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

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ABSTRACT

Over the past six 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 organizational forms (alt-labor), and employing new strategies. 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, as economic and labor market conditions have changed, labor law’s New Deal-era rules have remained fixed in place, “ossifying,” “stagnating,” shrinking in “reach and significance,” and “more and more resembl[ing] an elegant tombstone for a dying institution.”⁴ Despite multiple efforts by workers and their advocates to update the law to better keep pace with changing conditions, opponents have leveraged institutional veto
points to block those reforms and maintain the status quo. Meanwhile, a confluence of trends has
rendered national labor law effectively irrelevant for the vast majority of private sector workers.
Although scholars writing from different perspectives weigh certain factors more heavily than
others, these trends are usually said to include deindustrialization and the changing composition
of industries; capital flight from mostly pro-labor states to mostly anti-union states; the
development of global supply chains and production processes predicated on subcontracting,
outsourcing, and offshoring; the decline of the traditional employment relationship and
restructuring of labor markets; technological change; and employers’ adeptness at exploiting
loopholes in the existing labor law to deter or quash unionization drives with relative impunity.⁵
The effects of these trends are perhaps most evident in the percentage of the workforce that
remains unionized: by 2017, membership in private sector unions had declined to a mere 6.5
percent, with only 0.8 percent more covered by collective bargaining agreements.⁶

Labor law has thus undergone a transformation of function but not form – a process
Cynthia Estlund terms “ossification” and Jacob Hacker and colleagues call “policy drift.”⁷
However conceptualized, the consequences are plainly evident: 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

Yet the erosion of the old collective bargaining regime has not meant that the institutional
bases of workers’ rights have entirely disappeared. They have, however, changed in form and
content. As the problems to which New Deal-era labor law was initially addressed have
reappeared in spades, workers and their advocates have responded by developing alternative
policy instruments in alternative venues to achieve the same purposes through different means
and mechanisms. Most importantly, as I will document below, they have pushed for the enactment of employment laws at the state and local levels to raise minimum workplace standards, establish substantive individual rights, and provide legal and regulatory pathways for workers to vindicate those rights. Indeed, 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.

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 related to organized labor, employment law covers all other laws, regulations, and policies regarding the employee-employer relationship. 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 that labor law ostensibly seeks through collective bargaining: namely, boosting wages and regulating the terms and conditions of employment.

The dramatic growth of subnational employment laws since the 1960s thus appears to represent another 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. To be sure, for most workers, employment law has long been the only institutional guarantor of rights in the workplace—for 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 extant 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 historic 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 advocacy groups. Over the past twenty 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 – and lacking unions’ right of exclusive representation in collective bargaining – they 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 employed legislative strategies, 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 changes have emerged slowly and have largely escaped public attention, they constitute a veritably new phase of U.S. labor politics.¹⁰

Critically, however, these twin institutional and organizational developments have not occurred 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 powerful and continuous governing authority in its expansive domain. Its broad and encompassing rules have
severely limited the range of options for workers and their advocates and encouraged them to develop workaround solutions. Indeed, 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, and contingent workers), the law preempts any and all state efforts to regulate private sector labor-management relations. In so doing, it both eliminates potentially generative sources of labor law innovation and experimentation and incentivizes state-level reformers to circumvent labor law and seek alternative institutional solutions. These alternatives, however, are often quite limited in content and reach, feature high barriers to access, and exist in tension with other institutional arrangements. Labor law has thus “boxed in” the labor movement while channeling reformers’ efforts in certain substantive directions rather than others.

A similar effect can be observed in the constellation of political organizations working in this space. For even as the primary group beneficiaries of labor law’s early feedback effects (private sector labor unions) have suffered dramatic membership losses, they have remained pivotal players in the labor movement, directing the flow of resources and designing strategies that bring all allied groups into their orbit. The new advocacy groups that have formed in response to the growing need for worker representation have thus entered an arena in which many of the most significant resources – both material and ideational – are controlled by groups with a strong 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, I will argue, can be located precisely there, in the constraints imposed by the outmoded national labor law regime on the institutional and organizational responses of workers and their advocates to resurgent
problems. My central argument is that the persistence of this labor law regime has 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 content and reach, disjointed delivery mechanisms, high barriers to access for most workers, and the new kinds of political 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 and organizational strategy for the labor movement as a whole. Thus, although 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.\textsuperscript{13}

This paper offers new empirical evidence of these shifts and begins sketching their causes and considering their consequences. 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.\textsuperscript{14} 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 at the national level 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.\textsuperscript{15}
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 strategic adaptation of labor unions around these 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.

**Development and Decline of National Labor Law**

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 statute 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. 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.”

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. 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.\textsuperscript{20} 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; for the seventeen-year stretch between 1943 and 1960, union density remained above 30 percent (Figure 1).\textsuperscript{21} Strike activity grew dramatically after the Wagner Act was passed as well, averaging over 300 large work stoppages per year until 1976 (dipping to an average of only 56 large work stoppages per year thereafter) (Figure 2).\textsuperscript{22}

[Figures 1 and 2 about here]

The Wagner Act 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.”\textsuperscript{23} National labor law encouraged workers to view their interests as \textit{collective} interests that could be pursued through self-organization and collective action.\textsuperscript{24} It also limited the range of imaginable alternatives for reform in subsequent periods. More radical possibilities were eliminated from the realm of possibility as the collective bargaining regime became taken for granted.\textsuperscript{25} 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.\textsuperscript{26} In these ways and more, the Wagner Act “made” labor politics in America.\textsuperscript{27}

Importantly, the NLRA barred state and local efforts to legislate in any of the broad areas of labor law it covered. Unlike the Fair Labor Standards Act (FLSA) of 1938, which allowed states to enact stronger protections and set higher standards than federal law provided, the NLRA preempted state efforts to do anything similar.\textsuperscript{28} States that might have preferred to allow industry-wide, occupation-based, or regional unions, for example, were forbidden from
establishing alternatives to the individual firm-centric structure of the NLRA, which privileges the “employer-employee dyad” in the private ordering of industrial relations.\textsuperscript{29} 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. 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.

