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

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Version: September 25, 2018

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ABSTRACT

Over the past several decades, a new kind of labor politics has emerged in new venues (state and local levels), focusing on new governing institutions (employment laws), involving new strategies by labor unions, and featuring new organizational forms (alt-labor). The timing, form, and content of these developments have been powerfully shaped by the persistence of the increasingly outmoded but still authoritative national labor law, which has constrained and channeled the efforts of workers and their advocates to respond to growing problems. While the new institutions and organizations provide new substantive rights for workers and alternative vehicles for voice and collective action, the layering of these new forms alongside the old—without displacing the latter—has generated new problems without solving the problems produced by the ossification of labor law in the first place. Using novel empirical data and analysis, this paper documents these changes, explores their causes, and considers their consequences for the changing politics of workers’ rights.
There has always been a vast power asymmetry in the American workplace—a great imbalance between the prerogatives of employers, on one hand, and the rights of employees on the other. The magnitude of this imbalance has fluctuated over time, however, along with changes in the primary institutions constituting workers’ rights. At different points in American history, these institutions have provided workers with more or fewer legal protections against exploitation and wider or narrower pathways for collective action.

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

But over the last half-century, a confluence of economic, legal, political, and social trends has rendered labor law effectively irrelevant for the vast majority of private sector workers. Different scholars weigh different factors more heavily than others, but these trends are often said to include deindustrialization and the changing composition of industries; the development of global supply chains and production processes predicated on subcontracting, outsourcing, and
offshoring, which undermine the traditional employment relationship; capital flight from mostly pro-labor states to mostly anti-union states; technological change; a series of employer-friendly court decisions allowing permanent replacements, restricting the scope of collective bargaining, and more; the political mobilization of business and its growing clout within both parties; the gaining electoral strength of the national GOP; the rise of partisan polarization; and employers’ growing adeptness at exploiting labor law’s loopholes to deter or quash unionization drives with relative impunity.\(^4\)

Despite multiple attempts by workers and their advocates to update the law to better keep pace with changing conditions – including the ill-fated campaigns for the Labor Law Reform Act of 1978 and the Employee Free Choice Act of 2009 – opponents have leveraged institutional veto points to block those reforms and maintain the status quo. Indeed, since the major Taft-Hartley amendments of 1947, the NLRA has only been altered twice: the Landrum-Griffin Act of 1959 (regulating unions’ internal affairs) and the minor health care amendments of 1974 (restoring coverage to non-profit hospital employees). For multiple decades, then, national labor law has remained awkwardly fixed in place, “ossifying,” “stagnating,” shrinking in “reach and significance,” and “more and more resembl[ing] an elegant tombstone for a dying institution.”\(^5\)

Labor law has thus undergone a transformation of function but not form – a process Cynthia Estlund terms “ossification” and Jacob Hacker and colleagues call “policy drift.”\(^6\)

However this process is conceptualized, the consequences are plain to see. By 2017, the percentage of all unionized wage and salary workers had fallen to 10.7 percent, with only 6.5 percent in the private sector.\(^7\) Employees in all industries have become more vulnerable to exploitation and abuse, wage theft, discrimination, uncompensated workplace injuries, political
pressure, and more, with those at the bottom of the income scale and the least bargaining power most at risk.8

Workers and their advocates have responded to these urgent problems by developing a broad range of strategies to recover institutional protections for workers and rebuild their collective power. In recent years, for example, they have experimented with “social bargaining” between workers, government, and business – sometimes called tripartism or corporatism – to set basic standards of employment at the sectoral, regional, or local levels, and called for its broader use9; proposed the establishment of wage boards as an alternative route to tripartism10; strategically leveraged the anti-retaliation provisions of federal employment and civil rights laws to vindicate workers’ rights and promote concerted action11; enacted local ordinances extending collective bargaining rights to workers excluded from national labor law (such as independent contractors and “gig” workers)12; forged stronger partnerships between government and worker organizations in the “co-enforcement” of labor standards13; implemented systems of “self-regulation” in which groups of employees work in concert with outside monitors to expose employer malfeasance, mobilize the regulatory capacities of the state, and initiate litigation to redress employees’ grievances14; and expanded the use of “private attorneys general” laws to circumvent mandatory arbitration clauses and enable individual employees to file lawsuits on behalf of themselves, other employees, and the state for employers’ violations of employment statutes and labor codes.15

Notably, all such reforms share two key features. First, they all represent workaround solutions. Contending with a national labor that is irrelevant for the vast majority of American workers but also an immovable object, they layer new forms atop old forms, exploit loopholes in existing law, and seek to scale up local experiments.16 Second, each envisions a central role for
employment law in galvanizing, empowering, and protecting workers. This, I will argue, reflects an historical-institutional development of vast significance: the gradual shift from labor law to employment law as the primary “guardian” of workers’ rights.17

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

The dramatic growth of subnational employment laws since the 1960s thus appears to represent an historic shift in the primary institutions constituting workers’ rights—one at least as consequential as the advent of collective bargaining in the 1930s, if not more so, given the larger proportion of workers affected. Of course for most workers, employment law has long been the only institutional guarantor of rights in the workplace, since even at the height of unionism in the U.S., a majority of workers remained un-unionized. But until recently, the scope and content of 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 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
coaition-building among allied advocacy groups. Over the past thirty years, for example, worker
centers and other nonprofit “alt-labor” groups have emerged as important organizational anchors
of the labor movement. Not subject to the same restrictions as labor unions – but lacking unions’
right of exclusive representation in collective bargaining – these nontraditional worker
organizations have developed a broad range of political and social-movement tactics to help
improve the terms and conditions of work for many low-wage workers. They have engaged in
policy campaigns, street-level protests, secondary boycotts, direct corporate campaigns, legal
actions, and media outreach strategies while forging alliances with traditional labor unions,
kindred social movements, and state agencies. Although these organizational developments and
strategic shifts have emerged slowly and have largely escaped the attention of professional
political science, they constitute a veritably new phase of U.S. labor politics.20

Critically, however, these twin institutional and organizational developments have not
emerged on a blank slate. For even as labor law has become an increasingly insufficient
foundation for building worker power, it has remained fixed in place, exerting a powerful,
jealous, and continuous governing authority in its expansive domain. Indeed, it has become
almost as significant for what it prohibits as for what it allows: in addition to denying collective
bargaining rights to millions of vulnerable workers by excluding key industries and occupations
from coverage (domestic work, agricultural work, independent contractors, and contingent
workers), the law has long been interpreted by courts as preemting any and all state efforts to
regulate private sector labor-management relations.21 Preemption thus eliminates potentially
generative sources of labor law innovation and experimentation and boxes in reformers, severely
limiting their range of options. Unable to start from scratch and design new institutions better
suited to changing economic and political conditions, workers and their advocates have had to structure their innovations to carefully circumvent or work within the confines of the stubbornly persistent labor law without intruding into its broad purview. In this way, labor law has insinuated itself into the new state-level employment laws that have emerged as well as the recent workaround proposals mentioned above. As I will elaborate below, the constraints labor law imposes are evident in the new laws’ delimited substantive content, distinctive forms, and alternative delivery mechanisms.

Similar effects 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 (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. Labor law has also powerfully shaped the new advocacy groups that have formed in response to the growing need for worker representation. They bear labor law’s imprint in both their organizational forms and in the scope of their activities. While these new groups can do some things labor unions cannot do, they cannot do other things labor unions can; and although in many areas their interests and activities align perfectly, in others, they conflict. The relationship between new and old worker organizations is complex, but the historical-organizational pattern is clear: nontraditional worker organizations, which have emerged slowly and relatively recently, have entered an arena in which many of the most significant resources – both material and ideational – are controlled by labor unions, the groups with the strongest stake in the “old” labor law regime and whose own commitments and operations remain powerfully shaped by it.
The political significance of the shift from labor law to employment law, I will argue, can be located precisely there, in the constraints imposed by the outmoded but persistent national labor law regime on the institutional and organizational responses of workers and their advocates to growing problems. My central argument is that the labor law regime – its institutional persistence as well as its organizational feedback effects – has powerfully shaped the timing, content, and form of the new institutions and organizations that have emerged. State-level employment laws now bear labor law’s imprint in their limited content and reach, disjointed delivery mechanisms, high barriers to access for most workers, and in 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, organizational strategy, and permissible legal pathways forward. Moreover, while the new institutions and organizations that have emerged do provide new substantive rights for workers and alternative vehicles for voice and collective action, the “layering” of these new forms 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.

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

Moreover, the theoretical perspective adopted here – emphasizing the significance of historical-institutional developments in shaping substantive outcomes – enables us to zero in on key developmental dynamics such as how old institutions and organizations can constrain and limit the options of downstream reformers and how the early beneficiaries of a policy’s feedback effects can persist and shape subsequent political developments. For example, as I discuss in greater detail below, labor unions – which thrived off of labor law’s feedback effects in the early years of the policy’s development – were instrumental in the construction of alternative institutions (state-level employment laws) and the development of new organizations and mobilization strategies in later years. These efforts, in turn, were politically formative: although they did not necessarily solve the main problems they sought to redress, they did generate a whole new set of complications and problems for the labor movement as a whole. As a case, then, this study offers an illustration of the “new politics” that scholars have argued can emerge from the processes of policy “feedback,” institutional “layering,” and “intercurrence,” showing how old and new institutions and organizations can intersect in time to create a veritably new politics of workers’ rights.

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. Complementing these findings, this study argues that there has also arisen a veritably new politics surrounding questions of workplace governance—structured by the persistence of an outmoded but powerful labor law regime and characterized by the new problems generated by the abrasion of old and new institutions and organizations operating simultaneously at different levels of the federal system.

In the first section below, I provide a brief overview of labor law’s early feedback effects and subsequent decline in effectiveness. The three empirical sections that follow then present evidence of the emergence of state employment laws, the role labor unions have played in the construction and deployment of 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.

