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RELATIONS ASSOCIATION SERIES**

**THE DISUNITED
STATES OF
AMERICA**

Employment Relations
Systems in Conflict

Edited By
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Peggy Kahn

THE DISUNITED STATES OF AMERICA: Employment Relations Systems in Conflict.
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To our families ...

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—David Jacobs and Peggy Kahn

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The Disunited States of America: Employment Relations Systems in Conflict

Introduction

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Early in 2014, Senator Thomas Harkin (D-Iowa) described a heartbreaking episode of labor exploitation in his own state. For 40 years, mentally disabled men had toiled under body-wrecking conditions in a turkey-processing plant in Atalissa, Iowa. Each received monthly wages of \$65. Room and board were provided but in a dangerously decrepit bunk. “What happened in Atalissa is hard to shake. It’s as close to involuntary servitude as I’ve ever seen,” said Senator Harkin in the *New York Times* (Barry 2014).

Henry’s Turkey Service paid a subminimum wage to its employees as permitted by a provision of the Fair Labor Standards Act (FLSA) of 1938 covering less productive disabled workers. Shrouded in secrecy and willful ignorance, working and living conditions were in free fall. The loopholes in the FLSA permitted powerful actors to abuse employees while reserving greater degrees of protection for others. Exclusions for agricultural and domestic workers, lower minimum wages for restaurant workers, the exception for the mentally disabled, and uneven enforcement of the act leave many workers subject to exploitation. On the other hand, some states and cities have enacted much more generous minimums and have lifted labor standards in their jurisdictions (Barry 2014).

Although the Thirteenth Amendment abolishes slavery and involuntary servitude, the courts have refused to interpret the prohibition of involuntary servitude with sufficient breadth to address the persistent problem of exploitation (“wage slavery” as perceived by many Civil War-era reformers). The Thirteenth Amendment’s exception for prisoners even allows some state governments to offer prison labor at a profit to private enterprise, thereby producing another low-wage employment enclave. While the National Labor Relations Act was meant to guarantee private sector workers positive rights as a corrective to weak individual bargaining power, the exclusion of significant categories of workers and the weakness of remedies for employer abuses leave the vast majority of American workers without the promised protections. The minority of workers with strong unions and

generous employers find temporary respite on the tip of the archipelago of labor standards while the rest are at risk.

The complex and differentiated results of FLSA enforcement and underlying deficits in constitutional protection are just two of the factors producing an uneven plain in employment relations in the United States. Despite the common misconception that Americans possess a consistent bundle of rights and that national government and “free markets” generate uniform results, the labor market would appear to be highly segmented. The federal structure, the unsettled nature of constitutional and statutory rights, the power and strategic choices of profit-maximizing employers, the persistence of variety in organizations forms, and uneven levels of democratic participation generate vast differences in workplace outcomes. As a federal republic, the United States has multiple levels of government at the city, county, state, and national levels. Its size, history, and institutional complexity contribute to complex, multi-layered, and inconsistent patterns of economic regulation. In addition to the disparate policies of cities, counties, and states, economic conditions and strategic decisions by managers produce a wide divergence of behaviors by firms.

The contributors to this volume explore the evidence for a multiplicity of industrial relations or employment relations systems in what we might call the Differentiated States of America.

DUNLOP’S INDUSTRIAL RELATIONS SYSTEMS

John Dunlop’s concept of an industrial relations system (1958) remains an influential model for the analysis of employee–employer relations in a given society. An industrial relations system is the web of rules governing employment as determined by the interaction of hierarchies of employers, employees, and governments. Every workplace requires rules, and the substance of the rules ranges from wages and hours to performance requirements.

Dunlop describes the distinctive features of U.S. industrial relations in this way:

the [large] size of the system; the role of immigrants to people a vacant [*sic*] continent in contrast to Western Europe in which labor–management relations confronted an old society; the federal structure of government; the independence of entrepreneurs and managements (low level of authority of associations); their deep hostility to labor organizations and the relatively low degree of union penetration in employment; the dominant elements of business unionism in the policies and practices of labor organizations. ... (Dunlop 1958: 20–21)

Dunlop identifies employer anti-unionism and union conservatism as important and enduring elements of industrial relations in the United States. He clearly recognizes the impact of the size and federal structure of the nation. However, Dunlop sees expanding consensus for a system in which collective bargaining plays a critical role. He emphasizes the contributions of neutrals (mediators and arbitrators) in forging a stable, pluralist model. He seeks to do so himself at the national level in a succession of peak labor–management councils. Dunlop is plainly aware of the persistence of North–South differences in labor standards and industry practice, deriving from the history of slavery and servitude. However, he expects convergence toward the pluralist, voluntarist industrial relations system he associates with the North.

Noah Meltz (1991) contends that Dunlop’s *Industrial Relations Systems* has been the most influential book in the field of industrial relations since the Second World War. Dunlop’s work has faded in importance in the past two decades, however. Recent studies of political economy have in common with Dunlop assumptions of internal congruence and system stability (see Parsons [1951], whose bias toward coherence and stability has shaped much of post-war social science).

On the other hand, Kochan, Katz, and McKersie (1986) find employment relations to be unstable. They argue in the *Transformation of American Industrial Relations* that the 1980s brought changes in the U.S. industrial relations system, including increased employer hostility to unionism and the elaboration of non-union models. According to Kochan and his coauthors, a New Deal Industrial Relations System, characterized by management accommodation of unionism, generous negotiated wages and benefits, and pattern-following in many industries, had emerged in the 1940s, only to begin to erode in the 1970s. Kochan’s work (Kochan 1999) continues to emphasize inconsistencies in U.S. employment relations and the strategic choices actors face, with a few employers, such as Southwest Airlines and Kaiser Permanente, continuing to negotiate high labor standards with their unions.

Building on the work of Kochan, Katz, and McKersie (1986), Locke (1992) submits that simultaneous globalization and fragmentation of markets and technological change have led to the proliferation of alternative industrial relations systems within, not simply between, nations. He acknowledges the role of “national institutional arrangements” and “public policies.” He does not consider explicitly the role of federalism within the United States (see also Katz and Darbishire [2000]). More recent work by Herrigel (2010), Zeitlin and Trubeck (2003), Streeck (2005), and Thelen (1999) has illuminated the interplay of political, historical, and economic forces that permit the coexistence of disparate models of production and

development. (Herrigel's "constructivism" plays an important role in the analysis that follows.)

Some observers continue to assert that there is one stable system of political economy in the United States—and that it is a robust form of laissez-faire capitalism with highly flexible labor markets. Neo-institutionalists such as Hall and Soskice (2001) tell us that the United States is an exemplar of "liberal market capitalism," an integrated bundle of free market institutions and weakly regulated profit-maximizing enterprises. Gannon and Rajnandini (2009) take the unitarist perspective even further, as they find an essential congruence of American institutions and culture confirmed in the unifying metaphor of American football (reflecting the "bedrock" value of competitive individualism). Many of these writers may be guilty of the fallacy of composition, mistaking the free market part for the ambiguous whole.

NEO-INSTITUTIONALISM

The neo-institutionalism of Hall and Soskice (2001) emphasizes a static equilibrium in institutional configurations, finds internal consistency across regions and institutions, and minimizes considerations of agency. It is a perspective that exercises a great deal of influence in contemporary scholarship and sometimes obscures understanding of the complexities of institutional development in the United States.

John Godard (2009) builds on the neo-institutionalism of Hall and Soskice to develop a hypothesis about union weakness and decline in the United States. He argues that enduring individualistic assumptions and mobilization biases in the political system produce a fragile form of unionism that is currently in decline and unlikely to rebound. However, he recognizes a diversity of American experience:

Various forms of collaboration, cooperation, and concerted action have often been widespread, and that has to varying degrees created the space for alternative cultures and movements that challenge dominant norms or interpretations of these norms. (Godard 2009:85)

Godard ultimately submits that the exceptional instances of robust, militant, and politically aggressive unionism merely confirm his overall hypothesis.

For a more accurate model of U.S. institutions than the overdeterministic arguments of Hall, Soskice, and Godard, we must fashion an alternative framework for analysis. Streeck explains that a dynamic political economy incorporates "temporary and idiosyncratic products of fleeting configurations of competing causal forces entering an unending permuta-

tion of local compromises with one another” (2005:579–80). Herrigel (2010) offers an even sharper challenge to any static and monochromatic view of political economy. He embraces a social constructivism, according to which hybrid and provisional institutions emerge outside of the hypothesized central tendency. He emphasizes creativity and uncertainty and minimizes homogenizing influences. While existing power relations and policies circumscribe experimentation, Herrigel’s imaginative vision potentially guides the search for institutional alternatives in a differentiated system.

SOUTHERN EXCEPTIONALISM?

While there may be several axes of differentiation across the states, North–South differences are worthy of special emphasis. Margo and Griffin (1997) are among the many who have written of the persistence of a Southern “exceptionalism”:

Before the United States existed as a nation separate from Great Britain, the idea that its southern regions were different in crucial ways from the remainder of the country had begun to be discussed and accepted. But what became known as “Southern exceptionalism,” the full-blown belief that the South was virtually a distinct society, governed by principles quite different from, perhaps even opposite, to those characterizing the rest of the nation, was a consequence of the South’s retention of slavery long after the rest of the country had abandoned it and the region’s intensive and extensive use of it to produce staple crops, such as cotton, for a world market. . . .

The southern economy was peculiar, at least as compared to the remainder of America, in its internal organization and functioning [and was characterized by] slave labor, sharecropping and tenant farming, one party politics, and underlying and overarching all, White supremacy. . . . (332)

Few can dispute the notion that the South represented a distant political and economic system in the antebellum years. The South still may be a distinctive society today. After the Civil War, sharecropping and tenant farming replaced slavery, bringing little improvement in the lives of former slaves. Low-wage employment in agriculture and domestic service continues to characterize the region. Business elites remain politically dominant. The former “lily white,” one-party states of the South have become “solid red” and still limit the use of government as an instrument of social reform (Quadagno 1987; MacLean 2007).

Several contemporary Southern leaders of the Republican Party have links to organizations such as the Council of Conservative Citizens and other groups who honor the Confederate cause and states' rights. In fact, several writers have applied the phrase "neoconfederate" to important elements of contemporary Southern politics (MacLean 2007). Needless to say, today's "Southern partisans" favor the preservation of a low-wage, anti-union subnational political economy.

Many observers have noted that the South tends to be characterized by higher rates of poverty, deficits in investment in infrastructure and other public goods, poor educational outcomes, and lower life expectancies (see, for example, statistics from the U.S. Census Bureau [2009] on poverty measures and Lewis and Burd-Sharps [2010]). While the perceived phenomenon of the "New South" has generated stories of racial progress and cosmopolitanism in the great Southern cities, the political differences between the regions appear to have sharpened in the Obama era.

Southern states are characterized by an embedded anti-unionism: very low union density, public policies of union suppression, little legitimacy for union political action, and low wages (U.S. BLS 2014). The region has welcomed anti-union employers and actively discouraged unionized firms from investing. For example, the government of South Carolina has publicly rebuffed inquiries from employers with unionized plants elsewhere (Fladung 1990). More recently, Tennessee's political leadership has sought to influence a representational election at Volkswagen to defeat the United Auto Workers. Southern resistance to unionism has been a cooperative project of the political and economic elites (as had been true with the defense of Jim Crow).

Consider the patterns of union density across the states. As shown in Table 1, union membership data for 2013 from the U.S. Bureau of Labor Statistics (2014) demonstrate that all states have lost union membership in the past few decades. However, union membership remains robust in New York, California, and Hawaii. South Carolina, Arkansas, and Southern states in general are among the most weakly organized. Meltz (1989) found a six-to-one ratio in union density from the most highly organized to least organized state. Figures from 2013 (U.S. BLS 2014) reveal an eight-to-one ratio. The gap is not substantially explained by industrial mix. It appears to derive from fundamental differences in institutions and dominant values.

Jacobs (1978) finds an association between the African American proportion of the population and labor legislation characteristics on the state level. With right-to-work laws, minimum wage, and unemployment insurance legislation as dependent variables, he notes that the percentage of

TABLE 1
Workers Represented by Unions

| State | Percentage | State | Percentage |
|---------------|------------|----------------|------------|
| Alabama | 11.7 | Montana | 14.8 |
| Alaska | 24.5 | Nebraska | 9.0 |
| Arizona | 6.0 | Nevada | 16.1 |
| Arkansas | 4.2 | New Hampshire | 10.7 |
| California | 17.4 | New Jersey | 16.6 |
| Colorado | 9.2 | New Mexico | 7.3 |
| Connecticut | 14.3 | New York | 25.8 |
| Delaware | 11.0 | North Carolina | 4.8 |
| Florida | 6.9 | North Dakota | 8.5 |
| Georgia | 6.3 | Ohio | 14.1 |
| Hawaii | 23.6 | Oklahoma | 9.5 |
| Idaho | 5.8 | Oregon | 14.8 |
| Illinois | 16.3 | Pennsylvania | 13.7 |
| Indiana | 10.3 | Rhode Island | 17.8 |
| Iowa | 12.0 | South Carolina | 4.7 |
| Kansas | 8.4 | South Dakota | 5.8 |
| Kentucky | 13.0 | Tennessee | 7.6 |
| Louisiana | 5.5 | Texas | 6.0 |
| Maine | 13.1 | Utah | 5.4 |
| Maryland | 13.1 | Vermont | 13.2 |
| Massachusetts | 14.6 | Virginia | 6.4 |
| Michigan | 16.9 | Washington | 19.7 |
| Minnesota | 15.0 | West Virginia | 13.5 |
| Mississippi | 4.2 | Wisconsin | 13.1 |
| Missouri | 10.4 | Wyoming | 6.4 |

Source: U.S. BLS (2014).

blacks is statistically significant as an independent variable. He concludes that racial divisions within the working class or racism in political elites lead to political outcomes adverse to workers' interests. So-called red states in the South may tend to produce anti-union policies as long as the large minority populations are not able to build effective majorities with white working-class voters given patterns of low voter turnout and entrenched political leadership.

LABORIST CAPITALISM

On the other hand, some of the Northeastern, Midwestern, and Western states have at times had a kind of "laborist capitalism" in which public policy and prominent employers acknowledged union power and legitimacy. Austrian economist Joseph Schumpeter (1947) warned of the emergence of this system and worried about its entrenchment. Similarly, John Kenneth Galbraith (1993) noted the "countervailing power" of trade unions, farmers' organizations, cooperatives, and government and identified the nucleus of a "planning system" in the American political economy. Neither fully appreciated the regional limitations of laborism and countervailing power.

In the Populist, Progressive, and New Deal eras, some U.S. states introduced progressive economic policies, substantially enhancing the status of workers. Kansas, North Dakota, New York, Vermont, California, Washington, Oregon, and Wisconsin are among the many states that enacted "social democratic" reforms promoting economic equality and constraining capitalism. For example, Populist Kansas briefly implemented universal worker representation in a (short-lived) labor chamber in the 1890s. North Dakota passed a radical program for family farmers in the second decade of the 1900s, including a prohibition of corporate farming, an industrial commission for the regulation of labor standards, and state ownership of flour mills, grain elevators, hail insurance, and banks (McGuire 1995). Corporate interests have yet to roll back these reforms.

New York has a long history of powerful unions, independent labor parties, labor participation in community planning, and a labor-supported cooperative housing system (in New York City) (Freeman 2000). Wisconsin has been recognized for labor policy innovations since the time of Governor Robert La Follette. Washington and Oregon have experimented with mandatory workplace safety committees.

One can identify at least four regions with significant social democratic traditions: the environmentally conscious West Coast, the centers of agrarian agitation, the union-friendly Midwest, and the strongly Democratic Northeast. Obviously, there are powerful conservative movements in these

states. However, if any one of these regions elected its own government, the results at times would resemble European or Canadian social democracy.

Of course, states may move from one labor regime to another. Republican governors in Wisconsin, Michigan, and Ohio have sought to rescind public sector collective bargaining rights and introduce policies more familiar in the anti-union South. The influx of new liberal-leaning and union-friendly immigrants in Florida, Arizona, and New Mexico threatens to recast the politics of these states and may enhance prospects for the enactment of pro-worker policies.

HIGH LABOR STANDARDS ENTERPRISE

Employment practices are not fully determined by the federal–state regulatory apparatus or by market forces. Local actors retain a range of discretion as Sidney Webb (1912) demonstrated in his argument that firms may raise wages to more socially “efficient” levels. Even in a low-wage jurisdiction, individual enterprises can challenge the prevailing logic and acquire goodwill by improving the terms of employment. Zeynep Ton (2013) has described “the good jobs strategy” (at Costco, Trader Joe’s, etc.), through which retail employers enhance sales through cross training, higher wages, more-secure jobs, and pruned inventory. Scholars Thomas Kochan (1999) and Jeffrey Pfeffer (1998) have written favorably of Southwest Airlines’ progressive employment practices despite the aggressive profit-maximizing displayed by many of its competitors. The Mondragon cooperatives, founded in Catalonia during the Franco era, demonstrate that there is limited space even under state repression for democratic alternatives.

At the other extreme, labor standards may reproduce slavery or embody murderous abuse in criminal forms of enterprise—so-called organized crime. There are alternative employment systems in the margins, however unstable and impermanent. While the outliers may be few in number, they suggest alternative trajectories to be resisted or transformed.

HOW FEDERALISM WORKS: FEEDBACK LOOP

The over-representation of small conservative states in the Senate, the filibuster, and other features of federalism have generated loopholes in the federal regulatory regime and guaranteed that gains for labor are precarious and incomplete. The exemption for farm and domestic labor in the Wagner Act, the defeat of labor law reform in the 1970s and 1990s, and the demise of the Employee Free Choice Act reflect, to varying degrees, the entrenchment of Southern conservative power in the Senate.

The federal system provides multiple opportunities for conservative states to attenuate and even nullify ostensibly national policies. The Republican Party has emerged as a unified instrument of states' rights ideology and retains control in the House, from which it continues to seek to circumscribe the power of federal agencies focused on workers' rights. Many observers have argued that policy making has been stymied by the rise of a "neoconfederate" ideology in Congress, the legislatures, courts, and business councils (Jacobs 2012).

Despite these obstacles, single-payer health insurance is emerging in Vermont. New York State domestic workers have won protection for organizing, paid family leave has been enacted in a few cities and states, and Seattle recently implemented a \$15 minimum wage. Living-wage ordinances and progressive procurement strategies have sustained the active role of cities as sites of labor policy innovations. While it is not a matter of labor policy, city and state initiatives on climate change, despite an impasse on the federal level, provide further evidence of policy innovation and divergence. Barber (2013) argues that cities are particularly well suited to be the wellsprings of social change.

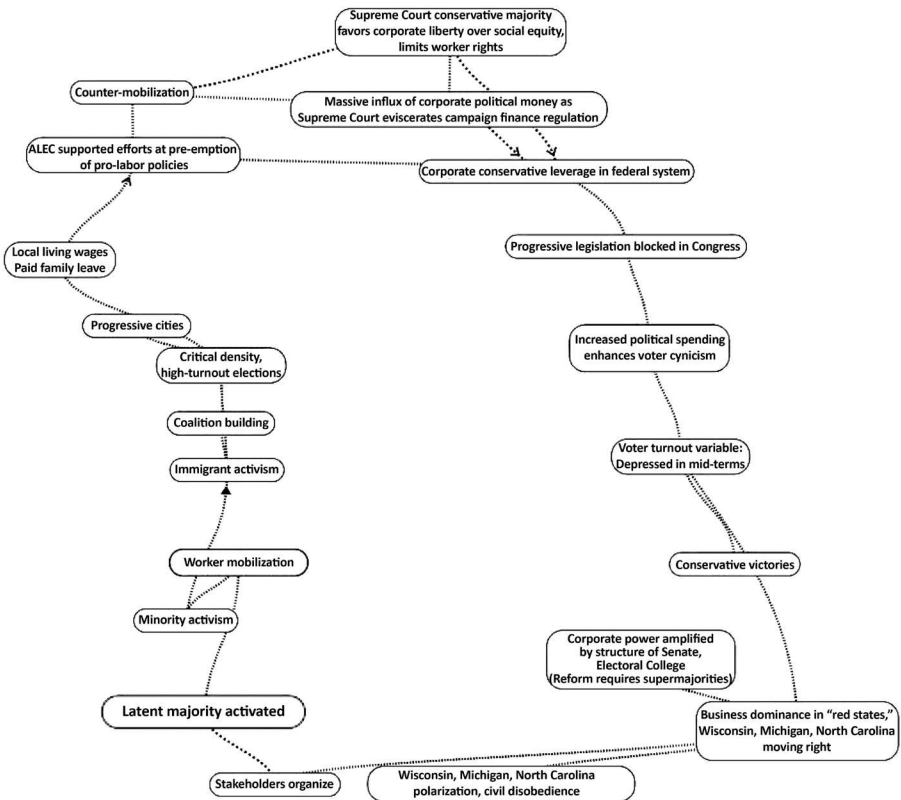
These state and local innovations do not represent durable victories for labor. The federal structure provides opportunities for conservative business interests to seek to contain and reverse these gains (Figure 1). For example, conservative legislators in several states have passed legislation to prevent cities within their jurisdiction from enacting paid family leave and raising the minimum wage. Conservative business advocates combine such state pre-emption strategies with aggressive support of the Senate filibuster in order to limit labor's gains on all levels of the federal system. Conservative dominance on the Supreme Court provides another powerful constraint on policy activism (see Robin [2014] and Newman and Kahn, discussed in the chapter summaries that follow).

In an effort to develop a detailed portrait of the dynamics of differentiation in employment relations systems, the contributors to this volume evaluate the impact of culture, local activism, and public policies at the local, state, and federal levels. Ray Hogler explores the persistence of Southern cultural differences more deeply. Nathan Newman considers the consequences for labor of the struggles over federalism. Peggy Kahn and Kimi Lee discuss the potential of worker centers—community-based organizations for worker advocacy—to enhance standards for workers lacking traditional union protection. Peggy Kahn finds that developments in paid family leave reflect a diversity of patterns of worker mobilization at the local and state levels. Roland Zullo investigates the processes that

are rolling back labor power in much of the Midwest. John Schmitt analyzes the uneven impact of labor standards enforcement through the federal Fair Labor Standards Act. Sara Collins and Tracy Garber find low-income workers at the mercy of state policy makers debating the expansion of Medicaid under the Affordable Care Act. Finally, I assess the multiple directions of change in a turbulent industrial relations environment and the unfulfilled potential of craft-based enterprise.

A detailed chapter preview follows.

FIGURE 1
The Feedback Loop



CHAPTER SUMMARIES

Chapter 2—The Persistent Effects of Slavery in the United States: Culture, Legal Policy, and the Decline of American Labor Unions

Ray Hogler examines the culture that sustained slavery in America from its development in Barbados and extension into the Southern colonies. Slavery was embedded in the constitutional order established after the Revolution. The existence of slavery demanded the cognitive accommodation of social contradictions. For example, slavery was theoretically justified by the notion of a person captured in war. Yet slaves and their offspring were in servitude for perpetuity. Slavery was ineradicably racialized. Hierarchical social relations, deep religiosity, and traditionalism in Southern culture sustained acceptance of slavery and continue to shape how Southerners currently view collective activity such as unionization. Persisting cultural attitudes contribute to acceptance of right-to-work laws and other anti-union policies. The lingering effects of slavery explain union weakness more completely than do some popular theories emphasizing patterns of unfair labor practices.

Chapter 3—Labor in the World of Cynical Conservative Federalism

Nathan Newman highlights the way conservative judicial doctrine has been used alternately to pre-empt state laws or undermine federal rulings by the National Labor Relations Board depending on which approach to federalism limits union power. This fight over federalism has been an important part of the conflict between labor and capital. Substantive issues of policy have often been concealed in disputes as to whether state law, federal judicial power, or actions at the National Labor Relations Board would prevail. While in the post-war period, the courts tended to bar states from a direct role in governing labor relations, increasingly conservative courts have sought to open up space for states to undermine union power when it suited them, while pre-empting state laws that might benefit unions and workers.

Chapter 4—Worker Centers as an Inflection Point? An Introduction and Interview with Kimi Lee

Peggy Kahn and Kimi Lee consider the role of worker centers amid failed labor standard regimes. Increasing numbers of workers in the United States fall outside the standard employment relationship and industrial relations system envisaged by industrial relations researchers and experienced by many Northern (primarily male) manufacturing workers in the 1950s and 1960s. Immigrant workers are disproportionately represented among workers excluded from collective bargaining law, unionization,

and employment rights. Increased immigration of less-educated workers has coincided with global economic restructuring and new corporate profitability strategies since the 1970s and with the expansion of service sector employment. Immigrant workers are a growing percentage of the labor force. Undocumented migrants in particular face severe barriers to fair treatment and economic security through work: limited legal and policy support, employer exploitation and intimidation, language barriers, cultural and social dislocation. Many immigrant workers are excluded by occupational category (agricultural worker, domestic worker), classification or misclassification as non-employees, short duration of employment, small size of employer, or other characteristics.

Worker centers, now numbering more than 200, serve the needs of such excluded workers through service, as well as advocacy and organizing, incorporating identities and interests related to both class and ethnicity. Originally relatively small and isolated, worker centers have increasingly formed networks and partnerships—with each other, traditional unions, and public agencies. They have waged campaigns to organize in occupational sectors, against large specific employers, around deficiencies in employment law and implementation, along complex supply chains, and in support of immigration law reform. As most workers face increased economic insecurity and precarity, the worker center model suggests new forms and strategies for organizing in a new employment landscape and a broader and more inclusive idea about which working people ought to be included in discussions of work and worker organization.

Chapter 5—Beyond the Family Medical Leave Act: The Pluralization of Leave Rights from Below

Peggy Kahn explores the struggle for paid family leave. The 1993 Family and Medical Leave Act enacted a set of substantive worker rights to both family care and medical leave. However, its provisions excluded many workers in policy or in practice. The act, offering leave of up to 12 weeks in a calendar year, does not cover small firms, has considerable individual worker eligibility requirements, provides only unpaid leave, specifies limited purposes for leave excluding routine illness, and contains limited definitions of “family” for whose care leave is available. These significant limits have resulted in the enactment of state and local policies attempting to supplement FMLA. What may have appeared to have been a statute creating a nationally standardized system of worker rights and a national work–family reconciliation employment policy has, in fact, given way to the pluralization of leave rights through the enactment of expansionary state and local ordinances.

In general, these initiatives reflect a move toward collective labor standards beyond those traditionally won plant by plant, firm by firm, or

sector by sector through collective bargaining, though the standards are enacted at subnational and often local levels. Some of the strongest impetus for state- and city-level standards has come from workers traditionally excluded from collective bargaining and public policy. To win these policies, coalitions have built on distinctive labor and community movements and resources and political opportunities and used strategies ranging from “outsider” ballot initiatives to more “insider” legislative processes, usually combining insider and outsider work.

Chapter 6—Labor and Class in a Neo-Mercantile Context: A View from the U.S. Midwest

Drawing evidence from the U.S. Midwest, Roland Zullo frames the contemporary attack on public sector unions as an outcome of an economic development strategy by the states to attract and retain export-oriented private firms. Corporate-friendly policy at the federal level has resulted in employment loss and declining tax revenue from the tradable goods sectors of the private economy, which is fiscally harmful for state and local governments. Economic hardship has provoked a neo-mercantile response by the U.S. states, whereby political regimes serve the interests of export-oriented manufacturing in exchange for political support. These policies are meant to re-subordinate public services and local labor markets to private global commerce.

State neo-mercantilism has three pillars. First, effort and resources shift toward the commercial sector, usually through tax and appropriations policy. Second, policies are passed that soften the labor market by undermining labor’s capacity to act collectively and by reducing transfer payments and tax breaks and adulterating public services that benefit lower-income households. Third, because neo-mercantilism is an elite agenda, states must circumvent democratic conventions and suppress democratic participation to overcome popular opposition and make the reforms semi-permanent. As with traditional mercantilism, the working class loses rights, essential services, and political power and will predictably experience greater precarity and inequality. It is an open question whether organized labor and its allies can stoke discontent over these conditions, disturb popular forbearance, and advance a countermovement toward a new social accord.

Chapter 7—Differences in the “Inclusiveness” of State Labor Market Institutions

John Schmitt considers the uneven terrain of federal labor standards enforcement. Labor market policy across the states is governed by the national Fair Labor Standards Act (FLSA) and a handful of other pieces of legislation and related federal regulations. These federal policies, how-

ever, leave considerable room for policy variance. Key institutions regulating wage setting (minimum wages and the Earned Income Tax Credit), unemployment insurance, collective bargaining (in the private and public sectors), and employment protection differ in important ways across the U.S. states. This chapter reviews these differences and assesses whether this state variation should alter our understanding of the U.S. labor market and its position as a “low-road” outlier among the world’s rich economies.

Chapter 8—Health Insurance Coverage of Low-Income Workers in the United States

Sara Collins and Tracy Garber examine persisting state and firm influences on access to health insurance. Employer-based health insurance has been the principal source of insurance coverage in the United States for more than half a century. While the vast majority of large companies—those with 50 or more employees—offer health insurance, small companies have historically been much less likely to insure their workers. There are, however, considerable disparities in the health insurance coverage of low-wage and high-wage employees in both small and large firms. This chapter uses the U.S. Current Population Survey in 2010 and 2011 to examine differences in employment-based coverage and uninsurance among full-time workers, nationally and in seven states with the nation’s largest workforces. Collins and Garber look at coverage differences by income, firm size, and in three industries: manufacturing, retail, and food and hospitality. They discuss variation in worker coverage in the context of both the pre-Affordable Care Act insurance market environment and state Medicaid policy, as well as emerging state and national implementation of the Affordable Care Act, with a focus on the law’s Medicaid expansion and the employer requirement to offer health insurance.

Chapter 9—Conclusions: Reconstituting Laborist Capitalism

The turbulence in labor policies and practices conceals multiple directions of change. Most of organized business appears to demand the nationalization of Southern conservative practices. Moves by conservative governors in Michigan and Wisconsin have reawakened labor militancy. Convergence in either the progressive or conservative directions would require significant victories by those who would restrain the advantages of concentrated wealth or by those who would deliver another painful defeat for organized workers. Some of the relevant action will take place in extra-parliamentary and extra-constitutional spaces, among grassroots movements and within the business power structure.

I consider underlying sources of variance in organizational alternatives: the degrees of hierarchy and collaboration and the fundamental

capacity of individuals and groups. Both hierarchical and collaborative forms of work are present in every region and across political divides. Craft production has ebbed and flowed as the advocates of the corporate form have sought a dominant position. The craft alternative remains vibrant and may play an important part in the reinvention of an employment relations system that honors human possibility and social needs.

The authors hope that this volume will stimulate debate among scholars in the disciplines of industrial relations, labor studies, and political science. Many in these fields generalize about American values and institutions—looking for “central tendencies”—and miss important developments outside the presumed mainstream. We would like in particular to provide practitioners with the tools to understand the variance in U.S. institutions so that they might more effectively seek social change. Activists and policy makers pursuing improved conditions for workers and stable employment must reckon with the implications of a differentiated federal system. In fact, my co-editor and I would argue that an understanding of the way in which the federal system preserves forms of servitude on the local level is critical to the pursuit of broad social change.

REFERENCES

- Barber, B. 2013. *If Mayors Ruled the World: Dysfunctional Nations, Rising Cities*. New Haven, CT: Yale University Press.
- Barry, D. 2014 (Mar. 9). “The Boys in the Bunkhouse: Toil, Abuse, and Endurance in the Heartland.” *New York Times*, p. A1.
- Dunlop, J. 1958. *Industrial Relations Systems*. Boston: Harvard Business School Press.
- Fladung, T. 1990 (Dec. 16). “South Carolina Learns Costly Lesson from Truckmaker.” *Washington Post*, p. H2.
- Freeman, J. 2000. *Working Class New York*. New York: New Press.
- Galbraith, J.K. 1993. *American Capitalism: The Concept of Countervailing Power*. New Brunswick, NJ: Transaction Publishers.
- Gannon, M.J., and K. Rajnandini. 2009. *Understanding Global Cultures: Metaphorical Journeys Through 29 Nations, Clusters of Nations, Continents, and Diversity*. Thousand Oaks, CA: Sage.
- Godard, J. 2009. “The Exceptional Decline of the American Labor Movement.” *Industrial and Labor Relations Review*, Vol. 63, no. 1, pp. 81–107.
- Hall, P.A., and Soskice, eds. 2001. *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*. New York: Oxford University Press.
- Herrigel, G. 2010. *Manufacturing Possibilities: Creative Action and Industrial Recomposition in the U.S., Germany, and Japan*. New York: Oxford University Press.
- Jacobs, D. 1978. “On the Determinants of Class Legislation: An Ecological Study of Political Struggles between Workers and Management.” *The Sociological Quarterly*, Vol. 19, no. 3, pp. 469–80.
- Jacobs, D. 2012 (Fall). “The Affordable Care Act and the Neoconfederate Challenge.” *Perspectives on Work* (online companion). Champaign, IL: Labor and Employment Relations Association. <<http://bit.ly/1m1i8Xm>>

- Katz, H., and O. Darbishire. 2000. *Converging Divergences: Worldwide Changes in Employment Systems*. Ithaca, NY: ILR Press/Cornell University Press.
- Kochan, T. 1999. *Rebuilding the Social Contract at Work: Lessons from Leading Cases*. Cambridge, MA: MIT Sloan School of Management.
- Kochan, T., H. Katz, and R. McKersie. 1986. *The Transformation of American Industrial Relations*. New York: Basic Books.
- Lewis, K., and S. Burd-Sharps. 2010. *The Measure of America 2010–2011: Mapping Risks and Resilience*. New York: New York University Press.
- Locke, R. 1992. "The Demise of the National Unions in Italy: Lessons for Comparative Industrial Relations Theory." *Industrial and Labor Relations Review*, Vol. 45, no. 2, pp. 229–49.
- MacLean, N. 2007. "Neo-Confederacy Against the New Deal: The Regional Utopia of the American Right?" In J. Crespino and M. Lassiter, eds., *The End of Southern History*. New York: Oxford University Press, 2007. (See also M. Lind. 2002. *Made in Texas: The Southern Takeover of American Politics*. New York: Basic Books.)
- Margo, R., and L. Griffin. 1997. "Trade Policy in the Southern Economy: NAFTA in Historical Perspective." *Work and Occupations*, Vol. 24, no. 3, pp. 332–47.
- McGuire, P. 1995. "The Non-Partisan League and Social Democracy: Social Networks, Class Power, State Occupancy, and Embedded Class Biases." In *Political Power and Social Theory: A Research Annual*, Vol. 9, no. 1, pagination unknown.
- Meltz, N. 1989. "Interstate vs. Interprovincial Differences in Union Density." *Industrial Relations*, Vol. 28, no. 2, pp. 142–58.
- Meltz, N. 1991. "Dunlop's IR Systems After Three Decades." In R.J. Adams, ed., *Comparative Industrial Relations*. London: HarperCollins Academic.
- Parsons, T. 1951. *The Social System*. Glencoe, IL: The Free Press.
- Pfeffer, J. 1998. *The Human Equation: Building Profits by Putting People First*. Cambridge, MA: Harvard University Press.
- Quadagno, J. 1987. "Theories of the Welfare State." *Annual Review of Sociology*, Vol. 13, pp. 109–28.
- Robin, C. 2014 (May 19). "The Republican War on Workers' Rights." *New York Times*, p. A17.
- Schumpeter, J. 1947. *Capitalism, Socialism and Democracy*. New York: Harper and Brothers.
- Streeck, W. 2005. "Rejoinder on Terminology, Functionalism, (Historical) Institutionalism, and Liberalization." *Socio-Economic Review*, Vol. 3, no. 3, pp. 577–87.
- Thelen, K. 1999. "Historical Institutionalism in Comparative Politics." *Annual Review of Political Science*, Vol. 2, pp. 369–404.
- Ton, Z. 2013. *The Good Jobs Strategy*. Seattle: Lake Union Press.
- U.S. Bureau of Labor Statistics (U.S. BLS). 2014 (Jan. 14). "Economic News Release: Union Members." <<http://1.usa.gov/1kXdAMp>>
- U.S. Census Bureau. 2009. "Poverty: Experimental Measures." <<http://1.usa.gov/1qLkv2u>>.
- Webb, S. 1912. "The Economic Theory of a Legal Minimum Wage." *Journal of Political Economy*, Vol. 20, no. 10, pp. 973–98.
- Zeitlin, J., and D. Trubek, eds. 2003. *Governing Work and Welfare in a New Economy: European and American Experiments*. New York: Oxford University Press.

The Persistent Effects of Slavery in the United States: Culture, Legal Policy, and the Decline of American Labor Unions

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Prior to the 2013 convention of the American Federation of Labor-Congress of Industrial Organizations, President Richard Trumka declared that the organized labor movement had reached a point of deepening crisis. The crisis was made up of “myriad setbacks, including a steady loss of union membership, frequent defeats in organizing drives and unions being forced to accept multiyear wage freezes” (Greenhouse 2013a). According to the U.S. Bureau of Labor Statistics (2014), levels of union membership in 2013 fell to the lowest point in 60 years, with 11.3% of nonagricultural, nonsupervisory workers belonging to a union. Private sector workers covered by the federal National Labor Relations Act made up only 6.7% of total density; the remainder consisted of government employees at the federal, state, or local level. Most striking, union density both in the private and public sectors showed substantial differences among states. North Carolina, for example, had an overall union membership density of 3%, while New York had 24.4% density. The disparities are particularly notable in the public sector. State and local workers in North Carolina were organized at a level of 9.7%; in New York, the figure was 69.9% (Hirsch and Macpherson, 2014).

Contrasting explanations are offered to account for labor’s failure to maintain a stable and effective presence in our economy. One narrative attributes the failure of organizing activities to aggressive and often illegal employer opposition designed to maintain competitive labor market advantage (Weiler 1983; Schmitt and Zipperer 2007). Recently, Western and Rosenfeld (2011:516) noted the changes in employment trends away from traditional union sectors, including “manufacturing, construction, and transportation, utilities and communications” as an important factor in competitive strategies. Opposition is increasingly effective because our weak legal regime fails to protect workers, and from this perspective, the structural impediments to union formation in the United States are made clear by comparison with legal systems in various countries such as Canada (Warner 2013). Labor law reform efforts during the Carter and George W.

Bush administrations were designed to offset employers' capacity to interfere with organizing activity, but those initiatives failed as a result of political resistance (Fink 1998; Hamsher 2010).

Other researchers view cultural factors as the driving force behind falling density (Lipset and Meltz 2005; Goldfield 1987, 1994), and this essay pursues the point. The proposition is that the anti-union offensive succeeds by marshaling deep cultural forces that are aligned with the South and its historical relations with the social apparatus of slavery. The consequences still resonate in the evolution of institutions burdened by the fractures in our political economy and its effects on the labor movement. From its colonial foundations until the Civil War, America was made up of two countries divided by the issue of slavery (Tomlins 2010), and the resulting political configurations and cultural topography continue to shape our society. Robert Reich (2013), former Secretary of Labor in the Clinton administration, claims that the clash of cultures in red and blue states has reached a point of political schism: "In effect, America is splitting apart without going through all the trouble of a civil war." A crucial question is what causes regional variations in values, political outlook, and union organization. Research into the interplay between environments and cognitive processes indicates that culture is the linchpin of our social and political orientation.

MAKING LABOR LAW POLICY: TWO DIMENSIONS OF CULTURE

Over the past decade, scholars have developed a convincing body of knowledge dealing with the phenomenon of "cultural cognition." Behavioral economists, legal experts, and psychologists describe a mode of perception that shapes individual responses to difficult policy issues such as abortion, gun control, same-sex marriage, and climate change. Academics associated with the movement share the basic idea that culture acts as a cognitive filter for information and shapes our decision-making processes prior to rational thought. A representative collection of work, including survey data, is available on the Cultural Cognition Project website (<http://www.culturalcognition.net>). Findings drawn from the cultural cognition literature help tie together the connections among slavery, law, and labor organization through a broadened understanding of individuals and communities. Cultural cognition studies provide an explanation of how facts and reasoning may be interpreted to arrive at a particular conclusion in legal decision making. Kahan, Hoffman, and Braman (2009), in a widely cited study, described how values influenced the Supreme Court's view of salient legal facts in a case involving whether a fleeing motorist posed a "deadly risk" to the public, and police were therefore justified in crashing into the motorist's car. Antonin Scalia's majority opinion upheld the use of force and asserted that "no reasonable person" could conclude that

the motorist did not pose a deadly risk. To validate Scalia's thesis, the court posted the video of the chase on its website. Cultural cognition researchers showed the video to a sample of subjects and found that many people disagreed with Scalia's assessment depending on cultural, ideological, and environmental factors. The court's insistence that no reasonable person could disagree with its interpretation actually served to delegitimize the judicial process. As the authors summed up: "By declaring, in particular, that 'no reasonable juror' could have formed beliefs contrary to the Court's own, the Court inevitably called into question the integrity, intelligence, and competence of identifiable subcommunities whose members in fact held those dissenting beliefs" (2009:897).

A central insight of culturally determined cognition is that an individual's familiarity with a subject and accurate information about the issue fail to produce a balanced perspective on policy. Kahan says, to the contrary, "If anything, social science suggests that citizens are culturally polarized because they are, in fact, too rational—at filtering out information that would drive a wedge between themselves and their peers" (2012:255). The influence of culture acts as a mental screen to sort out information on the basis of social acceptability. We choose sides about climate change and other important policy questions depending on what kind of people we are, and we decline to challenge the cultural commitments of our social environment. "Culture is prior to facts in the cognitive sense that what citizens believe about the empirical consequences of those policies derives from their cultural worldviews" (Kahan and Braman 2006:147). Consequently, rational individual decision making is neither rational nor individual but is framed prior to articulation by a set of values and social influences (Kahan, Peters, Dawson, and Slovic 2013). Where environment and values conflict, citizens may migrate to locations more congenial to their outlook, and as a result, regional political enclaves tend to display homogeneous characteristics (Bishop 2008).

On the basis of a number of studies, researchers hold that two bisecting dimensions capture the phenomenon of biased perceptions. The first dimension, labeled the "grid," is a social metric anchored by hierarchy at one pole and egalitarianism at the other. Hierarchicals believe that traditional sources of authority such as legal, religious, and social institutions are the best guides to ethical behavior. Status and accepted roles are essential to social stability, and, for example, marriage between two persons of the same gender is inconsistent with deeply embedded norms. For egalitarians, in contrast, citizens deserve a fair opportunity to participate in economic and social affairs regardless of immutable characteristics or condition. Society has an obligation to provide adequate levels of support for food, shelter, and education. Egalitarians generally advocate avenues of social mobility, reward based on opportunity and merit, and a fair

distribution of resources. Egalitarians favor legal policies such as affirmative action that redress historical oppression and unfair treatment.

The second measure, referred to as the “group,” contrasts the values of individualism with communitarianism. It evaluates the extent to which we believe that individuals are the animating social unit and that public policy should promote the interests of individuals over and against the interests of the group. Those espousing an individualistic worldview maintain that individuals are rational, competent actors whose economic decisions are the foundation for a political and economic system; accordingly, markets are the best mechanism for allocating wealth and political freedom (Friedman 1962). Individualists resist any efforts that are perceived as coercive in nature; instead, liberty and property are inviolate rights to be everywhere promoted and protected. As MacLean noted in her study of the modern neo-Confederate movement, the group’s leadership was impelled by “the power of their felt need for a proving ground for their utopia: a model of actually existing conservatism which combined untrammelled property rights, a small state restricted largely to punitive functions, a hierarchical social order, and public religiosity” (2010:312).

Conversely, communitarians adhere to the principle that collective needs take precedence over individual ones, that individuals depend on each other and must cooperate on a regular basis to achieve their goals, and that society has an obligation to secure collective welfare and the power to override competing individual interests. Individuals who commit to the values of communitarianism willingly engage in collective action, such as labor unions for the mutual benefit of all members of the group. From this perspective, the successful enactment of the National Labor Relations (Wagner) Act resulted from a narrative of values associated with fairness, participation, and collective action that overcame oppositional narratives based on property rights, profitability, and rewards through individual effort (Sefcovic and Condit 2001).

SOUTHERN CULTURE

The formative elements of cultural cognition are ubiquitous in the legacy of slavery. The system rested on stratification, rigid social barriers, insularity, and superior force. The American theory of slavery entailed complete subjugation to power in exchange for life itself; the resulting problematic was, in Orlando Patterson’s words, “How does a society, any society, come to terms with the idea of socially dead persons in its midst?” (1991:11). The answer is through embedded social mores, legal codes, and shared beliefs to create a mode of denial that slaves were human. In the case of Africans transported to the United States, slave society was rationalized as a manifestation of the Great Chain of Being in which hierarchy was part of the

created universe, and the foreordained status of conquered Africans allowed slave owners to explain the ownership of “inferior” beings who were located between white persons and apes in the natural order of things. Indeed, “the popularity of the concept of the Chain in the eighteenth century derived in large measure from its capacity to universalize the principle of hierarchy” (Jordan 1968:228). The hierarchical order was so entrenched in slave society that ownership of black beings was merely a variation of property in livestock and other chattels (Jordan 1968:232–35).

Accompanying the cultural scheme of slavery was a complementary vision of rank, status, and worth attaching to the individual within the social matrix. White males occupied a unique role at the apex of the pyramid, but the precise quantum of worthiness was allocated to the man himself. W.J. Cash declared in his classic study of the mind of the South that “the dominant trait of this mind was an intense individualism—in its way, perhaps the most intense individualism the world has seen since the Italian Renaissance and its men of ‘terrible fury’” (Cash 1941:31). Individualism was coupled with a code of honor that supplied the ethical basis justifying the “racial and social bondage that first made temporary chattels of white servants, then made permanent slaves of African imports. From the start, slavery and honor were mutually dependent.” (Wyatt-Brown 1986:ix). To the extent necessary to defend an individual’s status, violence could be deployed in the service of honor. The concept rested on adherence to social rank and was enforced by any necessary amount of force against others. Slaves occupied the bottom rung of the order, with white men at the top and white women in between. Slave owners mediated their contradictory ideals of civic participation and exclusion based on race and gender by dichotomizing “public” and “private” life; households were managed as patriarchal enclaves distinct from the sphere of public affairs (Tomlins 2010). Under the Southern code of honor, individuality, and masculinity, secession was the only acceptable response to Lincoln’s election in 1860 (Olsen 2011).

Core cultural values in the United States are besotted with racial attitudes. The geography of culture follows lines of demarcation flowing from the Old South and into states of the West, as reflected by right-to-work laws. The elaborate system of race domination marking the Jim Crow era from 1877 to 1964 reinstated the essentials of the antebellum order, penetrating American life and indelibly stamping our social and political structures (Woodward 1974). Social historian Daniel Rodgers in his discussion of race and social memory describes an incident in 1986 when a young black man was beaten to death in Brooklyn because he crossed into the “wrong” neighborhood while responding to an advertisement of a car for sale (2011:111). A more recent case involving the death of Trayvon Martin, a young black man, skewed racial attitudes and sharply

differentiated responses about race relations. As the *Wall Street Journal* reported, “Optimism over race relations in the U.S. has slid since its historic high in January 2009, when 77% of Americans polled—79% of whites and 64% of blacks—described such relations as good. In the new poll, 52% of those polled felt that way, including 52% of whites and 38% of blacks” (King and Ballhous 2013).

The defining features of the Confederacy mesh seamlessly with the cultural cognitionists’ description of hierarchy and individualism in the “group–grid” formulation. Americans’ cultural orientation is a contemporary expression of deeply sedimented values laid down at the formation of the Republic; the mechanics of slavery took root in the first waves of colonization and remained indelibly fixed in our constitutional scheme until the Civil War (*Dred Scott v. Sandford* 1857; Tomlins 2010). The ongoing relevance of culture for labor unions can be traced from the first attempts at national legislation during the New Deal through contemporary examples of governmental and judicial hostility to working-class solidarity. A historical perspective explains the deleterious conditions that confront modern unionism and the tightly knit connections among slavery, race, culture, and collective action. From the outset, those conditions were embedded in federal labor policy.

RACE AND THE MAKING OF THE WAGNER ACT

As Senator Robert Wagner moved forward in early 1934 with his Labor Disputes Bill, Witherspoon Dodge, chairman of the board of directors of the Atlanta Urban League, wrote Wagner to protest certain provisions of Senate Bill 2926 as inimical to the welfare of African American workers. Dodge (1934) claimed that the provisions dealing with closed shops and exclusive representation would lead to racial discrimination and exclusion of some “five million Negro workers in the United States” from regular employment. He proposed changes to the bill that would allow compulsory union membership only if unions did not engage in discrimination because of “race, color, or creed.” Wagner (1934) responded to Dodge a few days later assuring him that he would “examine [the] bill with the utmost care to prevent any such eventualities.” Wagner continued that his legislative proposal had been misrepresented by detractors and would not force “a closed shop upon all industry” but rather “merely leaves the worker free to determine whether or not he wishes to belong to a union, prevents discrimination either on the basis of union membership or non-union membership, and insofar as it affects the closed shop, places certain restrictions around it that do not exist at the present time.” The legal environment then regulating the formation and administration of closed shops rested on state common law, which was evolving toward more expansive union rights (“All-Union Shop” 1938).

The exchange between Wagner and Dodge underscored a powerful contradiction at the heart of American labor law policy. If, as Wagner contended, security was the foundation of union organization, then unions required some means to enforce collective engagement. The closed shop offered a solution to the problem, but closed shops could succeed only under a principle of exclusive representation through majoritarian rule. Consequently, Wagner needed to address the threat raised by company unions, which had proliferated under the organizational rights in Section 7(a) of the National Industrial Recovery Act. The elements of union security, elimination of employer-dominated entities, and exclusive representation made up the main structural pillars of the Wagner Act's architecture (Hogler 2007). Taken altogether, Wagner's legal regime conferred unprecedented power on unions, and, as a consequence of his failure to deal with the problem of race, it perpetuated systemic racial discrimination in employment.

The Labor Disputes Bill was overtaken by political developments in March 1934 when President Roosevelt endorsed the idea of proportional representation to end a strike in the automobile industry. According to Roosevelt's interpretation of Section 7(a), "each bargaining committee shall have total membership pro rata to the number of men each member represents," a principle that Congress affirmed in Public Resolution No. 44 (National Labor Relations Board 1985, I:1067, 1255B). By allowing workers to be represented by a trade union or a company employee representation plan, or to bargain individually, the resolution effectively abolished the closed shop (Bernstein 1969:184–85). Shortly before the Supreme Court declared the NIRA unconstitutional in *Schechter Poultry Corp. v. United States* (1935), Wagner introduced the legislation that would become the National Labor Relations Act (NLRA). Senate Bill 1958, introduced in February 1935, included prohibitions against company unions, explicit rights for a union to enjoy exclusive representation, and protection for closed shops (National Labor Relations Board 1985, I:1295–310).

As Dodge and others feared, Wagner did not address the question of racial inequality in labor markets. To have done so most likely would have doomed the bill by alienating Southern politicians whose goal was to reinforce Jim Crow stratifications and ensure that "southern employers could continue to draw without hindrance on the still-enormous supply of inexpensive and vulnerable black labor" (Katznelson 2013:163). Secretary Walter White of the National Association for the Advancement of Colored People reluctantly conceded that it would be futile to amend Wagner's legislation or to seek the support of the American Federation of Labor to outlaw race discrimination as a condition of the closed shop (White 1934). The final version of S. 1958, signed into law on July 5, 1935, contained no reference to race or race discrimination.

