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From Labor Law to Employment Law: The Changing Politics of Workers' Rights

Daniel Galvin
Associate Professor of Political Science
IPR Fellow
Northwestern University

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ABSTRACT

Over the past several decades, a new kind of labor politics has emerged in new venues (state and local levels), focusing on new governing institutions (employment laws), involving new strategies by labor unions, and featuring new organizational forms (alt-labor). The timing, form, and content of these developments have been powerfully shaped by the persistence of the increasingly outmoded but still authoritative national labor law, which has constrained and channeled the efforts of workers and their advocates to respond to growing problems. While the new institutions and organizations provide new substantive rights for workers and alternative vehicles for voice and collective action, the layering of these new forms alongside the old–without displacing the latter–has generated new problems without solving the problems produced by the ossification of labor law in the first place. Using novel empirical data and analysis, this paper documents these changes, explores their causes, and considers their consequences for the changing politics of workers' rights.

There has always been a vast power asymmetry in the American workplace—a great imbalance between the prerogatives of employers, on one hand, and the rights of employees on the other. The magnitude of this imbalance has fluctuated over time, however, along with changes in the primary institutions constituting workers' rights. At different points in American history, these institutions have provided workers with more or fewer legal protections against exploitation and wider or narrower pathways for collective action.

Prior to the 1930s, for example, the Supreme Court's adherence to the "liberty of contract" doctrine severely limited the scope and content of workers' rights and barred many forms of collective action.[1] The National Labor Relations Act of 1935 transformed this institutional order by legitimizing unions and collective bargaining, allowing workers to participate in the construction and enforcement of their own rights.[2] For a time, the collective bargaining system seemed to work roughly as intended: at its peak in the 1940s and 1950s, a third of all workers enjoyed union representation, voice in the workplace, and protection against exploitation—and millions more benefited from the upward pressure unions put on wages, hours, and other terms and conditions of employment in highly unionized regions and industries.[3] The New Deal's collective bargaining system never reached as broadly or penetrated the workforce as deeply as its designers had hoped, but for a substantial share of American workers, collective rights were a reality, protected by a stable set of national labor market institutions.

But over the last half-century, a confluence of economic, legal, social, and political trends has rendered labor law effectively irrelevant for the vast majority of private sector workers. Different scholars weigh certain factors more heavily than others, but these trends are usually said to include deindustrialization and the changing composition of industries; the emergence of global supply chains and production processes predicated on subcontracting, outsourcing, and

offshoring, which undermine the traditional employment relationship; capital flight from mostly pro-labor states to mostly anti-union states; technological change; a series of employer-friendly Court decisions allowing permanent replacements, restricting the scope of collective bargaining, and more; employers' growing adeptness at exploiting labor law's loopholes to deter or quash unionization drives with relative impunity; the political mobilization of business and its growing clout within both parties; electoral gains by the national GOP; and the rise of partisan polarization.[4]

Despite multiple attempts by workers and their advocates to update the law to better keep pace with changing conditions – including the ill-fated campaigns for the Labor Law Reform Act of 1978 and the Employee Free Choice Act of 2009 – opponents have leveraged institutional veto points to block those reforms and maintain the status quo. Indeed, since the major Taft-Hartley amendments of 1947, the NLRA has only been altered twice: the Landrum-Griffin Act of 1959 (regulating unions' internal affairs) and the minor health care amendments of 1974 (restoring coverage to non-profit hospital employees). For multiple decades, national labor law has remained awkwardly fixed in place, "ossifying," "stagnating," shrinking in "reach and significance," and "more and more resembl[ing] an elegant tombstone for a dying institution."[5] Labor law has thus undergone a transformation of function but not form – a process Cynthia Estlund terms "ossification" and Jacob Hacker and colleagues might call "policy drift."[6]

However this process is conceptualized, the consequences are plain to see. By 2017, the percentage of all unionized wage and salary workers had fallen to 10.7 percent, with only 6.5 percent unionized in the private sector.[7] Employees in all industries have become more vulnerable to exploitation and abuse, wage theft, discrimination, uncompensated workplace

injuries, political pressure, and more, with those at the bottom of the income scale and the least bargaining power most at risk.[8]

Workers and their advocates have responded to these urgent problems by developing a broad range of strategies to recover institutional protections and rebuild workers' collective power. In recent years, for example, they have experimented with "social bargaining" strategies – sometimes called tripartism or corporatism – to set basic standards of employment at the sectoral, regional, or local levels, and called for its broader use;[9] proposed the wider use of wage boards as an alternative route to tripartism;[10] strategically leveraged the anti-retaliation provisions of federal employment and civil rights laws to vindicate workers' rights and promote concerted action;[11] enacted local ordinances extending collective bargaining rights to workers excluded from national labor law (such as independent contractors and "gig" workers);[12] forged stronger partnerships between government and worker organizations in the "co-enforcement" of labor standards;[13] implemented systems of "self-regulation" in which groups of employees work with outside monitors to expose employer malfeasance, mobilize the regulatory capacities of the state, and initiate litigation to redress grievances;[14] and expanded the use of "private attorneys general" laws to circumvent mandatory arbitration clauses and enable individual employees to file lawsuits on behalf of themselves, other employees, and the state for employers' violations of employment statutes and labor codes.[15]

Notably, all such reforms share two key features. First, they all represent *workaround solutions*. Contending with a national labor that is irrelevant for the vast majority of American workers but also an immovable object, they layer new forms atop old forms, exploit loopholes in existing law, and seek to scale up local experiments. Second, each envisions a central role for *employment law* in galvanizing, empowering, and protecting workers.[16] This, I will argue,

reflects an historical-institutional development of vast significance: the gradual shift from *labor law* to *employment law* as the primary "guardian" of workers' rights.[17]

As I will document and explain more fully below, over the last six decades, states (and a growing number of cities and counties) have enacted a rich variety of employment laws aimed at raising minimum workplace standards, establishing substantive individual rights, and providing legal and regulatory pathways for workers to vindicate those rights.[18] At precisely the same time that *labor law* has withered, *employment law* has flourished, proliferating at the subnational level and expanding into new substantive domains.[19]

The dramatic growth of subnational employment laws since the 1960s thus appears to represent an historic shift in the primary institutions constituting workers' rights—one at least as consequential as the advent of collective bargaining in the 1930s, if not more so, given the larger proportion of workers affected. Of course for most workers, employment law has long been the *only* institutional guarantor of rights in the workplace, since even at the height of unionism in the U.S., a majority of workers remained un-unionized. But until recently, the scope and content of those employment laws were quite limited, and in many areas of employment relations the state was entirely silent. The expansion of these laws – in number, breadth, depth, and across space – may therefore be said to have fundamentally altered the structure and content of workplace governance in the United States.

This *institutional* shift has been accompanied by an equally consequential *organizational* shift in the forms and strategies of workers and their advocates. Whereas unionization, collective bargaining, and concerted action in the workplace were once the primary preoccupations of the labor movement, attention has gradually shifted to the political arena: to the legislative process, to public protests and collective action in the public sphere, and to organizational innovation and

coalition-building among allied advocacy groups. Over the past thirty years, for example, worker centers and other nonprofit "alt-labor" groups have emerged as important organizational anchors of the labor movement. Not subject to the same restrictions as labor unions – but lacking unions' right of exclusive representation in collective bargaining – these nontraditional worker organizations have developed a broad range of political and social-movement tactics to help improve the terms and conditions of work for many low-wage workers. They have engaged in policy campaigns, street-level protests, secondary boycotts, direct corporate campaigns, legal actions, and media outreach strategies while forging alliances with traditional labor unions, kindred social movements, and state agencies. Although these organizational developments and strategic shifts have emerged slowly and largely escaped the attention of professional political science, they constitute a veritably new phase of U.S. labor politics.[20]

Critically, however, these twin institutional and organizational developments have not emerged on a blank slate. For even as labor law has become an increasingly insufficient foundation for building worker power, it has remained fixed in place, exerting a powerful, jealous, and continuous governing authority in its expansive domain. Labor law has become almost as significant for what it prohibits as for what it allows: in addition to denying collective bargaining rights to millions of vulnerable workers by excluding key industries and occupations from coverage (domestic work, agricultural work, independent contractors), the law has been interpreted by courts as preempting any and all state efforts to regulate labor-management relations in the private sector.[21] Preemption eliminates potentially generative sources of labor law innovation and experimentation while boxing in reformers, severely limiting their range of options. Unable to start from scratch and design new institutions better suited to changing economic and political conditions, workers and their advocates have had to structure their

innovations to carefully circumvent the stubbornly persistent labor law without intruding into its broad purview.[22] In this way, labor law has insinuated itself into the new state-level employment laws that have emerged as well as the recent workaround proposals mentioned above. As I will elaborate below, the constraints labor law imposes are evident in the new laws' delimited substantive content, distinctive institutional forms, and alternative delivery mechanisms.

Similar effects can be observed in the constellation of political organizations working in this space. The new advocacy groups that have formed in response to the growing need for worker representation reflect labor law's constraints in both their organizational forms and in the scope of their activities. While these new groups can do some things labor unions cannot do, they cannot do other things labor unions can; and although in many areas their interests and activities align perfectly, in others, they conflict. The relationship between new and old worker organizations is complex, but the historical-organizational pattern is clear: nontraditional worker organizations, which have emerged slowly and relatively recently, have entered an arena in which many of the most significant resources – both material and ideational – are controlled by labor unions, the groups with the strongest stake in the "old" labor law regime and whose own commitments and operations remain powerfully shaped by it.

The political significance of the shift from labor law to employment law can be located precisely there, in the constraints imposed by the outmoded but persistent national labor law regime on the institutional and organizational responses of workers and their advocates to growing problems. My central argument is that the labor law regime – its institutional persistence as well as its organizational feedback effects – has powerfully shaped the *timing, content,* and *form* of the new institutions and organizations that have emerged. State-level employment laws now bear labor law's imprint in their limited substantive content and reach,

disjointed delivery mechanisms, high barriers to access for most workers, and in the new kinds of conflicts they generate. New workers' organizations, likewise, reflect the rigid rules of labor law in their structural arrangements, delimited roles, and in the complications they add to questions of resource allocation, organizational strategy, and legally permissible pathways forward.[23] Moreover, while the new institutions and organizations that have emerged do provide new substantive rights for workers and alternative vehicles for voice and collective action, the "layering" of these new forms atop the old – without displacing the latter – has generated new problems without solving the problems produced by the ossification of labor law in the first place.[24]

This is not, of course, the first study to observe that employment law has been on the rise or that new organizational developments in the labor movement are afoot. Nor has the relationship between labor law's ossification and subnational reform efforts escaped the attention of careful scholars working in the fields of history, sociology, industrial relations, or especially legal studies.[25] But a comprehensive empirical analysis of the rise of state employment laws is lacking, as is any synoptic treatment of the historical-institutional dynamics at play in its ongoing development. Using a novel dataset of all state employment laws enacted between 1960-2014, the present study offers the first look at the rich variation in its content and takes the first steps toward explaining its politically structured emergence across space. These data, in other words, enable us to systematically analyze the contours of a historical phenomenon that astute observers have perceived qualitatively but have hitherto been unable to study empirically.

Moreover, the theoretical perspective adopted here – emphasizing the significance of historical-institutional developments in shaping substantive outcomes – enables us to zero in on the ways in which old institutions and organizations can constrain and limit the options of

downstream reformers and how the early beneficiaries of a policy's feedback effects can persist and shape subsequent political developments. For example, as I discuss in greater detail below, labor unions – which thrived off of labor law's feedback effects in the early years of the policy's development – were instrumental in the construction of alternative institutions (state-level employment laws) and the development of new organizations and mobilization strategies in later years. These efforts, in turn, were politically formative: although they did not necessarily solve the main problems they sought to redress, they did generate a whole new set of complications and problems for the labor movement as a whole. As a case, then, this study offers an illustration of the "new politics" that can emerge from processes of policy feedback, institutional layering, and intercurrence, showing how old and new institutions and organizations have intersected in time to create a veritably new politics of workers' rights.[26]

Although the analysis presented here represents only the first step of what must necessarily be a broader inquiry, it proposes to reorient our thinking about the political capacities of workers left behind by major shifts in the U.S. economy over the last several decades. In recent years, scholars have linked the decline of the New Deal collective bargaining system to widening income inequality, the growth of "precarious" jobs, the declining moral economy of labor, and the increased vulnerability and psychosocial distress felt by American workers.[27] Complementing these findings, this study argues that there has also arisen a veritably new politics surrounding questions of workplace governance—structured by the persistence of an outmoded but powerful labor law regime and characterized by the new problems generated by the abrasion of old and new institutions and organizations operating simultaneously at different levels of the federal system.[28]

In the first section below, I provide a brief overview of labor law's early feedback effects and subsequent decline in effectiveness. The three empirical sections that follow then present evidence of the emergence of state employment laws, the role labor unions have played in the construction and deployment of those laws, and the rise of "alt-labor" groups representing workers that have been left behind or excluded from labor law's protections. In the final section, I discuss the new problems and tensions generated by the awkward juxtaposition of new and old institutional and organizational forms.

The Development and Decline of Labor Law

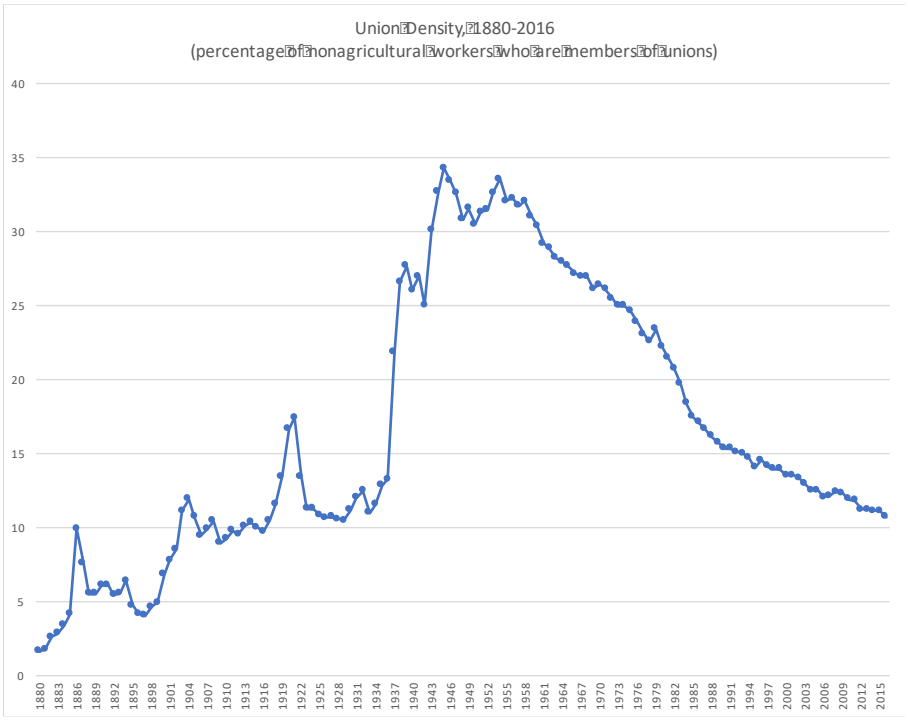
The rise and fall of U.S. labor unions and the ossification of labor law are topics that have been so carefully discussed by legal scholars, historians, sociologists, political scientists, and activists that in retreading the same ground one runs a high risk of redundancy, committing sins of omission, or both.[29] The following sketch therefore prioritizes brevity, emphasizing only the dynamics most relevant for the ensuing analysis.

The National Labor Relations Act (NLRA or "Wagner Act"), enacted at the height of the New Deal in 1935, remains the primary federal law governing labor relations in the United States. Its stated purpose is to redress "the inequality of bargaining power" in the workplace by protecting the right of workers "to organize and bargain collectively" over the "terms and conditions of their employment." If left unaddressed, the statue notes that this inequality would produce a "diminution of employment and wages," decrease the "purchasing power of wage earners," put downward pressure on working conditions, and threaten the flow of commerce.[30] Once the Supreme Court affirmed the constitutionality of the Act in 1937, it began to generate

strong feedback effects on interest groups, government elites, and mass publics. Indeed, it offers a model case of how "new policies create a new politics."[31]

Its most significant feedback effects can be observed in the development of private sector labor unions. Many unions, of course, were already in existence and instrumental in securing the law's passage in the first place.[32] But by formally recognizing unions as workers' representatives and establishing procedures for union elections, the Wagner Act accelerated their growth and influenced their organizational development.[33] The share of non-agricultural private sector workers belonging to a union more than doubled from 13 to 27 percent between 1936 and 1938 and did not dip below a quarter of the workforce until 1975. Despite the challenges posed by the Taft-Hartley amendments of 1947, union density remained above 30 percent for the seventeen-year stretch between 1943 and 1960 (**Figure 1**).

Figure 1: Union Density, 1880-2016



Sources: 1880-1995 data is from Richard B. Freeman, "Spurts in Union Growth: Defining Moments and Social Processes (No. W6012)" (National Bureau of Economic Research: 1997); 1996-2016 data is from Barry T.

Hirsch and David A. Macpherson, "Union Membership and Coverage Database from the Current Population Survey: Note," Industrial and Labor Relations Review 56 (2017): 349-354. (www.unionstats.com).

The collective bargaining system established through national labor law also had profound feedback effects on workers' and employers' political capacities. As Theda Skocpol writes, policies can "affect the capabilities of various groups to achieve self-consciousness, organize, and make alliances."[34] Labor law encouraged workers to view their interests as *collective* interests that could be pursued through self-organization and collective action.[35] Indeed, as the collective bargaining system matured, the range of imaginable alternatives for reform narrowed: as Nelson Lichtenstein, Ira Katznelson, and others have shown, by the early post-war period, more radical possibilities had been eliminated from the realm of possibility and the collective bargaining regime had become largely taken for granted.[36] Both workers' advocates and business interests structured their political activities around the new system, seeking to gain sufficient political power to control the NLRB and shape its common law.[37] In these ways and more, the Wagner Act "made" labor politics in America.[38]

As a legal matter, the NLRA has long maintained exclusive governing authority over an extremely broad domain. In 1959, the Supreme Court ruled in *San Diego Building Trades Council v. Garmon* that the NLRA barred any and all state and local efforts to legislate in the areas of labor law it covered, prohibiting regulation in areas even "arguably" protected or prohibited by the NLRA.[39] Unlike the Fair Labor Standards Act (FLSA) of 1938, which allowed states to enact stronger protections and set higher minimum standards than federal law provided, the "Garmon doctrine" prohibited state efforts to do anything similar in the field of labor law. Subsequent Court decisions narrowed the ability of states and localities to intervene further still, "virtually banish[ing] states and localities from the field of labor relations," with precious few exceptions.[40] States were permitted to design their own labor laws only for those workers

excluded from coverage under the Wagner Act, such as public sector and agricultural workers. If they sought to provide stronger rights and protections to a wider range of workers, they would need to find alternative routes for doing so; the Wagner Act was to be the primary, authoritative, centralized labor law in the United States that would enjoy an effective monopoly on the process of collective bargaining and unionization for the vast majority of workers.

Although the Taft-Hartley Act of 1947 and numerous business-friendly Court decisions over the years chipped away at unions' power, undermined workers' right to strike, weakened the NRLB, and created openings for employers to more vigorously oppose unionization, they also served to further ratify the Wagner Act's exclusive governing authority over private sector labor-management relations.[41] Those changes effectively gutted the Wagner Act from the inside, distorting its original purposes while leaving intact its core structures, broad authority, and expansive reach.