The Development and Decline of Labor Law

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

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

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. The share of non-agricultural private sector workers belonging to a union more than doubled from 13 to 27 percent between 1936 and 1938 and did not dip below a quarter of the workforce until 1975. Despite the challenges posed by the Taft-Hartley amendments of 1947, union density remained above 30 percent throughout the seventeen-year stretch between 1943 and 1960 (Figure 1).

The collective bargaining system established through national labor law also had profound feedback effects on workers’ and employers’ political capacities. As Theda Skocpol writes, policies can “affect the capabilities of various groups to achieve self-consciousness, organize, and make alliances.” Labor law encouraged workers to view their interests as collective interests that could be pursued through self-organization and collective action. Indeed, as the collective bargaining system matured, the range of imaginable alternatives for
reform narrowed: as Nelson Lichtenstein, Ira Katznelson, and others have shown, by the early
post-war period, more radical possibilities had been eliminated from the realm of possibility and
the collective bargaining regime had become largely taken for granted.40 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.41 In
these ways and more, the Wagner Act “made” labor politics in America.42

As a legal matter, the NLRA has long maintained exclusive governing authority over an
extremely broad domain. In 1959, the Supreme Court ruled in San Diego Building Trades
Council v. Garmon that the NLRA barred any and all state and local efforts to legislate in the
areas of labor law it covered, prohibiting regulation in areas “even ‘arguably’ protected” by the
NLRA.43 Unlike the Fair Labor Standards Act (FLSA) of 1938, which allowed states to enact
stronger protections and set higher minimum standards than federal law provided, the “Garmon
doctrine” prohibited state efforts to do anything similar.44 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.45 States were
permitted to design their own labor laws only for those workers excluded from coverage under
the Wagner Act, such as public sector and agricultural workers. If they sought to provide
stronger rights and greater protections to a wider range of workers, they would need to find
alternative routes for doing so. The Wagner Act was to be the primary, authoritative, centralized
labor law in the United States that would enjoy an effective monopoly on the process of
collective bargaining and unionization for the vast majority of workers.
Even the controversial Taft-Hartley amendments of 1947 – ostensibly designed to protect employees’ rights, but in practice, privileging employers’ prerogatives – did not disturb the Garmon preemption doctrine, alter the presumption of enterprise bargaining, or make the law any more tractable for creative reformers. Although Taft-Hartley and the subsequent Landrum-Griffin reforms of 1959 added more challenges for unions, their enactment served to further entrench the structural and procedural arrangements established through national labor law and further ratify the NLRA’s exclusive governing authority over labor-management relations.

Indeed, even as national labor law gradually became an ever-more glaring “mismatch” with global and domestic economic developments, its basic structures remained entirely unchanged. Despite vast changes in the composition of industries, in patterns of capital investment, and in the nature of work – despite the “bewilderingly complex proliferation of employment relationships that structure work in the modern city, college, or company” featuring “layer after layer of subcontractors and vendors” – national labor law remained as it was. As such, it became increasingly unable to provide the vast majority of private sector workers with access to representation in the workplace. As the protections and rights available through national labor law gradually reached fewer and fewer workers, employees in all industries became more vulnerable to exploitation and abuse. Employment became more precarious, income inequality widened, wages stagnated, and the power asymmetry in the workplace grew. But this was no accident or oversight: despite attempts by labor unions and their allies to update the law to better keep pace with changing economic conditions – by streamlining union election procedures (“card check”), increasing penalties for employer interference, by eliminating the NLRA’s preemption of state labor laws to allow experimentation, and more – opponents (chiefly
business-funded Republicans but also some Democrats) successfully blocked reforms from advancing through the legislative process.\footnote{48}

As Kate Bronfenbrenner and Tom Juravich have shown in their ground-breaking work, employers benefited greatly from the status quo. Anti-union employers regularly exploited its loopholes and blind spots and even blatantly violated the law in order to deter and quash unionization drives. They used “a combination of legal and illegal approaches” such as illegally discharging workers for participating in union activity, “captive-audience meetings, employer leaflets and mailings, supervisor one-on-ones, and illegal wage increases.”\footnote{49} They also became more politically engaged over the years, developing a multi-pronged approach to promoting their interests and curtailing workers’ rights. As Alexander Hertel-Fernandez has shown in a series of recent articles, business began in the 1970s to build a “durable ‘conservative-corporate’ subnational coalition” and a formidable organizational infrastructure to advance its legislative aims, “systematically changing the state policy landscape in ways that disadvantaged their political opponents over the long run.”\footnote{50} For example, the pro-business American Legislative Exchange Council (ALEC) developed “model bills,” many explicitly aimed at “weakening labor unions,” and was broadly successful, especially in states with low policy capacity and high ideological conservatism.\footnote{51}

To be sure, many additional factors contributed to the growing inability of labor law to provide workers’ rights and protections to the vast majority of workers, including the conservatism and mismanagement of union leaders; the changing attitudes of workers; the “changing relation of class forces,” and more.\footnote{52} Studies have also emphasized how institutional and ideational abrasions between the emergence of civil rights consciousness, activism, and enforcement, on one hand, and labor rights and collective commitments, on the other,
contributed to the enervation of labor law and the labor movement more broadly. For example, as Paul Frymer has brilliantly shown, as a result of a “bifurcated system of power that assigned race and class problems to different spheres of government,” the enforcement of civil rights laws “unintentionally weakened national labor law,” ultimately producing a more “diverse but weakened labor movement.” Nelson Lichtenstein has argued that it was also an unsustainable ideational conflict between “the concept of rights and that of solidarity, between the civil rights consciousness that has proven so potent during the last half century and the collective institutionalism that stands at the heart of the union idea” which contributed to labor’s decline. “As the former became a near hegemonic way of evaluating the quality of American citizenship,” he summarized, “the latter atrophied. Indeed, in its most extreme interpretation, rights consciousness subverts the mechanisms, both moral and legal, that sustain the social solidarity upon which trade unionism is based.”

As is evident, the causes of labor’s decline are multifaceted and complex; and its consequences are equally multiform. But for the purposes of the present analysis, two key features of labor law and its subsequent decline stand out as especially important. First, even as labor law became increasingly ineffective, its stubborn persistence, broad authority, and preemption of subnational innovation limited the options of workers’ rights activists and reformers. Efforts to promote and defend workers’ rights were (and continue to be) formulated in light of those limits; reformers must either work within or around immobile national labor law. By cordoning off potential pathways for reform, labor law has powerfully shaped the substantive content and institutional form of the alternative policy instruments that have emerged, as I will elaborate further below.
Second, labor law’s ossification and drift altered the balance of power among organized interests. Those with the greatest stake in matters of labor-management relations did not disappear, but rather came to embrace qualitatively different kinds of politics. Business interests – the “losers” in the New Deal – gradually shifted from offense to defense, and their main task became one of simply preserving the legal status quo. In the absence of formal policy change, employers could continue to exploit labor law’s weaknesses to make unionization more difficult while letting changes in the broader economic context further enervate and fractionalize workers, undermining what remained of the labor movement.55

Meanwhile, labor unions and their allies – the “winners” in the New Deal but increasingly the “losers” in the post-Taft Hartley period – gradually shifted from defense to offense (some say too gradually). Organizationally mature, resource-rich, and politically experienced, many labor unions responded to the growing problems facing workers by developing innovative organizing strategies and building new policy instruments in alternative venues to achieve many of the same purposes as labor law, but through different means and mechanisms.56 And as new groups nontraditional workers’ advocacy groups gradually emerged in this organizational space to meet the needs of an increasingly fragmented and vulnerable workforce, their goals dovetailed with unions’ goals but their approach was quite different (in part because as nonprofit, non-union groups, it legally had to be): these new organizations experimented with creative strategies to help those workers left behind by labor law’s ossification while accommodating the realities of the changing legal and economic landscape. Many of the new and emergent tactics in the labor movement have thus evolved as responses to old but persistent institutional constraints and the growing obsolescence of old organizing tactics;
as I will discuss further below, synergies, conflicts, and ongoing negotiations between allies new
and old now constitute the labor movement.

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

The “Changing of the Guard” from Labor Law to Employment Law

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

“The significant fact is that collective bargaining does not regulate the labor
market. Unions and collective agreements do not guard employees from the potential
deprivations and oppressions of employer economic power. The consequence is
foreseeable, if not inevitable; if collective bargaining does not protect the individual
employee, the law will find another way to protect the weaker party. The law, either
through the courts or the legislatures, will become the guardian. Labor law is now in the
midst of that changing of the guard. There is current recognition that if the majority of
employees are to be protected, it must be by the law prescribing at least certain rights of
employees and minimum terms and conditions of employment.”57

Summers’ rather functionalist depiction of this shift notwithstanding, the notion that there
has been a historic shift in the “guardian” of workers’ rights has been confirmed and elaborated
by numerous legal scholars. 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.” Scholars including Nancy MacLean and Benjamin Sachs have helpfully brought workers back in to the story, with Sachs vividly describing this shift as a “hydraulic” process driven by workers themselves:

“The deep dysfunctionality of the NLRA constitutes a blockage only of the traditional legal channel for collective action and labor-management relations. Because workers, unions, and certain employers continue to demand collective organization and interaction, this blockage has led not to ‘ossification’ but to a hydraulic effect: unable to find an outlet through the NLRA, the pressure from this continuing demand for collective action has forced open alternative legal channels…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.”

Richard Bales further observes that by 1991, “in addition to enacting state statutes that parallel the federal statutes…state legislatures have passed legislation protecting employees in a wide variety of other circumstances,” including in areas as diverse as wrongful discharge, whistleblowing, employee testing, and workplace safety and health. And although Theodore St. Antoine focuses on state courts’ role in reshaping the doctrine of doctrine of at-will employment, he too keenly observes that “the most important and dramatic development in employment law over the last couple of decades came at the state level, not the federal.”