THE ROAD TO SECTION 14(B)

After World War II, organized labor embarked on a massive drive to unionize southern workers and bring the South into the collective bargaining domain of industrialized states. The effort failed because of intense cultural differences between organizers and business, religious, and civic opposition (Griffith 1988). Southern opponents of Operation Dixie, as the movement was known, characterized officials of the Congress of Industrial Organizations (CIO) as “outside aliens” with foreign names who were engaged in a Northern invasion reminiscent of attacks on the Confederacy (Minchin 2005:41). The unsuccessful campaign had enduring consequences for the labor movement as Southern enclaves of low wages, race discrimination, and developmental policies based on a lack of workers’ bargaining power provided the opening for a six-decades-long offensive against unions beginning in the immediate post-war era (Cobb 1993). More crucially, “The failure of Operation Dixie left southern Dixiecrats and the system of white supremacy with complete social, political, and economic hegemony intact in much of the South” and marked a pivotal moment in American politics (Goldfield 1994:168).

The strategic element in the resistance to unions focused on their organizational security. Without compulsory support from all beneficiaries of labor contracts, collective action lacks the strength and resources to sustain an effective movement (Olson 1965). Labor relations during World War II fell under the authority of the federal government’s National War Labor Board (NWLB), which promoted union solidarity through maintenance of membership clauses (Lichtenstein 1982).

Reacting to the NWLB’s rulings, some states enacted laws attempting to exercise control over unions and regulate the scope of their activities (Killingsworth 1948). Legal scholar E. Merrick Dodd (1944) characterized legislative activity in the states during the period as a “war on unions” by restricting their internal affairs and activities. The Colorado Labor Peace Act of 1943, which provided a model for later national legislation, was among the more prominent statutory examples. Joseph Padway, general counsel of the American Federation of Labor, called the Peace Act an example of legislative “fascism” and commented that “those who framed the Colorado law worked overtime in excerpting those provisions most destructive of the rights of labor, and were blinded with hatred against labor unions that little heed was paid to fundamental principles of law or basic constitutional rights” (Padway 1943:12).

The statute aimed particularly at union security by requiring employees to approve by a three-quarters supermajority a closed shop in a secret ballot election. A variant of the union shop election requirement made its way into federal labor law, and it remained in effect until 1951 when Congress

repealed the measure as unnecessary and redundant because unions won more than 95% of elections (Millis and Brown 1950:613).

After the 1946 elections gave Republicans an overwhelming majority in Congress, they passed the Taft–Hartley amendments to the Wagner Act over President Truman’s veto. The linchpin of the 1947 Taft–Hartley modifications was Section 14(b), which allowed states authority to outlaw union security through so-called right-to-work laws. Beginning with Florida in 1943 and culminating with right-to-work legislation in Indiana and Michigan in 2012, right to work has inflicted lethal wounds on organized labor by reducing union density and collective action (Baraghoshi and Bilginsoy 2013). The persistence of a distinctive Southern culture helps explain the political origins and continuing impact of right to work.

THE PATHOLOGY OF RIGHT TO WORK

Opposition to the Wagner Act intensified after the Supreme Court ruled in *National Labor Relations Board v. Jones and Laughlin Steel Corp.* (1937) that the federal government had constitutionally exercised its power over interstate commerce when enacting the NLRA. Employer groups immediately launched an agenda for legislative reform through a “long-range program to influence public opinion” using media outlets and other forms of publicity (Millis and Brown 1950:283). During World War II, unions expanded their organizational capacity under the protection of the federal government and its efforts to minimize work stoppages through “no-strike” commitments (Atleson 1998).

The defection of Southern Democrats from the New Deal political bloc provided conservative forces with the means to curb union expansion. Shifts in the political environment, along with high levels of strike activity, generated strong public support for modifications to the Wagner Act (Millis and Brown 1950:271–362). Legislative action also served the mutual goals of Northern business and Southern politicians in the emerging post-war economy: “The shared interests of northern-based corporate migrants and the southern elite were advanced in the political realm by an emerging coalition of business-oriented Republicans and southern Democrats who joined hands to preserve the North–South differential in the name of company profitability, southern economic development, and states’ rights” (Friedman 2008:325).

In the Taft–Hartley scheme of things, unions were viewed as instruments of obstruction to commerce and mechanisms of oppression for individual workers. The act’s declaration of policy emphasized that industrial strife “which interferes with the normal flow of commerce” can be mitigated only by recognition of the “legitimate rights” of all parties to the labor agreement. Toward that end, the stated purpose of

Taft–Hartley was to define the rights of employers and employees, to establish procedures to prevent interference with those rights, and “to protect the rights of individual employees in their relations with labor organizations” that affected commerce (Committee on Labor and Public Welfare 1974:1). One of the key ingredients in the protection of individual rights was the regulation of union membership rules.

From the start, legislators made clear that the tilt of the new law favored individual rather than collective dealings. In the House, the Committee on Education and Labor began H.R. 3020, its draft of the bill, by castigating unions as oppressive, illegitimate organizations that exercised undue power over workers (Committee on Labor and Public Welfare 1974). The American workingman, the report claimed in a fit of ideological fervor, “has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in Section 1 of the National Labor Relations Act. His whole economic life has been subject to the complete domination and control of unregulated monopolists.” As a result, “his mind, his soul, and his very life have been subject to a tyranny more despotic than one could think possible in a free country.” The proposed legislation, the committee said, “has been formulated as a bill of rights both for American workingmen and for their employers” (295). The project of liberation called for the recruitment of the respective states as guardians of liberty.

H.R. 3020 recognized unions’ rights to bargain for contractual safeguards of union security, subject to the requirements of an employee’s payroll deduction authorization and bargaining unit approval of the clause in a secret ballot election. Section 13 of H.R. 3020 added new language to confirm states’ powers in dealing with union security. First, the section clarified that nothing in the bill should “be construed to invalidate any State law or constitutional provision which restricts the right of an employer to make agreements with labor organizations,” requiring union membership as a condition of employment. Second, the language excised any basis for challenging right to work under a theory of federal pre-emption. Any contractual provisions contrary to state law were “divested of their character as a subject of regulation by Congress under its power to regulate commerce among the several States. . . .” (Committee on Labor and Public Welfare 1974:207).

The committee explained this particular anomaly in labor law with the following statement about the NLRA: “In reporting the bill that became the National Labor Relations Act, the Senate committee to which the bill had been referred declared that the act would not invalidate any such State law or constitutional provision. The new section 13 is consistent with this view” (Committee on Labor and Public Welfare 1974:335). The claim that state law had always governed closed shops was disingen-

uous in important respects. Although Wagner recognized the role of state *common law* in dealing with different aspects of union security clauses, he never conceded that state *legislatures* would have authority to displace federal law protecting union rights. Consistent with Supreme Court doctrine at the time, states lacked constitutional authority to interfere with “freedom of contract” between employer and employee; thus, the proposition that union security was historically under control of state statutory law is incorrect and misleading (Hogler 2005). Despite the inaccuracy, resistance to federal power prevailed.

The Senate version of union security provided for a 30-day period of employment prior to compulsory support and limited an employee’s obligation to the payment of dues rather than actual membership, but the Senate bill contained no express provisions regarding state jurisdiction (Committee on Labor and Public Welfare 1974:412). The House Conference Report rectified the lack of an express legislative intent to delegate state control over union security and articulated the rationale for Section 14(b) (60). The report noted that H.R. 3020 made explicit the rule that federal law did not protect union security where prohibited by state law, commenting: “Many states have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal.” It then recited the standard assertion that the NLRA never intended “to deprive the States of their power to prevent compulsory unionism” and concluded: “[t]o make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14 (b), contains a provision having the same effect.”

Whatever the rationale for the inclusion of 14(b), the conference committee made a radical change in federal labor policy. James Gross, a leading authority on the history of the National Labor Relations Board, notes that Taft–Hartley instigated a course of “individual bargaining and employer resistance to unionization and collective bargaining” (1995:272). The anti-union agenda is made possible by inherently contradictory legal policies that enable the National Labor Relations Board to interpret the statute in “radical changes that swing labor policy from one purpose to its direct opposite.” The federal policy of promoting collective bargaining is incompatible with state limitations on group solidarity.

By 2001, 22 states had enacted laws prohibiting union security. Colorado citizens rejected a right-to-work ballot initiative in 2008 after labor unions brought a series of ballot measures forward that appeared to threaten business interests in the state; business joined with labor in opposing the right-to-work initiative, and it failed by a substantial margin (Hogler 2009). Despite that minor setback, the political success of radicalized tea party Republicans in the 2010 state and federal elections led to renewed attacks on collective bargaining, culminating in 2012 with right-to-work

legislation in the two industrial states of Indiana and Michigan. The narratives used to justify right-to-work laws adhered closely to the hierarchical individualist playbook. Supporters of right to work claimed that the laws promote individual freedom of choice by allowing workers to decline participation in collective action, and they argued that corporate development is facilitated by a low wage, non-union workforce in which management can make business decisions without interference with their prerogatives (Pasulka 2012). Some economists lend weight to that contention by pointing out that economic growth in right-to-work states has surpassed that in union security states, implying that the correlation between economic measures and legislative strategy is causal (Barro 2011). Contradicting the right-to-work economic thesis, more recent and sophisticated empirical studies find no developmental benefits from the laws (Hicks 2012; Lafer and Allegretto 2011).

Contemporary iterations of the right-to-work agenda differ little from the initial formulations deployed in the Deep South. Right-to-work laws are a manifestation of cultural bias in favor of personal interests over group demands, resistance to the power of the national government, and the supremacy of rights of an individual; the culture also fosters higher levels of inequality, less union organization, and lower levels of generalized trust (Hogler, Hunt, and Weiler, in press). The identification of right to work as a value uniquely protected at the state level plays directly into the traditionalism championed by the Confederacy and its race-based frame. Shermer trenchantly summarizes the point in her historical appraisal: “The central message in the Southern right-to-work campaigns was preserving the Old South’s racial order” (2009:95).

The rhetoric of right to work connects at a foundational level with the cultural orientation that exalts individualism and fixed social gradation emanating from racial difference. The Civil War motifs of invasion and resistance came into play in late 2013 when a Volkswagen plant in Tennessee contemplated a “works council” arrangement with the United Auto Workers, and a political operative compared the union drive with the Battle of Chickamauga with its “resounding defeat for Northern forces” (Fang 2013). The latticework of slavery rested on a peculiar set of precepts, and those precepts impel contemporary assaults on collective action, social activism, and any efforts to meliorate the consequences of inequality. As politicians in Republican-dominated states such as North Carolina enact laws to oppress racial groups, women, and workers (Lithwick 2013), courts join in the effort to weaken and immobilize labor groups. In a 2012 decision, five members of the Supreme Court aimed a lethal blow at unions’ financial resources. The rationale for that decision rests on ideological bedrock rather than policy, precedent, or reasoning.

CULTURE WARRIORS ON THE COURT: REMAKING THE RULES OF PAYCHECK PROTECTION

Four justices of the Supreme Court—Alito, Roberts, Scalia, and Thomas—are members of the Federalist Society, an organization dedicated to the furtherance of conservative judicial principles. The society's founding purpose is to oppose in legal education the perceived dominance of an "orthodox liberal ideology which advocates a centralized and uniform society" (Federalist Society 2013). Founded in 1982, the society is "committed to the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be" (Federalist Society 2013). Lawyers associated with the society subscribe to a program of hierarchical individualism that advocates personal autonomy, disengagement from legal regulation by the state, and disdain for any conception of "social" justice. In *Knox v. Service Employees International Union, Local 1000* (2012), the four Federalists and the ineffable Justice Kennedy created a constitutional rule dismantling labor's political power; to accomplish that end, they violated the basic proposition of Federalist dogma that judges shall not engage in legal activism.

A durable meme of anti-union campaigns affirms the primacy of individual interests as opposed to communal needs. For individualists, protection of liberty is achieved by reducing or eliminating the power of a majority of the group to command allegiance to its activities. The 1943 Colorado Labor Peace Act, for example, offered two techniques for obstructing collective effectiveness once workers had chosen union representation. The first was a mandatory vote on the negotiation of union security, and the second was a procedure now known as "paycheck protection." Section 6(1)(i) of the Peace Act required that before any dues could be deducted from an employee's wages, the employee must have personally consented to such deduction. Over time, the strategy periodically surfaced in different legislative venues, including a failed effort in 1998 by Representative Bob Schaeffer (R-Colo.) to pass a federal paycheck protection law (Hogler 1998).

In *Knox*, the Supreme Court fashioned a constitutional offshoot of paycheck protection by allowing government workers under a contractual union security clause to avoid dues obligations if unions used members' dues for political purposes. The rule flowed from the perceived coercion of political speech connected with financial support derived from union dues, an issue that has generated a history of doctrinal discourse over some five decades. The broad principle emerging from the precedent is that unions have authority to compel dues payments from all people

receiving benefits under a collective bargaining agreement, but if money is dedicated to political purposes, dues payers may request exemption from that portion of their contribution. The majority in *Knox* stood the established procedural framework on its head, effectively gutting unions' capacity for political action.

Beginning with *Machinists v. Street* (1961), the court announced the rule that federal labor law allowed unions to collect dues from all employees covered by a collective bargaining agreement, with the caveat that no dues could be used for political purposes over an employee's objection. As part of their pleadings, the plaintiffs in *Machinists* requested injunctive relief prohibiting collection of any dues that supported political activities. The court denied the request for an injunction and explained why dissent was not presumed in the course of dues requirements. Its principal reason was that a minority should not have power to interfere with the desires of most union members:

For the majority also has an interest in stating its views without being silenced by the dissenters. To attain the appropriate reconciliation between majority and dissenting interests in the area of political expression, we think the courts, in administering the Act, should select remedies which protect both interests to the maximum extent possible without undue impingement of one on the other. (749)

The court's rationale for protecting unions from a minority of objectors was the idea that unions played a legitimate and important role in safeguarding interests of the group and its role should not be undermined by the whims of any given individual. As a result, legal redress for improper use of dues would be available only when an objector made his or her position known to the union. The rule against enforced political contributions protected dissenters; however, the court went on, such dissent could not be assumed but "must affirmatively be made known to the union by the dissenting employee. The union receiving money exacted from an employee under a union shop agreement should not, in fairness, be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities" (*Machinists* 1961:774). The *Machinists* reasoning is grounded in the concept of majority rule in a democracy. Unions are analogous to a collective body operating under the principle that support is mandatory for all who benefit from the action (Olson 1965).

In *Beck v. Communication Workers of America* (1988), the court extended the *Machinists* principle by holding that private sector unions regulated under the NLRA could not spend union dues paid by an individual on political activities if the employee objected. In the court's explanation: "We conclude that § 8(a) (3) [of the NLRA], like its statutory

equivalent [in the Railway Labor Act], authorizes the exaction of only those fees and dues necessary to ‘performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues’” (*Beck*:762). As a consequence of *Beck*, the National Labor Relations Board formulated rules for a union’s administration of dues and fees that accommodated political objectors. Generally, the board upholds dues collection procedures that allow employees at some point to opt out of any amounts used for purposes unrelated to collective bargaining and representation [*United Auto Workers Local 376 (Colt’s Manufacturing)* 2011].

The *Knox* litigation arose in the context of a payroll protection ballot initiative. In 2005, California governor Arnold Schwarzenegger called for a special election to deal with the state’s budget problems. One ballot item would have required any employee in a bargaining unit to sign an express consent form allowing the union representative to spend dues money for political purposes. Voters defeated Schwarzenegger’s paycheck proposal by a vote of 46.5% in favor and 53.5% opposed. The California Teachers Association contributed more than \$12 million to the campaign, and SEIU donated \$1.75 million (Ballotpedia 2005). SEIU Local 1000 notified all bargaining unit employees in June 2005 that approximately 56% of total dues for the year would be devoted to collective bargaining activities and the remainder to other union initiatives. Any dues or fee payer who informed the union of an objection within 30 days would be charged only for the amount of collective bargaining expenditures, but the communication also stated that the fee could be raised in the future without additional notice to members. Two months later, the local levied an assessment to fight Schwarzenegger’s ballot initiatives and to defeat his 2006 re-election bid. The local did not give fee payers an opportunity to “opt out” of the assessment at that time, although it subsequently offered a dues rebate based on the amounts actually spent on the political campaign.

Knox and other plaintiffs filed a class action suit claiming they were improperly charged for the union assessment, which they characterized as exclusively devoted to political action, and the district court granted their motion for summary judgment. The Ninth Circuit reversed based on Supreme Court precedent in *Chicago Teachers Union v. Hudson* (1986). The appeals court interpreted *Hudson* to require a balancing test, which it stated in the following way:

In that [the *Hudson*] case, the Supreme Court articulated the legal standard to be applied in this analysis as a balancing test, stating that “[t]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union’s

ability to require every employee to contribute to the cost of collective bargaining activities. (*Knox et al. v. California State Employees Association* 2010:1119–20)

It concluded that Local 1000's procedures in the *Knox* case were reasonably sufficient to protect fee payers' rights against unwanted political activity. Objectors could request a refund of any dues payments that did not relate to collective bargaining, and the prorated amount of the following year's dues would be derived from the previous year's accounting.

The appeal before the Supreme Court in *Knox* (2012) presented a narrow question in light of the controlling precedent. Unions have a contractual right to demand that all beneficiaries of representation pay a fair share of costs for representation. Unions do not have a right to extract money from workers to pursue a political agenda if an individual objects. According to the established rules for fee payments, unions could collect dues for a period of time and determine what amounts were necessary for collective bargaining. In the successive dues period, unions could charge workers who objected to political activities only the amount actually devoted to collective bargaining, and the burden of exemption fell on objectors to submit their claims against the union. The Ninth Circuit ruled that the union had met the procedural requirements in *Knox* because it offset future dues payments by the amounts of political expenditures.

For the majority, Justice Alito rejected the conclusion that *Knox* involved only a balancing of interests of the union representative and a particular employee. He found that the case involved two specific areas needing judicial scrutiny. First, the union imposed a fee without giving unit members an opportunity to object at the time, and consequently, the union collected the surcharge without explicit approval. Second, according to Alito, federal constitutional concerns arose in connection with the opt-out procedure itself. Alito proclaimed at the beginning of his opinion, "In this case, we decide whether the First Amendment allows a public sector union to require objecting nonmembers to pay a special fee for the purpose of financing the union's political and ideological activities" (*Knox*, slip op.:2). He then went on to decide that the First Amendment was implicated by the opt-out approach. Framing the litigation as a constitutional inquiry about political speech, Alito maneuvered away from the union's need for a program of financial security onto a terrain of superordinate values emanating from an individual's "voice" in political affairs (slip op.:2). Because the union failed to give objectors an opportunity to opt out of the assessment, which was presumed to be dedicated only to political lobbying, Alito characterized the union's decision as an "impingement" on the objectors' First Amendment rights. Such rights are predicated, he says, on "an open marketplace" where different ideas compete

freely for public acceptance “without improper government interference” either to promote or suppress expression of those ideas. Just as the state may not compel speech, it may not compel funding to support the speech of “other private speakers or groups” (slip op.:8).

The only purpose of union security, Alito went on, is to overcome problems of free riders who would otherwise obtain benefits from the union without bearing a share of the costs of acquiring them. But the rationale of preventing free riding by requiring a fee payment is an “anomaly” in that it permits a temporary deprivation of rights. At this point, Alito inserts a rhetorical question that goes to the core of his judicial strategy: if, he says, a nonmember is exempt from paying for politics, “what is the justification for putting the burden on the nonmember to opt out of making such a payment?” Continuing with a string of hypothetical interrogatories unsupported by citation to precedent or evidence in the case, Alito dishes up a hash of ideological speculations about the value of individual versus collective rights:

Shouldn't the default rule comport with the probable preferences of most nonmembers? And isn't it likely that most employees who choose not to join the union that represents their bargaining unit prefer not to pay the full amount of union dues? An opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree. But a “[u]nion should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.” (slip op.:11–12)

Having parlayed a set of assumed facts not raised in the case into a basis for decision, Alito then moves to the payoff in the case—a holding that the First Amendment mandates an opt-in rule rather than allowing an opt-out one.

Alito and his four allies chose to inflict severe pain on unions as organizations (Fisk and Chemerinsky 2013). They accomplished the feat by ignoring precepts of judicial constraint and by misrepresenting applicable precedent. Alito concluded that forcing employees to opt out of some portion of dues payments was merely a “historical accident,” and the better rule was to exclude all employees from excess contributions unless the employee has “opted in” to such payments. Alito’s gambit differentiating opt-in versus opt-out regimes enabled him to elude both the holding and rationale of accepted doctrine regarding the burden on objectors. It also made up the whole cloth of his constitutional costume.

The most destructive legal principle to emerge from *Knox* is its constitutional dictate that unions must adhere to an opt-in rather than an opt-out procedure. Before collecting dues under a union security clause, the union must determine what amount it will exclusively devote to collective bargaining. If a portion of the payment exceeds that amount, the excess can be collected only if the employee has consented to a payroll deduction. If there is no authorization, the public employer cannot withhold dues. Essentially, the rule is a “paycheck protection” protocol for the collection of public sector union dues unless those dues are demonstrably confined to activities related to collective bargaining. As Sotomayor and Ginsburg point out in their concurring opinion, the issue of “opt-in” was not raised, argued, or briefed by the parties. Alito and company simply ignored the traditions of judicial restraint to issue a ruling that went far beyond the scope of the case. Unfortunately, the ruling in *Knox* will also have immediate consequences for union security administration under the NLRA.

The NLRB decided two cases involving the United Auto Workers in May 2011 and upheld the union’s method of dealing with objectors under an opt-out process [*United Auto Workers Local 376 (Colt’s Manufacturing)* 2011]. In July of each year, the UAW notified objectors of the amount of dues reduction to which they would be entitled. An objection could be filed at any time, but the UAW required individuals to maintain their status by renewing their objection annually. If the objection was not renewed, the union informed the employer that full dues should be deducted from the employee’s paycheck. Two employees filed charges with the board claiming that the burden of renewing an objection was unacceptably onerous. An administrative law judge (ALJ) ruled in favor of the employees, finding that the union had not proved a legitimate business reason for its procedure and the employee could rely on his initial objection to the use of dues for political activity.

Over a dissenting opinion, two members of the board reversed the ALJ’s decision. The majority’s review of the process, including the notice afforded objectors and the opportunity to promptly reinstate their status, found that there was no undue impact on the rights of objectors. In the majority’s reasoning, “Here, we conclude that the burden imposed by the annual renewal requirement, in the context of the Unions’ *Beck* procedures, is, indeed, *de minimis*.” Member Brian Hayes in dissent concluded that the requirement of an annual renewal was substantial, unjustified, and not legitimately related to any union purpose. In his view, the process was also coercive in that it forced an employee to declare his position on unionization each year. He asserted that once an employee has made a decision about support, “[T]here is no more warrant for requiring its

annual renewal than there is for permitting an employer to inquire about union sympathies of unit employees every year after a union's certification."

The board's reasoning in *United Auto Workers Local 376* is flatly inconsistent with the majority decision in *Knox*. The court's decision holds that the default rule of dues collection should be one of opt-in to political contributions rather than opt-out. The logic that gave privileged the individual interests in *Knox* applies to private sector union activity under *Beck*. If an opt-out rule in the public sector rises to a constitutional infirmity, the same rule under *Beck* would amount to a "substantial" burden. Consequently, even a board majority made up of new Obama appointees would be obliged to adopt Hayes' dissent as the appropriate means of regulating collection of union dues and fees. If they ruled otherwise, a reviewing appellate court would correct their error. *Knox* therefore will have an immediate impact on private sector union security procedures, such as the situation in which an employer refuses to deduct any union dues from paychecks until the union either reduces the dues amount to collective bargaining costs only or submits employee authorizations for the full deduction of dues including political action. What was allowed under *United Auto Workers Local 376* is now forbidden under *Knox*.

Justices Sotomayor, Ginsberg, Breyer, and Kagan offered a persuasive critique of the majority decision as an exercise in judicial activism and overreach. Alito's homage to the sanctity of an individual, who is presumed to care only about "his money" and is a disengaged, atomistic cipher lacking allegiance or attachment to his fellow workers, is used to explain a decision that further enervates an already feeble labor movement. In essence, *Knox* is an act of intellectual fealty to a world view suited to early 20th-century jurisprudence. Alito's antic efforts to fashion a coherent judicial principle from his cultural predisposition creates ineffectual labor policy and contradicts the Federalist Society's credo that courts should confine themselves to the law as it exists, not as they envision it should be. Whatever Chief Justice Roberts' purported beliefs about judicial "minimalism," and to the extent that they are merely fabrications (Magarian 2013), the empirical evidence shows that "the Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts, which preceded it, were" (Epstein, Lander, and Posner 2013:1471). Unfortunately for workers and unions, the future consequences of *Knox* will be catastrophic.

As law professor and historian William Forbath (2012) summed up the juridical state of affairs, Roberts and his fellows are reclaiming constitutional territory established during the New Deal "chiefly because they have a bold, clear account of past constitutional commitments, adding

up to a vision the Constitution promises to promote and redeem: individualism, small government, godliness and private property.” Those views were fully articulated in such cases as *Adair v. United States* (1908), in which the court struck down a federal statute protecting the rights of railroad employees to join and form unions because the employer had a constitutional property interest in setting terms and conditions of employment, and the individual employee had the liberty to seek employment elsewhere. The rhetoric in *Adair* fits easily with Alito’s antediluvian world view where an employer and employee meet as notional equals on a level playing field and any collective action “that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land” (1908:175). The sentiments of Alito and his Federalist brethren in *Knox* are indistinguishable in tenor and impact from their progenitors in *Adair*, and they share the same cultural antipathy to any collective action that involves labor.

THE END OF THE ROAD

In an editorial opinion reflecting on the 2012 state elections, the *New York Times* pondered what had happened to North Carolina (Lithwick 2013). The commentary noted that in January 2013, Republicans took control of the governorship and the legislature in that state for the first time since Reconstruction, and lawmakers promptly embarked on a series of moves described as “a demolition derby, tearing down years of progress in public education, tax policy, racial equality in the courtroom and access to the ballot.” Among other measures, the legislature opted out of a federal unemployment assistance program that resulted in drastic cuts in benefits to unemployed workers. “The State Chamber of Commerce argued that cutting weekly benefits would be better than forcing businesses to pay more in taxes to pay off the debt, and lawmakers blindly went along, dropping out of the federal program.” Cuts to school budgets, restrictions on voting rights, changes in tax policy to benefit high income groups, and closure of abortion clinics are pending. The *Times* summed up with this observation: “North Carolina was once considered a beacon of far-sightedness in the South, an exception in a region of poor education, intolerance and tightfistedness. In a few short months, Republicans have begun to dismantle a reputation that took years to build.”

Other reports expanded on the *Times* story, including the role of the Koch brothers and the financial apparatus at work driving the legislative agenda of state governments through the American Legislative Exchange Council, or ALEC (Lithwick 2013). Republicans hold governorships in 30 states, and in all but five of those states, they also control the legislature (Sullivan 2013). The right-to-work laws in Michigan and Indiana, the retrenchment of collective bargaining laws in Ohio and Wisconsin,

and similar attacks on workers and unions are strategies outlined by conservative political groups led by ALEC and funded by the so-called super PACs such as Americans for Prosperity (2013) to drive a familiar neo-Confederate” agenda promoting lower taxes, less regulation, and smaller government. An article in *Forbes* (Bennett 2012) tracked the influence of David and Charles Koch in funding various institutes and political action groups dedicated to the promotion of this agenda. Their perspective on American society exerts powerful influence on voters who share their attitudes toward hierarchy and individualism, mostly whites in rural areas. Though limited in numbers, zealous conservatives exercise political power far beyond their strongholds.

Because of demographics in the United States, control of the Senate could shift to Republicans in the 2014 elections. Presently, 36 of 50 states have a majority of non-Hispanic white voters, and that population tends to vote Republican (Enten 2013). Whether Republicans gain a Senate majority or not, they and their counterparts in the House control the legislative product of Congress, and the outcome will be continued political deadlock. “One well-established fact,” according to historian Jill Lepore, “is that polarization in Congress maps onto one measure better than any other: economic inequality” (2013:79). The probability of any federal labor reform to strengthen workers’ bargaining power is unlikely in the foreseeable future, regardless of the 2016 presidential election.

What is likely is that more states will adhere to the directives from ALEC, limiting union rights for public workers and joining the right-to-work crusade. Probable right-to-work inductees are Ohio, Kentucky, Missouri, and Pennsylvania, among others. Proponents of right to work in Ohio formed an organization to submit a 2014 constitutional amendment “to secure workplace freedom for all Ohioans by amending Ohio’s Constitution to guarantee the freedom of Ohioans to choose whether to participate in a labor organization as a condition of employment” (Ohioans for Workplace Freedom 2013). Legislative stirrings are also apparent in other jurisdictions, including the traditionally union states of Oregon (*Oregonian* Editorial Board 2013) and Washington (Eldridge 2013).

CONCLUSION

To halt the reversal in labor’s fortunes, Trumka has committed the AFL-CIO to a strategy of cooperation with groups having negligible connection with traditional labor organizations (Porter 2012). His goal is to form coalitions based on a loose affinity with groups that include the NAACP, the Sierra Club, and the National Council of La Raza, in order to promote social legislation benefiting workers with or without union representation (Greenhouse 2013a). Despite Trumka’s initiative, some labor advocates point out that his “new direction” is not particularly new nor is it likely

to be effective. Selfa (2013) asserted that “the AFL-CIO is diluting its distinctive character as a federation of unions representing workers organized in their workplaces, and embracing the broader swamp of Democratic Party interest group politics.” Harold Schaitberger, president of the International Association of Firefighters, expressed similar doubts: “This is the American Federation of Labor. We are supposed to be representing workers and workers’ interests.” He added, “We are not going to be the American Federation of Progressive and Liberal Organizations” (Bogardus 2013). Trumka’s master plan may attract renewed interest in unions, but it has little chance to restore the power that labor formerly exercised in the economy.

Consequently, the future prospects for labor unions in the United States are dim and darkening. More sanguine labor advocates sometimes raise the case of George Barnett, president of the American Economic Association, who predicted at the group’s 1932 annual meeting in Cincinnati that unions would generally decline into irrelevance. “I see no reason to believe that American trade unionism will so revolutionize itself within a short period of time as to become in the next decade a more potent social force than it has been in the past decade,” Barnett said (1933:6). What in fact happened was the election of Franklin Delano Roosevelt and the creation of the New Deal. The rise of the Congress of Industrial Organizations under John L. Lewis and the unionization of automobile, steel, and other mass-production industries led to the deliverance of workers and the establishment of an American middle class (Levy and Temin 2010). On this line of thinking, energized workers in the service sector could signal a renewed labor movement as indicated by mass walkouts beginning in mid 2013 (Greenhouse 2013b).

The times are different. The Great Recession of 2008 and the presidency of Barack Obama failed to produce a similar resurgence of working-class energy. Former Federal Reserve Chairman Ben Bernanke, an accomplished scholar of the Great Depression, managed to avoid an economic collapse comparable to the 1930s (Blinder and Zandi 2010), but Bernanke and the Obama administration lacked the political capital to build another New Deal. Republican dissidents, burning with tea party fervor, brought the liberal agenda to a halt in the 2010 congressional elections (Williamson, Skocpol, and Coggin 2011) and continue to immobilize the machinery of government. With the cultural alignments now in place in the United States, the class war has crystallized, and another working-class mobilization such as the one that transformed the country 80 years ago is improbable at best. Instead, political gridlock will grind on, accompanied by shrinking labor unions, rising levels of inequality, and the continued immiseration of American workers. Marching in the vanguard of the revanchist program will be the indestructible cultural

icons of individualism, property rights, social rank, color, and privilege—all enduring accoutrements handed down from the kingdom of slavery.

REFERENCES

- Adair v. United States*. 1908. 208 U.S. 161.
- “All-Union Shop in the Courts.” 1938. *National Juridical Association Monthly Bulletin*, Vol. 6, no. 12, pp. 147–58.
- Americans for Prosperity. 2013. <<http://americansforprosperity.org>>
- Atleson, James. 1998. *Labor and the Wartime State: Labor Relations and Law During World War II*. Urbana: University of Illinois Press.
- Ballopedia. 2005. “California Proposition 75, Permission Required to Withhold Dues for Political Purposes.” <<http://bit.ly/1tKbWam>>
- Baraghoshi, Behroz, and Cihan Bilginsoy. 2013. “Interstate Variations in Private Sector Union Density in the U.S.” *Journal of Labor Research*, Vol. 34, no. 2, pp. 180–202.
- Barnett, George. 1933. “American Trade Unionism and Social Insurance” *American Economic Review*, Vol. 23, no. 1, pp. 1–15.
- Barro, Robert. 2011. “Unions vs. the Right to Work.” *Wall Street Journal* online. <<http://on.wsj.com/1oBhfAJ>>
- Beck v. Communication Workers of America*. 1988. 487 U.S. 735.
- Bennett, Laurie. 2012. “Tracking Koch Money and Americans for Prosperity.” *Forbes* online. <<http://onforbes.com/1mbQUaY>>
- Bernsein, Irving. 1969. *The Turbulent Years: A History of the American Worker, 1933–1940*. New York: Houghton Mifflin.
- Bishop, Bill. 2008. *The Big Sort: Why the Clustering of Like-Minded America is Tearing Us Apart*. New York: Houghton Mifflin.
- Blinder, Alan S., and Mark Zandi. 2010. “How the Great Recession Was Brought to an End.” *Economy.com*. <<http://bit.ly/1yjaAT2>>
- Bogardus, Kevin. 2013. “Unions Push Back Against Labor’s Ties to Progressive Groups.” *The Hill.com* <<http://bit.ly/1sVCO35>>
- Cash, William J. 1941. *The Mind of the South*. New York: Knopf.
- Chicago Teachers Union v. Hudson*. 1986. 475 U.S. 292.
- Cobb, James C. 1993. *The Selling of the South: The Southern Crusade for Industrial Development, 1936–1990*, 2nd ed. Urbana: University of Illinois Press.
- Committee on Labor and Public Welfare, 80th Congress. 1974. *Legislative History of the Labor Management Relations Act, 1947*. Washington, DC: Government Printing Office.
- Dodd, E. Merrick. 1944. “Some State Legislatures Go to War—On Unions.” *Iowa Law Review*, Vol. 29, Jan., pp. 148–73.
- Dodge, Witherspoon. 1934. Letter to Senator Robert Wagner. April 20. Robert F. Wagner Papers: Labor Files, Box 2, Folder 8, Georgetown University Library.
- Dred Scott v. Sandford*. 1857. 60 U.S. 393.
- Eldridge, Keith. 2013 (Nov. 14). “Lawmaker Wants Washington to Become ‘Right-to-Work’ State.” *KOMO News.com*. <<http://bit.ly/1okKM0R>>
- Enten, Harry. 2013 (Jul. 19). “How the Republicans Could Win Big in the 2014 Senate Elections.” *The Guardian* online. <<http://bit.ly/1oVZUWn>>
- Epstein, Lee, William Lander, and Richard Posner. 2013. “How Business Fares in the Supreme Court.” *Minnesota Law Review*, Vol. 97, no. 6, pp. 1431–72.

- Fang, Lee. 2013. "Anti-UAW Consultant: Defeat 'Invading Union Force' at VW Plant Like Our Confederate Ancestors." *The Nation* online. <<http://bit.ly/1npNVMD>>
- Federalist Society. 2013. "Our Background." The Federalist Society for Law & Public Policy Studies. <<http://bit.ly/1nAapzh>>
- Fink, Gary. 1998. "Labor Law Revision and the End of the Postwar Labor Accord." In Boyle, Kevin, ed., *Organized Labor and American Politics, 1894–1994: The Labor–Liberal Alliance*. Albany: State University of New York Press, pp. 239–57.
- Fisk, Catherine, and Erwin Chemerinsky. 2013. "Political Speech and Association Rights after *Knox v. SEIU, Local 1000*." *Cornell Law Review*, Vol. 98, no. 5, pp. 1023–91.
- Forbath, William E. 2012 (Jul. 5). "Workingman's Constitution." *New York Times* online. <<http://nyti.ms/1sgDsKX>>
- Friedman, Milton. 1962. *Capitalism and Freedom*. Chicago: University of Chicago Press.
- Friedman, Tami J. 2008. "Exploiting the North–South Differential: Corporate Power, Southern Politics, and the Decline of Organized Labor After World War II." *Journal of American History*, Vol. 95, no. 2, pp. 323–48.
- Goldfield, Michael. 1987. *The Decline of Organized Labor in the United States*. Chicago: University of Chicago Press.
- Goldfield, Michael. 1994. "The Failure of Operation Dixie: A Critical Turning Point in American Political Development?" In Gary Fink and Merl Reed, eds., *Race, Class, and Community in Southern Labor History*. Tuscaloosa: University of Alabama Press, pp. 166–89.
- Greenhouse, Steven. 2013a (Sep. 6). "A.F.L.-C.I.O. Has Plan to Add Millions of Nonunion Members." *New York Times* online. <<http://nyti.ms/1zD4caQ>>
- Greenhouse, S. 2013b (Aug. 1). "A Day's Strike Seeks to Raise Fast-Food Pay." *New York Times* online. <<http://nyti.ms/W5dXPY>>
- Griffith, Barbara. 1988. *The Crisis of American Labor: Operation Dixie and the Defeat of the CIO*. Philadelphia: Temple University Press.
- Gross, James. 1995. *Broken Promise: The Subversion of U.S. Labor Relations Policy, 1947–1994*. Philadelphia: Temple University Press.
- Hamsher, Jane. 2010. "What Happened to the Employee Free Choice Act?" Work in Progress (blog) <<http://bit.ly/1oBqlyG>>
- Hicks, Michael. 2012 (Jan.). *Right-to-Work Legislation and the Manufacturing Sector*. Center for Business and Economic Research Miller College of Business, Ball State University. <<http://bit.ly/1oBqu41>>
- Hirsch, Barry, and Donald Macpherson. 2014. "Union Membership and Coverage Database from the CPS." <<http://bit.ly/1mbWhXT>>
- Hogler, Raymond. 1998. "Unions, Politics and Power: The Ideology of Paycheck Protection Proposals." *Labor Law Journal*, Vol. 42, no. 8, pp. 1195–204.
- Hogler, Raymond. 2005. "The Historical Misconception of Right to Work Laws in the U.S.: Senator Robert Wagner, Legal Policy, and the Decline of American Unions." *Hofstra Labor and Employment Law Journal*, Vol. 23, pp. 101–52.
- Hogler, Raymond. 2007. "Exclusive Representation and the Wagner Act: The Structure of Federal Collective Bargaining Law." *Labor Law Journal*, Vol. 58, pp. 157–69.
- Hogler, Raymond. 2009. "The 2008 Defeat of Right to Work in Colorado: Is It the End of Section 14(b)?" *Labor Law Journal*, 60, pp. 5–15.
- Hogler, Raymond, Herbert Hunt III, and Stephan Weiler. 2014. "Killing Unions with Culture: Institutions, Inequality, and the Effects of Labor's Decline in the United States." *Employee Responsibilities and Rights Journal*. In press.

- Jordan, Winthrop. 1968. *White over Black: American Attitudes Toward the Negro, 1550–1812*. Chapel Hill: University of North Carolina.
- Kahan, Dan M. 2012 (Aug. 16). “Why We Are Poles Apart on Climate Change.” *Nature*, Vol. 488, p. 255. <<http://bit.ly/1wnBGWe>>
- Kahan, Dan M., and Donald Braman. 2006. “Cultural Cognition and Public Policy.” *Yale Law and Policy Review*, Vol. 24, no. 1, pp. 147–70.
- Kahan, Dan, David A. Hoffman, and Donald Braman. 2009. “Whose Eyes Are You Going to Believe? *Scott v. Harris* and the Perils of Cognitive Illiberalism.” *Harvard Law Review*, Vol. 122, pp. 838–906.
- Kahan, Dan, Ellen Peters, Erica Dawson, and Paul Slovic. 2013. *Motivated Numeracy and Enlightened Self-Government*. Yale Law School, Public Law Working Paper No. 307. <<http://bit.ly/1yjjmQK>>
- Katznelson, Ira. 2013. *Fear Itself: The New Deal and the Origins of Our Time*. New York: W.W. Norton.
- Killingworth, Charles. 1948. *State Labor Relations Acts: A Study of Public Policy*. Chicago: University of Chicago Press.
- King, Neil Jr., and Rebecca Ballhaus. 2013 (Jul. 24). “Views on Race Relations Sour, Especially Among Blacks.” *Wall Street Journal* online. <<http://on.wsj.com/1mDN2od>>
- Knox et al. v. California State Employees Association*. 2010. 628 F.3d 1115 (9th Cir.).
- Knox et al. v. Service Employees Union, Local 1000*. 2012. 567 U.S. ____ (slip op.).
- Lafer, Gordon, and Sylvia Allegretto. 2011. *Does ‘Right-to-Work’ Create Jobs? Answers from Oklahoma*. Economic Policy Institute Briefing Paper No. 300. <<http://bit.ly/1wnBK8o>>
- Lepore, Jill. 2013 (Dec. 2). “Long Division: Measuring the Polarization of American Politics.” *New Yorker*, pp. 75–79.
- Levy, Frank, and Peter Temin. 2010. “Institutions and Wages in Post–World War II America. In Clair Brown, Barry Eichengreen, and Michael Reich, eds., *Labor in the Era of Globalization*. New York: Cambridge University Press, pp. 15–49.
- Lichtenstein, Nelson. 1982. *Labor’s War at Home: The CIO in World War II*. New York: Cambridge University Press.
- Lipset, Seymour M., and Noah Meltz. 2005. *The Paradox of American Unionism: Why Americans Like Unions More Than Canadians Do But Join Much Less*. Ithaca: Cornell University Press.
- Lithwick, Dahlia. 2013 (Jul. 24). “What’s the Matter with North Carolina?” *Slate.com*. <<http://slate.me/1oBqVew>>
- Machinists v. Street*. 1961. 367 U.S. 740.
- MacLean, Nancy. 2010. “Neo-Confederacy against the New Deal: The Regional Utopia of the Modern American Right.” In Matthew D. Lassiter and Joseph Crespino, eds., *The Myth of Southern Exceptionalism*. New York: Oxford University Press, pp. 308–30.
- Magarian, Gregory. 2013. “Chief Justice Roberts’s Individual Mandate: The Lawless Medicine of *National Federation of Independent Business v. Sebelius*.” *Northwestern University Law Review*, Vol. 108, no. 1, pp. 15–35.
- Millis, Harry A., and Emily Clark Brown. 1950. *From Wagner to Taft–Hartley: A Study of National Labor Policy and Labor Relations*. Chicago: University of Chicago Press.
- Minchin, Timothy. 2005. *Fighting Against the Odds: A History of Southern Labor since World War II*. Gainesville: University of Florida Press.
- National Labor Relations Board. 1985. *Legislative History of the National Labor Relations Act, Vols. I and II*. Washington, DC: Government Printing Office.

- National Labor Relations Board v. Jones and Laughlin Steel Corp.* 1937. 301. U.S. 1.
- Ohioans for Workplace Freedom. 2013. <<http://ohioansforworkplacefreedom.com>>
- Olsen, Christopher. 2011. "The Politics of Honor and Masculinity: Political Culture in the Deep South, 1820s–1861." In Lisa T. Frank and Daniel Kilbride, eds., *Southern Character: Essays in Honor of Bertram Wyatt-Brown*. Gainesville: University of Florida Press, pp. 41–55.
- Olson, Mancur. 1965. *The Logic of Collective Action: Public Goods and the Theory of Groups*. Cambridge, MA: Harvard University Press.
- Oregonian Editorial Board. 2013 (Sep. 3). "John Kitzhaber vs. Employee Choice." *Oregon Live* online. <<http://bit.ly/1zD54Mu>>
- Padway, Joseph. 1943. "Fascism Comes to America." *American Federationist*, Vol. 50, May, pp. 10–12.
- Pasulka, Nicole. 2012 (Mar. 16). "Right-to-Work Laws, Explained." *Mother Jones* online. <<http://bit.ly/1oW1uaB>>
- Patterson, Orlando. 1991. *Freedom, Volume 1: Freedom in the Making of Western Culture*. New York, Basic Books.
- Porter, Eduardo. 2012 (Jul. 18). "Unions' Past May Hold Key to Their Future." *New York Times*, p. B1. <<http://nyti.ms/1p31G9f>>
- Reich, Robert. 2013 (Jul. 9). "The Quiet Closing of Washington." *Huffington Post.com*. <<http://huff.to/1mbWSJ4>>
- Rodgers, Daniel. 2011. *The Age of Fracture*. Cambridge, MA: Harvard University Press.
- Schechter Poultry Corp. v. United States*. 1935. 295 U.S. 495.
- Schmitt, John, and Ben Zipperer. 2007. *Dropping the Ax: Illegal Firings During Union Election Campaigns*. Center for Economic and Policy Research. <<http://bit.ly/1rmx8Pm>>
- Sefcovic, Enid, and Celeste Condit. 2001. "Narrative and Social Change: A Case Study of the Wagner Act of 1935." *Communication Studies*, Vol. 52, no. 4, pp. 284–301.
- Selfa, Lance. 2013 (Sep. 23). "What Will Get the Labor Movement Moving?" *Socialist Worker.org*. <<http://bit.ly/Ua69Ld>>

- Shermer, Elizabeth T. 2009. "Counter-Organizing the Sunbelt: Right-to-Work Campaigns and Anti-Union Conservatism, 1943–1958." *Pacific Historical Review*, Vol. 78, no. 1, pp. 81–118.
- Sullivan, Sean. 2013 (Feb. 4). "The Republican Party's Big State-level Advantage, in One Chart." *Washington Post* online. <<http://wapo.st/1qZMURd>>
- Tomlins, Christopher. 2010. *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865*. New York: Cambridge University Press.
- United Auto Workers Local 376 (Colt's Manufacturing)*. 2011. 356 NLRB No. 64.
- U.S. Bureau of Labor Statistics (U.S. BLS). 2014. "Union Members' Survey." <<http://1.usa.gov/1kXdAMp>>
- F. Wagner Papers: Labor Files, Box 2, Folder 8, Georgetown University Library.
- Warner, Kris. 2013. "The Decline of Unionization in the United States: Some Lessons from Canada." *Labor Studies Journal*, Vol. 38, no. 2, pp. 110–38.
- Weiler, Paul C. 1983. Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA." *Harvard Law Review*, Vol. 96, no. 8, pp. 1769–827.
- Western, Bruce, and Jake Rosenfeld. 2011. "Unions, Norms, and the Rise in U.S. Wage Inequality." *American Sociological Review*, Vol. 76, no. 4, pp. 513–37.
- White, Walter. 1934. Letter to Senator Robert Wagner. April 20. Robert F. Wagner Papers: Labor Files, Box 2, Folder 8, Georgetown University Library.
- Williamson, Vanessa, Theda Skocpol, and John Coggin. 2011. "The Tea Party and the Remaking of Republican Conservatism." *Perspectives on Politics*, Vol. 9, no. 1, pp. 25–43.
- Woodward, C. Vann. 1974. *The Strange Career of Jim Crow*, 3rd ed. New York: Oxford University Press.
- Wyatt-Brown, Bertram. 1986. *Honor and Violence in the Old South*. New York: Oxford University Press.

Labor in the World of Cynical Conservative Federalism

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Federalism is a wonderful topic for a legal realist. The rhetoric and inconsistencies engaged in by almost everyone on the subject, especially the conservative members of the Supreme Court, reinforce the broader idea that law is what judges want it to be to serve their policy preferences.

And if federalism in general reinforces a cynical view of the law, federalism and labor policy tend to reveal law at its most ideologically partisan. In fact, the legal realist view that “law” has little fixed meaning outside the political and policy agenda of judges was largely born out of the frustrations of many legal thinkers sympathetic to the way labor rights were treated under federalism doctrines of the pre-New Deal era.

While conservative political leaders and jurists tend to talk and write far more about respecting “state sovereignty” or the Tenth Amendment, they actually override state power at a far higher rate than their liberal counterparts. The House Republican majority in Congress voted more than 57 times between 2001 and 2006 to pre-empt state laws, including action to pre-empt state limits on air pollution, to pre-empt state regulation of contaminated food, and to block tougher state regulation of Internet “spam.”¹

To cite one major example, which had a large national impact, early in the past decade, state predatory lending laws that sought to limit abuses by subprime lenders were shut down by the Bush administration using the club of federal power, yet conservative groups largely supported that wildly destructive attack on state authority.² And when Dodd–Frank was being written to give state legislatures and state attorneys general more authority to target abuses in their states by national banks, conservative elected leaders and organizations lined up to support amendments to undermine that increased state authority over local financial abuses.³

Ironically, even as conservative political leaders have decried the Affordable Care Act as a violation of state sovereignty, two of the major health reforms proposed by conservative leaders in Congress—“tort reform”⁴ and allowing insurance companies to sell their products across state lines⁵—both involved using federal law to limit consumer protections for health care patients provided for by state laws.

This conservative focus on pre-empting state law protections for consumers and workers (which will be discussed in more detail later in this chapter) is hardly accidental. Financial backers of conservative legal efforts, such as the U.S. Chamber of Commerce, have unambiguously argued for pre-empting state regulation in favor of “one set of rules” set by the federal government.⁶ An intellectual center for this attack on pre-emption over the past decade especially was the Federalism Project at the corporate-funded⁷ American Enterprise Institute (AEI), which readily admits that corporations see federal pre-emption as their “safeguard against unwarranted state interference with the national economy” and use it to stop “aggressive trial lawyers and [state] attorneys general” from increasing regulation on corporations.⁸ As the AEI argued, “billions of dollars hang on regulatory nuances” and corporate interests have aggressively supported the right-wing assault on state laws. The corporate-backed AEI even has a project dedicated exclusively to criticizing state attorneys general for seeking to hold corporate lawbreakers accountable.⁹

Still, when it suits them, as with the litigation to overturn the Affordable Care Act, conservative judges and activists will trot out a “states’ rights” legal history, highlighting the way federal law can be used to attack state laws they dislike and constitutional attacks in the name of federalism can be used to undermine federal laws they seek to overturn.

HISTORICAL CONTEXT OF FEDERALISM DEBATE

Before turning to the specific context of labor and federalism, it’s worth highlighting that the conflict between the rhetoric of states’ rights and the reality of conservative love of select federal power when it suits its purposes is long-standing. Those who argue that the “original intent” of the Founders was a strong commitment to a judicially enforced states’ rights face a basic inconvenient fact: in the 72 years before the Civil War, the Supreme Court, with one exception, never struck down a federal law as unconstitutional because federal officials had overstepped their powers under the Constitution. The exception was the *Dred Scott* decision, which expanded slavery to territories against the will of Congress and helped lead to the Civil War. As the Supreme Court justices appointed by those founding drafters of the Constitution said in 1819 in their *McCullough v. Maryland* decision, affirming the wide authority of the federal government:

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional.¹⁰

Yet state laws were repeatedly struck down by that court when those laws encroached on the rights of property holders, especially slave property holders. Most notably, the 1793 Fugitive Slave Act, which gave slave owners the right to cross into free states and kidnap alleged fugitive slaves, reflected the pervasive enforcement of slave owner rights, even when it conflicted with local state law.¹¹ New federal laws protected the international slave trade and overturned state laws that had begun restricting the importation of slaves.¹² In only three court decisions were congressional laws even partially struck down in this period, and in none of these cases were individual human rights or state government power to resist federal direction protected.

