

# Libertarian Corporatism is Not an Oxymoron

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## Introduction

Our constitutional democracy and our republican form of government, Joseph Fishkin and William Forbath argue in their recent work, depend on “a measure of economic and social democracy.”<sup>1</sup> A truly democratic state, in their view, cannot just regulate powerful actors. It must also enable or positively encourage “robust intermediate organizations,” especially unions, to “offset the political power of concentrated wealth.”<sup>2</sup> The history of the welfare state bears out this point. It is no accident that the era of mass unionization was also an era of quite progressive taxation, relatively tame executive compensation, and definancialization.<sup>3</sup> Nor is it an accident that the decline of the welfare state, the decline of the labor movement, and the rise in income inequality have occurred in tandem in virtually every advanced economy.<sup>4</sup> Mainstream policy debate around inequality, which focuses largely on ensuring progressive taxation, often misses this lesson.<sup>5</sup>

And yet empowering secondary associations can be very difficult in a constitutional culture that prizes individual liberty. It is not enough to just protect workers’ freedom to choose unionization while leaving other property relations intact,<sup>6</sup> since economic elites will generally resist

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1. JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* (forthcoming 2017) (manuscript at 77) (on file with the *Texas Law Review*).

2. *Id.*

3. WOLFGANG STREECK, *BUYING TIME: THE DELAYED CRISIS OF DEMOCRATIC CAPITALISM* 110–12 (2014) (“Central to the Keynesian political economy were the corporatist interest associations of labour and capital, together with the negotiating system established between them.”).

4. *See id.* at 26–46 (outlining the transformation of state and global economic institutions since the Keynesian era).

5. *See generally* THOMAS PICKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014) (proposing a global wealth tax to address inequality and not considering unionization as a complementary or alternative option); Joseph E. Stiglitz, *Inequality Is Not Inevitable*, N.Y. TIMES: OPINIONATOR (June 27, 2014, 6:16 PM) <http://opinionator.blogs.nytimes.com/2014/06/27/inequality-is-not-inevitable/> [https://perma.cc/2RXB-A9A7] (proposing tax reform as the primary means of ensuring equality without discussing unionization).

6. As I have argued elsewhere, courts and commentators today usually view protecting employee free choice as the main goal of United States labor law. Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 313, 353–68 (2012).

collective bargaining, and since unions' powers of concerted action will ebb and flow with workers' desires.<sup>7</sup> As a result, Industrial-Era labor law systems typically did more, weaving unions into economic governance processes and granting them special legal powers vis-à-vis workers.<sup>8</sup> Those more corporatist structures have been in decline for decades,<sup>9</sup> however, and today they are under acute threat from recent Supreme Court cases empowering workers vis-à-vis unions.<sup>10</sup>

This Essay considers what sort of labor law regime would mediate these tensions and advance Fishkin and Forbath's goal of dispersing economic and political power through robust secondary associations. Such a regime must satisfy several criteria. It must be consistent with emerging constitutional doctrine and civil society norms around freedom of association. It must encourage the right sort of worker associations—associations that can effectively exert power while remaining accountable to workers. It must be attuned to the contemporary economy, which is dramatically different from the New Deal-era economy. And it must reflect contemporary social life, which involves less formal associations than the urban political machines and industrial trade unions that predominated in the New Deal and post-New Deal eras.

Drawing lessons from worker organizations' recent efforts to move beyond the strictures of existing law, I ultimately propose a model that I term *libertarian corporatism*.<sup>11</sup> Here the state would strongly encourage or even mandate collective bargaining at the occupational or sectoral level (as corporatism has historically required), while leaving workers nearly unfettered choice as to bargaining representatives and removing certain core legal constraints on workers' concerted action (as a principled civil libertarianism requires).<sup>12</sup> This is more of a thought experiment than a

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7. See discussion *infra* subpart I(A).

8. See discussion *infra* subpart I(A).

9. For definitions of corporatism, see Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 589–91 (2007), which defines corporatism as a governance system that enfranchises not just individuals, but also certain groups such as firms and unions, and James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 AM. J. COMP. L. 747, 752 (1991), which describes corporatism as the delegation of state powers to private organizations.

10. See discussion *infra* subpart I(B).

11. Hence my title, which references Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

12. In what follows I will use the term *libertarian* to refer to civil libertarian commitments to individual negative liberties such as freedoms of expression, association, and political participation. I will use the term *classical-liberal* to refer to what scholars have variously called a “libertarian,” “neoliberal,” or “classical-liberal” approach to economics and political economy—recently revived in legal theory and in certain constitutional law and administrative law decisions—under which the state is limited to the tasks of enforcing classical private law rights and establishing systems of market ordering. See Brishen Rogers, *Three Concepts of Workplace Freedom of Association*, 37 BERKELEY J. EMP. & LAB. L. (forthcoming 2016) (outlining three

policy proposal; I harbor no illusions that Congress or the Executive Branch will embrace libertarian corporatism anytime soon. But in my opinion existing labor law has become so ineffective that we need to begin thinking about dramatic rather than piecemeal reforms.

Part I first discusses the tensions between individual liberties and collective power that arise in state efforts to rebuild secondary associations. It then summarizes the weaknesses and failures of our labor law model, and discusses various worker organizations' efforts to move beyond that model. Part II then considers alternatives. It first sketches a new "collective laissez-faire" regime in which unions would enjoy fewer special powers and restrictions. It then outlines libertarian corporatism as a more promising path forward. The conclusion suggests that the state might embrace libertarian corporatism as a power-dispersion strategy in fields beyond labor law.

## I. The Long Decline of the Wagner Model

### A. *Tensions Between Individual Liberties and Collective Power*

Governance strategies that depend on the state's empowering associations have important virtues. For example, associations can ensure more responsive governance by enabling democratic deliberation, and by enabling non-elites to exert collective power.<sup>13</sup> The first step toward empowering associations is simply to protect their growth and development by building a set of legal buffers around them. In the labor context, preventing discrimination against workers for organizing<sup>14</sup> and preventing judges from enjoining labor protest<sup>15</sup> can enable workers to achieve small victories that lead to larger victories and even to collective bargaining relationships.<sup>16</sup> Negative rights, however, are rarely if ever sufficient to ensure a stable labor movement. Workers' desire to confront management may ebb and flow, and management will tend not to hire workers who seem

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distinct jurisprudential approaches to the balance between workers' individual liberties and unions' political power); David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 1, 12–14 (describing the influence of "neoliberal" or "classical-liberal" ideals on recent U.S. law); Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 398–400 (2015) (outlining the influence of "libertarian" or "classical-liberal" ideals on recent administrative law decisions of the Court of Appeals for the District of Columbia Circuit).

13. Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, in ASSOCIATIONS AND DEMOCRACY at 7, 9–10 (Erik Olin Wright ed., 1995) (discussing the benefits of associations for democratic governance).

14. 29 U.S.C. § 158(a)(1) (2012).

15. 29 U.S.C. § 101 (2012) (codifying the anti-injunction provision of the Norris-LaGuardia Act of 1932).

16. See Rogers, *supra* note 6, at 355 (noting that small victories won through collective action can set the stage for larger victories).

confrontational. Conversely, workers' organizations that enjoy robust civil and political liberties may become so disruptive that employers obtain state assistance in ensuring labor peace.<sup>17</sup>

Labor law was central to the welfare state because it mediated these conflicts, institutionalizing workers' movements that otherwise threatened to destabilize the industrial economy.<sup>18</sup> It represents a grand bargain of sorts. States recognized unions' rights to exist, granted them powers to bind workers to collective agreements, required employers to bargain with them, and often granted them special powers in economic policymaking processes. In exchange, unions consented to the basic terms of capitalist employment and promised to curtail or end industrial strife.