In other words, the importance of employment laws at both the federal and state levels for workers’ rights has been widely noted and discussed by attentive scholars. But to date, no
empirical evidence has been systematically marshaled to substantiate the claim that employment law has, in fact, grown. Nor, consequently, has any existing work been able to systematically analyze its substantive complexity or begin to hazard an explanation for its variation across space and time. Thus while we think we know employment law has grown, we do not know what it consists of, where it has grown most, or whether its development is owed in any part to labor unions. For example, St. Antoine’s claim that “part of the growth we have seen in employment law, as distinguished from labor law, is attributable to the decline of organized labor,” is an empirical question that we have yet to answer.64

Part of the reason for this empirical lacuna is practical, as tens of thousands of new laws are enacted every year at the state level and systematically obtaining reliable, equivalent information on the many different types of employment laws passed in 50 states over many decades appears daunting. But as it turns out, the Department of Labor has continuously monitored, recorded, categorized, and summarized employment law enactments at the state level every year for many decades. Expert staff members write and publish summary reports of all laws passed during the prior year along with short descriptions of each in the Bureau of Labor Statistics’ Monthly Labor Review (MLR).65 The format and authorship of the reports have been remarkably stable over time, with over 90% of the reports issued between 1960 and 2014 authored by the same five individual authors, with some overlap between them.

With a small team of research assistants, I used these reports to construct a dataset of every legislative enactment between 1960-2014, coded according to the categories listed in the reports (“wages,” “hours of work,” “plant closings,” “child labor,” “whistleblower,” and so on).66 During this period, states enacted 7,336 employment laws in 33 categories, and their attention to employment law grew steadily over the years. As Figure 2 indicates, across all states,
employment laws as a share of all enacted bills *more than quintupled* over those fifty-five years. At precisely the same time that national labor law atrophied and private sector union membership plummeted, state legislatures evidently became increasingly preoccupied with employment law.

Of course, new laws are not enacted in a vacuum. Many build on extant laws, addressing weaknesses that have become apparent in the course of events, and are often designed with the state’s existing administrative capacities in mind. Once a given state passes a pay equity law, for example, it need not pass another law to establish the same standard, but it may develop additional laws to bolster the enforcement of the primary law, add new categories of covered occupations, and so on. Many new laws thus build upon previous laws and alter their operation in ways both big and small. **Figure 2** should therefore be interpreted as an aggregate count of laws that are actually often cumulative in nature. Still, as discussed further below, the simple measure of the *volume* of state employment laws enacted over time – including both minor and major enactments together – is highly correlated with multiple alternative measures of the strength of statewide protections for workers, and remains quite useful in over-time analyses.67

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

The *relative attention* paid to different areas of employment law has changed as well. Grouping the 33 types of employment laws into four relatively distinct groups – Wages; Hours and Leave; Discrimination and Retaliation; and Terms and Conditions of Employment (see Table 2) – we can see that employment laws dealing with Wages became less common over the years relative to other types of laws, especially those pertaining to Terms and Conditions of Employment (Figure 3). Laws covering matters of Discrimination and Retaliation notably rose and then fell over the decades, consistent with the historical trajectory of the “rights revolution”; while fairly steady attention was paid to laws pertaining to hours and leave.68

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

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

The powerful influence of labor law’s drift is also evident in what is conspicuously absent from these state laws. Due to labor law’s preemption of almost 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 state labor laws altering union election procedures, raising the penalties for employer interference and intimidation, allowing for industry-based unions, or constructing other alternative arrangements, they surely would have (indeed, many have tried). Many states did, of course, enact a variety of extensive labor laws governing industries explicitly falling outside the Wagner Act’s reach: especially in the public sector, but also in agricultural and domestic work. But as long as national labor law remained in place and exerted exclusive authority over private sector labor relations, the possibility of regulating labor-management relations in the private sector through state-level labor laws was foreclosed. Instead, workers and
their advocates turned to employment law to achieve the same substantive ends through different means.

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

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

**Explaining the Variation in State Employment Laws**

Geographically, the volume employment law enactments between 1960 and 2014 varied substantially across all 50 states and the District of Columbia over this period (*Figure 4, Table 3*). The most active states (scoring greater than one standard deviation above the mean) include California, Illinois, New York, Oregon, Rhode Island, Maryland, and Maine. California is an extreme outlier, having enacted 513 employment laws (compared to 142 on average). Most states
(30) fall within one standard deviation below the mean. Only three fell more than one standard deviation below the mean: Mississippi, Alabama, and South Carolina.

Fine-grained case studies are clearly needed to examine how different historical trajectories produced more or less robust employment law regimes across the states -- for as Margaret Weir has written, states are “political arenas with their own distinctive capacities and political logics that must be understood in terms of earlier reform efforts.”70 Still, to begin exploring why some states enacted more employment laws than others, some theoretical possibilities can be examined statistically.

Of particular interest here is the relationship between labor unions and employment laws. Was part of the growth in employment law “attributable to the decline of organized labor,” as St. Antoine has posited?71 If so, why and how? Were employment laws enacted as substitutes for disappearing unions, were labor unions themselves instrumental in enacting those same laws, or both? While statistical analyses cannot answer these questions definitively, they can reveal associations that can guide further investigation.

I build on the preeminent labor economist Richard Freeman’s examination of the relationship between state-level protective legislation and union density (which builds on the models developed by Neumann and Rissman, and Moore et al.), and add three politically relevant variables.72 The modified model estimates the following equation:

\[
\begin{align*}
\text{Employment Laws} &= a + b \text{UnionDensity} + c \text{MFG} + d \text{Unemployment} + e \text{Income} + f \text{LegislativeProductivity} + g \text{Democratic} + h \text{MassEconLiberalism} + i \text{CA} + j \text{RTW} + u
\end{align*}
\]

The dependent variable is the number of state employment laws enacted by session. Explanatory variables include \textit{UnionDensity}, which measures state-level union density, since a greater share of unionized workers may indicate a more politically powerful labor movement, which may push for the enactment of stronger employment laws or, alternatively, reduce their
necessity\textsuperscript{73}; \textit{MFG} is the share of the state’s nonagricultural workforce employed in manufacturing: as a state’s manufacturing industry declines, it may be encouraged to enact stronger protections for the workforce that remains\textsuperscript{74}; \textit{Unemployment} is the level of nonagricultural unemployment in the state during the period: 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.\textsuperscript{75} \textit{Income} measures per-capita personal income in the state, since economic modernization is related to policy innovation more generally and states with richer populations may be more likely to enact employment laws.\textsuperscript{76} \textit{LegislativeProductivity} is the overall number of laws enacted by the state legislature during the session (minus vetoes plus overrides), since states that typically enact more laws in general may be more likely to enact employment laws than states that are generally less legislatively productive\textsuperscript{77}; \textit{Democratic} is a dummy variable indicating Democratic control of both legislative houses in the state, since these states may be more likely to pass worker-friendly laws\textsuperscript{78}; \textit{MassEconLiberalism} is the Caughey-Warshaw state-year measure of the mass public’s economic policy liberalism, included because states with more ideologically liberal populations on economic matters may be more likely to enact worker-friendly employment laws\textsuperscript{79}; \textit{CA} dummies for California because it is an extreme outlier; and \textit{RTW} is a dummy variable indicating whether the state adopted a “right to work” law after the Taft Hartley Act of 1947, since these states may be less inclined to pass worker-friendly employment laws. Right to work is also sometimes used as a proxy for the political strength of business.\textsuperscript{80}

Using these variables, I conducted a time-series cross-section analysis and estimated the model with and without year and state fixed effects (because both individual years and unobserved time-invariant characteristics of states -- such as political culture, political history,
nature of the economy, composition of the workforce, etc. -- may also matter). Results are reported using each specification (Table 4). 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. Data limitations confine the time-series cross-section analysis to the period 1976-2013.

Model 1 includes year fixed effects, which a Wald test indicates are needed, along with the explanatory variables described above. Models 2 and 3, using state fixed effects, are displayed for informational purposes but are less analytically useful, since they overfit the model and leave little for other variables to explain. (Other potential causes of employment law activity may not change much within states over time, and would thus be obscured by state fixed effects.) Still, in all three models, union density, legislative productivity, and democratic legislative control are positive and statistically significantly related to the enactment of employment laws. 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. Right to work is negative and significant in the first model, as expected. (Although its sign is flipped in the second two models, it is difficult to interpret the within-state explanatory power of having a right to work law on the books.) Taken all together, these results indicate that union density and employment law enactments are positively associated and suggest that political factors matter as well, thus recommending further examination of why (see discussion below).

Although time-series cross-section analyses are useful for examining the relative influence of political and economic factors within states and years, they have little to say about
why some states constructed more robust employment law regimes over multiple decades.

Indeed, the analysis above 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 (number of categories, out of 33 possible) passed between 1974-2014 (Table 5). These “snapshot” models use the same covariates as above, but they disaggregate Union Density into two variables: the baseline level of union density prior to the period under investigation and the percentage point change in union density over the period (to account for the fact that the change in union density may affect states differently depending on the level at which they started). I also include base-level and percentage point change variables for MFG for the same reason. A measure of the total contributions to state office candidates from the general business sector is also added to capture the relative political strength of business in the states, in addition to RTW.82

The results are similar. In each model, union density stands out. Above and beyond all other factors, state union density is highly correlated with 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 have substantively large coefficients and are highly statistically significant. The higher the starting point and the less decline in union density over time, the more laws enacted. The unemployment rate, employment change in the manufacturing industry, and Right to Work are all negatively related to employment law enactments, as expected.

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

Of course, despite its ubiquitous use in the literature, the standard measure of union density provides a rather crude proxy for the political strength of the labor movement: union density may or may not be related to the political and legislative clout of labor unions at the state level. In Table 6, the first model therefore uses an alternative measure of labor union strength as a substitute for union density: like the business strength measure above, LaborContributions measures the total contributions to state office candidates from contributors in the labor sector for available years.83

The composite union density measure also makes no distinctions between different types of unions – Teamsters vs. UAW, for example – and it lumps together private and public sector unions despite their substantial differences. This is problematic, for as Alexis Walker and others have discussed, public sector unions are outgrowths of state labor laws (public sector workers fall outside the purview of national labor law) and are both subject to, and instrumental in creating, different political dynamics than private sector unions.84 Indeed, the U.S. labor movement has long been bifurcated between the public and the private sectors, and this divide has grown increasingly consequential for the labor movement over time. In many states, public sector unions now considerably outspend private sector unions in electoral and lobbying
activities, and their members have become increasingly engaged in political activities. Model 2 in Table 6 thus disaggregates UnionDensity into public and private-sector union density measures (data available only since 1983).

The first model shows that labor contributions are positive and significant -- lending additional support to the notion that labor unions, whether measured as the percentage of unionized workers in a state or via their campaign contributions, do help to explain employment law enactments at the state level. The second model indicates that public sector union density is significantly related to the enactment of employment laws, and while private sector union density is also positive and significant when used alone, including public sector union density overpowers the explanatory weight of private sector union density.

This finding is intriguing but not surprising. As public sector unions have surpassed private sector unions in membership totals over the years, the clout of the former relative to the latter has grown. Indeed, state-level Republicans, backed by the Koch brothers’ Americans for Prosperity, have in recent years targeted public sector unions in their coordinated efforts to demobilize the left. The positive and significant empirical relationship between public sector union density and employment law growth suggests another potential motivation behind the concerted action of politically mobilized business to undermine workers’ rights in the public sector.

Caution is warranted in interpreting the results reported here, however, since both the political strength of public sector unions (in terms of union density as well as the overall size of the public sector workforce) as well as their institutional power (collective bargaining rights, agency fees, dues check-off, etc.) are products of the same legislative process that produce state-level employment laws. Including a separate measure of their strength on the right-hand side
may invite endogeneity into the analysis. Moreover, making strong distinctions between public and private sector unions may obscure more than it reveals. For example, as (Author’s coauthored manuscript) shows, state AFL-CIOs are usually comprised of a mix of both public and private sector unions and represent the interests of both simultaneously in the state legislative and political arena. Many individual unions, including the nation’s largest union, SEIU, also represent both public and private sector workers. In Rhode Island, for example, even as unionized workers in the public sector gradually became a majority of workers represented by the state AFL-CIO, the legislative agenda of the state federation (central labor council in other states) remained remarkably stable and consistent over several decades (ibid.). Further investigation is needed, and additional case studies at the state level should be useful in unpacking the relationships further. But clearly, partnerships between public sector unions, private sector unions, community groups, and other workers’ advocates constitute the organizational core of the labor movement, and the relative strength of each cannot easily be disentangled with quantitative measures of union density.

For the purposes of cross-validating the analyses above, I tested three alternative dependent variables that theoretically capture the same phenomenon of interest (variation in the strength of state employment laws), albeit in quite different ways. The first two reveal the stake that employers and business advocates clearly have in this arena of governance. The first uses the Chamber of Commerce’s study of the “Impact of State Employment Policies on Job Growth,” conducted in 2012. Chamber of Commerce researchers examined 34 types of laws and graded each state on the extent to which its laws increased the regulatory burden on business and opened the door to litigation. The second is the Index of Worker Freedom (IWF) compiled in 2009 by the conservative Alliance for Worker Freedom, “the only state-by-state comparative study that
measures the level of worker freedom by analyzing policy implications as well as quantitative state data. The third, compiled by the author, uses three sources other than the MLR to measure whether, in 2014, states were deemed to have enacted comprehensive laws in 11 key categories. The sources include the National Conference of State Legislatures; the Wage and Hour Division of the Department of Labor; and the BLR (Business & Legal Resources) annual publication “50 Employment Laws in 50 States.” Data from each source was cross-checked against the others.

All three alternative measures of the dependent variable of interest are highly correlated with the employment law data examined above, and as Table 7 shows, union density is strongly related to each. (Note that in model 2 the IWF measure is flipped such that a higher score means greater worker freedom and less employment law regulation.)

Finally, a note on the MLR-derived dataset of employment laws. The overall “direction” of these laws is obvious: a plain reading of the MLR employment law summaries indicates that the overwhelming majority of the enacted laws are designed to advance workers’ rights and provide statutory protections from exploitation. Still, the purposes of some laws are difficult to discern due to unclear descriptions, and some are clearly aimed at reducing the regulatory burden on employers and limiting their liability. A qualitative effort at hand-coding the summaries indicates that about 10 percent of the laws appear to be more employer-friendly, designed to reduce regulation of employers’ behavior or weaken rules and protections for employees in various ways. As a share of all employment laws, employer-friendly laws have grown somewhat over time, consistent with Jacob Grumbach’s recent findings, but only slightly, with significant variation over the years (see Figure 6). The peak years of 1995 and 1996, for example, correspond to the Republican Party’s dramatic electoral gains at the state level. These
laws are highly correlated with only clearly worker-friendly laws by state, however (corr: 0.71, and see Figure 7), suggesting that some states are simply more legislatively active in this area than others and may be considered more lively sites of political contestation on employment issues.

Still, 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. But Table 8 provides robustness checks. The first model excludes any law that could reasonably be considered employer-friendly (e.g., reducing the regulatory burden on employers; making it more difficult for workers to sue). The second uses as its dependent variable only those potentially employer-friendly laws. 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.

Finally, it should be noted that none of these cross-sectional models deal satisfactorily with unobserved heterogeneity, such as states’ deeply rooted structural or cultural attributes, which may explain both union density and employment law activity. Still, the robust statistical relationship is intriguing and invites further consideration at a theoretical level. Why might there be such a strong correlation between union density and state-level employment laws, above and beyond other “usual suspect” explanations?

Why Might Labor Unions Support Employment Laws?

When viewed from one angle, the relationship is puzzling. As some economists have argued, some employment law protections may constitute substitutes for what unions might
otherwise help workers achieve through collective bargaining. As such, there may be a tradeoff such that the greater the protections afforded by employment law, the weaker the incentive for would-be union members to form or join unions. This “government substitution” hypothesis therefore suggests that unions’ support for employment law would be counterproductive, as successes in the legislative realm could contribute to their 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, as “measured by resources used in the political arena, influence on congressional voting, and contributions to passage of general social legislation, unions are the political powerhouse” many think they are, 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 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 narrow the range of issues over which unions must negotiate with employers, thereby increasing their leverage over the issues that remained.
But their support for state employment laws may also stem from the labor movement’s long and proud history of advancing workers’ rights broadly while raising the “social wage” and combating systemic economic inequality. Such deeply rooted commitments can be traced back to the Knights of Labor and are epitomized by UAW-led political activism in the 1960s—the idea that “organization, bargaining, and political action are indissolubly linked.” 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. 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.

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 more capable than many assume. 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, occupation, or citizenship status became increasingly appealing.

With declining membership rolls presenting a veritable existential crisis, employment laws arguably also offered a new source of policy “feedbacks” (which Paul Pierson disaggregates into resource/incentive and interpretive effects) to replace or supplement what had been lost amid labor law’s drift. Campaigns to raise the minimum wage, deter wage theft, and ensure family and sick leave, for example, have served to bring workers in disparate occupations together in common cause and into a common space where unions could begin to convey the
power of solidarity, organization, and collective action to nonunion workers who would be difficult if not impossible to reach on a shop-by-shop basis. Somewhat paradoxically, then, the labor movement’s core ideational commitment to the collective interest of workers has in many cases been advanced by embracing the cause of individual rights and demonstrating that despite their great diversity and heterogeneity, individual workers face similar challenges and have similar types of grievances. By associating unions with successful policy campaigns on behalf of workers, labor unions could demonstrate to existing and potential new members that they still had political clout and could achieve tangible benefits for workers—both critical resource and interpretive effects.

Again, well-selected case studies are needed to confirm or disconfirm these potential explanations for unions’ support of employment laws and to flesh out the variety of motivations, strategic concerns, and intervening processes at work. But inasmuch as we want to better understand the process, we also want to take stock of the achievement. And to the extent that labor unions were even partially responsible for the growth of state-level employment laws, these institutions might be considered some of the most significant legacies organized labor leaves behind as it continues its seemingly inexorable decline. Scholars have examined the effects unions once had in boosting wages for both union and nonunion workers alike and in elevating the broader “moral economy,” including putting upward pressure on “norms of fairness regarding pay, benefits, and worker treatment,” and have ably demonstrated that as unions have declined, these broader effects have disappeared as well. 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.¹¹⁰

**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 and millions of low-wage immigrant workers entered the workforce between the 1990s and 2010s, a growing number of workers became more vulnerable to exploitation and abuse. But traditional labor unions faced significant legal limits on how they could confront these problems and represent these workers. Labor law prohibits labor unions from engaging in secondary boycotts, for example, or seeking to engage formally in sectoral or regional bargaining. As a new generation of workers’ advocates—many of whom sought principally to aid the growing number of immigrant workers in the U.S. and not advance the purposes of the labor movement per se—began to appreciate the legal limits that labor law imposed on labor unions, they began to work in concert with workers themselves to develop new tactics and innovative strategies to advocate for workers’ rights.¹¹¹ As the numbers of such workers seeking representation and advocacy began to grow more rapidly in the 1990s, nontraditional workers’ organizations, sometimes called “alt-labor” groups, began to multiply in locations across the country to represent and advocate for those left behind by labor law’s drift.¹¹²