Supported by its bold institutional design and powerful feedback effects, the formal structures of national labor law have remained remarkably stable for over eighty years. Indeed, even amid vast changes in the global and national economic context – including the shift from a predominantly manufacturing to a predominantly service economy, technological change, the migration of manufacturing jobs away from highly unionized states to states with low levels of unionization, and the “fissuring” of the workplace – national labor law has been amended only three times (the Taft-Hartley Act of 1948, Landrum-Griffin Act of 1959, and the minor health care amendments of 1974), and not at all in over forty years.\textsuperscript{30}

This structural resiliency, however, has not meant that labor law has continued to operate as intended. To the contrary, the law’s New Deal-era rules now appear a glaring “mismatch” with the globalized economy and its “bewilderingly complex proliferation of employment relationships that structure work in the modern city, college, or company” featuring “layer after layer of subcontractors and vendors.”\textsuperscript{31} Despite attempts by labor unions and their allies to update the law to keep pace with changing economic conditions – for example, by streamlining union election procedures (“card check”), increasing penalties for employer interference, or by eliminating the NLRA’s preemption of state labor laws to allow experimentation – opponents
have successfully blocked reforms from advancing through the legislative process.\textsuperscript{32} The “losers” during the New Deal have become the “winners” in the post-1970s period, able to advance their objectives simply by preserving the status quo. Labor law thus appears to be an emblematic case of \textit{policy drift}, which is “when institutions or policies are deliberately held in place while their context shifts in ways that alter their effects.”\textsuperscript{33}

As the protections and rights available through national labor law have effectively reached fewer and fewer workers, employees in all industries have become more vulnerable to exploitation and abuse. Employment has become more precarious, income inequality has widened, wages have stagnated, and the power asymmetry in the workplace has grown. The ossification and drift of national labor law, in other words, has contributed to a resurgence of many of the very same problems the policy was initially designed to redress in 1935.

In most accounts – both scholarly and popular – that is the end of the story. But it is not, of course, the end of the story for workers in their efforts to build more bargaining power and defend against exploitation. For even as old channels for collective action, self-organization, and political activism have gradually closed, new channels have gradually opened, albeit heavily shaped and circumscribed by the stubbornly persistent and powerful labor law regime. This changing politics of workers’ rights – characterized by a new set of institutions, new strategic repertoires, and new organizational forms – did not emerge on a blank slate but rather developed alongside old forms without displacing them. The new and the old now operate simultaneously, sometimes in harmony and sometimes in conflict, generating complex incentives, constraints, and challenges for workers and their advocates.

\textbf{The Shift 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.”

The notion that there has been a historic shift in the “guardian” of workers’ rights has since become common wisdom among legal scholars. 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.” 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.” And Benjamin Sachs describes the shift as a “hydraulic” process:

“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…which I name ‘employment law as labor law.’ 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.”

Although the growing prominence of employment law has been much discussed, empirical evidence of its growth over time has been lacking. To be sure, there is no shortage of
studies examining the cornerstone federal employment laws discussed by Sachs (among others, including the Occupational Safety and Health Act of 1970, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, and more). But confining the analysis to laws enacted at the federal level may ultimately obscure more than it reveals, since the same forces blocking revision of labor laws may have also blocked the enactment of significant federal employment laws, with the “drift” of the Fair Labor Standards Act a case in point. Looking only at federal employment laws, in other words, may actually understate the extent to which employment laws have supplanted labor law as the “guardian” of workers’ interests. It is therefore useful to look elsewhere for evidence of the shift.

States have been discussed as active sites of employment law proliferation for decades, but no evidence has been systematically marshaled to substantiate the claim. Most take the growth of state-level employment law for granted and move on to consider its effects. 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.

Thankfully, 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)*. 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 individuals, 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).\textsuperscript{43} During this period, states enacted 7,256 employment laws in 33 categories. To ascertain whether employment law garnered increased state legislative attention over those five-plus decades, I also tallied the number of enacted bills in each state each year (including overrides, minus vetoes) reported in the annual publication \textit{Book of the States} to generate the appropriate denominator.\textsuperscript{44}

As \textbf{Figure 3} indicates, employment laws as a share of all enacted bills \textit{more than quintupled} over the past fifty-five years while the average number of enacted laws per year actually declined beginning in the 1990s. Thus at the same time that national labor law atrophied and private sector union membership plummeted, employment law garnered escalating legislative attention.

[\textbf{Figure 3 about here}]

Of course, new laws are not enacted in a vacuum. They often 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. It would be most appropriate to interpret \textbf{Figure 3}, then, as an aggregate count of laws that are actually often cumulative in nature.

The \textit{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 about here]

Finally, it is worth noting that the content of these laws clearly reflects the constraints imposed by the persistence of national labor law. In part, these constraints are evident in what is conspicuously absent: due to the Wagner Act’s preemption of any and all subnational labor laws pertaining to private sector employment, 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 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, they have tried).45 Many states did, of course, enact a variety of extensive labor laws governing the public sector, agricultural, and domestic work—all industries explicitly falling outside the Wagner Act’s reach. But as long as national labor law remained in place and exerted exclusive authority over private sector labor relations, the possibility of pursuing alternative means of regulating labor-management relations in the private sector was foreclosed.
What is most notable, then, is what the laws do cover substantively: even as they circumvent national labor law, they address many of the same issues that otherwise would have been subject to, and the subject of, collective bargaining. In addition to wages, hours, and other terms and conditions of employment, state-level employment laws govern 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. These are precisely the substantive issues labor law was originally designed to address through the collective bargaining process—now addressed through state-level employment laws, implemented through different processes, and enforced through different mechanisms.