Granting associations such positive entitlements, however, carries its own set of costs. One is a matter of scale: in large, complex states dominated by large corporations, there is an inherent tension between localized democracy and collective power, and the sorts of unions necessary to ensure economic and political equality can become relatively unresponsive to members.<sup>19</sup> Another cost is lock in: state-favored associations will tend to bend legal rules to support their institutional interests, and to prevent other associations from gaining power.<sup>20</sup> Indeed, once an association is recognized as the appropriate economic, political, or social representative of a class of citizens, that state sanction, rather than an organic relationship among its members, may become the association's source of power, eroding the prelegal social bonds that made it a promising partner for the state in the first place.<sup>21</sup> These are all basic challenges with corporatist models of labor law, which may help explain why unions have

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17. One example of this dynamic in the United States was employers' successful push for the Taft-Hartley Act after the post-World War II strike wave. See ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING § 1.4, at 7-8 (2d ed. 2004).

18. See, e.g., STREECK, *supra* note 3, at 111 ("Central to the Keynesian political economy were the corporatist interest associations of labour and capital, together with the negotiating system established between them.").

19. As one data point, note Clyde Summers's arguments that workers have little if any voice in European trade unions engaged in peak bargaining. Clyde W. Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367, 385-86 (1980); see also Clyde Summers, *Worker Participation in Sweden and the United States: Some Comparisons from an American Perspective*, 133 U. PA. L. REV. 175, 215 (1984) (describing how collective agreements in Sweden have "removed decision-making so far from the union members that they have no effective voice"). But see Cohen & Rogers, *supra* note 13, at 70-71 (noting that centralized, corporatist labor representation may, but does not necessarily, decrease responsiveness to membership).

20. See Cohen & Rogers, *supra* note 13, at 65-66 (noting the problem of state-favored groups using their power to "freeze their position"). I would classify this as a specific form of regulatory capture. See generally Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL'Y 203 (2006).

21. See Paul Q. Hirst, *Can Secondary Associations Enhance Democratic Governance?*, in ASSOCIATIONS AND DEMOCRACY, *supra* note 13, at 101, 107 (discussing this tension).

often affiliated with the church or political parties,<sup>22</sup> either of which may provide a collective identity that a distant collective bargaining agent cannot. Any effort to disperse political and economic power through legal reform needs to take these tensions into account.

*B. The Decline of the Wagner Model*

Such tensions between individual liberties and collective power are clear in our own labor law. Our regime, often known as the “Wagner Model” after Senator Robert Wagner, the lead sponsor of the National Labor Relations Act (NLRA), is one of “majoritarian exclusivity.”<sup>23</sup> The NLRA establishes a process for a union to demonstrate that it enjoys majority support from workers in a proper bargaining unit,<sup>24</sup> which often means a single job classification within a firm.<sup>25</sup> Upon that showing, the National Labor Relations Board (NLRB) will certify the union as those workers’ exclusive representative and hold the employer to a duty to bargain in good faith.<sup>26</sup> No other union may then represent workers in that bargaining unit, and the terms of resulting collective bargaining agreements apply to all workers in the unit, but only to them, not to other workers in the industrial sector.<sup>27</sup> Cynthia Estlund has aptly described this system as involving a “quid pro quo” under which unions are “subject to a constellation of powers, privileges, duties, and restrictions” that are unique among civil society organizations.<sup>28</sup>

While courts today usually view protecting employee choice as the central principle of our labor law,<sup>29</sup> that is a relatively recent development.

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22. *E.g.*, GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 166–70 (1990) (noting instances in which unions aligned and affiliated with political parties in several welfare-state countries during the Postwar Era).

23. Lance A. Compa, *The Wagner Model and International Freedom of Association Standards*, in *AUTONOMIE COLLECTIVE ET DROIT DU TRAVAIL: MÉLANGES EN L’HONNEUR DU PROFESSEUR PIERRE VERGE* 427, 435–36 (Dominic Roux ed., 2014) (outlining elements of the U.S. “Wagner Model”).

24. 29 U.S.C. § 159 (2012).

25. *See* GORMAN & FINKIN, *supra* note 17, § 5.1, at 76–84 (discussing factors tending toward small units); *id.* § 5.1, at 103–04 (discussing factors tending toward single-employer, localized bargaining).

26. 29 U.S.C. § 158(a)(5) (making it an unfair labor practice for an employer to refuse to bargain collectively with a certified union); 29 U.S.C. § 159(a) (providing for exclusive representation based on majority rule); 29 U.S.C. § 159(b) (granting the NLRB the power to determine that bargaining unit).

27. Compa, *supra* note 23, at 443–44. *But see* Samuel Estreicher, *Trade Unionism Under Globalization: The Demise of Voluntarism?*, 54 *ST. LOUIS U. L.J.* 415, 416 (2010) (stating that “because of multiemployer bargaining structures and extension laws, contract coverage in some European countries far outstrips union membership”).

28. Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 *MICH. L. REV.* 169, 174–75 (2015).

29. Rogers, *supra* note 6, at 315.

Through the New Deal and much of the postwar period, our labor law affirmatively promoted unionization and collective bargaining rather than employee choice per se, often on the grounds that doing so was necessary to ensure industrial peace.<sup>30</sup> For example, the NLRA as originally passed protected workers' rights to organize, but not their rights to refrain from doing so.<sup>31</sup> Various labor law doctrines also make it relatively difficult to decertify a union,<sup>32</sup> and courts have often limited workers' rights to strike despite language in the statute explicitly protecting that right.<sup>33</sup> In a de facto recognition of unions as the appropriate political representatives of workers, the NLRA also permitted so-called "union shop" clauses, under which workers must join and pay dues to a union that represents them and therefore must contribute to that union's political activities.<sup>34</sup> Our welfare state was never "corporatist" in Esping-Andersen's famous typology,<sup>35</sup> but these elements of our labor law did grant unions and employers special powers to negotiate the terms of economic life.<sup>36</sup>

I am hardly the first to observe that the Wagner Model has long ceased to encourage or perhaps even to enable unionization and collective bargaining.<sup>37</sup> One reason is that the NLRB effectively cannot deter

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30. The predominant labor law theory was "industrial pluralism" rather than corporatism. See generally Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981) (leading the discussion of industrial pluralism and its influence on postwar labor law). But for present purposes the distinction is not important, as both are starkly opposed to libertarianism.

31. Compare National Labor Relations Act of 1935, Pub. L. No. 74-198, § 7, 49 Stat. 449, 452 (1935) (containing no mention of an employee's right to refrain from any or all concerted action), with 29 U.S.C. § 157 (2012) (containing an explicit mention of an employee's right to refrain from concerted action).

32. These include the contract and certification bar doctrines. GORMAN & FINKIN, *supra* note 17, §§ 4.8–9, at 70–77; see Samuel Estreicher, "Easy in, Easy Out": A Future for U.S. Workplace Representation, 98 MINN. L. REV. 1615, 1628–29 (2014) (noting the difficulty of decertification under the NLRA).

33. See, e.g., Stone, *supra* note 30, at 1538–39 (discussing how the Supreme Court interpreted arbitration as a quid pro quo for an agreement not to strike, despite guarantees of the right to strike in the Norris-LaGuardia Act and the NLRA).

34. See GORMAN & FINKIN, *supra* note 17, §§ 28.1–2, at 897–906 (discussing the purpose and evolution of union security clauses in the United States). The Supreme Court subsequently disallowed "union shop" clauses but continued to permit "agency shop" clauses, under which unions may charge workers for representational expenses but not political activities. *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 762–63 (1988) (holding that the NLRA permits agency shops but not union shops, per the statutory interpretation required by *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961)); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977) (holding a union shop unlawful in the public sector on First Amendment grounds).

35. ESPING-ANDERSEN, *supra* note 22, at 26–27.

36. Wachter, *supra* note 9, at 599; Whitman, *supra* note 9, at 752–53 (defining corporatism).

37. See generally Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002) (arguing that the insulation of American labor law from constitutional scrutiny and legislative reform has contributed to the decline of unions and collective bargaining); Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655 (2010) (advocating removal of certain key impediments to

employer resistance to unionization, whether lawful or unlawful.<sup>38</sup> Another reason lies in broad economic transformations. Heavy industry, where unions were able to establish themselves early in the NLRB's history, is no longer the core of our economy. Today the service sector predominates, which tends to utilize smaller and more dispersed workplaces, which are far more difficult to unionize than large factories.<sup>39</sup> The "fissuring" of employment through vertical disintegration has also undermined the Wagner Model, since today workers' legal employers often enjoy little real power over their working conditions.<sup>40</sup> Leading reform proposals, while absolutely justified as a means of equalizing bargaining power and ensuring workplace equality, would likely do little to address such dynamics, since they mainly aim to protect employees' freedom to choose unionization.<sup>41</sup> Some propose to limit management's power to resist unionization,<sup>42</sup> others to require employers to bargain with unions that represent a minority of their workers,<sup>43</sup> still others to guarantee "card check" certification<sup>44</sup> or quick elections.<sup>45</sup> But under all such proposals, unions would still need to organize shop-by-shop, making it extraordinarily difficult to build sufficient power to counter corporations with a continental or even global reach.

To make matters still worse, broader trends in constitutional law are enhancing workers' rights vis-à-vis unions. The Supreme Court and some

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employee choice regarding unionization); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (arguing that the NLRB's inability to deter employers' unfair labor practices has contributed to a decline in unionization rates).

38. See Weiler, *supra* note 37, at 1787–95 (outlining problems with the NLRA regime, particularly the NLRB's inability to deter employer coercion of workers).

39. See GORMAN & FINKIN, *supra* note 17, § 5.1, at 84–86 (discussing factors tending toward small units); *id.* § 5.5, at 103–04 (discussing factors tending toward single-employer, localized bargaining). See generally KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004) (examining the shift to the digital age and the implications on labor and employment regulation).

40. See generally DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014) (noting how large corporations have shed their role as direct employers by outsourcing work to smaller companies).

41. See *infra* notes 46–49.

42. See Press Release, *106 Professors Petition NLRB for Regulation of Captive-Audiences*, LAW PROFESSOR BLOGS (Jan. 4, 2016), <http://lawprofessors.typepad.com/files/captive-audience-news-release-1-4.pdf> [<https://perma.cc/H48R-HNDE>] (noting a recent petition for rulemaking filed by labor law professors to restrict "captive audience" meetings in which employees must listen to management's anti-union messages).

43. CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE 230 (2005); see also Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857, 868–72 (2014) (discussing the law on members-only unionization and the potential benefits of employers negotiating with unions that represent a minority of employees).

44. See Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009) (providing for expedited union certification procedure).

45. Sachs, *supra* note 37, at 673.

lower courts have resurrected a classical-liberal understanding of the Constitution that the New Deal had seemingly interred, one in which the state's powers are limited to establishing and policing systems of market ordering.<sup>46</sup> Within labor law, these trends have bolstered conservative activists' longstanding campaigns to ban union security clauses.<sup>47</sup> Current doctrine in roughly half the states<sup>48</sup> permits the so-called "agency shop" under which workers must help defray contract bargaining and administration expenses, but need not contribute to unions' political, lobbying, or organizing efforts.<sup>49</sup> That longstanding rule reflects a compromise between unions' interest in preventing free riding and workers' interest in not funding political and expressive activities to which they object.

In a series of cases, however, the Court has chipped away at that compromise,<sup>50</sup> and before Justice Scalia's death, appeared ready to ban union security devices across the public sector in *Friedrichs v. California Teachers Association*.<sup>51</sup> Since unions are currently healthiest in the public sector, this would have been a major blow to efforts to rebuild the labor movement. The implicit theory of freedom of association in the line of cases leading up to *Friedrichs* is that unions are just like other voluntary organizations, such as parent-teacher associations (PTA) and community groups, which individuals may join and leave at will.<sup>52</sup> This view disregards the economic context in which unions operate, where their very existence comes at employers' expense, such that state supports are necessary for their institutional survival.<sup>53</sup> It also rejects the political-economic theory underlying much of our labor law: that unions' special

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46. Grewal & Purdy, *supra* note 12, at 10–11.

47. For a detailed summary of the case law that has resulted, see Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights after Knox v. SEIU*, Local 1000, 98 CORNELL L. REV. 1023, 1034–39 (2013).

48. As of early 2016, over half of the states have passed "right-to-work" laws that ban union security clauses entirely. *Right to Work States*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND. (Feb. 12, 2016), <http://www.nrtw.org/rtws.htm> [<https://perma.cc/Q6PZ-RJGJ>].

49. *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 762–63 (1988); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977).

50. See *Harris v. Quinn*, 134 S. Ct. 2618, 2638 (2014) (holding that "partial public employees" cannot be compelled to contribute to any funds to unions that bargain on their behalf); *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288–96 (2012) (altering the procedure unions must follow before levying a special assessment for political activity).

51. 136 S. Ct. 1083 (2016) (per curiam) (affirming the lower court's decision not to overturn *Abood* in a 4–4 decision), *aff'g* No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014).

52. This is clear in a predecessor case to *Friedrichs*. See *Knox*, 132 S. Ct. at 2289–90 (comparing unions to PTAs while rejecting the free-rider argument). See generally Rogers, *supra* note 12 (discussing the theory of freedom of association behind *Knox* and other recent union security cases).

53. Wolfgang Streeck, *The Sociology of Labor Markets and Trade Unions*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY 254, 267 (Neil J. Smelser & Richard Swedberg eds., 2d ed. 2005).

entitlements are an important means of ensuring industrial peace, distributive justice, and economic democracy. Presumably, it rejects the value of a democratic political economy.

While the further evolution of these trends will turn largely on the battle to replace Justice Scalia,<sup>54</sup> it seems clear that unions are unlikely to recover by organizing under the Wagner Model. Organizing is simply too difficult, and unions' constitutional status too tenuous. Ensuring economic and social democracy likely requires a new model, one better suited to contemporary economic and social realities and broadly consistent with such trends in constitutional law.

### C. *The Rise and Limits of "Alt-Labor"*

The seeds of such a model may lie in recent efforts by labor unions and their allies to work around these strictures by building so-called "alt-labor" groups, or worker organizations that depart from the Wagner Model.<sup>55</sup> Those groups vary widely. Some represent workers of a particular ethnicity or who live or work in a particular neighborhood;<sup>56</sup> others represent workers in a particular industry, such as restaurant workers, day laborers, or domestic workers;<sup>57</sup> some have a hybrid approach,

54. Importantly, there are also significant barriers to constitutionalizing the right-to-work in the private sector, since the Court has never found state action in the NLRA context. See *Price v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 927 F.2d 88, 92 (2d Cir. 1992); *Fitz v. Commc'ns Workers of Am.*, No. 88-1214, 1989 WL 226082, at \*2 (D.D.C. Aug. 17, 1989) (rejecting plaintiffs' First Amendment claim against a union for want of state action), *aff'd*, 917 F.2d 62 (D.C. Cir. 1990), *cert denied*, 499 U.S. 960 (1991); see also Fisk & Chemerinsky, *supra* note 47, at 1037-38 (discussing the question of state action in the NLRA context); Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 844-51 (2012) (same). Constitutional decisions do nevertheless tend to exert gravitational pull on the private sector, see Roger C. Hartley, *Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector Cases*, 41 HASTINGS L.J. 1, (1989) (arguing that *Beck* incorporates constitutional values), and as noted above, *supra* note 48, almost half the states are already right-to-work.

55. For overviews, see generally Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232 (2009); Michael M. Oswald, *Improvisational Unionism*, 104 CALIF. L. REV. (forthcoming 2016); David Rosenfeld, *Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469 (2006) (book review).

56. E.g., *Chinese Staff and Workers' Association*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Chinese\\_Staff\\_and\\_Workers%27\\_Association](http://en.wikipedia.org/wiki/Chinese_Staff_and_Workers%27_Association) [<http://perma.cc/B74S-KFVK>] (describing a Chinese immigrant workers' rights organization based in Chinatown in New York); *About KIWA*, KIWA WORKERS FOR JUST., <http://www.kiwa.org/about/> [<https://perma.cc/8E5E-UATU>] (describing a similar organization in Koreatown in Los Angeles).