As the moniker implies, alt-labor groups are not labor unions—many of their members are forbidden from unionizing and the groups have no collective bargaining rights under the NLRA. They do sometimes receive funds from traditional unions and almost always stand
shoulder-to-shoulder with unions in policy campaigns and street-level protests.\textsuperscript{113} They include “worker centers” like the Restaurant Opportunities Centers United and over two hundred other community-based worker centers across the nation; “workers’ alliances” like the National Taxi Workers’ Alliance; “employee associations” like OUR Walmart; “associate member” groups formally affiliated with unions, like Working America; nonprofit organizations like the Freelancers Union; faith-based groups like Interfaith Worker Justice; and digital platforms for collective action like Coworker.org.\textsuperscript{114}

Like the employment laws discussed above, both the \textit{substantive aims} and \textit{organizational forms} of these alt-labor groups reflect the constraints and opportunities imposed by the still-authoritative but far less effective national labor law. In terms of their substantive foci, they self-consciously target workers that have been left behind as labor law has ossified. Their primary members include 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.”\textsuperscript{115}

And because they are not structured nor do they claim to serve as employees’ exclusive bargaining representatives with employers (as per the rules of national labor law), their approach to protecting and promoting workers’ individual and collective rights has tended to be more confrontational, involving street-front protests, boycotts, and the generation of negative publicity for low-road employers (and favorable promotion of “high road” employers). Although many
worker centers do take advantage of Section 7 of the NLRA protecting “concerted activities” and
often encourage workers to unionize, they typically focus more on assisting and empowering
individual workers, helping them to navigate the bureaucratic process, connecting workers with
others experiencing similar problems in similar industries or geographic locations, and pushing
for the enactment and enforcement of stronger state and local employment laws, alongside many
other varied activities. They also emphasize connecting workers with private attorneys and
building broader coalitions with other like-minded organizations. Thus in virtually every way,
the structures and operations of alt-labor groups reflect the constraints imposed by the
persistence of national labor law.

Thanks to the pioneering work of Janice Fine and her collaborators, we know that worker
centers, the organizational core of alt-labor, have grown dramatically in number over the last
three decades, from only 5 in 1992 to 139 in 2005 to approximately 214 in 2012 (see Figure
8). 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.” 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. 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 tackle new issues and continue building their coalitions. And those were
only the successful cases: as a tally taken by Interfaith Worker Justice shows, dozens of other
wage theft campaigns failed or stalled in places with less favorable partisan majorities.
Alternative labor organizations are now central parts of the organizational structure and strategic
outlook of the labor movement in the early 21st century.
A helpful illustration of how this new organizational innovation and political mobilization has been shaped by economic change amid labor law’s inertia is found in the case of home-care workers. As Eileen Boris and Jennifer Klein detail in their magisterial study, low-wage home-care workers ineligible for NLRA’s collective bargaining rights found their exclusion to be, itself, galvanizing.\textsuperscript{121} 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.\textsuperscript{122} After decades of grassroots organizing, coalition-building, and a long and tortuous 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.\textsuperscript{123} In recent years, the union-launched Fight for $15 has been the most highly publicized alt-labor movement to raise wages for all workers and bring together those who would not necessarily have a chance to interact otherwise.\textsuperscript{124} 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. 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.

As discussed further below, alt-labor faces significant financial challenges and its activities have presented some knotty organizational conflicts for the broader labor movement. Indeed, just as their tactics have been shaped by the opportunities and constraints imposed by the persistence of labor law (not to mention the tax code), they have faced serious challenges in trying to “scale up” and expand when many of their resources are provided by traditional labor unions, themselves facing serious financial challenges. 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, but in different forms and through different mechanisms; 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.”129 “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, thereby contributing to union decline. Although empirical analyses have not demonstrated a clear causal relationship between the two developments, union leaders are sensitive to the possibility. The government substitution hypothesis thus suggests yet another way in which employment and labor law may exist in tension with one another.

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. Abrasions between individual-rights and
collective-rights systems likewise underpins Paul Frymer’s investigation, discussed above, of how the courts’ interpretation of civil rights laws, especially Title VII of the Civil Rights Act, had an enervating effect on unions, the labor movement, and the New Deal coalition.\textsuperscript{135}

But perhaps the biggest problem with employment law is simply that it does not resolve the problems generated by labor law’s stagnation and the decline of labor unions. By itself, employment law does not 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.\textsuperscript{136}

Moreover, for low-wage workers, employment law remedies are often much too costly to pursue.\textsuperscript{137} Class action lawsuits involving low-wage workers are rare, and after the \textit{Epic Systems} Supreme Court ruling of 2018, those cases deemed to abrogate arbitration clauses in employment contracts are no longer allowed. Furthermore, many states are “opt-in,” meaning exploited workers, often already fearful of termination or deportation, must publicly sign on before industry-wide problems may be contested in court. Employment law remedies thus often privilege those with resources, information, relative job security, and more leverage in hiring negotiations—typically white-collar workers—while putting low-wage workers at an even greater disadvantage.

As is evident in the rapid growth of mandatory arbitration clauses in employment contracts in recent years, opponents have not sat idly by while employment laws have proliferated.\textsuperscript{138} As Alexander J.S. Colvin has found, the percentage of workers forced to sign mandatory arbitration agreements grew from about 2 percent in 1992 to almost 25 percent in the
early 2000s. Through a nationally representative survey of over 600 nonunion private-sector employers in 2017, Colvin estimated the share of workers subject to mandatory employment arbitration had risen to over 50 percent. The success of this pernicious strategy by employers and their advocates to deprive workers of their statutory employment rights throws into sharp relief precisely what employment laws lack relative to labor law: mechanisms for building collective power (not to mention visibility and ease of access to those rights). Paradoxically, without those mechanisms, the beneficiaries of employment laws have been unable to defend those very employment laws against their subversion by opponents.

Finally, the effective enforcement of employment laws cannot be taken for granted. While certain employment laws may, depending on their design, deter workplace exploitation on their own, most require a substantial commitment to regulatory enforcement. 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

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?”141 Another said, “The money going into this is a gamble. These workers aren’t paying dues; they’re not financing this right now.”142

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.143 Many argue that the labor movement should not be so quick to give up on the goal of reviving traditional unions.144 “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.”145

The growth of alt-labor has also exacerbated the free-rider problems confronting the labor movement in an increasingly right-to-work nation.146 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. But it is notable that this effort to support alternative worker organizations, like so many others, relies on employment law fixes, legislative activism, and continuous engagement in political and legal processes.

Indeed, growing number of practitioners, labor law scholars, and activists have in recent years begun to develop wide-ranging and creative strategies to address the multi-layered problems generated by labor law’s ossification, employment law’s inadequacies, and the emergent organizational challenges within the labor movement. For example, with funding from SEIU and several foundations, David Rolf and Carmen Rojas co-founded The Workers Lab in 2014 to study and invest in startup organizations and ideas that promise to build power for workers “at scale” and be financially self-sustaining. And at the Labor and Worklife Program at the Harvard Law School, a number of new initiatives have been launched under the leadership of Sharon Block and Benjamin Sachs to rethink labor law and prepare for future moments of political opportunity. In 2017, a conference asking “Is it Time to End Labor Preemption?” convened labor law scholars and practitioners to “explore whether experiments at the state and local level could expand collective bargaining and workers’ collective action” while weighing the tradeoffs (such as the prospect of “stronger rights for some against weakened rights for others” depending on the state in which one lives). The following year, they launched a longer-range initiative to identify ways to unify and empower the labor movement, starting from
the provocative premise that, because of labor law’s ossification and drift, “any successful strategy must include a complete rewriting of our national labor laws in order to establish new rules of the road for organizing and collective bargaining.” 150 By 2020, the “Clean Slate Project” promises to issue its findings and recommendations “to fundamentally reconstruct U.S. labor law.” 151

There are, of course, no clean slates in politics or law. 152 But in these far-sighted reform proposals, we can observe the very same historical-institutional dynamics that built state employment laws and shaped the development of alt-labor organizations. That is, to resolve emergent tensions and new problems, reformers who now find themselves on the “offense” seek to repair ineffective institutions, build workaround solutions, and re-organize to accommodate new legal and organizational realities. The powerful constraints imposed by the outmoded but persistent labor law are, in these ways, simultaneously both powerfully delimiting and highly generative for the labor movement.

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 unionize 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. Despite the growing number of obstacles placed in their way – including, as noted, mandatory arbitration agreements that increasingly deprive them of these rights – no comparable, alternative institutional basis for workers’ rights has yet emerged. State-level employment law now stands as the primary institutional guardian of workers’ rights, feeble and inadequate as that guardian may be. This paper has provided empirical evidence of this institutional shift, examined its contours, and begun to explore the links between these changes and accompanying organizational changes in the labor movement. Taken all together, I have argued that these institutional and organizational developments have invigorated but also complicated the labor movement, generating new problems without solving the problems produced by labor law’s stagnation in the first place.

While previous scholars have surely noticed these institutional and organizational shifts, their ability to analyze and explain them has been hampered by a lack of empirical data. As a consequence, their explanatory frameworks have repaired to metaphors, anthropomorphized the law, or depicted change as an automatic or reflexive response to labor law’s ossification and declining union density. But as this study has shown, labor law’s problems and the decline of union density did not cause employment law to grow. If anything, we have seen, the relationship was the reverse: states that experienced a steeper decline in union density over the last forty-plus years enacted fewer employment laws than states that maintained a higher share of unionized workers. But as already discussed, the relationship is more complicated still.

This study suggests that the main political effect of labor law’s drift is to be found in how it shapes the downstream reactions of key political players. In particular, the primary organizational beneficiaries of labor law’s feedback effects in the early years of the policy’s development – labor unions – did not disappear, but rather switched from defense to offense and
sought to adapt to new contextual conditions by trying new approaches and investing in new experiments. Their support for state employment laws and alt-labor groups – as substitute vehicles for delivering the rights, protections, and voice for workers that unions were once expected to provide – produced tangible results in many places. Yet these efforts contributed to the emergence of new complications and problems with which contemporary unions, workers’ advocates, and other reformers must now negotiate.