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.46 With respect to their timing, form, and content, then, these employment laws clearly reflect the constraints imposed by the increasingly outmoded but still authoritative labor law.

The insights thus far have been gleaned from a great distance, 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 patterns.

**Examining the Variation in State Employment Laws**

Geographically, employment law activity varied substantially across all 50 states and the District of Columbia over this period (Figure 4).

[Figure 4 about here]

California is the extreme outlier, having enacted 513 laws (compared to 142 on average). But California’s legislature is also far more productive than any other state. Dividing each state’s tally of employment laws enacted by the total number of all laws enacted in that state standardizes the measure and gives us a better reading of the relative attention each state paid to employment law (relative to everything else on their legislative agenda). Using this alternate measure, California registers only slightly above average (Table 2). The Deep South emerges as a distinct region, perhaps unsurprisingly, with significantly less relative attention paid to employment law than other states (Figure 5). The states most attentive to employment law (scoring greater than one standard deviation above the mean) include Vermont, Alaska, Hawaii, Minnesota, New Jersey, Ohio, Oregon, Washington, and Wisconsin – all generally more politically liberal states with above average union density rates.

[Table 2 about here]

[Figure 5 about here]

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,” and fine-grained case studies are clearly needed to examine how different historical trajectories
produced more or less robust employment law regimes across the states. Still, to begin exploring why some states enacted more employment laws than others, some theoretical possibilities can be considered quantitatively.

A variety of political factors, for example, could have played a role. I consider the following. Legislative productivity: as just noted, states that typically enact more laws in general may be more likely to enact employment laws than states that are generally less legislatively productive. Democratic control of state legislature: when both houses of the state legislature are controlled by Democrats, the state may be more likely to pass worker-friendly laws. Citizens’ ideology: states with more ideologically liberal populations may be more likely to enact worker-friendly employment laws. Right to work laws: states that adopted “right to work” laws after the Taft-Hartley Act of 1946 may be less likely to pass worker-friendly employment laws (Kogan 2016). And since economic conditions may also play a role, I consider the following economic factors as well. Unemployment: 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. Average personal income: because economic modernization is related to policy innovation more generally states with richer populations may be more likely to enact employment laws. Percent nonfarm employment in manufacturing: as a state’s manufacturing industry declines, it may be encouraged to enact stronger protections for the workforce that remains. Union density: a greater share of unionized workers may indicate a more politically powerful labor movement, which may push for the enactment of stronger employment laws. Finally, other unobserved and idiosyncratic characteristics of states and individual years, such as political culture, political history, nature of
the economy, composition of the workforce, or temporal developments, may also matter, and should be taken into account.

Using these variables, I conducted a time-series cross-section analysis in which the dependent variable is the number of employment laws passed in a given state-year (two-year legislative session). The model is estimated with and without state- and year- fixed effects, with results reported from each specification (Table 3). The robust 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.54 Data limitations confine the analysis to the timeframe of 1976-2013.

As Table 3 indicates, across all four models, union density, democratic control, and overall legislative productivity are positive and statistically significantly related to the enactment of employment laws. Liberal ideology is only positive and significant in models without state fixed effects, which may reflect that both are capturing the overall ideological orientation of the state. In each of the first three models, average personal income is positive and significant and the share of nonfarm employment in manufacturing is negative and significant, suggesting that the tendency to enact more worker protections is greater in richer states and when the share of manufacturing jobs in the state declines. Although the fourth model yields contrary results for the latter two variables, it is difficult to interpret because using both year- and state-fixed effects leaves very little to be explained by other variables.

[Table 3 about here]

While these time-series cross-section models nicely capture political and economic conditions in each state in each year, they do not permit us to ask why some states constructed more robust employment law regimes over multiple decades. Indeed, the analysis is so
disaggregated that it runs the risk of missing the bigger picture. To take a broader view, I ran a similar set of models using only 50 observations (for each state), asking which factors are most correlated with a state’s overall volume, relative attentiveness, and scope of employment laws passed between 1974-2014 (Table 4). The dependent variables are: (1) Total number of employment laws enacted; (2) employment laws as a share of all laws enacted; and (3) the scope of employment laws (number of categories, out of 33 possible) in which a state enacted legislation.

The results are similar. In each model, union density remains highly correlated with the state’s attention to employment law: both the base level of union density (average, 1969-1973) and the percentage point change in union density over the forty years are positive and statistically significant, indicating that the higher the starting point and the less decline in union density, the more laws enacted. The average unemployment rate is also somewhat negatively related to employment law activity.

[Table 4 about here]

Table 5 provides robustness checks. The first two models exclude laws clearly aimed at reducing the regulatory burden on employers and the third uses as its dependent variable only the laws that are highlighted in the MLR’s opening pages (the opening section summarizes the most notable or significant legislation enacted in the previous year). Union density remains positive and significant in each specification.

[Table 5 about here]

Of course these cross-sectional models cannot deal satisfactorily with unobserved heterogeneity, such as states’ deeply rooted structural or cultural attributes, which may explain both union density and employment law activity. What is more, union density is itself a noisy
measure that is of questionable value when used as a proxy for workers’ political strength or levels of activism. Still, the robust statistical relationship is intriguing and invites further consideration at a theoretical level. Why indeed might there be such a strong correlation between union density and attention to employment law at the state level, above and beyond other “usual suspect” explanations?