57. E.g., *Who We Are*, NAT'L DOMESTIC WORKERS ALLIANCE, <http://www.domesticworkers.org/who-we-are> [<https://perma.cc/2YS3-Q5LX>] (describing a nationwide organization representing domestic workers); *About Us*, NAT'L DAY LABORER ORGANIZING NETWORK, <http://www.ndlon.org/en/about-us> [<https://perma.cc/DR89-CKTQ>] (describing a similar organization representing day laborers).

representing particular groups of workers within a particular sector.<sup>58</sup> While many alt-labor groups disclaim any desire for exclusive bargaining rights and are independent of unions, some receive support from unions.<sup>59</sup> In fact, various unionization drives, including Service Employee's International Union's (SEIU) famed "Justice for Janitors" campaign<sup>60</sup> are best understood as alt-labor variants given their tactics and strategies.<sup>61</sup>

Such groups share a number of family resemblances that point toward a new model of collective negotiation. For example, alt-labor groups often organize workers along occupational or geographical lines rather than organizing worksite by worksite.<sup>62</sup> Many do not focus on the immediate employer–employee relationship, instead organizing up and down supply chains.<sup>63</sup> Many represent the "new" working class, which is heavily made up of immigrant workers, women, and people of color—and more likely to face precarious working conditions.<sup>64</sup> Most rely on a combination of direct action and public pressure, typically casting their demands for better treatment in moral terms.<sup>65</sup>

Finally, and perhaps most importantly, many alt-labor groups seek broad changes to corporate policies such as guarantees of decent wages and

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58. *E.g.*, *About CIW*, COALITION IMMOKALEE WORKERS, <http://www.ciw-online.org/about/> [<https://perma.cc/ZQ6B-G9QA>] (describing a worker-based human rights organization with wide-ranging initiatives in the agricultural sector).

59. A prominent example is "OUR Walmart," which has been supported by the United Food and Commercial Workers Union. *See, e.g.*, OUR WALMART, <http://www.forrespect.org> [<https://perma.cc/TZA5-9YXV>].

60. *See generally* Roger Waldinger et al., *Helots No More: A Case Study of the Justice for Janitors Campaign in Los Angeles*, in ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 102 (Kate Bronfenbrenner et al. eds., 1998) (providing an overview of the Justice for Janitors campaign).

61. This seems to be the case for Warehouse Workers for Justice and Fight for \$15, the group organizing fast-food protests. WAREHOUSE WORKERS FOR JUST., <http://www.warehouseworker.org> [<https://perma.cc/7G78-9XSY>]; FIGHT FOR \$15, <http://www.fightfor15.org> [<https://perma.cc/EPJ3-9D6D>].

62. *See supra* notes 55–59 and accompanying text.

63. *See, e.g.*, Waldinger et al., *supra* note 60, at 116–17 (discussing supply chain organizing in Justice for Janitors); Steven Greenhouse, *Fight for \$15: The Strategist Going to War to Make McDonald's Pay*, GUARDIAN (Aug. 30, 2015, 10:42 AM), <http://www.theguardian.com/us-news/2015/aug/30/fight-for-15-strategist-mcdonalds-unions> [<https://perma.cc/8684-6JQH>] (reporting that the Fight for \$15 rejected a strategy to unionize 100 or 200 McDonald's restaurants to focus on changing the company's policies nationwide, including at franchisees' restaurants).

64. *See, e.g.*, Naduris-Weissman, *supra* note 55, at 246–48 (noting the Koreatown Immigrant Workers Alliance as an example of an organization representing an immigrant, ethnic community).

65. Many also use employment litigation strategically, but that is less important for present purposes. *See* JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 68–69 (2005) (mentioning such efforts by the Workplace Project, an organization in Long Island); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2708–14 (2008) (discussing use of antidiscrimination litigation by Brooklyn-based Make the Road by Walking).

benefits but do not seek (or cannot realistically achieve) unionization and formal collective bargaining agreements.<sup>66</sup> One major alt-labor group has pressed major restaurant chains to adopt codes of conduct in which they commit to abide by particular labor standards;<sup>67</sup> another has organized “work site committees” that provide a collective voice for workers in discussions with management.<sup>68</sup> The Coalition of Immokalee Workers (CIW) has perhaps gone furthest toward developing a new model of collective labor regulation.<sup>69</sup> CIW organizes farm workers in Florida, nearly all of whom are immigrants or guest workers, to demand that retailers and restaurants commit to improve their conditions. Specifically, CIW urges major brands to join a “Fair Food Program” under which they will purchase from suppliers who pay decent wages, commit to a “zero tolerance” policy around forced labor and child labor (still shockingly prevalent in parts of the agricultural sector) and submit to annual auditing and a complaint resolution mechanism by an independent “Fair Foods Standards Council.”<sup>70</sup> As of this writing, for example, a Fair Food Program website calls for action against Wendy’s, which it says “stands alone” among the five largest fast-food corporations as “the only one who has refused to join the Fair Food Program and respect the rights and dignity of farmworkers in its supply chain.”<sup>71</sup>

While some alt-labor groups have been profoundly successful in improving workers’ conditions, current law places them in a bind. Without certification under the NLRA, alt-labor groups cannot hold employers to a duty to bargain<sup>72</sup> and cannot negotiate union security clauses,<sup>73</sup> leaving them dependent on voluntary contributions and foundation funding. And

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66. The Restaurant Opportunities Center’s (ROC’s) codes, for example, generally require restaurants to abide by wage-and-hour and antidiscrimination laws, and at least some require employers to notify ROC attorneys prior to terminating workers. See Naduris-Weissman, *supra* note 55, at 254–55 (discussing ROC settlement with that provision). Justice For Janitors is a notable exception here, of course, in that they seek formal collective bargaining rights. See Waldinger et al., *supra* note 60, at 103 (“Emblematic of this shift is the [Justice for Janitors] campaign, which successfully reorganized the building services industry, ultimately bringing more than eight thousand largely immigrant workers under a union contract, in what has become a model for [Justice for Janitors’] national organizing efforts.”).

67. See Naduris-Weissman, *supra* note 55, at 252–53 (discussing the ROC code).

68. Steven Greenhouse, *Workers Organize, but Don’t Unionize, to Get Protection Under Labor Law*, N.Y. TIMES (Sept. 6, 2015), <http://www.nytimes.com/2015/09/07/business/economy/nonunion-employees-turn-to-work-site-committees-for-protection.html> [<https://perma.cc/P3MZ-8B4U>] (discussing use of the NLRA by alt-labor groups to form such committees).

69. See generally *About CIW*, *supra* note 58.

70. *Fair Food Program*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Fair\\_Food\\_Program](https://en.wikipedia.org/wiki/Fair_Food_Program) [<https://perma.cc/JQ5T-Y3J7>].

71. ALLIANCE FOR FAIR FOOD, <http://www.allianceforfairfood.org/take-action/#> [<https://perma.cc/7ULH-V2PQ>].

72. 29 U.S.C. § 158(a)(5) (2012).

73. *Id.* § 158(a)(3).

yet if an alt-labor group starts behaving like a classic union by negotiating collective terms with an employer, it can be subject to various union-specific regulations implemented as part of the NLRA's quid pro quo.<sup>74</sup> Arguably the most important restriction is Section 8(b)(4) of the NLRA,<sup>75</sup> which prohibits labor organizations from taking much action against so-called "secondary" targets, or firms that have a commercial relationship with their members' employer.<sup>76</sup> That restriction is unique to labor groups; civil rights, environmental, and anti-abortion groups face no such restrictions on their public speech and activity.<sup>77</sup>

This rule deprives workers of one of their most powerful weapons in the fissured workplace.<sup>78</sup> A union that organizes janitorial contractors will be unable to reach a contract without convincing building managers to pay union scale wages, since managers can simply replace a unionized contractor to save costs. As the lead organizer of SEIU's Justice for Janitors campaign recently said, reflecting on the campaign's early days,

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74. See, e.g., *id.* § 158(b)(4)(ii)(A–B) (prohibiting most secondary boycotts by labor organizations); *id.* § 158(b)(7) (restricting recognitional picketing by labor organizations); see also 29 U.S.C. § 402(i) (2012) (imposing obligations on unions under the Labor Management Reporting and Disclosure Act). Such obligations apply only to groups defined as "labor organizations" under the NLRA and other statutes. See *NLRB v. Peninsula Gen. Hosp. Med. Ctr.*, 36 F.3d 1262, 1268–72 (4th Cir. 1994) (providing a test for "labor organization" status, which requires that organization have or seek a "bilateral mechanism" through which its proposals are considered by management); 29 U.S.C. § 152(5) (2012) (defining labor organization under the NLRA); *E.I. Du Pont De Nemours & Co.*, 311 N.L.R.B. 893, 894 (1993) (holding that whether an entity is a "labor organization" is the threshold question for determining § 8(a)(2) violations); Stefan J. Marculewicz & Jennifer Thomas, *Labor Organizations by Another Name: The Worker Center Movement and Its Evolution into Coverage Under the NLRA and LMRDA*, ENGAGE, October 2012, at 79, 86–90 (arguing that certain alt-labor groups are statutory labor organizations despite their arguments to the contrary).

75. 29 U.S.C. § 158(b)(4); see also James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEXAS L. REV. 889, 919–31 (1991) (summarizing secondary boycott doctrine). Unions also face important restrictions on intermittent strikes. Craig Becker, "Better Than a Strike": *Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. CHI. L. REV. 351, 354 (1994).

76. For example, peaceful secondary hand billing is generally lawful. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575–76 (1988). But whether particular conduct constitutes hand billing or "picketing" is in part a question of whether the conduct is confrontational, such that even today, "whether particular activity constitutes picketing is still a matter of significant debate." Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 32 n.145 (2011).

77. E.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932–33 (1982). Those groups are still subject to ordinary tort and criminal laws that are consistent with the First Amendment. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (holding that the First Amendment prohibits tort liability for emotional distress caused by nonthreatening anti-LGBT protests at the funeral of a U.S. Serviceman, even where the protest is outrageously offensive).

78. Indeed, the threat of 8(b)(4) liability or injunctive relief has shaped ROC's behavior: it now includes a disclaimer in its flyers stating that it has no intention to "interfere with deliveries." *SMJ Grp., Inc. v. 417 Lafayette Rest. LLC*, 439 F. Supp. 2d 281, 286 (S.D.N.Y. 2006) (quoting one such flyer).

“The majority of our work . . . was trying to figure out how to negotiate around the secondary boycott laws.”<sup>79</sup> Warehouse workers, security guards, garment workers, fast-food workers, and many other low-wage workers face similar constraints. Ironically, CIW’s success stems in part from agricultural workers’ *exclusion* from the NLRA, which renders their organizations immune from liability under 8(b)(4).<sup>80</sup> Given this double bind, alt-labor groups are limited in how much they can achieve without labor law reform.

## II. Toward a New Model

Alt-labor groups’ successes and limits hold important lessons for labor law reform and for efforts to ensure economic democracy more generally. This Part draws out those lessons, and in the process further explores the tension in labor law between individual liberties and collective power. It first explores the virtues and limits of a “collective laissez-faire” system under which workers would face no unique restrictions on concerted action. It then argues for a broader set of labor law reforms that encourage or mandate corporatist forms of representation while strongly protecting employee free choice as to representatives.

### A. *Collective Laissez-Faire and Its Limits*

Alt-labor groups’ struggles point toward one obvious labor law reform: guaranteeing worker organizations full First Amendment liberties of speech and association. The secondary boycott prohibition has for decades been recognized as a constitutional outlier, since it involves a content-based and speaker-based restriction on speech,<sup>81</sup> and past arguments supporting the ban are no longer convincing.<sup>82</sup> For example, in past cases judges have reasoned that picketing may be restricted because it involves conduct rather than speech or an appeal to base instincts rather than reason,<sup>83</sup> but, since

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79. Josh Eidelson, *The Lessons Unions Learned from the ‘Justice for Janitors’ Protests*, BLOOMBERG (June 16, 2015, 4:55 AM), <http://www.bloomberg.com/politics/articles/2015-06-16/the-lessons-that-unions-learned-from-the-justice-for-janitors-protests> [https://perma.cc/E5R8-UMZY].

80. 29 U.S.C. § 152(3).

81. See *NLRB v. Fruit & Vegetable Packers, Local 760 (Tree Fruits)*, 377 U.S. 58, 79 (1964) (Black, J., concurring) (arguing that § 8(b)(4) violates the First Amendment because under it “picketing, otherwise lawful, is banned only when picketers express particular views”). See generally Pope, *supra* note 75.

82. Here I am heavily indebted to Alan Hyde, *Exclusion Is Forever: How Keeping Labour Rights Separate from Constitutional Rights Has Proven to Be a Bad Deal for American Trade Unions and Constitutional Law*, 15 CANADIAN LAB. & EMP. L.J. 251 (2009) and Pope, *supra* note 75.

83. *E.g.*, *NLRB v. Retail Store Emps. Union, Local 1001 (Safeco)*, 447 U.S. 607, 618–19 (1980) (Stevens, J., concurring in part and concurring in the result) (asserting that in picketing “it is the conduct element rather than the particular idea being expressed that often provides the most

those cases, the Court has granted some First Amendment protection to cross burning and nude dancing, neither of which involves a rational effort to persuade.<sup>84</sup> Another classic argument for the ban—that secondary activity can pull “neutral” parties into a labor dispute<sup>85</sup>—seems constitutionally irrelevant, particularly since nonlabor organizations may threaten the economic livelihood of “neutrals.”<sup>86</sup> The well-worn argument that picketing interferes with employee choice is also unconvincing, since unions cannot compel membership<sup>87</sup> and have limited powers to require workers to defray expenses.<sup>88</sup>

Most importantly, the Court’s recent First Amendment cases have undermined a baseline assumption of all these arguments—that unions are primarily economic rather than political actors, and therefore that their speech can be restricted without running afoul of the First Amendment.<sup>89</sup> The notion that unions are purely economic actors is flatly inconsistent with recent doctrine holding that compelled contributions to commercial speech have an expressive component and are therefore protected.<sup>90</sup> It is also inconsistent with the Court’s holding in *Harris v. Quinn*,<sup>91</sup> a predecessor case to *Friedrichs*, that public sector unions’ political and economic activities are inseparable.<sup>92</sup> Logically, then, the political/economic

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persuasive deterrent to third persons about to enter a business establishment”); *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 776 (1942) (Douglas, J., concurring) (“Picketing . . . is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.”).

84. *Virginia v. Black*, 538 U.S. 343, 347–48 (2003) (holding that a state may ban cross burning undertaken with intent to intimidate, but may not ban all cross burning per se because cross burning can be a form of political expression); *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 565–67 (1991) (holding that erotic nude dancing “is expressive conduct within the outer perimeters of the First Amendment,” but can be regulated as part of public indecency statute).

85. *Safeco*, 447 U.S. at 616.

86. This occurred in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). See also Hyde, *supra* note 82, at 264–66.

87. *NLRB v. General Motors Corp.*, 373 U.S. 734, 738 (1963).

88. See discussion *supra* subparts I (A)–(B).

89. *Claiborne Hardware*, 458 U.S. at 912 (distinguishing civil rights from labor protest, noting “the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association”); cf. *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 429–32 (1990) (upholding an antitrust action against a boycott by public defenders on the grounds that their speech was economic rather than political). But see *Int’l Longshoremens’ Ass’n v. Allied Int’l, Inc.*, 456 U.S. 212, 226 (1982) (rejecting a constitutional challenge to § 8(b)(4) as applied to a politically motivated secondary strike by a union).

90. *United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001).

91. 134 S. Ct. 2618 (2014).

92. *Id.* at 2634–38; see also Garden, *supra* note 76, at 21–23 (criticizing the political/economic distinction).

distinction is no longer a sufficient basis for restricting unions' First Amendment rights of speech and association.<sup>93</sup>

Ending such restrictions could be the centerpiece of a new “collective laissez-faire” model of labor law. That term is most commonly associated with the United Kingdom’s postwar labor law system—which differed from the Wagner Model in that the state neither recognized unions nor enforced the terms of collective bargaining agreements<sup>94</sup>—but it also has roots in American labor history. The American Federation of Labor in the early twentieth century demanded collective liberty of contract rather than more pervasive labor legislation, in part because unions had lost repeated battles with the courts over injunctions and protective legislation.<sup>95</sup> Now, like the *Lochner*-era economy, “collective laissez-faire” was never really laissez-faire, and the United Kingdom immunized unions from tort prosecution and cabined labor–management conflict in various ways.<sup>96</sup> But the term usefully captures a particular relation among the state, unions, and the economy that was anything but corporatist: rather than granting state sanction to particular unions, the state should simply protect workers’ and unions’ basic liberties of contract and freedoms of association, and then allow them to fight it out with employers.<sup>97</sup> While the NLRA did far more—establishing a federal agency empowered to oversee labor

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93. Notably, some circuit courts have extended the First Amendment protections for unions’ speech in recent years. *See* *Sheet Metal Workers’ Int’l Ass’n, Local 15 v. NLRB*, 491 F.3d 429, 439 (D.C. Cir. 2007) (finding a “mock funeral” outside a secondary target hospital to *not* be threatening and coercive and therefore not subject to injunction); *Overstreet v. United Bhd. of Carpenters, Local No. 1506*, 409 F.3d 1199, 1211–15 (9th Cir. 2005) (holding a banner protest was not unlawful secondary picketing where there was nothing “about the Carpenters’ members’ behavior that could be regarded as threatening or coercive—no taunting, no massing of a large number of people, no following of the Retailers’ patrons”). *But see* *Kentov v. Sheet Metal Workers’ Int’l Ass’n, Local 15*, 418 F.3d 1259, 1266 (11th Cir. 2005) (upholding an injunction against the same protest). The NLRB might also carve out additional space for labor by declining jurisdiction over secondary boycott cases on constitutional avoidance grounds, especially if the labor group at issue disclaims any desire for certification. *See* *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (outlining the constitutional avoidance rationale in a § 8(b)(4) case).

94. *See* ALAN BOGG, *THE DEMOCRATIC ASPECTS OF TRADE UNION RECOGNITION* 31–32 (2009) (discussing origins of collective laissez-faire); Ruth Dukes, *Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law*, 35 J.L. & SOC’Y 341, 352–53 (2008) (describing academic theories of collective laissez-faire in the United Kingdom).

95. WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 128–35 (1991); *see also* Dukes, *supra* note 94, at 355–56 (arguing that the U.K. labor movement in the early twentieth century eschewed legislative protection); James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941, 942, 959, 997 (1997) (discussing labor’s deployment of First, Thirteenth, and Fourteenth Amendment claims in the same time period).

96. *See* Dukes, *supra* note 94, at 353 (noting Kahn-Freund’s arguments that labor protest is appropriately cabined).

97. *See, e.g., id.* at 355–56 (noting that collective labor contracts were not enforceable in the United Kingdom).

relations<sup>98</sup>—this ideal never quite died on our shores. U.S. unions remain deeply suspicious of the state and the courts, and labor leaders often speculate that they would today be better off without the NLRA’s “protections.”<sup>99</sup>

Eliminating the secondary boycott prohibition and other restrictions on workers’ concerted action<sup>100</sup> could encourage experimentation with new organizing models. Many of today’s worst-off workers provide goods or services via contract to major retailers, grocers, restaurant chains, logistics firms, and other industrial megaliths, all of whom are sensitive to public pressure in a way that small low-wage employers are not.<sup>101</sup> Pickets outside those firms’ headquarters or meetings, marches through city streets targeting them directly, coordinated protests by workers inside and outside such firms, and other confrontational tactics could—if linked to a moral message around equality—move those firms to alter practices.

In addition to CIW and Justice for Janitors, such efforts could draw lessons from new social movements such as Occupy and #BlackLivesMatter. Both are decentralized and relatively anarchic, but have built to a national scale quickly through skillful use of social media together with targeted direct action. Occupy accomplished little in terms of reform, but it put economic inequality squarely into national political debate and public consciousness—paving the way for the Fight for \$15 and Fast Food Workers United campaigns.<sup>102</sup> #BlackLivesMatter likewise reshaped debate on structural racism and police misconduct by pointing out and repeating the basic truth that state institutions tend to act as if African-Americans’ lives don’t matter. It has moved tens of thousands into direct

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98. Cf. FORBATH, *supra* note 95, at 164–66 (arguing that the NLRA model reflected the regulatory needs of industrial unions rather than craft unions).

99. See, e.g., Josh Eidelson, *American Workers: Shackled to Labor Law*, IN THESE TIMES (May 23, 2012), [http://inthesetimes.com/article/13181/american\\_workers\\_shackled\\_to\\_labor\\_law](http://inthesetimes.com/article/13181/american_workers_shackled_to_labor_law) [<https://perma.cc/QLU2-J9S4>] (noting such statements by former and current AFL-CIO presidents).

100. Including, for example, restrictions on recognitional picketing and intermittent strikes. See *supra* notes 74–75.

101. See, e.g., ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES 8–9 (2009), <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf?nocdn=1> [<http://perma.cc/HGH4-KJVJ>] (noting wage theft allegations against large firms and contractors to large firms); Myron Levin et al., *How Corporations Get Away with Rampant Wage Theft*, SALON (May 17, 2014, 11:00 AM), [http://www.salon.com/2014/05/17/report\\_regulators\\_cant\\_stop\\_wage\\_theft\\_partner/](http://www.salon.com/2014/05/17/report_regulators_cant_stop_wage_theft_partner/) [<http://perma.cc/Q5LD-WE4Z>] (noting wage theft allegations against the San Francisco Giants, various fast-food brands, and major retailers).

102. See, e.g., Harry Bruinius, *Schooled by Occupy Movement, Fast-Food Workers Put Demands on the Table*, CHRISTIAN SCI. MONITOR (July 30, 2013), <http://www.csmonitor.com/Business/2013/0730/Schooled-by-Occupy-movement-fast-food-workers-put-demands-on-the-table-video> [<https://perma.cc/UPV5-BRBE>] (noting Occupy Wall Street as an important precedent for the Fight for \$15).

action and political action and profoundly affected the Democratic presidential primary.<sup>103</sup>

Both efforts bring to mind Piven and Cloward's famous argument that social movements achieve the most before they develop official leadership and organizational structures, because formal movements must make compromises.<sup>104</sup> They also bring to mind Saul Alinsky's adage that "Power is not only what you have but what the enemy thinks you have."<sup>105</sup> More anarchic protest movements can often gain significant concessions because the target of a disruptive protest fears that an even more disruptive protest is just over the horizon. At this moment, that might be just what workers need.

Yet an anarchic labor movement, and a new collective laissez-faire, would be far from perfect. Without broad reforms to union certification procedures, workers' associations will not be able to negotiate formal collective bargaining agreements. They might, of course, be able to reach less formal agreements and enforce them through concerted action, consumer pressure, and perhaps private internal processes. But doing so is expensive, distracting resources from organizing and other efforts.

Moreover, there are significant legal impediments to collective laissez-faire. While a principled civil libertarianism would clearly support greater rights of concerted action, the Court's recent case law sweeps more broadly, resurrecting a *Lochner*-era vision of the Constitution in which the state should do little more than strongly enforce classical property and contract rights.<sup>106</sup> It may be no coincidence that several district courts have found that public communications and other concerted action by unions as part of "comprehensive campaigns" against firms can be the basis for civil liability under RICO.<sup>107</sup> As the University of Texas's Julius Getman has observed, this development "harkens back to the days when unions were viewed as a criminal conspiracy."<sup>108</sup> Similar questions also lurk in antitrust doctrine,

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103. Peter Dreier, *Black Lives Matter Joins a Long Line of Protest Movements that Have Shifted Public Opinion – Most Recently, Occupy Wall Street*, SALON (Aug. 15, 2015, 1:29 PM), [http://www.salon.com/2015/08/15/black\\_lives\\_matter\\_joins\\_a\\_long\\_line\\_of\\_protest\\_movements\\_that\\_have\\_shifted\\_public\\_opinion\\_most\\_recently\\_occupy\\_wall\\_street/](http://www.salon.com/2015/08/15/black_lives_matter_joins_a_long_line_of_protest_movements_that_have_shifted_public_opinion_most_recently_occupy_wall_street/) [https://perma.cc/VSC8-GJP2].

104. FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL*, at xx–xxiii (Vintage Books 1979) (1977).

105. SAUL D. ALINSKY, *RULES FOR RADICALS: A PRAGMATIC PRIMER FOR REALISTIC RADICALS* 127 (Vintage Books 1972) (1971).

106. See generally Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 *LAW & CONTEMP. PROBS.*, no. 4, 2014, at 195 (tracing the influence of similar neoliberal ideals on recent U.S. constitutional law); Sunstein & Vermeule, *supra* note 12 (tracing the influence of such ideals on administrative law decisions of the Court of Appeals for the District of Columbia Circuit).

107. *Smithfield Foods, Inc. v. UFCW*, 633 F. Supp. 2d 214, 225–27 (E.D. Va. 2008).

108. Josh Eidelson, *That's RICO*, *AM. PROSPECT* (Sept. 30, 2011), <http://prospect.org/article/thats-rico> [https://perma.cc/8M7G-QAM7].

which may prohibit agreements among multiple employers to alter practices within their own firms or their supply chains, if not negotiated with a labor union.<sup>109</sup>

In short, collective laissez-faire is no panacea. It would bolster workers' bargaining power by removing long-outdated impediments to their concerted action. But it would ultimately do relatively little to ensure economic and social democracy.

### B. *The Promise of Libertarian Corporatism*

Collective laissez-faire could nevertheless set the stage for a broader set of labor law reforms. Worker organizations that can work across supply chains, and that can take more effective concerted action, may over time generate the economic and political pressures necessary for another grand bargain—one in which labor commits to labor peace in exchange for different state protections. In this final section, I offer one model for that bargain, which I call “libertarian corporatism.”<sup>110</sup> Given both space constraints and a desire to avoid getting lost in the weeds, I outline this model in broad strokes. My hope is that even such a basic outline can demonstrate its merits and set the stage for future research.

Libertarian corporatism would draw lessons both from alt-labor groups' work and from European nations' labor law systems. A key corporatist institution in continental European countries is “peak” bargaining at the sectoral or even the national level,<sup>111</sup> which tends to reduce wage inequality far more than the decentralized bargaining characteristic of the United States and Canada.<sup>112</sup> Yet European trade unions have historically relied far less than their American counterparts on union security devices.<sup>113</sup> Italy and France, for example, have plural labor law systems in which multiple unions can represent workers in a jurisdiction, and where the “most representative” union, as determined by a

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109. See generally Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 101 (forthcoming 2016) (discussing various tensions between labor law and antitrust law).

110. For overlapping ideas, see generally MARK BARENBERG, ROOSEVELT INST., *WIDENING THE SCOPE OF WORKER ORGANIZING: LEGAL REFORMS TO FACILITATE MULTI-EMPLOYER ORGANIZING, BARGAINING, AND STRIKING* (2015), <http://rooseveltinstitute.org/widening-scope-worker-organizing/> [<http://perma.cc/5RVF-JML6>].

111. See Joel Rogers, *Divide and Conquer: Further “Reflections on the Distinctive Character of American Labor Laws,”* 1990 WIS. L. REV. 1, 56–57 (comparing comprehensive, centralized bargaining in European countries with fragmented collective bargaining in the United States).

112. See generally Jelle Visser & Daniele Checchi, *Inequality and the Labor Market: Unions*, in THE OXFORD HANDBOOK OF ECONOMIC INEQUALITY 230 (Wiemer Salverda et al. eds., 2009) (arguing that unions' power, coverage, and level of bargaining coordination in particular nations correlates with economic equality in those nations).

113. *Sørensen v. Denmark*, 2006 Eur. Ct. H.R. 1, 32 (declaring union security clauses incompatible with the European Convention on Human Rights).

state agency, has bargaining rights.<sup>114</sup> This means that workers may belong to whichever union reflects their political preferences, or to no union at all. Minority unions in those countries tend to follow the agreement reached with the “most representative” union<sup>115</sup> or to bargain alongside it, and the state in both countries generally applies the terms of collective bargaining agreements across the entire industrial sector.<sup>116</sup> While such institutions are embedded in very different political systems, versions of plural unionism, “most representative” tests, and extension laws could surely be imported into the U.S. context.<sup>117</sup>

The “corporatist” side of libertarian corporatism would lie in its bargaining structure, which would grant workers an infeasible right to collective representation. The bargaining units would ideally include all key companies in a sector (transportation, retail, health care), or all companies whose workers are in an occupation (drivers, retail clerks, nurses). Bargaining units would also reach up and down supply chains to incorporate whichever firms’ assent is necessary for an effective collective agreement. The key is to establish peak bargaining attuned to modern production strategies. That requires bargaining units that extend horizontally across the major firms within a sector, as in classic European corporatism, and that also (unlike in classic corporatism) extend vertically from lead firms down through their suppliers. The principle underlying such large units is that workers in the same occupation or sector have common interests simply based on their shared structural position—not, as in some earlier forms of corporatism, that such workers have an organic unity.<sup>118</sup>

The “libertarian” side of this model would have two prongs, both rooted in civil libertarian commitments to strong negative liberties. One would eliminate various restrictions on rights to strike and picket, as

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114. MARCO BIAGI, REPORT ON SIX NATIONAL CASE STUDIES IN THE FIELD OF FREEDOM OF ASSOCIATION (1998), [http://training.itcilo.it/actrav\\_cdrom1/english/global/LISTS/MARCO.HTM](http://training.itcilo.it/actrav_cdrom1/english/global/LISTS/MARCO.HTM) [<http://perma.cc/C9RV-YSZF>].

115. *Id.*

116. See Estreicher, *supra* note 27, at 417 (discussing collective bargaining in England and Germany).

117. For example, some state wage and hour laws enable state departments of labor to set wages on an industry-specific basis, a procedure that involves delegated lawmaking authority not so different from that in extension laws. See, e.g., Nat’l Emp. L. Project, *New York Department of Labor Wage Board for Fast-Food Workers* (May 2015), <http://www.nelp.org/content/uploads/Fact-Sheet-New-York-Labor-Department-Fast-Food-Wage-Board.pdf> [<https://perma.cc/VU3X-APJZ>] (describing a New York law authorizing the state labor commissioner to set industry-specific minimum wages without legislative approval).

118. CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960*, at 77–79, 116 (1985) (highlighting such organicist theories in the 1920s).

discussed above.<sup>119</sup> The other would shift the locus of employee choice in our labor law. Rather than focusing on employees' decision as to whether to have union representation at all, this model would simply establish a representative structure and then guarantee employee choice as to bargaining representatives within that structure. Plural unionism would be encouraged, with workers able to form, join, and leave unions as they wish. To enable bargaining stability, workers would be required to register their preferences among unions at regular intervals, perhaps using online tools, and whatever union or coalition of unions had the greatest amount of support would then enjoy bargaining rights vis-à-vis the companies within a unit. The NLRB might also calibrate unions' bargaining rights based on their degrees of support, for example by granting consultative rights to unions that reach a certain threshold of support and full-fledged bargaining rights for unions that reach a plurality.<sup>120</sup> The NLRB would need to police the member solicitation process to prevent employer or union coercion, but the basic pluralist union structure would be simple enough to establish. Reflecting the nonorganicist understanding of workers' associations alluded to above, the basic principle would be that they have powers by virtue of being freely chosen.

Importantly, despite creating an infeasible employee right to representation, this model would not require or presume agreement on the normative value of trade unionism or collective bargaining. Workers opposed to collective bargaining would have every right to establish a "union" dedicated to avoiding collective bargaining, or to bargain toward a regime of unilateral managerial decision making. But such a "union" could not permanently defeat workers' power to choose representatives. If that "union" lost majority support in a future round of voting, employers would need to bargain with its successors.

Beyond those basics, Congress and the NLRB or a successor agency would need to figure out how to shape this regime. Defining the vertical boundaries of bargaining units may be challenging, given the plethora of relationships between firms and their suppliers. One option would be to reform the statutory definitions of "employer" and "employee" to reach workers who are a few contractual degrees removed from firms.<sup>121</sup> Another would be to delegate to an agency the authority to determine whether a lead firm is an appropriate bargaining partner with a union representing workers within its supply chain. That agency could then take account of the

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119. Though perhaps unions would need to trade off some of those rights in order to gain state protection for corporatist bargaining structures.