Indeed, these developments, layered upon one another over time, have combined historically to create new political problems for the labor movement at the intersection of new and old, which I have referred to as a “new politics” of workers’ rights.¹⁵³ This process involves what Karen Orren and Stephen Skowronek view as a defining attribute of American political development:

“When continuity and change are given their maximum play in the analysis of political history, chronology gives way to a fugue-like motion of stops and starts, with back-tracking and leapfrogging not readily captured on a calendar…It is precisely in its combination and juxtaposition of patterns that politics may be understood as shaped by time…Put yet another way, the contours of the polity are determined in the first instance by those who seek to change it and by the changes that they make, and in the second instance, by all the arrangements that get carried over from the past during these interventions and are newly situated by them in an altered setting.”¹⁵⁴

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

And the fugue-like motion continues. Where state legislatures have been reluctant to pass new employment laws, cities and counties have acted on their own; in turn, conservative state legislatures have responded by enacting preemption laws to strip them of their local governing
authority.\textsuperscript{155} And as discussed, employers have leapfrogged employment law by forcing employees to sign mandatory arbitration clauses as conditions of employment, thereby depriving them of the rights they might otherwise vindicate through litigation, further atomizing workers, and undermining one of their primary institutional mechanisms for generating collective action.\textsuperscript{156} Workers and their advocates have responded in turn by pushing for “private attorneys general” laws – enacted in California, with similar laws proposed thus far in New York, Oregon, and Vermont -- to allow aggrieved employees to act as agents of the state and file representative actions on behalf of themselves as well as other workers to recover civil penalties for violations of state employment laws.\textsuperscript{157} Others have proposed new workarounds and alternative institutional arrangements such as wage boards, sectoral bargaining, local labor laws for NLRA-excluded workers, works councils, and the adoption of variations on the “Ghent system.”\textsuperscript{158} If they could start over from scratch, workers’ rights advocates surely would. Because they cannot, all such proposals are designed to accommodate the existing institutional landscape – in their design and content, they reveal the necessity of circumventing, layering, and re-organizing.

All such proposals also reveal a glaring need for workers to find new catalysts for political mobilization and collective action and new mechanisms to facilitate interaction across fragmented workplaces—which, in turn, invites new resource challenges and strategic conflicts. As discussed, as labor unions have struggled to adapt, survive, and grow, their relationship with alternative labor organizations has become both a conspicuous flashpoint and a source of innovation and inspiration.

Thus in all of these developments we can observe a new politics of workers’ rights taking shape. It has moved increasingly out of the workplace and into the political arena, seeking to build and strategically leverage employment law protections to generate the resources,
incentives, and interpretive effects that facilitate collective action; it is often fueled by the new organizations, networks, and coalitions of workers’ advocates that have formed; it increasingly focuses on outcomes, emphasizing the need for more effective enforcement of employment laws;¹⁵⁹ it involves more street-level protests and direct corporate campaigns to press for higher wages and better employment conditions;¹⁶⁰ 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.¹⁶¹

The development of labor politics in the United States over the last several decades has thus not unfolded in a vacuum but has been powerfully shaped by preexisting institutional and organizational arrangements. This suggests that the effectiveness and generative potential of any new pathways for workers’ rights and collective action will depend, as always, on how these historical-institutional trajectories are negotiated and renegotiated in the years ahead.
Figure 1: Union Density, 1880-2016

Union Density, 1880-2016
(percentage of nonagricultural workers who are members of unions)
Figure 2: Employment Laws as a Share of All Enacted Laws by Session

Sources: Monthly Labor Review; Book of the States. Note: number of enacted bills in each state each year (including overrides, minus vetoes) reported in the annual publication Book of the States to generate the appropriate denominator.
Figure 3: Issue Attention by Decade

**Issue Attention by Decade**

- **Wages**
- **Hours and Leave**
- **Discrimination and Retaliation**
- **Terms and Conditions of Employment**

<table>
<thead>
<tr>
<th>Decade</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960s</td>
<td></td>
</tr>
<tr>
<td>1970s</td>
<td></td>
</tr>
<tr>
<td>1980s</td>
<td></td>
</tr>
<tr>
<td>1990s</td>
<td></td>
</tr>
<tr>
<td>2000s</td>
<td></td>
</tr>
</tbody>
</table>
Figure 4: Map of Total Employment Laws Enacted by State, 1960-2014

Note: States shaded black are >1SD above mean; white are >1SD below mean; dark gray are above average, light gray are below average.
Figure 5: Relationship between Union Density and Category Groups of Employment Laws

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

Figure 6: Employer-Friendly Laws as a Share of All Employment Laws Enacted
Figure 7: Relationship between more only employer-friendly laws and all laws excluding employer-friendly laws by state (1974-2010)

Figure 8: Growth of Worker Centers

**TABLES**

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

<table>
<thead>
<tr>
<th>Decade</th>
<th>Wages</th>
<th>Hours and Leave</th>
<th>Discrimination and Retaliation</th>
<th>Terms and Conditions of Employment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960s</td>
<td>287 Wages*</td>
<td>120 Child Labor</td>
<td>52 Women’s Laws</td>
<td>37 Employment Agencies</td>
</tr>
<tr>
<td></td>
<td>577 Wages*</td>
<td>421 Discrimination/EEO</td>
<td>487 Employment Agencies</td>
<td>162 Hours of Work</td>
</tr>
<tr>
<td></td>
<td>465 Wages*</td>
<td>371 Discrimination/EEO</td>
<td>95 Employment Agencies</td>
<td>34 Hours of Work</td>
</tr>
<tr>
<td></td>
<td>481 Wages*</td>
<td>267 Discrimination/EEO</td>
<td>101 Worker Privacy</td>
<td>28 Hours of Work</td>
</tr>
<tr>
<td>1990s</td>
<td>187 Child Labor</td>
<td>136 Child Labor</td>
<td>81 Family Leave*</td>
<td>95 Family Leave*</td>
</tr>
<tr>
<td></td>
<td>36 Women’s Laws</td>
<td>84 Worker Privacy</td>
<td>79 Employee Testing</td>
<td>79 Employee Testing</td>
</tr>
<tr>
<td></td>
<td>34 Hours of Work</td>
<td>59 Hours of Work</td>
<td>50 Employment Agencies</td>
<td>50 Employment Agencies</td>
</tr>
<tr>
<td></td>
<td>28 Displaced Homemakers</td>
<td>40 Plant Closings</td>
<td>49 Plant Closings</td>
<td>49 Plant Closings</td>
</tr>
<tr>
<td></td>
<td>15 Undocumented Workers*</td>
<td>36 Employee Testing</td>
<td>7 Discharge of Employees</td>
<td>7 Discharge of Employees</td>
</tr>
<tr>
<td></td>
<td>10 Department of Labor</td>
<td>17 Family Leave*</td>
<td>2 Undocumented Workers*</td>
<td>2 Undocumented Workers*</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: Groups of Employment Laws**

<table>
<thead>
<tr>
<th>Wages</th>
<th>Hours and Leave</th>
<th>Discrimination and Retaliation</th>
<th>Terms and Conditions of Employment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minimum wage</td>
<td>Family issues</td>
<td>Discharge</td>
<td>Child labor</td>
</tr>
<tr>
<td>Overtime</td>
<td>Hours of work</td>
<td>Discrimination</td>
<td>Department of labor</td>
</tr>
<tr>
<td>Prevailing wage</td>
<td>Offsite work</td>
<td>Employee testings</td>
<td>Displaced homemakers</td>
</tr>
<tr>
<td>Wages</td>
<td>Parental leave/family leave</td>
<td>Equal employment opportunity</td>
<td>Employee leasings</td>
</tr>
<tr>
<td>Wages paid</td>
<td>Time off</td>
<td>Genetic testing</td>
<td>Garment industry/apparel</td>
</tr>
<tr>
<td></td>
<td>Women’s laws</td>
<td>Workers with disabilities</td>
<td>Independent contractor</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Workplace security/violence</td>
<td>Plant closings</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Whistleblower</td>
<td>Private employment agencies</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Undocumented workers</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(includes human trafficking, immigrant protection, immigration legislation, and migrant workers)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Worker privacy</td>
</tr>
</tbody>
</table>
Table 3: Total Number of Employment Laws Enacted, 1960-2014
Table 4: TSCS models

<table>
<thead>
<tr>
<th></th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Dependent variable</strong>: Employment laws by session (1976-2013)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Union Density</td>
<td>0.127*** (0.0177)</td>
<td>0.0917*** (0.0225)</td>
<td>0.0987*** (0.0300)</td>
</tr>
<tr>
<td>Legislative Productivity</td>
<td>0.00447*** (0.000665)</td>
<td>0.00338*** (0.000443)</td>
<td>0.00294*** (0.000618)</td>
</tr>
<tr>
<td>Democratic</td>
<td>1.282*** (0.315)</td>
<td>1.560*** (0.462)</td>
<td>1.651*** (0.393)</td>
</tr>
<tr>
<td>Mass Economic Liberalism</td>
<td>-1.205 (0.739)</td>
<td>0.187 (0.918)</td>
<td>2.316** (1.139)</td>
</tr>
<tr>
<td>MFG</td>
<td>-6.644*** (1.347)</td>
<td>-6.788** (3.048)</td>
<td>-6.860*** (3.331)</td>
</tr>
<tr>
<td>Unemployment</td>
<td>-0.201* (0.112)</td>
<td>0.113 (0.116)</td>
<td>-0.111 (0.0888)</td>
</tr>
<tr>
<td>Income</td>
<td>4.26e-05 (2.38e-05)</td>
<td>8.55e-05*** (1.69e-05)</td>
<td>-8.29e-05** (3.36e-05)</td>
</tr>
<tr>
<td>CA</td>
<td>9.220*** (2.033)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>RTW</td>
<td>-1.346*** (0.202)</td>
<td>1.097*** (0.368)</td>
<td>0.754** (0.334)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Year fixed effects</strong></th>
<th>Yes</th>
<th>No</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>State fixed effects</strong></td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Constant</td>
<td>2.882</td>
<td>-1.211</td>
<td>0</td>
</tr>
<tr>
<td>(1.798)</td>
<td>(1.154)</td>
<td></td>
<td>(0)</td>
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<tr>
<td>Observations</td>
<td>931</td>
<td>931</td>
<td>931</td>
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<tr>
<td>R-squared/within R-squared</td>
<td>0.504</td>
<td>0.1360</td>
<td>0.1981</td>
</tr>
<tr>
<td>Number of groups</td>
<td>49</td>
<td>49</td>
<td>49</td>
</tr>
</tbody>
</table>