Consequently, despite its formal institutional persistence, national labor law became an ever-more glaring "mismatch" with changing economic conditions, including the changing composition of industries, new patterns of capital investment, and the changing nature of work. Amid the "bewilderingly complex proliferation of employment relationships that structure work in the modern city, college, or company" featuring "layer after layer of subcontractors and vendors," labor law's manifold weaknesses became all the more glaring.[42] As fewer and fewer workers were able to take advantage of its procedures for establishing rights, representation, and voice in the workplace, employees in all industries became more vulnerable to exploitation and abuse. Employment became more precarious, income inequality widened, wages stagnated, and the power asymmetry in the workplace grew.

But this was no accident or oversight: despite attempts by labor unions and their allies to update the law to better keep pace with changing economic conditions – by streamlining union election procedures ("card check"), increasing penalties for employer interference, eliminating the NLRA's preemption of state labor laws to allow experimentation, and more – opponents (chiefly business-funded Republicans but also some Democrats) successfully blocked reforms from advancing through the legislative process.[43]

As Kate Bronfenbrenner and Tom Juravich have shown in their ground-breaking work, employers benefited greatly from the status quo. Anti-union employers regularly exploited labor law's loopholes and blind spots and even blatantly violated the law in order to deter and quash unionization drives. They used "a combination of legal and illegal approaches" such as illegally discharging workers for participating in union activity, "captive-audience meetings, employer leaflets and mailings, supervisor one-on-ones, and illegal wage increases."[44]

Labor's opponents also became more politically engaged over the years, developing a multi-pronged approach to promoting their interests and curtailing workers' rights. As Alexander Hertel-Fernandez has shown, the business community began in the 1970s to build a "durable 'conservative-corporate' subnational coalition" and a formidable organizational infrastructure to advance its legislative aims, "systematically changing the state policy landscape in ways that disadvantaged their political opponents over the long run."[45] For example, the pro-business American Legislative Exchange Council (ALEC) developed "model bills," many explicitly aimed at "weakening labor unions," and was often successful, especially in states with low policy capacity and high ideological conservatism.[46]

To be sure, many additional factors contributed to the growing inability of labor law to provide workers' rights and protections to the vast majority of workers. These include the

conservatism and mismanagement of union leaders; the changing attitudes of workers; the "changing relation of class forces," and more.[47] Studies have also emphasized how institutional and ideational abrasions between the emergence of civil rights consciousness, activism, and enforcement, on one hand, and labor rights and collective commitments on the other contributed to the enervation of labor law and the labor movement more broadly. For example, as Paul Frymer has shown, as a result of a "bifurcated system of power that assigned race and class problems to different spheres of government," the enforcement of civil rights laws "unintentionally weakened national labor law," ultimately producing a more "diverse but weakened labor movement."[48] Nelson Lichtenstein has similarly argued that it was the unsustainable ideational conflict between "the concept of rights and that of solidarity, between the civil rights consciousness that has proven so potent during the last half century and the collective institutionalism that stands at the heart of the union idea" which contributed to labor's decline. "As the former became a near hegemonic way of evaluating the quality of American citizenship," he summarized, "the latter atrophied. Indeed, in its most extreme interpretation, rights consciousness subverts the mechanisms, both moral and legal, that sustain the social solidarity upon which trade unionism is based."[49]

The causes of labor's decline are thus multifaceted and complex; and its consequences are equally multiform. But for the purposes of the present analysis, two key features of labor law and its decline stand out as especially important. First, even as labor law became increasingly ineffective, its stubborn persistence, broad authority, and preemption of subnational innovation limited the options of workers' rights activists and reformers. Efforts to promote and defend workers' rights were (and continue to be) formulated in light of those limits; reformers must either work within or around immobile national labor law. By cordoning off potential pathways

for reform, labor law has powerfully shaped the substantive content and institutional form of the alternative policy instruments that have emerged, as I will elaborate further below.

Second, labor law's ossification and drift altered the balance of power among organized interests. Those with the greatest stake in matters of labor-management relations did not disappear, but rather came to embrace qualitatively different kinds of politics. Business interests – the "losers" in the New Deal – gradually shifted from offense to defense, and their main task became preserving the legal status quo. In the absence of formal policy change, anti-union employers could continue to exploit labor law's weaknesses to make unionization more difficult while letting changes in the broader economic context further enervate and fractionalize workers, undermining what remained of the labor movement.[50]

Meanwhile, labor unions and their allies – the "winners" in the New Deal but increasingly the "losers" in the post-Taft Hartley period – gradually shifted from defense to offense (some say too gradually). Organizationally mature, resource-rich, and politically experienced, many labor unions responded to the growing problems facing workers by developing innovative organizing strategies and building new policy instruments in alternative venues to achieve many of the same purposes as labor law, but through different means and mechanisms.[51] And as new groups nontraditional workers' advocacy groups gradually emerged in this organizational space to meet the needs of an increasingly fragmented and vulnerable workforce, their goals dovetailed with unions' goals but their approach was quite different (in part because as nonprofit, non-union groups, it legally *had* to be): these new organizations experimented with creative strategies to help those workers left behind by labor law's ossification while accommodating the realities of the changing legal and economic landscape. Many of the new and emergent tactics in the labor movement have thus evolved as responses to

old but persistent institutional constraints and the growing obsolescence of old organizing tactics. As I will discuss further below, synergies, conflicts, and ongoing negotiations between allies new and old now constitute the labor movement.

To fully understand the political development of workers' rights – past, present, and future – these complex institutional and organizational dynamics must be disentangled and analyzed more closely. A severely delimited institutional landscape channeled and constrained the responses of workers' and business' advocates while flipping the balance of power between them. The new institutions, organizations, and strategic repertoires that have emerged in this space have, consequently, durably altered the politics of workers' rights. This new politics did not emerge on a blank slate, but was rather spawned from old configurations, with old problems and purposes insinuated into the new formations. New and old now operate simultaneously, sometimes in harmony and sometimes in conflict, generating complex incentives, constraints, and challenges.

The "Changing of the Guard" from Labor Law to Employment Law

In 1988, renowned law professor Clyde Summers observed a "changing of the guard" from labor law to employment law:

> "The significant fact is that collective bargaining does not regulate the labor market. Unions and collective agreements do not guard employees from the potential deprivations and oppressions of employer economic power. The consequence is foreseeable, if not inevitable; if collective bargaining does not protect the individual employee, the law will find another way to protect the weaker party. The law, either through the courts or the legislatures, will become the guardian. Labor law is now in the midst of that changing of the guard. There is current recognition that if the majority of employees are to be protected, it must be by the law prescribing at least certain rights of employees and minimum terms and conditions of employment."[52]

Summers' rather functionalist depiction of this shift notwithstanding, the notion that there has been a historic shift in the "guardian" of workers' rights has been confirmed and elaborated by numerous legal scholars.[53] In her influential work, for example, Katherine Van Wezel Stone writes that "the emerging regime of individual employee rights represents not a complement to or an embellishment of the regime of collective rights, but rather its replacement."[54] Cynthia Estlund likewise affirms that "the New Deal collective bargaining system has been supplemented, and largely supplanted, by other models of workplace governance: a regulatory model of minimum standards enforceable mainly by administrative agencies and a rights model of judicially enforceable individual rights."[55] A number of scholars including Kate Andrias, Nancy MacLean, and Benjamin Sachs have helpfully brought workers back in to the story, with Sachs vividly describing this shift as a "hydraulic" process driven by workers themselves:

> "The deep dysfunctionality of the NLRA constitutes a blockage only of the *traditional* legal channel for collective action and labor-management relations. Because workers, unions, and certain employers continue to demand collective organization and interaction, this blockage has led not to 'ossification' but to a hydraulic effect: unable to find an outlet through the NLRA, the pressure from this continuing demand for collective action has forced open alternative legal channels…Faced with a traditional labor law regime that has proven ineffectual, 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 as the legal guardians of their efforts to organize and act collectively."[56]

Federal employment laws represent only the tip of the iceberg, however. For as several scholars have observed, most of the action has actually been at the state level: Richard Bales, for example, found that "in addition to enacting state statutes that parallel the federal statutes…state legislatures have passed legislation protecting employees in a wide variety of other circumstances," including in areas as diverse as wrongful discharge, whistleblowing, employee testing, and workplace safety and health.[57] And although Theodore St. Antoine focuses on state courts' role in reshaping the doctrine of doctrine of at-will employment, he too keenly observes

that "the most important and dramatic development in employment law over the last couple of decades came at the state level, not the federal."[58]

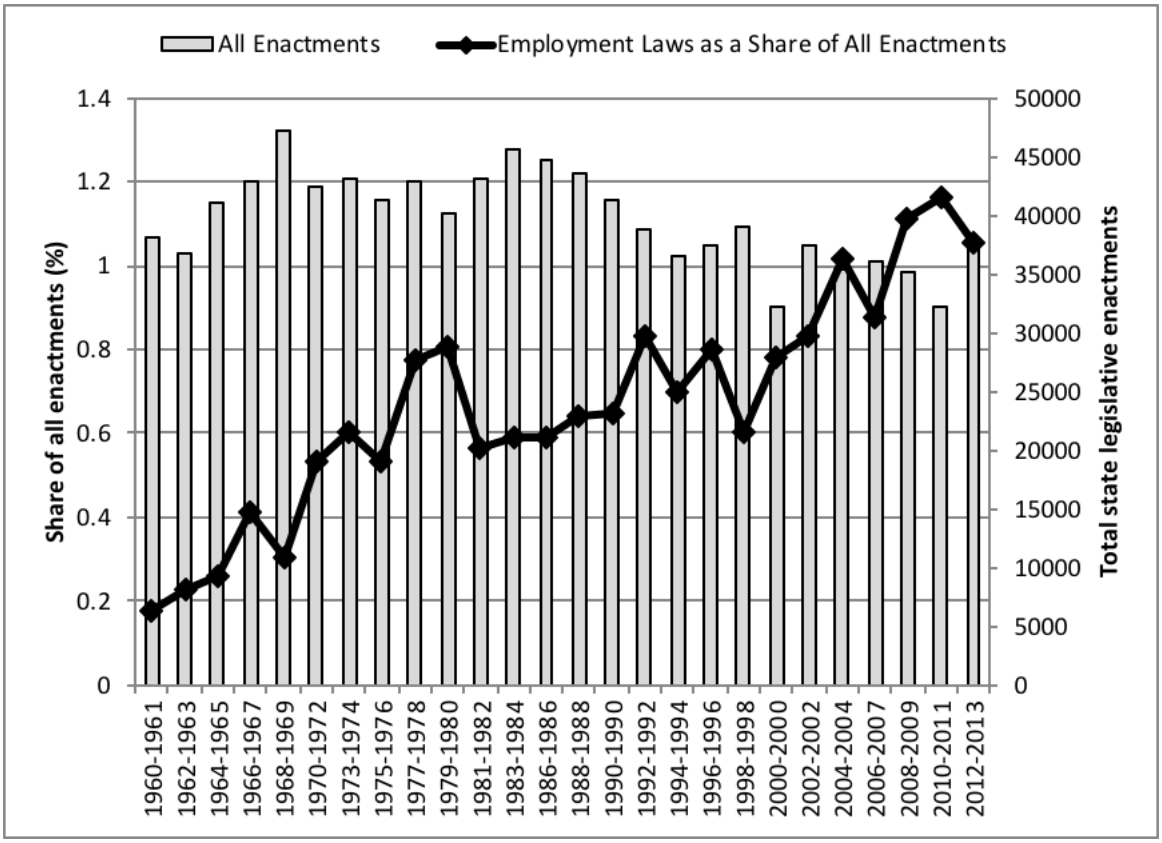
Employment law's growth, in other words, has been widely asserted by attentive scholars. But to date, no empirical evidence has been systematically marshaled to substantiate the claim that employment law has, in fact, grown. Nor, consequently, has any existing work been able to analyze its substantive complexity or begin to hazard an explanation for its variation across space and time. Thus while we think we know employment law has grown, we do not know what it consists of, where it has grown most, or whether its development is owed in any part to labor unions. For example, St. Antoine's claim that "part of the growth we have seen in employment law, as distinguished from labor law, is attributable to the decline of organized labor," is an empirical question that we have yet to answer.[59]

Part of the reason for this empirical lacuna is practical, as tens of thousands of new laws are enacted every year at the state level and systematically obtaining reliable, equivalent information on the many different types of employment laws passed in 50 states over many decades appears daunting. But as it turns out, the Department of Labor has continuously monitored, recorded, categorized, and summarized employment law enactments at the state level every year for many decades. Expert staff members write and publish summary reports of all laws passed during the prior year along with short descriptions of each in the Bureau of Labor Statistics' *Monthly Labor Review (MLR)*.[60] The format and authorship of the reports have been remarkably stable over time, with over 90% of the reports issued between 1960 and 2014 authored by the same five individual authors, with some overlap between them.

With a small team of research assistants, I used these reports to construct a dataset of every legislative enactment between 1960-2014, coded according to the categories listed in the

reports ("wages," "hours of work," "plant closings," "child labor," "whistleblower," and so on).[61] During this period, states enacted 7,336 employment laws in 33 categories, and their attention to employment law grew steadily over the years. As **Figure 2** indicates, across all states, employment laws as a share of all enacted bills *more than quintupled* over those fifty-five years. At precisely the same time that national labor law atrophied and private sector union membership plummeted, state legislatures became increasingly preoccupied with employment law.

Figure 2: Employment Laws as a Share of All Enacted Laws by Session



Sources: Employment law counts are from the Bureau of Labor Statistics, "State Labor Legislation Enacted in [Previous Year]," *Monthly Labor Review* (1918-2017). Total legislative enactments are from the Book of the States. American Legislators' Association Council of State Governments, *The Book of the States* (Lexington, Ky.: Council of State Governments, 1935-2017). Note: number of enacted bills in each state each year (including overrides, minus vetoes) reported in the annual publication *Book of the States* to generate the appropriate denominator.

Of course, new laws are not enacted in a vacuum. Many build on extant laws, addressing weaknesses that have become apparent in the course of events, and are often designed with the

state's existing administrative capacities in mind. Once a given state passes a pay equity law, for example, it need not pass another law to establish the same standard, but it may develop additional laws to bolster the enforcement of the primary law, add new categories of covered occupations, and so on. Many new laws thus build upon previous laws and alter their operation in ways both big and small. **Figure 2** should therefore be interpreted as an aggregate count of laws that are actually often cumulative in nature. Still, as discussed further below, the simple measure of the *volume* of state employment laws enacted over time – including both minor and major enactments together – is highly correlated with multiple alternative measures of the strength of statewide protections for workers and remains quite useful in over-time analyses.

The *scope* of employment laws has clearly grown over time as well. New topics and issues have been added to the list of core employment laws each decade, indicating a gradually expanding issue space (**Table 1**). Whereas in the 1960s the vast majority of employment laws dealt principally with wages and child labor, the 1970s saw a surge of attention to discrimination and equal employment opportunity, and the 1980s saw the emergence of new employment laws pertaining to parental leave, plant closings, privacy and drug testing, whistleblower protections, and more. In the 1990s, state legislatures expanded their attention to issues of genetic testing and the complex standards for discharging employees; and in the 21st century, legislatures have tackled all of the traditional issues plus independent contractor issues, the eligibility of undocumented immigrants to work, workplace violence, and more.

Table 1: Categories and Counts of Employment Laws Enacted by Decade

1960s		1970s		1980s		1990s		2000s	
287	Wages*	577	Wages*	465	Wages*	481	Wages*	608	Wages*
120	Child Labor	421	Discrimination/EEO	371	Discrimination/EEO	267	Discrimination/EEO	351	Worker Privacy
85	Discrimination/EEO	187	Child Labor	136	Child Labor	184	Child Labor	236	Undocumented Workers*
52	Women's Laws	122	Employment Agencies	95	Employment Agencies	101	Worker Privacy	235	Discrimination/EEO
37	Employment Agencies	36	Women's Laws	84	Worker Privacy	81	Family Leave*	160	Child Labor
7	Department of Labor	34	Hours of Work	59	Hours of Work	79	Employee Testings	159	Prevailing Wage
4	Undocumented Workers*	28	Displaced Homemakers	40	Plant Closings	52	Whistleblower	127	Time Off
		15	Undocumented Workers*	36	Employee Testings	50	Employment Agencies	105	Employee Testings
		10	Department of Labor	17	Family Leave*	33	Hours of Work	78	Family Leave*
				13	Whistleblower	32	Employee Leasing	68	Workplace Security/Violence
				8	Undocumented Workers*	11	Garment Industry*	65	Independent Contractor
				7	Garment Industry*	11	Plant Closings	63	Whistleblower
				3	Displaced Homemakers	7	Discharge of Employees	56	Employment Agencies
						6	Genetic Testing	49	Plant Closings
						2	Undocumented Workers*	43	Hours of Work
								41	Department of Labor
								38	Discharge of Employees
								31	Workers with Disabilities
								24	Employee Leasing
								21	Offsite Work
								19	Genetic Testing
								7	Garment Industry*

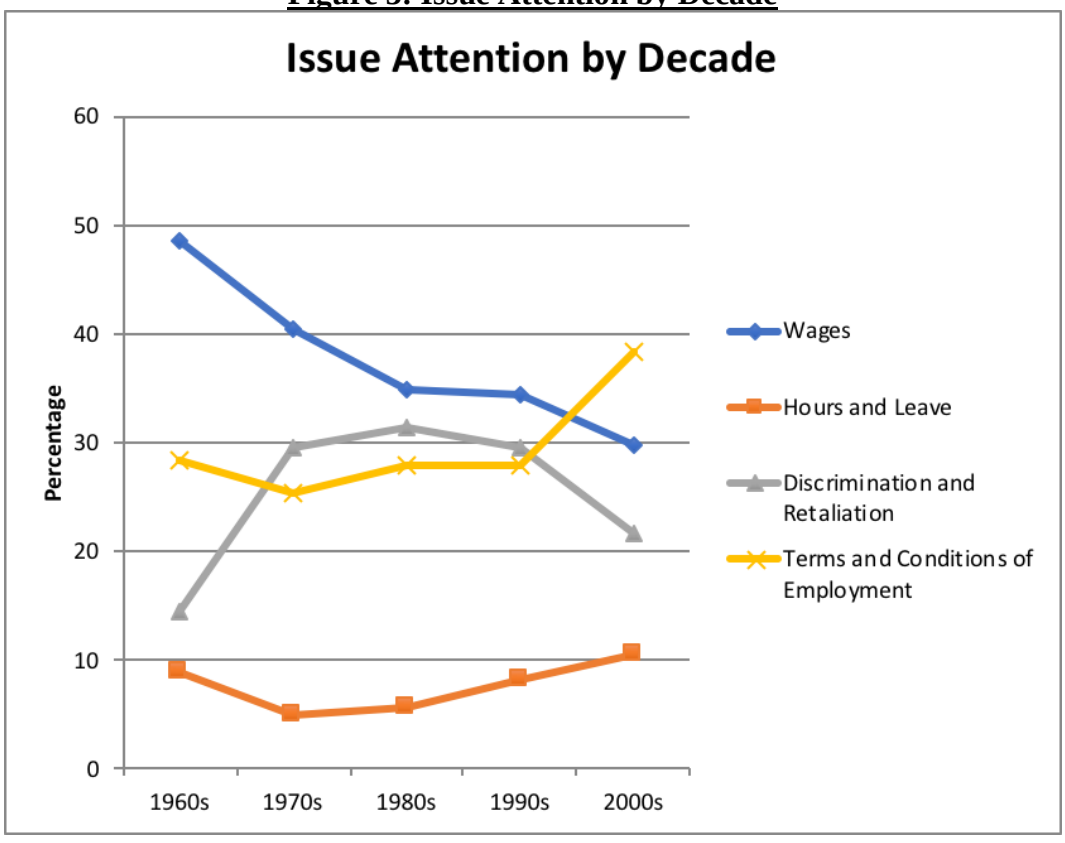
* "Wages" includes minimum wages, overtime, wages paid, and prevailing wage. "Family leave" includes parental leave and family issues. "Undocumented workers" includes protections for immigrant workers, migrant workers, and penalties for work-related human trafficking.

