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Union Rights for All: Towards Sectoral Bargaining in the United States

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The Cambridge Handbook of U.S. Labor Law for the Twenty-First Century

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6 Union Rights for All

Toward Sectoral Bargaining in the United States

Kate Andrias

American labor unions have collapsed. Having once bargained for more than a third of American workers, unions now represent only about 6 percent of the private sector workforce.¹ In the wake of new statutory and constitutional limitations, their presence in the public sector is shrinking as well.²

As unions have declined, the United States has lost a key equalizing institution in politics and the economy.³ Indeed, economic inequality is at its highest point since the Gilded Age, when unionization rates were similarly low.⁴ With the weakening of unions, the United States has also lost the key mechanism for protecting against employer domination and providing workers a voice on the job.⁵ Employment law, which protects employees on an individual basis irrespective of unionization, has not filled the void.

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¹ See JAKE ROSENFELD, *WHAT UNIONS NO LONGER DO* 1, 10–30 (2014); see also BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *UNION MEMBERS – 2017* (2018), www.bls.gov/news.release/union2.nr0.htm [<https://perma.cc/Y38D-9K4E>] (providing data about union membership in 2017); cf. RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* (1984) (describing, as of the mid-1980s, the role of trade unions in the United States). Despite recent declines, unions still represent about 35 percent of public sector workers; the unionization rate in the private sector is about six percent. BUREAU OF LABOR STATISTICS, *supra*.

² See *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448 (2018) (overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the longstanding precedent that permitted public sector employers and unions to require workers to pay fair-share fees).

³ ROSENFELD, *supra* note 1, at 4–8; see Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 *POL. & SOC'Y* 152 (2010). On rising political inequality, see LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 2, 285 (2008); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 79–81, 157–158 (2012); ROSENFELD, *supra* note 1, at 170–181; KAY LEHMAN SCHLOZMAN ET AL., *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* 69–95 (2012). For an earlier account, see Thomas Byrne Edsall, *The Changing Shape of Power: A Realignment in Public Policy, in THE RISE AND FALL OF THE NEW DEAL ORDER, 1930–1980*, at 269 (Steve Fraser & Gary Gerstle eds., 1989).

⁴ THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 23–24 (2014).

⁵ See ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT)* (2017).

Most workers are employed at-will, entitled only to minimal wage, hour, and benefit protections, violations of which are not infrequent.⁶

As other authors in this volume detail, existing labor law makes reversing unions' decline all but impossible.⁷ The NLRA, despite its broad promise to protect concerted action, makes it extremely difficult for workers to organize and bargain with their employers. Employers have a slew of lawful tools at their disposal to resist unionization: they can "predict" that unionization will have a negative impact on the company; require workers to listen to anti-union speeches; exclude union organizers from the premises; shut down their enterprises following unionization; and, in many circumstances, permanently replace workers for striking – all without running afoul of the law. And when employers do violate the law – for example, by threatening or firing workers who seek to unionize – they risk little punishment.⁸

Moreover, even when workers are able to overcome employer resistance to unionization, they confront a regime deeply mismatched with the contemporary economy. The modern economy 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.⁹ The NLRA, however, channels organizing and bargaining to the level of the individual enterprise, between traditional employers and employees.¹⁰ This mismatch leaves many workers unable to effectively exercise organizing and bargaining rights. For example, the statute excludes independent contractors, as well as whole sectors of the economy like domestic and agricultural work.¹¹ In addition, the law creates a process for organizing workers primarily at a single work-site or enterprise; it does not facilitate organizing across multiple employers in the economic sector, or even all subcontracted employees at a given worksite.¹² Relatedly, the legal obligation to bargain rests only with the "employer" and that employer is obligated to bargain only with its own "employees."¹³ Although multiunit bargaining is

⁶ For further discussion of labor and employment law's failure and the relationship to political and economic inequality, see Kate Andrias, *The New Labor Law*, 126 *YALE L.J.* 2 (2016).