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1
<table>
<thead>
<tr>
<th></th>
<th>(1) Total # of employment laws enacted by state</th>
<th>(2) Employment laws as a share of all laws enacted</th>
<th>(3) Scope of employment laws (% of categories)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Base union density (avg, (1969-1973)</td>
<td><strong>6.157</strong>* (1.445)</td>
<td><strong>0.0369</strong>* (0.00959)</td>
<td><strong>0.447</strong>* (0.150)</td>
</tr>
<tr>
<td>Change in union density (1974-2014)</td>
<td><strong>-6.002</strong>* (2.021)</td>
<td><strong>-0.0410</strong>* (0.0135)</td>
<td><strong>-0.477</strong> (0.210)</td>
</tr>
<tr>
<td>Democratic control of state legislature (years)</td>
<td>0.680 (0.452)</td>
<td>0.00468 (0.00301)</td>
<td>0.0606 (0.0469)</td>
</tr>
<tr>
<td>Mass Economic Liberalism</td>
<td>-62.25 (51.35)</td>
<td>-0.105 (0.340)</td>
<td>-7.370 (5.334)</td>
</tr>
<tr>
<td>Business political contributions</td>
<td>2.88e-06 (3.49e-06)</td>
<td>1.47e-08 (2.29e-08)</td>
<td>1.46e-07 (3.62e-07)</td>
</tr>
<tr>
<td>Unemployment</td>
<td><strong>-16.12</strong> (6.564)</td>
<td>-0.0706 (0.0438)</td>
<td><strong>-2.130</strong>* (0.682)</td>
</tr>
<tr>
<td>Base % manufacturing</td>
<td><strong>-464.7</strong> (251.4)</td>
<td>-0.324 (1.676)</td>
<td>-33.63 (26.11)</td>
</tr>
<tr>
<td>Change in manufacturing</td>
<td><strong>-712.3</strong> (357.8)</td>
<td>-0.527 (2.385)</td>
<td>-50.15 (37.16)</td>
</tr>
<tr>
<td>Income</td>
<td>-0.00232 (0.00233)</td>
<td>-5.22e-06 (1.55e-05)</td>
<td>-0.000354 (0.000242)</td>
</tr>
<tr>
<td>Total Enactments</td>
<td><strong>0.00482</strong>* (0.000822)</td>
<td><strong>-1.50e-05</strong>* (5.09e-06)</td>
<td><strong>0.000339</strong>* (8.54e-05)</td>
</tr>
<tr>
<td>CA</td>
<td><strong>168.3</strong>* (39.87)</td>
<td></td>
<td>-2.713 (4.141)</td>
</tr>
<tr>
<td>RTW</td>
<td><strong>-24.77</strong>* (12.56)</td>
<td><strong>-0.165</strong>* (0.0834)</td>
<td><strong>-2.937</strong>* (1.305)</td>
</tr>
<tr>
<td>Constant</td>
<td>102.2 (83.40)</td>
<td>1.139** (0.550)</td>
<td>29.83*** (8.663)</td>
</tr>
<tr>
<td>Observations</td>
<td>50</td>
<td>50</td>
<td>50</td>
</tr>
<tr>
<td>R-squared</td>
<td>0.856</td>
<td>0.650</td>
<td>0.579</td>
</tr>
</tbody>
</table>

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1
### Table 6: Alternate measures of labor strength

<table>
<thead>
<tr>
<th></th>
<th>(1) Total # of employment laws enacted by state</th>
<th>(2) Total # of employment laws enacted by state</th>
</tr>
</thead>
<tbody>
<tr>
<td>Labor Contributions</td>
<td>$1.08e-05^{**}$</td>
<td>$1.382^{***}$</td>
</tr>
<tr>
<td></td>
<td>($3.97e-06$)</td>
<td>($0.503$)</td>
</tr>
<tr>
<td>Public sector union density</td>
<td>0.589</td>
<td>0.668</td>
</tr>
<tr>
<td></td>
<td>(0.498)</td>
<td>(0.465)</td>
</tr>
<tr>
<td>Private sector union density</td>
<td>3.049</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(2.628)</td>
<td></td>
</tr>
<tr>
<td>Democratic control of state legislature (years)</td>
<td>0.589</td>
<td>0.668</td>
</tr>
<tr>
<td></td>
<td>(0.498)</td>
<td>(0.465)</td>
</tr>
<tr>
<td>Business political contributions</td>
<td>$-7.54e-06$</td>
<td>$1.54e-06$</td>
</tr>
<tr>
<td></td>
<td>($4.97e-06$)</td>
<td>($3.57e-06$)</td>
</tr>
<tr>
<td>Mass economic liberalism</td>
<td>$-57.61$</td>
<td>$-107.0^*$</td>
</tr>
<tr>
<td></td>
<td>($57.07$)</td>
<td>($56.93$)</td>
</tr>
<tr>
<td>Unemployment</td>
<td>$-5.983$</td>
<td>$-11.78^*$</td>
</tr>
<tr>
<td></td>
<td>($6.690$)</td>
<td>($6.809$)</td>
</tr>
<tr>
<td>Base % manufacturing</td>
<td>$-265.7$</td>
<td>$-512.7^*$</td>
</tr>
<tr>
<td></td>
<td>($260.3$)</td>
<td>($262.1$)</td>
</tr>
<tr>
<td>Change in manufacturing</td>
<td>$-324.7$</td>
<td>$-704.3^*$</td>
</tr>
<tr>
<td></td>
<td>($374.0$)</td>
<td>($390.9$)</td>
</tr>
<tr>
<td>Income</td>
<td>0.00263</td>
<td>0.00209</td>
</tr>
<tr>
<td></td>
<td>(0.00216)</td>
<td>(0.00244)</td>
</tr>
<tr>
<td>Total Enactments</td>
<td>$0.00467^{***}$</td>
<td>$0.00496^{***}$</td>
</tr>
<tr>
<td></td>
<td>($0.000875$)</td>
<td>($0.000864$)</td>
</tr>
<tr>
<td>CA</td>
<td>84.92</td>
<td>164.3^{***}</td>
</tr>
<tr>
<td></td>
<td>(58.14)</td>
<td>(41.54)</td>
</tr>
<tr>
<td>RTW</td>
<td>$-39.31^{***}$</td>
<td>$-24.20^*$</td>
</tr>
<tr>
<td></td>
<td>(13.08)</td>
<td>(13.39)</td>
</tr>
<tr>
<td>Constant</td>
<td>19.69</td>
<td>86.23</td>
</tr>
<tr>
<td></td>
<td>(89.28)</td>
<td>(85.54)</td>
</tr>
<tr>
<td>Observations</td>
<td>50</td>
<td>50</td>
</tr>
<tr>
<td>R-squared</td>
<td>0.818</td>
<td>0.845</td>
</tr>
</tbody>
</table>

Standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1
### Table 7: Alternate DVs

<table>
<thead>
<tr>
<th></th>
<th>(1) Chamber of Commerce score</th>
<th>(2) Index of Worker Freedom score</th>
<th>(3) Compiled “employment law regime” score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Base Union Density</td>
<td>$1.552^{***}$ (0.309)</td>
<td>$-0.361^{***}$ (0.0839)</td>
<td>$0.326^{***}$ (0.0733)</td>
</tr>
<tr>
<td>Change in Union Density</td>
<td>$-1.573^{***}$ (0.432)</td>
<td>$0.381^{***}$ (0.117)</td>
<td>$-0.339^{***}$ (0.103)</td>
</tr>
<tr>
<td>Democratic control of state legislature (years)</td>
<td>$0.224^{**}$ (0.0967)</td>
<td>$-0.0445^*$ (0.0262)</td>
<td>0.0376</td>
</tr>
<tr>
<td>Business political contributions</td>
<td>1.68e-07 (7.46e-07)</td>
<td>-2.10e-07 (2.02e-07)</td>
<td>-1.23e-07 (1.77e-07)</td>
</tr>
<tr>
<td>Mass economic liberalism</td>
<td>0.0534 (10.98)</td>
<td>$-5.437^*$ (2.983)</td>
<td>2.988</td>
</tr>
<tr>
<td>Unemployment</td>
<td>-1.327 (1.404)</td>
<td>0.574 (0.381)</td>
<td>-0.288</td>
</tr>
<tr>
<td>Base % manufacturing</td>
<td>-25.47 (53.77)</td>
<td>8.134 (14.60)</td>
<td>-1.704</td>
</tr>
<tr>
<td>Change in manufacturing</td>
<td>-51.91 (76.53)</td>
<td>24.74 (20.78)</td>
<td>-7.843</td>
</tr>
<tr>
<td>Income</td>
<td>0.000627 (0.000498)</td>
<td>2.11e-05 (0.000135)</td>
<td>1.41e-05 (0.000118)</td>
</tr>
<tr>
<td>Total Enactments</td>
<td>$-0.000369^{**}$ (0.000176)</td>
<td>$0.000110^{**}$ (4.77e-05)</td>
<td>-4.41e-05 (4.17e-05)</td>
</tr>
<tr>
<td>CA</td>
<td>$31.70^{***}$ (8.528)</td>
<td>$-4.585^*$ (2.316)</td>
<td>3.319</td>
</tr>
<tr>
<td>RTW</td>
<td>$-5.793^{**}$ (2.687)</td>
<td>$1.732^{**}$ (0.730)</td>
<td>-0.227</td>
</tr>
<tr>
<td>Constant</td>
<td>55.99*** (17.84)</td>
<td>6.480 (4.844)</td>
<td>3.985</td>
</tr>
<tr>
<td>Observations</td>
<td>50</td>
<td>50</td>
<td>50</td>
</tr>
<tr>
<td>R-squared</td>
<td>0.832</td>
<td>0.825</td>
<td>0.715</td>
</tr>
</tbody>
</table>

Standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1
### Table 8: Robustness Checks

<table>
<thead>
<tr>
<th></th>
<th>(1) Employment laws enacted by state (1974-2014), “pro-employer” excluded</th>
<th>(2) Employment laws enacted by state, only “pro-employer”</th>
<th>(3) Employment laws enacted by state, only “significant”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Base union density</td>
<td><strong>5.367</strong>* (1.281)</td>
<td><strong>0.790</strong> (0.297)</td>
<td><strong>2.649</strong>* (0.582)</td>
</tr>
<tr>
<td>Change in union density</td>
<td><strong>-5.131</strong>* (1.792)</td>
<td><strong>-0.871</strong> (0.415)</td>
<td><strong>-2.926</strong>* (0.812)</td>
</tr>
<tr>
<td>Democratic control of legislature</td>
<td>0.741* (0.401)</td>
<td>-0.0606 (0.0929)</td>
<td>0.195 (0.182)</td>
</tr>
<tr>
<td>Business political contributions</td>
<td>2.88e-06 (3.09e-06)</td>
<td>-9.69e-09 (7.17e-07)</td>
<td>3.83e-07 (1.40e-06)</td>
</tr>
<tr>
<td>Mass economic liberalism</td>
<td>-39.15 (45.54)</td>
<td>-23.10*** (10.56)</td>
<td>-15.87 (20.69)</td>
</tr>
<tr>
<td>Unemployment</td>
<td><strong>-16.79</strong>* (5.822)</td>
<td>0.666 (1.349)</td>
<td><strong>-5.756</strong> (2.645)</td>
</tr>
<tr>
<td>Base % manufacturing</td>
<td>-398.2* (222.9)</td>
<td>-66.44 (51.67)</td>
<td>-155.8 (101.3)</td>
</tr>
<tr>
<td>Change in manufacturing</td>
<td>-624.6* (317.3)</td>
<td>-87.67 (73.55)</td>
<td>-267.0* (144.2)</td>
</tr>
<tr>
<td>Income</td>
<td>-0.00177 (0.000206)</td>
<td>-0.000546 (0.000478)</td>
<td>-0.00143 (0.000938)</td>
</tr>
<tr>
<td>Total Enactments</td>
<td>0.00412*** (0.000729)</td>
<td>0.000695*** (0.000169)</td>
<td>0.00133*** (0.000331)</td>
</tr>
<tr>
<td>CA</td>
<td>143.5*** (35.36)</td>
<td>23.80*** (8.195)</td>
<td>44.48*** (16.07)</td>
</tr>
<tr>
<td>RTW</td>
<td><strong>-22.18</strong> (11.14)</td>
<td>-2.589 (2.582)</td>
<td>-5.202 (5.062)</td>
</tr>
<tr>
<td>Constant</td>
<td>95.96 (73.96)</td>
<td>6.190 (17.14)</td>
<td>57.93* (33.61)</td>
</tr>
<tr>
<td>Observations</td>
<td>50</td>
<td>50</td>
<td>50</td>
</tr>
<tr>
<td>R-squared</td>
<td>0.858 (0.692)</td>
<td>0.692 (0.760)</td>
<td></td>
</tr>
</tbody>
</table>

Standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

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2 29 U.S.C. §§ 151-169


16 e.g., Sachs sees existing employment law as the new locus of workers’ collective action; both Andrias’s call for sectoral bargaining the public arena and Madland’s proposal for more robust uses of wage boards aim to strengthen and improve employment laws (such as the minimum wage in the Fight for $15); Estlund’s self-regulation takes as its “impetus” the “public enforcement and private litigation” of employment law protections and rights; even Seattle’s collective bargaining law for independent contractors was explicitly designed to remedy their exclusion from local employment laws covering only “employees,” as Garden writes (5): “The ordinance was one in a string of recent Seattle laws designed to improve working conditions.
Over the last three years, Seattle has begun requiring employers to provide paid “sick and safe” leave, created an Office of Labor Standards to target wage theft, passed legislation that will raise the minimum wage to $15/hour, and required certain employers to follow fair scheduling practices. These improvements – often situated as a necessary response to increasing income inequality and rising rents in booming Seattle – were part of the impetus for the driver bargaining ordinance. As the city council put it in a press release: “Over the past few years, Seattle has implemented ordinances to raise local labor standards that these drivers are exempt from . . . This legislation gives drivers a chance to address these issues in their industry.””


18 This study focuses on state-level employment laws, but for a running inventory of local minimum wage ordinances, see UC Berkeley Center for Labor Research and Education, "Inventory of Local Minimum Wage Ordinances," For a running inventory of local paid sick day laws, see National Partnership for Working Families, "Current Paid Sick Days Laws," . For fair scheduling laws, see National Women's Law Center, "Recently Enacted and Introduced State and Local Fair Scheduling Legislation," .

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

For more on these efforts in the context of how state legislatures are passing “preemption” laws to strip local governments of authority to enact local employment laws, see Marni von Wilpert, "City Governments Are Raising Standards for Working People--and State

19 Although the terms “labor law” and “employment law” are sometimes used interchangeably, legal scholars draw an important distinction between the two: whereas labor law focuses on collective bargaining, unionization, and other issues 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 labor law ostensibly seeks through collective bargaining: namely, boosting wages and regulating the terms and conditions of employment.


29 Author’s book manuscript in progress…


33 29 U.S.C. §§ 151-169


The Labor Management Relations Act of 1947 (“Taft-Hartley Act”) shifted the purposes of labor law away from favoring concerted action and privileging collective bargaining and “instead, it embraced employees’ ‘full freedom’ to engage in or refrain from such activity.” Andrias, “New Labor Law” p. 18. It allowed states to implement “right to work” laws banning fair share agency fees (triggering classic free-rider problems -- see for example, Janus v. AFSCME, 2018); prohibited a wide range of strike activities; outlawed secondary boycotts and closed shops; codified the right of employers, within limits, to campaign against unionization and contest the legitimacy union elections; and authorized the executive branch to obtain strikebreaking injunctions.

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


54 Lichtenstein, *State of the Union*, x.


57 Summers, "Labor Law as the Century Turns: A Changing of the Guard”.


60 Estlund, "Rebuilding the Law of the Workplace in an Era of Self-Regulation".


63 St. Antoine, "Labor and Employment Law in Two Transitional Decades," p. 510; See also Andrias, "The New Labor Law"; St. Antoine also writes that the preceding “two decades have continued the shift of emphasis from labor law to employment law—from governmental regulation of union-management relations, with collective bargaining expected to set most of the substantive terms of employment, to the direct governmental regulation of more and more aspects of the employer-employee relationship.” St. Antoine, "Labor and Employment Law in Two Transitional Decades" as quoted in Andrias, "The New Labor Law” p.8 fn20.

64 St. Antoine, Ibid., p.495.


66 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.

67 And indeed, the statistical relationships examined below hold up across a wide range of robustness checks (see below).

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


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


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

74 Freeman, "Unionism and Protective Labor Legislation".

75 Coombs, "The Decline in American Trade Union Membership and the “Government Substitution” Hypothesis: A Review of the Econometric Literature"


77 Compiled by the author. Source: The Book of the States, tallies of annual state legislative enactments.


Ibid.

See (author’s manuscript)

Skocpol and Hertel-Fernandez, "The Koch Network and Republican Party Extremism”;


89 Ibid., p.6.

90 Employers Council Network BLR, *50 Employment Laws in 50 States* (Business and Legal Resources, 2013). BLR is a human resources information services and technology company whose annual publication contains voluminous information on each state’s employment laws. Categories drawn from NCSL include: overtime, state family medical leave laws, discrimination laws, child labor, whistleblower. Categories drawn from WHD include: minimum wage, prevailing wage, meal period. And categories drawn from BLR include: drug and alcohol testing, OSHA state plans, and misclassification.


92 Data and coding rules in the appendix.


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


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

Cite to author’s other work

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

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


Luce, et al., What Works for Workers?: Public Policies and Innovative Strategies for Low-Wage Workers; Milkman and Ott, New Labor in New York: Precarious Workers and the Future


116 Section 7 covers “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. §§ 151-169. In addition to this important advocacy work, many worker centers “engage in some sort of direct service provision…Whether providing language classes, employment and training programs, adult education, transportation supports, soft skills workshops, “know your rights” workshops, or a range of legal services, organizations devote a significant amount of their time and resources to understanding the direct service needs of their members and constituents, developing service strategies and programs, and securing resources
and partnerships to deliver them.” Quote from Héctor R Cordero-Guzmán, Pamela A Izvănariu and Victor Narro, "The Development of Sectoral Worker Center Networks," *The ANNALS of the American Academy of Political and Social Science* 647 (2013): 102-123. Also see Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*.


118 Fine, "New Forms to Settle Old Scores: Updating the Worker Centre Story in the United States”


123 See note 108, *supra*.


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


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


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

134 Ibid., p. 128.

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

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


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

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


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

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


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


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

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

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

Orren and Skowronek, The Search for American Political Development, pp. 11-12.

E.g., von Wilpert, “City Governments Are Raising Standards for Working People--and State Legislators Are Lowering Them Back Down”.

As demonstrated in Sachs, “Employment Law as Labor Law”


Milkman, "Back to the Future? U.S. Labour in the New Gilded Age”