**Labor Unions and Employment Laws**

When viewed from one angle, the relationship is puzzling. As some economists have argued, employment law protections constitute “substitutes” for what unions might otherwise help workers achieve through collective bargaining. As such, there may be a tradeoff between employment law and unionization: the greater the protections afforded by employment law, the weaker the incentive for would-be union members to form or join unions. The “substitution hypothesis” therefore suggests that unions’ support for employment law is counterproductive: successes in the legislative realm contributes to their own decline. Efforts to empirically demonstrate a tradeoff, however, have yielded mixed results, and even if the laws do deter some individuals from joining unions, those losses may be more than offset by the benefits associated with helping to enact laws that aid workers.

For as many scholars have shown, labor unions have long sought to advance policies that benefit all workers, not just union members. In their classic study, for example, Freeman and Medoff show that while unions have consistently failed to secure labor law reforms and other policies that might aid their own organizational advancement, they have been far more successful in other areas, winning on “legislation pertaining to general labor issues” 58 percent of the time and on all non-labor related legislation 55 percent of the time. Thus, “measured by resources
used in the political arena, influence on congressional voting, and contributions to passage of
genereal social legislation, unions are the political powerhouse” many think them to be. But “their
main political success is as the voice of workers and the lower income segments of society, not
as a special interest group enhancing its own position” (206, 202).

On some of those issues, labor 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). And by taking certain issues off
the bargaining table, employment laws also likely narrowed the range of issues over which
unions would have to negotiate with employers, thereby increasing their leverage over the issues
that remained.59 But the labor movement as a whole also has a long and proud history of
advancing the cause of 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 were epitomized by UAW-led political activism in the 1960s—the idea
that “organization, bargaining, and political action are indissolubly linked.”60 Indeed, 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.61 Indeed, despite the AFL’s early commitment to a more apolitical
“voluntarism,” political and legislative action has been part and parcel of labor unions’ activities
since the New Deal.62

In the last 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 for 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 Sweeney 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.” 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.

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 quite capable. 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. 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, or occupation became increasingly appealing.\textsuperscript{67}

With declining membership rolls presenting a veritable existential crisis, employment laws arguably also offered a new source of policy “feedbacks” (resource, incentive, and interpretive effects) to replace or supplement what had been lost amid labor law’s drift.\textsuperscript{68} Campaigns to raise the minimum wage, deter wage theft, and ensure family and sick leave, for example, 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 was advanced by embracing the cause of individual rights and demonstrating that despite their great diversity and heterogeneity, individual workers faced similar challenges and had similar types of grievances. By associating unions with successful policy campaigns on behalf of workers, labor unions could demonstrate to existing and potential new members that they still had 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. 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 would appear to constitute a major institutional achievement indeed.

The Changing Organizational Landscape

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, many workers became more vulnerable to exploitation and abuse, as discussed. Old problems, in other words, were resurgent. In response, workers and their advocates began to experiment with new types of service and advocacy organizations. Beginning in the 1990s, a variety of alternative workers’ organizations, sometimes called “alt-labor” groups, began to emerge in locations across the country.

As the moniker implies, alt-labor groups are not traditional 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. They include “worker centers” like the Restaurant Opportunities Centers United and about 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 and HourVoice.\(^{73}\)

Like the employment laws discussed above, these alt-labor groups reflect the constraints and opportunities imposed by the still-authoritative but less effective national labor law in both their content and forms. In terms of their substantive focus, they self-consciously target workers that have been left behind as labor law has ossified. Their primary members include those 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.”\(^{74}\)

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.\textsuperscript{75} 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 6).\textsuperscript{76} In part, this fast growth was a response to an immigration wave that doubled the population of foreign-born workers between the 1990s and 2010s. With many immigrants working jobs that were either not covered by the NLRA or nearly impossible to unionize under its antiquated rules, their need for support, representation, and advocacy grew quickly.\textsuperscript{77}

[Figure 6 about here]

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.”\textsuperscript{78} For example, Daniel Galvin details how alt-labor groups took the lead in pushing for the enactment of major “wage-theft laws” in twelve states between 2006 and 2013.\textsuperscript{79} In most cases, policy advocates built new coalitions of alt-labor groups, conventional unions, legal clinics, and other groups. Many continued to collaborate after the laws were passed, expanding their policy agendas to include new issues and expanding 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.\textsuperscript{80} Alternative
labor organizations are now central to the organizational structure and strategic outlook of the labor movement in the early 21st century.

A helpful illustration of how organizational innovation and political mobilization has been generated 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.81 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.82 After decades of grassroots organizing, coalition-building, and a long, 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.

Alt-labor groups have also sought to use campaigns on behalf of stronger employment laws as a means of generating collective action, building solidarity across disparate occupations, and awakening ordinary workers’ collective consciousness. 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 otherwise would not necessarily have a chance to
interact. 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.” 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. Although the union paid the startup costs, it exercised little control over its evolving content and expanding activities.

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. The words “and a union” were added to the demand, but the tardiness of the addition was telling; this was an improvisational effort to adapt to an altered context.

As discussed further below, alt-labor faces significant financial challenges and its activities have presented some knotty organizational conflicts for the broader labor movement. Yet new types of workers’ groups have managed to fill an important organizational need and are now widely recognized as important players in the labor movement and in Democratic Party politics more broadly, with politicians and party activists often overtly seeking to curry favor with alt-labor.

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; strategic adaptation by private sector labor unions to promote
employment law and generate alternative sources of policy feedback; 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.”