⁷ See, e.g., Chapter 3 in this volume. For earlier work on this topic, see Andrias, *supra* note 6; Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 *COLUM. L. REV.* 1527, 1611–1612 (2002); Alan Hyde, *The Idea of the Idea of Labour Law: A Parable*, in *THE IDEA OF LABOUR LAW* 88, 97 (Guy Davidov & Brian Langille eds., 2011); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 *HARV. L. REV.* 1769, 1769 (1983). But see Lance Compa, *Not Dead Yet: Preserving Labor Law Strengths While Exploring New Labor Law Strategies*, 4 *U.C. IRVINE L. REV.* 609, 610–612 (2014) (arguing that U.S. labor and employment law regimes constructed in the twentieth century are viable for the twenty-first century).

⁸ See, e.g., Weiler, *supra* note 7, at 1769–1770; Andrias, *supra* note 6, at 25–27.

⁹ DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 10 (2014).

¹⁰ KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* 290 (2004); Andrias, *supra* note 6, at 28–32 nn.132–159 and accompanying text.

¹¹ National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (2018).

¹² Andrias, *supra* note 6; Mark Barenberg, *Widening the Scope of Worker Organizing: Legal Reforms to Facilitate Multi-Employer Organizing, Bargaining, and Striking*, ROOSEVELT INST. (Oct. 7, 2015), <http://rooseveltinstitute.org/wp-content/uploads/2015/10/Widening-the-Scope-of-Worker-Organizing.pdf> [https://perma.cc/MUX8-V7QJ].

¹³ For this reason, the definition of "joint employer" has been highly contested. See *Hy-Brand Indus. Contractors*, 365 N.L.R.B. 156 (Dec. 14, 2017) (overruling *Browning-Ferris Indus. of California, Inc.*, 362 N.L.R.B. 186 at 2 (Aug. 27, 2015)). The Board's *Hy-Brand* decision was vacated after the NLRB's Inspector General held that one member should have recused himself from the case; the Board has since

permitted, and has been used in various industries where employers have agreed to it, it is not required.¹⁴ Finally, since the Taft–Hartley Amendments of 1947, the Act has also significantly limited the ability to engage in cross-employer collective action; labor organizations are not permitted to picket a “secondary” employer, even when the secondary employer’s business is intertwined or related to that of the primary.¹⁵

Meanwhile, the federal government provides no affirmative support for unionization and bargaining, nor does it give worker organizations a seat at the table when important decisions about the political economy are made.¹⁶ And broad preemption doctrine largely prevents states from doing so, even if they want to. In short, American law establishes a system of voluntaristic, decentralized unionism against a background presumption of employment-at-will and broad managerial rights; collective bargaining is a private negotiation between individual employers and employees that exists only where a majority of employees, despite extraordinary employer resistance, chooses to unionize. At least since 1947, the regime has not been designed to give workers significant power over the political economy – and employer resistance and changes to the economy have only made the situation worse for workers.

Scholars and advocates have long offered proposals to reform the NLRA.¹⁷ But their proposals repeatedly have stalled in Washington, even under unified Democratic government.¹⁸ Indeed, in recent years, many of labor’s historic allies seemed to abandon the project of collective labor rights altogether, concluding that unionism in the contemporary political economy was hopeless.¹⁹ Ambitions checked, unionists’ own proposals focused on tinkering at the edges of the existing law, without success.²⁰

But the decline of the twentieth-century labor law regime is not the end of the road for the rights and interests of working people. To the contrary: demands for fundamental reform are gaining steam. In particular, academics and policy makers who support unions have begun to converge in their calls for a new, inclusive system of sectoral bargaining that would enable unions to bargain to raise wages and negotiate benefits for *all* workers throughout the economy.²¹ Notably, almost all other industrialized

turned to rulemaking in order to narrow the definition of joint employment. See *The Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46681 (proposed Sept. 14, 2018).