The *relative attention* paid to different areas of employment law has also evidenced instructive temporal dynamics. Placing the 33 types of employment laws into four relatively distinct groups – Wages; Hours and Leave; Discrimination and Retaliation; and Terms and Conditions of Employment (see **Table 2**) – we can further see that employment laws dealing with Wages became less common over the years relative to other types of laws, especially those pertaining to Terms and Conditions of Employment **(Figure 3)**. Laws covering matters of Discrimination and Retaliation notably grew and then fell over the decades, consistent with the historical trajectory of the "rights revolution"; while fairly steady attention was paid to laws pertaining to hours and leave.[62]

Table 2: Groups of Employment Laws

Wages	Hours and Leave	Discrimination and Retaliation	Terms and Conditions of Employment
Minimum wage Overtime Prevailing wage Wages Wages paid	Family issues Hours of work Offsite work Parental leave/family leave Time off Women's laws	Discharge Discrimination Employee testings Equal employment opportunity Genetic testing Workers with disabilities Workplace security/ violence Whistleblower	Child labor Department of labor Displaced homemakers Employee leasings Garment industry/apparel Independent contractor Plant closings Private employment agencies Undocumented workers (includes human trafficking, immigrant protection, immigration legislation, and migrant workers) Worker privacy

Figure 3: Issue Attention by Decade



These over-time trends appear to reflect the emergence of new problems and vulnerabilities in the workplace as the nature of the employment relationship changed and unions declined. Laws dealing with wages -- constituting over 40 percent of all state employment laws in the 1960s and 1970s -- generally raise the floor on wages and deal with the procedural requirements of where, when, and how employees are paid. They establish a baseline above which unions could conceivably negotiate other terms and conditions of employment. But as fewer workers were represented by unions and a greater share of the workforce became vulnerable to new forms of exploitation (e.g., using genetic tests to discriminate, the rising use of independent contractors and misclassification of employees), attention appears to have shifted to more nuanced and complex issues regarding the terms and conditions of employment: who is eligible to work; how workers must be/cannot be treated; and who is considered an employee.

The *content* of these laws thus appears to reflect the changing nature of work in the U.S. and the growing need for workers' rights and protections in areas that might have otherwise been guarded by unions and collective bargaining agreements. In addition to wages, hours, and other terms and conditions of employment, state-level employment laws govern core rules and workplace relations such as the eligibility to work; discrimination in hiring, firing, and relations in the workplace; the supply of workers; the legal status of workers; the ability to take temporary leave; the privacy of employees at work; employers' responsibilities to employees; the legal bases for discharging employees; and enforcement mechanisms for all of the above. The very same substantive issues labor law was originally designed to address through union representation and collective bargaining processes are now addressed through *state-level employment laws,* implemented through different processes, and enforced through different mechanisms.

The powerful influence of labor law's drift is also evident in what is conspicuously *absent* from these state laws. Due to labor law's preemption of subnational labor laws pertaining to private sector labor-management relations, state employment laws do not (and cannot) address issues related to unionization or collective bargaining in the private sector. If workers' advocates had been able to enact state labor laws altering union election procedures, raising the penalties for employer interference and intimidation, allowing for industry-based unions, or constructing other alternative arrangements, they surely would have (indeed, many have tried).[63] Many states did, of course, enact a variety of extensive labor laws governing industries explicitly falling outside the Wagner Act's reach: especially in the public sector, but also in agricultural and domestic work. But as long as national labor law remained in place and exerted exclusive authority over private sector labor relations, the possibility of regulating labor-management relations in the private sector through state-level labor laws was foreclosed. Instead, workers and their advocates turned to employment law to achieve the same substantive ends through different means.

In other words, as a practical matter, governance of the employment relationship has shifted to alternative venues (states rather than the national level), taken on alternative institutional forms (employment laws rather than labor law), and employed alternative enforcement mechanisms (regulation and litigation rather than collective bargaining). Rather than create and defend workers' rights through union-negotiated collective bargaining contracts, they mobilize the regulatory instruments of the state to enforce higher standards and provide workers with a private right of action. With respect to their *timing, form,* and *content,* then, these employment laws reflect the constraints imposed by the increasingly outmoded but still authoritative labor law.

These insights have been gleaned from a great distance and at the aggregate level, however, and many questions remain. Not least, what explains the variation in employment law activity across states? And within states, are there patterns to be observed in *who* was pushing for the laws and what state-level conditions were more conducive to their enactment? The next section digs deeper into the data to begin sketching out these dynamics.

Labor Unions and the Growth of State Employment Laws

Geographically, the volume of employment law enactments varied significantly across all 50 states and the District of Columbia between 1960 and 2014 **(Table 3, Figure 4**), with California an extreme outlier, enacting 513 employment laws (compared to the median of 122). Fine-grained case studies are clearly needed to examine why different states produced more or less robust employment law regimes across the states -- for as Margaret Weir has written, states are "political arenas with their own distinctive capacities and political logics that must be understood in terms of earlier reform efforts."[64] Still, to begin exploring why some states enacted more employment laws than others, some theoretical possibilities can be examined statistically.

Table 3: Total Number of Employment Laws Enacted, 1960-2014

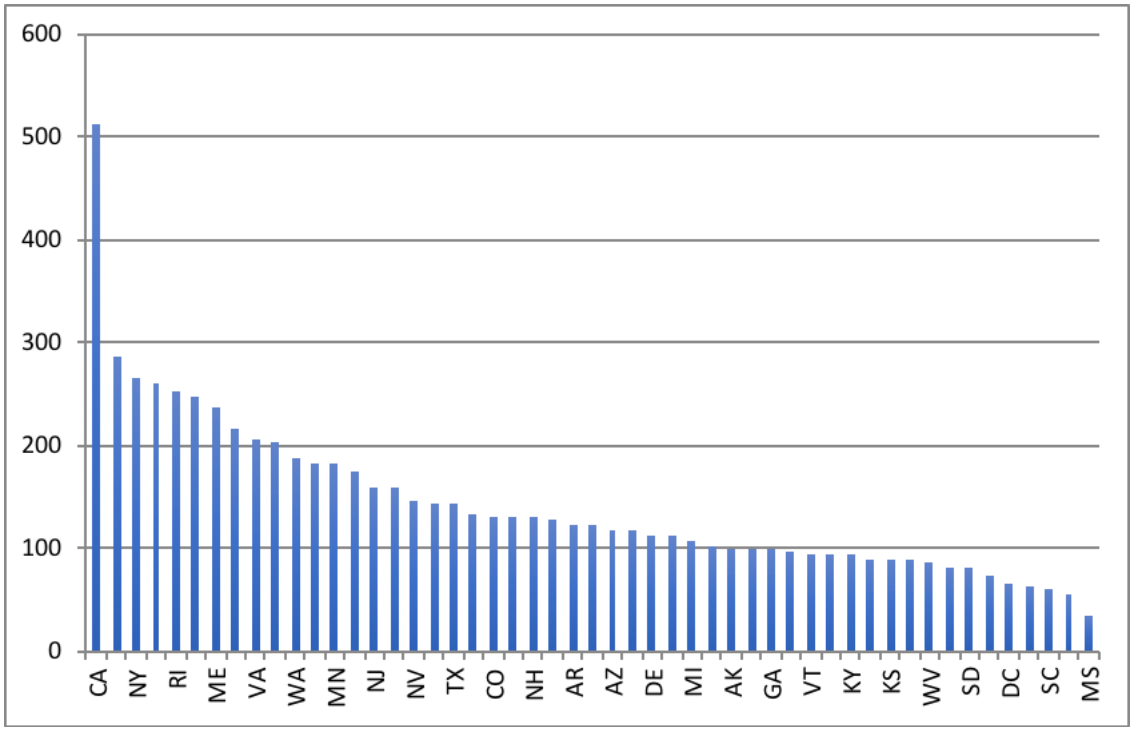
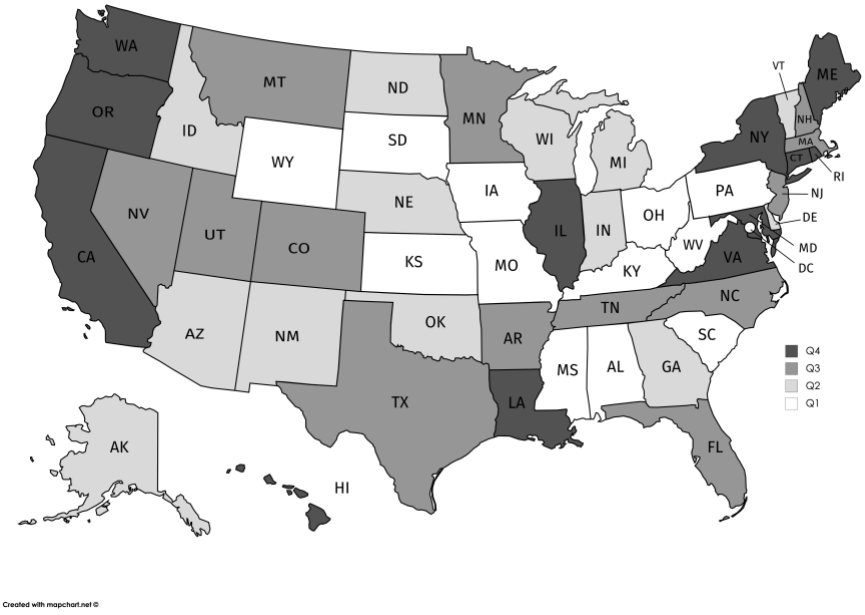


Figure 4: Map of Total Employment Laws Enacted by State, 1960-2014



Note: Shades represent quartiles, with darker shades indicating more employment laws.

Of particular interest here is the relationship between labor unions – the primary group beneficiaries of labor law's early feedback effects – and employment laws. Was part of the growth in employment law "attributable to the decline of organized labor," as St. Antoine has posited?[65] If so, why and how? Were employment laws enacted as substitutes for disappearing unions, were labor unions themselves instrumental in enacting those same laws, or both?

While statistical analyses cannot answer these questions definitively, they can reveal associations that may serve as the starting point for further investigation. I build on the preeminent labor economist Richard Freeman's examination of the relationship between state-level protective legislation and union density but use the state-year *MLR* employment law data as my dependent variable.[66] Specifically, I use a biennial measure of the total number of employment laws enacted in each state during the preceding legislative sessions (regular and special) and add three theoretically relevant political explanatory variables.[67] The modified model estimates the following equation:

(1) Employment Laws = $a + b\ UnionDensity + c\ MFG + d\ Unemployment + e\ Income + f\ LegislativeProductivity + g\ Democratic + h\ MassEconLiberalism + i\ CA + j\ RTW + u$

Explanatory variables include *UnionDensity*, which measures the percentage of nonagricultural workers in each state who are members of unions, since a greater share of unionized workers may indicate a more politically powerful labor movement, which may push for the enactment of stronger employment laws or, alternatively, reduce their necessity;[68] *MFG* is the share of the state's nonagricultural workforce employed in manufacturing: as a state's manufacturing industry declines, it may be encouraged to enact stronger protections for the workforce that remains;[69] *Unemployment* is the level of nonagricultural unemployment in the state: when a state's unemployment rate is higher, legislators may be more reluctant to enact stronger protections for workers out of fear that such laws may deter investment in state and

cause capital to flee.[70] *Income* measures per-capita personal income in the state, since economic modernization is related to policy innovation more generally and states with richer populations may be more likely to enact employment laws.[71] *LegislativeProductivity* is the overall number of laws enacted by the state legislature during the previous two-year term (minus vetoes plus overrides), since states that typically enact more laws in general may be more likely to enact employment laws than states that are generally less legislatively productive;[72] *Democratic* is a dummy variable indicating Democratic control of both legislative houses in the state, since these states may be more likely to pass worker-friendly laws;[73] *MassEconLiberalism* is the Caughey-Warshaw state-year measure of the mass public's economic policy liberalism, included because states with more ideologically liberal populations on economic matters may be more likely to enact worker-friendly employment laws;[74] *CA* dummies for the state of California because it is an extreme outlier; and *RTW* is a dummy variable indicating whether the state adopted a "right to work" law, since these states may be less inclined to pass worker-friendly employment laws. Right to work is also sometimes used as a proxy for the political strength of business.[75]

Using these variables, I conducted a time-series cross-section analysis and estimated the model with and without year and state fixed effects, since unobserved time-invariant characteristics of states -- such as political culture, political history, industrial mix, demographic composition of the workforce, etc. -- may also matter. Results are reported from each specification (**Table 4**). The Driscoll and Kraay standard errors are heteroskedasticity- and autocorrelation- consistent and robust to general forms of cross-sectional dependence, all of which is necessary given the structure of the data.[76] Data limitations confine the time-series cross-section analysis to the period 1976-2013.[77]

Table 4: Time-Series Cross-Section Models

	(1)	(2)	(3)
Union Density	0.0999***	0.0918***	0.117***
	(0.0325)	(0.0313)	(0.0159)
Legislative Productivity	0.00298***	0.00342***	0.00452***
	(0.000607)	(0.000452)	(0.000607)
Democratic Control	1.617***	1.512***	1.308***
	(0.419)	(0.473)	(0.343)
Mass Economic Liberalism	2.350*	0.214	-1.364*
	(1.247)	(0.842)	(0.801)
Manufacturing	-6.509*	-6.515**	-6.815***
	(3.384)	(3.215)	(1.335)
Unemployment	-0.109	0.115	-0.196*
	(0.0897)	(0.113)	(0.105)
Income	-8.65e-05**	8.80e-05***	4.41e-05*
	(3.37e-05)	(1.67e-05)	(2.39e-05)
California			9.106***
			(2.218)
Right to Work	-0.0600	0.490	-1.506***
	(0.617)	(0.614)	(0.223)
Year fixed effects	**Yes**	**No**	**Yes**
State fixed effects	**Yes**	**Yes**	**No**
Constant	0	-1.073	2.873
	(0)	(1.237)	(1.748)
Observations	931	931	931
R-squared/within R-squared	0.197	0.135	0.506
Number of groups	49	49	49

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Model 1 in Table 4 includes both year and state fixed effects, while Models 2 and 3 include one but not the other. In all three models, union density is positive and statistically significantly related to the enactment of employment laws. That is, the relationship holds both *within* and *across* states even when controlling for aggregate time trends. In addition, states that are more legislatively productive overall and states with Democratic legislative control are also positive and significantly related to employment law enactments, as expected. The share of nonfarm employment in manufacturing is negative and significant in each model, suggesting that

the tendency to enact more worker protections is greater when the share of manufacturing jobs in the state declines. The relationship between employment laws and both personal income and mass economic liberalism depends on whether one is looking within or across states; and right-to-work is negative and significant when looking across states. Taken all together, then, these results indicate that union density and employment law enactments are positively associated and suggest that political factors matter as well, thus recommending further examination of *why* (see discussion below).

The same results obtain when we step back and consider aggregate outcomes over time: Why did some states pass more laws over multiple decades than others? Why did some pay more attention to employment law relative to other items on their legislative agenda? Why did some tackle more categories of employment law than others? Aggregating the data and using only 50 observations (for each state), I ran a similar set of models to see which factors were most correlated with a state's overall volume, relative attentiveness, and scope of employment laws (number of categories, out of 33 possible) passed between 1974-2014 **(Table 5)**. These models use the same covariates as above, but they disaggregate *Union Density* into two variables: the baseline level of union density prior to the period under investigation and the percentage point change in union density over the period (to account for the fact that the change in union density may affect states differently depending on the level at which they started). I also include baseline level and percentage point change variables for *MFG* for the same reason. A measure of the total contributions to state office candidates from the general business sector is also added to capture the relative political strength of business in the states, in addition to *RTW*.[78]

Table 5: Snapshot Models (50 states, 1974-2014)

	(1) Total # of employment laws enacted by state	(2) Employment laws as a share of all laws enacted by state	(3) Scope of employment laws (% of categories)
Base Union Density	5.892***	0.0352***	0.0421***
	(1.454)	(0.00974)	(0.00948)
Change in Union Density	-5.969***	-0.0407***	-0.0458***
	(1.994)	(0.0134)	(0.0130)
Labor political contributions			
Public Sector Union Density			
Private Sector Union Density			
Democratic control of legislature	0.680	0.00467	0.00442
	(0.446)	(0.00299)	(0.00291)
Business political contributions	4.56e-06	2.46e-08	1.11e-08
	(3.50e-06)	(2.29e-08)	(2.28e-08)
Mass Economic Liberalism	-68.66	-0.133	-0.148
	(51.06)	(0.338)	(0.333)
Legislative Productivity	0.00481***	-1.55e-05***	-1.80e-05***
	(0.000807)	(4.99e-06)	(5.26e-06)
Income	-0.00229	-5.25e-06	-7.29e-06
	(0.00230)	(1.54e-05)	(1.50e-05)
Unemployment	-16.19**	-0.0713	-0.0868**
	(6.487)	(0.0435)	(0.0423)
Base % Manufacturing	-470.7*	-0.392	-0.803
	(248.1)	(1.661)	(1.617)
Change in Manufacturing	-713.4*	-0.581	-1.740
	(353.3)	(2.364)	(2.303)
CA	159.3***		0.501*
	(39.96)		(0.260)
RTW	-29.47**	-0.187**	-0.105
	(13.37)	(0.0879)	(0.0871)
Constant	108.1	1.190**	1.203**
	(82.66)	(0.549)	(0.539)
Observations	50	50	50
R-squared	0.860	0.655	0.705

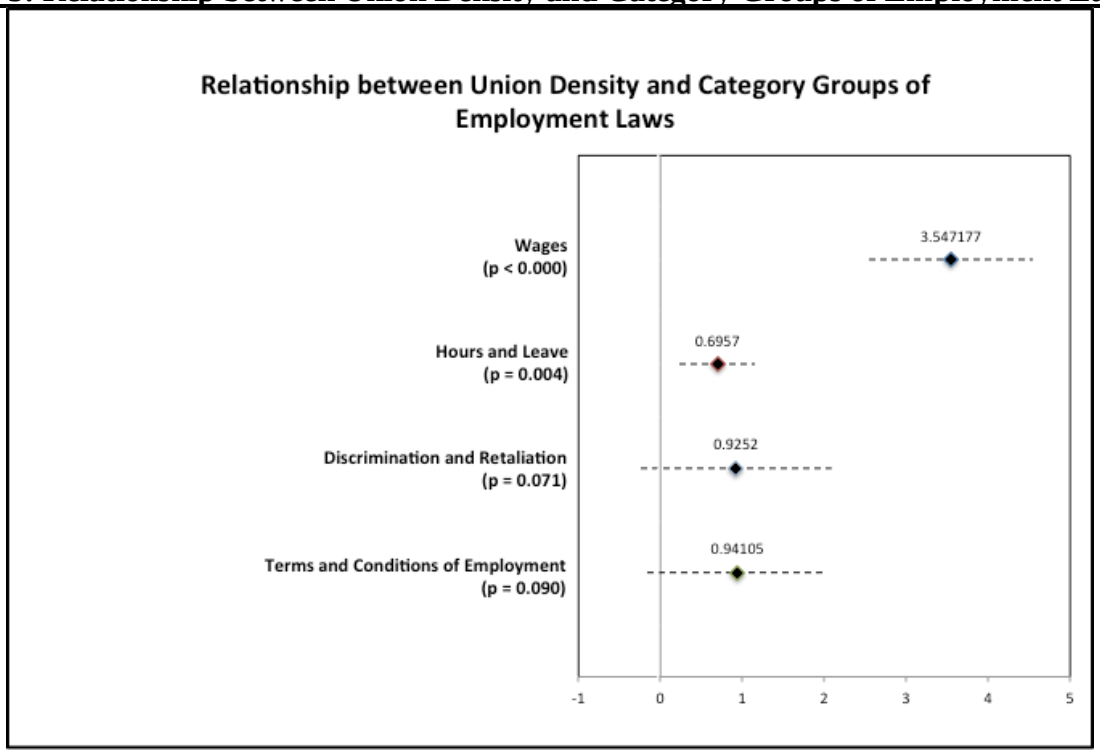
Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

The results indicate that above and beyond all other factors, union density is strongly related to state employment laws: both the base level of union density (average, 1969-1973) and the percentage point change in union density over the forty year period have substantively large

coefficients and are highly statistically significant. That is, the higher the starting point and the less decline in union density over time, the more laws enacted. Legislative productivity and right-to-work are also strongly related, in the expected directions.