The immediate post-Civil War amendments—the Thirteenth, Fourteenth, and Fifteenth—created a new constitutional mandate of not only freedom and voting rights for freed slaves but more broadly gave Congress the “power to enforce, by appropriate legislation” (Section 5 of the Fourteenth Amendment) the protection of the “privileges or immunities” of Americans overall and to protect them from state abuses denying them “life, liberty or property.” This was followed a few decades later by the Sixteenth Amendment clearly supporting the ability of the federal government to collect income taxes and the Seventeenth Amendment promoting the direct election of U.S. senators, which laid the basis for the New Deal revolution of the 1930s empowering a pro-worker and pro-consumer turn of federal power.

A fundamental failing of almost all states’ rights conservative legal arguments is they invoke the intent of the Founders who wrote the 1789 Constitution but are remarkably silent on the intent of those who wrote all the post-Civil War amendments, which were clearly meant to empower the federal government to take wide-ranging action in a range of areas, especially of commerce, including labor relations.

LABOR IN THE FEDERALISM DEBATE

In the case of labor, the fight over federalism has been a pervasive part of the more general capital-labor conflict. Labor unions in our early history were often subject to criminal conspiracy statutes, then anti-trust injunctions, as well as a range of other court-ordered restrictions.¹³ Even as federal troops were withdrawn from Southern states following Reconstruction, they were redeployed increasingly to break strikes in the North, often against the will of local government officials who might support the labor action in question. This pattern was set with the Great Railroad Strike of 1877—the year after federal troops stopped enforcing Reconstruction in the South—and continued through the strike wave of 1885–1886 and the 1894 Pullman Strike, and into the Progressive Era.¹⁴

It is par for the course that even as corporate interests would use the federal government to target labor in the post-Civil War period, the rhetoric of states' rights would become more common to selectively neutralize the aspects of federal power that might favor labor interests.

Armed with the Sherman Anti-Trust Act,¹⁵ federal courts would deploy that new tool against unions much more than against corporations in the law's early years. In an era when the Supreme Court otherwise declared local commerce not subject to federal regulations such as minimum wage or child labor laws, the federal courts were quite willing to jump in to suppress local labor disputes. In the 1908 decision in *Loewe v. Lawlor*,¹⁶ the so-called Danbury Hatters case, the Supreme Court upheld an injunction against a hatters union for launching a consumer boycott because it supposedly imposed the conflict on "third parties and strangers involuntarily."¹⁷ Similarly, in *Coronado Coal Co. v. United Mine Workers of America*,¹⁸ the Supreme Court would recognize that local economic activity could affect other regions of the country—in this case arguing an otherwise legitimate local strike could be enjoined because its purpose was not merely to win higher wages locally but also to prevent non-union production from undermining union wages at other companies.¹⁹

In response, labor unions generally developed a strong anti-judicial orientation. The 1914 Clayton Act created an exception to the anti-trust laws to protect unions from injunction,²⁰ although the Supreme Court essentially gutted the intent of the law in *Duplex Printing Press Co. v. Deering*²¹ by arguing that the exemption applied only to actions taken by employees against their employers,²² so any sympathy action or boycott could still be blocked by federal courts.²³ With the 1932 Norris-LaGuardia Act, the goal was to take federal courts completely out of the business of regulation by injunction.²⁴ The 1935 Wagner Act reflected that anti-judicial streak with a clear pre-emption of state and federal courts in favor of decisions being made by a new National Labor Relations Board (NLRB), whose function was to mediate industrial conflict but not impose substantive results on the industrial combatants.²⁵

What is interesting about the U.S. system of federalism is that most corporate charters and the laws under which they operate derive from state corporate law statutes, overwhelmingly overseen by the Delaware chancery court,²⁶ with some aspects of governance effected by federal securities laws. Internal corporate control of corporations governed largely by the Delaware chancery court and labor dispute governed by the NLRB brought about an almost complete procedural and even jurisdictional separation between the realms of internal corporate governance and industrial relations law in the United States. This development avoided even the semblance of the corporatist, social democratic, or codetermination systems that encouraged some direct legal mediation between labor and corporate interests in Europe in the post-World War II period.

Still, the labor law also largely depoliticized labor action and channeled it into single firm or narrow industry-specific labor actions.²⁷ Anti-union amendments added with the 1947 Taft–Hartley Act²⁸ and 1959 amendments,²⁹ along with National Labor Relations Board interpretations, weakened labor’s ability to bargain over many “management” areas while barring labor law protection for supervisors³⁰ and management personnel.³¹ Unions lost not only the ability to contract against the company dealing with non-union subcontractors and suppliers,³² but the law also largely barred unions from contracting to prevent a firm itself from opening non-union subsidiaries³³ or requiring that workers be retrained for new jobs when automation eliminated their old ones.³⁴

In the post-war period, the courts would largely bar states from a direct role in governing labor relations: in *San Diego Building Trades Council v. Garmon* in 1959³⁵ and *Machinists v. Wisconsin Employment Rel. Comm’n* in 1976,³⁶ the Supreme Court declared that states could not regulate how unions or employers engaged in organizing campaigns or what economic weapons they could use during strikes and related activity. In *Garmon*, the court argued that whenever any union or employer conduct “is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.”³⁷ Even a potential conflict with federal law would pre-empt state law unless a “compelling state interest . . . in the maintenance of domestic peace” (e.g., preventing physical violence) was at stake.³⁸ Therefore, regardless of whether a state law helped or hurt workers, it would theoretically be struck down.

Similarly, in *Machinists*, the court declared that Congress meant to leave “self-help” economic weapons in labor conflict largely unregulated.³⁹ For example, state laws could not ban union members from refusing to work overtime.⁴⁰ Labor conflict was to be “controlled by the free play of economic forces.”⁴¹ The message to the federal courts and the states was to leave labor regulation to the NLRB.

THE EXCEPTIONS: THE LEGAL GAMESMANSHIP OF LABOR RELATIONS FEDERALISM

The courts, however, would increasingly ignore that message, especially in the hands of conservative justices in recent decades as federalism would selectively shut down or conversely empower state law based largely on whether it further weakened labor union strength in the workplace.

The Right-to-Work Provision

The most obvious states’ rights exception in federal labor law is the so-called right-to-work 14(b) provisions added in the Taft–Hartley amendments, which allowed state governments to ban labor unions from

negotiating contracts that required employees benefiting from a union contract from paying fees to the union that negotiated the contract.

From early on, even many conservative economic thinkers found this exception ideologically odd and at cross-purposes with their general view that employers should be able to negotiate any contract they wished with employees. Milton Friedman in his *Capitalism and Freedom* compared restrictions on employer bargaining rights embodied in right-to-work laws with the loss of contractual liberty resulting from anti-discrimination laws.⁴² Sheldon Richman wrote as recently as 2012 in the libertarian magazine *Reason* about the long-held belief by many pro-market theorists that allowing state governments to be involved with “banning a voluntary agreement” between employers and employees and instead “substitute the decisions of politicians for those that consumers would like to express in the market place.”⁴³ Yet he notes that most employers didn’t want “laissez-faire for labor organizers” but preferred the government policing of the workplace embodied in federal labor law, especially once the limitations on labor power were enacted with Taft–Hartley.

What right-to-work largely did was reinforce the regional divide in the nation between a largely non-union South, where state governments could now use right-to-work laws to prevent unions from getting a financial foothold, and the union North, where unions could largely block the passage of right-to-work laws. This followed the exemption of agricultural and domestic workers from rights under the National Labor Relations Act (NLRA), provisions demanded by many Southern legislators to deny the then-largely black workforce in those occupations in the South from being able to unionize under the law.

The Uncertain State Control of Property Rights Under Labor Law

Access to employer property to discuss labor rights was possibly the most important gain for labor from the original Wagner Act. In *Republic Aviation Corp. v. N.L.R.B.* in 1945,⁴⁴ the Supreme Court affirmed that pro-union employees could promote unionization on company property so long as they did so on their own time, but the more disputed issue has been the extent to which *nonemployee* union organizers and picketers could access employer property to inform employees about their rights to unionize.⁴⁵

In 1968, the court held that unions could not be barred from picketing in shopping centers open “generally to the public,”⁴⁶ but as conservative jurists were added to the Supreme Court in the 1970s, the court determined that state trespass law would trump National Labor Relations Board rulings on union rights to access employer property. While the NLRB found that picketing was protected under Section 7 of the NLRA,⁴⁷ the Supreme Court would rule in the 1978 *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* decision that a union picketing

in a department store parking lot could be evicted under state trespass law,⁴⁸ despite this clearly contradicting the *Garmon* standard of pre-emption. As Justice William Brennan argued in dissent, “[b]y holding that the arguably protected character of union activity will no longer be sufficient to pre-empt state court jurisdiction, the Court creates an exception of indeterminate dimensions to a principle of labor law pre-emption that has been followed for at least two decades.”⁴⁹ Justice Brennan argued the majority decision undermined the tradition of establishing uniform national labor law and instead left state courts free to interpret federal labor law.⁵⁰

Even the Reagan-dominated NLRB of the 1980s sought a middle-ground compromise, with a 1988 ruling in *N.L.R.B. v. Jean Country*,⁵¹ which balanced the right to organize with property rights: “[O]ur ultimate concern . . . is the extent of impairment of the Section 7 right if access should be denied, in balance with the extent of impairment of the private property right if access should be granted.”⁵² *Jean Country* gave union organizers access to a shopping mall to conduct informational leafleting and area-standards picketing on the premises of a two-store shopping center.⁵³ But a 5–4 Supreme Court majority in the 1992 *Lechmere* decision written by Justice Clarence Thomas definitively declared that state property law would trump federal labor law unless nonemployee organizers had “no reasonable alternative [way]” to communicate with employees.⁵⁴ Because the union could picket at a distance or advertise in local newspapers, the court held that it had the NLRA-required access to workers.⁵⁵ The dissenters castigated the majority for overriding the NLRB’s own interpretation of the statutes involved and creating a “narrow, iron-clad rule”⁵⁶ that de facto undermined the ability of employees to “learn from others the advantages of self-organization”.⁵⁷

[I]t is singularly unpersuasive to suggest that the union has sufficient access for this purpose by being able to hold up signs from a public grassy strip adjacent to the highway leading to the parking lot.⁵⁸

State property law was thereby used by the conservative *Lechmere* majority to pre-empt support by the federal NLRB to give unions access to employees to better exercise their rights.

What about where state property law was designed to give unions that access? Just 2 years after *Lechmere*, the Supreme Court endorsed the view that federal labor law would pre-empt state efforts to modify state property law to accommodate labor interests. In that decision, the Supreme Court unanimously endorsed a Fourth Circuit decision that had struck down a West Virginia law that determined the state would not intervene in strikes to enforce trespass statutes during a strike (“A [state] may not,

consistently with the NLRA, withhold protections of state anti-trespass law from [an] employer involved in [a] labor dispute”).⁵⁹ The liberal members of the court had maintained their commitment to pre-emption of state property law by the NLRA, but all the conservative members of the *Lechmere* majority flipped where the state had favored labor in a dispute. This seems to create the Catch-22 that state property law trumps the NLRB’s attempts to accommodate the free speech needs of labor to talk to workers on the job, yet states may not themselves try to accommodate those labor interests without potentially seeing those laws struck down as pre-empted.

The West Virginia case had involved the more fraught issue of a strike situation,⁶⁰ but the Supreme Court did decide in the recent term not to take cert on a decision by the California Supreme Court, which upheld the so-called California Moscone law⁶¹ prohibiting injunctions and the application of trespass laws against nonviolent labor picketing. Still, a future case may bring to the Supreme Court the issue brought by employers—and supported by the D.C. Circuit Court of Appeals in another case—that such a law violates the First Amendment because it favors speech in a viewpoint-discriminatory way. So, we could very well see a future conservative court majority using federal First Amendment law to override state property law, which otherwise overrides federal labor law, with the twists and turns of pre-emption and states’ rights mostly having consistency in conservative legal doctrine in coming to anti-union outcomes.

Public Money and Labor Rights Under State Public Contracts

One other clear area of state government authority in labor relations traditionally pertained to state and public employees, who are excluded from protection under the federal NLRA. Yet as states have increasingly turned to using private contractors to provide public services, they have seen federal labor law cited in trumping state rules seeking to maintain rights for workers performing state public services. In some cases, foreign policy concerns have motivated these limitations, such as the court striking down Massachusetts’ “Burma law,” which had banned government agencies from doing business with the then-Burmese dictatorship.⁶²

The trend has gone further in essentially mandating that public money go to companies that abuse workers and violate labor laws. For example, back in 1986, the Supreme Court unanimously pre-empted a Wisconsin law that prohibited state contracts from going to companies that had repeatedly violated the NLRA. In *Wisconsin v. Gould*, states were barred from requiring that the money they spent on government services match their public policy preferences; the refusal to give an employer the privilege of a government contract was treated as a “punishment” for breaking federal law, where any punishments for such violations were reserved

“exclusively for the [National Labor Relations] Board.”⁶³ In 1996, the D.C. Circuit Court of Appeals extended the *Gould* rationale to apply to federal procurement policies, striking down an executive order from the Clinton administration barring companies that had hired striker replacements from bidding on federal contracts.⁶⁴

For liberals, this was restating their decades-old support for pre-emption in the federal labor law context, but the support for such expansive pre-emption of state spending powers hardly fits the conservative rhetoric of states' rights. For conservative justices, state control of property rights had in fact been so fundamental that they overrode NLRB decisions, but a state's control of its own spending was not so fundamental and had to bow to federal pre-emption.

More recently, the Supreme Court ruled that states could not even require that money provided to contractors go only to the work contracted for; instead, a California law prohibiting public funds from being used to hire lawyers or other consultants to oppose employee unionization was struck down as pre-empted by the NLRA.⁶⁵ In that case, Justices Ruth Bader Ginsberg and Steven Breyer dissented from this radical extension of pre-emption, saying it forced states to be “conscripted into paying” for anti-union employer speech.⁶⁶ So, not only do states have to give public money to anti-union contractors, but they also have to fund their anti-union attacks on their employees while performing those contracts.

THE CYNICISM OF CONSERVATIVE PRE-EMPTION OF STATE INDIVIDUAL EMPLOYMENT RIGHTS

The selective pre-emption of rights under federal labor law at least has some historical reflection in the tension between the original pro-labor Wagner Act and the anti-labor amendments added in the 1947 Taft–Hartley Act, but the recent string of decisions by the Supreme Court voiding state employment rights based on employees signing contracts agreeing to arbitrate those claims and the 1925 Federal Arbitration Act⁶⁷ overriding state law⁶⁸ highlights the fundamental cynicism of the conservative Supreme Court majority.

For essentially 75 years after passage of the 1925 Federal Arbitration Act (FAA), it was understood that the law was meant to enforce arbitration agreements between businesses and did not apply to employment contracts. In fact, the issue of its application to workers was debated at the law's passage, and a specific clause was inserted in the FAA that no arbitration would apply “to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” Then–Commerce Secretary Herbert Hoover argued that there was no intention to cover employment contracts at passage, and organized labor dropped their opposition to the bill only with that assurance.

The question is how did the five conservative members of the Supreme Court in a majority decision 76 years later in the 2001 *Circuit City Stores v. Adams* decision⁶⁹ find that state law protections of employment rights had to give way to a federal law? They made the bizarre move of claiming that the specific legislative exemption for employment contracts applied only to the specified classes of employees such as seamen and railroad employees mentioned in the text and not to the far larger group of workers engaged in interstate commerce as defined by the New Deal Court a decade later. And Justice Anthony Kennedy for that majority stated bluntly that “we need not assess the legislative history of the exclusion provision.”⁷⁰

As Justice Stevens lambasted the majority in dissent, they had cynically ignored the language and intent of the Federal Arbitration Act and were “[p]laying ostrich to the substantial history behind the [labor exclusion] amendment.” He added on behalf of the four dissenters, “Today, the Court fulfills the original—and originally unfounded—fears of organized labor by essentially rewriting the text” of the law.⁷¹

Ultimately, the conservative Supreme Court majority’s cynical disrespect for state authority is reflected in the twists of both legislative history and the language of the text of a federal law to find pre-emption where none was intended or warranted.

CONCLUSION

Labor in the modern judicial landscape faces, in many cases, the worst of worlds, where federal law pre-empted the most favorable aspects of state law, while unfavorable state law overrides the more pro-labor aspects of federal law. Under the most conservative state governments, this has meant that labor density is at unfathomably low levels, with less than 3% of employed workers in a union in North Carolina.⁷²

The main encouraging fact is that some of the more pro-labor states have managed to maintain an environment supportive of a degree of union density. New York in particular still has 23.2% of its workforce who are members of a union,⁷³ while California stands out as a state where the percentage of the workforce in a union has actually defied the national downward trend and increased marginally over the past decade, rising from 16.8% of the workforce in 2003 to 17.2% in 2012. Much of this difference can be attributed to support for unions in the public sector or publicly funded sectors, such as home health care and construction, but the sharp differences in labor density among states show that there has been some room to promote supportive state policy for unions despite the obstacles of federal pre-emption.

Still, as noted previously, states have repeatedly seen supportive policy struck down by the courts, creating almost a cat-and-mouse relationship

between pro-labor state policy makers and anti-labor courts. No legislative victory has been secure because success at the state level, or even the federal, has been so often subject to a judicial voiding of that success in the name of some twist of pre-emption or states' rights legal doctrine as it suits conservative legal interests.

ENDNOTES

¹ *Congressional Preemption of State Laws and Regulations, United States House of Representatives Committee on Government Reform*. Minority Staff Special Investigations Division (June 2006). <<http://bit.ly/1y6FYIA>>

² J. Mijin Cha, *The Predatory Lending Bubble and How the Feds Made It Worse*, Progressive States Network Stateside Dispatch, March 19, 2007. <<http://bit.ly/1pP2IYJ>>

³ Nathan Newman, *Financial Reform: Keep State AGs and State Law on the Beat Against Predatory Lending Practices*. Progressive States Network Stateside Dispatch, May 10, 2010. <<http://bit.ly/XQcAVR>>

⁴ Americans for Insurance Reform, *Major Study of Malpractice Insurance Industry Finds No Basis to Further Limit Liability of Unsafe Health Care Providers*, Press Release, July 22, 2009. <<http://bit.ly/1saDEZy>>

⁵ Elizabeth Carpenter, Len Nichols, and John Bertko, *Across State Lines Explained: Why Selling Health Insurance Across State Lines Is Not the Answer*, New America Foundation Report, October 8, 2008. <<http://bit.ly/TIbR6y>>

⁶ *How Are Businesses Affected by Latin American's Legal Environment?* <<http://bit.ly/1saDLUM>>

⁷ SourceWatch website. <<http://www.sourcewatch.org>>

⁸ *Federal Preemption: Law, Economics, Politics*, The Federalism Project: American Enterprise Institute. <<http://bit.ly/1msjYkv>>

⁹ *AG Watch: The Federalism Project's Eye on Attorneys General*, The Federalism Project: American Enterprise Institute. <<http://bit.ly/1n0XZQG>>

¹⁰ *McCulloch v. Maryland*, 17 U.S. 316 (1816).

¹¹ Kaczorowski at 1027.

¹² Foner 2002 at 173.

¹³ Between 1880 and 1930, state and federal courts issued roughly 4,300 anti-strike decrees. *The Oxford Companion to the Supreme Court of the United States 490* (Kermit Hall, ed., 1992).

¹⁴ See Josiah Bartlett Lambert, *If the Workers Took a Nation: The Right to Strike and American Political Development* (2005) for one of the most detailed histories of federal action against the right to strike in American history.

¹⁵ See Sherman Anti-Trust Act, 15 U.S.C. §§ 1–7 (2000) (making some labor union activities a violation of the anti-trust laws because they restrain trade).

¹⁶ *Loewe v. Lawlor*, 208 U.S. 274, 308 (1908).

¹⁷ *Id.* at 294.

¹⁸ *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925).

¹⁹ *Id.* at 310.

²⁰ Clayton Act of 1914 §§ 6, 20, 15 U.S.C. § 17 (2000), 20 U.S.C. § 52 (original version found at Ch. 323, §§ 6, 20, 38 Stat. 730 (1914)); see also William E. Forbath, *Law and the Shaping of the American Labor Movement*, 156–58 (1991) (discussing the exceptions

found in sections 6 and 20 of the Clayton Act). The Clayton Act exceptions would essentially be nullified by a narrow interpretation by the Supreme Court in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 468–75 (1921) (holding that sections 6 and 20 merely codified pre-existing common law).

²¹ *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

²² *Id.* at 472.

²³ *Id.* at 479.

²⁴ Norris–LaGuardia Act, 29 U.S.C. §§ 101–115 (original version at 47 Stat. 70 (1932)); see also Forbath, *supra* n. 30, at 159–63 (discussing the Norris–LaGuardia Act as a collective libertarian impulse).

²⁵ Wagner Act, § 3, 49 Stat. 449 (1935) (codified as amended 29 U.S.C. § 153). The chairman of the Senate committee that drafted the National Labor Relations Act declared: “When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, ‘Here they are, the legal representatives of your employees.’ What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.” 79 Cong. Rec. 7660 (statement of Senator Walsh) (cited in *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 484 (1960)).

²⁶ On the rise of Delaware as the premier venue for corporate incorporation, see Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 Del. J. Corp. L. 885 (1990), and William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 Yale L.J. 663, 663–70 (1974).

²⁷ Mark Barenberg contrasts the NLRAs upholding of exclusive representation chosen by a majority of workers as reflecting a view of workers in a firm as “organic groups unified by solidarity interests and norms.” Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 Harv. L. Rev. 1381, 1452–53 (1993).

²⁸ Labor Management Relations (Taft–Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended in 29 U.S.C. §§ 141–197 (2000)).

²⁹ Labor–Management Reporting and Disclosure Act, Pub. L. No. 86-257, 73 Stat. 543 (1959) (codified as amended in 29 U.S.C. § 158(e) (2000)). In 1959, Section 8(e)—the “hot cargo” amendment—was added to the NLRA to further tighten prohibitions on unions negotiating with firms for agreements by the firm “to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer.” 29 U.S.C. § 158(e); see also Theodore J. St. Antoine, *Secondary Boycotts and Hot Cargo: A Study in the Balance of Power*, 40 U. Det. L.J. 189, 205–11 (1962) (analyzing the history of Section 158(e)).

³⁰ In exclusions to NLRA coverage, Section 2(3) added “[t]he term ‘employee’ shall ... not include ... any individual employed as a supervisor” with supervisor defined in Section 2(11): “The term ‘supervisor’ means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action. ...” 29 U.S.C. § 152(3), (11).

³¹ While the NLRA has no specific management exclusion clause, the NLRB developed its own doctrine that management employees were not entitled to the protections of the Act. *In re Denver Dry Goods*, 74 N.L.R.B. 1167, 1175 (1947).

³² See, e.g., *NLRB v. Milk Wagon Drivers Union, Local 753*, 335 F.2d 326, 328–29 (7th Cir. 1964) (holding that a union-only subcontracting clause violates Section 8(e) of

the Labor–Management Relations Act); *Unis v. Int’l Bhd. of Teamsters*, 541 F. Supp. 706 (W.D. Pa. 1982) (holding subcontracting clauses for unions violates only Section 8(e) of the Labor–Management Relations Act).

³³ In *D’Amico ex rel. NLRB v. Painters & Allied Trades Dist. Council No. 51*, 120 L.R.R.M. 3473, 3477 (D.Md. 1985), the NLRB barred contracts by unions to prevent the creation of such “double-breasting” non-union subsidiaries doing bargaining-unit work. In this case, a court issued an injunction against a strike to attain such a clause, declaring it an illegal “hot cargo” strike in violation of Section 8(e).

³⁴ While courts and the NLRB protect union contracts that protect traditional bargaining-unit work, they bar union efforts to negotiate inclusion of new work within the bargaining unit, even in most cases where the new jobs functionally substitute for the older jobs being lost to automation. See Howard Lesnick, *Job Security and Secondary Boycotts: The Reach of N.L.R.A. §§ 8(b)(4) and 8(e)*, 113 U. Pa. L. Rev. 1000, 1004–05 (1965); Ted Cassman, *Deconsolidating the Work Preservation Doctrine: Dolphin-Associated Transport*, 4 Indus. Rel. L.J. 604 (1981); Alicia G. Rosenberg, Note, *Automation and the Work Preservation Doctrine: Accommodating Productivity and Job Security Interests*, 32 UCLA L. Rev. 135, 148–49 n.69 (1984). However, while this general NLRB policy was upheld, some flexibility was introduced in *NLRB v. International Longshoremen’s Association*, 447 U.S. 490 (1980), and *NLRB v. International Longshoremen’s Association*, 473 U.S. 61 (1985), in which some work replacement rules were upheld where “the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere.” *NLRB v. Int’l Longshoremen’s Ass’n*, 447 U.S. at 510.

³⁵ *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

³⁶ *Int’l Ass’n of Machinists & Aerospace Workers v. Wisc. Employment Rel. Comm’n*, 427 U.S. 132, 140 (1976).

³⁷ *Garmon*, 359 U.S. at 245.

³⁸ *Id.* at 247. While labor activity containing elements of violence may violate Section 8(b)(1)(A), it might seem to come under the *Garmon* pre-emption; see *id.* at 247–48, but the court has allowed state courts to stop violent or threatening actions by unions. See *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941) (upholding the prohibition of picketing because it could incite extreme violence); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954) (damages allowed in state court because of the violence of the threats involved). *Garmon* emphasized that these kinds of state actions were allowed only because of the “‘type of conduct’ involved (e.g., ‘intimidation and threats of violence’).” *Garmon*, 359 U.S. at 248.

³⁹ *Machinists*, 427 U.S. at 140.

⁴⁰ This was the state law involved in *Machinists*.

⁴¹ *Machinists* at 140 (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)).

⁴² *Capitalism and Freedom*, 4th ed. (2002).

⁴³ Sheldon Richman, “The Libertarian Case Against Right-to-Work Laws,” *Reason*, December 16, 2012. <<http://bit.ly/1xtbw6G>>

⁴⁴ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

⁴⁵ In *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956), the court held that “an employer may validly post his property against nonemployee distribution of union literature.”

⁴⁶ *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 313, 319 (1968).

⁴⁷ Scott Hudgens, 230 NLRB 414 (1977).

⁴⁸ *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978).

⁴⁹ *Id.* at 215.

⁵⁰ *Id.* at 231–32.

⁵¹ *N.L.R.B. v. Jean Country*, 291 NLRB (1988) 11.

⁵² *Id.* at 19.

⁵³ See *Giant Food Mkts., Inc.*, 241 NLRB (1979) 727.

⁵⁴ *Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527, 537–38 (1992).

⁵⁵ *Id.* at 540.

⁵⁶ *Id.* at 544.

⁵⁷ *Id.* at 543 (citation omitted).

⁵⁸ *Id.* at 543 (citation omitted).

⁵⁹ See *Livadas v. Bradshaw*, 512 U.S. 107, 199 n.13 (1994), citing to the Fourth Circuit’s decision, *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353 (4th Cir. 1991).

⁶⁰ This is based on a 1976 decision that protected the right of each side to “make use of ‘economic weapons,’ not explicitly set forth in the Act, free of governmental interference.” *Machinists v. Wisconsin Employment Rel. Comm’n*, 427 U.S. 132, 150 (1976).

⁶¹ *Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8*.

⁶² See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000) (national legislation imposing sanctions on Burma pre-empted additional sanctions or actions by state governments).

⁶³ See *Wis. Dep’t of Indus., Labor & Human Rel. v. Gould, Inc.*, 475 U.S. 282, 291 (1986).

⁶⁴ See *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322 (DC Cir. 1996).

⁶⁵ *Chamber of Commerce of United States v. Brown*, 554 U.S. 60 (2008).

⁶⁶ *Id.*, 554 U.S. at 80 (2008).

⁶⁷ 9 U.S.C. § 1 et seq.

⁶⁸ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (employees can be forced to waive jury trial if an arbitration agreement is signed); *Circuit City Stores, Inc. v. Adams*, 352 U.S. 105 (2001) (arbitration can pre-empt jury trial for all workers involved in interstate commerce); *Rent-a-Center v. Jackson*, 130 S.Ct. 2772 (2010) (arbitrator can decide what issues are subject to arbitration under a contract); *Oxford Health Plans, LLC v. Sutter*, 133 S. Ct. 2064 (2013) (voiding right to seek class actions in employment disputes).

⁶⁹ *Circuit City Stores v. Adams*, 532 U.S. 105 (2001).

⁷⁰ *Id.*

⁷¹ *Id.* at 128.

⁷² *Union Affiliation of Employed Wage and Salary Workers by State, 2011–2012 Annual Averages*, Bureau of Labor Statistics. <<http://1.usa.gov/VLTY8N>>

⁷³ *Id.*

Worker Centers as an Inflection Point? An Introduction and an Interview with Kimi Lee

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Worker centers are a relatively new form of institution, incorporating elements of community organizations, social movements, and labor organizations in order to provide support and resources to workers, particularly immigrants, excluded from traditional labor rights through policy or in practice. With the restructuring of the political economy away from the “standard employment contract,” sharp declines in unionization, and weakening labor market regulation, combined with recent waves of immigration especially from Latin America, the Caribbean, and Asia, worker centers have become important institutions for mediating employment and assisting with daily life. The approximately 200 existing worker centers and increasing numbers of worker center networks offer direct services, conduct research and advocacy, and engage in worker mobilization and organizing. They suggest the need for both public policy and the labor movement to embrace large numbers of workers left out of traditional regulatory and organizing models and to recognize increased insecurity across the workforce.

“EXCLUDED WORKERS” AND WORKER CENTERS

In the past several decades in the United States, increasing job insecurity, worker risk, and employee anxiety have pervaded the occupational and social structure, with particularly serious consequences for workers with the least education and skill. The traditional industrial relations model—based on large industrial firms, long-term direct employment, labor and employment rights, and union gains of the New Deal and post-war era—is no longer the national norm but the exception. Corporate strategies following recession in the 1970s and global industrial restructuring beginning in the 1980s have spatially and organizationally fragmented production through subcontracting and outsourcing. Two-tier

systems of compensation, low wages, withdrawal of benefits, casualization, and other forms of labor flexibilization have driven down wages. Anti-union activity, as well as the changing nature of employment, has diminished labor's capacity to resist (Peck and Theodore 2001; Appelbaum, Bernhardt, and Murnane 2003; Mishel, Bivens, Gould, and Shierholz 2012; Kalleberg 2013). Well before the 2007 economic downturn, the U.S. General Accounting Office (now named the Government Accountability Office) estimated that 30% of the workforce was in some sort of nonstandard or "contingent" employment relationship (U.S. GAO 2000).

The recent period of economic and corporate restructuring has coincided with a large wave of predominantly Latin American, Asian, and Caribbean immigrants, both documented and undocumented. Between 1990 and 2000, more immigrants arrived in the United States than in any previous decade, and the immigrant population grew from 19.8 million to 28.4 million (Fine 2006). Immigrants are a growing percentage of the labor force, and by 2010 they were 16% of the labor force and about one fifth of all workers in "mixed and low-skilled" industries including construction, food service, and agriculture (Singer 2012). Large numbers of immigrant workers are pushed and pulled into the United States as a consequence of reduced opportunities in their home countries and the voracious appetite of some U.S. employers for immigrant labor, even while immigration policies make it difficult for immigrants to legalize their status.

Less-skilled immigrant workers face multiple barriers to fair treatment and economic security through work: limited legal and policy support, employer exploitation and intimidation, language barriers, and social and cultural dislocation. Their immigration status renders them easily intimidated and exploitable, and the jobs they do become devalued because they are filled by stigmatized and devalued ethnic and immigrant groups. Immigrant domestic workers are additionally handicapped by work that is largely invisible in private homes, seen as an extension of women's caring nature rather than as "real work." Employers hire such workers with an understanding that they will accept the working conditions and compensation the employer offers, even when such terms and conditions do not conform to minimal legal or human rights standards (Fine 2005, 2006; Gleeson 2010). Contemporary immigrants, unlike the European immigrant workers of the "Golden Era," face a deindustrialized economy with fewer stable and high-wage jobs and considerably weakened unions. New immigrants are also marked as nonwhite and arrive undocumented without immediate authorization to work and without a clear path to citizenship.

Not only immigrants but also African Americans tend to be disproportionately represented in contingent, low-paid, and unregulated work. Over many decades, rural poverty, racist Southern laws, and racial intimidation and terror marginalized African Americans in the South and pushed them north, into segregated urban enclaves. New Deal legislation explicitly excluded domestic and agricultural workers, occupations with disproportionately high numbers of African Americans, from organizing and collective bargaining rights, fair labor standards, and other social protection; it was “friendly to labor but unfriendly to the majority of African Americans who lived below the Mason–Dixon line” (Katznelson 2005:55).

In the 1960s, black poverty diminished because of an expanding economy, the slow dismantling of discriminatory barriers in workplaces and educational institutions, unionization in both the manufacturing and public sectors, and increases in the minimum wage. Many African Americans moved from low-wage agricultural, domestic, hotel and janitorial, and manufacturing labor into public sector employment. However, progress has stalled or even reversed in the past several decades as a consequence of deindustrialization, declines in the value of the minimum wage, and deunionization. Attacks on public sector workers have been particularly detrimental to black workers (Stein 1994; Pitts 2011). In addition, the expansion of the prison system and disproportionate incarceration of African American and Latino men have contributed to higher unemployment, poor-quality and irregular jobs, and lower wages over the life course (Peck and Theodore 2000; Pager, Western, and Sugie 2009; Lyons and Pettit 2011; Schmitt 2011).

Immigrant and ethnic minority workers are disproportionately located in the expanded low-wage service sector and in low-wage blue-collar work where employment departs from the standard employment contract and the industrial relations model. Rather than belonging to large bargaining units at fixed sites, workers are classified (and often deliberately misclassified) as independent contractors, hired as indirect employees, and categorized as “companions.” Workers are employed for short periods of time, often without consistent and secure hours. Corporations increasingly use temporary agencies to supply core workers rather than simply to deliver short-term replacements. Many employers are small and transient. Workers move from job to job, from site to site. In the labor-intensive service sector, labor is a high proportion of business costs, profit margins are small, and employers see workers as unskilled and easily replaceable. Concentrations of excluded workers are found in domestic work (cleaning and caregiving), day labor construction, agricultural work, restaurant and food service work, lodging and accommodation work, and taxi driving.

While labor statutes generally cover workers irrespective of immigration status or race/ethnicity, they exclude workers by virtue of occupation or certain other characteristics. Even when these low-wage workers are included in formal labor protections, many of their rights are not enforced, and violations and abuse are widespread. The enforcement of labor rights is particularly weak in cases of undocumented immigrants.

The National Labor Relations Act (NLRA), which formally protects the right to organize, excludes government workers, agricultural workers, domestic service workers, independent contractors, and supervisors. In 24 states, especially in the South but more recently also in the Midwest “Rust Belt,” right-to-work statutes have weakened rights to organize effective unions. In many right-to-work states, public employees have no right to bargain collectively. The strength of public sector unions, related to a unionization rate of 35.9% in 2012 (higher than that in the private sector), is under attack not only from legislative initiatives but also from contracting out and other mechanisms. Many workers across regions and sectors face intensive employer interference with NLRA-governed organizing drives, including threats of plant closure, one-on-one sessions with supervisors, and other forms of intimidation, harassment, or firing (Dannin 2006; Bronfenbrenner 2009).

Exemptions by sector, size of employer, or employment status (independent contractors, companions, or otherwise indirect employees) exclude workers from Fair Labor Standards Act (FLSA) minimum wage and overtime provisions. The Fair Labor Standards Act of 1938 did not cover domestic workers. In 1974, Congress extended FLSA protections to many domestic service workers but not to “companions” to the elderly and disabled. Live-in workers were exempted from overtime provisions. New Department of Labor regulations issued in September 2013 narrowed the “companionship exemption” from FLSA minimum wage and overtime protections. In addition, farmworkers are excluded from the maximum hours and overtime provision of the FLSA.

Beyond the NLRA and FLSA, there are additional exclusions. Small employers, including private households, are often exempt from anti-discrimination law. Title VII has been held not to prohibit employer discrimination on the basis of noncitizen status or alienage, even in the case of legal immigrant workers, though noncitizen discrimination may overlap with animus toward national origin (Garcia 2012). Both small and large employers operate blanket hiring denials based not on qualifications and actual ability to perform jobs but merely because an individual has a conviction record. The EEOC views such hiring practices as a form of disparate impact discrimination made illegal by Title VII of the 1964 Civil Rights Act—that is, as the exercise of a policy neutral on its face but not necessary to the operation of the business and with a disproportional

tionately negative impact on a racial (or other protected) category (Rodriguez and Emsellem 2011).

Sexually hostile work environments for immigrant female agricultural workers have been documented, and employers sometimes prosecuted by the Equal Employment Opportunity Commission (EEOC), but investigative journalists and women's advocates suggest that enforcement is weak (CIR 2013). Federal occupational safety and health policies exclude independent contractors, domestic workers, and labor on small farms. The Family and Medical Leave Act covers only employers with 50 or more employees, and workers are eligible only when they have worked 1,250 hours for the same employer during the 12-month period immediately preceding the leave.

Geographically, excluded workers are numerous in major cities with large low-wage service sectors and light manufacturing, inner-city urban areas, and rural areas across the country. Fine (2006) found worker centers concentrated in the largest cities, with the highest number in the Northeast and West and a growing number in the South and Midwest. While most were in urban areas, "more have cropped up in suburban areas as immigrant workers have become mainstays of the service economy and in rural places as immigrant workers ... are organizing to improve conditions" (8). A few states have enacted additional policy protections for traditionally excluded workers, and state and local ordinances regarding minimum and living wages may also benefit such workers. Gleeson (2012) has shown that local geography affects not only the nature of the work and economic position of immigrants but also the political and social climate and the range of local intermediaries that help workers secure employment rights.

WHAT WORKER CENTERS DO

By 2010, more than 200 worker centers were in existence, and they were increasingly federating and cooperating with each other and other organizations (Fine 2006, 2011a, 2011b). While some centers and networks are occupation specific, others may incorporate low-wage immigrant workers in multiple industrial sectors and several occupations. They may focus on a specific ethnic group or organize across ethnicities. They pursue a variety of interconnected activities, often described as service, advocacy, and organizing. Often, worker centers and networks launch particular campaigns—organized and integrated sets of activities focused on particular abuses, practices, and corresponding policy remedies.

Community Spaces Providing Services

Worker centers often orient themselves toward specific marginalized communities populated by immigrants and people of color with a

variety of needs, and they describe their work as organizing people in the context of many aspects of their everyday lives rather than organizing workplaces. In worker centers, Fine (2011a) has noted, “ethnic, racial, gender, geographic and even religious ties of low-wage workers [march] hand in hand with craft and industrial identities” (606). Similarly to certain community organizations, they build visibility and trust within communities. Members of the community support and lead others with whom they share work experiences, language, national political histories, and other cultural characteristics. Such centers offer a variety of resources: language classes or referrals, health services (workshops, training, referrals, and actual clinics), banking and financial-assistance services, soft skills development, and occupational training. They may use cultural symbols and the arts, as well as popular education techniques, to create community and strengthen solidarity.

Legal assistance is a key service provided by worker centers, and wage claims are an important element. Bernhardt et al. (2009) found severe and widespread violations of employment and labor laws in a survey of 4,387 low-wage workers in New York, Los Angeles, and Chicago. One in four workers was paid below minimum wage in a given work week, 76% were not paid required overtime, and more than two thirds were denied meal breaks. Bobo (2011) has documented the epidemic of wage theft—experienced disproportionately by low-wage immigrant workers—through both deliberate wage payment practices and lack of safeguards against unfair payment. The complexity of laws and the understaffing and indifference of oversight agencies contribute to these violations.

Worker center legal clinics educate workers regarding rights, write worker rights handbooks, create media presentations in multiple languages, employ staff to monitor how agencies handle legal complaints, make lawyers available to assist with individual claims, and engage in strategic litigation. The provision of legal assistance poses a dilemma: to what degree to individualize problems and frame the solution as resolvable by an expert lawyer, as opposed to collectivizing problems and solutions. Generally, worker centers attempt to deliver legal services in ways that empower workers—imparting understanding of the rules and processes of claiming rights, encouraging workers to work and testify on their own behalf, and involving individuals and groups in decisions (Gordon 2005; Fine 2006).

Organizing, Advocacy, and Campaigning

Many worker centers build workplace or occupational solidarity and organization focused on terms and conditions of work at specific local sites. For example, KIWA, the Koreatown Immigrant Worker Alliance, used direct action tactics against restaurants in Koreatown, Los Angeles, fol-

lowed later by a campaign to unionize a local supermarket held by a large Asian food corporation (Bum Kwon 2010). The Laundry Workers Center supported a successful unionizing drive by largely immigrant workers at New York City's Hot and Crusty Bakery and Restaurant. Some have tried to organize day labor corners or establish safe day labor centers. These initiatives aim to regularize hiring practices, monitor and maintain labor standards, and diminish harassment (Gordon 2005; Fine 2006; Theodore, Valenzuela, and Melendez 2009).

Policy campaigns often tackle wage questions. The Workplace Project and its Latino workers mobilized to win the 1997 passage of the Unpaid Wages Prohibition Act, a New York State law raising penalties for non-payment of wages to the status of a felony with a maximum \$20,000 penalty (Gordon 2005). After 6.5 years of organizing, building a base of more than 4,000 workers and employers, unions, clergy, and community organizations, Domestic Workers United (DWU) won passage in 2010 of the New York Domestic Workers Bill of Rights. The act supports fair wages and other improved working conditions. DWU now supports implementation of the act and its provisions through extensive outreach, education, and enforcement work. The Restaurant Opportunities Center (ROC United), decrying the facts that the federal minimum wage for tipped workers has been frozen at \$2.13 per hour and that restaurant workers regularly experience wage theft, has been campaigning for an increase in the tipped minimum wage to at least 70% of a raised federal minimum wage. Other worker centers are affiliated with state minimum wage coalitions and work for raising the federal minimum. ROC-NY played a critical role in the campaign for paid sick days in New York City (Jayaraman 2013), a city ordinance that prevents loss of essential pay in low-wage jobs.

Worker center alliances have increased their efforts to organize along supply chains. Supply-chain organizing has gone beyond fighting for traditional labor rights and often involves protecting immigrant workers from exploitation by resorting to human rights-based statutes and the general intent of the Thirteenth Amendment (Ontiveros 2007, 2012; Garcia 2012). The Coalition of Immokalee Workers (CIW), a community-based organization comprised primarily of Latinos, has won agreements with major food retailers to add a penny a pound to the purchase price of tomatoes and has forced growers to pass these gains on to farmworkers. CIW has expanded these agreements with a code of conduct including minimum wage and a complete ban on forced and child labor. Its broad Fair Food campaign educates consumers about the realities of farm labor exploitation; it forges alliances between farmworkers and food consumers to press food corporations to demand ethical behavior from suppliers.

The National Guestworker Alliance (NGA), affiliated with the New Orleans Worker Center for Racial Justice, has organized along the Walmart supply chain. In a major campaign, it supported immigrant guest workers at CJ's Seafood, a Walmart supplier. These workers went on strike after being forced to work 16- to 24-hour shifts; facing severe and constant harassment, psychological abuse, and threats of violence; and receiving wages below the legal minimum. NGA worked with workers' relatives at points of recruitment in Mexico, targeted the CJ company itself, and brought the issues to Walmart and its executives (Penn State Dickinson School of Law and NGA 2012; Thompson 2012). They also connected with Walmart warehouse workers in Southern California, who are disproportionately Latino and themselves subject to Walmart's domestic outsourcing to logistics corporations. Logistics contractors, in turn, used temporary agencies for staffing (Cho et al. 2012; Warehouse Workers United and Cornelio 2011).

Centers also advocate comprehensive immigration reform, which includes strong protection for workers. They support protection from retaliation for workers who exercise their labor and civil rights, development of an inclusive road map to citizenship, and strong labor standards in future guest worker programs. They favor full enforcement of federal labor law, including back pay compensation to undocumented workers unlawfully fired during legally protected labor activity, a compensation right revoked by the Supreme Court in its *Hoffman Plastics v. National Labor Relations Board* decision in 2002. Fine (2006) found that while centers often focus on changing policies at state levels, including, for example, laws and rules limiting the rights of immigrants to obtain drivers' licenses (188–89), they also participate in national immigration coalitions. Black worker centers continue the racial economic justice themes of the U.S. civil rights movement and attempt to rebuild labor organizing within black communities stressed by unemployment, poor health, housing insecurity, and high rates of incarceration.

Many worker centers maintain ties with “sending” communities, which they recognize as affected by international economic and trade policies and as waging their own struggles around work and with basic well-being. In many cases, workers remain in close touch with family members, send remittances, and consider returning to their communities of origin. The Filipino Worker Center of LA and KIWA were shaped by struggles in the Philippines and South Korea and ongoing exchange. In 2007, domestic workers from across the United States established not only the National Alliance of Domestic Workers, but they also began organizing with domestic worker rights groups from Mexico, South America, and Europe. Griffith (2009) argues that while the CIW emphasizes organizing in a local place, it opens pathways to the transnational. CIW teaches the importance of

solidarity across ethnic and national lines, an orientation farmworkers carry with them when they cross state lines to harvest crops in northern states, when they work outside of agriculture, and when they return to their home communities.

Worker Centers as Organizations

Worker centers operate with limited staff and on very small budgets, with most revenue coming from foundations. Membership tends to be informal, small, and relatively transient. While centers make use of professionalized staff resources, they identify and develop activists and organizational leaders from within the ranks of low-wage immigrant workers. Internally, most centers are governed by member leaders and aim for a democratic or participatory internal culture. Many engage in forms of popular education—discussions about how things actually are, how they got that way, and how workers could change them, as well as education and training about rights.

Small, local worker centers have increasingly been forming networks. Among the largest are sectoral alliances of day laborers, domestic workers, restaurant workers, food chain workers, and guest workers. Cordero-Guzman, Izvanariu, and Narro (2013) distinguish two types of networks. “Agglomeration networks” combine existing groups and organizations in particular labor market sectors into national networks (National Day Labor Organizing Network and National Domestic Workers Union). “Replication networks,” on the other hand, are those in which an existing core organization develops new organizations or brands partnerships with existing groups, replicating the model of the core organization (Direct Care Alliance, Restaurant Opportunities Center). In turn, these networks, together with other national alliances such as Jobs with Justice and Interfaith Worker Justice and with local centers, have taken steps to form a national Excluded Workers Congress, now renamed United Workers Congress (UWC) (Goldberg and Jackson 2011; Henry-Offor 2012). UWC is an effort to support workers in building a movement that addresses exclusion from protective labor policies and develops effective broad campaigns. Fine (2011a, 2011b) has argued that this new stage of worker center development is marked by increased capacity building, often through federation and development of partnerships among worker centers, unions, and public agencies (see also Fine and Gordon 2010).

The relationship between unions and worker centers and worker center networks is in motion, despite concerns that differences in underlying organizational structures, cultures, and orienting ideas pose challenges to strong collaboration (Fine 2007). Following many years of pressure, especially from unions representing service workers, the AFL-CIO executive council in 2000 abandoned its more punitive and exclusionary

stance toward undocumented immigrant workers and called for a new amnesty program, repeal of employer sanctions, and strengthening of the right to organize for immigrant workers. In 2006, after the 2006 immigrant rights marches that drew a million demonstrators across the country, the AFL-CIO began to formalize its relationship with the worker center movement. Its executive council authorized worker centers to formally affiliate with state labor federations, local labor councils, and Working America. At the same time, the AFL-CIO entered into a partnership with the National Day Laborer Organizing Network to work together on state and local enforcement of rights, worker protections involving wages and hours, health and safety regulations, immigrants' rights, employee misclassification, and immigration reform.

In September 2011, the National Taxi Workers Alliance was formerly chartered by the AFL-CIO (Fine 2007; Milkman 2011, 2013). At the 2013 AFL-CIO convention, it appeared that much of the official union leadership articulated a vision that would bring non-union workers struggling to organize and claim rights into the labor movement and acknowledged the importance of the innovative methods of worker centers, community organizations, and advocacy groups (Greenhouse 2013a, 2013b). In 2013, the AFL-CIO also passed a strongly worded resolution condemning mass incarceration and the increase in for-profit prison companies. AFSCME, which supported the resolution, noted the devastating impacts of mass incarceration on communities of color, as well as exploitative policies toward prison employees and inhumane conditions in which inmates were held.

CONCLUSION

By focusing on workers, particularly immigrant workers, excluded from many provisions of traditional industrial relations and employment law, worker centers refocus public debate and collective action on workers who are most economically insecure and vulnerable to workplace exploitation. Thus, the conception of potential labor movement participants is broadened beyond workers traditionally organized in large industrial or even service sector settings. The worker center movement has introduced the argument that labor and employment law as it currently stands divides workers based on inclusion or exclusion from employment statutes, from effective workplace power, and from political power. It argues that allowing wages and conditions for the most vulnerable to decline has negative impacts on all workers. Worker centers and other "alt-labor" approaches suggest new strategies and tactics for organizing working people. They move labor organizing toward occupation-based organizing, horizontal political organizing, and sociocultural and gender recognition and inclusion (Cobble 1991; Weir 2009; UWC 2010).

INTERVIEW WITH KIMI LEE

Kimi Lee is the former executive director of the Los Angeles Garment Workers Center and serves currently as lead organizer for the United Workers Congress. Peggy Kahn conducted this interview on November 19, 2013.

PK: How did you become aware of the need to organize workers excluded from the traditional labor movement?

KL: I have a long history with social justice. My own family emigrated from Burma. My brother and sister were born in Burma, and only I was born in the U.S., so growing up here I had a different perspective, which was a trigger for me realizing things weren't all right, something was wrong in the world. So I got the human rights part, but the worker part comes much later. My mother was a garment worker in Burma, but it was a military dictatorship, and she was forced to leave. She and my father applied to immigrate as master garment workers; they came in the visa quota for garment workers.

Later in the 1990s, when I was in college at UC Davis, the Jessica McClintock fashion line campaign was at its peak. A contractor had laid off 12 immigrant Chinese women whom they owed \$15,000 in back wages. And the [workers] were being paid about \$5 for each dress, which sold for \$175. Asian Immigrant Workers Advocates (AIWA) had begun a huge public campaign and was joined by the Koreatown Immigrant Workers Association (KIWA), Korean students, and Asian-Pacific students. I was at a rally, and a reporter asked why I was there, and it made me think about it, make the personal connection, to my own mother.

In college, I studied environmental biology but became involved with organizing. In California in the 1990s, there was a surge of attacks on people of color. In 1994, Proposition 187 took away public services including health care and public education for undocumented workers, so there was a huge surge of immigrant organizing. Then there was the English-only movement and an attack on bilingual education. Then there was Proposition 209 in 1996, a state constitutional amendment to eliminate affirmative action. There was a series of attacks, and I was organizing students and got involved in community issues.

