no restrictions on picketing, strikes, or other labor protest. Rather, after decades of court injunctions and violent repression of worker actions, federal law in the aftermath of the Wagner Act offered workers considerable protection.¹⁰¹ And the use of strikes was critical in building the American labor movement. In the period after the NLRA’s enactment through the aftermath of World War II, millions

⁹⁶ Universal Declaration of Human Rights, G.A. Res.217A(III), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948) (art. 20(1); art. 23(4)). On the international law foundations of workers’ rights to organize, see Compa, *supra* note 21.

⁹⁷ ILO Convention 87. See also General Survey on the Freedom of Association and Collective Bargaining, Report III (Part 4B), ILC, 69th Session, 1983, p. 62; 2012 General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalizations, 2008.

⁹⁸ NLRA §§ 7, 13.

⁹⁹ *E.g.*, *Business Employees v. Missouri*, 374 US 74, 82 (1963) (noting core right to strike); *NLRB v. Wash. Aluminum*, 370 U.S. 9 (1962) (making clear that concerted action provision protects workers who are not unionized nor engaged in a unionization campaign). See also *Thornhill v. Alabama*, 310 U.S. 88 (1940) (finding state law criminalizing all peaceful picketing unconstitutional).

¹⁰⁰ Craig Becker, “*Better Than a Strike*”: *Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. CHI. L. REV. 351 (1994); James Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004).

¹⁰¹ National Labor Relations Act, 49 Stat. 449 (1935); see also Norris-LaGuardia Act, Public Law No. 72-65, 47 Stat. 70 (1932); Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53.



of Americans across the country participated in strikes.¹⁰² Through collective action, workers won union rights, wage increases, new benefits, and a voice on the job. But when conservatives gained control of Congress in 1946, business groups pressured Congress to rein in the power of labor, adding to restrictions that the Supreme Court and states had already imposed. In the Taft-Hartley Act of 1947, and again in 1959, Congress significantly restricted labor protest and strike rights, and the Supreme Court and states have repeatedly grafted on additional restrictions.

Several restrictions are worth highlighting:

Striker replacements. Although the law promises that employers cannot retaliate against workers for engaging in strikes, it has been interpreted to permit employers to hire permanent replacements when workers strike over the terms and conditions of employment.¹⁰³ This means that whenever workers use their right to strike to try to win better economic conditions, they risk losing their job. The permanent replacement doctrine is used not only against organized workers who strike; employers also use the threat of permanent replacements against workers who are considering forming a union. For example, in every organizing drive examined by Human Rights Watch for a report on American labor rights, management raised the prospect of permanent replacement in written materials, in captive-audience meetings, and in one-on-one meetings where supervisors spoke with workers under their authority.¹⁰⁴

Non-traditional collective action. Most slowdowns, refusals to perform specific tasks, and intermittent strikes are unprotected by the NLRA. The law does not recognize a right to strike if the strike blurs the clear-cut boundary between working and stopping work. That is, to benefit from the NLRA's protection, strikers must leave the workplace and wholly abandon their work. This restriction dramatically circumscribes the range of protected strike activity—and forces workers to expose themselves to the risk of permanent replacement if they wish to exercise economic power.¹⁰⁵ In short, despite the statute's promise, the law privileges employers' property rights over employees' rights to engage in a range of concerted action short of strikes.

¹⁰² IRVING BERNSTEIN, *THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933-1941* (2010); NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 136-38* (2003); GEORGE LIPSITZ, *A RAINBOW AT MIDNIGHT: LABOR AND CULTURE IN THE 1940S* (1994).

¹⁰³ *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938) (concluding in dicta that an employer enjoys the right to permanently replace workers who strike for better wages and conditions). In contrast, when workers strike because of an employer's unfair labor practice, the employer can only replace them temporarily. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

¹⁰⁴ *Compa*, *supra* note 21, at 284.

¹⁰⁵ *Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930, 942 (1938), enforcement denied, 98 F.2d 375 (7th Cir. 1938), rev'd in part, 306 U.S. 240 (1939); *Elk Lumber Company*, 91 NLRB 333 (1950). See Becker, *supra* note 100; Pope, *supra* note 100.



Picketing. The law significantly limits the nature and timing of union picketing. For example, section 8(b)(7) prohibits workers from picketing in order to seek recognition as a union where the picketing occurs for more than “a reasonable” time “not to exceed thirty days from the commencement of such picketing.” Although a proviso allows picketing that exceeds thirty days “for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization,” that exception does not apply if the picketing induces any work stoppage.¹⁰⁶ This provision is in significant tension with First Amendment law, which disallows content and viewpoint discrimination.¹⁰⁷ That is, the statute prohibits speech by certain speakers (labor organizations and their agents) that has a particular purpose: seeking to “forc[e] or requir[e]” recognition by the employer or selection by the employees.¹⁰⁸ The law also prohibits mass picketing, which was a common and effective practice during the 1930s and 40s when strikers gathered in large numbers to protest.¹⁰⁹

Cross-employer and political concerted action. The law significantly restricts the ability of workers to engage in cross-employer concerted action by prohibiting “secondary boycotts.” This means that, when seeking to win improvements in wages, benefits, or working conditions, worker organizations are not permitted to exercise economic pressure over a “secondary” employer to put pressure on their employer.¹¹⁰ For example, a picket at corporate headquarters by employees whose primary employer is a franchise of that corporation (assuming no joint-employment status) may be illegal.¹¹¹ Additionally, a worker organization may not sign an agreement that commits an employer to contract exclusively with unionized suppliers or buyers.¹¹²

Further restricting solidarity across traditional divides, the law offers only limited protection for concerted action aimed at winning improvements in labor policy from governmental actors, rather than from an employer directly. Section 7 has been interpreted to extend to workers’ concerted activity that occurs through political channels, as long as such activity has a direct nexus to employment issues.¹¹³ But the NLRB has concluded that workers may not be protected if they leave work in support of a political cause, either to

¹⁰⁶ NLRB § 8(b)(7)(C).