But what about different types of employment laws – have labor unions pushed for certain categories of laws more than others? Looking at the relationship between union density and groups of employment laws while including the same covariates as above, it is apparent that union density is positive and statistically significantly related to each group, but it explains some groups better than others (**Figure 5**). Specifically, when we look only at laws pertaining to wages, hours, and leave, union density is significant at the $p=0.000$ level; it is significant but only at the $p<0.10$ level when explaining discrimination/retaliation and terms/conditions of employment. In sum, then, the relationship between labor unions and state-level employment laws is strong but there is still some variation that cannot be fully explained quantitatively and from a distance.

Figure 5: Relationship between Union Density and Category Groups of Employment Laws



Note: point estimates are for Union Density variable in models that include all the same covariates as above. Error bars represent 95% confidence intervals.

Of course, despite its ubiquitous use in the literature, the standard measure of union density provides a rather crude proxy for the political strength of the labor movement: union density may or may not be related to the political and legislative clout of labor unions at the state level. In **Table 6**, the first model therefore uses an alternative measure labor union political involvement as a substitute for union density: like the business strength measure above, *LaborContributions* measures the total contributions to state office candidates from contributors in the labor sector for available years.[79]

Table 6: Alternate measures of labor strength

	(1) Total # of employment laws enacted by state	(2) Total # of employment laws enacted by state
Labor political contributions	8.64e-06**	
	(4.15e-06)	
Public Sector Union Density		1.668***
		(0.515)
Private Sector Union Density		0.236
		(1.269)
Democratic control of legislature	0.588	0.703
	(0.499)	(0.463)
Business political contributions	-3.44e-06	5.73e-06
	(5.27e-06)	(3.78e-06)
Mass Economic Liberalism	-63.54	-99.77*
	(57.45)	(55.43)
Legislative Productivity	0.00465***	0.00464***
	(0.000874)	(0.000859)
Income	0.00255	-0.00106
	(0.00217)	(0.00230)
Unemployment	-6.692	-8.782
	(6.758)	(6.530)
Base % Manufacturing	-305.8	-394.3
	(261.3)	(254.8)
Change in Manufacturing	-373.0	-476.1
	(375.3)	(365.7)
CA	92.49	162.1***
	(58.20)	(41.75)
RTW	-42.33***	-37.19***
	(14.15)	(13.57)
Constant	25.98	56.58
	(89.90)	(83.90)
Observations	50	50
R-squared	0.817	0.847

The standard union density measure also makes no distinction between private and public sector unions, despite their substantial differences. This is problematic, for as Alexis Walker and others have discussed, public sector unions are outgrowths of state labor laws and are therefore subject to, and may contribute to, different political dynamics than private sector unions.[80] Indeed, the U.S. labor movement has long been bifurcated between the public and the private sectors, and this divide has grown increasingly consequential for the labor movement over time.

In many states, public sector unions now considerably outspend private sector unions in electoral and lobbying activities, and their members have become increasingly engaged in political activities.[81] Indeed, state-level anti-union conservatives, often backed by the Koch brothers' Americans for Prosperity, have in recent years targeted public sector unions in strategic efforts to demobilize the left.[82] Model 2 in **Table 6** thus disaggregates *UnionDensity* into public and private sector union density measures (state-level data available only since 1983).

The first model shows that labor unions' political contributions are positive and significant -- lending additional support to the notion that the strength of labor unions, whether measured as the percentage of unionized workers in a state or as a function of labor's campaign contributions, helps to explain employment law enactments at the state level. The second model indicates that public sector union density is significantly related to the enactment of employment laws -- and although private sector union density is positive and significant when used alone, the inclusion of public sector union density in the model overpowers the explanatory weight of private sector union density.[83] This positive and significant relationship between public sector union density and employment laws may therefore suggest yet another reason why opponents have sought to undercut collective bargaining rights in the public sector.

Caution is warranted in interpreting the results, however, since both the strength and size of public sector unions, as well as their institutional power (such as collective bargaining rights, agency fees, dues check-off, etc.) are products of the same legislative process that produce state-level employment laws. Including a separate measure of their strength on the right-hand side of the equation may invite endogeneity into the analysis. Moreover, making strong distinctions between public and private sector unions may obscure more than it reveals. State AFL-CIOs are usually comprised of a mix of both public and private sector unions – as are many of the larger

unions like SEIU – and they self-consciously represent the interests of both types of workers in the legislative arena. In Rhode Island, for example, even as public sector workers grew into the majority of workers represented by the state AFL-CIO, the state federation's legislative agenda remained remarkably stable and consistent over the years, suggesting that the interests of public and private sector union workers in state politics may not be easy to distinguish.[84] In other words, partnerships between public sector unions, private sector unions, community groups, and other workers' advocates constitute the organizational core of the labor movement, and the relative strength of each cannot easily be disentangled with quantitative measures of union density. Further investigation is clearly needed, and additional case studies should help unpack the relationships further.

For the purposes of cross-validating the analyses above, I tested three alternative dependent variables that theoretically capture the same phenomenon of interest (variation in the strength of state employment laws), albeit in quite different ways. The first two measure the extent to which state laws are considered by employers and business advocates to be hospitable environments for investment and growth. The first uses a Chamber of Commerce study in which researchers examined 34 types of laws on the books in 2009 and graded each state on the extent to which its laws increased the regulatory burden on business and opened the door to litigation. The second uses the Index of Worker Freedom (IWF) compiled by the conservative Alliance for Worker Freedom in 2009, which tracked 15 laws that it claimed obstructed workers' freedom and drove away high-quality workers.[85] Note that the sign is flipped on this measure. The third, compiled by the author, measures the number of 11 major state-level employment laws on the books in each state in 2014, as tracked by two authoritative sources: the National Conference of State Legislatures (NCSL) and the Department of Labor (DOL).[86] All three alternative measures

of the dependent variable are highly correlated with the employment law data examined above, and as **Table 7** shows, union density is strongly related to each.

Table 7: Alternate Dependent Variables

	(1) Chamber of Commerce score	(2) Index of Worker Freedom score	(3) Employment Law Regime Score
Base Union Density	1.483***	-0.346***	0.450***
	(0.309)	(0.0847)	(0.0965)
Change in Union Density	-1.561***	0.381***	-0.480***
	(0.424)	(0.116)	(0.132)
Democratic control of legislature	0.223**	-0.0448*	0.0363
	(0.0948)	(0.0260)	(0.0296)
Business political contributions	5.70e-07	-3.24e-07	-1.13e-07
	(7.44e-07)	(2.04e-07)	(2.32e-07)
Mass Economic Liberalism	-1.540	-5.038*	3.393
	(10.85)	(2.972)	(3.389)
Legislative Productivity	-0.000368**	0.000111**	-2.72e-05
	(0.000172)	(4.70e-05)	(5.36e-05)
Unemployment	-1.348	0.577	-0.779*
	(1.379)	(0.378)	(0.431)
Income	0.000634	1.92e-05	2.55e-05
	(0.000489)	(0.000134)	(0.000153)
Base % Manufacturing	-26.70	8.639	-1.802
	(52.75)	(14.45)	(16.47)
Change in Manufacturing	-51.85	24.99	-7.251
	(75.11)	(20.57)	(23.46)
CA	29.50***	-4.007*	3.674
	(8.496)	(2.327)	(2.653)
RTW	-7.059**	1.976**	-1.035
	(2.841)	(0.778)	(0.887)
Constant	57.53***	6.148	9.218
	(17.57)	(4.812)	(5.487)
Observations	50	50	50
R-squared	0.838	0.828	0.737

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Finally, a note on the *MLR*-derived dataset of employment laws. The overall "direction" of these laws is obvious: a plain reading of the *MLR* employment law summaries indicates that the overwhelming majority of the enacted laws are designed to advance workers' rights and provide statutory protections from exploitation.[87] Still, the purposes of some laws are difficult to discern due to unclear descriptions, and some are clearly more employer-friendly—aimed at

reducing the regulatory burden on employers, limiting their liability, making it more difficult for workers to sue, and so on. A qualitative effort at hand-coding the summaries indicates that about 15-20 percent of the laws fall into this category.[88] As a share of all employment laws, these laws have grown slightly over time while roughly tracking partisan shifts, which is consistent with Jacob Grumbach's recent findings regarding growing state-level policy polarization (see **Figure 6** and **Figure 7**). The peak years in the late 1970s and mid-1990s, for example, correspond to major electoral gains for the GOP at the state level (357 legislative seats in the 1978 elections, 514 seats in the 1994 elections). By state, the volume of employer-friendly laws is correlated with employee-friendly laws, however (corr: 0.79), suggesting that some states are simply more legislatively active in this area than others and may be considered more lively sites of political contestation on employment issues.

Figure 6: Employer-Friendly Laws

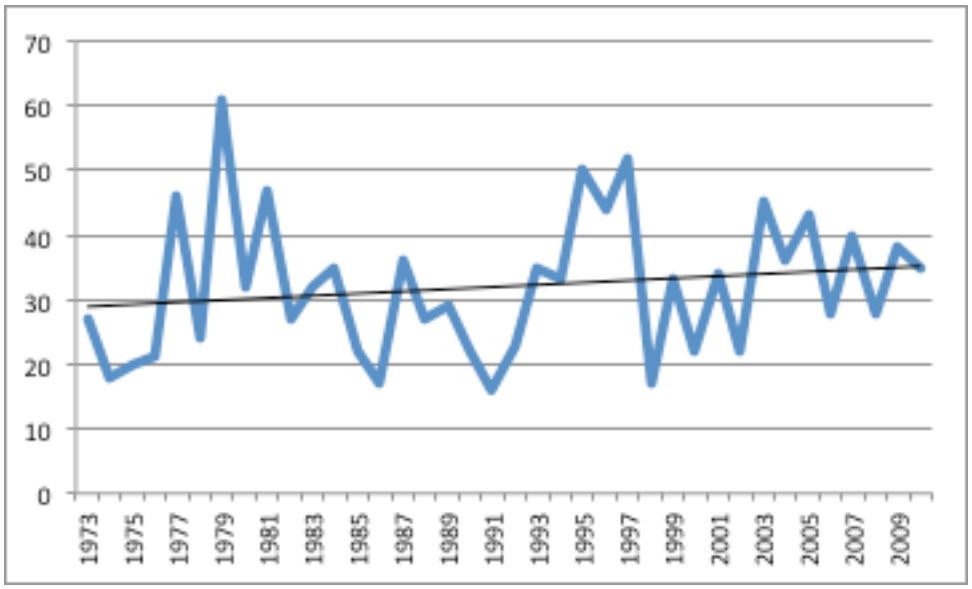
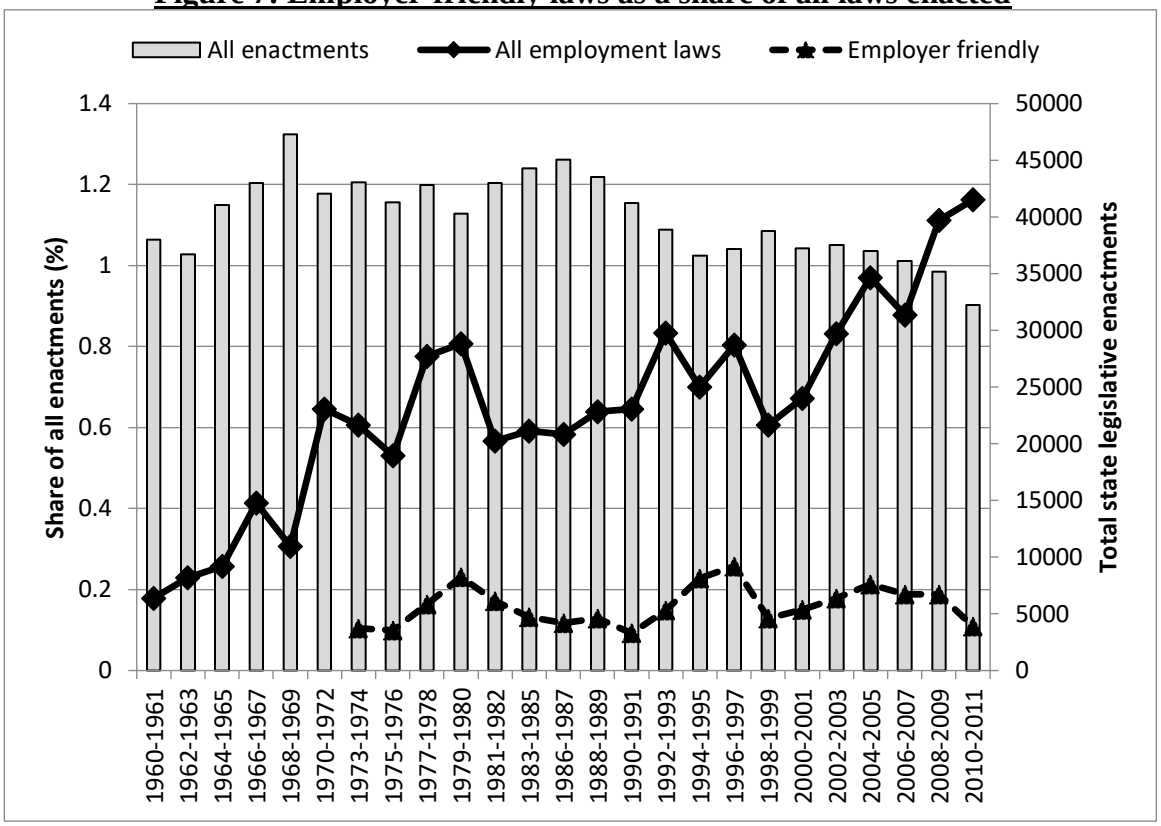


Figure 7: Employer-friendly laws as a share of all laws enacted



Still, to be as conservative as possible, the above analyses include *all* employment laws, effectively biasing the analyses against the findings that more Democratic states with stronger labor unions enacted more laws. But **Table 8** provides robustness checks. The first model excludes any law that could reasonably be considered employer-friendly (e.g., reducing the regulatory burden on employers, making it more difficult for workers to sue, and so on). The second model uses as its dependent variable only those laws that are highlighted in the *MLR's* opening pages, in which the major trends in employment law enactments in the previous year are summarized, arguably providing a measure of "significance." The third model uses as its dependent variable *only* employer-friendly laws. Union density is positive and significant in models 1 and 2 but not in model 3, as expected.

Table 8: Robustness Checks

	(1) Only employee-friendly laws	(2) Only "significant" laws	(3) Only employer-friendly laws
Base union density	4.499***	2.602***	0.608
	(0.944)	(0.614)	(0.369)
Change in union density	-4.564***	-2.878***	-0.855*
	(1.270)	(0.825)	(0.496)
Democratic control of legislature	0.522*	0.181	-0.0656
	(0.283)	(0.184)	(0.111)
Business political contributions	2.70e-06	4.84e-07	-7.53e-09
	(2.21e-06)	(1.43e-06)	(8.63e-07)
Mass economic liberalism	-9.738	-18.06	-22.19*
	(32.70)	(21.26)	(12.78)
Legislative productivity	0.00243***	0.00134***	0.00101***
	(0.000515)	(0.000335)	(0.000201)
Unemployment	-11.92***	-4.722*	1.210
	(3.987)	(2.592)	(1.558)
Income	-0.00236	-0.00134	0.000272
	(0.00151)	(0.000983)	(0.000591)
Base % manufacturing	-267.3*	-144.3	-59.07
	(157.2)	(102.2)	(61.43)
Change in manufacturing	-421.5*	-254.9*	-91.68
	(224.5)	(146.0)	(87.74)
California	98.29***	42.42**	12.33
	(25.46)	(16.56)	(9.952)
Right to Work	-11.60	-5.345	-4.552
	(8.506)	(5.530)	(3.324)
Constant	93.85*	51.10	-9.633
	(52.90)	(34.39)	(20.67)
Observations	50	50	50
R-squared	0.846	0.752	0.686

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Finally, it should be noted that none of these cross-sectional models deal fully with unobserved heterogeneity, such as states' deeply rooted structural or cultural attributes, which may explain both union density and employment law activity. Strategically selected case studies are clearly needed to help flesh out the nature of the relationship further. But as a first step, the robust statistical relationship deserves greater theoretical consideration. Why might there be such

a strong correlation between union density and state-level employment laws, above and beyond other "usual suspect" explanations?

Why Might Labor Unions Support Employment Laws?

Unions are widely understood to be vigorous defenders of workers' rights in general. And as John Ahlquist and Margaret Levi have shown, many unions have also exhibited a remarkable capacity to broaden their purview and expand their "communities of fate" to include "unknown others for whom the members feel responsibility."[89] We know, for example, that they have long used their political clout to advocate for a wide range of social insurance and redistributive programs that benefit all workers.[90] But their interest in expanding the role of the state in regulating the workplace is less obvious. From Samuel Gompers' advocacy of "pure and simple unionism" to the "government substitution hypothesis" posited by economists, there has long been a question of whether state intervention helps or hurts unions, and in particular, whether the establishment of protective laws for workers undermines the incentive to unionize by providing for free what workers might otherwise get through their unions.[91]

Studies have examined the relationship between union density and a wide range of state-provided "union-like" benefits, including social welfare expenditures, exceptions to at-will employment, protective employment laws, and more. Efforts to statistically demonstrate tradeoff, however, have yielded mostly null results.[92] But even if tradeoffs do exist in certain contexts, unions may still view potential losses as offset by potential gains.[93] For example, on some issues, unions have undoubtedly engaged in logrolling -- supporting legislation that offers little direct benefit to them in the hopes of securing reciprocal support on laws that advance their more instrumental purposes.[94] And by leveling the playing field, higher employment standards may

make competitive employers more likely to bargain with unions.[95] Similarly, by taking certain issues off the bargaining table, employment law may narrow the range of issues over which unions must negotiate with employers, thereby increasing their leverage over the issues that remain.[96]

But unions' support for state employment laws may be less instrumental than constitutive of the labor movement's long and proud history of advancing workers' rights broadly while raising the "social wage" and combating systemic economic inequality. Such deeply rooted commitments can be traced back to the Knights of Labor and are epitomized by UAW-led political activism in the 1960s.[97] Moreover, as seminal work by J. David Greenstone, James Q. Wilson, and others has shown, labor unions are not single-issue interest groups: not merely "interest articulators," they are also often "interest aggregators" that view their own objectives as inextricably linked to a broader set of political and economic issues.[98] Despite the AFL's early commitment to a more apolitical "voluntarism," political and legislative action has figured prominently in labor union activities since the New Deal.[99]

Over the past two decades, scholars have observed an even more conspicuous ramping-up of labor unions' political and legislative activities. The rapid growth of the Service Employees International Union (SEIU) in the 1980s is usually seen as pivotal in this strategic shift. After a long struggle with business unionists, the SEIU's more insurgent, politically minded, social-movement unionism prevailed at the AFL-CIO when SEIU president John Sweeny unseated long-serving Lane Kirkland as AFL-CIO president in 1995. At that point, Nelson Lichtenstein explains, "with collective bargaining in relative eclipse and the strike weapon rarely in use, the world of politics and public policy became the vital terrain upon which the labor movement fought its most important battles…key decisions were often made not at the

bargaining table, but at the ballot box and in the legislative chamber."[100] AFL-CIO's decision to launch Working America a few years later—a "community affiliate" comprised of mostly non-dues paying members that campaigns for workplace justice and stronger employment laws—was emblematic of the federation's self-conscious political turn.[101]

Labor unions' growing interest in political activism in general, and in employment laws in particular, may have also represented yet another instance of organizational adaptation to contextual changes, of which they have proven more capable than many assume.[102] As noted, the growth of the service sector brought an increasingly convoluted and elaborate set of employment relationships, with subcontractors, franchises, vendors, independent contractors, and ambiguous lines of authority structuring many industries.[103] In this new employment context, the firm-by-firm organizing model mandated by the NLRA became increasingly untenable. Especially in low-wage industries like fast food (characterized by franchises), janitorial and temporary staffing (characterized by subcontractors), and apparel, personal services, day labor, and domestic work (with a high proportion of immigrant workers), the prospect of self-organization and collective action was dimmed by high turnover rates, workers' fears of deportation, and fragmented workplaces in which employees seldom had opportunities to interact with one another. In this changed world of work, using employment law to raise the floor on wages and working conditions for all workers irrespective of union membership, employer, occupation, or citizenship status is said to have become increasingly appealing.[104]

With declining membership rolls presenting a veritable existential crisis, employment laws arguably also offered a new source of policy "feedbacks" (disaggregated by Paul Pierson into resource/incentive and interpretive effects) to replace or supplement what had been lost amid labor law's drift.[105] Campaigns to raise the minimum wage, deter wage theft, and ensure

family and sick leave, for example, have served to bring workers in disparate occupations together in common cause and into a common space where unions could begin to convey the power of solidarity, organization, and collective action to nonunion workers who would be difficult if not impossible to reach on a shop-by-shop basis. Somewhat paradoxically, then, the labor movement's core ideational commitment to the *collective interest* of workers has in many cases been advanced by embracing the cause of *individual rights* and demonstrating that despite their great diversity and heterogeneity, individual workers face similar challenges and have similar types of grievances. By associating unions with successful policy campaigns on behalf of workers, labor unions could also demonstrate to existing and potential new members that they still had political clout and could achieve tangible benefits for workers—both critical resource and interpretive effects.

Again, well-selected case studies are needed to confirm or disconfirm these potential explanations for unions' support of employment laws and to flesh out the variety of motivations, strategic concerns, and intervening processes at work. But inasmuch as we want to better understand the process, we also want to take stock of the achievement. And to the extent that labor unions were even partially responsible for the growth of state-level employment laws, these institutions might be considered some of the most significant legacies organized labor leaves behind as it continues its seemingly inexorable decline. Scholars have examined the effects unions once had in boosting wages for both union and nonunion workers alike and in elevating the broader "moral economy," including putting upward pressure on "norms of fairness regarding pay, benefits, and worker treatment," and have ably demonstrated that as unions have declined, these broader effects have disappeared as well.[106] In contrast to those evidently more ephemeral effects, employment laws represent a far more durable (although certainly not

permanent) legacy. Notwithstanding their downsides and tradeoffs, discussed further below, enshrining legal rights and protections for all employees in public statutes appears to constitute a major institutional achievement indeed.[107]

The Rise of Alt-Labor

Labor law's fixity and stagnation amid major economic change left growing numbers of workers either formally denied collective bargaining rights or unable to realistically access them. As the structure of the employment relationship changed and millions of low-wage immigrant workers entered the workforce between the 1990s and 2010s, a growing number of workers became more vulnerable to exploitation and abuse. But traditional labor unions faced significant legal limits on how they could confront these problems and represent these workers. For example, labor law prohibits labor unions from engaging in secondary boycotts and privileges the "employer-employee dyad" in the private ordering of industrial relations.[108] As a new generation of workers' advocates – many of whom sought principally to aid the growing number of immigrant workers in the U.S. and not advance the purposes of the labor movement per se – began to appreciate the legal limits that labor law imposed on labor unions, they began to work in concert with workers themselves to develop new tactics and innovative strategies to advocate for workers' rights.[109] As the numbers of such workers seeking representation and advocacy began to grow more rapidly in the 1990s, nontraditional workers' organizations, sometimes called "alt-labor" groups, began to multiply in locations across the country to represent and advocate for those left behind by labor law's drift.[110]

As the moniker implies, alt-labor groups are not labor unions—many of their members are forbidden from unionizing and the groups have no collective bargaining rights under the

NLRA. They do sometimes receive funds from traditional unions and almost always stand shoulder-to-shoulder with unions in policy campaigns and street-level protests.[111] They include "worker centers" like the Restaurant Opportunities Centers United and over two hundred other community-based worker centers across the nation; "workers' alliances" like the National Taxi Workers' Alliance; "employee associations" like OUR Walmart; "associate member" groups formally affiliated with unions, like Working America; nonprofit organizations like the Freelancers Union; faith-based groups like Interfaith Worker Justice; and digital platforms for collective action like Coworker.org.[112]

Like the employment laws discussed above, both the *substantive aims* and *organizational forms* of these alt-labor groups reflect the constraints and opportunities imposed by the still-authoritative national labor law. In terms of their substantive foci, they self-consciously target workers that have been left behind as labor law has ossified. Their primary members include workers who are either virtually impossible to organize given the nature of their occupations or their geographic dispersion (like temp workers, fast food workers, and taxi drivers); those who are legally excluded from labor law's provisions (such as domestic workers, independent contractors, farm workers, and day laborers); and those who do not know their rights or feel unable to assert them without fear of legal trouble (such as some non-native English speakers and undocumented immigrants). They represent workers who are "either by law or practice excluded from the right to organize in the United States."[113]

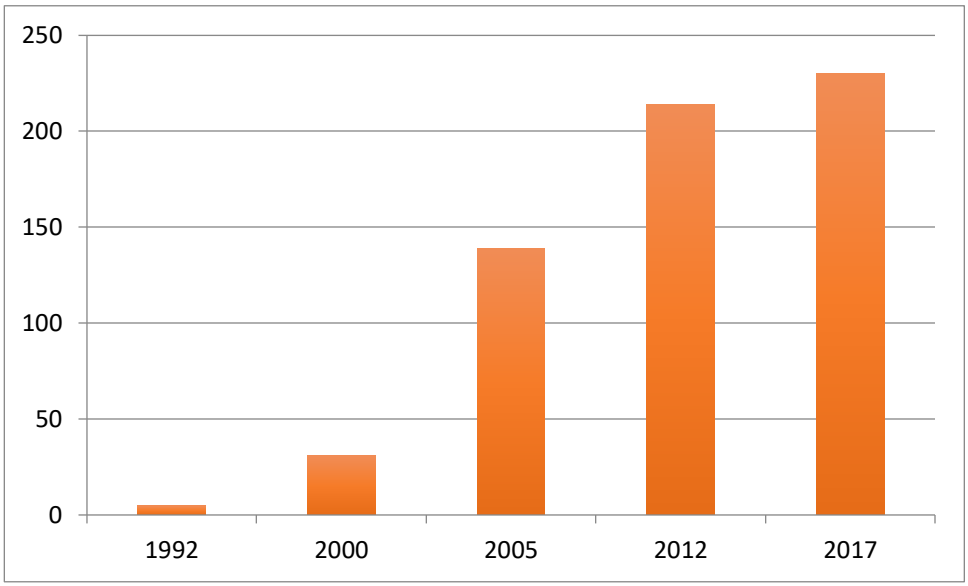
And because they are not structured nor do they claim to serve as employees' exclusive bargaining representatives with employers (as per the rules of national labor law), their approach to protecting and promoting workers' individual and collective rights has tended to be more confrontational, involving street-front protests, boycotts, and the generation of negative publicity

for low-road employers (and favorable promotion of "high road" employers). Although many worker centers do take advantage of Section 7 of the NLRA protecting "concerted activities" and often encourage workers to unionize, they typically focus more on assisting and empowering individual workers, helping them to navigate the bureaucratic process, connecting workers with others experiencing similar problems in similar industries or geographic locations, and pushing for the enactment and enforcement of stronger state and local employment laws, alongside many other varied activities.[114] They also emphasize connecting workers with private attorneys and building broader coalitions with other like-minded organizations. Thus in virtually every way, the structures and operations of alt-labor groups reflect the constraints imposed by the persistence of national labor law.

Thanks to the pioneering work of Janice Fine and her collaborators, we know that worker centers, the organizational core of alt-labor, have grown dramatically in number over the last three decades, from only 5 in 1992 to 139 in 2005 to approximately 214 in 2012 (see **Figure 8**).[115] As worker centers multiplied, they became increasingly politically active, "successfully [placing] labor standards enforcement on the public policy agenda at the state and national levels."[116] For example, alt-labor groups took the lead in pushing for the enactment of major "wage-theft laws" in twelve states between 2006 and 2013.[117] In most cases, policy advocates built new coalitions comprised of alt-labor groups, unions, legal clinics, and other organizations. Many continued to collaborate after the laws were passed, expanding their policy agendas to tackle new issues and continue building their coalitions. And those were only the successful cases: as a tally taken by Interfaith Worker Justice shows, dozens of other wage-theft campaigns failed or stalled in places with less favorable partisan majorities.[118] Alternative labor

organizations now play a central role in the organizational structure and strategic outlook of the labor movement in the early 21st century.

Figure 8: Growth of Worker Centers



Sources: Janice Fine, Worker Centers: Organizing Communities at the Edge of the Dream (Ithaca: ILR Press/Cornell University Press, 2006); Janice Fine, "New Forms to Settle Old Scores: Updating the Worker Centre Story in the United States," Relations Industrielles/Industrial Relations (2011): 604-630; Janice Fine and Nik Theodore, "Worker Centers 2012: Community Based and Worker Led Organizations," (Center for Faith-Based and Community Partnerships, U.S. Department of Labor: 2012); http://www.wagetheft.org (accessed June 15, 2017).

A helpful illustration of how this new organizational innovation and political mobilization has been shaped by economic change amid labor law's inertia is found in the case of home-care workers. As Eileen Boris and Jennifer Klein detail in their magisterial study, low-wage home-care workers ineligible for NLRA's collective bargaining rights found their exclusion to be, itself, galvanizing.[119] As these disproportionately female, minority workers grew in numbers and came to see themselves as part of a broader group of workers facing the same sorts of challenges in disparate workplaces, they began to organize collectively to contest their exclusion (eventually forming the alt-labor National Domestic Workers' Alliance in 2007). In a process akin to what Chloe Thurston describes as the work of "boundary groups" in discovering

and contesting the state's role in authorizing exclusionary public-private policies, home-care workers found that although they could not change the labor laws, they could push for access to employment law protections.[120] After decades of grassroots organizing, coalition-building, and a long and tortured legal process, home-care workers won Domestic Workers' Bills of Rights (coverage under state labor and employment laws) in New York in 2010, Hawaii in 2013, California in 2014, and Illinois in 2016, and finally achieved eligibility for federal minimum wage and overtime pay in 2015.

Employment laws have also been instrumental for alt-labor groups: campaigns for stronger laws have served as a means of generating collective action, building solidarity across disparate occupations, and awakening ordinary workers' collective consciousness.[121] In recent years, the union-launched Fight for $15 has been the most highly publicized alt-labor movement to raise wages for all workers and bring together those who would not necessarily have a chance to interact otherwise.[122] Although initially focused on fast-food workers, the movement quickly grew to include "home health aides, federal contract workers, childcare workers, and airport workers…employees at gas stations, discount outfits, and convenience stores" and more, eventually morphing into a "broad national movement of *all low-wage workers*."[123] The SEIU invested $2 million to support the first set of protests in New York in 2012 and by 2017 some reports estimated it had invested $19 million in the growing movement.[124] Not wedded to a single tactic, the Fight for $15 employed day strikes, public relations campaigns, community organizing, corporate campaigns, and legal battles to convince both public officials and employers to raise the minimum wage to $15 per hour.[125]

Despite its wide-ranging activities and myriad accomplishments to date, alt-labor's room to maneuver has been remarkably narrow. Labor law sharply delimits what non-union groups can

do to influence workplace relations; tax law presents an additional set of limitations even as it affords certain political opportunities; financial resources are in short supply and the beneficiaries of alt-labor's activities can easily free-ride; and as the Fight for $15 illustrates, many of alt-labor's hopes of moving forward and scaling up depend on the strategic choices made by already heavily resource-constrained traditional labor unions that are themselves struggling to maintain their "core competencies" in the workplace. Still further challenges and tensions are discussed in the next section below.

Yet these new types of workers' groups have managed to fill an important organizational need and are now widely recognized as important players in both the labor movement and in Democratic Party politics more broadly, with politicians and party activists often overtly seeking to curry their favor. In 2016, for example, the national Democratic party platform adopted Fight for $15's call for a national $15 minimum wage in an unconcealed effort to harness the energy of the movement; and the runner-up for the presidential nomination, Senator Bernie Sanders, publicized the Coalition of Immokalee Workers' national Campaign for Fair Food in a 5-minute campaign commercial.[126] But while many Democratic politicians have come to understand the political potential inherent in the bottom-up workers' rights movements, any "alliance" between the party and these nonprofit, mostly decentralized grassroots workers' rights groups is likely to look quite different from the ties built between New Deal Democrats and CIO unions in the 1930s.[127] Nevertheless, unless opponents succeed in curtailing alt-labor's activities, these groups appear poised to continue to develop their political clout, especially in local races and with local governments, and their effect on partisan politics is only likely to grow.[128] For as Michelle Chen writes, the relationship works in both directions: the inspirational work of the Coalition of

Immokalee Workers served as both a "metaphor for the Sanders' campaign" and spoke "to a deeper grassroots ethos of social change from which his politics emerged."[129]

Discussion: Old Problems, New Problems

Reactions to labor law's declining effectiveness thus include the emergence of new employment laws at the subnational level designed to address the very same problems labor law no longer effectively addressed, but in different forms and through different mechanisms; strategic efforts by labor unions to embrace employment laws and pursue their expansion; and the emergence of new groups and movements representing those workers who have been left behind amid the decline of the national collective bargaining regime. In each case, the persistence of national labor law appeared to powerfully shape the form, content, and timing of those institutional and organizational developments.

At the same time that labor law was stagnating, union density was falling precipitously, right to work laws were spreading to more states, and both private and public sector unions were coming under increasing attack. The developments discussed here cut in the other direction, invigorating the labor movement and creating new pathways to collective action and the assertion of workers' rights. Yet as the new institutions and organizations emerged *in parallel* to old and persistent institutions and organizations, new problems emerged in the space between them. Put differently, not only were the new institutions and organizations unable to solve the problems produced by the increasingly antiquated labor law, but the coexistence of multiple institutions and organizations geared toward solving the same problems in different ways created a new set of unforeseen problems.

Institutional Frictions

Consider first the institutional frictions that have emerged between state-level employment laws and national labor law. Legal scholars have pointed out that while employment law opens alternate channels for workers to address their grievances, in practice, union members are often left out. The Federal Arbitration Act and the preemption doctrine of Section 301 of the Labor Management Relations Act, in particular, mandate arbitration for union members in most cases, thus denying aggrieved employees access to a court and "the benefit of the substantive provisions of the state employment right."[130] "Paradoxically, nonunion employees frequently have more workplace rights than their unionized counterparts," Bales writes. Employment law protections may therefore undercut workers' incentives to join unions by making "the two models of workplace governance both practically and theoretically incompatible."[131] Employment law, Stone writes, thus contains "a built-in self-destruct dynamic. It functions to disorganize labor, to prevent the very group-formation that is necessary to retain or improve the minimal terms."[132]

Economists have suggested a similar kind of conflict between employment and labor law, as noted above. The protections afforded by employment law, Neumann and Rissman were the first to argue, may effectively serve as "substitutes" for what unions might otherwise provide to workers, thereby contributing to union decline.[133] Although subsequent empirical analyses have failed demonstrated a clear relationship between the two developments, union leaders are sensitive to the possibility. The government substitution hypothesis thus suggests yet another way in which employment and labor law may exist in tension with one another.

Labor law and employment law are, in many ways, dichotomous institutions. The former is designed to foster workers' collective action, collaboration, and to promote the idea of

"collective rights," while the latter directs attention to individual experiences, private lawsuits, and independent, case-by-case interactions between individual employees and regulatory agencies. In fact, the two legal regimes have operated as oppositional alternatives throughout American history. In Karen Orren's canonical *Belated Feudalism,* for example, it was the Supreme Court's antiquated interpretation of individual rights which protected the feudal common law of master-and-servant for almost 150 years while frustrating workers' efforts at collective action and self-organization.[134] Only after a long "succession of assaults" by labor unions were those barriers finally broken down and the liberty of contract doctrine was supplanted by the New Deal's collective bargaining regime.[135] Abrasions between individual-rights and collective-rights systems likewise underpins Paul Frymer's investigation, discussed above, of how the courts' interpretation of civil rights laws, especially Title VII of the Civil Rights Act, had an enervating effect on unions, the labor movement, and the New Deal coalition.[136]

But perhaps the biggest problem with employment law is simply that it does not resolve the problems generated by labor law's stagnation and the decline of labor unions. By itself, employment law does not provide employees greater "voice" in the workplace or do much to redress the inequality of bargaining power. It is also a blunt instrument, seldom tailored to meet the particular needs of specific industries, workplaces, or labor force characteristics. And by incentivizing litigation, it may only exacerbate employment relations by precluding negotiation and the fashioning of more constructive relationships.[137]

Moreover, for low-wage workers, employment law remedies are often much too costly to pursue.[138] Class action lawsuits involving low-wage workers are rare, and after the *Epic Systems* Supreme Court ruling of 2018, class actions that are deemed to abrogate arbitration clauses in

employment contracts are no longer allowed. Furthermore, many states are "opt-in," meaning exploited workers, often already fearful of termination or deportation, must publicly sign on before industry-wide problems may be contested in court. Employment law remedies thus often privilege those with resources, information, relative job security, and more leverage in the labor market—typically white-collar workers—while putting low-wage workers at an even greater disadvantage.