After I graduated, I organized students statewide with the University of California Student Association; did some research for the Service Employees International Union, which exposed me to unions and labor; and then I took a job with the ACLU in Los Angeles. Both of those jobs were tied to national organizations and gave me perspective on social justice work, national advocacy, and national infrastructures. But I was thinking I wanted to be more grounded in community work, to work much more directly with people and organizing people.

In 1995, 72 Thai garment workers were found locked up in a sweatshop in El Monte, a suburb of Los Angeles, behind barbed wire and with armed guards. The owners of the factory had taken their passports and told them they had to work off their debt to them. They were sleeping 20 people to one room, and a living room and garage had been converted into the sewing area. They had to pay for food and supplies like shampoo, and there were deductions from their checks. The workers were never able to pay off their debt. One managed to escape after seven years of being trapped. State and federal agents raided the place, but, instead of seeing workers as victims, immigration locked them up, and they went from one imprisonment to another. The community thought this was an opportunity. Thai Community Development became involved. KIWA stepped in because they were also doing worker organizing. CHIRLA, the Coalition for Humane Immigrant Rights of Los Angeles, became involved. Lots of LA groups got together to support the campaign that fought to get them documents. From that mid-'90s incident, groups started to have workers come together and asked how can we change this? Workers themselves said there was a need to set up a center for garment workers.

At the time, in LA there were 160,000 garment workers in 5,000 factories, but less than 1% of garment workers were in a union. These sweatshops were underground, and the unions didn't step in, but community groups did. It took a seven-year legal battle to get the Thai workers their back pay and immigration documentation to stay. There needed to be some place to support these workers, a garment workers center. This was happening while I was organizing in the community. When they decided to hire someone, I was looking for work that was more directly connected to a community and since I had some experience—as a student organizer, policy advocate, researcher, nonprofit manager, etc.—it called to me. I was at a developmental stage where I saw need for on-the-ground work and the need to have people on the ground making decisions.

PK: You were the executive director at the LA Garment Workers Center, an early worker center. What was the work there like?

KL: I was the first person hired, and my job was to create the center. I had support from senior organizers from other groups, but I had the freedom to explore and experiment. There was community-based worker organizing going on in other sectors. CHIRLA had a domestic worker project; KIWA was organizing restaurant and grocery. Worker centers at first were more immigrant organizations that had worker projects. CHIRLA had domestic and day labor projects but was not a worker center. The Pilipino Worker Center in the 1990s was at first more a community center doing international solidarity work. KIWA started after the uprisings in Los Angeles.

The new generation of worker organizing reflected what was happening in the economy and politics of the U.S.—free trade and economic restructuring leading to huge groups being shut out. At the same time, we had more immigrant workers needing somewhere to go. There was also a generation of organizers coming out of college, born at the end of the '60s, not part of but impacted by the civil rights movement, including people of color and children of immigrants. Unions had hit a peak in terms of membership and were starting to decline. In the 1990s there was only a handful of worker centers. Then more worker centers started to pop up around the country. Now there are over 200 worker centers.

The Los Angeles garment industry was less than 1% unionized. The union had tried, and made its last stands around Guess jeans. Guess moved its production to Mexico—globalization, and in general the garment industry was moving away in search of cheap labor. So, with that background, the question was why bother to organize? But there was still a need for a local garment industry. Long Beach Harbor is where goods come to be finished (rhinestones, trims, or decorations), and retailers could say it was “made in America” if finishing occurred here. The other big thing was just-in-time fashion. There are four seasons for weather, but 11 seasons in the fashion industry, especially for teenage fashion. There are a lot of quick, small batches for young women. We knew that the industry was going to shrink, but knew there would always be a need for some local production and finishing. In the 1990s, there were 160,000 garment workers, and now there are only 60,000 workers, but this is still 60,000 workers. Garment work is a first step for a lot of workers, even if an immigrant did not speak the language, had never sewed before—because it is based on manual labor and does not need English proficiency. So it continued to be an entry-level job for many immigrants. Immigrants started in garment and then sometimes moved on. So, the fact that garment work would probably always be a local industry provided some impetus.

What could we do? We thought about what other worker centers were doing. Well, the basic thing workers need is their paycheck. How do we help them get paid when they are not being paid properly? We started doing a lot of work on wage claims. We had to educate people to explain they were supposed to be getting minimum wage. In garment, people are paid by the piece, but the minimum wage is supposed to provide a minimum floor. So if you don't sew enough, you are still supposed to get minimum wage. Contractors were not paying minimum wage. We found that owners were lowering the piece rate as people sewed faster. There was lots of informality, so it was difficult to keep track of what was happening; people were being paid in cash or given IOUs. Just as it's easy for workers to enter garment work, it's easy for contractors to start small factories. There was an estimated factory life span of 13 months—

contractors open and close. If the retailer didn't pay the contractor or there was no order, the factory closed. There were slim margins and lots of competition, 5,000 factories for 200 retailers in the area. So, in this competitive environment, the contractor who paid workers least got the contract.

The Garment Workers Center was trying to improve worker rights by putting pressure on from different sides. We pressured contractors, but more the retailers since the contractors were barely squeaking by. The idea was to get it right for all parts of the chain so that the industry could be productive but the workers and contractors would get paid. We looked at different retailers and labels, talking to them and doing consumer actions. We had workers going to schools, going to events and meetings, testifying. People had heard about the El Monte incident, but at the time sweatshops weren't generally discussed as something that was in the U.S. Now the sweatshop issue is a more household term, and there has been lots of consumer organizing.

But what we did at the GWC was not just about wage claims and pay. [It was] more holistic. We worked on health and safety, we had a women's group, yoga, children's activities and good child care, political education. It really felt like more than workplace organizing.

PK: How has the worker center movement changed organizationally, and how have you been involved in the movement more recently?

KL: Worker centers began working with each other in multi-ethnic immigrant organizing, and there was a growth of worker centers in neighborhoods and in specific industries. MIWON, the Multi-Immigrant Organizing Network, began, and it was a network of worker centers, of CHIRLA, KIWA, PWC (Pilipino Workers Center), and IDEPSCA (Instituto de Educación Popular del Sur de California). The core of the network's work was immigration. The majority of workers were undocumented. MIWON made a big push for better state and federal policies. MIWON revived May 1, traditionally International Workers' Day, as Immigrant Workers Day in 2000. The first May Day protest attracted about 200 people, but by 2006 more than a million people around the country were demonstrating. It triggered a huge immigration movement around the country, millions standing up for undocumented workers. The Garment Workers Center was a key organization for MIWON, and we had to go beyond sector, think regionally and nationally.

Ten years later, a new formation was created at the 2010 Social Forum in Detroit. The Excluded Workers Congress was founded during a People's Movement Assembly. There were lots of worker centers and independent worker organizing, and we needed some way to connect them all. Over

the previous few years, more worker centers had started their own national alliances like the National Domestic Workers Alliance and the National Guestworker Alliance. But now the Excluded Workers Congress became a super-alliance of local and national networks, and it was also thinking internationally. There seemed to be a natural evolution to national and international connection. I had to move for personal reasons and returned to the Bay Area and became a lead organizer for the EWC. After a year, as we kept talking about shared strategy, we thought about how we are part of a larger movement, not just those on the side. We changed our name to United Workers Congress and put more emphasis on all workers excluded from legal rights by policy or practice, the majority of workers. Even if you look at workers in the public sector, everyone seems under attack and becoming excluded. We are trying to develop new ways of organizing and bargaining.

PK: Can you talk more about the link between marginalized workers and immigration status? How do worker centers operate at that intersection between employment and immigration status?

KL: Immigration is the key issue for lots of worker centers. There are 11.5 million immigrants in the country who are undocumented. All workers need to be working together. If some workers are paid in cash, under the table, and less, it hurts other workers in the same workplace and workers generally. It hurts all workers to have some who are working for lower wages. If garment workers are locked in a factory and making \$2 an hour, then why would an owner pay \$10 an hour to someone else? Owners will always want easily exploitable undocumented workers. All workers in the U.S. are protected by labor law, but most workers don't know that. Immigrant workers will take whatever job they can get. They won't push because they don't know their rights and need any job.

Why is the worker in that position in the first place? Immigrant workers are not trying "to steal American jobs." They're trying to provide for their families. They can't provide in their home country because we have shifted the dynamics around the world, because our economic policies have shifted the dynamics around the world. We've created it where workers can't just stay where they are. People cannot just farm anymore or just do what their families have done for the last 100 years. They now must work in the factories, and their local economies have shifted so there are no other jobs. The global economy has made it easier for corporations to set up free trade zones that do not have to follow labor or environmental laws and that push down wages and job opportunities for everyone in the area. Everyone would rather stay home. No one wants to come on a dangerous trip to cross the border into a country where you can't speak

the language, to leave your children, to leave your family. Nobody wants to do that. They are forced into that situation. So there are multiple layers of issues that we've got to deal with. We have to deal with the fact that the global economy pushes workers to migrate, forcing them into positions where they have to take whatever work they can get. Within the U.S., we need more recognition of how to balance this out. Workers need work, they are willing to pay to come here (guest workers sell their homes to come to the U.S.), and then they get locked up. This is the reality, so we have to figure out how to protect these workers and all workers, because if not we get things like what happened in New Orleans after Hurricane Katrina.

After Katrina, even though there were thousands of displaced local workers looking for jobs, contractors brought 500 Indian guest workers to the U.S. to work for Signal International, a major U.S. shipbuilder, charged them up to \$20,000, housed them in overcrowded labor camps, forced them to work under terrible conditions, and didn't pay them. When workers started to protest, the Department of Homeland Security and Immigration and Customs Enforcement (ICE) colluded with the company to retaliate against the workers. This gave rise to the Signal Campaign, sponsored by the New Orleans Center for Racial Justice.

Trying to fix immigration is important because we don't want workers who are easily exploitable. Under temporary work visas, workers are tied to one employer so they can't leave their jobs, they don't speak the language, and they are desperate for work. Worker centers are trying to educate workers on the ground so that workers themselves can then push for change and better conditions. We are trying to get workers themselves to understand what their rights are. We saw that with day laborers. Day laborers started out with no connection to each other, but the National Day Laborer Organizing Network saw an opportunity. The day laborers on a corner in Los Angeles decided they should all ask for \$12 an hour, and all needed the same pay. The purest form of independent worker organizing means workers deciding among themselves what they want. The goal is to get enough workers out there in certain sectors in the community so that they can assert their rights and terms on the ground. On the other side, we try to get consumers to support workers. Independent worker organizing proceeds along these two parallel tracks.

Intimidation of and retaliation against workers—guest workers and others like day laborers and domestic workers—who claim their labor and civil rights is a key problem. The POWER (Protect Our Workers from Exploitation and Retaliation) campaign is supported by Jobs with Justice, the National Guestworker Alliance, the National Day Labor Organizing Network, the National Immigration Law Center, and others. It's working to create policy to prevent employers of undocumented or visa guest work-

ers from avoiding labor law and retaliating against undocumented workers trying to claim rights or organize. U visas and other provisions would allow certain abused workers to remain in the U.S. Instead of facing employers threatening them with ICE, workers would be protected from retaliation. We saw the president put pieces of the POWER campaign into his immigration proposal.

PK: Worker centers seem to have as part of their organizational model recognition of ethnic and cultural identities. Can you say more about this?

KL: Worker centers see workers holistically, as having ethnic and community identity, and fill a void in workers' lives. They provide a space for social support. Worker centers are culture-, language- or neighborhood-based, addressing ethnicity and race head-on, acknowledging workers for who they are as people. They build trust and family-like relationships. This is a unique strategy in that centers are organizing workers and providing support for them in a different way, not just thinking about the workplace but taking into account generation, language and dialect, cultural issues.

Many times, workers are monolingual or very new immigrants, so the language barrier is very high. Some worker centers are more culture based or language based. And they may be neighborhood based. Like if you're in Chinatown or Korea Town or Filipino Town, the worker centers are addressing race head-on. This is not "new" but is definitely a unique strategy in that you're organizing workers and providing support for them in a different way. So again, it's not just about what happens to them at the workplace but also taking into account what generation they are from, what language or dialect they are speaking, what cultural issues might be coming up for them. I mentioned earlier a lot of organizers lived through that because our families are immigrants and our families have gone through these different experiences. So we are leading from that space, and we're thinking, "If this was my mom, what would I do?" There's a very different way to organize, I think. And so the worker centers are helping to fill this void and create a space for workers to actually then develop a level of trust. I think the worker centers' relationship with their members is very deep. And there is this level of trust that workers hopefully gain from being in connection with the worker centers. Many workers are isolated. They are going to the factory or to the corner daily, and their families are back home in another country. So these workers are here alone. They don't have a social network.

In garment factories, workers were separated by nationality. We were organizing Latino and Chinese workers together. The owners could be

Asian, and Latinos had never talked with Asian peers. Chinese workers didn't talk to them. The GWC made them feel safe, and myself as Chinese trying to organize them ... that was new to them. The issue of race is also central, for example in the New Orleans Center for Racial Justice—it has racial justice in its name. Their Stand with Dignity project tries to place formerly incarcerated workers in transitional jobs (local and community benefit agreements), and they work with guest workers, mainly Latino, fighting for visas and pay. The evolution in some of this immigration–race partnership was that worker centers were looking at new immigration, then, with African Americans, teaching immigrants about slavery in U.S. Lots of immigrants don't really understand that history. We did a basic workshop on the immigration time line. We start with slavery because the workers just needed to understand that Africans were brought here against their will, as an unfree workforce. Then slowly, through the ages and decades, you see a different ethnic group that gets exploited for their work. It was African Americans first, and then Latinos—now you have Asians. So you can see the spectrum of everyone being exploited. I think that was the basis for breaking the barriers I've talked about before, but also really getting folks then to see the solidarity they should have among themselves. Now there is a black worker center movement rising, and more worker centers are engaged in multi-ethnic organizing.

PK: Can you explain a bit more about the new development of worker centers in African American communities?

KL: There is the Los Angeles Black Worker Center and Black Workers for Justice in North Carolina—and a National Black Worker Center project started in 2011 to support other cities. African American workers fought for recognition through the civil rights movement, more African Americans were in the workforce and in unions especially in the public sector, and they won entry into the skilled trades. Now, with the decline of unions, those workers are losing jobs. With the shredding of the social safety net and criminalization of people of color, African American young men face bleak prospects, and they are caught in the criminal justice system. We have to figure out how to interact with that, in terms of work. In the 1990s, California enacted a “three strikes and you're out” law expanding prison populations, and corporations could lease land and set up operations within prison walls, using prison labor not protected by basic labor law and paying 25 cents an hour. The workers were always there and contained on the grounds of the prison. Now there are all those issues of criminalization and mandatory minimums. There's a huge population who need to re-enter the workforce.

So we participate in the ban-the-box campaign so that job applicants don't have to show on an employment application if they were arrested

or convicted and be automatically disqualified for any consideration. If people have no job and no income and are stuck in a terrible cycle of poverty, then crime may seem tempting. How can they re-enter the workforce, and is there training? Before there was some idea of rehabilitation, but now there's no training or rehabilitation. People in prison spend 10 years not learning anything or being trained for jobs that don't exist—many are trained, but there's a mismatch with the jobs that are out there. There is no thinking about people and skills; there are lots of expendable people; people are unemployed, underemployed, working part-time without benefits.

So we work with All of Us or None, a campaign of the formerly incarcerated, which fights against discrimination after release. We are trying to identify formerly incarcerated people as workers. We work with them to ban the box, not just in employment but also in housing. This campaign has been successful in some cities and states. We need to do education on the ground level because people make assumptions; we are undoing stereotypes, explaining the criminalization system. Lots of groups are working on this, and we are thinking about how to support this, on the worker side. Worker centers, sometimes with unions, are using community benefit agreements (CBAs), which reserve some jobs on a project for local workers and for the formerly incarcerated. This is one way in practice to get people included. Sometimes this can include training classes to get people ready for the jobs. The Staples Center CBA in Los Angeles included living-wage standards, jobs for low-income residents in the neighborhood of the project, and job training coordinated with community groups. In Oakland, EBASE won an agreement around the army base redevelopment that banned the box on construction job applications and reserved training spots for local disenfranchised community members.

Another sector is workfare. Each state has a different name for this program, in which people have to work for their benefits. Even though in the past the Department of Labor and courts have clarified that workers hired or placed as part of meeting work requirements for cash benefits are employees protected by law, workers get name tags that say "nonemployee," and they are working alongside union workers. We think that work experience programs should be eliminated. And the idea of these work requirements that started with the 1996 legislation don't take into account that there is high unemployment and there are no jobs, and one reason lots of people are on welfare is that they have to take care of people, they have caregiving responsibilities. The traditional unions aren't so interested in these issues, though groups in New York City and San Francisco are organizing for transitional jobs and more permanent placement. A lot of welfare organizing happened in the 1990s, then organizing shifted away, so people don't identify with welfare rights organizing.

Community Voices Heard (CVH) has had success partnering with the local AFSCME DC37 to create subsidized transitional jobs with a pay-check and with union membership and benefits. The Transport Workers Union is also supportive of this transitional jobs program. San Francisco has had similar success. But the 100,000 WEP/workfare workers across the United States are completely invisible.

Our economy is not addressing the needs of people. We are not training people for real jobs or planning development to match skills and local development. More and more employment is becoming informal, contingent, and temporary. Companies would rather have a lot of part-time workers so they don't have to provide benefits and pay taxes. We've seen a lot of people who are working three or four jobs, trying to put things together. We don't have a comprehensive plan of what jobs are going to be out there for people. And our economy is not based on people. We don't think about the hundreds of thousands of people or millions of people who need work. Our economy is about what's going to make the most money for the top 1%. So there are lots of folks who are just falling through the cracks. As food stamps are being cut, as early childhood development and childcare centers and all these things are being cut, we are seeing more and more people who are in a situation where they can't get out of this. They can't find childcare. They can't pay for childcare. They can't find a job. They've got no training. It's just a cycle and there's no way out. So our country needs to have a larger discussion about what is happening to people. It relates to our school system, our health system. There are all these different parts of our country where there are no comprehensive plans.

PK: There's been a lot of work recently around domestic workers and agricultural workers—two occupations excluded from traditional labor law, heavy with immigrant workers, and often out of public sight. What are some of those developments?

KL: Domestic workers of course work in someone's home, a private place. Do they have a connection to other domestic workers? Well, maybe they see them in a park or grocery store. How do we organize them? It has been really interesting to watch the Domestic Workers Union, which started in New York City in the early 1990s. They started with very local domestic worker organizing and then asked how they could expand. They did amazing house-to-house, person-to-person organizing on the ground. They then expanded to create a National Domestic Workers Alliance and started to organize state by state. In some states, they won the Domestic Workers Bill of Rights—in New York, California, and Hawaii—and work is ongoing in four or five other states. Together with

domestic workers from other countries, they went to the International Labor Organization (ILO) and passed an international convention on domestic work. They are also one of the founding members of the International Domestic Workers Federation, their own global confederation for domestic workers. Domestic work makes all other work possible. It's an integral part of society and can't be farmed out to another country, and it's a huge issue all over the world. The U.S. Department of Labor recently updated its regulations regarding caregivers, and now caregivers are protected by minimum wage and overtime laws, a historic shift from exclusion for domestic workers in the U.S.

Farmworkers were also purposely written out of labor laws. There has been some recent organizing there, too, that has shown how workers can think bigger. The Coalition of Immokalee Workers in Florida is in a right-to-work state. They asked, "What can we do?" and they realized they should target the corporations (and consumers) that buy the products. Tomato pickers first won a penny per pound increase in purchasing price but had to fight to get that increase passed on to workers. Now CIW has got huge food retailers, like Yum! Brands, to adopt the Fair Food contract, which has been in effect for two seasons, 2011–2013. This regulates payment to contractors and farmworkers, prohibits forced labor and sexual harassment, sets up health and safety committees on every farm, and provides for worker-to-worker training by CIW in worker rights.

PK: So, in general, would you say that worker centers vary by region in the U.S.? Do they do different things in urban and rural areas, in right-to-work states as opposed to those with stronger union protections?

KL: Worker center organizing starts with a core community. Where are most people in need of this? Most are in urban areas on the coasts, where the majority of immigrants are. Those are the places where there is the most need and the most energy to create worker centers. Los Angeles has so many immigrants and so many different immigrant communities. But there has been a surge of worker centers across the country. Those in Nebraska and elsewhere in the Midwest, in the South like in Mississippi, Texas, and New Orleans, are younger than those on the coasts. And these centers have different strategies depending on politics in their area and the local economy. Some organizations may have been immigrant rights groups and decided to become worker centers or develop worker projects, and some may have begun as economic development organizations and then realized they needed a worker center. They may be focused in certain ethnic communities, but ROC-NY uses ten different languages and serves many different ethnic groups.

PK: And, finally, how do you see worker centers in relation to the traditional union movement?

KL: I always thought of worker centers as a bridge to unions. Some worker centers might explicitly try to form a union, like taxi workers. For the most part, new workers who are excluded are just trying to fight for jobs. To then make a leap to a union involves a few steps. A worker center brings people into the fold, warms them up to standing together, and then a union becomes relevant. Many immigrant workers are coming from countries where they are not experienced with unions, with real independent unions. Unions are not something they trust. Lots of workers were exposed to unions controlled by companies or the government. The worker center is a place where immigrant workers can build trust. We need to show what collective bargaining actually means. So, a worker center is a bridge and necessary step.

On other side, unions see the need to have these workers. [In fall of 2013], the AFL-CIO convention invited worker centers in for the first time. Two conventions ago, in 2005, the convention was anti-worker center and against day labor. In the last eight years there has been a shift because worker centers were successful at trying new things. Worker centers help unions see the need to have these workers. Larger, traditional unions can say, “Oh, there’s lots of workers that we haven’t been working with.” The bridge goes both ways.

In terms of policy and law, worker centers have pioneered new approaches like community benefits agreements, ILO conventions, new immigration laws, and protection of workers and labor rights within immigration and visa policy, working along the supply chain.

Worker centers have been a space for creativity and a place where new people coming into the movement have been allowed to use their energy and experiment. In traditional unions, young activists have little or no say in what happens. Even when they are working on the ground, they are not the decision makers. But worker centers are more open, and these communities in need provide an opportunity for younger, energetic organizers and new ways of organizing that will benefit the labor movement and all workers.

REFERENCES

Appelbaum, Eileen, Annette Bernhardt, and Richard J. Murnane. 2003. “Low-Wage America: An Overview.” In Eileen Appelbaum, Annette Bernhardt, and Richard J. Murnane, eds., *Low-Wage America: How Employers Are Reshaping Opportunity in the Workplace*. New York: Russell Sage Foundation, pp. 1–32.

- Bernhardt, Annette, Ruth Milkman, Nik Theodore, Douglas Heckathorn, Mirabai Auer, James DeFilippis, Ana Luz González, Victor Narro, Jason Perelshteyn, Diana Polson, and Michael Spiller. 2009. *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*. University of Illinois at Chicago, UCLA, and the National Employment Law Project. <<http://bit.ly/1zidhFR>>
- Bobo, Kim. 2011. *Wage Theft in America: Why Millions of Americans Are Not Getting Paid—And What We Can Do About It*. New York: The New Press.
- Bronfenbrenner, Kate. 2009. *No Holds Barred—The Intensification of Employer Opposition to Organizing*. EPI Briefing Paper #325. Washington, DC: EPI. <<http://bit.ly/1xC3hFt>>
- Bum Kwon, Jong. 2010. "The Koreatown Immigrant Workers Alliance: Spatializing Justice in an Ethnic 'Enclave.'" In Ruth Milkman, Joshua Bloom, and Victor Narro, eds., *Working for Justice: The L.A. Model of Organizing and Advocacy*. Ithaca, NY: Cornell University Press, pp. 23–48.
- Center for Investigative Reporting (CIR). 2013. "Rape in the Fields." <<http://bit.ly/1qLHYRc>>
- Cho, Eunice Hyunhye, Anastasia Christman, Maurice Emsellem, Catherine K. Ruckelshaus, and Rebecca Smith. 2012. *Chain of Greed: How Walmart's Domestic Outsourcing Produces Everyday Low Wages and Poor Working Conditions for Warehouse Workers*. New York: National Employment Law Project. <<http://bit.ly/1r103Za>>
- Cobble, Dorothy Sue. 1991. "Organizing the Postindustrial Workforce: Lessons from the History of Waitress Unionism." *Industrial and Labor Relations Review*, Vol. 44, no. 3, pp. 419–36.
- Cordero-Guzman, Hector, Pamela Izvanariu, and Victor Narro. 2013. "The Development of Sectoral Worker Center Networks." *Annals of the American Academy of Political and Social Science*, Vol. 647, no. 1, pp. 102–23.
- Dannin, Ellen. 2006. *Taking Back the Workers' Law: How to Fight the Assault on Labor Rights*. Ithaca, NY: Cornell University Press.
- Fine, Janice. 2005. "Worker Centers: Organizing Communities at the Edge of the Dream." *New York Law School Law Review*, Vol. 50, no. 2, pp. 417–63.
- Fine, Janice. 2006. *Worker Centers: Organizing Communities at the Edge of the Dream*. Ithaca, NY: Cornell University Press.
- Fine, Janice. 2007. "A Marriage Made in Heaven? Mismatches and Misunderstandings Between Worker Centres and Unions." *British Journal of Industrial Relations*, Vol. 45, no. 2, pp. 335–60.
- Fine, Janice. 2011a. "New Forms to Settle Old Scores: Updating the Worker Centre Story in the United States." *Relations Industrielle/Industrial Relations*, Vol. 66, no. 4, pp. 604–30.
- Fine, Janice. 2011b. "Worker Centers: Entering a New Stage of Growth and Development." *New Labor Forum*, Vol. 20, no. 3, pp. 45–53.
- Fine, Janice, and Jennifer Gordon. 2010. "Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations." *Politics and Society*, Vol. 38, pp. 552–85.
- Garcia, Ruben J. 2012. *Marginal Workers: How Legal Default Lines Divide Workers and Leave Them Without Protection*. New York: NYU Press.

- Gleeson, Shannon. 2010. "Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making." *Law and Social Inquiry*, Vol. 35, no. 3, pp. 561–602.
- Gleeson, Shannon. 2012. *Conflicting Commitments: The Politics of Enforcing Immigrant Worker Rights in San Jose and Houston*. Ithaca, NY: Cornell University Press.
- Goldberg, Harmony, and Randy Jackson. 2011. "The Excluded Workers Congress: Reimagining the Right to Organize." *New Labor Forum*, Vol. 20, no. 3, pp. 54–59.
- Gordon, Jennifer. 2005. *Suburban Sweatshops: The Fight for Immigrant Rights*. Cambridge, MA: Harvard University Press.
- Greenhouse, Steven. 2013a (Sep. 7). "AFL-CIO Has Plan to Add Millions of Nonunion Members." *New York Times*, pp. B1–2.
- Greenhouse, Steven. 2013b (Sep. 13). "At Labor Group, a Sense of a Broader Movement." *New York Times*, p. B3.
- Griffith, David. 2009. "Unions Without Borders: Organizing and Enlightening Immigrant Farm Workers." *Anthropology of Work Review*, Vol. 30, no. 2, pp. 54–66.
- Henry-Offor, Brenda. 2012. "The Excluded Workers Congress: International Conference on the Human Right to Organize." *International Labor and Working-Class History*, Vol. 82, pp. 201–04.
- Jayaraman, Saru. 2013. *Behind the Kitchen Door*. Ithaca, NY: Cornell University Press.
- Kalleberg, Arne L. 2013. *Good Jobs, Bad Jobs: The Rise of Polarized and Precarious Employment Systems in the United States, 1970s to 2000s*. New York: Russell Sage Foundation.
- Katznelson, Ira. 2005. *When Affirmative Action Was White*. New York: Norton.
- Lyons, Christopher, and Becky Pettit. 2011. "Compounded Disadvantage: Race, Incarceration, and Wage Growth." *Social Problems*, Vol. 58, no. 2, pp. 257–80.
- Milkman, Ruth. 2011. "L.A.'s Past, America's Future? The 2006 Immigrant Rights Protests and Their Antecedents." In Kim Voss and Irene Bloemraad, eds., *Rallying for Immigrant Rights: The Fight for Inclusion in 21st Century America*. Berkeley: University of California Press, pp. 201–14.
- Milkman, Ruth. 2013. "Back to the Future? US Labour in the New Gilded Age." *British Journal of Industrial Relations*, Vol. 51, no. 4, pp. 645–65.
- Mishel, Lawrence, Josh Bivens, Elise Gould, and Heidi Shierholz. 2012. *The State of Working America*, 12th ed. Ithaca, NY: Cornell University Press.
- Ontiveros, Maria Linda. 2007. "Female Immigrant Workers and the Law: Limits and Opportunities." In Dorothy Sue Cobble, ed., *The Sex of Class: Women Transforming American Labor*. Ithaca, NY: Cornell University Press, pp. 235–52.
- Ontiveros, Maria Linda. 2012. "A Strategic Plan for Using the Thirteenth Amendment to Protect Immigrant Workers." *Wisconsin Journal of Law, Gender & Society*, Vol. 27, no. 2, pp. 133–61.
- Pager, Devah, Bruce Western, and Naomi Sugie. 2009. "Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records." *Annals of the American Academy of Political and Social Science*, Vol. 623, pp. 195–213.

- Peck, Jamie, and Nik Theodore. 2000. "Carceral Chicago: Making the Ex-Offender Employability Crisis." *International Journal of Urban and Regional Research*, Vol. 32, no. 2, pp. 251–81.
- Peck, Jamie, and Nik Theodore. 2001. "Contingent Chicago: Restructuring the Spaces of Temporary Labor." *International Journal of Urban and Regional Research*, Vol. 25, no. 3, pp. 471–96.
- Penn State Dickinson School of Law and National Guestworker Alliance (NGA). 2012. *Leveling the Playing Field: Reforming the H-2B Program to Protect Guestworkers and U.S. Workers*. <<http://bit.ly/1lLmjku>>
- Pitts, Steven C. 2011. *Black Workers and the Public Sector*. Research Brief. Berkeley: University of California–Berkeley, Center for Labor Research and Education.
- Rodriguez, Michelle Natividad, and Maurice Emsellem. 2011. *65 Million Need Not Apply: The Case for Reforming Criminal Background Checks for Employment*. New York: National Employment Law Project.
- Schmitt, John. 2011. "Ex-Offenders and the Labor Market." *Working USA*, Vol. 14, no. 1, pp. 87–109.
- Singer, Audrey. 2012. *Immigrant Workers in the U.S. Labor Force*. Brookings Institution Research Paper. <<http://bit.ly/1j6Tomm>>
- Stein, Lana. 1994. "Privatization, Work-Force Cutbacks, and African-American Municipal Employment." *American Review of Public Administration*, Vol. 24, no. 2, pp. 181–91.
- Theodore, Nik. 2002. "Political Economies of Day Labour: Regulation and Restructuring of Chicago's Contingent Labour Markets." *Urban Studies*, Vol. 40, no. 9, pp. 1811–28.
- Theodore, Nik, Abel Valenzuela, and Edwin Melendez. 2009. "Worker Centers: Defending Labor Standards for Migrant Workers in the Informal Economy." *International Journal of Manpower*, Vol. 30, no. 5, pp. 422–36.
- Thompson, Gabriel. 2012 (Jul. 3). "The Big, Bad Business of Fighting Guest Worker Rights." *The Nation* online. <<http://bit.ly/1xC4sEY>>
- United States General Accounting Office (U.S. GAO). 2000 (Jun.). *Contingent Workers: Incomes and Benefits Lag Behind Those of Rest of Workforce*. GAO/HEHS 00-76. Washington, DC: GPO. <<http://1.usa.gov/1rDPGx5>>
- United Workers Congress (UWC). 2010 (Dec.). *Unity for Dignity: Expanding the Right to Organize to Win Human Rights at Work*. Report issued by the Excluded Workers Congress. <<http://bit.ly/1jdvVtV>>
- Warehouse Workers United, Deogracia Cornelio. 2011. *Shattered Dreams and Broken Bodies: A Brief Review of the Inland Empire Warehouse Industry*. Los Angeles: Warehouse Workers Accountability Commission.
- Weir, Margaret. 2009. "Beyond the Plant Gates": *Postwar Labor and the Organizational Substructure of Liberalism*. Institute for Research on Labor and Employment Working Paper 194-09. <<http://bit.ly/1qLID5p>>

Beyond the Family and Medical Leave Act: The Pluralization of Leave Rights from Below

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Historically in the United States, work–family and employment–illness conflicts have been treated as dilemmas requiring individual or voluntary firm-level solutions rather than national employment regulation. Enacted in 1993, the federal Family and Medical Leave Act (FMLA) (Pub.L. 103-3) is the only U.S. national statute to provide substantive worker rights to both caregiving and medical leave. It provides up to 12 weeks per year of job-protected leave for eligible workers in large firms for certain purposes. However, many workers are unable to use FMLA because of numerous barriers: no coverage of small firms, lack of individual eligibility, absence of pay during leave, limited allowed purposes for leave, and restrictive definitions of “family.”

As the national Republican Party has lurched to the right and national political institutions have become more polarized in recent decades (Hacker and Pierson 2005; Mann and Ornstein 2012), the gaps in FMLA have remained. Initiative has therefore shifted to states and localities. California (2002), New Jersey (2008), and Rhode Island (2013) have introduced paid caregiving leave, and San Francisco, Connecticut, Seattle, New York City, Washington, D.C., Portland, Newark, and Jersey City have passed paid sick leave laws mitigating the exclusion of routine, short-term illness of workers and their families from FMLA leave’s purposes. Effective use of political coalitions, organizational infrastructure, and opportunity, rather than simply higher levels of union density or Democratic majorities, has yielded policy successes. Leave policies have been pursued from the bottom up, by broad coalitions, built on distinctive local cultures, labor and community movements and resources, and political opportunities. Coalition strategies have ranged from more “outsider” ballot initiatives to more “insider” legislative processes and often combined insider and outsider efforts. In general, these initiatives reflect a move toward securing collective labor standards beyond those traditionally won plant by plant, firm by firm, or sector by sector through collective bargaining. Some of the strongest impetuses for state- and city-level standards have come from workers excluded from traditional collective bargaining. Recognizing the local momentum behind the leave movement, small business forces and

their conservative political allies have moved toward suppression of local initiatives through state-level pre-emption strategies.

FAMILY AND MEDICAL LEAVE ACT (1993)

Passage of the FMLA resulted in large part from the substantially increased presence of women and mothers in the workforce. By the 1980s, women of childbearing age and women with children of all ages had substantially increased their labor force participation (Grossman 1982; Fullerton 1993). Working women were not only pregnant and caring for children, but they were also serving as family caregivers to spouses, parents, parents-in-law, and others, in an aging society. Married women's median contribution to household incomes had reached about 30% (U.S. BLS 2011). Yet few women, mainly those at the upper end of the occupational and pay hierarchy, working for larger firms or in unionized work, had job-protected or paid leave (Meisenheimer 1989).

Responding not only to these developments but also to disappointing court decisions and legislative developments, the Women's Legal Defense Fund and the Congressional Caucus on Women's Issues constructed a broad coalition to expand pregnant and parenting women's employment security. The evolving design for a family and medical leave act recognized the limits of traditional maternity-leave programs. These programs were state or employer specific, stood in some tension with equality law, failed to address women's and men's needs to give care to both children and aging family members, and did not recognize workers' own illnesses beyond pregnancy-related disabilities. The new design aimed to increase both men's and women's employment security through minimum labor standards. It included protected leaves for pregnancy-related disability, family caregiving, and employee illness, acknowledging gender differences related to pregnancy within a "differential consideration," broad, gender-neutral package (Vogel 1993; Lenhoff and Bell 2002).

Labor was prominent within the broad coalition. Women in the trade union movement had in the 1940s and 1950s demanded support for child care, in the 1970s and 1980s mobilized around equal treatment, and had long seen the typical maternity policies of employers and the state "as inadequate and discriminatory" (Cobble 2004). Trade union women, particularly in the American Federation of State, County and Municipal Employees (AFSCME) and the Service Workers International Union (SEIU), moved family leave to the top of the labor movement's legislative agenda in the 1980s, at a time when labor was more successful in winning legislation serving the social needs of wider constituencies than directly strengthening unions (Cowell 1993; Dark 1999). Using not only gender equality and employment security but also more traditional maternalist and eldercare arguments, the coalition brought in additional powerful allies.

In the fractured U.S. business politics setting, large firms already offered family leave. However, small businesses in a Chamber of Commerce–led coalition and the Concerned Alliance of Responsible Employers led campaigns of fierce opposition (Martin 2000). The coalitions argued that Congress should not “dictate” benefits, undermining the voluntary, flexible, comprehensive benefits system the private system had developed. The Chamber predicted dire economic consequences, with costs approaching \$16.2 billion, an estimate revised downward by the U.S. General Accounting Office to \$147 million. Opponents argued that while the bill was gender neutral, it would encourage cost-saving discrimination against women in hiring, reduce female and male workers’ level and choice of pay, and possibly reduce other benefits. On grounds that it represented an inappropriate government mandate on employers, President George Bush twice vetoed versions of the bill.

The legislative political environment changed in the early 1990s. The November 1992 elections returned Bill Clinton as the first Democratic president in more than a decade. The 103rd Congress saw a 57 to 43 Democratic advantage in the Senate and a 258 to 176 (plus one independent) advantage in the House, with more women representatives in each chamber than previously. Democrats had been supporting childcare and family leave policy, partly “to erode the Right’s claim to speak for traditional family value ... and to appeal to the middle class, increasingly composed of two-career families” (Martin 2000:221). Major concessions—increasing the size of covered firms to 50 employees, reducing the number of weeks of leave to 12 for all reasons in a single year, and contracting the definition of family members covered to children, parents, and spouses only—were the result of negotiations with conservative legislators (Lenhoff and Bell 2002). The final vote on the FMLA in the House was 265 in favor, including 224 Democrats, and 163 against, including 134 Republicans. In the Senate, the vote was 71 to 27, with only two of the negative votes coming from Democrats, who were from Southern states.

The FMLA provides up to 12 weeks per year of job-protected leave for birth and care of a newborn child, for care of a newly fostered or adopted child under 6, for care of an immediate family member with a serious health condition, or for one’s own serious medical condition. Thus, while women can take time off for pregnancy complications and post-natal recovery, both male and female workers can use its provisions for caregiving and medical leave. FMLA offers only unpaid leave because the business lobby fought to prevent any form of compensation in the policy design. It covers only establishments with 50 or more employees. To be eligible, employees must have worked for their current employer for a total of 12 months and at least 1,250 hours. Estimates suggest that workers have taken 100 million FMLA leaves and that about 18 million workers

a year use family and medical leave. Multiple studies have documented increased availability and use of leaves as a result of FMLA (U.S. DOL 1996; Waldfogel 1999; Cantor et al. 2001; Han and Waldfogel 2003). Klerman, Daley, and Pozniak (2013) report that, based on 2012 surveys of worksites and employees, employee use of leave and employer granting and administration of leave are routinized and unburdensome. However, major limitations in coverage and eligibility, affordability to the worker, definitions of qualifying serious health conditions, permitted uses of leave, and qualifying family relationships remain.

FMLA LIMITS AND EXCLUSIONS

Limited Coverage and Eligibility

While FMLA makes substantial advances in helping workers reconcile caregiving and sickness with employment, it leaves at least 40% of workers without access to job-protected leave. In 2012, only one in six work sites reported being covered (17%), while researchers imputed a lower coverage rate of 9.7% of firms based on size. Overall, researchers estimate that 59% of workers are covered by FMLA and eligible for FMLA leaves, but only 71% of workers at covered firms have heard of FMLA and only 79% of covered surveyed work sites “allow” leave for qualifying FMLA reasons (Klerman, Daley, and Pozniak 2013). Part-time workers may not meet the coverage and hours thresholds, sometimes despite working more than one job.

Lack of Pay

FMLA’s lack of mandated pay during leave severely disadvantages lower-wage workers. The financial costs to the worker of taking leave are by far the biggest reason survey respondents give for not using leave for which they are eligible. In 2012, about 46% of workers surveyed with unmet need for leave could not take the leave because of inability to forgo income. The percentage for covered and eligible employees was nearly the same as the proportion of all employees, and 40% of surveyed employees returned earlier than desired owing to their inability to do without earnings. One in ten FMLA users was forced onto public assistance (Klerman, Daley, and Pozniak 2013). In 2000, 77.6% of employees cited inability to forgo compensation (Cantor et al. 2001). Many low-wage workers, and especially those in small establishments, part-time work or temporary jobs, can least afford to forgo pay.

In May 1999, President Clinton directed the Department of Labor to explore regulations that would permit states to tap surpluses in their Unemployment Trust Funds to cover 12 weeks of leave for birth or adoption, technically classifying workers as laid off. The Clinton administration recognized both the need for paid leave and the new legislative

barriers erected by the “Republican revolution” in both House and Senate. Such regulations were promulgated in June 2000. Growing opposition from business and conservative allies, rising unemployment, and the Bush administration’s instructions to the Department of Labor to rescind the regulations in 2003 defeated these efforts to create paid leave.

Limited Health Purposes

FMLA leave entitlement is linked to “a serious health condition that makes the employee unable to perform the employee’s job,” and the 2012 FMLA survey indicated that 57% of all leave taken was for a worker’s own illness and 19% for the illness of a family member. However, the final regulatory definition of “serious health condition” was complex. In general, the governing rule seemed to be a 3-day incapacity requiring treatment by a health care provider. This rule seemed to disqualify colds, flus, earaches, upset stomachs, headaches, and routine dental problems. The criteria were contested in policy and applied unevenly in practice. Business and conservatives argued for narrowing the health conditions that would qualify, for a longer required duration of incapacity, and for more verification. Labor and women’s groups worked to maintain flexibility that met the needs of workers and their families, as well as medical privacy.

The failure of FMLA to cover with pay the routine illness of workers or their children has led to repeated unsuccessful attempts to enact national sick pay legislation. As with unpaid family leave, lower-wage workers face not only possible disciplinary sanctions but also unaffordable pay loss as a result of illness. Gould, Filion, and Green (2011) have calculated that 40 million private sector workers, including many in service jobs, have no paid sick time and that many are therefore forced into sending sick children to school, going to work sick themselves, or forgoing critical pay (and possibly facing disciplinary action or job loss). The Healthy Families Act (HR 1876), introduced in 2004, would provide paid and job-protected leave up to 56 hours (7 days) in a calendar year, accrued on the basis of 1 hour for each 30 hours worked. Paid leave could be used for worker absences resulting from illness or injury or diagnostic or preventive care; caring for an ill or injured family member; and dealing with consequences of domestic violence, stalking, or sexual assault. However, the bill has been unable to surmount national legislative obstacles, and attempts to add other caregiving responsibilities, such as medical appointments or school conferences, to FMLA have also so far been unsuccessful.

Narrow Definition of “Family”

The FMLA permits leave to care for immediate family members, mainly the worker’s federally recognized spouse, child, or parent. However, ethnic minority families and African Americans, while having lower incomes, less wealth, and higher poverty rates than the white population, may more

often have strong extended family and intergenerational households, with primary caregiving relationships beyond the nuclear family. The Defense of Marriage Act prohibited the federal government from recognizing same-sex marriage in federal statutes such as FMLA, though this prohibition has been modified as a result of the June 2013 Supreme Court decision in *United States v. Windsor*. FMLA defines the child–parent relationship broadly: son or daughter includes a biological child, legally adopted child, foster child, stepchild, legal ward, or child of a person who stands in loco parentis (in the role of a parent toward a child with the intent to act as a parent). The Department of Labor under the Obama administration has clarified that in loco parentis may include an LGBT parent who shares or will share equally in the raising of an adopted child with a same-sex partner but who has no legal relationship with the child.

The Bush administration issued regulations in 2008 extending military-related leave under FMLA, a measure strongly supported by the FMLA coalition. New regulations amended the act to permit a spouse, son, daughter, parent, or next of kin to take up to 26 weeks of leave to care for a member of the Armed Forces with a serious injury or illness. In addition, an employee may take up to 12 weeks in certain circumstances when the employee’s immediate family member is on active duty or has been notified of an impending call or order to active duty. The Obama administration has extended leave time and the circumstances under which military FMLA leave can be taken.

Lack of pay, restricted eligibility, and limited definitions of family would be addressed by the proposed federal Family and Medical Insurance Leave Act, sponsored by Representative Rosa DeLauro (D-Conn.) and Senator Kirsten Gillibrand (D-New York) and introduced in December 2013. The act proposes at least 12 weeks or 60 workdays of paid leave with benefits generous enough to have a meaningful effect. It would establish a national social insurance fund resourced by employee and employer payroll contributions of two tenths of 1% (about \$1.50 per week per worker). This policy design would create national social insurance funding, avoiding burdens on employers to fund leave for their own employees. Recognizing increased job-switching and multiple job-holding in the current labor market, it would condition eligibility on overall work history and contribution records. This would move beyond current FMLA criteria that tie worker eligibility to job-tenure and hour requirements with a single employer and exempt small firms. The bill broadens the definition of family to include domestic partners, siblings, nieces and nephews, aunts and uncles, and grandchildren and grandparents (Boushey and Mitukiewicz 2014; National Partnership for Women & Families 2014). This proposal succeeds a variety of other federal bills that addressed FMLA gaps but found little legislative traction.

STATE AND LOCAL EXPANSIONS SINCE FMLA

In the 2 decades since passage of the FMLA, women and mothers have continued their high rates of labor force participation and have in large proportions provided half or more of family earnings. The 58.1% of women in the workforce in 2011 included 64.2% of mothers with children under the age of 6 and 71.3% of mothers with children under age of 18. About 40% of all households with children under the age of 18 included mothers who were either the sole or primary source of income for the family (Pew Research Center 2013), and more than 63% of mothers earned a significant share of their family's income in 2008 (Boushey 2009; Glynn 2012).

Longer-term trends resulting from periods of high unemployment, weakening labor market institutions (deunionization, fall in real value of the minimum wage), globalization, and a shift toward lower-paying service sector jobs increased the proportion of low-wage work in the United States, which in 2009 had a larger share of employees in low-wage work than most other OECD countries (Schmitt 2012). Women and minority workers were disproportionately represented among these job holders. Paid sick leave continues to be distributed very asymmetrically, mainly to the highest-paid workers (Lovell 2004, 2007; U.S. BLS 2012), despite the facts that children and adults in low-income families suffer more health problems (Heymann 2000) and that lost wages create greater, sometimes critical, financial hardships for lower-income families (Gould, Filion, and Green 2011). Reflecting these realities, public opinion has generally favored paid caregiving and sick leave provision (Smith and Kim 2010), and a growing work–family policy network has increased the issue's public visibility, political pressure on lawmakers, and policy advocacy resources.

California, New Jersey, and Rhode Island have enacted major paid caregiving leave extensions. These expansions build on pre-existing systems of social insurance for temporary disability and pre-existing family-supportive policies. Established soon after World War II, at the initiative of or with the support of organized labor, Temporary Disability Insurance (TDI) programs in California, New Jersey, New York, Rhode Island, Hawaii, and the territory of Puerto Rico compensate workers disabled through a variety of nonemployment-related conditions. Following passage of the Pregnancy Discrimination Act in 1978, TDI provided a limited amount of pay during the late weeks and early postpartum weeks of pregnancy, classifying pregnancy as a disability. Other states have passed more-limited FMLA expansions. These multiple minor changes extend unpaid leave coverage to smaller employers, extend job-protected leave time, create more inclusive definitions of family for purposes of leave, require job-protected leave for employees for children's educational

activities, or pay low-income parents for at-home infant care (National Partnership for Women & Families 2012).

Only one state, Connecticut, has enacted a statewide sick leave statute, but several cities have passed paid sick leave ordinances. Sick leave initiatives at state and local levels seek to extend FMLA by providing coverage for minor illnesses that do not meet the “serious health condition” requirement of FMLA, generally with pay and for broad groups of eligible workers. U.S. federalism permits states to raise employment standards above federal standards. In “home rule” states (the majority of state jurisdictions), city charters grant municipalities “police powers” to legislate relative to health, welfare, and safety; these cities may pass employment regulations that do not conflict with state law. Unlike the paid family leave initiatives that rely on social insurance funding from worker contributions, however, both state-level and city-level paid sick leave has been employer funded.

Paid Family Leave in California (2002)

The California Paid Family Leave program enacted in 2002, following many decades of legislative initiatives on work–family reconciliation and focused efforts starting in 1999, moved beyond the national FMLA in areas of coverage and eligibility, pay, and definition of “family.” It addressed needs of lower-waged workers as well as workers in higher-quality jobs with higher pay. The new Paid Family Leave (PFL) program—flanked by pre-existing supportive family leave legislation—was built on the administrative structure of TDI, renamed State Disability Insurance (SDI). PFL provides up to 6 weeks of partial wage replacement—55% of weekly earnings, up to a maximum benefit of \$1,101 per week (2012)—for eligible workers who take leave to bond with a new child or care for a seriously ill family member. For purposes of the law, a family member is a child, parent, spouse, or domestic partner. PFL is a social insurance program, funded entirely by an employee payroll deduction amounting to 1% of earnings to finance both SDI and PFL. In contrast to FMLA, its coverage is nearly universal in the private sector, and workers are eligible once they have earned more than \$300 in any quarter of the “base period.” PFL has resulted in considerable, though lower than projected, take-up of leave, with 210,167 total claims in 2011–2012, an average of 5.35 weeks per claim, and positive reported economic, social, and health outcomes for workers and their families. Since the enactment of PFL, men have increased their take-up of leave for bonding with a new child. While benefiting lower-waged workers who used it, PFL has unintentionally reproduced inequality of leave use based on income and ethnicity. Most businesses have complied without substantial burdens (Milkman and Appelbaum 2013).

A combination of a political opportunity and a broad-based, strategically effective coalition with a strong labor movement as a core participant

was critical to this policy success. In California in 2002, Democrats held the governorship and majorities in both houses of the legislature. California's Democratic legislators and Governor Gray Davis had strong ties to labor and were generally progressive. The broad Work and Family Coalition formed in 1992 and the Coalition for Paid Family Leave created in 2001 brought together state-level and local labor, civil rights, and community groups. They engaged in a series of critical activities: drafting legislation, enlisting support, getting technical assistance, gathering personal testimony, seeking support from progressive business organizations, building union awareness, and working with University of California experts and academics to study the costs and benefits of paid leave. As the political situation unfolded, they continued to coordinate and plan the campaign. The coalition publicly framed the bill in relation to the importance of workers' not having to choose between "a baby and a job," as well as balancing work with caring for aging parents and other family members. The group also noted that the benefit would help a wide range of workers, build on a successful existing TDI program, cost employers and the state little or nothing, and rely on only a very small employee contribution (Firestein and Dones 2007; Firestein, O'Leary, and Savitsky 2011; Labor Project for Working Families 2003).

Many business organizations continued to campaign against the law, even after major concessions to their demands. Legislative sponsors removed employer contributions, cut the leave period from 12 to 6 weeks, and allowed employers to require employees to use up to 2 weeks of paid vacation before receiving PFL. The business campaign focused on alleged costs to businesses, the dire consequences for an economy entering recession ("job-killing measure"), and insupportable burdens on small businesses. In addition, business called attention to likely worker abuse and framed the policy as a government mandate violating business freedom. The "business case" for paid leave (the research suggesting that employers benefit from increased employee access to leave because it creates cost-savings through reduced turnover and increased morale and motivation, while imposing limited new costs) may have affected public perceptions and the support of some politicians but apparently made no impact on organized business. As in the FMLA campaign, organized business continued to oppose statutory caregiving leave regulations primarily as a matter of business power and free market anti-regulatory principles (Milkman and Appelbaum 2013).

Organized labor was a critical component of the coalition. The California Labor Federation had strong ties to the Democratic Party, extensive general lobbying and campaigning capacity, and a history of involvement with earlier efforts to enact work-family legislation. Because unions and their members were also highly mobilized, particularly in the densely

organized metropolitan areas of Los Angeles and San Francisco, labor enhanced the capacity of the grassroots campaign and ability of the coalition to pressure legislators and the governor. In Los Angeles, a labor–Latino alliance was emerging in the 1990s and early 2000s as unions worked to organize and represent low-wage and migrant workers, often developing innovative “social movement responses to labor market transformations” (Milkman 2006). The unions were at the core of a new “civic left,” enacting minimum wage, health care, and worker rights ordinances that did the work of what might have been federal labor and social policy (Meyerson 2001; see also Gottlieb, Vallianatos, Freer, and Dreier 2006). Dean and Reynolds (2009) show how unions were engaged in regional power-building around a variety of policy issues. San Francisco also had a history of labor–community mobilization and progressive politics. The growing inequality in California’s cities, the expanding low-wage service sector, and the movement to organize low-wage service workers lent emphasis to the argument that low-wage workers could not afford to take needed unpaid leave.

San Francisco Paid Sick Leave (2006)

San Francisco’s Paid Sick Leave Ordinance, effective beginning February 2007, was the first successful local initiative extending paid sick days to workers within the political–geographic boundaries of a city or state. It expands FMLA by covering routine illness, paying for limited sick days, covering part-time workers through an accrual method, and expanding the covered relationships of care. The ordinance is nearly universal, covering not only traditional low-wage service workers but also domestic workers, workers in in-home supportive services providing care for seniors and the disabled, childcare providers contracted by the city, the city’s own part-timers, and welfare recipients working for public and other agencies. After 3 months on the job, any person who works within the City of San Francisco for an employer accrues 1 hour of paid sick leave for every 30 hours worked, with capped accrued leave carrying over from year to year. Employees in businesses with fewer than ten workers can earn up to 40 hours (5 days) of paid sick leave per year, while those at businesses with ten or more can earn up to 72 hours (9 days). PSL can be used when the employee is ill or injured or to aid or care for an ill or injured family member. An employee may use the time to care for a child, parent, legal guardian or ward, sibling, grandparent, grandchild, spouse, registered domestic partner, or other designated person.

Outcome studies suggest that the ordinance extended paid sick days to between 59,000 and 115,800 workers previously without sick leave and increased the availability and reliability of actual access to paid leave (Boots, Martinson, and Danziger 2009; Drago and Lovell 2011). Black, Latino, and low-wage workers most often benefited but were also most

likely to report employer noncompliance. Single mothers reported a greater need than other groups but actually used fewer days (Drago and Lovell 2011). Employers overall reported little difficulty in implementation or loss of profitability. However, small and medium employers previously most unlikely to offer sick days identified various new cost-containment strategies, and restaurants and some health care agencies noted challenges (Boots, Martinson, and Danziger 2009; Drago and Lovell 2011). In addition, evidence shows that, after implementation, employment in restaurant and food service jobs and other jobs in the city has continued to be more robust—to grow more, or shrink less in recession—than in other nearby counties and the state overall (Lovell and Miller 2008; Economic Opportunity Institute 2010).

San Francisco's ordinance was passed not by a vote of the Board of Supervisors but by a 2006 ballot measure on which the vote was 139,000 (60.95%) to 89,057 (39.05%). The ballot initiative thus not only moved the effort outside of traditional collective bargaining structures, but it also avoided standard local government processes and sidestepped negotiated "carve-outs" for certain businesses, a feature of other state- and locally legislated paid sick days expansions. The ballot measure passed only months after the Board of Supervisors approved a provision guaranteeing access to health care for uninsured adults, and the local Chamber of Commerce, according to some reports, was unable to mount another fight.

Young Workers United (YWU), a multi-ethnic membership organization committed to improving the quality of jobs in the low-wage service sector through organizing, grassroots policy advocacy, leadership development, and public education, was central to the initiative. YWU initiated the campaign after a survey yielded many stories of restaurant workers being forced to work while sick and to neglect sick children at home. According to YWU, the decision to put the measure directly on the ballot reflected a refusal to compromise on the issue of covering part-time as well as full-time workers. In addition, it took into account the organizing potential of longer-term grassroots campaigning. Also, YWU saw the campaign as an opportunity to educate workers and employers in advance of passage in order to ensure better implementation and better take-up of benefits. The grassroots, consistent message focused on fairness to sick workers and their right to heal, the right of worker-parents to take care of their sick children, and the public health advantages of avoiding sick workers in direct service—food and hospitality, child and elder care (YWU 2009). YWU built the sick days coalition of almost entirely membership organizations, including the Chinese Progressive Association, Parent Voices, United Food and Commercial Workers' Rising Up in Retail movement, St. Peter's Housing Committee, SEIU's Committee of Interns and Residents, and the powerful Local 2 of UNITE HERE.

San Francisco has long been recognized as a center of progressive and labor politics. Recent municipal legislation improves wages and benefits for low-wage workers. A June 2006 law provides health benefits to all uninsured people in San Francisco, and a 2003 citywide minimum wage ordinance raised the minimum wage. An equal benefits ordinance required firms doing business with the city and county to provide the same benefits to employees' domestic partners that they provided to married spouses, and an Employee Signature Authorization Ordinance required certain employers to enter into card-check agreements with labor organizations. Other policies placed conditions on firms doing business with the city (Jacobs 2010). Workers in tourism and hospitality industries have been relatively strong. UNITE HERE Local 2 is one of three strong unions on the Labor Council. Income and jobs generated by tourism and hospitality are place based, central to the economy, and especially sensitive to labor disruption, and San Francisco has a central urban center where tourism and cultural activities tend to be concentrated (DeLeon 1992; Wells 2002). Nevertheless, workers in those industries have been dependent on nontraditional labor campaigns and labor–community initiatives.

Connecticut's Paid Sick Leave Act (2011)

Effective January 1, 2012, Connecticut's Paid Sick Leave Act was enacted through a legislative policy process driven and supported by grassroots advocacy and mobilization. The act carved out substantial employer exemptions while maintaining coverage for many service sector workers. The act mandated that employers provide up to 5 paid sick days per year to certain employees to attend to their own health conditions or needs arising from domestic violence or sexual assault or to care for a spouse, domestic partner, minor child, or adult child incapable of self-care because of mental or physical disability. The act enumerates specific classes of covered employees, all in service industries, who accrue leave at a rate of 1 hour per 40 hours worked, exempting employers with fewer than 50 employees, employers in the manufacturing sector, and 501(c)(3) organizations providing daycare, recreation, and educational services. The original draft legislation had covered any employer of 25 or more workers in any sector and allowed workers to take up to 52 hours of sick leave per year. Prospective analysis of the bill estimated that about 257,000 private sector service workers employed in companies with 50 or more workers would receive paid sick days, at an average financial cost to workers of about \$6.87 per week, with limited net costs to employers, and with considerable public health benefits (Miller and Williams 2010).

The political mobilization supporting the Paid Sick Leave Act involved tightly linked grassroots organizing and electorally oriented work. The Working Families Party (WFP) provided coordination and leadership.

The Association of Community Organizations for Reform Now (more commonly known by its acronym, ACORN), based mainly in the communities of Hartford and Bridgeport, had initially identified the issue of work–family problems among low-wage workers. The WFP built a deep and broad coalition that not only framed sick days as a matter of workers’ economic security but also as a matter of public health and family well-being. It emphasized the benefits of lower-income working class families not losing necessary income, of parents caring for sick children, and of certain workers (daycare providers, homecare workers, retail employees, restaurant workers, school bus drivers, and others) not working while sick. The most active unions in the coalition included SEIU’s Connecticut State Employees Association Local 2001, mainly bus drivers, and SEIU Local 32BJ, which has 4,500 members consisting primarily of security staff, office cleaners, and food service workers in the Hartford, Stamford, and Bridgeport areas. Public sector unions such as AFSCME, UAW, and SEIU 1199 that wouldn’t win additional benefits for members were committed to the Working Families Party and in principle to improving the situation of lower-wage workers. Public health experts, including the American Medical Association, Planned Parenthood, and the Hispanic Health Coalition; women’s groups; faith leaders; the AARP; and some small business owners also participated (Dworkin 2011).

The WFP of Connecticut, an independent party that emphasizes the traditional working class constituency and program of the Democratic Party and cross-endorses major party candidates with a separate ballot line, joined its grassroots mobilizing and advocacy strategy to electoral pressure. It injected the sick pay campaign into Senate elections, anticipating a hard fight in the Senate, and into the gubernatorial Democratic primary. Democratic candidate Dannel Malloy made sick days a key issue in the primary and gubernatorial campaigns. The WFP endorsed Malloy, who in turn urged businesses to support the measure and lobbied in the Senate at the end. The party also endorsed other Democrats committed to a progressive agenda, including paid sick days. Employers and other opponents argued that imposing greater costs on businesses would drive investment and jobs from Connecticut. Some employers, including many who already provided paid leave that could be used for several of the enumerated circumstances, argued that they simply didn’t believe in employment regulation; and employers raised the issue of worker abuse. With a very close political fight in the Senate, advocates were forced into compromises to win votes. In the end, the legislative language excluded the manufacturing industry, set a 50-employee threshold, and exempted certain nonprofits. The Senate passed the bill with a vote of 18 to 17, the House 76 to 65.

New York City's Earned Sick Time Act (2013)

A long-running grassroots campaign tied to city council politics led to New York City Council's passing a sick leave ordinance by a 45 to 3 vote on May 8, 2013. The act's provisions were subsequently expanded by two new bills passed in February 2014. The expanded Earned Sick Time Act, which became effective April 1, 2014, requires that most private employers allow workers to earn up to 40 hours of paid sick time per year, accruing at 1 hour for every 30 hours worked. While the original act excluded most manufacturing firms, the final version included manufacturing employers. In addition, it extended coverage to smaller firms, lowering the number of employees triggering coverage from 15 to 5. The act makes clear that all workers in a business, not simply workers at specific sites, count. The revisions maintained a "carve in" of domestic workers, covering all employers with one or more domestic employees. It continued special provision for workers with collective bargaining agreements and a shift-swapping alternative provision. The revision also eliminated complicated phasing-in provisions. The revised bill includes an expansive definition of family linked to the provision that sick time may be used for mental or physical illnesses or injuries of family members: spouse, domestic partner, child, parent, grandchild, grandparent, sibling, or the child or parent of a worker's spouse or domestic partner. Businesses are required to inform workers of their rights to sick leave. The New York City Department of Consumer Affairs has enforcement powers, and workers are protected against retaliation for using the act or making complaints. Advocates estimated that the act would benefit mainly lower-paid workers, extending paid sick time to 1.2 million workers without existing paid sick time benefits and extending a legal right to sick time to 3.4 million workers overall in the private sector.

Following the Earned Sick Time bill's introduction in the city council in August 2009, the issue stalled. In late March 2013, the NYC Campaign for Paid Sick Days reached an agreement with council speaker and Democratic mayoral candidate Christine Quinn to bring the paid sick leave measure to a vote. Quinn had declined to introduce the measure for a vote, reportedly courting business allies in her run for mayor. However, she appeared to respond to the community coalition, national leaders, Democratic mayoral primary rival Bill de Blasio, and a petition from council members. In addition, local public opinion polls showed that 62% of Democrats said that they were less likely to vote for a mayoral candidate opposed to the measure. Independents and Republicans were also more likely to punish than reward a candidate opposed to paid sick time (Rankin 2012). The city's unions made support for sick days a threshold issue for political support. New York City Mayor Michael Bloomberg was

resolutely opposed and vetoed the legislation. However, in June 2013, a 47 to 4 council vote overrode the mayoral veto.

The New York City ordinance resulted from 4 years of work by a labor, women's, and community coalition, initially led by A Better Balance (a work–family legal advocacy organization) and then led jointly by several key organizations: A Better Balance, Family Values at Work, Make the Road, the Restaurant Opportunities Committee, the Working Families Party, and key union organizations. The coalition reached out to public health leaders and organizations, child advocates, faith leaders, senior advocates, LGBT and HIV/AIDS advocates, immigrant rights groups, women's groups, research organizations, economic justice groups, and small business organizations. It framed sick days in terms of worker rights, job and income security (especially for low-wage workers), and public health (especially in relation to low-wage workers preparing and serving food and caring for children and the elderly). While the business community argued that sick days would create hardship for business, the campaign emphasized instead the additional hardships endured by low-wage workers and their families during difficult economic times, especially in the absence of paid sick days (Petro 2013). As the coalition worked to strengthen the ordinance after de Blasio's election as mayor, many arguments focusing on the needs and everyday life circumstances of low-wage workers rather than business claims of negative impacts were again mobilized.

Unions and workers were core coalition participants, and participating unions fought both for their own members' interests and for general worker standards. The overall union membership rate in New York City in 2010 was about 25%. Men and women had equal rates of unionization, and 23% of foreign-born workers were in unions (Milkman and Braslow 2010). The Central Labor Council, an association of about 300 locals representing about 1.3 million workers, was strong. Among the most active individual unions in the sick days campaign were those in retail, health care, and property services. The Retail, Wholesale and Department Store Union organized workers, many part time, with little or no access to sick days. SEIU Local 1199 in the course of the 4 years of the campaign moved from having no guaranteed paid sick days to winning them in their contract. About 70,000 members in Local 32BJ of the SEIU (office cleaners, apartment building workers, security officers, window cleaners, theater and stadium cleaners, and public school workers) had little or no recourse to job-protected or paid sick days.

New York City's rich network of worker-community organizations, including Make the Road, New York Communities for Change, the Restaurant Opportunities Center, and Domestic Workers United and the

National Domestic Workers Alliance, were also critical. Make the Road is a nonprofit, membership-led organization based in Bushwick, Brooklyn, that fuses workplace and community issues mainly in Latino working class communities, “a unique amalgam of worker center, legal clinic, citizenship school, mutual aid society, policy shop, protest factory, and church” (McAlevey 2013). New York Communities for Change is an organization of working families in low- and moderate-income communities using direct action, legal advocacy, and community organizing to address issues in education, housing, and jobs.

The large restaurant sector in the city generated a growing restaurant organizing movement after 2002, as the Restaurant Opportunities Center advocated improved conditions for restaurant workers through workplace justice campaigns, research and policy work, and front- and back-of-the-house training. In collaboration with New York Communities for Change, the Restaurant Opportunities Center generated a series of reports about restaurant working conditions, especially in the back of the house. These boosted not only the employment security but also the public health case for paid sick days for lower-paid workers.

The domestic worker provision of the New York City earned sick day policy resulted from a firm negotiating position taken by A Better Balance and others. A Better Balance had a strong commitment to valuing care work. Its relationships with Domestic Workers United (the New York City organization supporting Caribbean, Latina, and African nannies; housekeepers; and eldercare givers) and the national Domestic Workers Alliance were strong. These organizations had succeeded in amending the New York State labor law in 2010 with a Domestic Workers’ Bill of Rights. That bill already provided domestic workers with 3 paid days of rest after 1 year of work for the same employer. It was the state’s first law requiring a private employer to grant paid days off.

Business organizations and conservatives mobilized against the act, with Mayor Bloomberg strongly opposed. The Partnership for New York City, representing large corporations and financial firms, opposed the bill, as did some of the borough Chambers of Commerce representing larger businesses. Manufacturing employers won an exclusion from the first version of the paid sick days bill, using arguments that the sector was fragile, that manufacturing was mobile, and that the sick leave act in neighboring Connecticut exempted manufacturing, while New Jersey (at the time) had no paid sick day regulations. New York City restaurant associations fought to limit provisions, winning a shift-swapping provision. This provision allowed that if workers picked up an extra shift in the week of their illness, employers did not have to pay them for a sick day. The Restaurant Opportunities Center continues to argue that this provision, maintained

in the final version of the act, undercuts workers' rights to paid, nonworking sick days and shifts staffing burdens to workers.

Milwaukee, the State of Wisconsin, and Pre-Emption

The fate of paid sick days in the City of Milwaukee emphasizes the limits of local mobilization and policy making in an era of coordinated conservative state-level opposition to workers' trade union and social rights and benefits. Organized business and other conservatives have reacted to the momentum around paid sick days by trying to undermine what local politics, political culture, labor movement organizing, and coalition building may effect, and a nationwide coordinated state-level pre-emption effort has unfolded. Milwaukee's sick days ordinance triggered a reaction from Republican governor Scott Walker and legislators who worked with the American Legislative Exchange Council (ALEC) to disseminate model pre-emption legislation and strategies. ALEC is widely understood to be a corporate-conservative lobbying group operating largely behind closed doors.

The City of Milwaukee coalition led by the Milwaukee chapter of 9to5, National Association of Working Women, campaigned for a paid sick days ordinance in response to complaints by workers, especially in low-wage industries, that they risked losing income or jobs if an illness caused them to miss work. A 2008 ballot initiative requiring all private businesses employing individuals in the city to provide paid sick time passed with 69% of the vote. Paid sick leave would accrue at 1 hour for every 30 hours worked, with a maximum credit of 40 hours per week and could be used for illness or attention to a sick family member. For employers with fewer than ten employees, earned sick time was capped at 40 hours per year; for larger employers, at 72 hours.

However, the Metropolitan Milwaukee Area Chamber of Commerce challenged the ordinance on ten separate legal grounds. In March 2011, the Wisconsin Court of Appeals (District 1, Milwaukee County) upheld the law, but the Chamber asked for reconsideration. Meanwhile, in March, the Senate passed a bill stating that no city, village, town, or county could enact an ordinance to provide employees with more leave, passing on a 19 to 0 vote with all Senate Republicans voting in favor and all 14 Democrats absent. (In February 2011, Senate Democrats had left the state to withdraw the necessary quorum on budget bills in the legislature to block Governor Walker's "Budget Repair Bill." It would have, among other things, severely limited the rights of municipal, state, and other public employees to bargain collectively and shifted costs of retirement and health benefits to public workers.) The pre-emption bill passed the Assembly in a near party-line vote of 59 to 35. Governor Walker signed

the bill in May 2011 at the offices of the Milwaukee Metropolitan Area Chamber of Commerce.

Walker, working with ALEC, pioneered the sick leave pre-emption strategy. At ALEC's August 2011 annual meeting in New Orleans, Wisconsin's 2011 Senate Bill 23, now Wisconsin Act 16, was reportedly brought to the Labor and Business Regulation Subcommittee of ALEC's Commerce, Insurance and Economic Development Task Force, whose members were given copies as a model. The subcommittee was at the time co-chaired by Yum! Brands and strongly supported by the National Restaurant Association, which has been strongly opposed to paid sick days (Bottari and Fischer 2013) at both the national and local levels. State-level sick day pre-emption bills have now been proposed or enacted in 13 states, often following wage-setting pre-emption initiatives or tying pre-emption of sick days to pre-emption of other local ordinances setting regulatory standards for low-wage workers. The National Employment Law Project (2013) noted that since January 2011, legislators from 31 states had introduced 105 bills aiming to repeal or weaken wage standards at the state or local level, 67 of which were sponsored or co-sponsored by ALEC-affiliated legislators and many of which disproportionately targeted wages of low-paid workers.

CONCLUSION

The development and enactment of the federal 1993 FMLA was made possible by social developments, coalition strategy, and political opportunities, but at the same time was limited by powerful business and conservative opposition. Expansions of access to caregiving and sick leave have at the national level been blocked by a succession of Republican presidents and legislators, as well as by political action by businesses. Federal employment regulation and social policy regarding leave in the United States remains stalled well below that of comparable capitalist democracies (Gornick and Meyers 2003; Kamerman and Moss 2009).

Forward momentum has occurred in states and localities where advocates have constructed broad mobilizing coalitions, including labor organizations, and used a variety of existing political opportunities. Private sector low-wage workers, including traditionally excluded workers, have the greatest urgency for expanding paid leave access. Appeals to public interests in women's employment security, family care and well-being, and public health have broadened the coalitions. Active business support for policy expansion remains the exception because larger companies already provide such leave yet may argue against provisions as interfering with business prerogatives, and smaller and middle-sized companies focus on anticipated costs and principles of nonregulation.

While successful efforts have all been characterized by local infrastructures of organized labor and community organizations, broadly constructed and strategically effective coalitions, and political opportunities provided either by legislative bodies or referendum prospects, local actors in decentralized political jurisdictions have activated specific local resources and created distinctive alliances and strategies. Thus, California's initial paid family leave resulted from statewide coalitions working closely with senior Democrats, Connecticut's sick days policy resulted in large part from the coordinating efforts of the Working Families Party, and San Francisco's effort bypassed elected politicians and was crafted largely by a labor–community organization. Two global cities, San Francisco and New York, were places with concentrated, place-tied service sector work, including a large food service public sector, in which low wages intersected with public health concerns and new organizing initiatives. In most cases, there were compromises with organized business or conservative politicians. The San Francisco effort relied least on traditional political processes and most on an outsider strategy, providing the most universal reach of the new labor standards. Coalition strategies vary between legislative approaches (more open-ended and subject to compromise and carve-outs) and ballot strategies (more determinate and closed and requiring more intensive public education and mobilization).

Expansions of paid caregiving and sick leave in states and localities suggest a decentralization and division of labor regimes in relation to caregiving and illness leave, areas in which social policy and employment intersect. Expansions have been fought for and constructed from the bottom up rather than initiated by policy elites. Workers, including many women, low-wage, and immigrant workers, some unionized and some not, assert rights to health and caregiving leave, noting in concert with other social groups that their rights as workers are not divorced from concerns of public health, household economic security, child development, and social justice. These excluded or marginalized workers also have participated in inventing new forms of labor organizing and renewed an insistence on universal labor standards that no longer exclude low-wage service sector workers. In cities and nationally, labor–community movements argue that workers excluded from labor policy protections, including many workers of color and immigrants concentrated in the low-wage service industries of global cities, need a model of worker rights beyond statutory collective bargaining and focused instead on public legal standards for all workers. These initiatives represent what Weir (2009) has characterized as a shift of labor from functionally defined, vertically integrated workplace-based organizations toward more horizontally organized political movements in local geographic spaces.

REFERENCES

- Boots, Shelley Waters, Karin Martinson, and Anna Danziger. 2009. *Employers' Perspectives on San Francisco's Paid Sick Leave Policy. Low-Income Working Families*, Paper 2. Washington, DC: The Urban Institute.
- Bottari, Mary, and Brendan Fischer. 2013 (Apr. 3). "Efforts to Deliver 'Kill Shot' to Paid Sick Leave Tied to ALEC." Huffington Post.com. <<http://huff.to/1kKPULo>>
- Boushey, Heather. 2009. "The New Breadwinners." In Heather Boushey and Ann O'Leary, eds., *The Shriver Report: A Woman's Nation Changes Everything*. Washington, DC: Center for American Progress, pp. 30–67.
- Boushey, Heather, and Alexandra Mitukiewicz. 2014. "Family and Medical Leave Insurance: A Basic Standard for Today's Workforce." Washington, DC: Center for American Progress. <<http://bit.ly/1sgtUQE>>
- Cantor, David, Jane Waldfogel, Jeff Kerwin, Mareena McKinley-Wright, Kerry Levin, John Rauch, Tracey Hagerty, and Martha Stapleton-Kudela. 2001. *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update*. Rockville, MD: Westat. <<http://1.usa.gov/TWLzXu>>
- Cobble, Dorothy Sue. 2004. *The Other Women's Movement: Workplace Justice and Social Rights in Modern America*. Princeton, NJ: Princeton University Press.
- Cowell, Susan. 1993. "Family Policy: A Union Approach." In Dorothy Sue Cobble, ed., *Women and Unions: Forging a Partnership*. Ithaca, NY: ILR Press, pp. 115–28.
- Dark, Taylor. 1999. *The Unions and the Democrats: An Enduring Alliance*. Ithaca, NY: ILR Press.
- Dean, Amy B., and David B. Reynolds. 2009. *A New New Deal: How Regional Activism Will Reshape the American Labor Movement*. Ithaca, NY: Cornell University Press.
- DeLeon, Richard. 1992. "The Urban Anti-Regime: Progressive Politics in San Francisco." *Urban Affairs Review*, Vol. 27, no. 4, pp. 555–79.
- Drago, Robert, and Vicky Lovell. 2011. *San Francisco's Paid Sick Leave Ordinance: Outcomes for Employers and Employees*. Washington, DC: Institute for Women's Policy Research.
- Dworkin, Greg. 2011 (Jun. 12). "An Interview with Jon Green, Connecticut Working Families." Daily Kos.com. <<http://bit.ly/VSu031>>
- Economic Opportunity Institute. 2010. *Paid Sick Days and Restaurant Jobs: The Evidence from San Francisco*. Seattle: EOI.
- Firestein, Netsy, and Nicola Dones. 2007. "Unions Fight for Work and Family Policies—Not for Women Only." In Dorothy Sue Cobble, ed., *The Sex of Class: Women Transforming American Labor*. Ithaca, NY: ILR Press, pp. 140–54.
- Firestein, Netsy, Ann O'Leary, and Zoe Savitsky. 2011. *A Guide to Implementing Paid Family Leave: Lessons from California*. Berkeley CA: Labor Project for Working Families.
- Fullerton, Howard. 1993. "Another Look at the Labor Force: The American Workforce, 1992–2005." *Monthly Labor Review*, Vol. 116, no. 11, pp. 31–40.
- Glynn, Sarah Jane. 2012 (Apr. 16). "The New Breadwinners. 2010 Update: Rates of Women Supporting Their Families Economically Increased Since 2007." Washington, DC: Center for American Progress. <<http://bit.ly/1otJroH>>
- Gornick, Janet, and Marcia Meyers. 2003. *Families That Work: Policies for Reconciling Parenthood and Employment*. New York: Russell Sage Foundation.
- Gottlieb, Robert, Mark Vallianatos, Regina M. Freer, and Peter Dreier. 2006. *The Next Los Angeles: The Struggle for a Livable City*. Berkeley: University of California Press.

- Gould, Elise, Kai Filion, and Andrew Green. 2011. *The Need for Paid Sick Days: The Lack of a Federal Policy Further Erodes Family Economic Security*. EPI Briefing Paper #319. Washington, DC: Economic Policy Institute. <<http://bit.ly/1kcHXyx>>
- Grossman, Allyson Sherman. 1982. "More Than Half of All Children Have Working Mothers." *Monthly Labor Review*, Feb. pp. 41–43. <<http://1.usa.gov/1oJXich>>
- Hacker, Jacob S., and Paul Pierson. 2005. *Off Center: The Republican Revolution and the Erosion of American Democracy*. New Haven, CT: Yale University Press.
- Han, Wen Jui, and Jane Waldfogel. 2003. "Parental Leave: The Impact of Recent Legislation on Parents' Leave Taking." *Demography*, Vol. 40, no. 1, pp. 191–200.
- Heymann, Jody. 2000. *The Widening Gap: Why America's Working Families Are in Jeopardy and What Can Be Done About It*. New York: Basic Books.
- Jacobs, Ken. 2010. "San Francisco Values: The New Social Compact." In *Proceedings of the 61st Annual Meeting, Labor and Employment Relations Association*. San Francisco, January 3–5, 2009, pp. 180–87.
- Kammerman, Sheila B., and Peter Moss, eds. 2009. *The Politics of Parental Leave Policies: Children, Parenting, Gender and the Labour Market*. Bristol, UK: Policy Press.
- Klerman, Jacob Alex, Kelly Daley, and Alyssa Pozniak. 2013. *Family and Medical Leave in 2012: Technical Report*. Cambridge, MA: Abt Associates.
- Labor Project for Working Families. 2003. *Putting Families First: How California Won the Fight for Paid Family Leave*. Berkeley, CA: LPWF.
- Lenhoff, Donna, and Lissa Bell. 2002. "Government Support for Working Families and Communities: Family and Medical Leave as a Case Study." In Christopher Beem and Jody Heymann, eds., *Learning from the Past—Looking to the Future*. Racine, WI: Work, Family and Democracy Project, pp. 6–27.
- Lovell, Vicky. 2004. *No Time to Be Sick: Why Everyone Suffers When Workers Don't Have Paid Sick Leave*. Washington, DC: Institute for Women's Policy Research.
- Lovell, Vicky. 2007. *Women and Paid Sick Days: Crucial for Family Well-Being*. IWPR Fact Sheet #B254a. Washington, DC: Institute for Women's Policy Research.
- Lovell, Vicky, and Kevin Miller. 2008 (Oct.). *Job Growth Strong with Paid Sick Days*. Fact Sheet. Washington, DC: Institute for Women's Policy Research. <<http://bit.ly/1sguNZw>>
- Mann, Thomas E., and Norman J. Ornstein. 2012. *It's Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism*. New York: Basic Books.
- Martin, Cathie Jo. 2000. *Stuck in Neutral: Business and the Politics of Human Capital Investment Policy*. Princeton, NJ: Princeton University Press.
- McAlevey, Jane. 2013. "Love and Agitation: Labor and Community Issues Are Interwoven, So 'Make the Road New York' Engages Both." *The Nation*, June 10–17, pp. 15–18.
- Meisenheimer, Joseph R. 1989. "Employer Provisions for Parental Leave." *Monthly Labor Review*, Vol. 112, no. 10, pp. 20–23.
- Meyerson, Harold. 2001. "California's Progressive Mosaic." *American Prospect*, Vol. 12, no. 11, pp. 17–23.
- Milkman, Ruth. 2006. *L.A. Story: Immigrant Workers and the Future of the U.S. Labor Movement*. New York: Russell Sage Foundation.
- Milkman, Ruth, and Eileen Appelbaum. 2013. *Unfinished Business: Paid Family Leave in California and the Future of U.S. Work–Family Policy*. Ithaca, NY: ILR Press.

- Milkman, Ruth, and Laura Braslow. 2010. *The State of the Unions: A Profile of 2009–10 Union Membership in New York City, New York State and the USA*. New York: The Joseph F. Murphy Institute for Worker and Labor Studies and the Center for Urban Research, CUNY Graduate Center.
- Miller, Kevin, and Claudia Williams. 2010 (Apr.). *The Costs and Benefits of Paid Sick Days*. IWPR No. B290. Washington, DC.: Institute for Women's Policy Research. <<http://bit.ly/1kKQHM6>>
- National Employment Law Project. 2013 (Feb.). *The Politics of Wage Suppression: Inside ALEC's Legislative Campaign Against Low-Paid Workers*. Issue Brief. <<http://bit.ly/1mR1biW>>
- National Partnership for Women & Families. 2012 (May). *Expecting Better: A State-by-State Analysis of Laws That Help New Parents*, 2nd ed. <<http://bit.ly/1otjSzp>>
- National Partnership for Women & Families. 2014 (Feb.). *The Family and Medical Insurance Leave Act*. Fact Sheet. <<http://bit.ly/W30HLL>>
- Petro, John. 2013. *Low Wage Jobs Dominate City's Job Growth*. New York: Drum Major Institute for Public Policy. <<http://bit.ly/1rdudbT>>
- Pew Research Center. 2013. *Breadwinner Moms*. Washington, DC: Pew Research Center. <<http://bit.ly/1rdupI0>>
- Rankin, Nancy. 2012 (Jan.). *Still Sick in the City: What the Lack of Paid Leave Means for Working New Yorkers*. New York: Community Service Society.
- Schmitt, John. 2012. *Low-Wage Lessons*. Washington, DC: Center for Economic and Policy Research.

- Smith, Tom W., and Jibum Kim. 2010. *Paid Sick Days: Attitudes and Experiences*. Chicago: National Opinion Research Center, University of Chicago. <<http://bit.ly/1r2upgz>>
- U.S. Bureau of Labor Statistics (U.S. BLS). 2011. *Women in Labor Force Databook*. Report 1034. Washington, DC: U.S. Bureau of Labor Statistics. <<http://1.usa.gov/1y2wEB2>>
- U.S. Bureau of Labor Statistics (U.S. BLS). 2012. Table 6, *Selected Leave Benefits: Access, National Compensation Survey, March 2012*. Washington, DC: U.S. Bureau of Labor Statistics. <<http://1.usa.gov/1mFFErP>>
- U.S. Department of Labor (U.S. DOL). 1996. *A Workable Balance: Report to Congress on Family and Medical Leave Policies*. Washington, DC: U.S. Department of Labor.
- Vogel, Lise. 1993. *Mothers on the Job: Maternity Policy in the U.S. Workplace*. New Brunswick, NJ: Rutgers University Press.
- Waldfogel, Jane. 1999. "The Impact of the Family and Medical Leave Act." *Journal of Policy Analysis and Management*, Vol. 18, no. 2, pp. 281–302.
- Weir, Margaret. 2009. "Beyond the Plant Gates:" *Postwar Labor and the Organizational Substructure of Liberalism*. Institute for Research on Labor and Employment Working Paper 194-09. Berkeley, CA: IRLE. <<http://bit.ly/VsVroE>>
- Wells, Miriam J. 2002. "When Urban Policy Becomes Labor Policy: State Structures, Local Initiatives, and Union Representation at the Turn of the Century." *Theory and Society*, Vol. 31, pp. 115–46.
- Young Workers United (YWU). 2009. *Five Year Report, 2002–2007*. San Francisco: YWU. <<http://bit.ly/1nkoUah>>

Labor and Class in a Neo-Mercantile Context: A View from the U.S. Midwest

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By 2009, the number of union members in the United States employed by government surpassed the number in private industry. This milestone marked a stunning turnabout from 60 years earlier, when unions in major private industries, such as automobiles, coal, steel, meatpacking, and trucking, were the economic and political voice of labor. In 1948, about one in three workers in private industry was a union member. Having influence over negotiations that shaped the working conditions of entire industries, the leaders of this rising proletariat were dubbed “the new men of power” by C. Wright Mills (1948). Collective bargaining was a momentary ingredient of the private industrial landscape.

Not all workers were swept upward. Classes of wage earners excluded from the rights and protections afforded by the National Labor Relations Act of 1935, such as farmworkers, lagged behind in living standards and organizational growth. Public sector unions, also excluded from the National Labor Relations Act (NLRA), had a limited presence in urban centers in states that tolerated public sector bargaining. The surge of public sector unionism occurred roughly three decades later, once the federal government and the states began granting public employees bargaining rights.¹ Predictably, as public workers gained collective bargaining rights they unionized, often by converting existing independent associations into state-registered bargaining agents.

Just as public workers found their collective voice, unionization in the private sector waned and, beginning with the deindustrialization era of the early 1980s, started a long and steady descent. Instructively, the vitality of public sector unionism during that era was counter-evidence against the theory that private sector union decline was due to worker “distaste” for collective representation. U.S. workers value union membership; however, workers are also aware that “value” is dependent on the economic context and their rights to act collectively. In the private sector, losses in union membership have been greatest in industries exposed to international trade (e.g., apparel); unions remain comparatively strong in industries that are growing and shielded from the destabilizing effect of capital flight (e.g., utilities). Plainly, the “competitive menace” brought by the

global movement of capital affects the risk and instrumentality of unionizing, and this factor explains a large share of inter-industry variation in union density.

Public employees produce goods and services that are generally not tradable on international markets. Instead, for public workers, private contracting has emerged as a competitive threat, but this method of service delivery has proven to be inefficient and problematic (Sclar 2000). Thus, to effectively deal with state and municipal fiscal stress, in large part caused by the decline in private industrial activity, the viable option for U.S. states is to reduce public employee compensation. To advance this agenda, collective bargaining rights for public workers are weakened or eliminated. As if obeying a long cycle, roughly three decades after the 1980s deindustrialization marked the beginning of the decline for private union density, public unions are now on the defensive.

In this chapter, I frame the contemporary attack on public sector unions as an outcome of an economic development strategy by the states to attract and retain export-oriented private firms. Corporate-friendly policy at the federal level has resulted in employment loss and declining tax revenue from the tradable goods sectors of the private economy, which has fiscally stressed state and local governments. Downward fiscal conditions have provoked a neo-mercantile response by the U.S. states, which includes tax cuts for export-oriented businesses, the restructuring of state and local services toward the interests of private commerce, and efforts to create a more compliant labor market by reducing public services and transfer payments that primarily benefit working-class citizens. Taking place is a movement to re-subordinate public services and local labor markets to private global commerce.

Unions hold positions of power within the pre-existing system—and therefore resist these reforms. To overcome labor impediments, states have weakened collective bargaining rights for public employees, reduced protections for private sector workers (including enacting right-to-work laws), and subverted conventional democratic practices. I draw evidence from Michigan and Wisconsin, two states with rich histories of unionism. Michigan was the birthplace of the United Auto Workers and International Brotherhood of Teamsters; Wisconsin was the birthplace of the American Federation of State, County and Municipal Employees.

NATIONAL CONTEXT OF PRO-CORPORATE POLICY

Neoliberal theory originally embodied a profound distrust of all large economic and political entities, including state bureaus, labor unions, and corporations. Economic activity, according to neoliberal thought, should be market determined and provided by a decentralized, competitive network of private firms governed by contracts. States were to limit their role

to enforcing property rights, adjudicating contract disputes, preventing the formation of monopolies, and only rarely imposing minimal employment and environmental constraints on private enterprise (Hayek 1944).

This ideal was captured and transformed by corporate interests (Van Horn and Mirowski 2009) to the point where contemporary neoliberalism only remotely resembles the original conceptualization. Trade pacts that safeguard investment abroad are neoliberal, insofar that the intent is to protect private property and expand markets. But military actions taken to topple recalcitrant regimes and appropriate foreign energy resources are state behaviors harkening back to the mercantile era. Likewise, public subsidies and currency manipulations meant to shore up domestic industries are considered a resurgent brand of neo-mercantilism. And tax incentives to expatriate corporate earnings, along with other forms of corporate welfare, serve neither the objective of small, private-firm networks nor the objective of expanding state power, failing to fit into either neoliberal or neo-mercantile frameworks. Indeed, it seems that the present political economy is in need of fresh idioms.

Regardless of how they are classified, pro-corporate policies have clearly facilitated the global spread of multinational corporate organizations and, in doing so, reasserted the financial and political standing of the economic elite (Harvey 2005). Global corporate expansion has multiple permutations, with varying effects for the host nation. When creative and labor-intensive divisions of the enterprise (i.e., research and development and production) are domestically anchored, and expansion amounts to growing marketing and sales capacity abroad, gainful employment and capital investment are retained, conferring valuable multiplier effects in regions where the industry is located. An economically destructive version, at least from the perspective of the host nation, is when value-added activities of production, usually followed by research and development, are transferred from domestic to foreign soil. This latter variety of globalization is motivated by low-cost labor in developing nations and by regulatory environments that allow firms to externalize costs. Successful adopters of this global strategy hit a rich vein of accumulation capacity by producing goods cheaply in developing economies for sale in the developed world.

It is the destructive version of globalization that has ascended in recent decades (Atkinson, Stewart, Andes, and Ezelle 2012). Evidence is found in the U.S. balance of trade deficit, particularly in the goods sector, which accelerated into negative territory beginning in the late 1970s, pausing briefly during the recessions of 1980–81 and 1990–91, before ballooning to more than \$800 billion just prior to the 2008 economic collapse.² Another indicator is the steady decline in U.S. manufacturing. In 1970, the nationwide ratio of manufacturing employment to private sector

employment was approximately 30.6%; by 2012 the ratio was 10.7%.³ Productivity gains account for a share of this drop, yet a substantial fraction is attributable to capital relocation.⁴ Mass layoffs and separations data from the U.S. Bureau of Labor Statistics provide additional evidence. Historically, the largest number of layoff events and employment separations associated with the movement of work has been in manufacturing.⁵ Although statistics vary widely over time periods, during any given quarter roughly half of these events may involve the movement of work out of the country.⁶

Manufacturing job loss has long-term implications nationally. Persistent balance of trade deficits threaten the standing of U.S. currency. Moreover, a nation cannot lose its industrial base and remain a military power (DeGrasse 1983). But these effects can be delayed with federal debt. It is at the regional level where the short-term effects of manufacturing decline are most immediately and acutely felt. Value-added work found in manufacturing is a necessary condition for financing middle-class wages and benefits. For the approximately 50% of U.S. citizens with a high school diploma or less, manufacturing decline equates to diminished economic opportunities. Service jobs cannot fill the void because the occupations that pay well are professional and require college degrees. Local economies without a substantial governmental employer or a regionally grounded industry (education, tourism, mining, and so forth) depend on manufacturing jobs to sustain a middle class. In such regions, when the manufacturing base disappears, the economy is no longer “developed.” The income loss and struggle for basic necessities qualifies these regions as “redeveloping.”

NEO-MERCANTILE RESPONSE BY U.S. STATES

Erosion of regional tax bases, largely precipitated by manufacturing employment loss, has forced the U.S. states onto a neo-mercantile path. Lacking militaries, the states obviously cannot adopt the conquest formula that dominated Western Europe from the 15th through 18th centuries. Nor can U.S. states adopt the neo-mercantilism artfully practiced by nations such as Japan and China because they do not have an independent currency and are constitutionally barred from establishing trade barriers along their boundaries. State leaders nonetheless have room to craft policy around the formula of supporting domestic manufacturing in exchange for political power. Assistance to domestic manufacturing comes in two mutual forms. First, by adjusting taxes and appropriations, resources are shifted toward firms producing for interstate and international markets. Second, states enact policy to tame the price of labor inputs.

Tax accommodation is widespread, as evident from aggregate state revenue trends. Figure 1 plots two ratios: corporate tax revenue to sales

FIGURE 1
Ratio of Corporate Income Tax Revenue to Sales
and Income Tax Revenue, All States, 1970 to 2012



Source: Census of Governments.

tax revenue, and corporate tax revenue to income tax revenue, from 1970 to 2012 for all U.S. states.

As Figure 1 illustrates, the U.S. states have gradually shifted the tax revenue burden from corporate owners and investors onto employees and consumers. The decline cannot be fully explained by the expected cyclical drop in corporate tax revenues during economic recessions (i.e., 1980–1982, 1990–1991, 2001, 2007–2009), and the burden shift from corporations to individuals begins after the deindustrialization era of the early 1980s. Contemporary snapshots of U.S. state tax policy support this conclusion (Davis et al. 2013).

A companion accommodation is the use of state resources to subsidize corporate activities. Around the early 1980s, states began to earnestly “bid” to lure or retain private employers by using a wide range of publicly financed tools, such as subsidies for relocation, training, infrastructure, and utility costs. These packages are politically sold as job creation investments, although the net public value from these deals is hard to verify (LeRoy, Healey, Doherty, and Khalil 1997). Other visible forms of corporate support include cheerleading by governors in global arenas to open market access for state industries or to attract investment from foreign sources.⁷

The second form of policy assistance is to reduce the bargaining power of labor, organized and unorganized. The states have less leeway in affecting policy for workers in the private sector because most employment and labor laws are federal, and states are allowed only to exceed federal standards. For instance, Section 18 of the Occupational Safety and Health Act (OSHA) allows states to establish agencies to develop workplace safety standards and conduct enforcement, but the plans must be federally certified, and evidence suggests that states with their own OSHA-approved plans have superior workplace safety records (Zullo 2011). One of the few exceptions in U.S. law that grants states an option that is beneath federal standards is 14(b) of the Taft–Hartley Act, which allows states to pass right-to-work (RTW) laws to weaken private sector labor organizations.⁸

Although the states have limited power to influence labor policy within the private workplace, they do have the power to adjust state benefits for nonworking adults and their families, which affects the price of the marginal workforce. Eliminating or reducing state benefit programs for the poor means that the “reserve army” of the unemployed and underemployed will grow in numbers and extent of dependency. The same holds for the provision of public services. Limiting the scope, content, and quality of publicly financed goods and services inflicts disproportionate harm on the families who benefit most from them—the working and middle class—and indirectly strengthens the hand of employers in any “at will” labor market context.

Moreover, states have direct control over labor relations law for nonfederal, public employees, and the removal of bargaining rights for this class of worker is tied to tax and budget policy. Fiscal reductions for education and other public services are inherent to the neo-mercantile model because tax breaks and budgetary redirections to serve corporate interests dictate program cuts in these areas. Thus, public education and other locally delivered public services that receive financing from revenue collected and controlled by a state become fiscally stressed. Reform must then occur to enable local governments to deal with austerity. Given that labor is the largest operational expense for nearly all public services, reform must target public employees, who along with the citizens they serve, ultimately bear the brunt of neo-mercantilism. Direct, state-imposed reductions in compensation occur in the absence of unions; when public employee unions exist, collective bargaining rights are eliminated or weakened to enable public employers to extract concessions from their unionized workforce.

EVIDENCE FROM THE INDUSTRIAL MIDWEST: MICHIGAN AND WISCONSIN

A neo-mercantile dynamic whereby a political regime serves the interests of export-oriented manufacturing (and to a lesser extent, services) in

exchange for political support is at play in the U.S. Midwest. The dynamic has three pillars. First, state effort and resources shift toward the commercial sector, usually through tax and budget policy. The resource shift is especially generous for firms that produce goods and services in the state for export elsewhere, thus importing private wealth while enabling political leaders to trumpet gains in private employment. Second are policies that soften the labor market by undermining the ability of labor to act collectively (especially in the public sector) and by reducing transfer payments, tax breaks, and public services that benefit lower-income households. Finally, because these reforms face political opposition, states must abandon democratic conventions and suppress democratic practice in order to override dissent and make the reforms semi-permanent.

Regressive Tax and Budget Priorities

The 2011 legislative session represented an important turning point in Michigan tax policy. The Michigan business tax was eliminated and replaced by a flat corporate tax of 6%,⁹ which was estimated to reduce business taxes by \$1,647.6 million in FY 2012.¹⁰ Later, during the December 2012 legislative session, Michigan enacted another round of tax exemptions for manufacturers, including the long-term phaseout of taxes on commercial and industrial personal property.¹¹ Approximately 80% of revenue from this latter source went to local governments, and 20% to the state (of the state share, two thirds was allocated to the school aid fund and one third to the general fund). Industrial centers will be particularly hard hit by revenue loss. Compilations by the Michigan Municipal League indicate that the City of Detroit raised \$50.8 million from property taxes in 2010.¹²

These reforms won praise from the Tax Foundation, which upgraded their ranking of Michigan's corporate tax burden from 49th to 7th best in the nation.¹³ From an opposite perspective, the Michigan League for Human Services (now the Michigan League for Public Policy) estimated that the change amounted to an 83% reduction in business taxes, and the group raised concern over how this revenue loss would be replaced.¹⁴

A partial offset to corporate tax cuts was achieved by transferring the tax burden to individuals, especially the working poor. The earned income tax credit (EITC) is a federal program that provides tax relief for low-income families. In 2006, Act 372 created the Michigan version of the EITC, which by 2009 was pegged at 20% of the federal rate. In the last year of the 20% rate, 2011, approximately 793,190 Michigan tax filers received just under \$353.7 million in credits, with the majority of filers earning \$15,000 or less. In 2011, Act 38 reduced the Michigan EITC from 20% to 6% of the federal rate.¹⁵ Also in 2011, the child deduction of \$600 per child age 18 and under was eliminated, Michigan introduced

new taxes on pension income,¹⁶ and the homestead tax credit, a program that primarily benefits the poor and elderly, was reduced.¹⁷

The year 2011 also brought state aid cutbacks for the nonemployed. Michigan's Temporary Assistance to Needy Families (TANF) program, the Family Independence Program, renewed a 48-month lifetime limit for state benefits that was set to sunset and match federal regulations imposing a 60-month time limit on the receipt of TANF cash assistance. Further, the federal government allows states to exempt up to 20% of TANF-funded cases from the time limit because of hardship. In 2011, the Department of Human Services was instructed to eliminate this hardship category. Finally, as of October 2011, Michigan imposed a \$5,000 limit on certain assets (such as bank accounts), automobiles valued more than \$15,000, and second homes in order to be eligible for Supplemental Nutritional Assistance Program (SNAP) benefits. Prior eligibility was based on family income only. SNAP benefits are 100% paid for by the Federal Department of Agriculture. States are required to finance 50% of administration costs.

Tax and budget reform also took place in Wisconsin in the pivotal year of 2011. Under Act 32 (2011), capital gains taxes were eliminated for Wisconsin businesses that held a capital asset for at least 5 years and had at least half of their personnel and operations expenses in Wisconsin.¹⁸ Additionally, Wisconsin-based industries receive a "domestic production activities credit," which will phase in at 7.5% by 2016 for manufacturing and agriculture. The Wisconsin Legislative Fiscal Bureau estimates that the domestic production activities tax credit will reduce state general fund revenues by \$128.7 million in fiscal year 2016.¹⁹ Several other tax credits were enacted in 2011, including a tax exemption for modular and manufactured homes built in Wisconsin but sold outside the state.²⁰

Wisconsin had to find ways to offset these revenue reductions, and like Michigan tapped benefits and services for the poor and working class. Wisconsin's EITC, also pegged to the federal rate, fell from 14% to 11% for claimants with two children and from 43% to 34% for claimants with three or more children, beginning in tax year 2011.²¹ The annual inflation adjustment to the homestead tax credit was repealed, so this tax credit for low-income citizens will diminish over time.

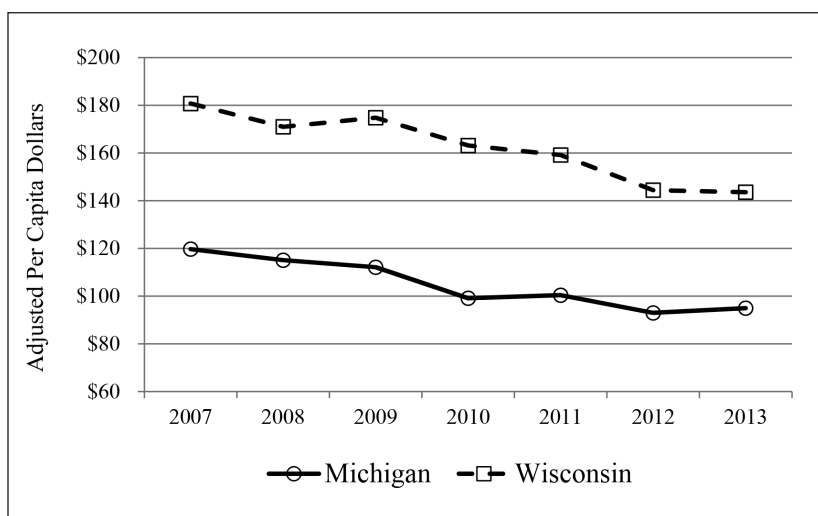
The other major offset to corporate tax reductions, common to both states, was to reduce state revenue sharing for local governments. Cutbacks occurred in education, the largest state-funded public program. In Michigan, Governor Snyder's proposed fiscal year 2012 executive budget cut spending for public schools by about 4% and intermediate school districts by 5%. Funds for K-12 education in Wisconsin were cut by nearly \$800 million in 2011.²²

Cities and counties were also pinched. For example, in February 2011, Michigan's Governor Snyder submitted his fiscal year 2012 budget, and among his recommendations was the elimination of statutory revenue sharing (about one third of the total—the other two thirds is constitutionally mandated) to reduce the state budget by about \$307 million. This cut was partially offset by a new \$200 million fund for awarding grants to local governments that adopt specified efficiency and effectiveness practices, including pension and health care payment maximums.²³ Quite contrary to the concept of "local control," the State of Michigan through its Economic Vitality Incentive Program began to impose its vision on the affairs of local governments.

Figure 2 provides the inflation-adjusted trends in per capita revenue sharing for Michigan and Wisconsin.

Cities and counties rely on state revenue sharing to finance a wide range of services. In inflation-adjusted terms, Michigan and Wisconsin reduced their financial commitment to local governments by more than 20% between 2007 and 2013, exerting pressure on local governments to trim services and extract concessions from employees. As will be explained in the next section, this general budgetary direction dovetails with policies to weaken the bargaining rights of public employees.

FIGURE 2
Michigan and Wisconsin Per Capita Revenue Sharing
for Local Governments, 2007 to 2013



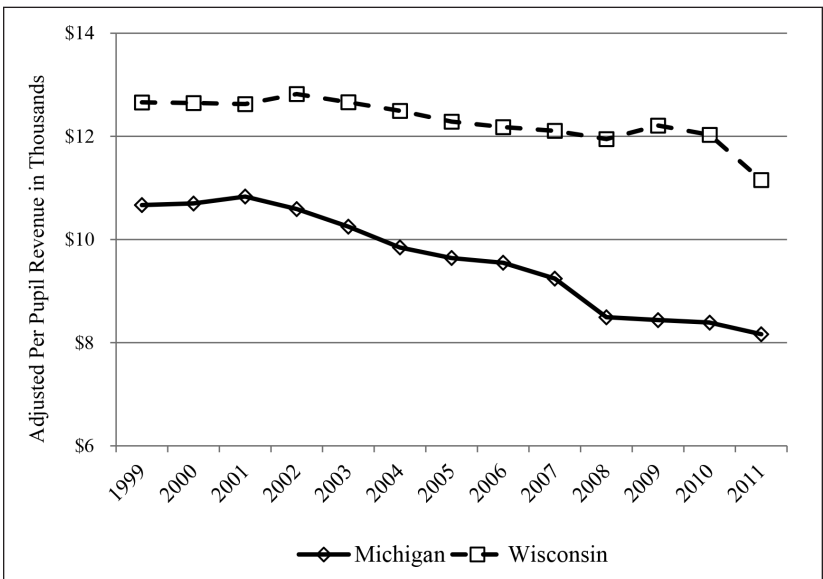
Sources: Michigan Department of Treasury, Revenue Sharing Reports; Wisconsin Legislative Fiscal Bureau, Informational Paper 18, Shared Revenue Program.

One way to appreciate the shift in state priorities is to contrast the two spending areas of education and economic development. Figure 3 provides the average inflation-adjusted per-pupil expenditures for Michigan and Wisconsin K–12 schools.

State funding for education peaked around the 2001 to 2002 period, a time of relatively robust economic activity in the Midwest. Since then, through a combination of the recession and budget policy, state resources for education have decreased. As Figure 3 shows, the 2011 per-pupil funding in Michigan is 24.7% less than the peak year of 2001. The loss of state support for Michigan school districts is especially painful given that the mandatory district contributions to the Michigan Public School Employees Retirement System (MPSERS) have been increasing. The historic MPSERS contribution varied between 11% and 15% of payroll between the years 1995 through 2005. Since 2009, the mandatory contribution escalated rapidly and was at 27.37% for 2012–13.

For Wisconsin, the 2011 per-pupil funding is 13.0% less than in the peak year of 2002. School districts in Michigan and Wisconsin are fiscally stressed, and what will likely compound the problem are proposals by current administrations to expand education privatization with vouchers, private charter schools, and Web-based instruction.

FIGURE 3
State and Local Per Pupil Contribution to K–12,
Michigan and Wisconsin Districts, 1999–2011



Sources: Michigan Department of Education, Bulletin 1011; Wisconsin Legislative Fiscal Bureau, State Aid to School Districts, Informational Paper 24, January 2013.

By comparison, resources are shifting to state agencies engaged in economic development. The Michigan Economic Development Corporation (MEDC), founded in 1999, has grown in size and power. According to the state website, MEDC is “a public–private partnership serving as the state’s marketing arm and lead agency for business, talent and jobs, tourism, film and digital incentives, arts and cultural grants, and overall economic growth,” offering “business assistance services and capital programs for business attraction and acceleration, economic gardening, entrepreneurship, strategic partnerships, talent enhancement and urban and community development.” Executive Order 2011-4 increased the size and scope of the MEDC by transferring the Workforce Development Agency, the Michigan State Housing Authority, and the Land Bank Fast Track Authority to the MEDC. With these changes, general funding for MEDC jumped from \$65.3 million in 2000–01 to \$218.2 million in 2013–14.²⁴

Wisconsin Act 7 (2011) established the Wisconsin Economic Development Corporation (WEDC) to replace the Department of Commerce as the state’s lead agency in promoting economic development. Under Wisconsin Act 32 (the 2011–13 biennial budget), WEDC was provided with \$34.1 million in general revenues for 2011–12 and \$32.8 million for 2012–13. Additionally, the WEDC was granted expenditure authority of \$6.5 million from funds transferred from the Department of Commerce (Shanovich 2013). The effectiveness of WEDC has recently been questioned (LeRoy et al. 2013).

Rescinding Labor Rights

Organized labor, especially from the public sector, posed an obstacle to these reforms. Removing the obstacle would prove to be controversial because both states had unionized industrial sectors, established public collective bargaining laws, and relatively strong public employee unions. According to data compiled by Hirsch and Macpherson (2011) from the Current Population Survey, private and public union density in Michigan was 11.1% and 48.9%, respectively, in 2011. In Wisconsin, the comparable numbers were 8.4% and 46.6% for 2011. While both states rolled back labor rights beginning in 2011, Wisconsin did so dramatically, and the prime target was public unions. Michigan labor reform was more incremental and included workers in the private sector.

Wisconsin Act 10, known as the Wisconsin Budget Repair Bill, was proposed by Governor Scott Walker, passed by the state legislature in 2011, and made effective on June 29, 2011. Wisconsin Act 32, the Biennial Budget Bill, was effective on July 1, 2011. Together the acts effectively gutted collective bargaining rights for all public employees, with the exception of the police, firefighting, and transit units. Public employee unionism was not outlawed, but by limiting mandatory subjects of bargaining to wages only, with increases capped at the level of the Consumer Price Index, there

is, practically speaking, little reason to engage in formal bargaining. In fact, the CPI limit increase on base wages for municipal employees under Act 10 applies only when there is a collective bargaining agreement; employees not covered by a union contract can receive a higher rate increase. Act 10 banned union security provisions (i.e., it imposed right to work) yet went further than Section 14(b) of Taft–Hartley by prohibiting dues collection through public payroll systems. Public unions must now devise their own method of collecting member dues. The acts also mandated health insurance premium co-payments of at least 12% and required public workers pay half of the contribution to retirement plans.

A particularly onerous provision of Act 10 is the requirement that public unions annually conduct recertification elections to verify majority status. Unions must register and pay a fee for every recertification election based on unit membership size. Failure to register leads to automatic decertification. In the election, a union must garner 51% support from all eligible bargaining unit members, with nonvotes tallied as desiring no union representation. Union locals affiliated with the American Federation of State, County and Municipal Employees (AFSCME) refrained from participating and instead mobilized members politically to shape the terms and conditions of the proliferating number of employee handbooks. Others, such as the Wisconsin Education Association Council (WEAC), participated in the recertification process.

The elections overwhelmingly recertified the bargaining unit. In the initial annual recertification rounds in the fall of 2011, which primarily included school district units, 88.2% of the units recertified. In the elections of spring 2012, which included a large number of municipal units, 84.3% of the units recertified.²⁵ These recertification rates might seem impressive given the narrow scope of bargaining in the new law, but those were the first of many rounds, and clearly the public sector union movement in Wisconsin cannot survive in a traditional form if they lose 12% to 15% of their units each year.

In this regard, the WEAC, with its history and identification as a professional association, may have an advantage in retaining members. A review of the recertification results from fall 2011 indicates that nearly all of the recertification losses were among school support staff; teachers lost very few units. Subsequent recertification rounds more broadly indicate a positive correlation between recertification success and the level of skill and professional qualification of the unit members. What these first recertification rounds suggest is that the public sector labor movement in Wisconsin is transitioning to an associational model, in which benefits from membership do not come from the bargaining table but instead through political representation and professional development services.

Police and firefighters were not completely spared in the Wisconsin

reform. Under Act 32, health care is a prohibited subject of bargaining, which allows public employers to unilaterally set benefits, co-pays, and so forth. Newly hired police and fire employees must contribute to their pension. Interest arbitration—which historically was a valuable source of bargaining leverage for public workers—remains, but arbitrators are required to give greatest weight to local economic conditions in their decisions. Transit workers escaped legislative changes only by virtue of Section 13(c) of the Federal Transit Law, which conditions federal funds for transit on the maintenance of collective bargaining rights.

Acts 10 and 32 were challenged in the political arena. Protests erupted at the Capitol in Madison beginning in the winter of 2011 and reached a crescendo in late February to include an occupation of the Capitol. The protest attracted widespread media attention, as well as promoting national and international solidarity, and led to the lockdown of the Capitol on March 3, 2011. In an unusual display of protest, 14 Democratic senators fled the state to deny the necessary quorum to advance bills dealing with fiscal issues. To move the initiative forward, Governor Walker eliminated the budgetary provisions and afterward, Act 10 was passed by the Senate majority.

As Wisconsin captured media headlines for eviscerating the collective bargaining rights of public employees with one large legislative initiative, the Snyder administration in Michigan was taking a more subtle approach to achieve similar ends. The blueprint can be found in recommendations outlined in an April 2010 report by the Citizens Research Council of Michigan (CRC 2010). To relieve municipal fiscal stress, the report stressed three policy directives: (1) consolidate services across units of government to achieve economies of scale, (2) privatize public services, and (3) facilitate labor concessions. Legislation in 2011 provided “carrots” to local governments to adopt these policies as well as the legal leverage to carry it out. As with Wisconsin, Michigan reform targeted the rights of public employees. However, labor reform in Michigan was broader than in Wisconsin, including initiatives affecting the rights and protections of private employees. Further, Michigan reform was driven more so than Wisconsin by incentives through the power of the state purse.

Again, Act 63 (2011), the Economic Vitality Incentive Program, replaced state revenue sharing with financial incentives based on whether local governments met three specific goals outlined by the Citizens Research Council. The first, accountability and transparency, involved creating a citizens’ guide and a performance dashboard of their local finances. The second was the consolidation of services across governmental units, and several labor policy changes were enacted to ease the task of public administrators. Act 259 (2011), the Municipal Partnership Act, promotes municipal consolidation by allowing two or more municipalities to raise taxes, while

also barring popular referenda to overturn the consolidation. Act 260 (2011) made consolidation decisions prohibited subjects for bargaining, although public unions retained the right to negotiate over the effect of such decisions. Acts 261, 262, and 263 (2011) eliminated requirements that transferred employees retain seniority, health care, and pension benefits status, and otherwise denied obligations to prior labor agreements.

Incentive funds were specifically tied to employee compensation. Employer contributions to pensions were capped, and health care expenses had to meet certain criteria. An employer could qualify for incentives if health insurance payments fall under a hard cap for individual and family coverage (indexed to inflation); alternatively, a public employer could qualify by paying 80% or less of the total annual costs of all of the medical benefit plans it offers. Total annual costs include the premium and all payments for reimbursement of co-pays, deductibles, and payments into health savings accounts, flexible spending accounts, or similar health care accounts. Most unions in government have agreed to the 80/20 plan because it is the better option for protecting against the risk of rapid health care cost inflation.

School district employees lost ground pertaining to the scope of bargaining. Act 25 (2011) expanded the list of prohibited subjects of bargaining by organized public school employees, including decisions over contracting with a third party for noninstructional support services and the use of volunteers in schools. The intent was to facilitate private contracting for food, custodial, and transit functions, which the administration believes is cost efficient. Since 2011, the Michigan Department of Education has implemented a “best practice incentive” that awards districts with additional per-pupil amounts if the districts accomplish certain objectives. One of these objectives is to obtain competitive bids for the provision of noninstructional services.

Bargaining reform also affected teacher units. A series of public acts weakened public school tenure protections by lengthening the probationary period, making the successful completion of probation partially dependent on standardized test scores and making “effectiveness” rather than seniority the determining factor when a workforce reduction is necessary.²⁶ As of June 2011, if contract negotiations became protracted, teachers are penalized by having step increases in wages frozen and being required to pay for any increase in health benefits costs until a new contract is finalized.²⁷ A year later, Act 45 (2012) prohibited teachers from bargaining over the design of an employer’s performance evaluation system, including any method for determining performance-based compensation. Clearly, these rule changes strengthened the bargaining position of public school administrators.

Other statutory changes were introduced that affected worker rights in the private sector. The Michigan building trades were set back by Act 98 (2011), the Fair and Open Competition in Governmental Construction Act, which prohibits any governmental unit from including in the bid process for a construction project any consideration about whether the bidder is a signatory to a labor agreement.

Workplace safety and health standards are becoming more business friendly. Michigan has a state plan to administer and enforce health and safety law. Act 10 (2011) amended the Michigan Occupational Safety and Health Act to prohibit the establishment and promulgation of workplace ergonomics rules beyond the federal standard. Executive Order 2011-5 created the Office of Regulatory Reinvention (ORR) within the Department of Licensing and Regulatory Affairs (LARA) and further charged LARA with “creating a regulatory environment and regulatory processes that are fair, efficient, and conducive to business growth and job creation through its oversight and review of current rules and regulations and proposed rule making and regulatory activities.”

Public bodies that once had rule-making responsibility, such as the General Safety Standards Commission, were abolished.²⁸ At present, the ORR makes recommendations for rescinding Michigan workplace safety code, which must be reviewed by LARA for adoption, where adoption means returning to the minimum federal standard. Act 415 (2012) requires the LARA to provide a “clear and convincing” need for any new safety standard that exceeds federal regulations.

These reforms were opposed by the Michigan labor movement; however, it was the imposition of RTW that triggered protests at the Capitol in Lansing. Public school employees went first. Act 53, signed in the spring of 2012, held that a “public school employer’s use of public school resources to assist a labor organization in collecting dues or service fees from wages of public school employees is a prohibited contribution to the administration of a labor organization.” The law not only prohibited union security clauses, but it also barred member dues collection through the school payroll system.

Following the 2012 fall election, in which House Republicans lost two house seats but maintained the majority, the Michigan legislature introduced two new bills: one to enact RTW for private sector unions, Act 348 (2012), and the other for nonschool public sector unions, Act 349 (2012). Protests began immediately, leading to a shutdown of the Capitol in Lansing.

Subverting Democracy

Neo-mercantile strategy is polarizing. Business interests actively lobby for neo-mercantile policies, while organized labor and citizens concerned with preserving the institutions responsible for ameliorating social inequity—

public services, income transfer programs, tax relief for working families and the poor, labor unions, and so forth—oppose neo-mercantile reform. Consequently, neo-mercantile policy must be implemented over the objections of large swaths of the electorate that are sensitive to class divisions over multiple social outcomes, including income, opportunity, health, and education. States embarking on a neo-mercantile path must therefore suspend or restrict the use of conventional democratic mechanisms in order to override popular opposition.

In both Wisconsin and Michigan, the passage of laws that repealed the rights of organized labor occurred through unusually undemocratic processes. In Wisconsin, Act 10 was advanced by Assembly Republicans over fierce opposition from Democrats. On February 25, 2011, Republicans cut off debate and all public hearings and moved quickly to pass the act. With no bipartisan forewarning, members of the Wisconsin Assembly were given 15 seconds to register their vote at 1:00 A.M.²⁹ Fewer than half of the Democratic representatives were able to vote.

Similarly aggressive action in Michigan was used to pass Acts 348 and 349, RTW for the private and public sectors, respectively. Voting took place during a marathon session on December 11, 2012, that ended at 4:30 A.M. the next day. Both acts passed without support from House Democrats and were quickly signed into law by Governor Snyder without formal public discussion or debate. Further, the RTW laws were attached to an appropriations bill, which, by Michigan law, prevents opponents from taking the issue to a popular referendum.

The process provoked criticism from the minority party in Michigan. The statement by Representative Stacy Erwin Oakes (D-Saginaw) was typical:

I voted no on [right to work] as a result of the undemocratic process employed by the majority party to push divisive legislation that attacks middle-class families at the last minute during lame duck session.³⁰

Jim Townsend (D-Royal Oak) placed the act in historical perspective:

They say that history repeats itself, and it's becoming increasingly clear that in Michigan we are witnessing the return of the Gilded Age of the early 1900s when there were two classes in our society, the rich and the poor. What [right to work] is really about: greed.³¹

Representative Douglas A. Geiss underscored the politicized nature of the act:

The people of the state of Michigan do not want this legislation, as shown by the fact that many of the members who voted for this bill lost re-election in November. The last-minute push for this legislation ends a deceptive 96th legislature. [After] what started with House Speaker Bolger and Representative Schmidt conspiring to rig an election, it should come as no surprise that this issue has been raised and rushed through the legislature as a surprise, last-minute attack. There is no honor in gaming the system.³²

Actions were taken to minimize the chance that the laws will be overturned by future legislative bodies. Wisconsin passed a restrictive voter identification law in 2011 that requires a government-sanctioned photo ID to cast a ballot.³³ Act 23, as of this writing, has been ruled unconstitutional and is on appeal. Adopting the standard of “heightened scrutiny,” Dane County Circuit Court Judge Flanagan ruled that Act 23 would result in “irreparable harm,” and enjoined the act.³⁴ In a separate, strongly worded decision, Judge Niess ruled that Act 23 violated the Wisconsin constitution.³⁵ Both justices were influenced by evidence that voter ID laws disproportionately disenfranchise the elderly, the indigent, and minorities.

The Michigan House passed a similar voter identification law in 2011, but Governor Snyder vetoed the measure.³⁶ Instead, Snyder expanded the powers of emergency executives who are appointed by the state to run financially distressed schools and municipalities. The idea of state intervention into the affairs of fiscally impaired local governments is not new to Michigan. Public Act 72 of 1990 established state oversight authority when local governments face bankruptcy, and since then, emergency financial managers have been appointed by Republican and Democratic governors.

However, the word “financial” in the job title underscores that the governor’s appointee was limited to a review and intervention in matters dealing with the budget. Recent controversy in Michigan over the emergency financial manager model is in cases where budgetary matters intersect other policy areas. Appointed emergency financial managers at Detroit Public Schools sought to expand their authority beyond the budget—for instance, into control over curriculum—which triggered opposition from the elected school board. In high-profile court cases, the Detroit school board prevailed,³⁷ prompting retaliation by the Michigan legislature. Acts 4 through 9 granted appointed emergency managers (note that “financial” was dropped from the title) the authority to terminate collective bargaining agreements, fire elected officials, and privatize or sell public assets.

Officially known as the Local Government and School District Fiscal Accountability Act, the initiative essentially suspended all power from democratically elected local leaders.

Acts 4 through 9 were repealed by state referendum in the November 6, 2012, election, with significant opposition coming from the Detroit region. Despite this mandate, in the following month during the controversial lame duck session, the Michigan legislature restored the powers of the emergency manager. Act 436 (2012) reinstated emergency managers' supreme control over budgetary and policy issues for a minimum of 18 months. Emergency managers are obligated to discuss policy changes with local elected leaders, but democratic validation is not required.

A GREAT DOWNWARD RATCHET AND THE LIMITS OF POPULAR FORBEARANCE

Traditional mercantilism was the economic and political accommodation of domestically incorporated private enterprise in exchange for military power and colonial conquest. Contemporary state-level neo-mercantilism is obeisance to the interests of large, domestically anchored corporations in return for electoral support. Corporations receive tax relief and other subsidies in return for the (often vaguely defined) pledge of domestic employment growth. Included in the reform are policies designed to lower the price of free labor, weakening labor unions and reducing publicly financed forms of welfare and other services that primarily benefit the working class.

A component of the traditional formula was the suppression of free labor through laws making it hard for wage earners to quit in search for better employment (e.g., individual contracts, maximum wage laws), live off the commons (e.g., land closure), or engage in collective protests, such as strikes or boycotts. Various incarnations of bound labor (e.g., indentured servitude, slavery, debt peonage) were instituted to further expand the low-cost labor pool.

Contemporary neo-mercantilism borrows from this strategy. Michigan Act 261 (2012) liberated the use of prison labor by corporations

if more than 80% of a particular product sold in the United States is manufactured outside the United States and none of that product is manufactured in this state, or if a particular service is not performed in this state, as determined by the department of corrections in conjunction with the advisory council for correctional industries, inmate labor may be used in the manufacture of that product or the rendering of that service in a private manufacturing or service enterprise.

Michigan inmates are thus offered to corporations as an alternative to low-wage labor in developing nations.

As with traditional mercantilism, contemporary policies will further immiserate the unemployed and underemployed, thus creating a larger and more pliant potential labor pool. Labor unions defend worker rights, including benefits available through the public safety net, so the political power of organized labor must be devitalized. Revising collective bargaining law to reduce labor's economic and political leverage is necessary.

Being controversial, such policies are passed using tactics that circumvent democratic conventions and practices. Political leaders counter the risk of popular backlash in the short term through police actions and in the longer run by politically disenfranchising the opposition. For political leaders, the gambit is to hold on to power through good news on the private jobs front, combined with unlimited electoral funding from an economic elite. This is the emergent political economy in the U.S. Midwest.

In a condensed time period, Michigan and Wisconsin offer a view of how the great ratchet downward of private sector manufacturing employment reverberates to the public sector. In 2011, both states restructured the tax code to lift the burden of financing public services from private firms, especially tradable goods producers. To some extent, reductions in these revenue sources were replaced by new taxes on citizens, particularly the working poor, retirees, and families. The other major offset was reductions in state funding for public services. Resources for school districts and local municipalities were cut, necessitating compensation concessions from public employees. To empower local governments to contend with funding shortfalls, collective bargaining rights for public employees were either eliminated, as was the case for Wisconsin, or curtailed to channel local government policy toward a state agenda, as in Michigan.

There are subtle differences between the two states, however. Michigan used budget incentives to pressure local governments to consolidate, privatize, and extract worker concessions, whereas Wisconsin left local governments to their own devices for handling fiscal stress. And unlike Wisconsin, Michigan passed laws, most notably RTW, that targeted private sector unions. Nevertheless, as with traditional mercantilism, the working class lost rights, essential services, and political power and will predictably experience greater depravity and inequality.

In both states, changes in collective bargaining policy were less severe for police units. There are several possible explanations for the favoritism. Members of police unions tend to be more politically conservative and Republican-leaning than other unionists, and preserving bargaining rights for this group could be a loyalty reward. Further, by carving out exceptions for police, the states were better equipped to suppress domestic conflict and protect private property using police power.

Finally, the carve-out can be perceived as a divide-and-conquer tactic. Not only did Wisconsin's Act 10 exempt patrol troopers and inspectors, the law also prohibited these police units from belonging to general municipal workers' unions.³⁸ Regardless of the motive, the contemporary state–police alliance is analogous with the state–military alliance of traditional mercantilism.

Future elections will decide the long-term fate of the neo-mercantile approach taken by Michigan and Wisconsin. One unknown is whether organized labor can overcome its divisions—organizational, industrial, legal coverage, and so forth—to form an effective, united political opposition that mobilizes union and non-union citizens alike. In this regard, perhaps the most critical divide within the house of labor is over strategy: union leaders believing that the path to revitalization involves direct action in the workplace versus union leaders who view revitalization as achievable through the political system. The dichotomy is a false one, but for the U.S. labor movement, this issue has historically suffocated genuine solidarity.

In raw display, events in Michigan and Wisconsin reveal the importance of an effective political strategy that includes class-based electoral mobilization. For organized labor, a question going forward is how to stoke discontent over the conditions caused by neo-mercantilism, disturb popular forbearance, and build a countermovement toward a new social accord.

ENDNOTES

¹ Executive Order 10988, signed by President Kennedy in 1962, expanded the rights of federal workers to bargain, and states followed with statutory initiatives that mimicked the rights in the NLRA for state and local government employees. Executive Order 10988 was important symbolically, but it was not the first bargaining law for public employees. In 1959, the Wisconsin Collective Bargaining Law was passed, the first such law in the United States to allow public employee collective bargaining and the first law enabling teachers to organize into unions. Early on, public services were perceived as different from private industry, and thus bargaining law contained some deviations from the NLRA. Chief among them were prohibitions on the right to strike, which were often replaced by the right to interest arbitration.

² U.S. Census Bureau, Foreign Trade Division.

³ Bureau of Labor Statistics, Current Employment Statistics (seasonally adjusted annual average). These figures likely understate the decline in manufacturing for goods destined for civilian markets. For security and political reasons, defense industry manufacturing is committed to domestic regions (Callahan, Vendrzyk, and Butler 2012).

⁴ The share of manufacturing job loss caused by the movement of capital to developing economies is not exactly known. A simple estimate of 3/5 can be derived based on productivity gains from 1987 through 2011 reported by the Bureau of Labor Statistics (U.S. BLS 2013). However, Atkinson et al. (2012) claim that reported productivity is

overstated and that the job loss through productivity is much lower. Depending on the empirical model, Autor, Dorn, and Hanson (2013) estimate that Chinese import penetration is associated with 21% to 44% of the decline in manufacturing employment from 1990 to 2007.

⁵ See U.S. BLS (2013), for the first quarter of 2013, news release, Table 6.

⁶ See U.S. BLS (2013), news release, Table 10.

⁷ During her tenure as Michigan's governor, Jennifer Granholm embarked on 12 international trips to drum up state investment.

⁸ Assuming that the law's intent is to promote collective bargaining as a method to resolve workplace conflict (Section 1 of the NLRA).

⁹ Michigan Public Act 38 (2011).

¹⁰ House Fiscal Agency Legislative Analysis: Replace MBT with Corporate Income Tax; Restructure Personal Income Tax, May 23, 2011.

¹¹ Michigan Public Acts 401, 402, and 403. From this tax cut alone, the Michigan Senate Fiscal Agency forecasted a reduction of \$600 million for 2021–22. See Michigan Senate Fiscal Agency. Personal Property Tax Exemptions: Bill Analysis. S.B. 1065-1072. Revised Committee Summary. Lansing Michigan. April 19, 2012.

¹² Michigan Municipal League website: <http://www.mml.org>.

¹³ Tax Foundation website: <http://taxfoundation.org>.

¹⁴ Michigan League for Public Policy website: <http://www.mlpp.org>. See Fact Sheet: Big Tax Shift (October 2011) and Michigan's Business Tax on Personal Property (April 2012).

¹⁵ For a descriptive report, see Michigan Earned Income Tax Credit: Tax Year 2011. Office of Revenue and Tax Analysis, Michigan Department of Treasury, January 2013.

¹⁶ Michigan Public Acts 41 through 45 (2011).

¹⁷ Michigan Public Act 38 (2011).

¹⁸ Credit filers are required to meet the following criteria in the tax year immediately preceding the application: (1) the amount of payroll compensation paid by the business in Wisconsin is equal to at least 50% of the amount of all payroll compensation paid by the business and (2) the value of real and tangible personal property owned or rented and used by the business in Wisconsin is equal to at least 50% of all such property owned or rented and used by the business.

¹⁹ Legislative Fiscal Bureau, State Tax and Fee Modifications Included in 2011 Act 32, July 5, 2011.

²⁰ For the list, *ibid*.

²¹ *Ibid*.

²² The decline in Wisconsin's commitment to education occurred prior to 2011. In 1993, Act 437 required the state to fund two thirds of K–12 revenues. A decade later, Act 33 (2003–2005 budget) eliminated the two-thirds funding commitment.

²³ Public Act 63 (2011).

²⁴ Michigan Senate Fiscal Agency, Department Funding History.

²⁵ Election statistics are at <http://1.usa.gov/1q07KBV>.

²⁶ Otherwise known as the Teacher's Tenure Act of 2011; Public Acts 257–264 and included 266, 268, 270–272, 274–282, 284–291, 293–296, 299–301, 303–304, and 315–323.

²⁷ Public Act 54 (2011).

²⁸ Public Acts 416, 447, and 448 (2012).

²⁹ “Ziegelbauer supports bill but didn’t push voting button quick enough.” htrnews.com, February 26, 2011. Article at <http://htrne.ws/1nfhCEv>.

³⁰ State of Michigan, Journal of the House of Representatives, 96th Legislature, Regular Session of 2012. December 11, p. 2577. Lansing, MI.

³¹ *Ibid.* at 2578.

³² *Ibid.* at 2572.

³³ Public Act 23 (2011).

³⁴ *Milwaukee Branch of the NAACP et al. v. Scott Walker et al.* Judge David Flanagan, Dane County Circuit Case No. 11 CV 5492, March 6, 2012.

³⁵ *League of Women Voters Education Inc. and Melanie G. Ramey v. Scott Walker et al.* Judge Richard G. Niess, Dane County Circuit Court Branch 9, Case No. 11 CV 4669, March 12, 2012.

³⁶ House Bill 5061 (2011).

³⁷ *Detroit Public School Board v. Robert Bobb.* Judge Wendy Baxter, Wayne County Circuit Court, Case No. 09-020160-AW; *Roy Roberts v. Detroit Board of Education.* Judge Annette J. Berry, Wayne County Circuit Court, Case No. 12-010545-AW.

³⁸ Public Act 10 (2011), p. 26.

REFERENCES

- Atkinson, Robert D., Luke A. Stewart, Scott M. Andes, and Stephen J. Ezelle. 2012. *Worse Than the Great Depression: What Experts Are Missing About American Manufacturing Decline*. Washington, DC: Information Technology and Information Foundation.
- Autor, David H., David Dorn, and Gordon H. Hanson. 2013. “The China Syndrome: Local Labor Market Effects of Import Competition in the United States.” *American Economic Review*, Vol. 103, no. 6, pp. 2121–68.
- Callahan, Carolyn M., Valaria P. Vendrzyk, and Maureen G. Butler. 2012. “The Impact of Implied Facilities Cost of Money Subsidies on Capital Expenditures and the Cost of Debt in the Defense Industry.” *Journal of Accounting and Public Policy*, Vol. 31, no. 3, pp. 301–19.
- Citizens Research Council of Michigan (CRC). 2010. *Financial Emergencies in Michigan Local Governments*. Report 362. Lansing, MI: Citizens Research Council of Michigan.

- Davis, Carl, Kelly Davis, Matthew Gardner, Harley Heimovitz, Robert S. McIntyre, Richard Phillips, Alla Sapozhnikova, and Meg Wiehe. 2013 (Jan.). *Who Pays? A Distributional Analysis of the Tax Systems in All 50 States*, 4th ed. Washington DC: The Institute on Taxation & Economic Policy.
- DeGrasse, Robert. 1983. *Military Expansion, Economic Decline: The Impact of Military Spending on U.S Economic Performance*. New York: Council on Economic Priorities.
- Emergency Financial Advisory Panel (EFAP). 2007 (Feb. 2). *Michigan's Defining Moment: Report of the Emergency Financial Advisory Panel*. Report to the Governor.
- Harvey, David. 2005. *A Brief History of Neoliberalism*. Oxford: Oxford University Press.
- Hayek, Friedrich A. 1944. *The Road to Serfdom*. Chicago: University of Chicago Press.
- Hirsch, Barry T., and David A. Macpherson. 2011. "Union Membership and Coverage Database from the CPS." <<http://unionstats.com>>
- LeRoy, Greg, Thomas Cafcas, Leigh McIlvaine, Kasia Tarczynska, and Philip Mattera. 2013. *Creating Scandals Instead of Jobs: The Failures of Privatized State Economic Development Agencies*. Washington DC: Good Jobs First.
- LeRoy, Greg, Richard Healey, Dan Doherty, and Hany Khalil. 1997. *No More Candy Store: States and Cities Making Job Subsidies Accountable*. Washington, DC: Good Jobs First.
- Mills, C. Wright. 1948. *America's Labor Leaders: The New Men of Power*. New York: Harcourt Brace.
- Sclar, Elliot. 2000. *You Don't Always Get What You Pay For: The Economics of Privatization*. Ithaca, NY: Cornell University Press.
- Shanovich, Ron. 2013 (Jan.). *Wisconsin Economic Development Corporation*. Informational Paper 93. Madison: Wisconsin Legislative Fiscal Bureau.
- U.S. Bureau of Labor Statistics (U.S. BLS). 2013. "The Editor's Desk, Extended Mass Layoff Events and Separations, First Quarter 2013." <<http://1.usa.gov/1jr1q3F>>
- Van Horn, Rob, and Philip Mirowski. 2009. "The Rise of the Chicago School of Economics and the Birth of Neoliberalism." In Philip Mirowski and Dieter Plehwe, eds., *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective*. Cambridge, MA: Harvard University Press.
- Zullo, Roland. 2011. "Right to Work Laws and Fatalities in Construction." *Working USA: The Journal of Labor and Society*, Vol. 14, no. 2, pp. 225–34.

Differences in the “Inclusiveness” of State Labor Market Institutions

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U.S. labor market institutions stand out sharply from those in the rest of the world’s high-income democracies. According to internationally comparable data compiled by the Organisation for Economic and Co-operation and Development (OECD), the United States lies at or near the bottom of the major OECD economies when it comes to the generosity of the unemployment insurance benefits, the degree of employment security provided by national employment protection legislation, and the share of the workforce that is unionized. The United States is also the only one of those countries that does not guarantee its workers paid vacations, paid sick days, or paid parental leave. While there is no consensus on the overall impact of these and other labor market institutions on U.S. employment performance,¹ a substantial body of research suggests that U.S. institutions are a major determinant of high and rising levels of wage and income inequality in the United States over the past 3 decades.²

Given the strongly federal system of labor market regulation in the United States, however, international comparisons based on national averages may mask important differences across the 50 states and the District of Columbia. Key institutions regulating wage setting (minimum wages and the Earned Income Tax Credit), unemployment insurance, collective bargaining (in the private and public sector), and employment protection differ in important ways across the U.S. states. This chapter reviews these differences and assesses whether this state variation should alter our understanding of the United States as an international outlier. The chapter also attempts to evaluate the potential for state-level legislative action to close the gap in inclusiveness between the United States and the rest of the wealthy world.

UNITED STATES AS AN INTERNATIONAL OUTLIER

U.S. labor market institutions are among the least inclusive in the major OECD economies, where the term “inclusive” refers to systems “that have formal—and sometimes informal—mechanisms to extend the wages, benefits, and working conditions negotiated by workers in industries and occupations with strong bargaining power to workers in industries and

occupations with less bargaining power” (Appelbaum et al. 2010:7). Two of the most important inclusive institutions are minimum wages and unions, but others include unemployment insurance benefits, employment protection legislation, and the regulation of working time. The available data for the major OECD countries puts the United States at or near the bottom of indicators designed to capture each of these dimensions of labor market regulation.

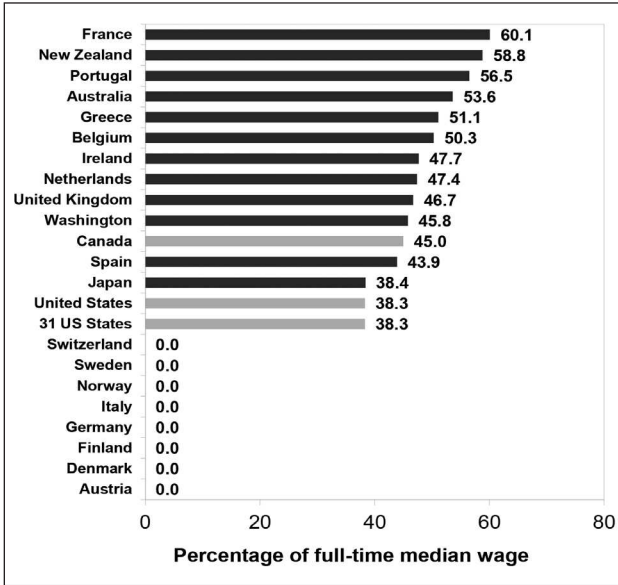
The two labor market institutions most directly involved in wage setting are minimum wages and unions. Only about half of the major OECD countries have statutory national minimum wages. Some of the countries without statutory minimum wages have a *de facto* national wage floor that is negotiated between employers and unions (Denmark, for example); others have sector-specific minimum wages (Germany, for example). But, as Figure 1 shows, among those countries with a national minimum wage, the federal minimum wage in the United States is the lowest when expressed as a share of the corresponding median wage for full-time workers (38.3%). Japan is nearly identical (38.4%), but in the rest of the countries with a national minimum wage, the level is at least 5 percentage points of the national median higher, and in six of the countries, the national minimum is more than 50% of the median, including France, at 60%. (Figure 1 and several subsequent figures also include two additional entries showing, separately, where the most and least inclusive U.S. states would lie if placed on the international scale. More on this later.)

The United States also has the lowest share of its workforce covered by a collective bargaining agreement (Figure 2). In 2007–08 (just before the Great Recession), about 13% of U.S. workers were represented by a union. In the rest of the major OECD economies in that same period, only two had coverage rates below 20% (Japan, 16%, and New Zealand, 17%), and coverage was near or above 50% in 14 of the 21 countries in the figure, and at or above 90% in five of the countries.

The degree of inclusiveness of labor market institutions goes beyond the immediate process of wage setting. The United States fares poorly on these other dimensions as well. Figure 3 presents a common indicator of the generosity of unemployment insurance benefits: the average unemployment insurance benefit payment expressed as the share of the average worker’s wage.³ The United States (20.2%) is not the least generous, but only five countries are worse.

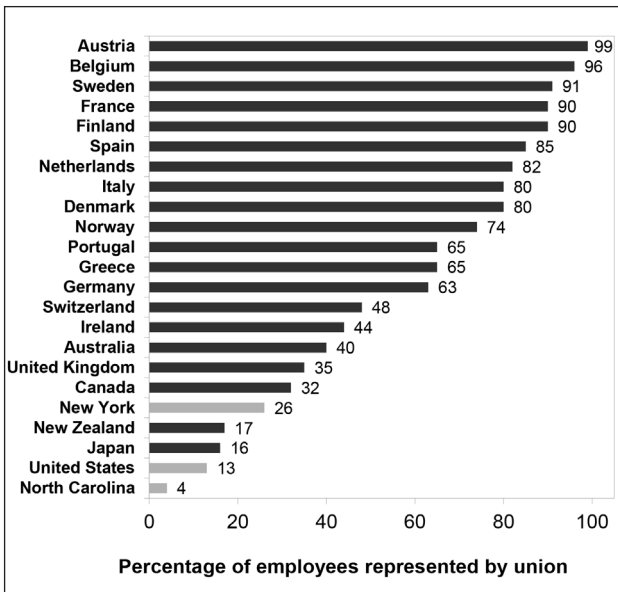
Figure 4 summarizes data prepared by the OECD on the strictness of employment protection legislation in each country. The OECD’s index, which runs from 0 (the least restrictive employment legislation) to 6 (the most restrictive), evaluates the level of protection workers have against individual dismissal or layoffs, including measures such as requirements for advanced notification and severance pay. The United States (1.17) is

FIGURE 1
Minimum Wage Relative to Median Wage of Full-Time Workers, 2011



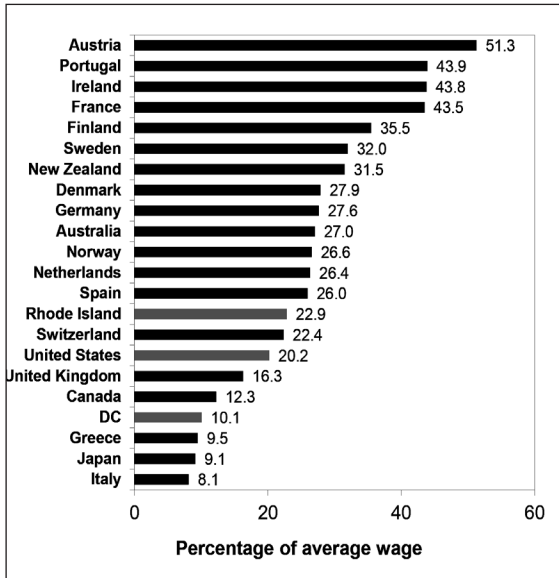
Source: OECD and author's calculations.

FIGURE 2
Union Coverage, 2007–2008



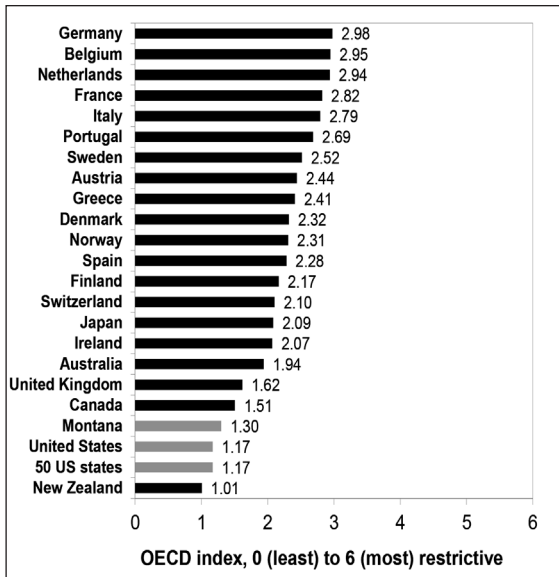
Source: ICTWSS dataset and UnionStats.com.

FIGURE 3
Unemployment Insurance, 2011



Source: OECD and author's calculations.

FIGURE 4
Employment Protection Legislation, 2013



Source: OECD and author's calculations.

second from the bottom on the OECD scale, just ahead of New Zealand (1.01) and below the other 19 countries in the figure.

Table 1 tells a similar story about the regulation of working time. The United States is the only rich democracy that does not have a statutory minimum requirement for paid annual leave, paid sick days, or paid parental leave. As a result, about one fourth of U.S. workers have no paid vacation, about 40% have no paid sick days, and an even higher share lack paid parental leave. The workers lacking these three forms of paid time off are disproportionately low wage, reinforcing the inequality in wages and other employee benefits.⁴

INSTITUTIONAL DIFFERENCES ACROSS U.S. STATES

The preceding comparison of labor market institutions follows the standard practice of treating the United States as a single, homogeneous labor market.⁵ But U.S. labor market institutions are far from uniform across the states. This section reviews some key differences across the states, including minimum wages, wage subsidies (Earned Income Tax Credit), regulation of unions in the private and public sector, unemployment insurance, employment protection, and working time.

The Fair Labor Standards Act of 1938 established a national minimum wage, initially set at 25 cents per hour. Through the 1970s, increases in the federal minimum wage generally tracked the growth in average wages. But, from the 1970s on, smaller, less frequent increases led the federal minimum to fall behind average wages. In response, several states took matters into their own hands, setting state-level minimum wages above the federal standard. As Table 2 shows, in 2013, 20 states (and the District of Columbia) had state minimum wages above the federal level of \$7.25 per hour, with Washington state setting the highest rate (\$9.19), followed closely by Oregon (\$8.95). Five states (Colorado, Florida, Nevada, Ohio, and, in 2013, New Jersey) have written the minimum wage into their state constitutions (Chokshi 2013). Of the 20 states with a higher state minimum, ten have also indexed future values to keep pace with increases in consumer prices.

The federal minimum wage establishes a separate wage floor for tipped workers, such as restaurant wait staff. In 2013, the federal minimum for tipped workers was \$2.13 per hour, unchanged since 1991 despite several rounds of increases in the minimum for nontipped workers. But 31 states have set the tipped worker minimum wage above the federal level (Table 2). Once again, Washington (\$9.19) and Oregon (\$8.95)—which do not have a separate, lower minimum wage for tipped minimums—have the highest wage floor for tipped workers in the country.

TABLE 1
Regulation of Working Time

| Country | Statutory minimum paid annual leave, 2013 (days) | Statutory sickness pay | | Statutory FTE paid parental leave, 2008 (weeks/child) |
|----------------|--|---|--|---|
| | | Portion of 5-day illness covered, 2009 (days) | Portion of 50-day illness covered, 2009 (days) | |
| Australia | 20 | 5 | 10 | 0* |
| Austria | 22 | 5 | 45 | 16 |
| Belgium | 20 | 5 | 39 | 18 |
| Canada | 20 | 0 | 22 | 29 |
| Denmark | 25 | 5 | 36 | 20 |
| Finland | 25 | 5 | 48 | 18 |
| France | 30 | 1 | 24 | 22 |
| Germany | 24 | 5 | 44 | 47 |
| Greece | 20 | 3.5 | 28 | 34 |
| Ireland | 20 | 0.7 | 17 | 21 |
| Italy | 20 | 1 | 29 | 25 |
| Japan | 10 | 0 | 28 | 26 |
| Netherlands | 20 | 3.5 | 35 | 16 |
| New Zealand | 20 | 5 | 5 | 14 |
| Norway | 25 | 5 | 50 | 44 |
| Portugal | 22 | — | — | 18 |
| Spain | 22 | 1.2 | 33 | 18 |
| Sweden | 25 | 3.2 | 38 | 47 |
| Switzerland | 20 | 5 | 15 | 11 |
| United Kingdom | 28 | 0.4 | 10 | 13 |
| United States | 0 | 0 | 0 | 0 |

Notes:

Paid annual leave, excluding statutory holidays, from Ray, Sanes, and Schmitt (2013), Figure 1.

Paid sick days and paid sick leave from Heymann, Rho, Schmitt, and Earle (2010), Figure 1.

Full-time equivalent paid parental leave from Ray, Gornick, and Schmitt (2010), Figure 1.

*In 2011, Australia established a paid parental leave plan; for details, see <http://bit.ly/U9vLrb> and <http://bit.ly/1oHrdRk>.

TABLE 2
 State Minimum Wage, Earned Income Tax Credit (EITC),
 and Unemployment Insurance Benefits, by State

| | Minimum wage (\$/hr) | Tipped minimum wage (\$/hr) | State EITC (% of federal EITC) | Average unemployment benefit as share of average wage (%) |
|---------------|----------------------------|-----------------------------------|--------------------------------------|--|
| Year | 2013 | 2013 | 2012 | 2011 |
| National | 7.25 | 2.13 | — | — |
| Alabama | 7.25 | 2.13 | 0 | 26 |
| Alaska | 7.75 | 7.75 | 0 | 25 |
| Arizona | 7.80 | 4.80 | 0 | 25 |
| Arkansas | 7.25 | 2.63 | 0 | 39 |
| California | 8.00 | 8.00 | 0 | 28 |
| Colorado | 7.78 | 4.76 | 0 | 35 |
| Connecticut | 8.25 | 5.69 | 30 | 28 |
| Delaware | 7.25 | 2.23 | 20 | 25 |
| DC | 8.25 | 2.77 | 40 | 19 |
| Florida | 7.79 | 4.77 | 0 | 28 |
| Georgia | 7.25 | 2.13 | 0 | 31 |
| Hawaii | 7.25 | 7.00 | 0 | 51 |
| Idaho | 7.25 | 3.35 | 0 | 36 |
| Illinois | 8.25 | 4.95 | 7.5 | 32 |
| Indiana | 7.25 | 2.13 | 9 | 38 |
| Iowa | 7.25 | 4.35 | 7 | 42 |
| Kansas | 7.25 | 2.13 | 18 | 42 |
| Kentucky | 7.25 | 2.13 | 0 | 38 |
| Louisiana | 7.25 | 2.13 | 3.5 | 24 |
| Maine | 7.50 | 3.75 | 5 | 38 |
| Maryland | 7.25 | 3.63 | 25 | 32 |
| Massachusetts | 8.00 | 2.63 | 15 | 34 |
| Michigan | 7.40 | 2.65 | 6 | 33 |
| Minnesota | 7.25 | 6.15 | 33 | 38 |
| Mississippi | 7.25 | 2.13 | 0 | 28 |
| Missouri | 7.35 | 3.68 | 0 | 30 |

Table continues next page

TABLE 2 (continued)
 State Minimum Wage, Earned Income Tax Credit (EITC),
 and Unemployment Insurance Benefits, by State

| | Minimum wage (\$/hr) | Tipped minimum wage (\$/hr) | State EITC (% of federal EITC) | Average unemployment benefit as share of average wage (%) |
|----------------|----------------------------|-----------------------------------|--------------------------------------|--|
| Year | 2013 | 2013 | 2012 | 2011 |
| Montana | 7.80 | 7.80 | 0 | 38 |
| Nebraska | 7.25 | 2.13 | 10 | 40 |
| Nevada | 8.25 | 8.25 | 0 | 39 |
| New Hampshire | 7.25 | 2.13 | 0 | 28 |
| New Jersey | 7.25 | 2.13 | 20 | 28 |
| New Mexico | 7.50 | 2.13 | 10 | 36 |
| New York | 7.25 | 5.65 | 30 | 33 |
| North Carolina | 7.25 | 2.13 | 5 | 36 |
| North Dakota | 7.25 | 4.86 | 0 | 38 |
| Ohio | 7.85 | 3.93 | 0 | 35 |
| Oklahoma | 7.25 | 2.13 | 5 | 35 |
| Oregon | 8.95 | 8.95 | 6 | 35 |
| Pennsylvania | 7.25 | 2.83 | 0 | 37 |
| Rhode Island | 7.75 | 2.89 | 25 | 43 |
| South Carolina | 7.25 | 2.13 | 0 | 32 |
| South Dakota | 7.25 | 2.13 | 0 | 37 |
| Tennessee | 7.25 | 2.13 | 0 | 29 |
| Texas | 7.25 | 2.13 | 0 | 34 |
| Utah | 7.25 | 2.13 | 0 | 40 |
| Vermont | 8.60 | 4.17 | 32 | 38 |
| Virginia | 7.25 | 2.13 | 20 | 29 |
| Washington | 9.19 | 9.19 | 10 | 39 |
| West Virginia | 7.25 | 5.80 | 0 | 33 |
| Wisconsin | 7.25 | 2.33 | 11 | 34 |
| Wyoming | 7.25 | 2.13 | 0 | 39 |

Notes: Minimum wage and tipped minimum wage from Wage and Hour Division, U.S. Department of Labor (2013a, 2013b). State EITC from National Council of State Legislators (2013). Average weekly unemployment insurance benefit paid as a share of average weekly earnings from Department of Labor, Employment and Training Administration, and Bureau of Labor Statistics.

These state minimum wages for regular and tipped workers create substantial national variation in the legally binding minimum wage. For regular workers, for example, the Washington state minimum wage is more than 25% higher than the federal minimum wage; for tipped workers, the Washington minimum is more than four times greater than the federal standard.

Four U.S. cities have established citywide minimum wages that are higher than the otherwise applicable state or federal minimum wage: Albuquerque, New Mexico (in 2014, \$7.60 with health insurance, \$8.60 without health insurance); Santa Fe, New Mexico (\$10.66 per hour, indexed to the Consumer Price Index); San Jose, California (\$10.15, indexed to the CPI); and San Francisco, California (\$10.74, indexed to the CPI). (A fifth U.S. city, Washington, DC, has a citywide minimum wage of \$9.50, but is treated here as a state.)⁶

In addition, more than 125 cities and other localities have “living wage” ordinances.⁷ These differ conceptually from minimum wages in that living wage laws typically focus narrowly on workers in particular sectors of the local economy, often those in which employers have received subsidies, tax breaks, or other forms of government support. In addition, living wages are usually set at levels that are considerably higher than more widely applied federal, state, or city minimum wages. While living wages have an important impact on the wages of covered workers, to date, the scale of coverage has probably been too small to have much impact on overall wage inequality, even within most cities that have passed such laws.⁸ One estimate for 2002 put the total coverage of living wage laws at between 100,000 and 250,000 workers; a recent update, which factored in more than 50 additional living wage ordinances passed in the interim, estimated coverage in the early 2010s at between 175,000 and 325,000 directly affected workers, with somewhere between half and twice that number affected indirectly.⁹

Many states have also taken steps to increase the generosity of the federal Earned Income Tax Credit (EITC), which uses the tax system to subsidize the after-tax earnings of low-wage workers in low-income families. Table 2 displays the level of state top-ups of the federal EITC. Twenty-five states supplement the federal EITC, with the increment over the federal level ranging from 3.5% (Louisiana) to 30% and higher (Connecticut, 30%; New York, 30%; Vermont, 32%; Minnesota, 33%; and Washington, DC, 40%). The federal EITC is one of the largest federal programs benefiting low-income working families,¹⁰ which makes state EITC extensions scaled to the federal program a potentially important state-level intervention in the low-wage labor market.

The legal environment regulating unionization also varies substantially across the states. Table 3 summarizes key features of state labor law affecting unions, as well as the corresponding state unionization rates for workers in both the private and public sectors.

The National Labor Relations Act (NLRA) sets the legal parameters for most private sector unions, but 24 states have passed right-to-work laws that further regulate private sector union activity. These laws permit employees who work in a job covered by a collective bargaining agreement to decline to pay union dues but still benefit from the terms of any contract negotiated between the union and employer. The effect of these laws is to deprive unions of resources they would otherwise use to negotiate collective agreements, organize new workplaces, and engage in political activity on behalf of their members.

The NLRA covers the large majority of workers in the private sector but excludes all federal, state, and local public employees. As a result, the regulation of public sector workers—especially teachers—falls heavily on state law. Table 3 summarizes differences across the states with respect to three key dimensions of public sector union activity, using public school teachers as a reference group (state laws often treat teachers, public safety, and other public sector workers differently)—whether public school teachers can bargain collectively, whether collective bargaining can cover wages and salaries, and whether public school teachers have the right to strike. In five states, it is illegal for public school teachers to bargain collectively (Georgia, North Carolina, South Carolina, Texas, and Virginia). In the remaining states where collective bargaining is allowed, seven have no statutes addressing public school teachers' ability to negotiate over wages, and public school teachers have the right to strike in only 12 states.

Table 3 also presents data on the share of workers covered by collective bargaining agreements in 2012. At the national level, the union coverage rate in the private sector was 7.3%. But private sector unionization rates varied widely, from only 1.7% in Arkansas and 2.3% in South Carolina to 14.8% in New York and 15.7% in Hawaii. In the public sector, the national coverage rate was 39.6%, but it also varied considerably, from about 13% in Georgia, Mississippi, North Carolina, and Virginia to almost 75% in New York.

Unemployment insurance is another area where states have substantial scope to shape labor market institutions. A key feature of the unemployment insurance system is that it is administered at the state level, with wide latitude for states to determine both eligibility requirements and benefit generosity. Table 1 (last column) displays one measure of generosity of state unemployment insurance systems—the average weekly unemployment insurance benefit paid by the state expressed as a share of the average weekly wage in the state. By this standard, the District of Columbia

TABLE 3
Unionization, by State, 2012

| State | Private sector | | Public school teachers | | | All | |
|-------------|----------------|-----------------------|------------------------|------------------|-----------------|-------------------------------------|-----------------------|
| | Right to work | Unionization rate (%) | Collective bargaining | Wage negotiation | Right to strike | Public sector unionization rate (%) | Unionization rate (%) |
| National | — | 7.3 | — | — | — | 39.6 | 12.5 |
| Alabama | YES | 6.3 | Legal | No Statute | Illegal | 29.8 | 10.5 |
| Alaska | NO | 11.2 | Legal | Legal | Legal | 57.7 | 23.9 |
| Arizona | YES | 3.7 | No Statute | No Statute | Illegal | 22.8 | 6.5 |
| Arkansas | YES | 1.7 | Legal | Legal | Illegal | 14.1 | 3.7 |
| California | NO | 9.6 | Legal | Legal | Legal | 62.6 | 18.4 |
| Colorado | NO | 5.4 | Legal | No Statute | Legal | 27.6 | 8.8 |
| Connecticut | NO | 7.5 | Legal | Legal | Illegal | 61.5 | 15.1 |
| Delaware | NO | 6.6 | Legal | Legal | Illegal | 40.3 | 11.8 |
| DC | NO | 6.5 | Legal | Legal | Illegal | 20.5 | 10.3 |
| Florida | YES | 3.3 | Legal | Legal | Illegal | 30.3 | 7.3 |
| Georgia | YES | 3.8 | Illegal | Illegal | Illegal | 13.1 | 5.4 |
| Hawaii | NO | 15.7 | Legal | Legal | Legal | 51.2 | 23.2 |

Table continues next page

TABLE 3 (continued)
 Unionization, by State, 2012

| State | Private sector | | Public school teachers | | | All | |
|---------------|----------------|-----------------------|------------------------|------------------|-----------------|-------------------------------------|-----------------------|
| | Right to work | Unionization rate (%) | Collective bargaining | Wage negotiation | Right to strike | Public sector unionization rate (%) | Unionization rate (%) |
| Idaho | YES | 3.7 | Legal | Legal | Illegal | 15.3 | 5.8 |
| Illinois | NO | 9.8 | Legal | Legal | Legal | 53.4 | 15.5 |
| Indiana | YES | 7.7 | Legal | Legal | Illegal | 26.8 | 9.9 |
| Iowa | YES | 5.9 | Legal | Legal | Illegal | 44 | 12.3 |
| Kansas | YES | 5 | Legal | Legal | Illegal | 21.8 | 8.4 |
| Kentucky | NO | 8 | Legal | No Statute | Illegal | 27.1 | 11.3 |
| Louisiana | YES | 4.6 | Legal | No Statute | Legal | 22.6 | 7.5 |
| Maine | NO | 6 | Legal | Legal | Illegal | 57.1 | 13.9 |
| Maryland | NO | 6.3 | Legal | Legal | Illegal | 31.3 | 12.3 |
| Massachusetts | NO | 8.9 | Legal | Legal | Illegal | 63.9 | 16.2 |
| Michigan | YES | 11.7 | Legal | Legal | Illegal | 55.4 | 17.1 |
| Minnesota | NO | 8.2 | Legal | Legal | Legal | 56.9 | 14.9 |
| Mississippi | YES | 3.4 | Legal | No Statute | Illegal | 13.8 | 5.7 |

Table continues next page

TABLE 3 (continued)
Unionization, by State, 2012

| State | Private sector | | Public school teachers | | | All | |
|----------------|----------------|-----------------------|------------------------|------------------|-----------------|-------------------------------------|-----------------------|
| | Right to work | Unionization rate (%) | Collective bargaining | Wage negotiation | Right to strike | Public sector unionization rate (%) | Unionization rate (%) |
| Missouri | NO | 7.9 | Legal | Legal | Illegal | 23.2 | 10.1 |
| Montana | NO | 8 | Legal | Legal | Legal | 45.5 | 16.5 |
| Nebraska | YES | 4.5 | Legal | Legal | Illegal | 25 | 8.1 |
| Nevada | YES | 12.2 | Legal | Legal | Illegal | 46.4 | 16.5 |
| New Hampshire | NO | 4.7 | Legal | Legal | Illegal | 55.1 | 12.0 |
| New Jersey | NO | 9 | Legal | Legal | Illegal | 61.2 | 16.8 |
| New Mexico | NO | 3.7 | Legal | Legal | Illegal | 20.8 | 8.7 |
| New York | NO | 14.8 | Legal | Legal | Illegal | 73.6 | 24.8 |
| North Carolina | YES | 2.5 | Illegal | Illegal | Illegal | 13.1 | 4.2 |
| North Dakota | YES | 4.8 | Legal | No Statute | Illegal | 21.6 | 8.2 |
| Ohio | NO | 9.2 | Legal | Legal | Legal | 44.1 | 13.9 |
| Oklahoma | YES | 5.1 | Legal | Legal | Illegal | 23.2 | 9.1 |
| Oregon | NO | 8.9 | Legal | Legal | Legal | 51.9 | 16.4 |

Table continues next page

TABLE 3 (continued)
Unionization, by State, 2012

| State | Private sector | | Public school teachers | | | All | |
|----------------|----------------|-----------------------|------------------------|------------------|-----------------|-------------------------------------|-----------------------|
| | Right to work | Unionization rate (%) | Collective bargaining | Wage negotiation | Right to strike | Public sector unionization rate (%) | Unionization rate (%) |
| Pennsylvania | NO | 8.5 | Legal | Legal | Legal | 57.7 | 14.4 |
| Rhode Island | NO | 10.5 | Legal | Legal | Illegal | 62.5 | 18.4 |
| South Carolina | YES | 2.3 | Illegal | Illegal | No Statute | 15.1 | 4.6 |
| South Dakota | YES | 3.3 | Legal | Legal | Illegal | 21.7 | 6.7 |
| Tennessee | YES | 3.6 | Legal | Legal | Illegal | 17.7 | 5.9 |
| Texas | YES | 4.2 | Illegal | Illegal | Illegal | 22.1 | 6.8 |
| Utah | YES | 4.1 | Legal | Legal | No Statute | 18.6 | 6.6 |
| Vermont | NO | 4.8 | Legal | Legal | Legal | 53.4 | 13.1 |
| Virginia | YES | 3.5 | Illegal | Illegal | Illegal | 13.4 | 5.5 |
| Washington | NO | 11.8 | Legal | Legal | Illegal | 53.5 | 19.5 |
| West Virginia | NO | 9.3 | Legal | Legal | Illegal | 26.5 | 13.1 |
| Wisconsin | NO | 7.2 | Legal | Legal | Illegal | 40.3 | 12.0 |
| Wyoming | YES | 5.6 | Legal | Legal | No Statute | 15.7 | 8.1 |

Notes: Union coverage rates from UnionStats.com. Right-to-work data from Wage and Hour Division, Department of Labor (<http://1.usa.gov/1mJRe5l>) updated using Economic Policy Institute (<http://bit.ly/1pdVYSb>) and CBS News (<http://cbsloc.al/1m4PnDJ>); accessed July 9, 2013. Legal environment facing public school teachers from Sanes and Schmitt (2014).

is the least generous U.S. state: the average benefit is only 19% of the average wage. In four other states, the ratio is 25% or less (Alaska, Arizona, Delaware, and Louisiana). Only one state, Hawaii (51%), replaces, on average, at least half of usual earnings. Unfortunately, we have no systematic data on differences across states with respect to the strictness of eligibility requirements for receipt of unemployment benefits. Anecdotally, however, the probability that an identical unemployed worker would receive unemployment benefits appears to differ substantially across the states, partly reflecting differences in formal eligibility criteria and partly reflecting differences in the administrative process that determines benefit receipt.¹¹

As seen earlier, the United States offers among the lowest levels of employment protection in the world's rich economies. The main reason for the low score on the OECD's index of employment protection is the central role that the employment-at-will doctrine plays in U.S. labor law. Under employment at will, in the absence of an agreement to the contrary, workers or employers are free to terminate an employment relation "for good cause, bad cause, or no cause at all."¹² The only state that deviates from the employment-at-will doctrine is Montana, which requires employers to show "just cause" before firing a worker.

The rest of the states have employment-at-will systems, though often with a limited range of exceptions determined by state statute or common law. Exceptions to employment-at-will fall into three categories: public policy, implied contract, and covenant of good faith (Muhl 2001). Public policy exceptions limit employers' ability to terminate a worker when the dismissal contravenes an aspect of broader state public policy. Implied contract exceptions arise when an employer's behavior (statements to the employee or the text of an employee handbook, for example) establish an implicit employment contract. Covenant-of-good-faith exceptions come closest to a just-cause standard by requiring that terminations "cannot be made in bad faith or with malice intended" (Muhl 2001, p. 4). Table 4 presents a summary of the exceptions in place in each of the states. Most states have narrow or broad public policy or implied contract exceptions to employment-at-will (Florida, Georgia, Louisiana, and Rhode Island are the only exceptions). Most states, however, do not allow for covenant-of-good-faith exceptions; of those that do, the exceptions are broad in only four cases (Montana, which has a just-cause standard, and Alaska, Nevada, and Wyoming).

The United States is also the only rich country that does not provide workers with minimum guarantees of paid vacation, paid sick days, and paid family leave. No U.S. state establishes a minimum standard for paid vacation, but several offer some form of paid family leave, and one requires employers to provide paid sick days.

TABLE 4
Judicial Exceptions to Employment at Will, by State, 2008

| State | Public policy | Implied contract | Good faith and fair dealing |
|---------------|---------------|------------------|-----------------------------|
| Alabama | None | Narrow | Narrow |
| Alaska | Broad | Broad | Broad |
| Arizona | Narrow | Broad | Narrow |
| Arkansas | Narrow | Narrow | None |
| California | Broad | Broad | Narrow |
| Colorado | Narrow | Broad | None |
| Connecticut | Broad | Narrow | Narrow |
| Delaware | Narrow | None | Narrow |
| DC | Narrow | Narrow | None |
| Florida | None | None | None |
| Georgia | None | None | None |
| Hawaii | Broad | Narrow | None |
| Idaho | Narrow | Narrow | Narrow |
| Illinois | Broad | Broad | None |
| Indiana | Narrow | Broad | None |
| Iowa | Narrow | Narrow | None |
| Kansas | Broad | Narrow | None |
| Kentucky | Narrow | Narrow | None |
| Louisiana | None | None | None |
| Maine | None | Broad | None |
| Maryland | Narrow | Narrow | None |
| Massachusetts | Narrow | None | Narrow |
| Michigan | Broad | Narrow | None |
| Minnesota | Broad | Broad | None |
| Mississippi | Narrow | Narrow | None |
| Missouri | Broad | None | None |
| Montana | Broad | Narrow | Broad |
| Nebraska | Broad | Narrow | None |
| Nevada | Narrow | Broad | Broad |
| New Hampshire | Broad | Narrow | Narrow |

Table continues next page

TABLE 4 (continued)
 Judicial Exceptions to Employment at Will, by State, 2008

| State | Public policy | Implied contract | Good faith and fair dealing |
|----------------|---------------|------------------|-----------------------------|
| New Jersey | Broad | Broad | None |
| New Mexico | Narrow | Broad | None |
| New York | Narrow | Narrow | Narrow |
| North Carolina | Narrow | Narrow | None |
| North Dakota | Broad | Narrow | None |
| Ohio | Broad | Broad | None |
| Oklahoma | Narrow | Narrow | None |
| Oregon | Broad | Broad | None |
| Pennsylvania | Broad | Narrow | None |
| Rhode Island | None | None | None |
| South Carolina | Narrow | Narrow | None |
| South Dakota | Narrow | Broad | None |
| Tennessee | Broad | Narrow | None |
| Texas | Narrow | Narrow | None |
| Utah | Narrow | Narrow | None |
| Vermont | Broad | Narrow | Narrow |
| Virginia | Narrow | Narrow | None |
| Washington | Broad | Broad | None |
| West Virginia | Broad | Narrow | None |
| Wisconsin | Narrow | Broad | None |
| Wyoming | Narrow | Narrow | Broad |

Notes: Unpublished analysis compiled by Eric Hoyt, Center for Economic and Policy Research (2011).

Three states—California, New Jersey, and Rhode Island—provide paid family leave through dedicated social insurance programs financed by workers and their employers. Only Rhode Island, however, combines financial support with a guarantee that workers who take paid family leave can return to their job when their leave is over. The federal Family and Medical Leave Act (FMLA) offers unpaid job protection for workers taking up to 12 weeks of family or medical leave, but the law covers only the people who work for employers with at least 50 employees and who have been on the job at least 1,250 hours in the year before the leave. Workers who meet these criteria in California and New Jersey have the

legal right to return to their jobs, but workers in those states who take paid leave but don't meet the federal FMLA standard have no legal job protection. Two other states, Hawaii and New York, have state temporary disability insurance (TDI) systems that finance leave only for women who give birth; the eligibility requirements for these TDI programs exclude all other new parents, including parents adopting a child.¹³

In 2012, Connecticut became the only state to require employers (with important exceptions) to provide up to 5 paid sick days per year (accrued at the rate of 1 hour of paid sick time per 40 hours of work). The law covers all "hourly, non-exempt, services workers such as healthcare, food service/restaurant, janitorial, hospitality, retail" of employers with 50 or more employees in the state of Connecticut. The legislation explicitly excludes workers in manufacturing and national nonprofit establishments.¹⁴ Five U.S. cities have also passed laws mandating paid sick days: New York, Portland, San Francisco, Seattle, and Washington, DC (passed as a city council resolution).¹⁵

A review of the available data reveals large differences in the inclusiveness of state-level labor market institutions. Across the states, the level of the minimum wage, size of wage subsidies for low-wage workers, and generosity of unemployment insurance systems all vary widely. The regulation of unions in the private and public sectors also differs markedly, contributing to overall unionization rates as low as 4% and as high as 25%. On other measures, especially the terms of employment (employment-at-will) and the regulation of working time, the differences across the states are much smaller. On these dimensions, most states have fairly similar laws and practices, with a small number of states deviating from the norm. Montana, which substituted a just-cause dismissal requirement, is the only state where employment at will does not lie at the core of state labor law. Only five states provide any form of paid parental leave, and only one of those states offers job protections beyond the minimal standard set by the federal FMLA. Only one state and a handful of cities require employers to provide paid sick days.

This chapter does not attempt to determine the causes of differences across the states. Nevertheless, the degree of inclusiveness does follow a loosely recurring pattern. While there are numerous exceptions, states in the South and the Mountain West consistently appear to offer the lowest levels of inclusiveness, while states in the Northeast and Pacific typically show among the highest levels of inclusiveness by most measures.

STATE DIFFERENCES IN INTERNATIONAL CONTEXT

Do these differences across states change the view of the United States as an international outlier? To help answer that question, each of the figures with international data presented earlier also includes two additional

entries showing where (approximately) the institutions in the *most* and *least* inclusive of the individual U.S. states would fall if they were treated as independent countries. Along all of the dimensions examined here, inclusion of the full range of state experiences makes relatively little difference to the assessment of the United States as among the least if not the least inclusive of the countries analyzed.

Using the data from the most inclusive U.S. state instead of the national average would have no impact on the international ranking of the United States in the case of employment protection (because the extra protections offered by Montana are small by international standards¹⁶) and paid vacation (because no state mandates paid vacation). Using the most inclusive state would increase the U.S. ranking by only one or two countries in the case of the minimum wage, unemployment insurance, or union coverage.¹⁷ No U.S. state follows what would be considered best practices by existing international standards.

The most inclusive U.S. states fare a bit better with respect to paid sick days and paid parental leave. While it is still too early to assess the full impact of the 2012 Connecticut paid sick days law, and several features of the law (including employer exemptions and the gradual accrual of paid sick days) make it difficult to assign Connecticut a score using the same scale for short-term sick leave used in Table 3, the average for Connecticut workers would certainly finish closer to the bulk of countries scoring 5 than to the national U.S. (and Japanese) score of 0. A score in the range of 3 to 4 would push the United States ahead of France, Ireland, Italy, Spain, and the United Kingdom, to roughly where Greece and Sweden are. A similar rough calculation designed to follow the methodology used to calculate the generosity of paid parental leave would put the full-time equivalent weeks of paid family leave in New Jersey at about 4 weeks—a substantial improvement over the current full-time equivalent of 0 weeks—but not enough to move the United States out of last place (with Australia) in the international ranking.¹⁸

Of course, labor market institutions are not uniform across regions within some of the other OECD countries examined here. Most important, Canada and Switzerland have strongly federal systems, with important variations across regions. The inclusion of Canadian provinces (less so with Swiss cantons) would likely show a greater degree of overlap between the most inclusive U.S. states and the least inclusive Canadian provinces. In most of the economies examined here, however, even where there are strong differences in labor market outcomes (unemployment rates, wage levels, and unionization rates, for example) across regions (the southeast versus the northeast of England or southern versus northern Italy, for example), national law and labor market institutions remain the dominant forces shaping the inclusiveness of regional labor markets.

NARROWING THE GAP, PUSHING THE ENVELOPE

This review of state labor market institutions points in two somewhat conflicting directions. On one hand, state labor market institutions differ widely with respect to their degree of inclusiveness. States in the South and the Mountain West consistently offer among the lowest levels of inclusiveness, while states in the Northeast and Pacific by most measures show among the highest levels of inclusiveness. On the other hand, these important differences across the states are small relative to the differences observed in corresponding institutions across the world's rich economies. Substituting the most (or the least) inclusive state's data for the country as a whole does little or nothing to change the international ranking of the United States.

The state data suggest that there is substantial scope for increasing the inclusiveness of the overall U.S. labor market by reforming labor market institutions to match the standards set by the most inclusive states in each category. At the same time, the international data suggest that any state-level strategy to increase the inclusiveness of U.S. labor markets must simultaneously work toward some combination of raising national standards or raising the standards in what are already the most inclusive states.

ENDNOTES

¹ For a review that implicates labor market institutions in high unemployment, see International Monetary Fund (2003). For a more benign view of labor market institutions, see Howell (2005) and Howell, Baker, Glyn, and Schmitt (2007).

² For a comprehensive analysis of economic inequality in the United States that emphasizes the role of labor market institutions, see various editions of *The State of Working America* (<http://www.stateofworkingamerica.org>). Opponents of more-inclusive labor market institutions generally argue that these institutions hurt employment by artificially compressing wages, particularly by raising the bottom of the wage distribution above the market-clearing level.

³ Specifically, Figure 3 shows the average unemployment benefit for a single worker with no children, as a share of the average worker's wage (OECD 2013b).

⁴ In 2008, the year covered in the data in the last column of Table 1, Australia did not have paid parental leave. Australia implemented a system of paid parental in 2011. For more detail on paid sick days, see Heymann, Rho, Schmitt, and Earle (2010); on paid parental leave, see Ray, Gornick, and Schmitt (2010); and on paid vacation and paid holidays, see Ray, Sanes, and Schmitt (2013).

⁵ Canada and Switzerland also have strong federal systems.

⁶ For details, see San Francisco (<http://bit.ly/1tE4Owd>), San Jose (<http://bit.ly/1mxebcx>), Albuquerque (<http://bit.ly/1riHU9x>), and Santa Fe (<http://bit.ly/1kRNbWH>).

⁷ For a list of localities with living wage laws, see National Employment Law Project (2011).

⁸ For a comprehensive discussion of living wage laws, see Pollin, Brenner, Wicks-Lim, and Luce (2008). For shorter discussions, see Lester and Jacobs (2010) and Luce (forthcoming).

⁹ Calculations by Luce (forthcoming).

¹⁰ For an overview of the federal EITC, see Center on Budget and Policy Priorities, “Earned Income Tax Credit” (<http://bit.ly/1oTQASU>).

¹¹ For an overview of the federal unemployment insurance system, including a detailed look at many state systems, see National Employment Law Project, “Unemployment Insurance” (<http://bit.ly/1zXtPIV>).

¹² Shane and Rosenthal, *Employment Law Deskbook*, § 16.02 (1999), cited in Muhl (2001), p. 3.

¹³ For a detailed discussion of paid family leave in California, see Milkman and Appelbaum (forthcoming). For details of the New Jersey program, see “Family Leave Insurance” (<http://bit.ly/1pe0u39>). On Rhode Island, which enacted its family leave law in July 2013, see Associated Press, “Rhode Island Becomes Third State to Provide Paid Family Leave,” July 11, 2013 (<http://yhoo.it/1tE8Gxr>).

¹⁴ Center for Law and Social Policy, “Implementing Earned Sick Days,” Policy Brief, July 18, 2003 (<http://bit.ly/1pe0DDG>). For details, including additional details on exemptions to the law, see “Connecticut General Statute 31-57R—Paid Sick Leave” (<http://bit.ly/1mLLFmO>).

¹⁵ For an overview of paid sick days laws at the city level, see National Partnership for Women and Families, “Current Sick Days Laws” (<http://bit.ly/1m7k0s3>).

¹⁶ I estimate the effect of Montana’s just-cause dismissal statute on the OECD index based on descriptions of the overall methodology (OECD 2013a) and the OECD’s application of this methodology to the United States (OECD, no date). The calculations in Figure 2 assume that just-cause legislation would increase the U.S. score under the component “definition of justified or unfair dismissal” from 0 (“when worker capability or redundancy of the job are adequate and sufficient grounds for dismissal”) to 1 (“when social considerations, age or job tenure must when possible influence the choice of which worker(s) to dismiss”). This decision likely overstates the impact of just-cause on the U.S. score because such laws are, strictly speaking, compatible with a score of 0 on the OECD scale. Based on Table 2 in OECD (<http://bit.ly/1joT9go>; no date), the contribution of this component to the overall is calculated by multiplying by 2 and applying a weight of 1/16 of the total. This would raise the score in Montana by 0.125 ($2 \times 1/16$) index points, from the overall U.S. level of 1.17, to 1.30.

¹⁷ The unionization data for OECD countries in Figure 4 are taken from Schmitt and Mitukiewicz’s (2012) analysis of data from the ICTWSS database maintained by Jelle Visser at the AIAS (<http://bit.ly/U8s2ui>). State-level data in the same figure are based on an analysis by Barry Hirsch and David Macpherson of the Current Population Survey and posted at UnionStats.com.

¹⁸ For a worker at average earnings in New Jersey, the state’s family leave insurance benefit covers about 67% of earnings for up to 6 weeks, for a full-time equivalent of 4 weeks.

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REFERENCES

- Appelbaum, Eileen, Gerhard Bosch, Jerome Gautie, Geoff Mason, Ken Mayhew, Wiemer Salverda, John Schmitt, and Niels Westergaard-Nielsen. 2010. "Introduction and Overview." In Jerome Gautie and John Schmitt, eds., *Low-Wage Work in the Wealthy World*. New York: Russell Sage Foundation.
- Chokshi, Niraj. 2013. "New Jersey Just Became the Fifth State to Add a Minimum Wage in Its Constitution." *Washington Post GovBeat*. <<http://wapo.st/1mLLRm6>>
- Heymann, Jody, Hye Jin Rho, John Schmitt, and Alison Earle. 2010. "Ensuring a Healthy and Productive Workforce: Comparing the Generosity of Paid Sick Day and Sick Leave Policies in 22 Countries." *International Journal of Health Services*, Vol. 40, no. 1, pp. 1–22.
- Howell, David. 2005. *Fighting Unemployment: The Limits of Free Market Orthodoxy*. Oxford, UK: Oxford University Press.
- Howell, David R., Dean Baker, Andrew Glyn, and John Schmitt. 2007. "Are Protective Labor Market Institutions at the Root of Unemployment? A Critical Review of the Evidence." *Capitalism and Society*, Vol. 2, no. 1, art. 1.
- International Monetary Fund. 2003 (Apr.). "Unemployment and Labor Market Institutions: Why Reforms Pay Off." World Economic Outlook. Washington: International Monetary Fund. <<http://bit.ly/U8s45k>>
- Lester, T. William, and Ken Jacobs. 2010 (Nov.). *Creating Good Jobs in Our Communities: How Higher Wage Standards Affect Economic Development and Employment*. Washington, DC: Center for American Progress. <<http://bit.ly/1q7UX0p>>
- Luce, Stephanie. Forthcoming. "Living Wages, Minimum Wages, and Low-Wage Workers." In Stephanie Luce, Jennifer Luff, Joseph A. McCartin, and Ruth Milkman, eds., *What Works for Workers: Public Policies and Innovative Strategies for Low-Wage Workers*. New York: Russell Sage Foundation.
- Milkman, Ruth, and Eileen Appelbaum. Forthcoming. *Unfinished Business: Paid Family Leave in California and the Future of U.S. Work–Family Policy*. Ithaca, NY: Cornell University Press.

- Muhl, Charles J. 2001 (Jan.). "The Employment-at-Will Doctrine: Three Major Exceptions." *Monthly Labor Review*. <<http://1.usa.gov/1mLLZln>>
- National Council of State Legislators. 2013. "Tax Credits for Working Families: Earned Income Tax Credit (EITC)." <<http://bit.ly/18EBPKO>>
- National Employment Law Project. 2011. "Local Living Wage Laws and Coverage." <<http://bit.ly/U22bE1>>
- Organisation for Economic Co-operation and Development (OECD). No date. "Calculating Summary Indicators of EPL Strictness: Methodology." <<http://bit.ly/1joT9go>>
- Organisation for Economic Co-operation and Development (OECD). 2013a. "Detailed Description of Employment Protection Legislation, 2012–2013." <<http://bit.ly/1qVJBdM>>
- Organisation for Economic Co-operation and Development (OECD). 2013b. "Tax and Benefit Models" (file NRR_Over5Years_EN.xls). Updated March 22, 2013. <<http://bit.ly/1m7kMp9>>
- Pollin, Robert, Mark Brenner, Jeannette Wicks-Lim, and Stephanie Luce. 2008. *A Measure of Fairness: The Economics of Living Wages and Minimum Wages in the United States*. Ithaca, NY: ILR Press.
- Ray, Rebecca, Janet C. Gornick, and John Schmitt. 2010. "Who Cares? Assessing Generosity and Gender Equality in Parental Leave Policy Designs in 21 Countries." *Journal of European Social Policy*, Vol. 20, no. 3, pp. 196–216.
- Ray, Rebecca, Milla Sanes, and John Schmitt. 2013. *No-Vacation Nation Revisited*. Center for Economic and Policy Research Briefing Paper. <<http://bit.ly/1jESGqR>>
- Sanes, Milla, and John Schmitt. 2014. *Regulation of Public Sector Collective Bargaining in the States*. Center for Economic and Policy Research Briefing Paper. <<http://bit.ly/1q7VjEh>>
- Schmitt, John, and Alexandra Mitukiewicz. 2012. "Politics Matter: Changes in Unionisation Rates in Rich Countries, 1960–2010." *Industrial Relations Journal*, Vol. 43, no. 4, pp. 260–80.
- U.S. Department of Labor, Wage and Hour Division. 2013a. "Changes in Basic Minimum Wage in Non-Farm Employment Under State Law: Selected Years 1968 to 2013." <<http://1.usa.gov/1tEa8ji>>
- U.S. Department of Labor, Wage and Hour Division. 2013b. "Minimum Wages for Tipped Employees." <<http://1.usa.gov/1ycEgBc>>

Health Insurance Coverage of Low-Income Workers in the United States

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Employer-based health insurance has been the principal source of insurance coverage in the United States for more than half a century. Employers' decisions to offer health insurance have been voluntary, but generous tax incentives and competition for high-skilled employees have made health insurance a ubiquitous benefit among large companies. Collective bargaining has also ensured that health benefits are included in compensation packages of unionized workforces. In 2012, more than 150 million U.S. adults and children, 57% of the nonelderly population, received their health insurance through an employer. While the vast majority of large companies (50 or more employees) offer health insurance, small companies, which face higher premiums and per-employee administrative costs than large companies, are much less likely to provide health benefits to their workers.

There are, however, considerable disparities in the health insurance coverage of low-wage and high-wage employees in both small and large firms. The Commonwealth Fund Biennial Health Insurance Survey (Collins, Robertson, Garber, and Doty 2013) finds that while employees of small companies are particularly unlikely to have coverage through their jobs, low-wage workers in firms of all sizes are disadvantaged compared with their higher-wage colleagues. Workers who earn less than \$15 an hour in both small and large firms are the least likely to work for companies that offer health benefits, to be eligible for benefits in companies that do offer them, and to be covered by their companies' health plans. Consequently, 18 million low-wage workers were uninsured in 2012; half were employed in large firms (Collins, Rasmussen, Doty, and Garber 2014).

Low-wage workers stand to make substantial gains in health insurance coverage under the Affordable Care Act. People with incomes below 400%

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of the federal poverty level (FPL; \$45,960 for an individual and \$94,200 for a family of four) without affordable health insurance through an employer are eligible for subsidized private plans through the new state insurance marketplaces; those with incomes below 138% FPL (\$15,856 for an individual and \$32,499 for a family of four) are eligible for Medicaid. Ninety percent of uninsured working-age adults have incomes that make them eligible for either subsidized private plans or Medicaid: nearly half are eligible for Medicaid (Tilipman and Sampat 2013).

Gains in coverage among low-wage workers will likely vary across states over the next few years. This disparity will be driven by the fact that employer-based coverage currently varies significantly across states and because many states have decided not to participate in the Affordable Care Act's Medicaid expansion in 2014. While workers with incomes between 100% and 138% FPL will be eligible for subsidized private plans in states that don't expand their programs, those with incomes below 100% FPL will be excluded from both Medicaid and subsidized private plans. Currently, about half the states are not expanding their programs in 2014. These states are concentrated in the South, where uninsured rates are highest.

This chapter uses the U.S. Census Current Population Surveys from 2010 and 2011 to examine differences in employment-based coverage and uninsurance among full-time workers, nationally and in the seven states with the nation's largest workforces: the three Rust Belt states of New York, Illinois, and Ohio; and the four Sun Belt states of California, Texas, Florida, and Georgia. It will look at coverage differences by poverty and firm size, and in three industries: manufacturing, retail, and food and hospitality. It will discuss differences in coverage in the context of both the pre-Affordable Care Act insurance market environment and state Medicaid policy, as well as emerging state and national implementation of the Affordable Care Act, with a focus on the law's Medicaid expansion and the employer requirement to offer health insurance.

HEALTH INSURANCE COVERAGE OF FULL-TIME U.S. WORKERS

An estimated 114.8 million adults ages 19 through 64 worked full or part time during 2010 and 2011 in the United States. Of those, 13.3 million worked part time, or less than 30 hours per week, and 101.5 million worked full time, or 30 or more hours per week. This analysis focuses on full-time workers.

Source of Health Insurance

The vast majority of the U.S. full-time workforce has health benefits through their own job or that of a family member. Nearly 63 million full-time workers, or 62%, were enrolled in a health plan offered by their own

employer in 2010 and 2011 (Table 1). Another 13.4 million, or 13%, had coverage through an employer of a spouse, partner, or parent. Just 5 million workers, or 5%, had coverage they purchased through the individual insurance market; and 2.6 million, or 3%, were enrolled in Medicaid. Nearly 17 million, or 17%, were uninsured.

There are an estimated 44 million full-time workers in the seven states, accounting for about 43% of the nation's full-time workforce. The source of these workers' health insurance varies significantly among the states. Workers in the three Rust Belt states (New York, Illinois, and Ohio) have coverage through their own employers at slightly higher rates than those in the four Sun Belt states (California, Texas, Florida, and Georgia). Workers in the Rust Belt states also have higher rates of insurance through the employers of family members than do those in the Sun Belt states. Consequently, three quarters or more of full-time workers in the Rust Belt states have employer-based insurance compared with 72% or less of those in the Sun Belt states.

This difference in employer-based coverage between Rust Belt and Sun Belt states is associated with greater presence of manufacturing jobs and unionized workforces in the Rust Belt states, among other factors. However, the decline of both over time has likely narrowed the differences between those groups of states.

Slightly greater shares of full-time workers in most of the Rust Belt states have insurance through Medicaid compared with those in most of the Sun Belt states. These differences stem from the fact that the three Rust Belt states and California expanded Medicaid before the Affordable Care Act to cover more adults (Kaiser Family Foundation 2013). By contrast, Florida, Texas, and Georgia provide coverage only to very low-income parents (Table 2). New York provides Medicaid benefits to parents of dependent children up to 150% FPL and nondisabled adults without children to 100% of FPL. New York has also eliminated the 5-year waiting period for Medicaid among legal immigrants. California covers parents of dependent children up to 106% FPL and provides benefits that are more limited to parents and childless adults with incomes up to 200% FPL. Illinois covers parents with incomes up to 139% FPL and Ohio to just below the poverty level. By contrast, Texas covers parents to just 12% to 25% FPL, or \$2,826 to \$5,888 for a family of four; Florida to parents with incomes between 19% and 56% FPL; and Georgia between 27% and 48% FPL. None of these three Sun Belt states provides Medicaid coverage to nondisabled adults without children.

Because of higher rates of employer-based coverage and Medicaid, full-time workers in the Rust Belt states are uninsured at lower rates than those in the Sun Belt states (Table 1). Uninsured rates are below the

TABLE 1
Source of Insurance Coverage Among Full-Time* Workers Ages 19–64 in the Seven States with the Highest Numbers of Full-Time Workers

| | Millions | Insurance source | | | | | |
|---------------|----------|-------------------------|-------------------------------|---------------------------|------------|----------|-----------|
| | | Employer-sponsored, own | Employer-sponsored, dependent | Employer-sponsored, total | Individual | Medicaid | Uninsured |
| United States | 101.5 | 62% | 13% | 75% | 5% | 3% | 17% |
| New York | 6.6 | 61% | 14% | 75% | 5% | 6% | 15% |
| Illinois | 4.3 | 63% | 13% | 76% | 4% | 4% | 15% |
| Ohio | 3.7 | 64% | 15% | 79% | 4% | 3% | 13% |
| California | 11.6 | 59% | 11% | 70% | 5% | 3% | 20% |
| Texas | 8.6 | 57% | 11% | 68% | 4% | 1% | 26% |
| Florida | 6.2 | 58% | 11% | 69% | 5% | 2% | 22% |
| Georgia | 3.1 | 59% | 13% | 72% | 5% | 1% | 20% |

*Full-time workers defined as working 30 or more hours per week.

Source: Analysis of the March 2011–2012 Current Population Surveys by C. Solis-Roman and B. Sampat of Columbia University for The Commonwealth Fund.

TABLE 2
Medicaid Eligibility for Parents and Adults Without Children
as a Percentage of Poverty in Seven States, as of January 2013

| | Parents of dependent children | | Other non- disabled adults | | ACA Medicaid expansion |
|-------------|----------------------------------|---------|-------------------------------|---------|------------------------------|
| | Jobless | Working | Jobless | Working | |
| New York | 150% | 150% | 100% | 100% | Yes |
| Illinois | 133% | 139% | — | — | Yes |
| Ohio | 90% | 96% | — | — | Yes |
| California* | 100% | 106% | 200% | 210% | Yes |
| Texas | 12% | 25% | — | — | No |
| Florida | 19% | 56% | — | — | No |
| Georgia | 27% | 48% | — | — | No |

*California offers limited benefits up to 200% of the federal poverty level (FPL) for jobless nondisabled parents and adults without children, and up to 206% FPL for working parents and 210% FPL for working adults without children.

Source: Kaiser Family Foundation, State Health Facts, Adult Income Eligibility Limits at Application as a Percent of the Federal Poverty Level (FPL), January 2013. Available at <http://bit.ly/1mpkQR4>.

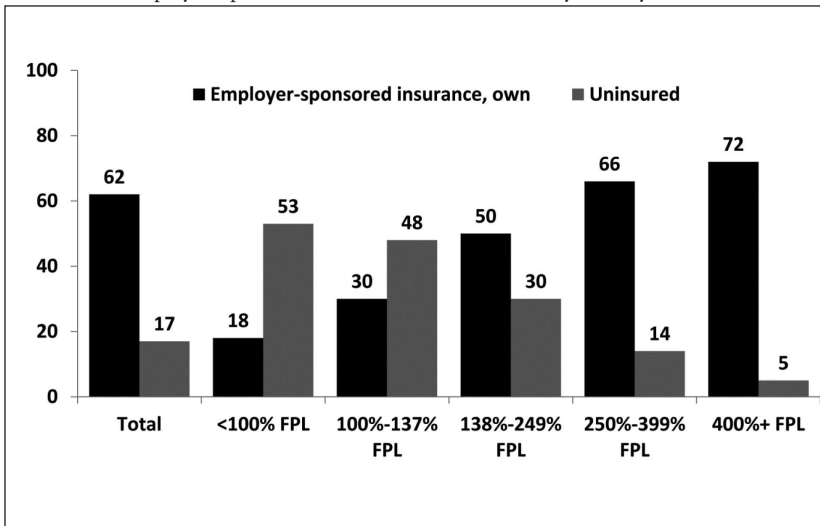
national average in all three Rust Belt states and above the national average in all four Sun Belt states. Texas has the highest uninsured rate in the country, with more than one quarter (26%) of full-time workers uninsured.

Health Insurance and Poverty

Full-time workers with low and moderate incomes are far less likely to have health benefits through their own employers and far more likely to be uninsured than those with higher incomes (Figure 1). Nationwide, just 18% of full-time workers with incomes below the poverty level (\$11,490 for an individual), 30% of those with incomes between 100% and 137% FPL (\$15,856 for an individual), and half of those with incomes between 138% and 249% FPL (\$28,725 for an individual) had health benefits through their jobs. These coverage rates are compared with nearly three quarters (72%) of full-time workers with incomes of 400% FPL (\$45,960 for an individual) or higher with health benefits through their employers. About half of those with incomes below 138% FPL were uninsured, as were three in ten of those with incomes between 138% and 249% FPL.

Across the seven states, there is little difference in own-employer coverage rates among the lowest-income workers, but significant differences exist in uninsured rates. In Texas, nearly seven in ten (69%) full-time workers with incomes below the poverty level are uninsured compared with 36% of those in New York, 44% in Ohio, and 49% in Illinois (Table 3). In Florida and Georgia, six of ten low-income full-time workers are uninsured.

FIGURE 1
 Percentage of Full-Time Workers* Ages 19–64 with Own
 Employer-Sponsored Insurance or Uninsured, by Poverty Level



Note: FPL refers to federal poverty level.

*Full-time workers defined as working 30 or more hours per week.

Source: Analysis of the March 2011–2012 Current Population Surveys by C. Solis-Roman and B. Sampat of Columbia University for The Commonwealth Fund.

In the next higher income category, 100% to 137% FPL, workers in Illinois, Ohio, and Georgia were covered by their employers at somewhat higher rates than those in the other four states. About one third of full-time workers in this income group in Illinois, Ohio, and Georgia had health benefits through their own employer compared with about one quarter of workers in Texas, Florida, California, and New York. But uninsured rates in this income group are substantially lower in New York (35%), Illinois (40%), and Ohio (41%) than they are in Texas (64%), Florida (51%), and Georgia (51%). The difference likely reflects both greater access to other sources of employer coverage and more expansive Medicaid programs in the Rust Belt states. A similar pattern holds among full-time workers earning between 138% and 249% FPL.

Health Insurance by Firm Size and Poverty

Firms with fewer than 50 employees—those that purchase coverage in the small-group insurance market—particularly those with fewer than ten employees, are much less likely than larger firms to offer coverage to their workers. This is because, on average, small businesses pay more than large firms do for the same benefits. According to an analysis by Jon Gabel and colleagues, small businesses pay nearly 18% more in premiums on average than large companies for the same benefits (Gabel et al. 2006). These

TABLE 3
 Percentage of Full-Time* Workers Ages 19–64 with Own Employer-Sponsored Insurance or
 Uninsured in the Seven States with Highest Numbers of Full-Time Workers, by Poverty Level

| | Total | | <100 FPL (%) | | 100–137% FPL | | 138–249% FPL | | 250–399% FPL | | ≥ 400% FPL | |
|---------------|-------|-----------|--------------|-----------|--------------|-----------|--------------|-----------|--------------|-----------|------------|-----------|
| | ESI | Uninsured | ESI | Uninsured | ESI | Uninsured | ESI | Uninsured | ESI | Uninsured | ESI | Uninsured |
| United States | 62 | 17 | 18 | 53 | 30 | 48 | 50 | 30 | 66 | 14 | 72 | 5 |
| New York | 61 | 15 | 19 | 36 | 27 | 35 | 46 | 29 | 64 | 14 | 73 | 6 |
| Illinois | 63 | 15 | 17 | 49 | 35 | 40 | 53 | 28 | 69 | 12 | 73 | 4 |
| Ohio | 64 | 13 | 19 | 44 | 33 | 41 | 56 | 26 | 71 | 9 | 73 | 4 |
| California | 59 | 20 | 15 | 53 | 26 | 48 | 44 | 37 | 64 | 18 | 74 | 6 |
| Texas | 57 | 26 | 14 | 69 | 24 | 64 | 44 | 43 | 64 | 19 | 73 | 7 |
| Florida | 58 | 22 | 19 | 60 | 26 | 51 | 46 | 35 | 63 | 15 | 68 | 8 |
| Georgia | 59 | 20 | 17 | 61 | 35 | 51 | 54 | 30 | 63 | 15 | 68 | 8 |

Note: FPL refers to federal poverty level. ESI refers to own employer-sponsored insurance.

*Full-time workers defined as working 30 or more hours per week.

Source: Analysis of the March 2011–2012 Current Population Surveys by C. Solis-Roman and B. Sampat of Columbia University for The Commonwealth Fund.

higher rates are the result of a number of factors: the ability of insurance carriers in some states to charge small firms higher premiums based on the health, age, and gender of their workforces, the type of business it is, and higher per-employee administrative costs, including broker commissions (Collins, Schoen, Colasanto, and Downey 2003; Collins, Davis, Nuzum et al. 2010; Doty, Collins, Rustgi, and Nicholson 2009; The Commonwealth Fund Commission on a High Performance Health System 2009).

In 2014, sweeping small-group insurance market reforms under the Affordable Care Act will substantially level the playing field between large and small employers by banning or restricting insurer underwriting on health, gender, age, and industry. In addition, new small-business marketplaces, or Small Business Health Options Program (SHOP) exchanges, may reduce administrative costs for small employers if companies choose to offer coverage to their employees (there is no penalty for employers with fewer than 50 employees that do not offer health benefits to their employees).

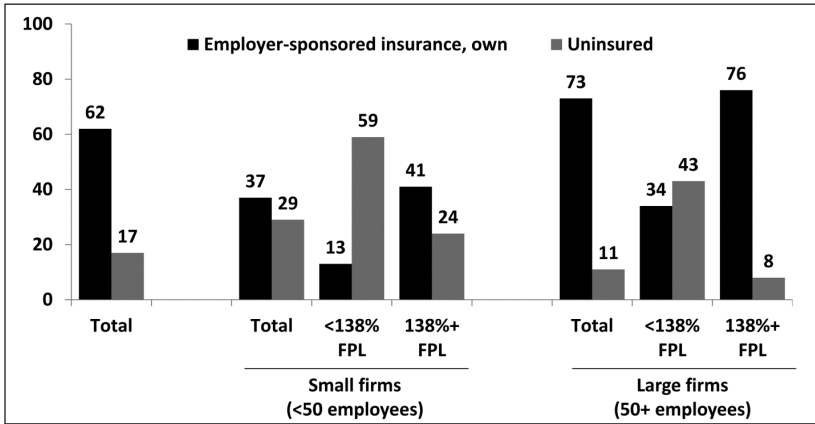
Nationally, 31.7 million full-time workers, or 31% of the full-time workforce, are employed in firms with fewer than 50 workers. Across the seven states, Illinois and Ohio have below-average shares of their full-time workforce employed in small firms (27% and 29%, respectively) while California, Florida, and New York have above-average percentages of their workforces employed in small firms (35%, 34%, and 35%, respectively). Georgia and Texas are at the national average.

Only 37% of full-time workers in small firms nationally have health insurance through their employers (Figure 2). This is compared with 73% of those working in companies with 50 or more employees. Small-firm coverage rates are above average in Ohio (45%) and Illinois (41%). Small-firm workers in Texas and Georgia have the lowest rates of own-employer coverage (29% and 31%).

While employees of small firms are significantly less likely than employees in larger firms to have health benefits through their jobs, there are substantial differences by income. Among full-time workers with incomes below 138% FPL employed in firms with fewer than 50 employees, only 13% have coverage through their own jobs (Figure 2) compared with 41% of small-firm employees with incomes of 138% FPL or higher. Consequently, uninsured rates are substantially higher among lower-income small-firm employees: 59% of small-firm workers with incomes below 138% FPL are uninsured compared with 24% of those with incomes of 138% FPL or higher.

Across the seven states, less than one in five full-time workers in small firms who have incomes below 138% FPL have health benefits through their jobs, but there are significant differences in the percentage of those workers who are uninsured (Table 4). In Texas, just 8% of these workers

FIGURE 2
 Percentage of Full-Time Workers* Ages 19–64 with Own Employer-Sponsored Insurance, or Uninsured, by Poverty Level and Firm Size



Note: FPL refers to federal poverty level.

*Full-time workers defined as working 30 or more hours per week.

Source: Analysis of the March 2011–2012 Current Population Surveys by C. Solis-Roman and B. Sampat of Columbia University for The Commonwealth Fund.

have benefits through their jobs, and more than three quarters (76%) are uninsured. In New York, 13% of low-income workers in small firms have benefits through their jobs, but 42% are uninsured. Among higher-wage workers in small firms, own-employer coverage rates are higher but are below the national average in the Sun Belt states and above the national average in Illinois and Ohio. Similarly, uninsured rates in this income group are at the national average (New York), below the national average in Illinois and Ohio, and above the national average in the Sun Belt states.

While working for a larger company improves low-wage workers' chances of gaining employer health benefits, they are still significantly disadvantaged compared with higher-wage earners. Nationally, among employees in companies with 50 or more workers, only one third (34%) of those with incomes below 138% FPL have health insurance through their jobs compared with more than three quarters (76%) of higher-income workers. Likewise, 43% of lower-income employees in large firms are uninsured compared with 8% of higher-income workers in large firms. Indeed, workers with low incomes in large firms have lower rates of coverage through their jobs and are uninsured at nearly twice the rate of higher-income workers in small firms.

This pattern is similar across the seven states, with more generous Medicaid eligibility protecting some workers in the Rust Belt states compared with those in the Southern Sun Belt states. Coverage rates of

TABLE 4
 Percentage of Full-Time* Workers Ages 19–64 with Own Employer-Sponsored Insurance or Uninsured,
 in the Seven States with the Highest Numbers of Full-Time Workers, by Poverty Level and Firm Size

| | Small firms (<50 employees) | | | | | | Large firms (50+ employees) | | | | | |
|---------------|-----------------------------|-----------|-----------|-----------|-----------|-----------|-----------------------------|-----------|-----------|-----------|-----------|-----------|
| | Total (%) | | <138% FPL | | ≥138% FPL | | Total (%) | | <138% FPL | | ≥138% FPL | |
| | ESI | Uninsured | ESI | Uninsured | ESI | Uninsured | ESI | Uninsured | ESI | Uninsured | ESI | Uninsured |
| United States | 37 | 29 | 13 | 59 | 41 | 24 | 73 | 11 | 34 | 43 | 76 | 8 |
| New York | 36 | 27 | 13 | 42 | 40 | 24 | 75 | 8 | 37 | 27 | 77 | 7 |
| Illinois | 41 | 24 | 18 | 51 | 45 | 20 | 71 | 12 | 30 | 41 | 76 | 8 |
| Ohio | 45 | 21 | 11 | 53 | 50 | 16 | 72 | 10 | 34 | 37 | 76 | 7 |
| California | 34 | 35 | 13 | 58 | 39 | 29 | 73 | 12 | 29 | 45 | 77 | 9 |
| Texas | 29 | 45 | 8 | 76 | 36 | 35 | 69 | 17 | 29 | 58 | 74 | 13 |
| Florida | 34 | 38 | 11 | 72 | 38 | 32 | 71 | 14 | 34 | 47 | 74 | 11 |
| Georgia | 31 | 38 | 13 | 70 | 36 | 30 | 71 | 12 | 35 | 45 | 75 | 9 |

Note: FPL refers to federal poverty level. ESI refers to own employer-sponsored insurance.