“Paradoxically, nonunion employees frequently have more workplace rights than their unionized counterparts,” Richard 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.” 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.”

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. The effect of this substitution is to reduce the incentives for would-be members to form or join unions. Although empirical analyses have yielded mixed results, the “substitution hypothesis” suggests yet another way in which employment and labor law may exist in tension with one another.

Indeed, in many ways, labor law and employment law are 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. Only after a long “succession of assaults” by labor
unions were those barriers finally broken down and the liberty of contract doctrine supplanted by
the New Deal’s collective bargaining regime.93 Abrasions between individual-rights and
collective-rights systems likewise underpins Paul Frymer’s investigation 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.94

To historians studying the same developments, the dichotomy is more ideational than
institutional, counterpoising “the concept of rights and that of solidarity.” As the former has
grown, “the collective institutionalism that stands at the heart of the union idea” has atrophied,
Lichtenstein writes. “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.”95

But perhaps the biggest problem with employment law is simply that it does not resolve
the problems generated by labor law’s drift in the first place. By itself, employment law does not
give 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.96

Moreover, for low-wage workers, employment law remedies are often much too costly to
pursue.97 Class action lawsuits involving low-wage workers are rare (and those perceived to
abrogate arbitration clauses may not last much longer, under review at the time of this writing by
a conservative-leaning Supreme Court),98 and 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, and relative job security—usually white-collar workers—while putting low-wage workers at an even greater disadvantage.

And 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. These arbitration clauses represent only the most recent effort by employers’ advocates to circumvent or otherwise deprive workers of rights and protections in the workplace. The success of the opposition throws into sharp relief precisely what employment laws lack relative to labor law: mechanisms for building collective power. Paradoxically, without those mechanisms, the beneficiaries of employment laws have been unable to defend those very employment laws against their subversion.

Finally, the effective enforcement of employment laws cannot be taken for granted. While certain employment laws may, depending on their design, effectively deter workplace exploitation on their own, most require a substantial commitment to regulatory enforcement. 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. As such, it almost always pays for the employer to violate the law. 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
Some 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 private and public sector 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?” Another said, “The money going into this is a gamble. These workers aren’t paying dues; they’re not financing this right now.”

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. Many argue that the labor movement should not be so quick to give up on the goal of reviving traditional unions. “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.”

The growth of alt-labor has also exacerbated the free-rider problems confronting the labor movement in an increasingly right-to-work nation. If hard-to-organize workers can get informational support, legal assistance, and even solidary benefits from alt-labor groups without
paying dues, what is their incentive to unionize? And if unions continue to decline and alt-labor groups are not able to find stable alternative revenue streams, the labor movement may find itself in even worse shape. 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.

Efforts to support the development of 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.\textsuperscript{107} Notably, this effort to support alt-labor conspicuously relies on employment law fixes, legislative activism, and continuous engagement in political and legal processes.

**Conclusion**

As New Deal-era labor law has remained fixed in place amid major economic change and grown 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. Rather than seek out unions and invest in the collective bargaining process, many workers now look to these laws for protection from exploitation, for substantive rights in the workplace, and for the procedural means of regulating employment relations. This paper has provided empirical evidence of this institutional shift 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 drift in the first place.

Despite these problems, a “new politics” of workers’ rights has clearly taken shape. It has moved increasingly out of the workplace and into the political arena, involving more street-level protests and direct corporate campaigns to press for higher wages and better employment conditions; it strategically leverages employment law protections to generate the resources, incentives, and interpretive effects that facilitate collective action; it is often fueled by alternative labor organizations, new organizational networks, and broad coalitions of workers’ advocates; it increasingly focuses on outcomes, emphasizing the need for more effective enforcement of employment laws; and more and more, it views its fate as intertwined with social justice and civil rights campaigns with different proximate foci: immigrants’ rights, women’s rights, and civil rights movements.

In short, the development of labor politics in the United States over the last several decades has been quite eventful, but it has not unfolded in a vacuum: it has been powerfully shaped by preexisting institutional arrangements. Looking ahead, the effectiveness of the new pathways for workers’ rights and collective action will depend to a large extent on how these various historical-institutional trajectories are negotiated.
### Table 1: Categories and Counts of Employment Laws Enacted by Decade

<table>
<thead>
<tr>
<th>Category</th>
<th>1960s</th>
<th>1970s</th>
<th>1980s</th>
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<th>2000s</th>
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<td>95</td>
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<td>59</td>
<td>79</td>
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<td>Displaced Homemakers</td>
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<td>28</td>
<td>40</td>
<td>52</td>
<td>105</td>
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<tr>
<td>Undocumented Workers*</td>
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<td>Whistleblower</td>
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<td>11</td>
<td>65</td>
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<tr>
<td>Garment Industry*</td>
<td>7</td>
<td>7</td>
<td>11</td>
<td>7</td>
<td>63</td>
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<tr>
<td>Displaced Homemakers</td>
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<td>2</td>
<td>6</td>
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<td>Genetic Testing</td>
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<td>Department of Labor</td>
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<td>Workers with Disabilities</td>
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<td>Garment Industry*</td>
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<td>Offsite Work</td>
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<tr>
<td>Human Trafficking</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>7</td>
</tr>
</tbody>
</table>

* *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.
Table 2: State Employment Laws as a Share of All Laws Enacted (percent), 1960-2014