As is evident in the rapid growth of mandatory arbitration clauses in employment contracts in recent years, opponents have not sat idly by while employment laws have proliferated.[139] As Alexander J.S. Colvin has found, the percentage of workers forced to sign mandatory arbitration agreements grew from about 2 percent in 1992 to almost 25 percent in the early 2000s. And through a nationally representative survey of over 600 nonunion private-sector employers in 2017, Colvin estimated the share of workers subject to mandatory employment arbitration had grown to over 50 percent. The success of this pernicious strategy by employers and their advocates to deprive workers of their statutory employment rights throws into sharp relief precisely what employment laws *lack* relative to labor law: mechanisms for building collective power (not to mention visibility and ease of access to those rights). Without those mechanisms, the beneficiaries of employment laws have been unable to defend those very laws against their subversion by opponents.

Finally, the effective enforcement of employment laws cannot be taken for granted. While certain employment laws may, depending on their design, deter workplace exploitation on their own, most require a substantial commitment to regulatory enforcement.[140] But state enforcement capacities are inadequate everywhere and the annual probability that a given employer will be inspected by the federal Department of Labor is less than 1 percent.[141] As such,

employers inclined to violate the law have little reason to fear detection. Thus, while the expansion of employment law may offer new protections to workers and even foster collective action under certain circumstances, it also brings downsides that may exacerbate inequalities in workers' rights.

Organizational Frictions

Organizational frictions have emerged between traditional labor unions and alt-labor groups as well. To be sure, the two are great allies: many alt-labor groups receive funding and logistical support from labor unions, and alt-labor groups frequently champion unionization as the ultimate objective for exploited workers. But with declining membership rolls, the decision to devote scarce union resources to fund alternative labor organizations and social movements like the Fight for $15 is often questioned. As one labor official told Harold Meyerson: "SEIU is making a huge investment with no clear sense that it will ever be able to claim a fast-food worker as a member. How long can that be a sustainable model?"[142] Another said, "The money going into this is a gamble. These workers aren't paying dues; they're not financing this right now."[143]

David Rolf, a prominent SEIU leader often credited with spearheading the successful $15 minimum wage campaign in Seattle, has ruffled more than a few feathers by likening conventional labor unions to "nurse logs" (fallen trees in the forest that provide nourishment for new plants to grow) whose role is to spawn the next generation of labor activism by transferring resources to alt-labor groups and movements.[144] Many argue that the labor movement should not be so quick to give up on the goal of reviving traditional unions.[145] "The problem with this, of course," labor activist Mark Dudzic writes, "is that it fails to leave behind the type of organic working-class institutions that can nurture leadership and a sense of collective power. At best,

the end result is hollowed-out structures like those unions created by administrative fiat to 'represent' home health care and family daycare workers."[146]

The growth of alt-labor has also exacerbated the free-rider problems confronting the labor movement in an increasingly right-to-work nation.[147] If hard-to-organize workers can get informational support, legal assistance, and even solidary benefits from alt-labor groups without having to pay dues, what is their incentive to unionize? But if unions continue to decline and alt-labor groups are unable to find alternative stable revenue streams (funding from private foundations, which constitutes a large share of their funding, is an equally precarious source), such organizations may find it more difficult to do even the most basic advocacy work. In sum, the contemporary labor movement is built on a precarious foundation, with new organizational forms potentially undercutting traditional labor unions in the near term without a concrete, sustainable plan for building worker power over the long term.[148]

Efforts to develop a dues-paying membership base for alt-labor groups – like a recent effort in New York City to allow fast-food employees to transfer money directly from their paychecks to a nonprofit worker center – have been quickly tied up in legal challenges, but suggest one potential path forward.[149] It is notable that this effort, like so many others, relies on employment law fixes, legislative activism, and continuous engagement in political and legal processes: all constitutive components of the "new" labor politics.

A growing number of practitioners, labor law scholars, and activists have in recent years begun to develop creative strategies to address the problems generated by labor law's ossification, employment law's inadequacies, and the emergent organizational challenges within the labor movement. For example, with funding from SEIU and several foundations, David Rolf and Carmen Rojas co-founded The Workers Lab in 2014 to study and invest in startup

organizations and ideas that promise to build power for workers "at scale" and be financially self-sustaining.[150] Kate Andrias and Brishen Rogers have proposed a range of strategies to reform, broaden, and expand labor law's reach while providing workers with more options for building collective power without displacing traditional unions; alongside Andrias' other impactful scholarship, these proposals have generated a vibrant and growing discussion.[151] And at the Labor and Worklife Program at the Harvard Law School, a number of new initiatives have been launched under the leadership of Sharon Block and Benjamin Sachs to rethink labor law and prepare for future moments of political opportunity. In 2017, a conference asking "Is it Time to End Labor Preemption?" convened labor law scholars and practitioners to "explore whether experiments at the state and local level could expand collective bargaining and workers' collective action" while weighing the tradeoffs (such as the prospect of "stronger rights for some against weakened rights for others" depending on the state in which one lives).[152] The following year, Block and Sachs launched a longer-range initiative to identify ways to unify and empower the labor movement, starting from the provocative premise that "any successful strategy must include a complete rewriting of our national labor laws in order to establish new rules of the road for organizing and collective bargaining."[153] The "Clean Slate Project" promised to issue its findings and recommendations "to fundamentally reconstruct U.S. labor law" by 2020.[154] As Dylan Matthews writes, although ideas like these "may seem pie-in-the-sky today, they could easily become part of the next Democratic president's agenda, or become law in left-leaning states even before 2020" – as we saw with the party's embrace of a $15 minimum wage in 2016 and the attention paid by Bernie Sanders' campaign to the work of alt-labor groups.[155]

There are, of course, no clean slates in politics or law.[156] But in these far-sighted reform proposals, we can observe the very same historical-institutional dynamics at play in the

construction of state employment laws and in the development of alt-labor organizations. That is, to resolve emergent tensions and new problems, reformers who find themselves on the "offense" seek to repair ineffective institutions, build workaround solutions, and engage in organizational adaptation and innovation. The powerful constraints imposed by the outmoded but persistent labor law have, in these ways, been both delimiting and generative for the labor movement.

Conclusion

As New Deal-era labor law has remained fixed in place amid major economic change and become increasingly unable to achieve its original purposes, the primary institutions constituting workers' rights have shifted ever more decisively to subnational employment laws. Labor unions and other workers' rights advocates have pushed for the enactment of these laws to achieve the same purposes that might otherwise have been achieved through collective bargaining: higher standards for wages, hours, and other terms and conditions of employment. Most workers now look to employment laws for protection against exploitation, for substantive rights in the workplace, and for the procedural means of regulating employment relations. Despite the growing number of obstacles placed in their way – including, as noted, mandatory arbitration agreements that increasingly deprive workers of their statutory rights – no comparable, alternative institutional basis for workers' rights has yet emerged. State-level employment law now stands as the primary institutional guardian of workers' rights, feeble and inadequate as that guardian may be. This paper has provided empirical evidence of this institutional shift, examined its contours, and begun to explore the links between these changes and accompanying organizational changes in the labor movement. Taken all together, I have argued that these institutional and organizational developments have invigorated but also complicated the labor

movement, generating new problems without solving the problems produced by labor law's stagnation in the first place.

While previous scholars have surely noticed these institutional and organizational shifts, their ability to analyze and explain them has been hampered by a lack of empirical data. Marshaling and analyzing new data, this study has examined how the ossification and drift of national labor law has channeled and constrained the reactions of key players and shaped the timing, form, and content of the new institutions and organizations that have emerged. As discussed, labor unions -- the primary organizational beneficiaries of labor law's feedback effects in the early years of the policy's development -- did not disappear, but rather switched from defense to offense and sought to adapt to new contextual conditions by experimenting with new strategies. Their support for state employment laws and alt-labor campaigns produced tangible results in many places, but no victory came without tradeoffs. In a similar dynamic, alt-labor, scholar-activists, and other workers' rights advocates have sought to develop workaround solutions to provide workers with more promising pathways for voice and collective action. In their creative efforts, too, we observe the powerful constraints of the outmoded but persistent labor law. Unable to discard the institutional or organizational legacies of the past and start fresh, each step forward has brought new complications and problems with which contemporary unions, workers' advocates, and other reformers must now negotiate.

Indeed, these developments, layered upon one another over time, have combined historically to create new political problems for the labor movement at the intersection of new and old, which I have referred to as a "new politics" of workers' rights.[157] This process involves what Karen Orren and Stephen Skowronek have described as a defining attribute of American political development:

> "When continuity and change are given their maximum play in the analysis of political history, chronology gives way to a fugue-like motion of stops and starts, with back-tracking and leapfrogging not readily captured on a calendar…It is precisely in its combination and juxtaposition of patterns that politics may be understood as *shaped* by time…Put yet another way, the contours of the polity are determined in the first instance by those who seek to change it and by the changes that they make, and in the second instance, by all the arrangements that get carried over from the past during these interventions and are newly situated by them in an altered setting."[158]

Once can readily see this leap-frogging and historical rearranging in the gradual shift in the institutional bases of workers' rights from labor law to employment law, in the new institutional forms and delivery mechanisms the latter offer in new venues, in the delimited substantive content of those new laws, and in their lopsided distribution across states – all producing new inequalities in workers' rights that are geographic as well as substantive.

And the fugue-like motion continues. Where state legislatures have been reluctant to pass new employment laws, cities and counties have acted on their own; in turn, conservative state legislatures have responded by enacting preemption laws to strip them of their local governing authority.[159] Employers have further leapfrogged employment law by forcing employees to sign mandatory arbitration clauses as conditions of employment, thereby depriving them of the rights they might otherwise vindicate through litigation, further atomizing workers, and undermining one of their primary institutional mechanisms for generating collective action.[160] Workers and their advocates have responded in turn by pushing for "private attorneys general" laws – enacted in California, with similar laws proposed thus far in New York, Oregon, and Vermont – to allow aggrieved employees to act as agents of the state and file representative actions on behalf of themselves as well as other workers to recover civil penalties for violations of state employment laws.[161] Others have proposed still more elaborate workaround solutions, such as wage boards, sectoral bargaining, local labor laws for NLRA-excluded workers, works councils, and the adoption of variations on the "Ghent system."[162] If they could start over from scratch, workers'

rights advocates surely would. Because they cannot, all such proposals are designed to accommodate the changing institutional landscape – in their design and content, they reveal the necessity of circumventing, layering, and re-organizing.

All such proposals also reveal a glaring need for workers to find new organizational frameworks to facilitate interaction and coordination across fragmented workplaces and new catalysts for political mobilization and collective action—which, in turn, highlights existing organizational weaknesses, presents new resource challenges, and invites strategic conflicts. And yet the search itself can be highly generative. As discussed, while labor unions have struggled to adapt, survive, and grow, relations with alternative labor organizations have become both a conspicuous flashpoint and a source of innovation and inspiration.

In all of these developments, we can observe a new politics of workers' rights taking shape. It has moved increasingly out of the workplace and into the political arena;[163] it centrally involves legislative politics and policy campaigns to establish stronger employment law protections and regulatory capacities; it leverages the laws' built-in protections and the need for stronger enforcement to generate the resources, incentives, and interpretive effects that can facilitate further collective action;[164] it increasingly employs street-level protests and direct corporate campaigns to press for higher wages and better employment conditions at the firm and industry levels;[165] it is often fueled by new coalitions of workers' advocates that have formed in the shadow of labor law;[166] and more and more, it views its fate as intertwined with social justice and civil rights campaigns with different proximate foci, such as immigrants' rights, women's rights, and civil rights movements.[167] But as in the past, the ability of workers' advocates to navigate these political dynamics and protect workers' rights depends on how effectively

preexisting institutional and organizational arrangements are negotiated (and renegotiated) in the years ahead.

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[2] 29 U.S.C. §§ 151-169

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[9] On social bargaining, see especially Kate Andrias, "The New Labor Law,"; Kate Andrias, "Social Bargaining in States and Cities: Toward a More Egalitarian and Democratic Workplace Law," *Harv. L. & Pol'y Rev.* (2017): Online Labor Law Reform Symposium (2017), https://repository.law.umich.edu/articles/2000/; Benjamin I. Sachs, "Despite Preemption: Making Labor Law in Cities and States," *Harvard law review* (2011): 1153-1224; Michael M. Oswalt and César Rosado Marzán, "Organizing the State: The 'New Labor Law' Seen from the Bottom-Up," *Berkeley Journal of Employment and Labor Law* forthcoming: available at SSRN: https://ssrn.com/abstract=3078193 (2017); and Ken Jacobs and Rebecca Smith, "State and Local Policies and Sectoral Bargaining: From Individual Rights to Collective Power," *Paper prepared for Cornell ILR/Rutgers SMLR Symposium on Federalism in US Work Regulation, November 5* (2018)

[10] E.g., David Madland, "Wage Boards for American Workers: Industry-Level Collective Bargaining for All Workers," *Center for American Progress Economy Blog* (2018): April 9.

https://www.americanprogress.org/issues/economy/reports/2018/2004/2009/448515/wage-boards-american-workers/; also see David Rolf, "A Roadmap to Rebuilding Worker Power," *The Century Foundation*, 2018; Jacobs and Smith, "State and Local Policies and Sectoral Bargaining"

[11] Sachs, "Labor Law Renewal,"; Benjamin I Sachs, "Employment Law as Labor Law," *Cardozo Law Review* 29 (2008).

[12] Charlotte Garden, "The Seattle Solution: Collective Bargaining by for-Hire Drivers and Prospects for Pro-Labor Federalism," *Harvard Law & Policy Review* (2017): Available at SSRN: https://ssrn.com/abstract=3137308; also see Andrias, "Social Bargaining in States and Cities: Toward a More Egalitarian and Democratic Workplace Law,"

[13] Janice Fine, "Enforcing Labor Standards in Partnership with Civil Society: Can Co-Enforcement Succeed Where the State Alone Has Failed?," *Politics & Society* 45 (2017): 359-388; Janice Fine and Tim Bartley, "Raising the Floor: New Directions in Public and Private Enforcement of Labor Standards in the United States," *Journal of Industrial Relations* Online first (2018): https://doi.org/10.1177/0022185618784100; Janice Fine and Jennifer Gordon, "Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations," *Politics & Society* 38 (2010): 552-585; Matthew Amengual and Janice Fine, "Co-Enforcing Labor Standards: The Unique Contributions of State and Worker Organizations in Argentina and the United States," *Regulation & Governance* 11 (2017): 129-142.

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[15] Ceilidh Gao, "What's Next for Forced Arbitration? Where We Go After SCOTUS Decision in Epic Systems," *NELP Blog*, June 5, 2018; Noam Scheiber,"Labor Unions Will Be Smaller after Supreme Court Decision, but Maybe Not Weaker," *The New York Times*, June 27, 2018, 2018; Ben Nicholson, "Businesses Beware: Chapter 906 Deputizes 17 Million Private Attorneys General to Enforce the Labor Code," *McGeorge Law Review* 35 (2004): 581.

[16] For example, Benjamin Sachs sees existing employment law as the new locus of workers' collective action; both Kate Andrias's call for sectoral bargaining the public arena and David Madland's proposal to expand wage boards aim to strengthen or leverage employment laws (such as the minimum wage in the Fight for $15); Cynthia Estlund's self-regulation takes as its "impetus" the "public enforcement and private litigation" of employment law protections and rights. Even Seattle's effort to establish collective bargaining for independent contractors was explicitly designed to remedy their exclusion from local employment laws covering only "employees," Charlotte Garden writes.

[17] "Guardian" is from Clyde W Summers, "Labor Law as the Century Turns: A Changing of the Guard," *Neb. L. Rev.* 67 (1988): 7.

[18] This study focuses on state-level employment laws, but for a running inventory of *local minimum wage ordinances*, see UC Berkeley Center for Labor Research and Education,"Inventory of Local Minimum Wage Ordinances," for updated list, see http://laborcenter.berkeley.edu/minimum-wage-living-wage-resources/inventory-of-us-city-and-county-minimum-wage-ordinances/. For a running inventory of *local paid sick day laws*, see National Partnership for Working Families,"Current Paid Sick Days Laws," November 9, 2016 (http://www.nationalpartnership.org/research-library/work-family/psd/current-paid-sick-days-laws.pdf). For *fair scheduling laws*, see National Women's Law Center,"Recently Enacted and

Introduced State and Local Fair Scheduling Legislation," January 2017 (https://nwlc.org/wp-content/uploads/2017/01/Fair-Scheduling-Report-1.30.17-1.pdf).

States in which cities or counties had passed local ordinances by 2018 pertaining either to the minimum wage, paid sick days, or fair scheduling include: CA (33 cities or counties), NJ (13), WA (5), NM (4), IL (4), MD (3), MN (3), DC (2), ME (2), PA (2), TX (2), AZ (1), NH (1), NY (1) – thus roughly tracking the relative volume of state employment laws (see below).

For more on these efforts in the context of how state legislatures are passing "preemption" laws to strip local governments of authority to enact local employment laws, see Marni von Wilpert, "City Governments Are Raising Standards for Working People--and State Legislators Are Lowering Them Back Down," *Economic Policy Institute* (April 26, 2017 (https://www.epi.org/publication/city-governments-are-raising-standards-for-working-people-and-state-legislators-are-lowering-them-back-down/)).

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

[20] But see the ground-breaking work of political scientist Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream* (Ithaca: ILR Press/Cornell University Press, 2006); Janice Fine, "New Forms to Settle Old Scores: Updating the Worker Centre Story in the United States," *Relations Industrielles/Industrial Relations* (2011): 604-630; Fine and Gordon, "Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations,". Nor has the development of "alt-labor" been overlooked by attentive scholars working primarily in other fields, e.g., Stephanie Luce, et al., *What Works for Workers?: Public Policies and Innovative Strategies for Low-Wage Workers* (New York: Russell Sage Foundation, 2014); Ruth Milkman and Ed Ott, *New Labor in New York: Precarious Workers and the Future of the Labor Movement* (Ithaca: ILR Press, an imprint of Cornell University Press, 2014); Ruth Milkman, Joshua Bloom and Victor Narro, *Working for Justice: The L.A. Model of Organizing and Advocacy* (Ithaca: ILR Press/Cornell University Press, 2010); Jacob Lesniewski, *Constant Contestation: Dilemmas of Organizing, Advocacy, and Individual Interventions at a Worker Center* (Chicago: The University of Chicago, 2013); César Rosado Marzán, "Worker Centers and the Moral Economy: Disrupting through Brokerage, Prestige, and Moral Framing," (2017); Marc Doussard and Ahmad Gamal, "The Rise of Wage Theft Laws: Can Community-Labor Coalitions Win Victories in State Houses?," *Urban Affairs Review* (2015); Catherine L Fisk, "Workplace Democracy and Democratic Worker Organizations: Notes on Worker Centers," *Theoretical Inquiries in Law* 17 (2016): 101-130; Ruth Milkman, "Back to the Future? U.S. Labour in the New Gilded Age," *British Journal of Industrial Relations* 51 (2013): 645-665; Rick Fantasia and Kim Voss, *Hard Work: Remaking the American Labor Movement* (Berkeley: University of California Press, 2004); Stephanie Luce, *Labor Movements: Global Perspectives* (Cambridge: Polity Press, 2014)

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[22] Cynthia L Estlund, "The Ossification of American Labor Law," pp. 1572-3; Sachs, "Despite Preemption: Making Labor Law in Cities and States,"; Andrias, "The New Labor Law,".

[23] Eli Naduris-Weissman, "The Worker Center Movement and Traditional Labor Law: A Contextual Analysis," *Berkeley Journal of Employment and Labor Law* (2009): 232-335.

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Employment Rights," *Hous. L. Rev.* 30 (1993): 1863; James J Brudney, "Reflections on Group Action and the Law of the Workplace Symposium: The Changing Workplace," *Texas Law Review* 74 (1996); Sachs, "Labor Law Renewal,"; Sachs, "Employment Law as Labor Law,"; Sachs, "Despite Preemption: Making Labor Law in Cities and States,"; Theodore J St Antoine, "Labor and Employment Law in Two Transitional Decades," *Brandeis LJ* 42 (2003): 495; Katherine Van Wezel Stone, "The Legacy of Industrial Pluralism: The Tension between Individual Employment Rights and the New Deal Collective Bargaining System," *The University of Chicago Law Review* (1992): 575-644; Garden, "The Seattle Solution: Collective Bargaining by for-Hire Drivers and Prospects for Pro-Labor Federalism,"; Michael M. Oswalt and César Rosado Marzán, "Organizing the State: The 'New Labor Law' Seen from the Bottom-Up," *Berkeley Journal of Employment and Labor Law* forthcoming: available at SSRN: https://ssrn.com/abstract=3078193 (2017); Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*; Milkman, "Back to the Future? U.S. Labour in the New Gilded Age,"; Ruth Milkman and Kim Voss, *Rebuilding Labor: Organizing and Organizers in the New Union Movement* (Ithaca, N.Y.: Cornell University Press, 2004); Nelson Lichtenstein, *State of the Union: A Century of American Labor* (Princeton, New Jersey: Princeton University Press, 2013); Nelson Lichtenstein,"Why Labor Moved Left," *Dissent*, Summer, 2015; Nancy MacLean, *Freedom Is Not Enough: The Opening of the American Workplace* (New York and Cambridge, MA: Russell Sage Foundation, Harvard University Press, 2006); Doussard and Gamal, "The Rise of Wage Theft Laws: Can Community-Labor Coalitions Win Victories in State Houses?,"; Rosado Marzán, "Worker Centers and the Moral Economy: Disrupting through Brokerage, Prestige, and Moral Framing,"

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[28] Karen Orren and Stephen Skowronek, "Beyond the Iconography of Order: Notes for a 'New Institutionalism'," 321; Robert C Lieberman, "Ideas, Institutions, and Political Order: Explaining Political Change," *American Political Science Review* 96 (2002): 697-712; Orren and Skowronek, *The Search for American Political Development*.

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[30] 29 U.S.C. §§ 151-169

[31] Schattschneider, *Politics, Pressures and the Tariff*, p. 288; Pierson, "When Effect Becomes Cause: Policy Feedback and Political Change."

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[35] Melvyn Dubofsky and Joseph Anthony McCartin, *Labor in America: A History* (Hoboken, NJ: John Wiley & Sons, 2017); Lichtenstein, *State of the Union: A Century of American Labor*.

[36] Lichtenstein, "From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era,"; Ira Katznelson, "Was the Great Society a Lost Opportunity?," in *The Rise and Fall of the New Deal Order, 1930-1980*, eds. Steve Fraser and Gary Gerstle (Princeton, N.J.: Princeton University Press, 1989). For an excellent full-length treatment of the interplay of ideas and institutions in constructing and channeling employment policy, see Margaret Weir, *Politics and Jobs: The Boundaries of Employment Policy in the United States* (Princeton, N.J.: Princeton University Press, 1992). Also see Kevin Boyle, *The Uaw and the Heyday of American Liberalism, 1945-1968* (Ithaca: Cornell University Press, 1995); Nelson Lichtenstein, *The Most Dangerous Man in Detroit: Walter Reuther and the Fate of American Labor* (New York, NY: Basic Books, 1995).

[37] Terry Moe, "Control and Feedback in Economic-Regulation - the Case of the Nlrb," *American Political Science Review* 79 (1985): 1094-1116

[38] Sarah F Anzia and Terry M Moe, "Do Politicians Use Policy to Make Politics? The Case of Public-Sector Labor Laws," ibid. 110 (2016): 763-777.

[39] San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), 359 U.S. 236 (1959).

[40] Importantly, however, Sachs notes that these rulings still allow for the "private reordering" of organizing and bargaining rules and Andrias explains that they do not preempt the enactment of universally applicable employment legislation. Quote is from Estlund, "Ossification," p. 1571, but also see pp. 1569-79; Sachs "Despite Preemption," 1164-1172; Andrias, "The New Labor Law," 89-92. The key preemption cases after Garmon include: Lodge 76, International Ass'n of Machinists Aerospace Workers, AFL-CIO, et al. v. Wisconsin Employment Relations Commission et al., 427 U.S. 132 (1976); Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986); Chamber of Commerce v. Brown, 128 S. Ct. 2408 (2008).

[41] The Labor Management Relations Act of 1947 ("Taft-Hartley Act") shifted the purposes of labor law away from favoring concerted action and privileging collective bargaining and "instead, it embraced employees' 'full freedom' to engage in or refrain from such activity." Andrias, "The New Labor Law" p. 18. It allowed states to implement "right to work" laws banning fair share agency fees (triggering classic free-rider problems -- see for example, *Janus v. AFSCME,* 2018); prohibited a wide range of strike activities; outlawed secondary boycotts and closed shops; codified the right of employers, within limits, to campaign against unionization and contest the legitimacy union elections; and authorized the executive branch to obtain strikebreaking injunctions. On the key Court decisions, see James G. Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 *Mich. L. Rev.* 518 (2004); Karl E. Klare,

"Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941." *Minn. L. Rev.* 62 (1977); Andrias, "The New Labor Law."

[42] "Mismatch" is from Andrias, "The New Labor Law,", 6, 28, 78; also Fine, "New Forms to Settle Old Scores: Updating the Worker Centre Story in the United States," p. 605. Description of employment relations is from Lichtenstein, *State of the Union: A Century of American Labor*, p. 264. Also see Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*. Also see Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace*; Sweet and Meiksins, *Changing Contours of Work: Jobs and Opportunities in the New Economy*.

[43] A good discussion of the failure of labor law reform in 1978 is in Hacker and Pierson, *Winner-Take-All Politics,* pp. 127-132. In these ways, labor law appears as a case of *policy drift*, which is "when institutions or policies are deliberately held in place while their context shifts in ways that alter their effects." Hacker, Pierson and Thelen, "Drift and Conversion: Hidden Faces of Institutional Change," 180; Hacker, "Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States,"; Hacker, "Policy Drift: The Hidden Politics of Us Welfare State Retrenchment," Also see Suzanne Mettler, "The Policyscape and the Challenges of Contemporary Politics to Policy Maintenance," *Perspectives on Politics* 14 (2016): 369-390.

[44] Kate Bronfenbrenner and Tom Juravich, "The Impact of Employer Opposition on Union Certification Win Rates: A Private/Public Sector Comparison," *Economic Policy Institute* Working Paper No. 113. http://digitalcommons.ilr.cornell.edu/articles/19 (1994)

[45] Alexander Hertel-Fernandez, "Explaining Durable Business Coalitions in Us Politics: Conservatives and Corporate Interests across America's Statehouses," *Studies in American*

Political Development 30 (2016): 1-18, p. 2; Theda Skocpol and Alexander Hertel-Fernandez, "The Koch Network and Republican Party Extremism," *Perspectives on Politics* 14 (2016): 681-699; Hertel-Fernandez, *Politics at Work: How Companies Turn Their Workers into Lobbyists*; Alexander Hertel-Fernandez, "Policy Feedback as Political Weapon: Conservative Advocacy and the Demobilization of the Public Sector Labor Movement," *Perspectives on Politics* 16 (2018): 364-379. Also see Hacker and Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer and Turned Its Back on the Middle Class*; David Vogel, *Fluctuating Fortunes: The Political Power of Business in America* (New York: Basic Books, 1989).

[46] Alexander Hertel-Fernandez, "Who Passes Business's "Model Bills"? Policy Capacity and Corporate Influence in Us State Politics," *Perspectives on Politics* 12 (2014): 582-602, pp. 594, 590.

[47] Goldfield, *The Decline of Organized Labor in the United States*; Richard B. Freeman and Joel Rogers, *What Workers Want* (Ithaca, New York: ILR Press, Russell Sage Foundation, 1999); Freeman and Medoff, *What Do Unions Do?*

[48] Frymer, *Black and Blue*, pp. 2, 25, 3.

[49] Lichtenstein, *State of the Union*, x.

[50] On the strategic shifts of winners and losers in the context of "policy drift," see Hacker, Pierson and Thelen, "Drift and Conversion: Hidden Faces of Institutional Change," pp. 202-203.

[51] On union adaptation, see Kim Voss and Rachel Sherman, "Breaking the Iron Law of Oligarchy: Union Revitalization in the American Labor Movement," *American Journal of Sociology* 106 (2000): 303-349; Milkman, *L.A. Story: Immigrant Workers and the Future of the U.S. Labor Movement*; Steven Henry Lopez, *Reorganizing the Rust Belt: An inside Study of the American Labor Movement* (Berkeley: University of California Press, 2004); Milkman and Voss,

Rebuilding Labor: Organizing and Organizers in the New Union Movement; Marc Dixon and Andrew W Martin, "We Can't Win This on Our Own: Unions, Firms, and Mobilization of External Allies in Labor Disputes," *American Sociological Review* 77 (2012): 946-969.

[52] Summers, "Labor Law as the Century Turns: A Changing of the Guard," 10-11.

[53] E.g., Paul C. Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (Cambridge: Harvard University Press, 1990); Robert J Rabin, "Role of Unions in the Rights-Based Workplace, The," *USFL Rev.* 25 (1990): 169; Stone, "The Legacy of Industrial Pluralism: The Tension between Individual Employment Rights and the New Deal Collective Bargaining System,"; Bales, "A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights,"; Richard Bales, "The Discord between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution," *BUL Rev.* 77 (1997): 687; Brudney, "Reflections on Group Action and the Law of the Workplace Symposium: The Changing Workplace,"; Stephen F Befort, "Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment," *BCL Rev.* 43 (2001): 351; Estlund, "The Ossification of American Labor Law,"; Cynthia Estlund, "Rebuilding the Law of the Workplace in an Era of Self-Regulation," ibid. (2005): 319-404; Sachs, "Labor Law Renewal,"; Sachs, "Employment Law as Labor Law,"; Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party*; Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization under the Nlra,"; Theodore J. St. Antoine, "Labor and Employment Law in Two Transitional Decades," *Brandeis LJ* 42 (2003): 495; for a contrary view, see Lance Compa, "Not Dead Yet: Preserving Labor Law Strengths While Exploring New Labor Law Strategies," 4 U.C. Irvine Law Review 609, 610-12 (2014). This legal scholarship dovetails in important ways with the much larger interdisciplinary

literature on the rights revolution, e.g., Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998); Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S* (Princeton, N.J.: Princeton University Press, 2010); Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994)

[54] Stone, "The Legacy of Industrial Pluralism: The Tension between Individual Employment Rights and the New Deal Collective Bargaining System,", p. 593.

[55] Estlund, "Rebuilding the Law of the Workplace in an Era of Self-Regulation," 321.

[56] Sachs, "Employment Law as Labor Law,", p. 2687. MacLean, *Freedom Is Not Enough: The Opening of the American Workplace*; Andrias, "The New Labor Law."

[57] Bales, "A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights," p. 1876

[58] St. Antoine, "Labor and Employment Law in Two Transitional Decades," p. 510; See also Andrias, "The New Labor Law,"; St. Antoine also writes 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." St. Antoine, "Labor and Employment Law in Two Transitional Decades," as quoted in Andrias, "The New Labor Law," p.8 fn20.

[59] St. Antoine, Ibid., p.495.

[60] Bureau of Labor Statistics, "State Labor Legislation Enacted in [Previous Year]," *Monthly Labor Review* (1918-2017)

[61] Ibid.. Note: Executive orders, judicial rulings, ballot initiatives, and automatic updates (e.g., annual increase in minimum wage as a result of prior legislation) are excluded.

[62] E.g., Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*

[63] See for example James J. Brudney, "Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms," *Iowa Law Review* 90 (2005): 819-886; Estlund, "Rebuilding the Law of the Workplace in an Era of Self-Regulation,"; Sachs, "Despite Preemption: Making Labor Law in Cities and States,"; Paul M. Secunda, "Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States," *Comp. Lab. L. & Pol'y J.* 29 (2007).

[64] Margaret Weir, "States, Race, and the Decline of New Deal Liberalism," *Studies in American Political Development* 19 (2005): 157-172, p. 158.

[65] St Antoine, "Labor and Employment Law in Two Transitional Decades,", p. 495.

[66] Richard B Freeman, "Unionism and Protective Labor Legislation," *Industrial Relations Research Association, Proceedings* (1986): 260-267, quote on 265. Freeman's analysis tests the "government substitution hypothesis" posited by George R Neumann and Ellen R Rissman, "Where Have All the Union Members Gone?," *Journal of Labor Economics* 2 (1984): 175-192, and tested and elaborated by: William J Moore and Robert J Newman, "A Cross-Section Analysis of the Postwar Decline in American Trade Union Membership," *Journal of Labor Research* 9 (1988): 111; William J Moore, Robert J Newman and Loren C Scott, "Welfare Expenditures and the Decline of Unions," *The Review of Economics and Statistics* (1989): 538-542; Christopher K Coombs, "The Decline in American Trade Union Membership and the

"Government Substitution" Hypothesis: A Review of the Econometric Literature," *Journal of Labor Research* 29 (2008): 99-113.

[67] Freeman's model took a snapshot of the relationship in 1985 and its dependent variable was the Southern Labor Institute's index of the "level of statutory protection of workers," which measured the "total number of laws in the state in a selected group of common worker protection laws" in the summer of 1985. The model employed here uses the more fine-grained *MLR* data in a time-series cross-section analysis covering 1976-2013. Freeman's data was from the Southern Labor Institute, "The Climate for Workers in the United States," *A Study and Report by the Southern Labor Institute, a special project of the Southern Regional Council, Inc.* August 29 (1986), Appendix II.

[68] Data from Hersch and MacPherson. Laura C. Bucci, "Organized Labor's Check on Rising Economic Inequality in the U.S. States," *State Politics & Policy Quarterly* forthcoming (2018); John S. Ahlquist and Margaret Levi, *In the Interest of Others: Organizations and Social Activism* (Princeton: Princeton University Press, 2013); Freeman and Medoff, *What Do Unions Do*; Rosenfeld, *What Unions No Longer Do*.

[69] Freeman, "Unionism and Protective Labor Legislation,".

[70] Coombs, "The Decline in American Trade Union Membership and the "Government Substitution" Hypothesis: A Review of the Econometric Literature,"

[71] Anthony S. Chen, "The Party of Lincoln and the Politics of State Fair Employment Practices Legislation in the North, 1945-1964," *American Journal of Sociology* 112 (2007): 1713-1774.

[72] Compiled by the author. Source: The American Legislators' Association Council of State Governments, "The Book of the States," (Lexington, Ky.: Council of State Governments, 1935-2017), tallies of annual state legislative enactments.

[73] Freeman and Medoff, *What Do Unions Do?*. Data from Carl E. Klarner, "Measurement of the Partisan Balance of State Government," *State Politics and Policy Quarterly* 3 (2003): 309-319.

[74] Devin Caughey and Christopher Warshaw, "Policy Preferences and Policy Change: Dynamic Responsiveness in the American States, 1936–2014," *American Political Science Review* 112 (2018): 249-266. Also see: Jerold Waltman and Sarah Pittman, "The Determinants of State Minimum Wage Rates: A Public Policy Approach," *Journal of Labor Research* 23 (2002): 51-56; Doussard and Gamal, "The Rise of Wage Theft Laws: Can Community-Labor Coalitions Win Victories in State Houses?,".

[75] Chen, "The Party of Lincoln and the Politics of State Fair Employment Practices Legislation in the North, 1945-1964,"; Marc Dixon, "The Politics of Union Decline: Business Political Mobilization and Restrictive Labor Legislation, 1930 to 1960," The Ohio State University, 2005).

[76] John C. Driscoll and Aart C. Kraay, "Consistent Covariance Matrix Estimation with Spatially Dependent Panel Data," *Review of Economics and Statistics* 80 (1998): 549-560.

[77] Specifically, the Bureau of Labor Statistics' historical database of state-level unemployment uses estimates that are limited to 1976 and later.

[78] Data limitations prevent the use of political contribution measures in the time-series cross-sectional models above. *National Institute on Money in State Politics.* 2016. Helena, Montana. Followthemoney.org 1989-2014 Contributions from the general business sector. See Marty P. Jordan and Matt Grossmann, "The Correlates of State Policy Project v2.0." East Lansing, MI: Institute for Public Policy and Social Research (IPPSR), 2016.

[79] *National Institute on Money in State Politics.* 2016. Helena, Montana. Followthemoney.org 1989-2014. See Marty P. Jordan and Matt Grossmann, "The Correlates of State Policy Project

v2.0." East Lansing, MI: Institute for Public Policy and Social Research (IPPSR), 2016.

[80] Alexis N Walker, "Labor's Enduring Divide: The Distinct Path of Public Sector Unions in the United States," *Studies in American Political Development* 28 (2014): 175-200*;* Henry Farber, "Union Membership in the United States: The Divergence Between the Public and Private Sectors," WP 503, Princeton. Sarah F Anzia and Terry M Moe, "Do Politicians Use Policy to Make Politics? The Case of Public-Sector Labor Laws"; Patrick Flavin and Michael T. Hartney, "When Government Subsidizes Its Own: Collective Bargaining Laws as Agents of Political Mobilization." *American Journal of Political Science* 59,4 (2015): 896-911; Hertel-Fernandez, "Policy Feedback as Political Weapon: Conservative Advocacy and the Demobilization of the Public Sector Labor Movement."

[81] Ibid.

[82] Skocpol and Hertel-Fernandez, "The Koch Network and Republican Party Extremism,"; Alexander Hertel-Fernandez, "Policy Feedback as Political Weapon: Conservative Advocacy and the Demobilization of the Public Sector Labor Movement," ibid. 16 (2018): 364-379; Gordon Lafer, *The Legislative Attack on American Wages and Labor Standards, 2011-2012* (Economic Policy Institute, 2013).

[83] For a fuller discussion, see Daniel J. Galvin and Jason N. Seawright, "Surprising Causes: Propensity-Adjusted Treatment Scores for Multimethod Case Selection" (working paper).

[84] See, for example, Steve Peoples' three-part series "Labor's Power Hangs in the Balance," *Providence Journal,* June 8-10, 2008.

[85] Jeffrey A. Eisenach, "The Impact of State Employment Policies on Job Growth: A 50-State Review," *U.S. Chamber of Commerce* (2011), p.6.

[86] Categories drawn from NCSL include: overtime, state family medical leave laws, discrimination laws, drug and alcohol testing, whistleblower laws, child labor, and employee misclassification. Categories drawn from DOL include: minimum wage, prevailing wage, meal/rest periods, and OSHA state plans.

[87] On the growing polarization of state policy issues, see Jacob M. Grumbach, "From Backwaters to Major Policymakers: Policy Polarization in the States, 1970-2014," *Perspectives on Politics* 16(2), June 2018.

[88] Two independent researchers coded 5,531 laws enacted between 1973-2010, yielding 89 percent agreement and a Cohen's Kappa coefficient of 0.77, which Landis and Koch interpret as in the high end of the "substantial" agreement range (0.61-.80). Richard J. Landis and Gary G. Koch, "The measurement of observer agreement for categorical data," *Biometrics,* (1977): 159-174.