¹⁴ *Artercraft Displays, Inc.*, 262 N.L.R.B. 1233 (July 23, 1982), *clarified*, 263 N.L.R.B. 804 (Aug. 30, 1982); see Andrias, *supra* note 6, at 32 nn.155–156 and accompanying text; Barenberg, *supra* note 12.

¹⁵ National Labor Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4) (2018).

¹⁶ See Andrias, *supra* note 6, at 6, 13–36; 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 Laws,”* 1990 WIS. L. REV. 1, 1 (1990).

¹⁷ See Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL’Y REV. 375, 399–400 (2007).

¹⁸ Dorian T. Warren, *The Politics of Labor Policy Reform*, in *THE POLITICS OF MAJOR POLICY REFORM IN POSTWAR AMERICA* 103–128 (Jeffery A. Jenkins & Sidney M. Milkis eds., 2014). On the history of labor law reform failure, see Estlund, *supra* note 7, at 1611–1612.

¹⁹ See Andrias, *supra* note 6, at 75 nn.389–394 and accompanying text.

²⁰ *Id.* at 27–28 nn.127–131 and accompanying text.

²¹ See, e.g., DAVID ROLF, *THE FIGHT FOR FIFTEEN: THE RIGHT WAGE FOR A WORKING AMERICA* 253–258 (2016); Andrias, *supra* note 6; Brishen Rogers, *Libertarian Corporatism Is Not an Oxymoron*, 94 TEX. L. REV. 1623, 1624 (2016); Kate Andrias & Brishen Rogers, *Rebuilding Worker Voice in Today’s Economy*, ROOSEVELT INST. (Aug. 9, 2018), <http://rooseveltinstitute.org/wp-content/uploads/2018/07/Rebuilding-Worker-Voices-final-2.pdf> [<https://perma.cc/M422-LQYP>]; David Madland, *The Future of Worker Voice and Power*, CTR. FOR AM. PROGRESS (Oct. 2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/10/06051753/WorkerVoice2.pdf> [<https://perma.cc/JA9C-8RDV>]; David Rolf, *Toward a 21st-Century Labor Movement*, AM. PROSPECT (Apr. 18, 2016), <http://prospect.org/article/toward-21st-century-labor>

democracies use some form of sectoral or industrial bargaining.²² In such systems, the law facilitates or mandates bargaining throughout an economic sector, extends the fruits of collective bargaining to the entire sector, and/or guarantees worker organizations a seat at the table when governmental decisions about employment standards are made.

Broadly inclusive sectoral bargaining, when combined with worksite bargaining, offers numerous advantages for workers. Scholars have shown that when the law facilitates power-sharing over decisions about wages, benefits, and the economy through comprehensive systems of sectoral bargaining, more egalitarian outcomes are achieved.²³ This is because, unlike firm-based bargaining, which tends to compress wages within a firm, sectoral bargaining directly affects wages throughout the labor market.²⁴ Indeed, comparative studies suggest that, from the perspective of creating egalitarian outcomes at the societal level, the critical factor in a labor law regime is the establishment of broadly inclusive union organizations with power to negotiate sectorally.²⁵

In addition, sectoral bargaining increases workers' voice in public policy decisions.²⁶ Depending on the design, sectoral bargaining can give worker organizations an official seat at the table when policy decisions affecting workers are made. More generally, worker organizations' broad mandate enhances their incentive and ability to serve as a counterweight to organized business interests in the political sphere. Indeed, giving worker organizations, as well as businesses, a formal role in setting social welfare policy could be a particularly helpful tool if, as some predict, automation becomes more prevalent and results in lower overall employment levels.²⁷ In that event, employer-based bargaining could become even more obsolete, with working people – or previously working people – needing to negotiate directly with the state to spread losses and gains from automation.