*Full-time workers defined as working 30 or more hours per week.

Source: Analysis of the March 2011–2012 Current Population Surveys by C. Solis-Roman and B. Sampat of Columbia University for The Commonwealth Fund.

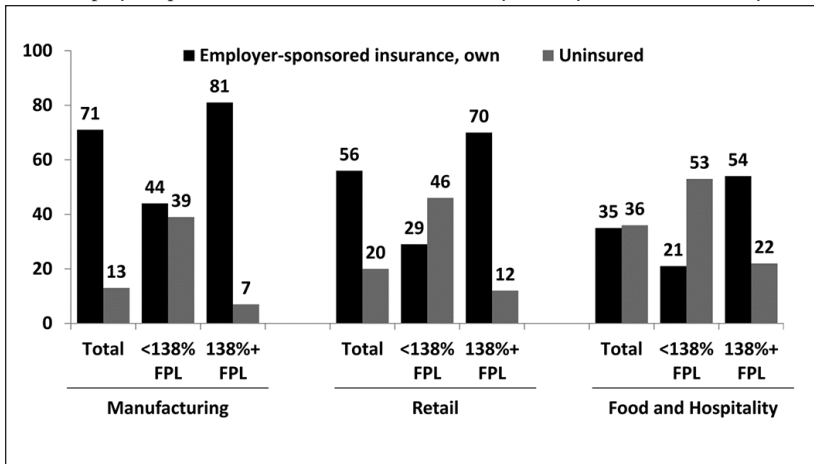
lower-income workers by their own employers in large firms ranged from 29% in Texas and California to 37% in New York (Table 4). These workers were much more likely to be uninsured in the Sun Belt states than in Rust Belt states. Nearly six in ten (58%) full-time workers with low incomes in large firms in Texas are uninsured compared with 27% in New York.

Health Insurance by Industry and Poverty

Health insurance coverage varies substantially by industry. Given the long history of unionization in the manufacturing industry, its workers are far more likely to have health benefits through their jobs than workers in service industries that are dominated by low-wage workers. In this analysis, employer-based coverage in two such industries—retail, and food and hospitality—is compared with that in manufacturing. We focus only on workers in firms with 50 or more employees. There are an estimated 12.3 million full-time workers employed in large firms in the manufacturing industry, 13.3 million in retail, and 7.1 million in food and hospitality.

More than seven in ten (71%) full-time workers in large manufacturing companies have health benefits through their own employers (Figure 3). By contrast, only 56% of full-time workers in the retail industry and 35% in food and hospitality have health benefits through their own jobs.

FIGURE 3
Percentage of Full-Time Workers* Ages 19–64 in Large Firms with Own Employer-Sponsored Insurance or Uninsured, by Poverty Level and Industry



Note: FPL refers to federal poverty level. Large firms are those with 50 or more employees.

*Full-time workers defined as working 30 or more hours per week.

Source: Analysis of the March 2011–2012 Current Population Surveys by C. Solis-Roman and B. Sampat of Columbia University for The Commonwealth Fund.

Reflecting these higher employer coverage rates, uninsured rates among full-time workers are lower in the manufacturing industry (13%) than in retail (20%) and food and hospitality (36%).

While lower-income workers fare better in manufacturing than they do in other industries, there is a substantial income divide in employer-based coverage in all three industries. In large manufacturing firms, just 44% of employees with incomes below 138% FPL have health benefits through their employers compared with 81% of those having incomes of 138% FPL or more; 39% of these lower-income workers are uninsured. The picture is even bleaker among workers in the two service industries. Only 29% of low-income workers employed in large firms in the retail industry have health insurance through their own jobs compared with 70% of those with higher incomes; 46% are uninsured. In food and hospitality, just one in five (21%) workers with low incomes are covered by their employers' health benefits compared with 54% of those with higher incomes; more than half (53%) are uninsured.

AFFORDABLE CARE ACT: IMPLICATIONS FOR WORKERS WITH LOW AND MODERATE INCOMES

The United States has long stood alone among industrialized countries as having no national system for financing universal health insurance coverage. While other countries developed such systems throughout the 20th century, the United States instead created a complicated set of employer tax incentives that evolved into a voluntary employer-based health insurance system (Starr 2013; Field and Shapiro 1993). This system has most benefited higher-wage workers employed by large companies. Health benefits are routinely included in compensation packages in firms with 50 or more employees; companies that do not offer health insurance are at a competitive disadvantage in white-collar labor markets. Collective bargaining has also ensured that health benefits are included in the compensation packages of unionized workforces.

However, workers with lower wages have been at a significant disadvantage in gaining health insurance through their jobs, both in large and small firms. Low-income workers employed in industries with a history of unionization have fared better than those working in industries with little or no collective bargaining. Even in unionized industries, low-income workers are by no means on an even playing field with higher-income workers with respect to health benefits. The decline in manufacturing and union membership has led to ever-increasing losses of coverage among lower wage earners and their dependents.

Some states have tried to address this coverage gap by expanding eligibility for Medicaid to adults. Under the Medicaid program that existed before the changes enacted by the Affordable Care Act, all states offered

Medicaid coverage to parents of dependent children, though income eligibility levels are very low in many states. A few states offered Medicaid coverage to adults without children. The analysis in this chapter shows that in states with higher-income Medicaid eligibility thresholds for parents and/or that provide coverage to adults without children, uninsured rates among low-income workers are substantially lower than those of lower-income workers in states with low eligibility thresholds or that do not provide coverage to childless adults. Still, even those efforts left significant shares of lower-income workers without health insurance coverage.

Passage of the Affordable Care Act in 2010

As Paul Starr chronicles in his recent book, *Remedy and Reaction* (2013) the United States is not only unique among industrialized nations in lacking a financing mechanism for universal health insurance, it also stands out for its decades-long battle over developing one. Starr identifies a set of substantial challenges to reform, including the complexity of the system with its mix of private and public payers and both state and federal regulatory authority, a lack of understanding among the general public about employer-based health insurance and its limitations, and a lack of consensus on the role of government in society. The combination of these barriers has given rise to a deeply entrenched ideological disagreement over the seriousness of the problem as well as its potential remedies and has greatly limited the choice of options for reform.

The ongoing conflict over health care reform came to a head in 2009 in the wake of the election of President Barack Obama. The number of people who lacked health insurance had climbed to nearly 50 million, and every 2008 presidential candidate in both parties had developed health insurance reform proposals (Collins and Kriss 2008; Collins, Nicholson, Rustgi, and Davis 2008). The Democrats took control of the House in 2009 and had a filibuster-proof majority in the Senate. In addition, there was recognition by industry stakeholders of the need for reform, as long as they had input into its structure (Starr 2013).

With the exception of Representative Dennis Kucinich, who proposed a single-payer system, the 2008 Democratic presidential candidates all had proposals that were variations on a theme of near-universal coverage based on subsidized private coverage, expanded income eligibility for Medicaid, incentives for employers to continue offering health insurance, and individual and small-group insurance market reforms. This approach had been in the works for many years among reform advocates from both parties, and a version of it was signed into law in Massachusetts by then-governor Mitt Romney in 2006 (Davis and Schoen 2003). Aimed at bridging the partisan divide over reform, several variations of this approach ultimately became a set of House and Senate bills introduced, debated, and passed by both houses over the course of 2009 (Collins, Davis, Nuzum

et al. 2010). After the death of Senator Edward Kennedy and the election of Republican Scott Brown to his senatorial seat, the Senate lost its filibuster-proof majority, and the Senate bill that passed in late 2009 was ultimately passed by the House in March of 2010 and signed into law by President Obama. The hope that the law would bridge the partisan divide had come to naught: it garnered not a single Republican vote.

Affordable Care Act

The Affordable Care Act's central goal is to extend near-universal coverage to the U.S. population. It is structured to accomplish this objective with the largest expansion in eligibility for Medicaid since the program's inception in 1965, combined with financial subsidies for people to purchase private health plans in health insurance marketplaces, or exchanges. Reforms to the individual and small-group insurance markets standardize rules across the states, including banning or limiting insurer underwriting on health, gender, age, occupation, industry, and other characteristics that signal potential high-cost individuals and small businesses that carriers have avoided insuring. The reforms to the small-group market, combined with new small-business marketplaces, were intended to increase the number of small businesses that offer health insurance. Starting in 2014, all legally present U.S. residents are required to have health insurance, and many people will face tax penalties if they do not gain coverage that meets the law's minimum standards.

The law and related federal regulations issued over the past three and a half years have strongly emphasized a shared responsibility among federal and state governments, individuals, employers, insurance carriers, and the health care industry for achieving near-universal coverage. The law relies on the revenue contributions of industry and the ongoing commitment of employers for the provision of health benefits. Under this approach to reform, a shared financial responsibility and fealty to the law's goals among stakeholders is essential to linking the U.S. insurance system's disparate parts into a unified whole.

With the exception of undocumented immigrants, all full-time uninsured workers with incomes below 400% FPL (\$45,960 for an individual) are now eligible for either Medicaid (below 138% FPL) or subsidized private health plans offered through the state insurance marketplaces (138% to 400% FPL). There are an estimated 14.4 million uninsured full-time workers with incomes in that range, or 85% of the total number of uninsured people working full-time.

Ongoing Partisan Division over the Affordable Care Act and Its Consequences

The coverage potential of the Affordable Care Act, however, has been jeopardized by implementation challenges that stem to a significant degree

from the ongoing partisan battles over the law. In the absence of bipartisan support for the law in 2010, its implementation was also ideologically fraught. The House of Representatives passed legislation to repeal the law 40 times after Republicans won control of the House in 2012. While these votes were largely symbolic, they likely helped fuel opposition to the law well after it had passed and created uncertainty among the public about the law's status and ultimate fate.

Substantively, however, the opposition to the law played out most dramatically in (1) the low number of states that elected to run their own marketplaces, (2) numerous legal challenges by state attorneys general and other parties that culminated in the 2012 Supreme Court case, and (3) the 2012 presidential campaign, in which the Affordable Care Act was a central issue and was at risk if President Obama did not win re-election. Each of these developments had significant consequences for implementation.

State and Federal Marketplaces

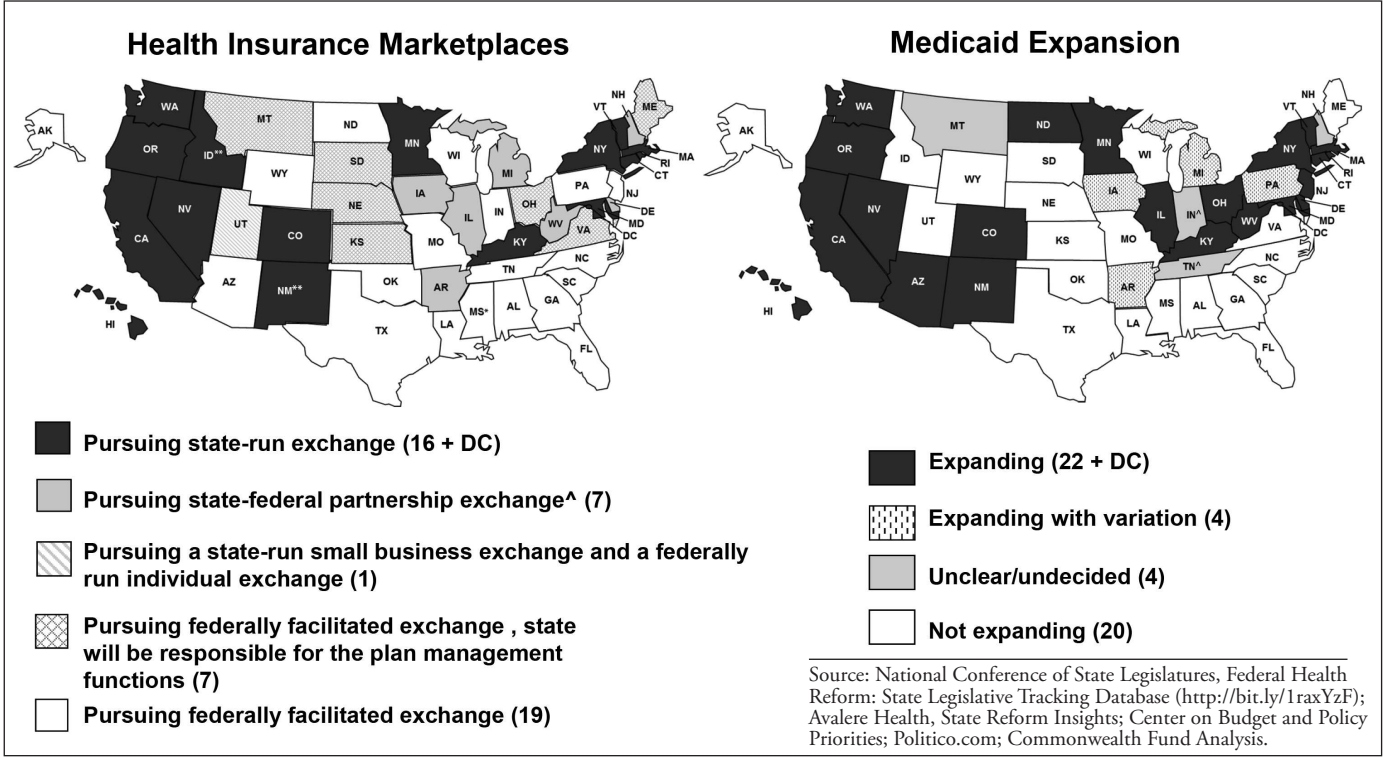
By 2013, only 16 states and the District of Columbia opted to run their own insurance exchanges; most of those had Democratic state leadership. After two additional states failed to get the necessary infrastructure in place in 2013, the federal government assumed primary responsibility for operating federal marketplaces in 36 states for 2014. While several states with federal marketplaces participated in some aspects of operation, including health plan management, the Department of Health and Human Services had to manage enrollment through the federal website HealthCare.gov for people in many more states than had been predicted when the law passed. Though other factors contributed to a difficult initial rollout period during the first 2 months of the open enrollment period, this was likely a major reason for the failure of the website to perform satisfactorily until December.

Supreme Court Decision on the Medicaid Expansion

The Supreme Court's 2012 decision on the law's legality, combined with ongoing opposition to the law at the state level, has become the biggest threat to the extension of coverage for low- and moderate-income families. The court upheld the constitutionality of the Affordable Care Act but ruled that states may choose not to expand their Medicaid programs under the conditions of the law and still maintain existing federal Medicaid funding. Despite the fact that most states that expand their programs receive 100% federal financing for the expansion through 2016, falling to 90% by 2020, only 26 states and the District of Columbia opted to expand their programs for 2014 (Figure 4). Nearly all states in the southeastern United States, with the exception of Arkansas and Kentucky; most of the Plains states, three western states; and Maine, Missouri, and Wisconsin decided not to participate in the expansion in 2014.

FIGURE 4

State Action on Establishing Health Insurance Marketplaces and Participation in Medicaid Expansion (as of January 2014)



*The U.S. Department of Health and Human Services denied Mississippi's application for a state-run marketplace on February 7, 2013. **In Idaho and New Mexico, the federal government will operate the individual market in 2014. ^Indiana and Tennessee have considered expanding with variation.

The Affordable Care Act provides Medicaid coverage to adults with incomes below 138% FPL. Tax credits to offset premium costs are available for people earning between 100% and 399% FPL who are not eligible for Medicaid, other public coverage, or affordable employer coverage. In addition, the tax credits are available to legal immigrants with incomes below 100% FPL while they are in the 5-year Medicaid waiting period required under federal law. But because lawmakers assumed that all states would participate in the Medicaid expansion, no similar allowance was made for citizens with incomes below the poverty level. As a result, in states that do not expand their programs, adults with incomes between 100% and 138% FPL will be eligible for tax credits, but adults with incomes below 100% FPL who are not legal immigrants will not have access to the new subsidized coverage options available under the law.

The three states with the highest uninsured rates among low-income workers—Florida, Georgia, and Texas—have decided not to participate in the law's Medicaid expansion. Among full-time workers earning less than 100% FPL in those states, nearly seven in ten (69%) in Texas and six in ten in Florida (60%) and Georgia (61%) lack health insurance of any kind. These workers will likely remain uninsured until their states move forward. In addition, a recent study by The Commonwealth Fund found that the vulnerability of low-income people in states that do not expand their Medicaid programs would be exacerbated by annual changes in income (Rasmussen, Collins, Doty, and Garber 2013). People might have incomes high enough to gain subsidized health coverage in one year, but then a job loss or other life change could mean a reduction in income that would make them ineligible for subsidies in the following year. Among people in households with incomes between 100% and 133% FPL in 2011, 29% experienced a change in income that lowered their household earnings to less than 100% FPL in 2012.

Congress could address this serious coverage gap with legislation extending eligibility for premium tax credits to people with poverty-level incomes, but the partisan divide over the law in Washington likely precludes such a solution for the foreseeable future. If this environment persists, it will continue to stymie legislative efforts needed to address other shortcomings in the law and implementation challenges.

2012 Presidential Election

Despite the Supreme Court ruling upholding most of the Affordable Care Act, the law nevertheless remained a central issue in the presidential election. Governor Romney had signed the Massachusetts health reform program into law, and despite that law's similarity to the Affordable Care Act, Romney ran against the national reform law as a presidential candidate. He offered a list of alternative proposals derived mainly from past

Republican health reform ideas, such as high-risk pools (Collins et al. 2012). While the law would have been difficult to repeal on day one of his presidency as he promised in the campaign, his opposition to it ultimately may have led to its demise over time.

The politics of the campaign likely slowed implementation as defense of the law became a priority. The Affordable Care Act had left many critical implementation decisions to the Secretary of Health and Human Services, and these decisions were made through a major regulatory effort on the part of the Health and Human Services, Labor, and Treasury departments commencing just after the passage of the law. Thousands of pages of proposed, interim, and final rules were issued through 2013 (Jost 2010–2013). The 2012 election likely led to the delayed issuance of some key regulations; indeed, there was a flurry of rules issued just after the election.

One of the longest delays involved the rule implementing the employer mandate. While a key provision of the law, it was not critical to the agency's meeting the October 1, 2013, launch date of the open enrollment period for federal and state marketplaces. Moreover, it is a controversial provision in the business community. In late summer 2013, the Department of the Treasury delayed the mandate for 1 year (Jost 2013; Collins 2013).

Despite the widespread use of the term “mandate,” the law does not require employers to offer health insurance but instead requires employers with 50 or more workers to make a “shared responsibility payment” to help cover the cost of premium tax credits, or subsidized coverage, for employees through the state insurance marketplaces. An employer would be required to make a payment if a full-time worker, working at least 30 hours a week, with income under 400% FPL gains a premium tax credit for a plan sold through the insurance marketplace in the state either because his or her company did not offer coverage, the coverage was determined to be unaffordable (costing the employee more than 9.5% of his or her household income for a self-only plan), or the coverage did not meet the minimum benefit standards in the law (covering less than 60% of average medical costs for a standard population). Payments are equal to \$2,000 per worker, excluding the first 30 employees, for companies that do not offer any coverage. For companies that offer inadequate coverage, the payment is \$3,000 for each worker that becomes eligible for a tax credit, or \$2,000 for each worker, excluding the first 30 employees.

Employers do not have to make a shared responsibility payment for their lowest-income workers if those workers become eligible for the law's Medicaid expansion. In this chapter's analysis, among full-time workers with incomes under 138% FPL, 39% of those in the manufacturing industry were uninsured, 46% were uninsured in the retail industry, and 53% were uninsured in the food and hospitality industry. Companies in

these industries would not have to contribute to the cost of their workers' insurance if they enrolled in Medicaid. However, in states that are not expanding their programs, these employers would have to pay a penalty for workers earning between 100% and 138% FPL who are eligible for tax credits for private plans.

The Treasury department's delay in the shared responsibility requirement for 1 year means that large employers whose employees gain subsidies in 2014 will not have to share in the cost of that coverage this year. This means that the cost of financing worker coverage will fall fully to the federal government in 2014. Large employers with substantial shares of uninsured low-income workers will continue to be able to avoid contributing to the cost of their health insurance.

LOOKING FORWARD

There is considerable uncertainty about how employers will respond to the set of incentives in the law over time. The Congressional Budget Office estimated a reduction of about seven million people with employer-based coverage by 2013. An estimated 11 million workers are projected to no longer have job-based health insurance. Another three million will have an offer from an employer but enroll in another source of coverage, likely because the employer plan is unaffordable or does not meet minimum standards under the law. These flows out of employer coverage are estimated to be partially offset by an estimated seven million people who will newly enroll in employer-based plans because of the law. Many of those new offers of coverage will come from employers responding to the requirements of the law and employees' new obligation to be insured.

There is certain to be widespread variability in the implications of the law for low- and moderate-income workers depending on the state in which they live. Just as low-income workers fared better in the Rust Belt states because of greater employer-based coverage and higher Medicaid income eligibility levels before the law was implemented, those same determinants of their coverage will persist. Uninsured or poorly insured low-income workers in states that have elected not to expand their Medicaid programs may not gain new or better coverage this year if their employers do not offer it. These workers live in precisely those states where their likelihood of being uninsured was the highest before passage of the law. In states that do expand their Medicaid programs, the deep divide in coverage between higher- and lower-income workers will narrow over time, though only among workers who are legally present in the United States.

Governors and legislators in the 24 states that have not yet expanded their Medicaid programs will continue to come under pressure from hospital, provider, and industry associations to expand their programs and

relieve these institutions of the costs of uncompensated care and local taxes to fund it. The experience of both the Medicaid and Children's Health Insurance Programs, in which all states eventually participated, suggests that states that are currently resisting the law's expansion may ultimately follow a similar path over the next few years.

There will be numerous additional health policy challenges with respect to low-income workers and their families in the coming years. These include financing the coverage or care of undocumented immigrants and ensuring equal access to affordable, high-quality health care across the income spectrum.

As of June 2014, according to a Commonwealth Fund survey, there were an estimated 9.5 million fewer uninsured working-age adults than there were just prior to open enrollment in 2013 (Collins, Rasmussen, and Doty 2014). People with low and moderate incomes, young adults ages 19 through 34, and Latinos had made particularly significant gains either through the Medicaid program or marketplace plans. Among states that had expanded eligibility for Medicaid as of April 2014, the uninsured rate among adults with incomes under poverty declined from 28% to 17%. In states that had not expanded eligibility for the program, the uninsured rate for adults in poverty was statistically unchanged at 36%. As the public continues to gain coverage, the law's thematic and essential characteristic of shared responsibility across stakeholders might ultimately take hold. If the history of the enduring public attachment to Social Security and Medicare is a guide, when the nation is well along the road to universal health insurance coverage, it will become increasingly difficult for those who oppose the law to turn the clock back. Making the necessary tweaks and improvements in the law will present ongoing regulatory and legislative challenges to policy makers over time.

METHODOLOGY

Data for this chapter come from the March Annual Social and Economic Supplement to the Current Population Survey (CPS), 2011 and 2012. Bhaven Sampat and Claudia Solis-Roman of Columbia University's Mailman School of Public Health provided analysis of the data. The CPS is a federal survey sponsored by the U.S. Census Bureau. The CPS, the primary source of information on U.S. labor force characteristics, is conducted monthly on a sample of about 57,000 households representing approximately 112,000 people. The Annual Social and Economic Supplement to the CPS is conducted in March of each year with a sample of about 99,000 households. The survey is representative of the nation as a whole, individual states, and other specified areas. Additional information is provided in more detail on the Census website (<http://1.usa.gov/1nGiAFj>).

REFERENCES

- Collins, Sara R. 2013 (Jul.). "A Shared Responsibility: Employers and the Affordable Care Act." The Commonwealth Fund blog. <<http://bit.ly/WnX3fD>>
- Collins, Sara R., and Jennifer L. Kriss. 2008 (Jan.). *Envisioning the Future: The 2008 Presidential Candidates' Health Reform Proposals*. New York: The Commonwealth Fund, January 2008.
- Collins, Sara R., Karen Davis, Rachel Nuzum, Sheila D. Rustgi, Stephanie Mika, and Jennifer L. Nicholson. 2010 (Jan.). *The Comprehensive Congressional Health Reform Bills of 2009: A Look at Health Insurance, Delivery System, and Financing Provisions*. New York: The Commonwealth Fund.
- Collins, Sara R., Stuart Guterman, Rachel Nuzum, Mark A. Zezza, Tracy Garber, and Jennie Smith. 2012 (Oct.). *Health Care in the 2012 Presidential Election: How the Obama and Romney Plans Stack Up*. New York: The Commonwealth Fund.
- Collins, Sara R., Jennifer L. Nicholson, Shelia D. Rustgi, and Karen Davis. 2008 (Oct.). *The 2008 Presidential Candidates' Health Reform Proposals: Choices for America*. New York: The Commonwealth Fund.
- Collins, Sara R., Petra W. Rasmussen, and Michelle M. Doty. 2014 (Jul.). *Gaining Ground: Americans' Access to Insurance Coverage and Access to Care After the Affordable Care Act's First Open Enrollment Period*. New York: The Commonwealth Fund.
- Collins, Sara R., Petra W. Rasmussen, Michelle M. Doty, and Tracy Garber. 2014 (forthcoming). *Working Without Health Benefits: Why Millions of Low Wage Workers in Both Large and Small Firms Are Uninsured and How the Affordable Care Act Will Help*. New York: The Commonwealth Fund.
- Collins, Sara R., Ruth Robertson, Tracy Garber, and Michelle M. Doty. 2013 (Apr.). *Insuring the Future: Current Trends in Health Coverage and the Effects of Implementing the Affordable Care Act*. New York: The Commonwealth Fund. <<http://bit.ly/1n2mJra>>
- Collins, Sara R., Cathy Schoen, Diane Colasanto, and Deirdre A. Downey. 2003. *On the Edge: Low-Wage Workers and Their Health Insurance Coverage*. New York: The Commonwealth Fund.
- Davis, Karen, and Cathy Schoen. 2003 (Apr. 23). *Creating Consensus on Coverage Choices. Health Affairs*. New York: The Commonwealth Fund. <<http://bit.ly/1tfNnhE>>
- Doty, Michelle M., Sara R. Collins, Sheila D. Rustgi, and Jennifer L. Nicholson. 2009. *Out of Options: Why So Many Workers in Small Businesses Lack Affordable Health Insurance, and How Health Care Reform Can Help*. New York: The Commonwealth Fund.
- Field, Marilyn J., and Harold T. Shapiro. 1993. *Employment and Health Benefits*. Washington, DC: National Academies Press.
- Gabel, Jon, Ronald McDevitt, Laura Gandolfo, Jeremy Pickreign, Samantha Hawkins, and Cherly Fahlman. 2006. "Generosity and Adjusted Premiums in Job-Based Insurance: Hawaii Is Up, Wyoming Is Down." *Health Affairs*, Vol. 25, no. 3, pp. 832–43.
- Jost, Timothy Stoltzfus. 2010–2013. "Implementing Health Reform." Various blog posts on Affordable Care Act implementation. Health Affairs Blog. <<http://healthaffairs.org>>
- Jost, Timothy Stoltzfus. 2013 (Jul. 2). "Implementing Health Reform: A One-Year Employer Mandate Delay." Health Affairs blog. <<http://bit.ly/1qPvMvA>>
- Kaiser Family Foundation. 2013. "State Health Facts." <<http://kff.org/statedata>>

- Rasmussen, Petra W., Sara R. Collins, Michelle M. Doty, and Tracy Garber. 2013. *In States' Hands: How the Decision to Expand Medicaid Will Affect the Most Financially Vulnerable Americans*. New York: The Commonwealth Fund.
- Starr, Paul. 2013. *Remedy and Reaction: The Peculiar American Struggle over Health Care Reform*. New Haven, CT: Yale University Press.
- The Commonwealth Fund Commission on a High Performance Health System. 2009. *The Path to a High Performance U.S. Health System: A 2020 Vision and the Policies to Pave the Way*. New York: The Commonwealth Fund.
- Tilipman, Nick, and Bhaven Sampat. 2013. *Analysis of the March 2012 Current Population Survey for The Commonwealth Fund*. New York: Columbia University.

Conclusions: Reconstituting Laborist Capitalism

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The preceding chapters reveal a United States that is starkly different from the one envisaged by the founders of the Industrial Relations Research Association. The neutrals and diverse practitioners of the organization in 1947 worried about balance and the public interest in the context of the apparent post-war labor–management accord that institutionalized collective bargaining. Today there is considerable turbulence in employment relations, and the middle ground is not easily found—if, in fact, it ever was (Kaufman 1993). Renewing the employment relations system and rebuilding laborist capitalism requires a challenge to authoritarian systems that tend asymptotically to conditions of servitude and may involve change at the constitutional level.

In this volume, we have explored the cognitive foundations of anti-unionism in the South, the anti-labor uses of federalism, the reversal of “laborist capitalism” in the Midwest, the patchwork quilt of fair labor standards, persisting gaps in access to health insurance, the local progress made on paid family leave policy, and the promise of worker centers for protecting workers poorly served by existing labor law. The convulsions in labor policies and practices we have described reveal multiple potential directions for change. Mainstream business associations appear to demand the nationalization of Southern conservative practices. On the other hand, moves by conservative governors in Michigan, Wisconsin, Ohio, and North Carolina have reawakened labor militancy. Convergence in either the progressive or conservative directions would require significant victories by those seeking to limit the advantages of concentrated wealth or by those who would deliver another painful defeat for organized workers. Some of the relevant action will take place in extra-parliamentary spaces, among grassroots movements, and within the business power structure.

While neoclassical economists may reduce human behavior to self-interest and embrace a competitive capitalism with minimal constraints, examples of solidaristic activity abound in the family, local community, social action, and politics. There is much that cannot be explained without explicit consideration of a reciprocal altruism. Daniel Bell contrasted “economizing” and “sociologizing” impulses in American society: private

profit-maximizing and the pursuit of broader public interests compete for influence (1960). An amalgam of social institutions inhabits a society and embodies both self-interest and broader collective interests. There is no fixed result, no ultimate triumph, no final equilibrium.

LEARNING BY DRIVING AROUND

The shifting terrain of the states and cities is evident from a short drive south from Washington D.C. On I-95 in Virginia, one discovers Richmond, the historic capital of the Confederacy. Philip Morris International is just off the highway. This corporation brings to mind the tobacco plantation, a central institution in the old South. Until recently, the tobacco industry still had the political power to prevent the classification of tobacco as a food, drug, or consumer product, thereby “nullifying” regulation. Virginia has been transformed politically by waves of immigration, but conservatives in the legislature have threatened to shut the government down in order to block the expansion of Medicaid under the Affordable Care Act. Virginia remains a right-to-work state without statutory recognition of collective bargaining rights for public employees.

In North Carolina, the conservative governor and legislature have introduced a new voter identification requirement, limited days for voting, instituted a tax penalty for parents whose students vote on campus, and prevented the expansion of Medicaid. These policies appear to disadvantage the poor, the elderly, students, and minority group members. In response, activists have assembled at the legislature every Monday to protest and practice civil disobedience in the “Moral Monday” movement. Many of the conservative initiatives in North Carolina reflect the agenda of the John Locke Foundation founded by businessman and activist Art Pope. North Carolina politics have shifted outside traditional structures, and important decisions now take place in the business lobbies and in the streets (Sturgeons 2013).

In states along the Atlantic Coast, one finds the remnants of the low-country Gullah culture, where former slaves established a relatively autonomous enclave and practiced subsistence farming and handicraft. More egalitarian craft communities such as these may arise in the interstices of oppressive hierarchies. In each of these states, conservative business interests seek to defend traditional hierarchies, and solidaristic movements arise in opposition (Opala 2003). The contributors to this volume have emphasized this dialectical process.

THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL: LIBERTY AND HIERARCHY

Among the most effective advocates of conservative business interests is the American Legislative Exchange Council (ALEC). Within ALEC

committees, conservative legislators meet with industry representatives to develop model legislation and are then bound to introduce and support these bills in their states. ALEC ranks states according to their implementation of these policies (Table 1; the ranking does not reflect the most recent ALEC successes, as Ohio and Michigan remain at the bottom).

TABLE 1
Economic Performance Rank

| | |
|--------------------|-------------------|
| 1. Texas | 26. Delaware |
| 2. Utah | 27. Georgia |
| 3. Wyoming | 28. Kentucky |
| 4. North Dakota | 29. Louisiana |
| 5. Montana | 30. Alabama |
| 6. Washington | 31. Maryland |
| 7. Nevada | 32. Kansas |
| 8. Arizona | 33. Minnesota |
| 9. Oklahoma | 34. New Hampshire |
| 10. Idaho | 35. New York |
| 11. Alaska | 36. Vermont |
| 12. North Carolina | 37. Pennsylvania |
| 13. Oregon | 38. Indiana |
| 14. Virginia | 39. Mississippi |
| 15. South Dakota | 40. Missouri |
| 16. Colorado | 41. Massachusetts |
| 17. Hawaii | 42. Maine |
| 18. West Virginia | 43. California |
| 19. Florida | 44. Wisconsin |
| 20. Nebraska | 45. Connecticut |
| 21. Arkansas | 46. Illinois |
| 22. South Carolina | 47. Rhode Island |
| 23. New Mexico | 48. New Jersey |
| 24. Iowa | 49. Ohio |
| 25. Tennessee | 50. Michigan |

Source: Laffer and Williams (2014).

The organization favors state convergence on an economic model that limits constraints on property and enterprise and invites states to compete to win private investment: a “competitive federalism.” The rationale for doing so derives from a philosophy that denies the validity of measures of social welfare and construes “equity” as fatal to individual liberty (Kraft and Kamieniecki 2007; see also Jacobs 1999 for a broader analysis of U.S. business lobbies).

Many ALEC-sponsored measures have rolled back worker protections and liberal voting policies in states such as Michigan, Ohio, Wisconsin, and North Carolina. ALEC strategy is, in fact, a recipe for the enduring transformation of the politics of a state (Weiser and Opsal 2014). If “right-to-work” limitations on public sector collective bargaining, reduced hours and sites for voting, and new identification requirements are implemented, the political balance of power may be fundamentally altered. The ALEC agenda is not merely a conservative program. It is also a formula for shifting a state to the “solid red” column. ALEC’s extra-parliamentary role has generated civil disobedience and street actions in such states as Wisconsin and North Carolina.

ALEC, the Chamber of Commerce, and many other conservative business organizations have similar philosophies, although there are varying vocabularies of “liberty” or “free enterprise.” As Mancur Olson (1971:147) noted, these groups are driven primarily by the agenda of a narrow and extremely conservative subset of their membership, and recent evidence suggests that this subset supplies a decisive share of funding (Shaw, Meyer, and Barker 2014). The Chamber and ALEC function as pillars of the power structure in some jurisdictions.

Liberty is the proclaimed principle of these organizations, but the defense of inequality and hierarchy are the underlying values. “Liberty” is often an ambiguous term. As ALEC and the business lobbies would have it, liberty stipulates no minimum standards in employment and offers no countervailing power to subordinates. Exploitive labor standards are the likely result. Clearly, the liberty of workers and minority group members to exercise voice is absent from the ALEC formulation.

U.S. business peak associations have been remarkably consistent in ideology in the past century. The Chamber was established with the support of the Taft administration to practice business self-government and has been hostile to most government regulation. The National Association of Manufacturers (NAM) was founded to serve non-union manufacturers. Both groups have opposed almost all measures to enhance workers’ economic security, including Social Security (see Cleveland 1948) and the Affordable Care Act. The Chamber, NAM, and ALEC are likewise unanimous in opposition to climate change policy.

ALEC-compatible ideology is well represented in many nodes in the federal structure. The Citizens United decision of the Supreme Court equated money with free speech and affirmed the political advantages of the wealthy. It has unleashed torrents of anonymous money in politics, to the benefit of ALEC contributors. The conservative majority of the Supreme Court shares the conception of liberty that animates ALEC and is equally skeptical of equity claims. Despite this, the mobilization of less-wealthy voters can sometimes counter the influence of ALEC's allies.

The dialectical process through which alternative workplace regimes emerge is evident throughout the United States. Pockets of "craft-oriented" production have emerged within hierarchical regimes, whether sought by unions or professional groups or tolerated by managers seeking enhanced quality. Problem-solving groups arise in the most hierarchical corporations. Innovation requires a space for imagination and more autonomous labor, even in service to routinized production. Spaces can defy "laws of physics"—that is, groups can carve out niches of craft production despite competitive pressures and isomorphism, leading to traditional hierarchies and highly exploitive systems in the extreme. Where unions have secured a strong position in an industry, they have campaigned for the humanization of work as well as the improvement of wages and benefits.

On the other hand, inadequate labor standards enforcement continues to permit abuses in the complex supply chains of many industries (Weil 2014).

The stakes of the struggle over the workplace are enormous. ALEC seeks the reversal of labor gains in the historically union-friendly Midwest. A nearly union-free America is perhaps the objective. At the other extreme, a pattern of pro-labor successes across the states and the return of pro-labor supermajorities in Congress might permit the renewal of laborist capitalism.

THE DISREGARDED CONSTITUTION

ALEC and similar groups would find their influence greatly reduced if the Thirteenth Amendment and the guarantee of republican government in the U.S. Constitution were more broadly redeemed. Legal scholars Jack Balkin and Sanford Levinson (2012:1459) make a very provocative argument:

The demand that "neither slavery nor involuntary servitude . . . shall exist within the United States," taken seriously, potentially calls into question too many different aspects of public and private power, ranging from political governance to market practices to the family itself.

Balkin and Levinson submit that the authors of the Thirteenth Amendment's prohibition of slavery and involuntary servitude had in mind an array of oppressive practices at work other than merely chattel slavery. Unfortunately, conservatives on the Supreme Court in the post-Civil War era were allied with rising corporate interests rather than the freed slave or white worker (consider, for example, the court's application of the Fourteenth Amendment to the corporate "person" [Storck 2012]).

The Constitution's guarantee of republican government in Article 4, Section 4, has also received short shrift: "The United States shall guarantee to every state in this union a republican form of government..." (see Merritt 1988).

Taken seriously, this provision might imply rather significant new limitations on states' rights. Combined with a more expansive interpretation of the Thirteenth Amendment, one would find labor rights more securely established across the states.

THE ALTERNATIVE TO HIERARCHY

Let us stipulate that at the opposite pole from slavery one finds relatively autonomous labor—workplace relationships in which the development and discretion of the worker are unconstrained by hierarchy and reinforced by egalitarian community. We are so accustomed to elaborate hierarchies that it may require a fertile imagination to visualize a realm of autonomy. Actually, many Americans have had such an imagination. The promise of more autonomous labor has been reflected in recurring American dreams of craft workshops, self-management, and self-employment. From the Knights of Labor's conception of the cooperative commonwealth to craft economies struggling to survive in the coastal lowlands and New England villages, many Americans continue to aspire to independence from corporate hierarchy.

Of course, hierarchical and collaborative forms of work are present in every region and across political divides. Craft production has ebbed and flowed as the advocates of the corporate form have sought a dominant position. However, the craft alternative remains viable and may play a role in the reinvention of an employment relations system that honors human possibility and social needs.

The Greek philosopher Aristotle defined work in three ways: the necessary labors of family, household, and slave that sustained daily life; the creative efforts of the craftsman producing for the marketplace; and the activism of the citizen (Arendt 1958). Aristotle, of course, embraced the rigid class hierarchy he found in ancient Athens. Can we conceive of an alternative division of labor in which citizens, workers, men, and women blend labor, craft, and action? Hannah Arendt (1958), Michael Piore (1995), and Richard Sennett (2008) are among the many scholars

who have pondered the Aristotelian categories of work and have sought means to realize a synthesis.

The reform unionists of the 19th century had in mind the vision of the cooperating artisan, neither oppressive master nor servile subordinate—an ideal however infrequently achieved. The Knights of Labor could not unite the industrial worker and small farmer in an effective movement, but both groups embraced a vision of a democratic economy extracted from the memory of small craft workshops. There was some forgetfulness in this. The old craft workshops sometimes were led by tyrannical masters, and the apprentices were sometimes indentured servants. But the dream remained: dignified labor, democratic control, craftsmanship.

According to the fundamental logic of craft, the master or mentor shares his or her experience with the apprentice, and the apprentice questions and develops skills. At its best, this model is consistent with Kantian ethics in that the master and apprentice treat one another as ends in themselves (and not exclusively as means). The transmission of craft knowledge ideally occurs in the context of respectful association. Here we find reflection of the historic virtues of the guild: self-government, dialogue, and continuous learning.

However, as John R. Commons argued, masters came under pressure in the early 1800s to treat their apprentices much less generously. Market competition stimulated a transformation of the workshop that limited upward mobility. Still, the democratic ideal of the workshop motivated labor reformers to challenge the encroachment of hierarchical corporations (Jacoby 1991).

One can find frequent references in the management literature to concepts of participative management that reflect the craft ideal (or honor it disingenuously). One can identify a “humanist-participatory” tradition with such exponents as Douglas McGregor honoring the possibility of workers expressing and elevating themselves through work. Similarly, business practitioners often pronounce themselves advocates of craft standards even as they choose less expensive and more profitable production strategies (Jacobs 2007). In fact, many contemporary management thinkers may make similar claims about the “flat” organization, but fail to note the additional layers associated with outsourcing.

To what degree is hierarchy a necessity in modern organizations? Curiously, neither left nor right is comfortable with direct embrace of hierarchy. Democracy or markets are invoked instead. I would argue that groups have the capacity to complete most tasks with a minimum of hierarchical control, as is evident in the performance of “learning organizations” and “autonomous working groups” (Smith 2001). Here I am influenced by John Dewey’s pragmatist optimism (see Jacobs 2013).

Several writers have illuminated the distinctive value of craft production and have inspired us to seek to redeem its utopian form. William Morris, a 19th century English artist, writer, and political activist, argued that every worker could be an artist, every product beautiful. He denied the necessity of subordinate labor and giant, impersonal enterprise:

It is right and necessary that all men should have work to do which shall be worth doing, and be of itself pleasant to do; and which should be done under such conditions as would make it neither over-wearisome nor over-anxious. (1973:111)

He celebrated the distinctive character of craft with these words:

The craftsman, as he fashioned the thing he had under his hand, ornamented it so naturally and so entirely without conscious effort, that it is often difficult to distinguish where the mere utilitarian part of his work ended and the ornamental began. Now the origin of this art was the necessity that the workman felt for variety in his work ... for it tamped all labor with the impress of pleasure. (102)

Morris described the ideal standards for work:

Nothing should be made by man's labour which is not worth making; or which must be made by labour degrading to the makers. (123)

No one who is willing to work should ever fear want of such employment as would earn for him all due necessities of mind and body. (127)

In his political writings, Morris insisted that the economy might be organized so as to maximize the role of craft and minimize the hierarchy and impersonality of the traditional factory. Certainly there is a utopian quality to Morris's vision of work. Curiously, though, it gains realism in the context of advances in our understanding of "neuroplasticity." The average human brain's capacity for learning and synaptic development suggests that each of us is able to practice a craft and to substitute collaboration for hierarchy. Repeated practice and increased experience, sometimes with the aid of technologies and expert systems, empower small groups to co-manage production of many kinds. It should no longer be controversial that elaborate hierarchies may be minimized (Sennett 2008).

Richard Sennett (2008) deepens our understanding of craft by stressing the importance of work by hand. Computer-aided design diminishes skill,

generates exactitude without human judgment. The physical practice of craft stimulates the development of the brain and enhances skill. The most tragic element of hierarchy is that it inhibits the function of the brain.

While Morris (1973) and Mills (1956) argued from a radical perspective, the concept of craft is widely supported. It is likely that most people would endorse the widest possible application of craft as a desirable and responsible form of enterprise. Even the leaders of giant corporations seek to fabricate a narrative of craftsmanship with which to clothe their global supply chains.

Charles Perrow (1990:22) denies that the craft trajectory was utopian:

[I]ndustrialization could have taken place under the more flexible and equitable inside contracting system; the craft system could have been preserved rather than destroyed; and different principles of organization could have survived that emphasized decentralization of control, profit sharing, output control rather than control by rules and regulations or direct controls, and so on. There were some attempts at alternative forms of production, such as the Utopian communities, and especially the producer cooperatives. But the latter could not survive in competition with competitive capitalism.

The giant corporations would probably not have established dominance without the connivance of the Supreme Court, which eviscerated anti-trust.

Moreover, there is a hidden empire of craft in the household. The household often mirrors the external hierarchies of the workplace, but the life-sustaining crafts of parenting, cooking, and homemaking may combine caring and creating in more autonomous ways. A family feast manifests the alternative logic of the home economy. It is crucial to recognize how widely relevant the logic of craft is. It exists wherever brother and sister, parent and child, teacher and student demonstrate mutual respect and aspire to collaboration. "Home economics" are not to be minimized.

The concept of craft can usefully be distinguished from the notion of entrepreneurship. Actually, entrepreneurship is an ambiguous idea that incorporates elements of craft but subordinates them to traditional notions of economic enterprise and hierarchy. The entrepreneur certainly creates and innovates but tends to impose costs on subordinates. The entrepreneur claims credit for taking risks and yet in many cases it is the employees who bear the greatest share of risk. Employee creativity and innovation are sacrificed at the pleasure of the entrepreneur, unless it is a collective form of entrepreneurship that distributes responsibility and discretion across the organization.

EXTENDING THE REACH OF CRAFT AND RESTORING LABOR POWER

What are the public policies that would advance craft and elevate labor? A broadened interpretation of the Thirteenth Amendment would, of course, help a great deal, but it will follow changes on the ground. Progressive labor standards are emerging, fitfully, on the local level. A few of these states and cities (for example, Vermont, New York City, and Cleveland) are seeking to develop networks of local and employee-owned enterprises to improve employment options of residents. To maximize the impact of these initiatives, the reform networks must build new connections across cities and states—and even with Canadian provinces. This means new associations of worker centers, federations of co-ops, “parliaments” of cities. The dignity of labor and the ideal of craft are critical to the argument to be made. Sympathetic businesses must also organize, perhaps through the Main Street Alliance, which is a vehicle for small businesses opposed to the extreme conservatism of the Chamber and ALEC (and founded to support health care reform).

The overwhelming public support (supermajorities: Oliphant [2013]) for an increase in the minimum wage across states and parties demonstrates that the protection of systems of servitude appeals to very few. Similarly, corporate gigantism has few defenders. This helps explain why living-wage campaigns by worker centers are bearing fruit. A growing movement to raise the minimum wage and require higher labor standards for government contractors will expose the problems of the low-wage sector. Conservative state governments will seek to pre-empt such policies, and the issue will be addressed by the courts. Perhaps these actions will provide an opportunity to revisit the Thirteenth Amendment. Whether or not this happens, corporations may be compelled to address wage issues more broadly (Greenhouse 2014).

Will there be a renewal of laborist capitalism or more divergence across the states? The future is yet to be made.

REFERENCES

- Arendt, H. 1958. *The Human Condition*. Chicago: University of Chicago Press.
- Balkin, J., and S. Levinson. 2012. “The Dangerous Thirteenth Amendment.” *Columbia Law Review*, Vol. 112, no. 7, pp. 1459–99.
- Bell, D. 1960. *End of Ideology: On the Exhaustion of Political Ideas in the 1950s*. Cambridge, MA: Harvard University Press.
- Cleveland, A. 1948. “NAM: Spokesman for Industry?” *Harvard Business Review*, Vol. 26, May, pp. 353–71.
- Greenhouse, S. 2014 (Jun. 26). “Ikea Plans to Increase Minimum Hourly Pay.” *New York Times* online. <<http://nyti.ms/1qWb5Qs>>
- Jacobs, D. 1999. *Business Lobbies and the Power Structure: Evidence and Arguments*. Westport, CT: Quorum Books.

- Jacobs, D. 2007. "Critical Biography and Management Education." *Academy of Management Learning & Education*, Vol. 6, no. 1, pp. 104–08.
- Jacobs, D. 2013. "Pragmatism, Social Reconstruction, and Organizational Theory." In M. Kelemen and N. Rumens, eds., *American Pragmatism and Organization: Issues and Controversies*. Farnham, UK: Gower.
- Jacoby, S., ed. 1991. *Masters to Managers: Historical and Comparative Perspectives on American Employers*. New York: Columbia University Press.
- Kaufman, B. 1993. *The Origins and Evolution of the Field of Industrial Relations in the United States*. Ithaca, NY: ILR Press.
- Kraft, M., and S. Kamieniecki. 2007. *Business and Environmental Policy: Corporate Interests in the American Political System*. Cambridge, MA: MIT Press.
- Laffer, A., S. Moore, and J. Williams. 2014. "Rich States, Poor States." ALEC. <<http://bit.ly/1ntTVbT>>
- Merritt, D. 1988. "The Guarantee Clause and State Autonomy: Federalism for a Third Century." *Columbia Law Review*, Vol. 88, no. 1, pp. 1–78.
- Mills, C.W. 1956. *White Collar: The American Middle Class*. New York: Oxford University Press.
- Morris, W. 1973. *Political Writings of William Morris*. New York: International Publishers.
- Oliphant, J. 2013 (Dec. 17). "Americans Broadly Support Minimum-Wage Hike." *National Journal* online. <<http://bit.ly/1rj7USd>>
- Olson, M. 1971. *The Logic of Collective Action: Public Goods and the Theory of Groups*. Cambridge, MA: Harvard University Press.
- Opala, J. 2003. *The Gullah: Rice, Slavery and the Sierra Leone—American Connection*. New Haven, CT: G. Lehrman Center for the Study of Slavery, Resistance, and Abolition, Yale University. <<http://bit.ly/U2qstr>>
- Perrow, C. 1990 (Oct.). *A Society of Organizations*. Estudio/Working Paper 1990/12. Center for Advanced Study in the Social Sciences of the Juan March Institute, Madrid, Spain.
- Piore, M. 1995. *Beyond Individualism*. Cambridge, MA: Harvard University Press.
- Sennett, R. 2008. *The Craftsman*. New Haven, CT: Yale University Press.
- Shaw, A., T. Meyer, and K. Barker. 2014. "How Dark Money Flows Through the Koch Network." Propublica.org. <<http://bit.ly/1m7T7Ez>>
- Smith, M.K. 2001. "Peter Senge and the Learning Organization." infed.org. <<http://bit.ly/1sbtr1s>>
- Storck, T. 2012. "Corporate Personhood and 14th Amendment Rights." *Crisis Magazine* online. <<http://bit.ly/1raAcNj>>
- Sturgeons, S. 2013. "Art Pope–Funded Group Launches Database Targeting Moral Monday Arrestees." Durham, NC: Institute for Southern Studies. <<http://bit.ly/1sQabnY>>
- Weil, D. 2014. *The Fissured Workplace*. Cambridge, MA: Harvard University Press.
- Weiser, W., and E. Opsal. 2014. "The State of Voting in 2014." New York: New York University School of Law Brennan Center for Justice. <<http://bit.ly/1raA9Bg>>

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