[89] Ahlquist and Levi, *In the Interest of Others: Organizations and Social Activism, 2*

[90] In their classic study, Freeman and Medoff (1984) found that although unions consistently failed to advance their own self-interests in legislative politics, they were far more effective in amplifying "the voice of workers and the lower income segments of society" more broadly. Freeman and Medoff, *What Do Unions Do*; Rosenfeld, *What Unions No Longer Do*; Western and Rosenfeld, "Unions, Norms, and the Rise in Us Wage Inequality,"

[91] On Gompers, see Julie Greene, *Pure and Simple Politics: The American Federation of Labor, 1881 to 1917* (Cambridge: Cambridge University Press, 1998). On the "government substitution hypothesis, see Neumann and Rissman, "Where Have All the Union Members Gone?," Moore and Newman, "A Cross-Section Analysis of the Postwar Decline in American Trade Union Membership,"; Moore, Newman and Scott, "Welfare Expenditures and the Decline of Unions,";

Coombs, "The Decline in American Trade Union Membership and the "Government Substitution" Hypothesis: A Review of the Econometric Literature,"; ibid.; Freeman, "Unionism and Protective Labor Legislation,"; Nancy R Hauserman and Cheryl L Maranto, "The Union Substitution Hypothesis Revisited: Do Judicially Created Exceptions to the Termination-at-Will Doctrine Hurt Unions," *Marq. L. Rev.* 72 (1988): 317; James T Bennett and Jason E Taylor, "Labor Unions: Victims of Their Political Success?," *Journal of Labor Research* 22 (2001): 261.

[92] Christopher K Coombs, "The Decline in American Trade Union Membership and the "Government Substitution" Hypothesis: A Review of the Econometric Literature," ibid. 29 (2008): 99-113; Freeman, "Unionism and Protective Labor Legislation,"

[93] As Moore, Newman and Scott, "Welfare Expenditures and the Decline of Unions," write (p. 539): "Charles McDonald, Director of the Department of Organization, AFL-CIO, expressed relief, but not surprise, that these studies provided evidence refuting the government substitution hypothesis. He noted, however, that even if the evidence had supported that hypothesis, the AFL-CIO would continue to support social welfare legislation that aided the working men and the poor in this country."

[94] James B Kau and Paul H Rubin, "Self-Interest, Ideology, and Logrolling in Congressional Voting," *The Journal of Law and Economics* 22 (1979): 365-384; Freeman and Medoff, *What Do Unions Do?*

[95] Jacobs and Smith, "State and Local Policies and Sectoral Bargaining: From Individual Rights to Collective Power,".

[96] Andrias, "The New Labor Law," p. 128.

[97] Boyle, *The Uaw and the Heyday of American Liberalism, 1945-1968*; Lichtenstein, *State of the Union: A Century of American Labor, 294*.

[98] J. David Greenstone, *Labor in American Politics* (New York: Knopf, 1969); James Q. Wilson, *Political Organizations* (New York: Basic Books, 1974).

[99] Forbath, *Law and the Shaping of the American Labor Movement*; Hattam, *Labor Visions and State Power: The Origins of Business Unionism in the United States*; Daniel Schlozman, *When Movements Anchor Parties: Electoral Alignments in American History* (Princeton: Princeton University Press, 2015).

[100] Lichtenstein, *State of the Union: A Century of American Labor*, p. 259; also see Melvyn Dubofsky, *The State and Labor in Modern America* (Chapel Hill: Univ of North Carolina Press, 1994).

[101] Lauren Snyder, "Working America," *NYL Sch. L. Rev.* 50 (2005).

[102] E.g., Voss and Sherman, "Breaking the Iron Law of Oligarchy: Union Revitalization in the American Labor Movement,"; Milkman and Voss, *Rebuilding Labor: Organizing and Organizers in the New Union Movement*.

[103] Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*; Sweet and Meiksins, *Changing Contours of Work: Jobs and Opportunities in the New Economy*.

[104] Robert Pollin and Stephanie Luce, *The Living Wage: Building a Fair Economy* (New York: New Press, 1998); Lichtenstein, *State of the Union: A Century of American Labor*; Kim Voss and Irene Bloemraad, *Rallying for Immigrant Rights: The Fight for Inclusion in 21st Century America* (Berkeley: University of California Press, 2011)

[105] Pierson, "When Effect Becomes Cause: Policy Feedback and Political Change,"

[106] Rosenfeld, Denice and Laird, "Union Decline Lowers Wages of Nonunion Workers,"; Western and Rosenfeld, "Unions, Norms, and the Rise in Us Wage Inequality,"

[107] Another important and relatively durable effect that has received less attention is the support and nourishment provided by private sector labor unions, like the UAW, to public sector unions like the AFT. See Michael Goldfield, "Public Sector Union Growth and Public Policy," *Policy Studies Journal* 18 (1989): 404-420.

[108] Andrias, "The New Labor Law,"; Sachs, "Despite Preemption: Making Labor Law in Cities and States,". As Andrias notes, industry-wide patterned bargaining is permitted but not mandated, and has "largely collapsed in the face of deindustrialization and globalization" (6-7).

[109] Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*. It is also true that alt-labor groups have in some cases *grown out of*, or benefitted organizationally, from periodic upsurges of contentious collective action and spontaneous worker insurgency. In these instances, protest and organization have been mutually reinforcing. Thus some alt-labor groups may in an important respect be considered the "residue of reform." Frances Fox Piven and Richard A Cloward, *Poor People's Movements: Why They Succeed, How They Fail* (New York: Pantheon Books, 1977), pp. 34-46. For good examples and a fuller elaboration of the complex relationship between organization and bottom-up protest on behalf of immigrants' rights, see in particular Voss and Bloemraad, *Rallying for Immigrant Rights: The Fight for Inclusion in 21st Century America*; Milkman and Voss, *Rebuilding Labor: Organizing and Organizers in the New Union Movement*; Fantasia and Voss, *Hard Work: Remaking the American Labor Movement*; Shannon Gleeson, "From Rights to Claims: The Role of Civil Society in Making Rights Real for Vulnerable Workers," *Law & Society Review* 43 (2009): 669-700; Shannon Gleeson, *Conflicting Commitments: The Politics of Enforcing Immigrant Worker Rights in San Jose and Houston* (Ithaca: Cornell University Press, 2012).

[110] Josh Eidelson, "Alt-Labor," *The American Prospect* 24 (2013): 15-18; Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*; Ruth Milkman, "L.A.'s Past, America's Future? The 2006 Immigrants Rights Protests and Their Antecedents," in *Rallying for Immigrant Rights: The Fight for Inclusion in 21st Century America*, eds. Kim Voss and Irene Bloemraad (Berkeley: University of California Press, 2011), pp. 201-214.

[111] Luce, et al., *What Works for Workers?: Public Policies and Innovative Strategies for Low-Wage Workers*; Milkman and Ott, *New Labor in New York: Precarious Workers and the Future of the Labor Movement*; Milkman, Bloom and Narro, *Working for Justice: The L.A. Model of Organizing and Advocacy*

[112] Eidelson, "Alt-Labor,"; Lesniewski, *Constant Contestation: Dilemmas of Organizing, Advocacy, and Individual Interventions at a Worker Center*; Rosado Marzán, "Worker Centers and the Moral Economy: Disrupting through Brokerage, Prestige, and Moral Framing,"; Doussard and Gamal, "The Rise of Wage Theft Laws: Can Community-Labor Coalitions Win Victories in State Houses?," Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*; Fine, "New Forms to Settle Old Scores: Updating the Worker Centre Story in the United States,"; Fine and Gordon, "Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations,"

[113] Janice Fine and Nik Theodore, "Worker Centers 2012: Community Based and Worker Led Organizations," (Center for Faith-Based and Community Partnerships, U.S. Department of Labor: 2012). Also see Ruth Milkman, "L.A.'s Past, America's Future? The 2006 Immigrants Rights Protests and Their Antecedents."

[114] Section 7 covers "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other

concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §§ 151-169. In addition to this important advocacy work, many worker centers "engage in some sort of direct service provision…Whether providing language classes, employment and training programs, adult education, transportation supports, soft skills workshops, "know your rights" workshops, or a range of legal services, organizations devote a significant amount of their time and resources to understanding the direct service needs of their members and constituents, developing service strategies and programs, and securing resources and partnerships to deliver them." Quote from Héctor R Cordero-Guzmán, Pamela A Izvănariu and Victor Narro, "The Development of Sectoral Worker Center Networks," *The ANNALS of the American Academy of Political and Social Science* 647 (2013): 102-123. Also see Fine, *Worker Centers: Organizing Communities at the Edge of the Dream.*

[115] Sources: Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*; Fine, "New Forms to Settle Old Scores: Updating the Worker Centre Story in the United States,"; Fine and Theodore, "Worker Centers 2012: Community Based and Worker Led Organizations,"; http://www.wagetheft.org (accessed June 15, 2017).

[116] Fine, "New Forms to Settle Old Scores: Updating the Worker Centre Story in the United States," 607, 615

[117] Galvin, "Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance,". Also see Doussard and Gamal, "The Rise of Wage Theft Laws: Can Community-Labor Coalitions Win Victories in State Houses?,"

[118] Interfaith Worker Justice, "Current and Pending Wage Theft Legislation," https://www.wagetheft.org/Local-and-State-Legislation. Also see Doussard and Gamal, "The Rise of Wage Theft Laws: Can Community-Labor Coalitions Win Victories in State Houses?,"

[119] Eileen Boris and Jennifer Klein, *Caring for America: Home Health Workers in the Shadow of the Welfare State* (New York: Oxford University Press, 2015)

[120] Chloe N. Thurston, "Policy Feedback in the Public-Private Welfare State: Advocacy Groups and Access to Government Homeownership Programs, 1934-1954," *Studies in American Political Development* 29 (2015): 250-267; Chloe N. Thurston, *At the Boundaries of Homeownership: Credit, Discrimination, and the American State* (New York: Cambridge University Press, 2018).

[121] See note 108, *supra.*

[122] David Rolf, *The Fight for Fifteen: The Right Wage for a Working America* (New York: The New Press, 2016); Stephanie Luce, "$15 Per Hour or Bust: An Appraisal of the Higher Wages Movement," *New Labor Forum* 24 (2015): 72-79.

[123] Andrias, "The New Labor Law," pp. 47-51, quote from Steven Greenhouse, "Movement To Increase McDonald's Minimum Wage Broadens Its Tactics," *The New York Times*, March 30, 2015.

[124] Steven Greenhouse, "Hundreds of Fast-Food Workers Striking for Higher Wages Are Arrested," *The New York Times*, September 4, 2014; Aaron Gupta, "Fight for 15 Confidential," *In These Times*, November 11, 2013. Andrias, NLL.

[125] Stephanie Luce, "Workers of the World Have Nothing, and Everything, to Lose " *Journal of World-Systems Research* 23 (2017): 205-212

[126] "Democratic Party Adopts $15 National Minimum Wage to Party Platform," https://fightfor15.org/democratic-party-adopts-15-national-minimum-wage-to-party-platform/. Michelle Chen, "The Story Behind the Immigrant Workers in Bernie Sanders' Stirring New Ad Lauding Worker Organizing," *In These Times*, March 9, 2016.

[127] Schlozman, *When Movements Anchor Parties: Electoral Alignments in American History*, pp. 49-76.

[128] E.g., Ben Penn, "Labor Dept. Probes Worker Centers but Plans No 'Blanket Rule' (1)," *Bloomberg News,* April 30, 2018; Mike Emanuel, "Unions by Another Name? Lawmakers Question Rise of 'Worker Centers,'" *Fox News,* December 21, 2015.

[129] Michelle Chen, "The Story Behind the Immigrant Workers in Bernie Sanders' Stirring New Ad Lauding Worker Organizing," *In These Times,* March 9, 2016.

[130] Bales, "A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights,"; Bales, "The Discord between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution,"; Stone, "The Legacy of Industrial Pluralism: The Tension between Individual Employment Rights and the New Deal Collective Bargaining System," 596; also see Sarah L. Staszak, *No Day in Court: Access to Justice and the Politics of Judicial Retrenchment* (New York: Oxford University Press, 2015).

[131] Bales, "The Discord between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution,", p. 690

[132] Stone, "The Legacy of Industrial Pluralism: The Tension between Individual Employment Rights and the New Deal Collective Bargaining System," p. 638.

[133] Neumann and Rissman, "Where Have All the Union Members Gone?,"; see also Coombs, "The Decline in American Trade Union Membership and the "Government Substitution" Hypothesis: A Review of the Econometric Literature,"; Moore, Newman and Scott, "Welfare Expenditures and the Decline of Unions,"; William J Moore and Robert J Newman, "A Cross-Section Analysis of the Postwar Decline in American," *Journal of Labor Research* 9 (1988):

111; Freeman, "Unionism and Protective Labor Legislation,"; Hauserman and Maranto, "The Union Substitution Hypothesis Revisited: Do Judicially Created Exceptions to the Termination-at-Will Doctrine Hurt Unions,".

[134] Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States*

[135] Ibid., p. 128.

[136] Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party*

[137] Weiler, *Governing the Workplace: The Future of Labor and Employment Law*

[138] Ellen Berrey, Robert L Nelson and Laura Beth Nielsen, *Rights on Trial: How Workplace Discrimination Law Perpetuates Inequality* (University of Chicago Press, 2017)

[139] Alexander J.S. Colvin, "The Growing Use of Mandatory Arbitration," *Washington, DC: Economic Policy Institute* (2017); Staszak, *No Day in Court: Access to Justice and the Politics of Judicial Retrenchment*.

[140] Galvin, "Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance,"

[141] Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*.

[142] Harold Meyerson, "The Seeds of a New Labor Movement," in *The American Prospect*, Fall 2014.

[143] Aaron Gupta,"Fight for 15 Confidential," *In These Times*, November 11, 2013

[144] Harold Meyerson, "The Seeds of a New Labor Movement."

[145] e.g., Jane McAlevey, *No Shortcuts: Organizing for Power in the New Gilded Age* (New York: Oxford University Press, 2016).

[146] Mark Dudzic,"The Afl-Cio "on the Beach"," *New Labor Forum*, June 1, 2017

[147] Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge: Harvard University Press, 1965)

[148] Shayna Strom, "Organizing's Business Model Problem," *The Century Foundation*, October 26, 2016.

[149] Steven Greenhouse,"Fast-Food Workers Claim Victory in a New York Labor Effort," *The New York Times*, January 9, 2017.

[150] Harold Meyerson, "The Seeds of a New Labor Movement," in *The American Prospect*2014); Cora Lewis, "As Gawker Unionizes, Labor Adapts," June 4, 2015. https://www.buzzfeednews.com/article/coralewis/gawker-labor-movement-adapts-to-post-union-world

[151] Kate Andrias and Brishen Rogers, "Rebuilding Worker Voice in Today's Economy," *Roosevelt Institute* August (2018); Andrias, "The New Labor Law,"; Andrias, "Social Bargaining in States and Cities: Toward a More Egalitarian and Democratic Workplace Law,". And see "Forum Collection: Reactions to Kate Andrias, The New Labor Law," *Yale Law Journal*, Volume 126, 2016-2017; also Oswalt and Rosado Marzán, "Organizing the State: The 'New Labor Law' Seen from the Bottom-Up,"

[152] Sharon Block and Benjamin Sachs, "Is it Time to End Labor Preemption?" September 11, 2017. https://onlabor.org/is-it-time-to-end-labor-preemption/. Papers here: https://lwp.law.harvard.edu/event/labor-law-reform-symposium.

[153] Sharon Block and Benjamin Sachs, "This Labor Day, a Clean Slate for Reform." September 3, 2018. https://onlabor.org/this-labor-day-a-clean-slate-for-reform/

[154] The Clean Slate Project, featuring over eighty participants, identified six necessary ingredients of a 21st Century labor law: (1) consider sectoral or industrial-level collective bargaining, (2) design legal reforms and workable revenue models to make it easier for unions to organize and for a wider range and richer variety of workers' organizations to form and thrive; (3) revise labor law to allow workers to treat networked firms as singular entities for the purposes of collective actions such as strikes, pickets, and boycotts; and (4) give workers' organizations responsibility for providing benefits and a greater role in enforcing employment laws; (5) revise interconnected laws like antitrust laws, corporate law, and election law; and (6) build workers' collective power in ways that are responsive to persistent racial and gender disparities. See: https://lwp.law.harvard.edu/clean-slate-project

[155] Dylan Matthews, "The Emerging Plan to Save the American Labor Movement," *Vox*, September 3, 2018 (https://www.vox.com/policy-and-politics/2018/4/9/17205064/union-labor-movement-collective-wage-boards-bargaining).

[156] As Orren and Skowronek have written, "Specifying sites historically underscores the fact that no political transformation is complete, that even violent revolutions leave traces of earlier regimes, and that nothing follows on a clean slate. APD assumes that development occurs on sites that are more or less changeable but never empty, nonexistent, or inconsequential," Karen Orren and Stephen Skowronek, *The Search for American Political Development,* 22.

[157] Borrowing from the classic turn of phrase in Schattschneider, *Politics, Pressures and the Tariff*, p. 288.

[158] Orren and Skowronek, *The Search for American Political Development,* pp. 11-12.

[159] E.g., von Wilpert, "City Governments Are Raising Standards for Working People--and State Legislators Are Lowering Them Back Down,".

[160] Colvin, "The Growing Use of Mandatory Arbitration,"; Staszak, *No Day in Court: Access to Justice and the Politics of Judicial Retrenchment*.

[161] Ceilidh Gao, "What's Next for Forced Arbitration? Where We Go After SCOTUS Decision in *Epic Systems,"* NELP Blog, June 5, 2018 (https://www.nelp.org/blog/whats-next-forced-arbitration-go-scotus-decision-epic-systems/).

[162] As discussed above. For a useful summary of recent initiatives, see Dylan Matthews, "The Emerging Plan to Save the American Labor Movement," *Vox*, September 3, 2018 (https://www.vox.com/policy-and-politics/2018/4/9/17205064/union-labor-movement-collective-wage-boards-bargaining); also Block and Sachs, "Is it Time to End Labor Preemption?" (https://lwp.law.harvard.edu/event/labor-law-reform-symposium).

[163] Lichtenstein,"Why Labor Moved Left,"

[164] Sachs, "Employment Law as Labor Law"; Janice Fine, "Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labour Standards Non-Compliance in the United States," *Osgoode Hall LJ* 50 (2013): 6-36; Janice Fine, "Co-Production: Bringing Together the Unique Capabilities of Government and Society for Stronger Labor Standards Enforcement," *San Antonio, TX: LiftFund. http://theliftfund.org/wp-content/uploads/2015/09/LIFTReportCoproductionOct_ExecSumm-rf_4.pdf* (2015); Fine and Gordon, "Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations,"; and on resource and interpretive effects, see Pierson, "When Effect Becomes Cause."

[165] Andrias, "The New Labor Law"; Milkman, "Back to the Future? U.S. Labour in the New Gilded Age,"

[166] Fine, *Worker Centers*, Galvin, "Deterring Wage Theft"

[167] Dan Clawson, *The Next Upsurge: Labor and the New Social Movements* (Ithaca: ILR Press, an imprint of Cornell University Press, 2003); Fantasia and Voss, *Hard Work: Remaking the American Labor Movement*; Luce, *Labor Movements: Global Perspectives*; Amy B. Dean,"Is the Fight for $15 the Next Civil Rights Movement?," *Al Jazeera*, June 22, 2015, 2015; Marissa Armas,"Latino Immigrants, Workers, Rally on May Day for 'Day without Immigrants'," *NBC News*, May 1, 2017.