<table>
<thead>
<tr>
<th>State</th>
<th>Share of Laws Enacted (%)</th>
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<tr>
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<td>AK</td>
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<tr>
<td>HI</td>
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<tr>
<td>MN</td>
<td>1.27</td>
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<tr>
<td>NJ</td>
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</tr>
<tr>
<td>OH</td>
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<tr>
<td>OR</td>
<td>1.20</td>
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<tr>
<td>WA</td>
<td>1.17</td>
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<tr>
<td>WI</td>
<td>1.13</td>
</tr>
<tr>
<td>CT</td>
<td>1.09</td>
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<tr>
<td>IL</td>
<td>1.07</td>
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<td>ME</td>
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<td>UT</td>
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<td>KS</td>
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<tr>
<td>OK</td>
<td>0.74</td>
</tr>
<tr>
<td>MA</td>
<td>0.46</td>
</tr>
<tr>
<td>ND</td>
<td>0.73</td>
</tr>
<tr>
<td>NM</td>
<td>0.45</td>
</tr>
<tr>
<td>NY</td>
<td>0.72</td>
</tr>
<tr>
<td>SD</td>
<td>0.42</td>
</tr>
<tr>
<td>WY</td>
<td>0.72</td>
</tr>
<tr>
<td>AR</td>
<td>0.36</td>
</tr>
<tr>
<td>CO</td>
<td>0.71</td>
</tr>
<tr>
<td>SC</td>
<td>0.36</td>
</tr>
<tr>
<td>PA</td>
<td>0.71</td>
</tr>
<tr>
<td>GA</td>
<td>0.36</td>
</tr>
<tr>
<td>MD</td>
<td>0.71</td>
</tr>
<tr>
<td>AL</td>
<td>0.25</td>
</tr>
<tr>
<td>NE</td>
<td>0.69</td>
</tr>
<tr>
<td>MS</td>
<td>0.14</td>
</tr>
</tbody>
</table>

Bold and shaded = >1 standard deviation above/below mean (0.79)
Note: no tally of all enactments available for Washington, D.C.

Table 3: Explaining Employment Laws Enacted by Session

Dependent variable: Employment laws enacted by session (1976-2013)

<table>
<thead>
<tr>
<th></th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Union density</td>
<td>0.158***</td>
<td>0.167***</td>
<td>0.0877***</td>
<td>0.0896***</td>
</tr>
<tr>
<td>(0.0240)</td>
<td>(0.0208)</td>
<td>(0.0241)</td>
<td>(0.0329)</td>
<td></td>
</tr>
<tr>
<td>Democratic control of legislature</td>
<td>1.073***</td>
<td>1.076***</td>
<td>1.556***</td>
<td>1.767***</td>
</tr>
<tr>
<td>(0.259)</td>
<td>(0.226)</td>
<td>(0.486)</td>
<td>(0.380)</td>
<td></td>
</tr>
<tr>
<td>Citizen ideology</td>
<td>0.0235***</td>
<td>0.0318***</td>
<td>0.00253</td>
<td>0.0120</td>
</tr>
<tr>
<td>(0.00612)</td>
<td>(0.00525)</td>
<td>(0.0151)</td>
<td>(0.0145)</td>
<td></td>
</tr>
<tr>
<td>Unemployment</td>
<td>0.00507</td>
<td>-0.116</td>
<td>0.0946</td>
<td>-0.113</td>
</tr>
<tr>
<td>(0.133)</td>
<td>(0.120)</td>
<td>(0.101)</td>
<td>(0.0934)</td>
<td></td>
</tr>
<tr>
<td>% Manufacturing employment</td>
<td>-8.160***</td>
<td>-8.332***</td>
<td>-6.646**</td>
<td>-6.271</td>
</tr>
<tr>
<td>(1.790)</td>
<td>(1.700)</td>
<td>(3.278)</td>
<td>(3.965)</td>
<td></td>
</tr>
<tr>
<td>Average personal income</td>
<td>0.000106***</td>
<td>4.93e-05**</td>
<td>8.59e-05***</td>
<td>-8.48e-05**</td>
</tr>
<tr>
<td>(1.10e-05)</td>
<td>(2.03e-05)</td>
<td>(1.16e-05)</td>
<td>(3.48e-05)</td>
<td></td>
</tr>
<tr>
<td>Total legislative enactments</td>
<td>0.00513***</td>
<td>0.00523***</td>
<td>0.00333***</td>
<td>0.00293***</td>
</tr>
<tr>
<td>(0.000542)</td>
<td>(0.000634)</td>
<td>(0.000390)</td>
<td>(0.000553)</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year fixed effects</th>
<th>No</th>
<th>Yes</th>
<th>No</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>State fixed effects</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Constant</td>
<td>-3.686***</td>
<td>-4.301***</td>
<td>-0.696</td>
<td>0.463</td>
</tr>
<tr>
<td>(1.025)</td>
<td>(1.185)</td>
<td>(1.416)</td>
<td>(1.575)</td>
<td></td>
</tr>
<tr>
<td>Observations</td>
<td>931</td>
<td>931</td>
<td>931</td>
<td>931</td>
</tr>
<tr>
<td>R-squared/within R-sq</td>
<td>0.411</td>
<td>0.434</td>
<td>0.1361</td>
<td>0.1956</td>
</tr>
<tr>
<td>Number of groups</td>
<td>49</td>
<td>49</td>
<td>49</td>
<td>49</td>
</tr>
</tbody>
</table>
Table 4: Explaining Sum of Employment Laws Enacted in States Over Time