¹⁰⁷ Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERK. J. EMP. & LAB. L. 277 (2015).

¹⁰⁸ NLRB § 8(b)(7).

¹⁰⁹ IRVING BERNSTEIN, *THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933-1941* (2010); Ahmed White, *Workers Unarmed: The Campaign Against Mass Picketing and the Dilemma of Liberal Labor Rights*, 49 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 59 (2014).

¹¹⁰ National Labor Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4) (2012).

¹¹¹ See *Int’l Longshoremen’s Ass’n v. Allied Int’l, Inc.*, 456 U.S. 212, 226 (1982); *NLRB v. Retail Store Emps. Union, Local 1001*, 447 U.S. 607, 616 (1980).

¹¹² See, e.g., *Gimrock Construction, Inc.*, 344 N.L.R.B. 934 (2005); NLRA § 8(e) (prohibiting so-called “hot cargo” agreements except in the garment and construction industries). For further discussion, see Barenberg, *supra* note 83, at 21.

¹¹³ *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).



mobilize public sentiment or to urge governmental action, even if the cause is employment-related.¹¹⁴

Other judicially created restrictions. Finally, the Supreme Court has interpreted federal law to impose—and to permit states and companies to impose—a host of other restrictions on workers’ concerted action. For example, the Court has held that it is unlawful for workers to strike over any issue covered by an arbitration clause in a collective bargaining agreement, even if the contracts made no express waiver of this kind.¹¹⁵ It has concluded that state trespass and tort laws are frequently not preempted by the NLRA, allowing them to be used against strikers and picketers. And most recently, the Court concluded that employers may deprive employees of their ability to engage in concerted legal action by requiring them to sign individual arbitration agreements—notwithstanding their rights under Section 7 of the NLRA.¹¹⁶ Together, these court interpretations and statutory provisions form a comprehensive web of restrictions against workers’ ability to engage in concerted action.¹¹⁷

SOLUTIONS

When workers can’t strike, picket, and take other collective action, they can’t exercise a real voice at work, in the economy, or in our democracy. Three specific changes to the law here are essential.

First, the law must be reformed so that it actually fulfills its promise to protect collective action. To that end, Congress should make clear that employers are not permitted to hire permanent replacements. When workers strike about economic issues, they should not be risking the loss of their jobs. Moreover, their strikes should not lose protection when they are in support of other workers or a broader issue facing workers in the political economy.

Second, Congress should repeal the broad restrictions on secondary boycotts. These restrictions are in significant tension with First Amendment law as it has developed in recent years. They have also become even more disabling of workers’ expressive rights in today’s economy given the growth of fissured employment relationships.¹¹⁸ They effectively prohibit workers from pressuring a range of companies that exercise significant control over their employment.

¹¹⁴ See Memorandum from Ronald Meisburg, General Counsel, NLRB to All Regional Directors, Officers-in-Charge, and Resident Officers, Memorandum GC 08-10 (July 22, 2008) (providing guidelines for how to handle unfair labor practice charges involving political activity arising out of immigration rallies).

¹¹⁵ *Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

¹¹⁶ *Epic Systems v. Lewis*, ___ U.S. ___ (2018).

¹¹⁷ See Pope, *supra* note 100; Becker, *supra* note 100.

¹¹⁸ Andrias, *supra* note 9, at 25-32.



Third, Congress should expand protections for union picketing and strikes. For example, it could make clear that peaceful recognitional picketing and large-group picketing are permissible. It could also make clear that concerted activity does not necessarily lose its protection when it involves something less than full work stoppage. Such reforms could be achieved by repealing Taft-Hartley’s restrictions, as the recently introduced Workplace Democracy Act proposes,¹¹⁹ and by adding more statutory language clarifying the scope of protection for worker expression, protest, and strikes.

To be sure, some of these recommendations are less controversial and easier to implement than others. Scholars and advocates take a range of positions on just how far protection of the right to strike and picket should go. But there can be little doubt that, as written, labor law fails to effectively protect workers’ right to protest, picket, and strike.

CONCLUSION

Labor law reform alone will not ensure economic and political equality, nor can it be a panacea for the challenges facing workers in 21st century America. Any conversation about progressive labor law reform should be accompanied by discussions about various legal regimes adjacent to labor law, including trade policy, fiscal policy, social insurance and social assistance, public investment in physical and social infrastructure, corporate governance, and antitrust policy. Progressive reforms to such policies would complement new rules for worker organizing and bargaining. Meanwhile, a rejuvenated labor movement would greatly assist passage of other ambitious reforms. Rebuilding a more just and equal political economy will be a long-term project, which will touch on many aspects of life and law. Fundamental labor law reform is central to that project—and to a more just and equal society overall.

¹¹⁹ See Workplace Democracy Act, S. 2810, 115th Cong. (2018) (proposing repeal of § 303 of Labor Management Relations Act of 1947 (Taft-Hartley Act), which prohibited secondary boycotts).



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