120. Cf. K.D. Ewing, *Trade Union Recognition—A Framework for Discussion*, 19 *INDUS. L.J.* 209, 209–10 (1990) (proposing such a staged recognition procedure in the United Kingdom).

121. Cf. 29 U.S.C. § 203(g) (2012) (defining "employ" as "suffer or permit to work" for purposes of federal wage and hour regulations).

economic power exerted by the lead firm and the proximate relationship between the firm and the workers, and issue bargaining unit determinations and orders appropriately.<sup>122</sup> Calibrating the boundaries of the right to strike will also be important. On the one hand, the model relies on unions being able to take secondary action, at least against firms that exert substantial power over their members. But other rights to strike might be limited where necessary to enable bargaining stability, perhaps including certain strikes in the course of a collective bargaining agreement.

Funding may also be a challenge, because if unions cannot compel fee payment, they will lack the resources for sustained collective bargaining and worker representation. I can see several ways to mitigate this concern. The first is to limit unions' duties of fair representation. As other scholars have pointed out, it is utterly unfair to require unions to process grievances on behalf of workers who are neither members nor fee-paying nonmembers.<sup>123</sup> A second reform would limit unions' powers and duties to strictly economic matters, leaving matters of workplace discipline for another system. Many European countries have such a dual-channel system, in which collective bargaining takes place at the national level and is limited to economic matters, with questions of local work rules left to legislatures, labor courts, and works councils—local consultative bodies that cannot lawfully bargain over economic matters.<sup>124</sup> There are virtues to such a system: employers enjoy greater flexibility, and unionization is not a competitive disadvantage since it does not alter their authority over work rules.<sup>125</sup> A third promising option would be to charge all workers small fees to defray costs of bargaining, while allowing those workers to allocate the fee to whatever union they desire—including, it bears repeating, a “union” of workers opposed to collective bargaining.<sup>126</sup> This final option may be ideal, since it would enable unions to collect appropriate fees while not compelling fees to any particular union.

Libertarian corporatism strikes me as quite promising for a few reasons. By encouraging large, encompassing bargaining units, it can combat economic inequality far better than the Wagner Model. Such bargaining structures, moreover, tend to ensure wage compression among

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122. Cf. BARENBERG, *supra* note 110, at 1 (arguing that firms should have bargaining duties towards employees over whom they exert “sufficient bargaining power” to impact employment standards).

123. See Fisk & Sachs, *supra* note 43, at 874–75 (documenting this inequity).

124. Estreicher, *supra* note 32, at 1624–26.

125. See Matthew Dimick, *Productive Unionism*, 4 U.C. IRVINE L. REV. 679, 683–89 (2014) (discussing efficiency and other benefits of dual-channel systems).

126. Cf. Philippe C. Schmitter, *The Irony of Modern Democracy and the Viability of Efforts to Reform Its Practice*, in ASSOCIATIONS AND DEMOCRACY, *supra* note 13, at 167, 171–72 (proposing a voucher system for general associational funding in which all citizens would be allowed to allocate state resources to associations of their choosing).

workers as well as between workers and managers, both of which are important aspects of economic equality.<sup>127</sup> This model also reflects emerging First Amendment doctrine and current norms around association and individual liberties better than the Wagner Model. Today, individuals can form an online group within minutes; our identities are fluid over time, and they are based less on our status as workers than on geography, ethnicity, religion, sexuality, political preferences, cultural preferences, and the like.

Libertarian corporatism also reflects the emerging role of secondary associations in our politics. The New Deal regime was instituted in an era of urban political machines, large factories, and dense, locally based social networks. All are far less important than they once were. Numerous issue campaigns and various insurgent political campaigns demonstrate the power of crowd funding and weaker interpersonal ties in driving political change. Given all these shifts, it makes sense to establish a labor law structure through which workers can freely form, join, and leave associations. Subjecting plural unions to basic competitive forces, and allowing workers to form new unions more-or-less at will, will also create strong incentives for unions to be responsive to workers' concerns, avoiding the "lock-in" and drift that corporatism can encourage.

Building toward this model also strikes me as smart politics. Unlike Europe, the United States lacks both a powerful indigenous socialist tradition and a set of religiously affiliated unions who could provide normative support for a new welfare state. A more libertarian approach to secondary associations "is in many ways more compatible with the individualistic tendencies of 'Anglo-Saxon' politics" than are classic corporatist or neo-corporatist approaches that lock particular associations into place.<sup>128</sup> Under libertarian corporatism, workers' associations would enjoy power just insofar as they are freely chosen. But since representation would be guaranteed rather than fought for, unions would provide a space for deliberation, experimentation, and collective power that is badly needed in today's economy.

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127. See Streeck, *supra* note 53, at 271–72 (“Encompassing industrial unions, by comparison, would internalize the losses suffered by the majority as a result of ‘restrictive practices’ benefiting a small minority. Their membership, being broadly based and heterogeneous, would on average benefit from higher productivity.”).

128. Hirst, *supra* note 21, at 112–13.

### Conclusion

As I noted in the introduction, I have proceeded on the heroic assumption that political forces will make major labor law reform a realistic possibility. Establishing this new regime would also require us to rebuild parts of the New Deal constitutional settlement that the Court has been tearing down. Guaranteed representation is a simple nonstarter in a classical-liberal state, since it would substantially interfere with employers' property and contract rights. Guaranteed representation stretching across supply chains is just short of utopian, as it threatens basic understandings of freedom of contract and limited corporate liability.

Yet to remedy economic inequality, we need to begin thinking this way again. Mainstream policy debate largely ignores the constitutional and political-economic dimensions of inequality, and focuses on regulatory and technocratic solutions—limiting banks' risk profiles, increasing income and wealth transfers, providing more generous education funding, and the like. Those are all laudable goals, but they are too narrow, as earlier generations of reformers would recognize. We don't need new regulations. We need new institutions, the sort that can check tendencies toward oligarchy.<sup>129</sup>

In closing, I'll just suggest that libertarian corporatism might be a useful model outside the labor context. The literature on associations and democracy has often focused on public processes such as participatory budgeting and neighborhood governance,<sup>130</sup> but labor law offers models of associative bargaining that might be extended to other commercial spheres. For example, perhaps Facebook and Google should be required to bargain with users' secondary associations over the terms of their privacy policies. User data seems like an emerging fictive commodity alongside labor, land, and money—it is not produced for sale, yet it has a market value<sup>131</sup>—and it should be subject to democratic norms. Perhaps credit card companies should be required to bargain with associations of cardholders over the terms of their consumer arbitration agreements, particularly given the important questions of due process and access to justice involved. Perhaps commercial banks should be required to bargain with account holders or

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129. See generally K. Sabeel Rahman, *What Clinton and Sanders Are Really Fighting About*, ATLANTIC (Feb. 5, 2016), <http://www.theatlantic.com/politics/archive/2016/02/the-allure-and-limits-of-managerialism/460146/> [<https://perma.cc/LSD4-CC9P>] (arguing that the democratic primary candidates are resurrecting a Progressive Era debate over whether to regulate big business or break up big businesses).

130. See Archon Fung & Erik Olin Wright, *Thinking About Empowered Participatory Governance*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE 3, 5 (Archon Fung & Erik Olin Wright eds., 2003) (highlighting neighborhood governance councils, participatory budgeting, and other public processes as key areas for reform).

131. See KARL POLANYI, THE GREAT TRANSFORMATION 68–69 (1944) (defining labor, land, and money as fictive commodities with incomes deriving from sales on the market).

mortgage holders over whether they may enter into higher risk lending or investment practices, given the important interest in financial stability.

As always, the devil is in the details, but is it so implausible to think that Facebook and Google users and the like constitute a “community of interest”<sup>132</sup> who deserve a collective voice in such matters? It seems to me that economic and social democracy requires nothing less.

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132. The NLRB’s test for whether a particular group of workers constitute an appropriate bargaining unit is whether they share a “community of interest.” *See* NLRB v. Catherine McAuley Health Ctr., 885 F.2d 341, 344–45 (6th Cir. 1989) (outlining the guidelines for determining what constitutes a “community of interest”).