<table>
<thead>
<tr>
<th></th>
<th>Dependent variables:</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1) Total # of employment laws enacted by state</td>
<td>(2) Employment laws as a share of all laws enacted</td>
<td>(3) Scope of employment laws (% categories)</td>
</tr>
<tr>
<td>Change in union density</td>
<td>5.518**</td>
<td>0.0438***</td>
<td>0.584**</td>
</tr>
<tr>
<td>(1974-2014)</td>
<td>(2.133)</td>
<td>(0.0153)</td>
<td>(0.243)</td>
</tr>
<tr>
<td>Base union density (avg.</td>
<td>5.943***</td>
<td>0.0473***</td>
<td>0.422**</td>
</tr>
<tr>
<td>1969-1973)</td>
<td>(1.615)</td>
<td>(0.0115)</td>
<td>(0.166)</td>
</tr>
<tr>
<td>Democratic control of state leg. (years)</td>
<td>0.383</td>
<td>0.00154</td>
<td>0.0977*</td>
</tr>
<tr>
<td></td>
<td>(0.438)</td>
<td>(0.00305)</td>
<td>(0.0503)</td>
</tr>
<tr>
<td>Citizen ideology</td>
<td>1.422</td>
<td>0.00159</td>
<td>-0.0815</td>
</tr>
<tr>
<td></td>
<td>(3.106)</td>
<td>(0.0221)</td>
<td>(0.246)</td>
</tr>
<tr>
<td>Unemployment</td>
<td>-14.23**</td>
<td>-0.0954**</td>
<td>-1.540**</td>
</tr>
<tr>
<td></td>
<td>(6.259)</td>
<td>(0.0433)</td>
<td>(0.682)</td>
</tr>
<tr>
<td>Base % manufacturing</td>
<td>-280.3</td>
<td>0.771</td>
<td>-12.16</td>
</tr>
<tr>
<td></td>
<td>(269.7)</td>
<td>(1.920)</td>
<td>(31.47)</td>
</tr>
<tr>
<td>Change in manufactur. employment</td>
<td>-441.6</td>
<td>0.633</td>
<td>-21.71</td>
</tr>
<tr>
<td></td>
<td>(383.2)</td>
<td>(2.713)</td>
<td>(43.22)</td>
</tr>
<tr>
<td>Avg personal income</td>
<td>-0.00267</td>
<td>-1.23e-05</td>
<td>-0.000297</td>
</tr>
<tr>
<td></td>
<td>(0.00231)</td>
<td>(1.64e-05)</td>
<td>(0.000273)</td>
</tr>
<tr>
<td>Total enactments</td>
<td>0.00482***</td>
<td>0.000764</td>
<td>0.000764</td>
</tr>
<tr>
<td>CA</td>
<td>178.1***</td>
<td>(40.16)</td>
<td></td>
</tr>
<tr>
<td>RTW</td>
<td>-17.56</td>
<td>-0.104</td>
<td>-2.072</td>
</tr>
<tr>
<td></td>
<td>(12.68)</td>
<td>(0.0903)</td>
<td>(1.515)</td>
</tr>
<tr>
<td>Constant</td>
<td>89.35</td>
<td>1.004*</td>
<td>33.89***</td>
</tr>
<tr>
<td></td>
<td>(84.81)</td>
<td>(0.592)</td>
<td>(7.323)</td>
</tr>
<tr>
<td>Observations</td>
<td>50</td>
<td>50</td>
<td>51</td>
</tr>
<tr>
<td>R-squared</td>
<td>0.842</td>
<td>0.573</td>
<td>0.313</td>
</tr>
</tbody>
</table>

Standard errors in parentheses. (*** p<0.01, ** p<0.05, * p<0.1). Dependent variables for each model are listed in top row and described in the text. Employment Laws is from Monthly Labor Review annual summaries. Change in union density is percentage point change in union density (1974-2014) and Base union density is from 1970, both are 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 (2013): 349-54. Unemployment is the average annual unemployment from 1976 (first year of comparable data) from the Bureau of Labor Statistics’ “Civilian Noninstitutional Population and Associated Rate and Ratio Measures for Model-Based Areas” (https://www.bls.gov/lau/rdsnp16.htm). Democratic control, both houses is years of Democratic control of both state houses, from Carl E. Klarner, ”Measurement of the Partisan Balance of State Government,” State Politics and Policy Quarterly 3 (2003): 309-19, as well as updates available on the State Politics and Policy Web site, and National Conference of State Legislatures. (Note: DC added by author. Nebraska assumed to be zero. If a legislature is 50-50, it is not coded as Democratic control.) Citizens’ ideological liberalism is from Peter K Enns and Julianna Koch, "Public Opinion in the Us States: 1956 to 2010," State Politics & Policy Quarterly 13 (2013): 349-72. Nonfarm workforce is average annual nonfarm employment from Bureau of Economic Analysis. California is a dummy for California. Right to work is a dummy for right to work prior to 1974, from National Conference of State Legislatures.
Table 5:
Explaning Sum of Employment Laws Enacted in States Over Time (Robustness Checks)