Sectoral bargaining also responds well to the increasing problem of the fissured employer.²⁸ Workers throughout an economic sector bargain together, whether employed by a lead firm, a contracted firm, or a temporary agency. This avoids protracted legal battles about the identity of the employer and provides a disincentive for companies to subcontract to reduce labor costs. Likewise, sectoral bargaining can cover both independent contractors and employees, minimizing battles over worker classification and extending the reach of bargaining to nontraditional workers.

movement [<https://perma.cc/DFV5-RRMU>]; Lawrence Mishel Testifies Before the Democratic Platform Committee 2016, ECON. POLICY INST. (June 9, 2016), www.epi.org/publication/testimony-raise-americas-pay [<https://perma.cc/5R7V-NMP6>]; cf. Matthew Dimick, *Productive Unionism*, 4 U.C. IRVINE L. REV. 679 (2014); Barenberg, *supra* note 12.

²² See Andrias, *supra* note 6, at 35 nn.172–177, 77–80 nn.401–420 and accompanying text.

²³ KATHLEEN THELEN, *VARIETIES OF LIBERALIZATION AND THE NEW POLITICS OF SOCIAL SOLIDARITY* (2014).

²⁴ Jonas Pontusson, *Comparative Political Economy of Wage Distribution: The Role of Partisanship and Labour Market Institutions*, 32 BRIT. J. POL. SCI. 281 (2002); Michael Wallerstein, *Wage-Setting Institutions and Pay Inequality in Advanced Industrial Societies*, 43 AM. J. POL. SCI. 649, 669 (1999).

²⁵ STEPHEN J. SILVIA, *HOLDING THE SHOP TOGETHER: GERMAN INDUSTRIAL RELATIONS IN THE POSTWAR ERA* 38–41 (2013) (emphasizing the central role the law and state institutions play in sustaining the German industrial relations system); THELEN, *supra* note 23, at 204–207.

²⁶ Andrias, *supra* note 6; Rogers, *supra* note 16, at 40–43.

²⁷ See Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254 (2018).

²⁸ Andrias, *supra* note 6, at 78.

Finally, sectoral bargaining takes the most contentious disputes about wages and benefits outside of the workplace. Doing so can help facilitate collaborative relationships between workers and firm managers.²⁹ It also addresses several of the efficiency-based objections to collective bargaining by moving the topics over which much bargaining occurs away from work rules and toward economic standards.³⁰

Despite these arguments, a system of labor law that empowers unions to bargain on behalf of all or most workers, with active support from the state, has long been considered to be unworkable and unachievable in the United States.³¹ Sectoral bargaining, the conventional wisdom holds, is distinctly European, unmoored from American culture and history.³²

Arguments for sectoral bargaining, however, are not merely academic; nor can they be dismissed as efforts to import a system from abroad. Rather, sectoral bargaining is analogous to the pattern bargaining achieved in the 1940s and 1950s by powerful unions in industries like auto and steel, or multiemployer bargaining like in coalmining or janitorial services.³³ It also recalls the tripartite wage boards that were part of the early Fair Labor Standards Act, enabling unions, along with employers, to set minimum standards on an industry-by-industry basis.³⁴ More important, a model of state-supported sectoral bargaining is emerging from the efforts of today's most energetic and successful worker movements.

Consider the "Fight for \$15," a campaign of low-wage workers organized by the Service Employees International Union (SEIU) as well as by other worker groups representing domestic workers, airport staff, Uber drivers, and more. These workers have been pressing localities and states to raise minimum wages and enact other employment law protections for entire economic sectors and regions.³⁵ In response, in the last five years, over two dozen states and many more localities have raised their minimum

²⁹ Madland, *supra* note 21, at 3, 13–14, 22.

³⁰ Dimick, *supra* note 21, at 692 (explaining that when union structures are highly decentralized and firm-based, the rational response of unions is to advocate for "seniority-based layoff policies, job definitions and demarcations, internal labor markets, rules limiting employer discretion over technology, manning, and staffing requirements, and so forth").

³¹ For discussion of this critique, see Andrias, *supra* note 6.

³² See Compa, *supra* note 7, at 610 (arguing that a "labor and employment law system cannot be wrenched from its historical moorings").

³³ For a discussion of historical pattern bargaining in the 1950s, see NELSON LICHTENSTEIN, *THE MOST DANGEROUS MAN IN DETROIT: WALTER REUTHER AND THE FATE OF AMERICAN LABOR 271–298* (1995); see also 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 pattern bargaining among garment workers before the era of globalization); CATHERINE L. FISK, *WRITING FOR HIRE: UNIONS, HOLLYWOOD, AND MADISON AVENUE* (2016) (describing industry-wide bargaining in Hollywood).

³⁴ Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 *YALE L.J.* 616 (2019); cf. LEON FINK, *THE LONG GILDED AGE: AMERICAN CAPITALISM AND THE LESSONS OF A NEW WORLD ORDER 96* (2015); DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865–1925* (1987); CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960* (1985).

³⁵ For detailed discussion, see Andrias, *supra* note 6.

wages.³⁶ Several of these, including California and New York, have enacted increases to fifteen dollars an hour – nearly eight dollars an hour more than the federal minimum, to be phased in over time.³⁷ Just a few years ago, increases of this scope and magnitude would have been unthinkable. The wage laws have been accompanied by new regulations providing scheduling protection, paid leave, and other benefits.³⁸

At first glance, these seem to be ordinary state and local employment statutes, separate and apart from the law that governs collective activity by workers.³⁹ But the laws are a direct result of collective worker organizing – and the express goal of the worker campaigns is not just higher wages, but also “a union” for all workers in each sector.⁴⁰ In fact, many of the new laws that the worker movements have won are actually a product of *bargaining*, either formal or informal, among unions, employers, and the state.⁴¹ Such efforts are not limited to the low-wage service sector. Public school teachers across the

³⁶ *City Minimum Wage Laws: Recent Trends and Economic Evidence*, NAT’L EMP. LAW PROJECT (April 2016), www.nelp.org/content/uploads/City-Minimum-Wage-Laws-Recent-Trends-Economic-Evidence.pdf [<https://perma.cc/V55C-D3AX>]; *Minimum Wage Tracker*, ECON. POL’Y INST. (Sept. 10, 2018), www.epi.org/minimum-wage-tracker [<https://perma.cc/HTG4-QHZQ>]; *State Minimum Wages*, NAT’L CONF. OF STATE LEGISLATURES (July 1, 2018), www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx [<https://perma.cc/UQ4E-MYMC>]. *But see* Alan Blinder, *When a State Balks at a City’s Minimum Wage*, N.Y. TIMES (Feb. 21, 2016), www.nytimes.com/2016/02/22/us/alabama-moves-to-halt-pay-law-in-birmingham.html [<https://perma.cc/WV4R-DJ7E>] (describing Alabama state legislature’s decision to overrule Birmingham’s local minimum wage).

³⁷ *See* S.B. 3, 2016 Leg., Reg. Sess. (Cal. 2016); *City Minimum Wage Laws*, *supra* note 36; Press Release, N.Y. Governor’s Press Office, Governor Cuomo Signs \$15 Minimum Wage Plan and 12 Week Paid Family Leave Policy into Law (Apr. 4, 2016), www.governor.ny.gov/news/governor-cuomo-signs-15-minimum-wage-plan-and-12-week-paid-family-leave-policy-law [<https://perma.cc/NYP6-UCQC>].

³⁸ *See* Jenny Brown, *Fast Food Strikes: What’s Cooking?*, LABOR NOTES (June 24, 2013), www.labornotes.org/2013/06/fast-food-strikes-whats-cooking [<https://perma.cc/A739-Y6CQ>]; Patrick McGeehan, *Push to Lift Minimum Wage Is Now Serious Business*, N.Y. TIMES (July 23, 2015), www.nytimes.com/2015/07/24/nyregion/push-to-lift-hourly-pay-is-now-serious-business.html [<https://perma.cc/S7M8-9VPH>]; Ovetta Wiggins, *Maryland Flexes Progressive Democratic Muscles to Override Two Hogan Vetoes*, WASH. POST (Jan. 12, 2018), www.washingtonpost.com/local/md-politics/maryland-will-require-businesses-to-provide-paid-sick-leave/2018/01/12/acb1a570-f7be-11e7-beb6-c8d48830c54d_story.html?utm_term=.52c9fa970d1c [<https://perma.cc/8FH8-LJYR>].

³⁹ *See* Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2688–2689 (2008) (describing the traditional view that labor and employment law constitute dichotomous regulatory regimes and noting critiques of that view); *see also* Theodore J. St. Antoine, *Labor and Employment Law in Two Transitional Decades*, 42 BRANDEIS L.J. 495, 526–527 (2004) (explaining that the preceding “two decades have continued the shift of emphasis from labor law to employment law – from governmental regulation of union-management relations, with collective bargaining expected to set most of the substantive terms of employment, to the direct governmental regulation of more and more aspects of the employer-employee relationship” and expressing regret at the diminishment of “private initiative and the voluntary arrangements that have made collective bargaining such a uniquely valuable American institution”).

⁴⁰ More precisely, the campaign demands fifteen dollars an hour and the right to a union “free of intimidation.” *See* Arun Gupta, *Fight for 15 Confidential: How Did the Biggest-Ever Mobilization of Fast-Food Workers Come About, and What Is Its Endgame?*, IN THESE TIMES, (Nov. 11, 2013), http://inthesetimes.com/article/15826/fight_for_15_confidential [<https://perma.cc/Y5V6-SNKS>]; *see also* Lydia DePillis, *It’s Not Just Fast Food: The Fight for \$15 Is for Everyone Now*, WASH. POST (Dec. 4, 2014), www.washingtonpost.com/news/storyline/wp/2014/12/04/its-not-just-fast-food-the-fight-for-15-is-for-everyone-now [<https://perma.cc/Z7GV-GJ6M>]; Josh Eidelson, *Fast Food Strikes to Massively Expand: “They’re Thinking Much Bigger”*, SALON (Aug. 14, 2013), www.salon.com/2013/08/14/fast_food_strikes_massively_expanding_theyre_thinking_much_bigger [<https://perma.cc/N9J2-6M3P>].

⁴¹ *See* Andrias, *supra* note 6, at 57–69.

nation have recently engaged in an upsurge of labor activity, demanding wage increases on a state-wide basis, even in conservative states where teachers lack the legal right to bargain collectively. Their strikes 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.⁴²

Critically, the outline of an American form of sectoral bargaining is emerging from the efforts of these social movements. That outline is nascent and contested and the specifics of what success would look like are far from clear. But from the social movements' efforts one can derive a path toward a new labor law regime that is distinct from the legal regime that has governed since the New Deal and particularly since 1947.

First, the new labor law would reject the old regime's commitment to the employer/employee dyad.⁴³ It would locate decisions about basic standards of employment at the sectoral, industrial, and regional levels, rather than at the level of the individual worksite or employer. Relatedly, the regime would protect broad cross-employer organizing and concerted action, and it would encompass even those workers who have long been excluded from the definition of "employee." Second, the new labor law would reject the principle of private ordering that was cemented in the years following the New Deal, under which labor negotiations are a private affair and the state plays a neutral and minimal role – a system that accepts existing distributions of power and operates against background common law assumptions regarding property and managerial rights.⁴⁴ Instead, the new labor law would position unions as political actors representing workers generally and would involve the state as an active participant in supporting collective bargaining and union rights.⁴⁵ Third, and related to the first two moves, the new labor law would reject the bifurcation between employment law and labor law that has governed in recent decades by rendering the basic terms of employment for all workers subject to social bargaining.⁴⁶ Finally, the new labor law would maintain a role for

⁴² Kate Andrias, Feller Lecture: *Peril and Possibility: Strikes, Rights, and Legal Change in the Age of Trump*, 40 BERKELEY J. EMP. & LAB. L. 137 (2019).

⁴³ See Karl Klare, *The Horizons of Transformative Labour and Employment Law*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* 3, 23 (Joanne Conaghan et al. eds., 2002) (“[O]ne must wonder about the adequacy of a model of redistribution classically wedded to the employer-employee dyad, when traditional workers and traditional employers are replaced by a complex variety of social actors in paid employment.”).

⁴⁴ For an analysis of how law encouraged the earlier American labor movement's embrace of private ordering over statism, see WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991).

⁴⁵ Nelson Lichtenstein, *The Demise of Tripartite Governance and the Rise of the Corporate Social Responsibility Regime*, in *ACHIEVING WORKERS' RIGHTS IN THE GLOBAL ECONOMY* 95, 95 (Richard P. Appelbaum & Nelson Lichtenstein eds., 2016) (noting that the system was “often denominated as ‘corporatism’ in Europe, ‘tripartism’ in the United States”).

⁴⁶ The current phenomenon is markedly different from previous efforts to blur the distinction between employment law and labor law. Those tended to use employment law to achieve NLRA aims, see Sachs, *supra* note 39, at 2687 (documenting how “workers and their lawyers are turning to employment statutes like the Fair Labor Standards Act (FLSA) and Title VII of the Civil Rights Act of 1964” to facilitate “their efforts to organize and act collectively”), or abandoned a system of unionization in favor of self-regulation with elements of worker voice, see CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 52–74 (2010) (describing the fall of collective bargaining and the proliferation of substantive mandates).

traditional firm-based organizing and bargaining, while experimenting with new forms of worksite representation.⁴⁷

At the federal level, achieving any pro-worker reform, let alone a broadly inclusive system of sectoral bargaining, is impossible in the near term. Yet progressive states and localities can move toward the vision by creating or expanding tripartite administrative structures that include representatives from worker organizations, business groups, and the general public who then negotiate over such employment law standards as minimum wages, benefits, health and safety, and scheduling on an industry-by-industry basis. Indeed, California, New Jersey, and New York already vest the power to set wages or other standards with tripartite commissions.⁴⁸ These commissions provide an existing foothold for a form of sectoral bargaining that can be expanded, even without federal law reform.⁴⁹

More long term, a federal system of mandatory and inclusive sectoral bargaining is essential and achievable. Such reform could take different shapes.⁵⁰ One possibility would be to combine a significantly strengthened NLRA, including more robust protection for class-wide organizing and concerted action, as well as new mandates for multi-employer bargaining, with a system of government-facilitated social bargaining that brings labor and business to the table regarding social welfare benefits and minimum employment standards. That dual approach builds directly on the efforts of the Fight for \$15 to date. Yet, it is not the only possible path to sectoral bargaining in the United States. Whatever the details entail, the goal must be to create a labor law system that truly gives workers power at work, in the economy, and in politics. Such reform is essential to salvage and secure labor law's most fundamental commitment to a more egalitarian workplace and political economy.

⁴⁷ One example is the recently enacted New York City law that allows fast food workers to contribute to worker advocacy organizations of their choice, via employer-facilitated paycheck deduction. Fair Workweek and Fast Food Deductions Law, N.Y.C. ADMIN. CODE §§ 20-1301-10 (2017); see Justin Miller, *In New York City, Fast-Food Workers May Soon Have a Permanent Voice*, AM. PROSPECT (June 15, 2017), <http://prospect.org/article/new-york-city-fast-food-workers-may-soon-have-permanent-voice> [https://perma.cc/3CGG-HD7U].

⁴⁸ See CAL. LAB. CODE §§ 70-74, 1173, 1178 (West 2011); N.J. STAT. ANN. § 34:11-56a4.7, -56a8, a9; N.Y. LAB. LAW § 654 (McKinney 2016).

⁴⁹ See Andrias, *supra* note 6, at 84-92.

⁵⁰ See Andrias & Rogers, *supra* note 21, at 28-33.