<table>
<thead>
<tr>
<th>Dependent variables:</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment laws enacted by state (1974-2014), “pro-employer” laws excluded</td>
<td>4.559**</td>
<td>0.0336**</td>
<td>0.0232**</td>
</tr>
<tr>
<td>(1.967)</td>
<td>(0.0131)</td>
<td>(0.00890)</td>
<td></td>
</tr>
<tr>
<td>Base union density (avg, 1969-1973)</td>
<td>5.096***</td>
<td>0.0381***</td>
<td>0.0225***</td>
</tr>
<tr>
<td>(1.489)</td>
<td>(0.00981)</td>
<td>(0.00668)</td>
<td></td>
</tr>
<tr>
<td>Democratic control of state leg. (years)</td>
<td>0.449</td>
<td>0.00259</td>
<td>-0.000347</td>
</tr>
<tr>
<td>(0.404)</td>
<td>(0.00260)</td>
<td>(0.00177)</td>
<td></td>
</tr>
<tr>
<td>Citizen ideology</td>
<td>2.164</td>
<td>0.0136</td>
<td>-0.00265</td>
</tr>
<tr>
<td>(2.864)</td>
<td>(0.0188)</td>
<td>(0.0128)</td>
<td></td>
</tr>
<tr>
<td>Change in union density (1974-2014)</td>
<td>-14.32**</td>
<td>-0.106***</td>
<td>-0.0422</td>
</tr>
<tr>
<td>(5.772)</td>
<td>(0.0369)</td>
<td>(0.0251)</td>
<td></td>
</tr>
<tr>
<td>Base % manufacturing</td>
<td>-242.6</td>
<td>0.946</td>
<td>0.603</td>
</tr>
<tr>
<td>(248.7)</td>
<td>(1.636)</td>
<td>(1.114)</td>
<td></td>
</tr>
<tr>
<td>Change in manufactur. employment</td>
<td>-391.6</td>
<td>0.924</td>
<td>0.457</td>
</tr>
<tr>
<td>(353.3)</td>
<td>(2.312)</td>
<td>(1.574)</td>
<td></td>
</tr>
<tr>
<td>Avg personal income</td>
<td>-0.00283</td>
<td>-1.60e-05</td>
<td>-8.07e-06</td>
</tr>
<tr>
<td>(0.00213)</td>
<td>(1.40e-05)</td>
<td>(9.50e-06)</td>
<td></td>
</tr>
<tr>
<td>Total enactments</td>
<td>0.00407***</td>
<td>(0.000705)</td>
<td></td>
</tr>
<tr>
<td>CA</td>
<td>155.5***</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(37.02)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>RTW</td>
<td>-15.21</td>
<td>-0.0919</td>
<td>-0.0250</td>
</tr>
<tr>
<td>(11.69)</td>
<td>(0.0770)</td>
<td>(0.0524)</td>
<td></td>
</tr>
<tr>
<td>Constant</td>
<td>78.31</td>
<td>0.861*</td>
<td>0.536</td>
</tr>
<tr>
<td>(78.20)</td>
<td>(0.504)</td>
<td>(0.343)</td>
<td></td>
</tr>
<tr>
<td>Observations</td>
<td>50</td>
<td>50</td>
<td>50</td>
</tr>
<tr>
<td>R-squared</td>
<td>0.826</td>
<td>0.584</td>
<td>0.402</td>
</tr>
</tbody>
</table>
FIGURES

Figure 1: Union Density, 1880-2016

Union Density, 1880-2016
(percentage of nonagricultural workers who are members of unions)

Figure 2: Work stoppages involving 1,000 or more workers, 1947-2016
Figure 3: Employment Laws as a Share of All Enacted Laws by Session

Figure 4: Total Number of Employment Laws Enacted, 1960-2014
Figure 5: State Employment Laws as a Share of All Laws Enacted, 1960-2014

Figure 6: Growth of Worker Centers


2 29 U.S.C. §§ 151-169


8 Annette D. Bernhardt, et al., The Gloves-Off Economy: Workplace Standards at the Bottom of America's Labor Market (Champaign, IL: Labor and Employment Relations Association, 2008);

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-


17 29 U.S.C. §§ 151-169


21 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 Hirsch and Macpherson, "Union Membership and Coverage Database from the


On “fissuring,” 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.


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-


37 Estlund, "Rebuilding the Law of the Workplace in an Era of Self-Regulation," 321. Similarly, Theodore J. St. Antoine 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.

38 Sachs, "Employment Law as Labor Law," p. 2687


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

41 County and municipal-level employment laws are also frequently cited. See *supra*, note 8.


43 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.


I hasten to add that some of the laws in the dataset are clearly aimed at reducing the regulatory burden on employers and limiting their liability. And the purposes of some laws are difficult to discern due to unclear descriptions. A plain reading of the summaries, however, indicates that the overwhelming majority of the enacted laws are designed to advance workers’ rights and provide statutory protections from exploitation. A qualitative effort at hand coding the summaries indicates that only 16% of the laws aim to roll back workers’ rights, liberties, protections, or benefits, and/or provide less regulation of employers. Robustness checks of the statistical analysis that follow -- with and without these laws included – are shown below. To be as conservative as possible, the main analyses presented include all the laws mentioned (thus biasing the analyses against the findings that more Democratic states with stronger labor unions enacted more laws – discussed further below).


Freeman and Medoff, *What Do Unions Do?*


303-349; Milkman, *L.A. Story: Immigrant Workers and the Future of the U.S. Labor Movement*;


68 Pierson, "When Effect Becomes Cause: Policy Feedback and Political Change,"

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

70 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.

71 Eidelson, "Alt-Labor,"; Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*.

of the Labor Movement; Milkman, Bloom and Narro, Working for Justice: The L.A. Model of Organizing and Advocacy


75 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.


77 Fine, Worker Centers: Organizing Communities at the Edge of the Dream; Steven A Camarota, "A Record-Setting Decade of Immigration, 2000 to 2010," Center for Immigration

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


80 Interfaith Worker Justice, "Current and Pending Wage Theft Legislation,"


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

"Democratic Party Adopts $15 National Minimum Wage to Party Platform,”


Belated Feudalism: Labor, the Law, and Liberal Development in the United States

Ibid., p. 128.

Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party


Weiler, Governing the Workplace: The Future of Labor and Employment Law


lawsuits; second, by gutting NLRA Section 7 protections for “concerted activities,” which would harm alt-labor in particular, which often relies on the protections of Section 7 to galvanize collective action.

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


103 Aaron Gupta,"Fight for 15 Confidential," In These Times, November 11, 2013


105 Mark Dudzic,"The Afl-Cio "on the Beach"," New Labor Forum, June 1, 2017


Gordon, "Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations."