

THREE TRANSNATIONAL DISCOURSES OF LABOR LAW IN DOMESTIC REFORMS

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ABSTRACT

Current labor law debates, in the United States and elsewhere, reflect entrenched discursive positions that make potential reform seem impossible. This Article identifies and examines the three most influential positions, which it names the “social,” “the neoliberal,” and the “rights-based” approach. It shows that these discursive positions are truly transnational in character. In contrast with conventional wisdom, which accepts the incompatibility of these positions, this Article creates a conceptual framework that productively combines elements from each to enrich the debates over labor law reform and to foster institutional imagination. Applying this framework, the Article examines the collective bargaining systems of the United States and Mexico comparatively. It illustrates how the Mexican labor law regime could embrace the democratic aspirations of the rights-based position (dominant in the United States) without eliminating labor rules that facilitate collective bargaining. In contrast, the American labor law regime could embrace the aspirations of the social position (dominant in Mexico) to ease workers’ organization and facilitate collective bargaining, without undermining the system’s democratic character. This analysis draws attention to possibilities that have been forec-

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losed in each country and, by showing how they have been opened up elsewhere, suggests potential alternatives for institutional experimentation in domestic reform.

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1. INTRODUCTION

The recent financial crisis has brought the question of employment front and center. With record high unemployment rates,

there is consensus about the need to create jobs and help employees who have slipped out of the labor market. This includes asserting a role for the state in creating jobs that we have not seen in decades. Beyond this short-term consensus, however, there is still a gulf between economic actors' positions about how to best regulate our labor markets.

This Article posits that the current economic crisis should be taken as an opportunity to rethink our labor market institutions. As a first step, the crisis should give us an occasion to reexamine the entrenched positions in the debate about labor regulation. Consider the debate about the Employee Free Choice Act ("EFCA"),¹ with actors advancing positions that seem not only conflicting, but also irreducible. Both unions and employers advance their cause as a democratic one and tout each other as undemocratic. Employers depict unions as wanting to introduce coercive practices that would deprive workers of their right to privately vote whether they want a union.² Unions depict employers as perpetrating a system where workers cannot freely organize.³ Each of these actors also advances their position as the most economically beneficial for the country.⁴

¹ Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009). The Employee Free Choice Act ("EFCA") proposes to amend the National Labor Relations Act to eliminate the secret-ballot election in favor of card-check certification. The National Labor Relations Board ("NLRB") would recognize a union when the majority of employees have signed authorization cards designating the union as their representative. The bill also provides for first contract mediation or arbitration in case of disagreement and increased penalties to employers who engage in unfair labor practices.

² The U.S. Chamber of Commerce has strongly opposed the EFCA on the grounds that forcing workers to sign a card in public—instead of voting in private—opens the door to intimidation and coercion. See LABOR, IMMIGRATION & EMP. BENEFITS DIV., U.S. CHAMBER OF COMMERCE, THE EMPLOYEE FREE CHOICE ACT: PIERCING THE RHETORIC 13 (2009), available at <http://www.uschamber.com/reports/employee-free-choice-act-piercing-rhetoric> ("Should EFCA become law, the level and severity of union misconduct may be expected to increase dramatically—union cards would be the first, last and only method required for a union to gain certification, the 'be all end all' for unions.").

³ The AFL-CIO issued a statement in support of EFCA and warned against "corrupt, corporate bullies," who "have always opposed workers' rights, freedoms and advancement." Press Release, AFL-CIO Exec. Council, Emp. Free Choice Act (Mar. 3, 2009), http://www.aflcio.org/joinaunion/voicework/efca/executive_council_03-2009.cfm.

⁴ The AFL-CIO argues:

EFCA would restore workers' freedom to form unions and bargain by enabling workers to form unions without the fear, delay and coercion in-

The tensions evident in the debate about EFCA are not unique to the United States. The global economy has forced governments to think hard about how to reform their market and state institutions to better deal with the challenges posed by global competition. What, in this global economic context of flexible modes of production, should be the role of collective bargaining and protective labor standards? The recent economic crisis has merely exacerbated and brought these tensions more clearly to the surface all around the globe.

This Article provides a conceptual framework to understand current labor law debates. It examines three historically pervasive discursive positions that often frame and limit how the debate over labor regulation takes place. I call these rhetorical positions the "social," the "neoliberal," and the "rights-based" positions. The "social" position stands for the defense of current employment protection and labor standards as a matter of national sovereignty, cultural pride, and inherently progressive politics. The "neoliberal" position seeks to reform labor and employment legislation and introduce particular forms of flexibility deemed required by global economic competition. Finally, the "rights-based" position proposes to weaken the institutions of collective bargaining to promote individual rights that are considered inherent to democracy.

This Article shows that these positions exist and operate at the transnational level. There is a surprising similarity in the rhetoric used in diverse parts of the world to advance or to resist changes to their labor market institutions. This is true in the developed world as it is in the developing one. This similarity can be attributed to the transnational actors who promote each position. The social position has been traditionally advocated by the International Labour Organization ("ILO"), which was created after World War I to address the *labor question* in the face of industrialization. The ILO stands today as a unique, corporatist, international organization where each member-state is not represented solely by its govern-

herent in our current system. Majority sign-up is a long-established way to form a union, dating back to passage of the National Labor Relations Act. It is a process that allows workers to decide whether to form a union without the fear and coercion endemic in the current National Labor Relations Act process. It is used today by major employers, such as AT&T and Harley-Davidson, as an important part of their successful high-road business plans.

Key Facts, Employee Free Choice Act, AFL-CIO, <http://www.aflcio.org/joinaunion/voicework/efca/10keyfacts.cfm> (last visited Sept. 22, 2010).

ment but also by representatives of workers and employers. With numerous conventions and declarations, the ILO has stood for the protection and advancement of workers' welfare around the world.⁵

The neoliberal position has been advanced by international financial institutions ("IFIs") like the World Bank and the International Monetary Fund ("IMF"), as well as international organizations like the Organisation for Economic Co-operation and Development ("OECD"). The primary objective of this position has been to promote a particular form of flexibility in labor markets in order to promote job creation, reduce unemployment, and foster economic growth.⁶

Finally, the rights-based position has been promoted by international non-governmental organizations, and has aimed to reconceptualize labor rights as fundamental individual human rights that should enjoy universal observance.⁷ The ILO has also forcefully embraced an individual rights-based approach in the form of a

⁵ For more on the ILO's mission and organization, see *About the ILO*, INT'L LABOUR ORG., http://www.ilo.org/global/About_the_ILO/lang--en/index.htm (last visited Nov. 6, 2010). For an account of the ILO's history and recent changes, see Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649 (2006).

⁶ See ORG. FOR ECON. CO-OPERATION AND DEV., *THE OECD JOBS STUDY: EVIDENCE AND EXPLANATIONS AND FACTS, ANALYSIS STRATEGIES* 69 (1994) (discussing the importance of "labour market flexibility" for economic performance); ORG. FOR ECON. CO-OPERATION AND DEV., *THE OECD JOBS STUDY: FACTS, ANALYSIS, STRATEGIES* 2f (1994), available at www.oecd.org/dataoecd/42/51/1941679.pdf (last visited Nov. 7, 2010) (advocating working-time and labor cost flexibility as a strategy for growth).

⁷ See Virginia A. Leary, *The Paradox of Workers' Rights as Human Rights*, in *HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE* 22, 22-43 (Lance A. Compa and Stephen F. Diamond eds., 1996) (exploring the different positions taken by human rights activists and trade unionists on workers' rights). For examples of NGOs treating workers' rights as human rights, see HUMAN RIGHTS WATCH, *THE EMPLOYEE FREE CHOICE ACT: A HUMAN RIGHTS IMPERATIVE* (Jan. 27, 2009), available at <http://www.hrw.org/en/reports/2009/01/27/united-states-employee-free-choice-act>; HUMAN RIGHTS WATCH, *BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS* (Jan. 25, 2005), available at <http://www.hrw.org/en/reports/2005/01/24/blood-sweat-and-fear>. See also AMNESTY INTERNATIONAL, *DOCUMENT: FUNDAMENTAL RIGHTS AT WORK: AMNESTY INTERNATIONAL'S CONCERNS TO THE INTERNATIONAL LABOUR CONFERENCE (4-20 JUNE 2002, GENEVA)*, IOR 42/001/2002 (Apr. 29, 2002), available at <http://www.amnesty.org/en/library/info/IO42/001/2002> (addressing forced labor, discrimination, child labor, freedom of association and other country-specific labor concerns as human rights).

“core” labor rights agenda.⁸ On their part, the IFIs have recognized the importance of most core labor rights and deemed them to be compatible with the labor flexibility agenda.⁹

These positions are also visible in the debates about labor, market regulation, and human rights in Europe.¹⁰ The European Court of Justice has recently had to deal with a series of very contentious cases illuminating the tensions between fundamental market freedoms (promoted by neoliberals), such as freedom of movement, and a country’s regulation enabling its unions to protect their interests against non-union and foreign workers (endorsed by the social position).¹¹ In addition, the European Court of Human Rights

⁸ See ILO Declaration on Fundamental Principles and Rights at Work, ILO (June 18, 1998), available at <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm> (setting out member states’ commitment to the values of freedom of association and collective bargaining, and the eradication of forced labor, child labor, and discrimination). For a critical examination of the ILO agenda and the relationship between labor rights and fundamental human rights, see generally LABOUR RIGHTS AS HUMAN RIGHTS (Philip Alston ed., 2005).

⁹ See Kerry Rittich, *Core Labor Rights and Labor Market Flexibility: Two Paths Entwined?*, in LABOR LAW BEYOND BORDERS: ADR AND THE INTERNATIONALIZATION OF LABOR DISPUTE SETTLEMENT 157, 160 (Int’l Bureau of the Perm. Court of Arbitration ed., 2003). For an analysis of the treatment of human rights by international financial institutions, see Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 TRANSNAT’L L. & CONTEMP. PROBS. 47 (1996). See also Balakrishnan Rajagopal, *Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights*, 11 B.U. INT’L L.J. 81 (1993) (assessing the role and function of the IMF and its impact on human rights).

¹⁰ A 2006 Green Paper by the European Commission invited the reactions of a broad range of participants in labor market regulation. See *Commission Green Paper on Modernising Labor Law to Meet the Challenges of the 21st Century*, at 3, COM (2006) 708 final (Nov. 11, 2006) (“The purpose of this Green Paper is to launch a public debate in the EU on how labour law can evolve to support the Lisbon Strategy’s objective of achieving sustainable growth with more and better jobs.”). Most parties involved welcomed the initiative but employee unions highly objected to the Green Paper’s characterization of steady employment as inflexible. Employer representative bodies thought that flexibility had been given a negative connotation. See *Outcome of the Public Consultation on the Commission’s Green Paper “Modernising Labor Law to Meet the Challenges of the 21st Century*, SEC (2007) 1373 final (Oct. 24, 2007) (“Many employer bodies at EU, sectoral and national levels, while sharing many of the concerns put forward by the Green Paper, considered, however, that it had taken an overly negative view of flexible forms of work.”).

¹¹ The Court of Justice of the European Union has recognized the fundamental right of workers to take collective action; however this right is limited by the freedom of establishment under Article 49 of the Treaty on the Functioning of the European Union (“TFEU”) and the freedom to provide services under Article 56 of TFEU such that labor activity “restriction[s] . . . [must be] suitable for ensuring the attainment of the legitimate objective pursued [e.g. public policy such as workers rights] and [should] not go further than what is necessary to achieve that objective.” Case C-438/05, Int’l Transp. Workers’ Fed’n v. Viking Line ABP, 2007

(ECHR) has recognized the importance of individual human rights and their prevalence over group rights or labor rules aimed at improving conditions of workers as a whole.¹²

Similarly, the debate in China over the passage of the new Labor Contract Law exhibited a conflict between these three rhetorical positions.¹³ The government and the official union advanced the law as a necessary tool to prevent abuses and to benefit workers as a whole.¹⁴ The business groups argued that increasing labor

E.C.R. I-10779, I-10783. The 2006 Services Directive allowed member states to limit the free movement of service to protect national labor conditions, but further cases continue to stand for the proposition that workers rights are not paramount over other rights recognized as fundamental by European Union law. *See, e.g.,* Case C-319/06, *Comm'n v. Grand Duchy of Lux.*, 2008 E.C.R. I-4323 (holding that Luxembourg's implementation of the Posted Workers Directive hindered free movement of services by imposing compliance with rules agreed to by collective agreements recognized as nationally applicable); Case C-341/05, *Laval un Parteneri Ltd. v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767 (holding that the right of workers to strike did not trump the right of businesses to provide services in multiple countries); Case C-346/06, *Rüffert v. Land Niedersachsen*, 2008 E.C.R. I-1989 (holding that the freedom of workers to offer services was abridged by a mandated collectively agreed salary). *See also* Catherine Barnard, *Case and Comment, Social Dumping Or Dumping Socialism?*, 67 *CAMBRIDGE L.J.* 262 (2008) (summarizing and discussing the aforementioned cases).

¹² *See* *Wilson v. United Kingdom*, 2002-V Eur. Ct. H.R. 51 (2002), for a declaration by the European Court of Human Rights ("ECHR") that workers have a right to union organization for the purpose of collective bargaining under Article 11 of the European Convention of Human Rights. However, the ECHR has also recognized a parallel right not to associate, which undermines the existence of any "closed shops" in Europe. For a conclusion by the ECHR that dismissing employees because they refused to join a trade union violated Article 11 on freedom of association, *see* *Young, James and Webster*, 44 Eur. Ct. H.R. (ser. A) at 24-27 (1981). For an analysis of *Young, James and Webster*, *see* M. Forde, *The "Closed Shop" Case*, 11 *INDUS. L.J.* 1 (1982).

¹³ For an analysis of China's recently adopted regulation, *see* Sean Cooney et al., *China's New Labour Contract Law: Responding to the Growing Complexity of Labour Relations in the PRC*, 30 *U. NEW S. WALES L.J.* 786 (2007).

¹⁴ *See* NATIONAL PEOPLE'S CONGRESS STANDING COMMITTEE, *LABOR CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA* [Unofficial English Translation], art. 1 (International Publications 2007), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1026&context=intl> (last visited Nov. 7, 2010) ("This Law has been formulated to improve and perfect the labor contract system, to ... protect the lawful rights and interests of laborers and to build and develop harmonious and stable labor relationships."); Virginia E. Harper Ho, *From Contract to Compliance? An Early Look at Implementation under China's New Labor Legislation*, 23 *COLUM. J. ASIAN L.* 35, 68-71 (2009) (listing several improvements to workers' rights brought by the new law, including limits on terminations, broadening the role of unions, and mandatory contracts for all workers); *see also* David Barboza, *China Drafts Law to Empower Unions and End Labor Abuse*, *N.Y. TIMES*, Oct. 13, 2006, available at <http://www.nytimes.com/2006/10/13/business/worldbusiness>

standards would raise their costs, thereby reducing investment in the country and potentially forcing firms to move elsewhere.¹⁵ Some observers argued that the new law maintained or even increased the stronghold of the official union.¹⁶ It thereby prevents workers' effective freedom of association and curtails the formation of independent workers' organizations that are truly representative.¹⁷

In current scholarly and policy debates in the United States and elsewhere, these discursive positions are often advanced as irreducible and as though they necessarily cancel each other out. In contrast, this Article develops an analytical framework that challenges the necessity of such conflict and, instead, explores the way

/13sweat.html?pagewanted=1&r=1 ("China is planning to adopt a new law that seeks to crack down on sweatshops and protect workers' rights by giving labor unions real power.").

¹⁵ See Tim Costello et al., *Behind the Great Wall of China: U.S. Corporations Opposing New Rights for Chinese Workers*, GLOBAL LAB. STRATEGIES, http://laborstrategies.blogs.com/global_labor_strategies/files/behind_the_great_wall_of_china.pdf.

US-based global corporations like Wal-Mart, Google, UPS, Microsoft, Nike, AT&T, and Intel, acting through US business organizations like the American Chamber of Commerce in Shanghai and the US-China Business Council, are actively lobbying against the new legislation. They are also threatening that foreign corporations will withdraw from China if it is passed.

Id.; Li Jing, *China's New Labor Contract and Protection of Worker*, 32 FORDHAM INT'L L.J. 1083, 1108-10 (2009) (describing negative reaction of employers to the new law).

¹⁶ Michael Zhang, *Official trade union gets the cold shoulder from private firms*, CHINA LABOUR BULLETIN, Feb. 3, 2006 (describing legal and political hurdles to the formation of independent unions, including the official union's rejection of the idea of allowing workers the right to form their own unions). See also *China's New Labour Law*, THE ECONOMIST, Dec. 6, 2007, available at http://www.economist.com/node/10268128?story_id=10268128 ("The new law has been a boon to the [official union], . . . but . . . few expect it to emerge as a strident new champion of workers' rights. Independent trade unions will remain in effect illegal.").

¹⁷ IHLO, *Trade union concerns update: People's Republic of China*, Nov. 2008, available at <http://www.ihlo.org/LRC/W/001108.html> (last visited Nov. 7, 2010) (describing the law as boosting the role of the official trade union, rather than representatives and worker congresses, leading to an absence of truly independent organizations that in turn handicapped collective bargaining). See M.O., *China's New Contract Labor Law*, GLOBAL LAB. STRATEGIES, July 2007, available at http://laborstrategies.blogs.com/global_labor_strategies/2007/07/chinas-new-cont.html (last visited Nov. 7, 2010) (finding the new labor law flawed as "[i]t does not allow for freedom of association, the right to independent unions, or the right to strike—the core labor rights that workers everywhere have fought for over the last century").

in which each of these discursive positions can inform the others productively. The framework aims to enable an exploration of trade-offs in labor regulation and experiment with potential legal-institutional arrangements currently beyond our imagination.

To apply this framework, this Article focuses on the debates over labor regulation in Mexico and the United States. Each country is at a moment where reform seems both desirable but also highly contentious. The comparison of the collective bargaining systems in Mexico and the United States can shed light on how these three labor discourses have limited the debates about labor regulation in two different countries. While these systems belong to different political traditions of collective bargaining organization, these rhetorical positions are alive in both jurisdictions. Under this framework, however, each position has something to contribute to a broader—and more fertile—debate about the role of collective bargaining in a democratic society.

The Article consists of three parts. Part 1 offers a conceptual framework that identifies three discourses in labor law debates, which it names the “social,” the “neoliberal,” and the “rights-based” positions. This part also explores the transnational character of these positions. Part 2 examines how these positions constrain the debate. It focuses on the tension between labor rules that give unions considerable power, like the closed shop agreement, and the individual right to freedom of association. In contrast with conventional wisdom, which accepts the incompatibility of these positions, this Article shows that some elements of these approaches can be combined to enrich the debate and foster institutional imagination for reform.

Part 3 applies the proposed conceptual framework to compare the collective bargaining systems of the United States and Mexico. It examines how the Mexican labor law regime could embrace the democratic aspirations of the rights-based position (dominant in the United States) without eliminating labor rules that facilitate collective bargaining. In contrast, the American labor law regime could embrace the aspirations of the social position (dominant in Mexico) to ease workers’ organization and facilitate collective bargaining, without undermining the system’s democratic character. This analysis draws attention to possibilities that have been foreclosed in each country and shows how they have been opened up elsewhere. Based on this analysis, the Article suggests reform alternatives other than eliminating the closed shop in Mexico, which could satisfy the democratic aspirations of the rights-based posi-

tion without foregoing mechanisms that ease workers' ability to organize. Lastly, it considers the concerns of the neoliberal position and examines the potential effects of such alternatives on specific groups of workers as well as on the economy in general.

2. THREE DISCOURSES OF LABOR LAW

2.1. *Labor Law as a Social Project*

The first discursive position, which I call the "social," stands for the regulation of labor relations as a means to ensure workers' welfare and guarantee security and stability at the workplace. This body of state regulation emerged in the late nineteenth and early twentieth centuries as a reaction to the dramatic effects of industrialization, for which private law was no longer deemed well-suited. Social law was carved out as a new space in between the private sphere of civil society, consisting of market transactions and family relations, and the public sphere of government rule and civic affairs.¹⁸

The intellectual origins of social law can be traced back to Europe, and particularly to France and Germany at the end of the nineteenth century. A group of jurists criticized the liberal foundations of the legal system, which was deemed outdated and detached from economic and social conditions of the time. These jurists attacked the then-predominant legal reasoning for being too formalist and uninterested in the way law shaped social relations and construed social order. These scholars also claimed that contrary to what liberal jurists held, the legal materials and doctrines were not a body of coherent and consistent rules from which a determinate result could be obtained; rather, they were riddled with contradictions and incoherencies that made law open-ended.¹⁹ Labor law stood at the forefront of the "socialization" of law, carving out a new field out of private law, which formerly governed employer-employee relations.

¹⁸ I use the term "social," following Duncan Kennedy in *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19, 37-62 (David M. Trubek & Alvaro Santos eds., 2006).

¹⁹ François Gény in France and Rudolf von Jhering in Germany both developed poignant critiques of the highly formalistic nineteenth century jurisprudence, which then influenced American legal scholars. See *id.* at 46-50; Mathias Reimann, *Continental Imports - The Influence of European Law and Jurisprudence in the United States*, 64 *TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS* 391, 398-99 (1996).

The critiques and ideas advocating the creation of social law spread around Europe and eventually all over the world. Moreover, social law became influential in the regulation of international affairs. After World War I, the Western powers relied on ideas of social law when they proposed the ILO in the Treaty of Versailles, which ended the armed conflict in 1919.²⁰

Governments and elites all around the world came to regard social law as the type of law needed in modern society. Social law became equivalent to modern law, and it gradually displaced the old classical liberal law, associated with a bygone era. As governments embarked on projects of industrialization and greater state control of the economy, the new laws were introduced as foundational national projects claiming some kind of original and cultural connection with the society in question.²¹ In Mexico, for instance, some aspects of social law, like communal land tenure, were associated with the pre-Hispanic legal regimes. Labor rights were presented as a uniquely national and innovative project that crystallized in the 1917 Constitution.

In the United States, critiques of classical liberalism stemming from European social thought influenced the development of the labor movement in its industrial phase,²² even though the dominant influence continued to be the tradition of civil republicanism that informed trade unions in the post-bellum era.²³ While the AFL

²⁰ The ILO Constitution was first set out in Part XIII of the Treaty of Versailles, adopted at the Peace Conference in April of 1919. The Constitution's preamble noted that "conditions of labour exist involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled . . ." Constitution of the International Labour Organization, pmbl., June 28, 1919, 49 Stat. 2712, 2713-14, 225 Consol. T.S. 373, available at <http://www.ilo.org/ilolex/english/constq.htm>.

²¹ See Kennedy, *supra* note 18, at 48 (identifying a pattern of legal elites claiming that the social was "uniquely appropriate to the nation in question").

²² CHRISTOPHER TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, 52 ("[W]hile the labor movement's republicanism continued to develop there came a growing interest in the collectivist theories now radiating from the centers of European social democracy."). For more literature on the socialist influences of American progressives, see BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 6-7* (2001) and *infra* sources and text accompanying note 25.

²³ WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 17-24*, 51, 57 (1991) (arguing that the broad reform politics influenced by European social thought were always part of the American labor movement, but remained in the minority partly through the aggressive anti-union decisions

struggled to convince courts that the individualist version of 'liberty' they propounded through anti-union injunctions was a perversion of republicanism,²⁴ legal scholars were attacking classical liberal thought and proposing a new sociological jurisprudence attuned to their society's needs and practices.²⁵ These scholars argued that legal interpretation had to turn from formal logic and speculation to empirical studies and the work of the social sciences.²⁶ Following on their heel, the legal Realists, many of whom were influenced by institutional economics, whose tradition could be traced back to the German historical school of economics,²⁷ devoted their energies not only in critiquing classical liberal law, but in creating a new legal framework for administering labor conflicts through the New Deal's administrative agencies.²⁸ Thus, even though the New Deal was the result of particular on-the-ground facts and intellectual forces in the United States, its predominant ideology of serving the public interest through extensive

of the courts which forced the labor movement to narrowly concentrate on a voluntarist agenda).

²⁴ TOMLINS, *supra* note 22, at 62 ("Labor unions, [the AFL leadership] asserted, were essential to the survival of a truly republican polity in the United States. It was the judiciary which professed to deny this that threatened the survival of the republic, not the unions.").

²⁵ See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 101-02 (1921) ("We are getting away from . . . the conception of a lawsuit either as a mathematical problem or as a sportsman's game. . . . We are thinking of the end which the law serves, and fitting its rules to the task of service."); Roscoe Pound, *The End of Law as Developed in Juristic Thought*, 30 HARV. L. REV. 201, 203 (1917) (arguing that the law was reinterpreted as "removing or preventing obstacles to . . . individual self-assertion"); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) ("Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.").

²⁶ See, e.g., Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821-34 (1935) (postulating a "functional" approach to interpreting law that would take a multidisciplinary perspective); Karl N. Llewellyn, *Some Realism About Realism - Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1222 (1931) (examining the main tenets of the Legal Realist movement and remarking that ideas from other fields of thought, like the social sciences and physics, had "spilled" into the study of the law).

²⁷ For a thorough account of the relationship between legal realists and two different strands of institutional economics, see Daniel R. Ernst, *Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915-1943*, 11 LAW & HIST. REV. 59, 60 (1993).

²⁸ The legal realists were influenced by Thornstein Veblen's version of institutional economics and were therefore prone to acknowledging a much broader role for the state in the regulation of labor conflict. *Id.* at 61.

government intervention was quite resonant with the internationally prevalent ideology of the social.²⁹

The confrontation between the classical legal thinkers and the younger Legal Realists took place at the turn of the nineteenth century in the context of industrialization, economic change, and labor unrest. It is no coincidence that many of the paradigmatic cases of the time, which animated the Legal Realist agenda, were indeed disputes between capital and labor.³⁰ The Realists' agenda helped change the classical conceptions about the role of law in the economy and enabled a progressive political movement to enact social legislation in favor of workers, and to defend this program in the courts. The New Deal and its programs of social regulation, including prominent labor laws like the National Labor Relations Act ("NLRA"), indicate an influence of social law ideas in the United States.³¹

In terms of its political valence, social law was often considered a progressive or even radical project. This was not true everywhere, however, and indeed the social agenda took different orientations depending on each country's political context. Labor law regulations were introduced by left and right-wing governments, and the same under democratic and dictatorial regimes.³²

In Mexico, the social position was the predominant intellectual tradition in the twentieth century, which underpinned the renewal of the modern nation-state after the Revolution and permeated the country's political, economic and institutional life. Jurists and politicians criticized nineteenth century liberalism both because of its individualistic assumptions and because of its negative conse-

²⁹ See, e.g., NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 4-13 (2003).

³⁰ See, e.g., *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (striking down a law on bakers' working hours and beginning an era of attacks by the Supreme Court of the United States on social legislation on the grounds that such laws violated substantive due process); *Vegelehrn*, 44 N.E. at 1079-82 ("The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and general propositions of law which nobody disputes."). See generally Ellen M. Kelman, *American Labor Law and Legal Formalism: How "Legal Logic" Shaped and Vitiating the Rights of American Workers*, 58 ST. JOHN'S L. REV. 1 (1983) (tracing the centrality of legal formalist thinking in shaping American labor law).

³¹ See, e.g., Kennedy, *supra* note 18, at 42-54 (describing the influence of the social in legislation and the creation of welfare state institutions around the world, including the United States).

³² See *id.* at 47-50 (listing the various manifestations of the "social" globally).

quences, which they saw in the unjust distribution of wealth and power in society.³³

The traditional narrative in Mexico's labor law scholarship claims that the country's labor law is a national invention that responded to a radically progressive political project. This view holds that social law stemmed from the 1910 Mexican Revolution and was crystallized in the 1917 Constitution, the first social constitution of the world and the first ever to include workers' rights in its text.³⁴

Doctrinally, social jurists pushed for recognition that free will could not be the sole source of a legally binding obligation. In a contract between employers and workers, free will could not capture the considerably different bargaining power of both parties to the agreement, which often resulted in a coerced deal. They proposed a list of non-negotiable baseline rules and compulsory clauses to level workers' bargaining power vis-à-vis employers and guarantee a set of minimum benefits and working conditions. They also sought to expand employers' liability for accidents in the workplace, abandoning negligence and moving towards strict liability.³⁵

Social law underpins a great number of national institutions that form the Mexican welfare state, comprising workers' compensation, health insurance, retirement, and public housing. These institutions were at the core of social security.³⁶ They provided a

³³ See PASTOR ROUAIX, GENESIS DE LOS ARTICULOS 27 Y 123 DE LA CONSTITUCIÓN POLÍTICA DE 1917 (1959).

³⁴ Noted labor law scholars have strongly sustained this position. See, e.g., ALFONSO NORIEGA CANTÚ, LOS DERECHOS SOCIALES, CREACIÓN DE LA REVOLUCIÓN DE 1910 Y DE LA CONSTITUCIÓN DE 1917 [SOCIAL RIGHTS, A CREATION OF THE 1910 REVOLUTION AND THE 1917 CONSTITUTION] (1988); ALBERTO TRUEBA-URBINA, DERECHO SOCIAL MEXICANO (1978) [MEXICAN SOCIAL LAW]; LA PRIMERA CONSTITUCIÓN POLÍTICO-SOCIAL DEL MUNDO (1971) [THE FIRST POLITICAL-SOCIAL CONSTITUTION OF THE WORLD]. This view is shared by the labor law canonical text: MARIO DE LA CUEVA, EL NUEVO DERECHO MEXICANO DEL TRABAJO [THE NEW MEXICAN LABOR LAW] (13 ed. 1993).

³⁵ Socialization ran through all areas of private law as was clearly expressed in the new Civil Code of 1928. The Commission that wrote the Civil Code explained: "The law must be socialized. . . . The central philosophy that is present throughout the Draft may be briefly expressed in these words: to harmonize the individual interests with the social ones, correcting the excessive individualism which prevailed in the Civil Code of 1884." EXPOSICIÓN DE MOTIVOS DE LA COMISIÓN REDACTORA DEL CÓDIGO CIVIL DE 1928, CÓDIGO CIVIL PARA EL DISTRITO FEDERAL 7-37 (Editorial Porrúa, 69th ed., 2001).

³⁶ See 2 MARIO DE LA CUEVA, NUEVO DERECHO MEXICANO DEL TRABAJO 68-74 (Mexico 1979).

safety net for workers and were largely responsible for the emergence and expansion of a new middle class.

In the debate about the reform of labor law, the main goal of the positions associated with the defense of the current law is to preserve the stability and security of employment. The rules that make this regime possible are related to grounds for dismissal (termination of employment contract) and duration of the contract. This position favors protections against unjust dismissal, right to reinstatement or compensation upon dismissal, and employment for an indefinite term. In terms of working conditions, the rules support wages and promotion based on seniority, limited working hours per day, and double payment for extra-hours. Benefits include maternity leave, paid vacation and annual bonuses, among others.³⁷

There are several actors supporting the status quo or the reinvigoration of these laws as a defense of social institutions. Although these positions vary, the list includes political parties like the Partido Revolucionario Institucional ("PRI") and Partido de la Revolución Democrática ("PRD"); which are associated with a nationalist left-of-center political project; the traditional labor movement, represented by the Confederación de Trabajadores de México ("CTM"); independent unions; a fraction of employers; and a sector of the Catholic Church.

The "social" critique of the liberal state is not an exclusively politically progressive project. There is a longstanding intellectual tradition in the Catholic "social doctrine," which emphasizes interdependence and reconciliation—rather than struggle—between social classes, with important influence in Mexico.³⁸ A few notable corporate firms hold these beliefs dear and have long emphasized corporate social responsibility, advocating the familial nature of the firm. Some of these firms began to provide corporate welfare such as health insurance, retirement, and housing, even before the national social security system was put in place.³⁹

³⁷ See COMMISSION FOR LABOR COOPERATION, *COMPARATIVE GUIDES TO LABOR AND EMPLOYMENT LAW IN NORTH AMERICA* (2002) (analyzing the structure of current Mexican labor law and comparing it with the laws of the United States and Canada).

³⁸ See, e.g., GASTON GARCIA CANTU, *EL SOCIALISMO EN MEXICO. SIGLO XIX 172-79* (1969); VICENTE FUENTES DIAZ, *LA DEMOCRACIA CRISTIANA EN MÉXICO, ¿UN INTENTO FALLIDO?* (1972).

³⁹ See JOHN WALTON, *ELITES AND ECONOMIC DEVELOPMENT: COMPARATIVE STUDIES ON THE POLITICAL ECONOMY OF LATIN AMERICAN CITIES 168-72* (1977) (ex-

Claims defending the current labor system present it as inherently good, desirable, or justifiable largely because it is thought of as a national invention and as the result of the winner-take-all victory of a radical progressive political project.⁴⁰ Contrary to mainstream labor law mythology, however, a careful study of the relevant historical developments reveals both the foreign intellectual influence and the rather centrist compromise between the groups that created the labor law.⁴¹ Labor scholars have played a fundamental role in the construction of a traditional narrative that fantasizes about the original labor law as a radical body of rules. Thus, they reinforce the view that all would be well for workers if only we could make that law a reality, acting as if the substantive issues of the debate have already been resolved.

2.2. Neo-Liberalism or "Neo-Laborism" as a Development Project

The neoliberal discursive position emerged as a reaction to the social position. The neoliberal discourse advocates a very limited role for the state in the economy, and the labor market is no exception. According to the neoliberal position, most labor laws create distortions in the market that result in inefficient outcomes. However lofty its objectives may be, protective labor legislation hinders economic activity and ends up hurting workers and society as a whole.

Neoliberals have advocated a strong labor reform agenda aimed at curtailing "legal rigidities" to ensure employment flexibility and reduce costs on employers. The prevailing assumption is that decreasing costs on hiring and firing workers would increase firms' competitiveness and would generate more jobs to the benefit

aming the role of the industrialist firms in Monterrey, Mexico). See generally MICHAEL SNODGRASS, DEFERENCE AND DEFIANCE IN MONTERREY: WORKERS, PATERNALISM, AND REVOLUTION IN MEXICO, 1890-1950 (2003) (analyzing Monterrey's system of industrial paternalism).

⁴⁰ See CANTÚ, *supra* note 38, at 83 (1988).

⁴¹ See generally PASTOR ROUAIX, *supra* note 33; Duncan Kennedy & Marie-Claire Belleau, *François Gény aux États-Unis*, in FRANÇOIS GÉNY, MYTHE ET REALITÉS: 1899-1999 CENTENAIRE DE MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF, ESSAI CRITIQUE 295 (2000) (analyzing the nature of the "centrist compromise" in projects of reconstruction of the legal system around the idea of the "social"); KEVIN J. MIDDLEBROOK, THE PARADOX OF REVOLUTION: LABOR, THE STATE, AND AUTHORITARIANISM IN MEXICO (1995) (analyzing the labor law movement's formation in Mexico).

of the most vulnerable groups in society.⁴² The proposed rules seek to establish at-will employment contracts, no right for reinstatement or compensation upon dismissal, temporary employment contracts, and trial periods. As for working conditions, proposed rules seek individualization of wages, promotion based on merit rather than seniority and flexibility in working hours.

The neoliberal position is associated with the intellectual tradition of the Chicago School of Economics in the United States. This approach had a profound influence on legal thought and legal scholarship. A number of legal scholars working in this tradition attacked the New Deal legislation, prominently its labor and employment laws, for their allegedly inefficient and wasteful outcomes.⁴³

Neoliberal thought replaced the post-World War II Keynesian consensus in the United States and at the same time had a profound influence abroad.⁴⁴ International institutions, emboldened by several crises in the developing world and the collapse of communism, advanced the neoliberal model as the recipe for development. As part of the model, international institutions recommended deregulation of labor laws to make them more flexible.⁴⁵

⁴² This position was articulated by international development institutions like the World Bank. See THE WORLD BANK, WORLD DEVELOPMENT REPORT 1995: WORKERS IN AN INTEGRATING WORLD 109-11 (1995) (arguing that “[i]ncreasing labor market flexibility” is an effective response to aid workers displaced by massive employment restructuring by “[f]acilitating labor mobility,” “[m]aking relative wages more flexible,” and “[b]reaking the link between social services and employment”). See also THE WORLD BANK, DOING BUSINESS 2004: UNDERSTANDING REGULATION: 30-33 (2004) [hereinafter DOING BUSINESS 2004] (arguing that employment regulations that facilitate flexible hiring and firing have better economic effects).

⁴³ See, e.g., Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1357 (1983) (arguing that New Deal legislation should be “scrapped in favor of the adoption of a sensible common law regime relying upon tort and contract law”); Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 990 (1984) (arguing that labor law can be best understood as a device for facilitating the cartelization of the labor supply by unions).

⁴⁴ See YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002) (examining how “northern exports” like neoliberal economic theory and international human rights law have been received in Latin America).

⁴⁵ See, e.g., THE WORLD BANK, WORLD DEVELOPMENT REPORT 1995: WORKERS IN AN INTEGRATING WORLD, *supra* note 42, at 109-11 (arguing the benefits of deregulation through regional examples); THE WORLD BANK, DOING BUSINESS 2006:

The neoliberal position in Mexico has been largely heralded as a critique of the labor regulation and labor institutions put in place by the nationalist regime that followed the Mexican Revolution. Its advocates argue that the country's process of economic integration with North America and its insertion in the global economy require specific changes in its labor law. According to this view, current labor law is excessively protectionist and out of touch with modern forms of production. It curtails productivity, competitiveness and ultimately prevents economic growth. Labor relations should be governed by the will of the parties in the employment relationship, unencumbered by state regulation requiring specific terms in the employment contract. If job stability is in the interest of the employee, he or she will negotiate it in the employment contract.⁴⁶ Advocates of this position deem social regulation to be passé and outdated. They argue that labor regulation needs to be reformed if the country ever aspires to become "modern" and wishes to participate competitively in the global economy. This critique portrays current regulation as pre-modern and the proposed reforms as the path to a modern economy.⁴⁷

Supporters of this position include political parties like the Partido Acción Nacional ("PAN") and an important fraction of the PRI (which has advocated market-oriented reforms). Among the staunchest supporters are employers, who advocate reform as the key to higher productivity and international competitiveness. Despite powerful critiques of the "Washington consensus" model of economic development⁴⁸ and of the impact of labor flexibility on

CREATING JOBS 26 (2006) (advocating the adoption of flexible employment regulation reforms in order to enhance business activity).

⁴⁶ See generally GUSTAVO R. VELASCO, LABOR LEGISLATION FROM AN ECONOMIC POINT OF VIEW (B.A. Rogge ed., 1973) (forcefully articulating these arguments in the case of Mexican labor regulation)

⁴⁷ Advocates of this position, however, forget that labor law and social legislation more broadly represented the modern position. Labor regulation was introduced as a reaction to the old liberal regime of the nineteenth century and it was indeed successful at modernizing the economy. Thus, the neoliberal position is subject to a symmetrical challenge that its proposals date back from the nineteenth century and are old-fashioned, far from representing the path to modernity.

⁴⁸ See, e.g., DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? (Inst. for Int'l Econ. 1997) (arguing that in its current form globalization may lead to domestic social disintegration and does not guarantee positive economic results); JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (W.W. Norton & Co. 2003) (analyzing the negative social and economic effects of the set of reforms associated with the neoliberal economic model).

job creation and economic growth,⁴⁹ proponents of the neoliberal position treat their arguments as uncontroversial.⁵⁰

2.3. *Individual Rights as a Proxy for Democracy*

This discursive position emphasizes individual rights as the paragon of individual autonomy. In the context of collective bargaining, this position advances the enjoyment of individual rights as a proxy for democracy. This position has shed light on the perils that collective action poses for individual freedom. It has called attention to the ways workers' organizations—and state regulation enabling them—can disregard effective representation and hinder individual liberty in the name of welfare gains. For advocates of this position, negative freedom, the right that neither the state nor a third party interferes with one's entitlements and choices is a paramount consideration and cannot be compromised. Indeed, a pervasive interpretation of the individual right to freedom of association as negative has severely undermined workers' ability—their right—to bargain collectively.

This position is often associated with a libertarian philosophical tradition, which has had influential followers in legal scholarship

⁴⁹ See Richard B. Freeman, *Labour Market Institutions Without Blinders: The Debate over Flexibility and Labour Market Performance*, 19 INT'L ECON. J. 129, 129-30 (2005) (arguing that the debate over whether labor institutions impair aggregate performance is inconclusive); Richard B. Freeman, *War of the models: Which labor market institutions for the 21st century?*, 5 LABOUR ECONOMICS 1, 1-24 (1998) (analyzing various models of labor market regulation and their different benefits). For an empirical analysis across countries, see DEAN BAKER ET AL., *Labor Market Institutions and Unemployment: Assessment of the Cross-Country Evidence*, in FIGHTING UNEMPLOYMENT: THE LIMITS OF FREE MARKET ORTHODOXY 72, 72 (David R. Howell ed., 2005) (discussing findings in several time series models, which conclude that institutions which adversely affect aggregate outcomes are not robust. Models that cover more years, countries, and measures than earlier studies "provide little support for those who advocate comprehensive deregulation of . . . labor markets." See also DAVID DE FERRANTI ET AL., *INEQUALITY IN LATIN AMERICA: BREAKING WITH HISTORY?* 271-75 (World Bank 2004) (analyzing theoretical debates and empirical disagreements concerning public employment schemes and select social assistance programs); ORG. FOR ECON. CO-OPERATION & DEV., *EMPLOYMENT OUTLOOK 1999* (1999).

⁵⁰ See WORLD BANK, *DOING BUSINESS 2010: REFORMING THROUGH DIFFICULT TIMES* 22-23 (2009) [hereinafter *DOING BUSINESS 2010*] (insisting on the need to make labor regulation more flexible to achieve better economic performance). For a critique of the Doing Business methodology and reform recommendations, see Alvaro Santos, *Labor Flexibility, Legal Reform and Economic Development*, 50 VA. J. INT'L L. 43 (2009).

and economics.⁵¹ Indeed, neoliberal advocates often embraced this libertarian position since they regarded almost all types of government intervention not only as highly inefficient, but also an affront to individual liberty. However, it is important to distinguish between the normative aspirations of the neoliberal position, efficiency or wealth maximization, and the libertarian ones, individual liberty, because they do not necessarily go in tandem. Although they are often intertwined, the relevance of each of these positions varies according to context.

In the United States, the rights-based position is strong and has exerted considerable influence in shaping the current collective bargaining system. Indeed, in the name of individual freedom, labor law protections of collective interests and group rights have been diminished since the passage of the NLRA both through courts and through legislation.⁵²

A case in point is union-security agreements, such as the closed shop, the union shop and the agency shop, which unions negotiate with employers to require union membership or financial contributions from employees as a condition of employment.⁵³ All forms of

⁵¹ See generally RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992) (advocating the repeal of anti-discrimination laws in the workplace because the laws create tension between groups, lead to inefficient employment practices, result in more invidious discrimination that they prevent, and impose limits on individual freedom of choice); Richard A. Epstein, *In Defense of the Contract at Will*, in *LABOR LAW AND THE EMPLOYMENT MARKET: FOUNDATIONS AND APPLICATIONS* 3, 6-7 (Richard Epstein & Jeffrey Paul eds., 1985) (arguing against the widely-held view that the contract at will has outlived its usefulness and stating that such notions restrict individual autonomy); FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (50th Anniv. ed. 1994) (criticizing government intervention from a libertarian perspective).

⁵² See, e.g., Reuel Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism and the Waning of Union Strength*, 20 *BERKLEY J. EMP. & LAB. L.* 1, 67 (1999) (analyzing a shift in judicial attitude in the balance between individual rights and the rights of unions. While initially sympathetic to the rights of unions, after World War II courts increasingly protected the rights of individual workers at the expense of organized labor). Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 *B.C. L. REV.* 125, 138 (2003) (stating that the courts have narrowed the initially broader meanings of the Act, thus leaving workers less protected); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 *MINN. L. REV.* 265, 292 (1978) ("In a number of cases, the Court overruled the decisions of the [National Labor Relations] Board . . . and thereby pushed the law in a markedly different political direction.").

⁵³ The closed shop is an agreement between an employer and a union that requires union membership as a condition of employment. Under the closed shop, employers hire only union members and terminate employees that leave the

union-security agreements have been eroded by legislative and judicial action.⁵⁴ Initially recognized by the NLRA⁵⁵, the closed shop was later prohibited by the Taft-Hartley Act.⁵⁶ The Supreme Court subsequently weakened union-security agreements by stripping down membership in union shops to its “financial core,” effectively reducing the membership obligation to the payment of union dues.⁵⁷ The Supreme Court further limited the financial core obligation to collective bargaining activities prohibiting unions to spend fees of objecting nonunion employees on other union activities that may advance the economic interests of workers, such as

union or are expelled from it. The union shop requires an employee to become a union member after a certain period upon being hired as a condition of continued employment. The agency shop requires an employee to contribute fee payments as a condition of employment. For a description of these types of union-security agreements and their implications, see THOMAS HAGGARD, *COMPULSORY UNIONISM, THE NLRB, AND THE COURTS: A LEGAL ANALYSIS OF UNION SECURITY AGREEMENTS* (1977).

⁵⁴ There is a line of judicial decisions addressing the union and agency shop agreements where the Supreme Court narrowly construed legislation involving collective rights and focused on the protection of individual rights. See *Ry. Emp. v. Hanson*, 351 U.S. 225 (1956) (recognizing the validity of the “union shop” but finding that the compulsory union membership extended only to financial support of the union in its collective bargaining activities); *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740 (1961) (construing the Railway Labor Act to deny unions the authority to expend union dues of dissenting employees in support of political causes to which those employees objected); *NLRB v. General Motors*, 373 U.S. 734 (1963) (construing compulsory union “membership” to include only payment of agency fees by non-members, where this is not prohibited by state right-to-work laws); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (ruling, in the public sector context, that union expenditures outside of fees for collective bargaining, over the protests of involuntary dues payers, interfered with their First Amendment rights and was unconstitutional); *Comm’n Workers of Am. v. Beck*, 487 U.S. 735 (1988) (construing the NLRA to deny unions the authority to expend union dues of dissenting employees beyond those “necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative”); *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991) (limiting further the permissible uses of union expenditures of dissenting fee-payers in the public sector). The *Lehnert* Court explained that “Chargeable activities must (1) be ‘germane’ to collective bargaining activity; (2) be justified by the government’s vital policy interest in labor peace and avoiding ‘free riders’; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.” *Id.* at 519.

⁵⁵ National Labor Relations Act § 8(a)(3), 29 U.S.C. §§ 151-169 (2006).

⁵⁶ The Taft-Hartley Act amended and narrowed §8(a)(3) of the NLRA to allow unions and employers to require “as a condition of employment [union] membership on or after the thirtieth day following the beginning of such employment...” Taft-Hartley Act of 1947, 29 U.S.C. § 141.

⁵⁷ *NLRB v. General Motors*, 373 U.S. 734 (1963).

lobbying for labor legislation.⁵⁸ Enabled by the Taft-Hartley Act, several states have altogether banned any type of union-security agreements through legislation commonly referred to as "right-to-work laws."⁵⁹

The story of the judiciary's transformation of union-security agreements is familiar in other areas of labor law, where courts have woven a labor law regime that many scholars now deem hostile to unions and the labor movement.⁶⁰ Indeed, some scholars attribute the dramatic decline in unionization rates, from 40% after World War II to about 10% today, to management opposition enabled by the legal regime.⁶¹ Similarly, scholars attribute a "representation gap" between the number of workers who are currently union members and those who would like to be part of a union to an unfavorable legal system.⁶²

This rights-based position is highly visible today in the debate generated by the proposed EFCA. Employers vehemently oppose it on the grounds that recognizing a system of card-check to ascertain whether a majority of employees in a firm want to unionize will undermine individual workers' right to choose freely, guaranteed by the current obligation to hold an election. Employers have therefore accused unions of attempting to impinge upon individual freedom and have touted the bill as anti-democratic. Opponents know that this bill will facilitate workers' organization and their ability to form unions. They seem to resist the bill not only because

⁵⁸ *Comm'n Workers of America v. Beck*, 487 U.S. 735 (1988). This restriction has imposed very onerous bookkeeping requirements on unions to make sure that money from objectors is not used to pay for expenses deemed impermissible.

⁵⁹ Currently, twenty-two states have passed right-to-work laws. *Right to Work States*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND. <http://www.nrtw.org/rtws.htm> (last visited Nov. 7, 2010).

⁶⁰ See, e.g., James G. Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004-2005)

⁶¹ Richard B. Freeman, *What do Unions Do? The 2004 M-Brane Stringtwister Edition*, in WHAT DO UNIONS DO?: A TWENTY-YEAR PERSPECTIVE 607, 627-629 (James T. Bennett & Bruce E. Kaufman eds., 2007); RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 66-67 (Cornell Univ. Press 1999) [hereinafter WHAT WORKERS WANT] ("In the aftermath of World War II . . . Some 40 percent of private-sector workers were organized into unions. . . . Unions [today] represent less than 10 percent of private-sector workforce . . .").

⁶² See Richard B. Freeman, *Do Workers Still Want Unions? More Than Ever* (Econ. Pol'y Inst., Briefing Paper No. 182, Feb. 22, 2007, available at <http://www.sharedprosperity.org/bp182/bp182.pdf>). See also Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUMBIA L. REV. 1527, 1528 (2002).

of the economic losses it may represent, but also because of the bill's alleged affront to individual freedom.

Internationally, the individualistic, rights-based position has gained considerable prominence. This position has gained sway in a variety of international courts in the world, including the European Court of Human Rights ("ECHR"). In a string of relatively recent cases, the ECHR has stripped down union security rules that gave workers power to organize and bargain collectively. In the name of the negative right of freedom of association, the ECHR has practically dismantled the UK's closed shop rule.⁶³

The turn to individual rights, however, has not been limited to the libertarian position. Seeking to regain visibility in the international debate about labor standards in the face of a strong neoliberal, deregulatory agenda, the International Labour Organization ("ILO") articulated a powerful rights-based agenda. This program, included in the 1998 Declaration of Fundamental Rights and Principles at Work, put forth a list of four core labor rights.⁶⁴ The ILO proposed these rights as universal; a minimum baseline to be observed everywhere in the world. A number of scholars have described this core agenda as too narrow, effectively giving up on a more robust promotion of workers' rights and labor standards around the world.⁶⁵ Nevertheless, speaking of labor rights as hu-

⁶³ See Sorensen and Rasmussen v. Denmark, Eur. Ct. H. R. 1, 27 (2006) (holding for the applicants, who complained that the existence of closed shops ran contrary to Article 11 of the European Convention of Human Rights); see also Virginia Mantouvalou, *Is There a Human Right Not to Be a Trade Union Member? Labour Rights Under the European Convention on Human Rights*, in HUMAN RIGHTS AT WORK: PERSPECTIVES ON LAW AND REGULATION 439 (T. Novitz & C. Fenwick eds., 2010).

⁶⁴ See *ILO Declaration on Fundamental Principles and Rights at Work*, supra note 8 (stating that these rights include freedom of association and collective bargaining, prohibition of forced labor, prohibition of discrimination, and prohibition of child labor. The right to freedom of association, as articulated by the ILO, is totally compatible with laws that give prominence to the negative right to freedom of association even when they undermine workers' ability to organize).

⁶⁵ For a critique of the core labor rights strategy, see Philip Alston, *'Core Labour Standards' and the Transformation of the International Labour Rights Regime*, 15 EUR. J. INT'L L. 457 (2004). For a reply, see Brian Langille, *Core Labour Rights - The True Story* (Reply to Alston) 16 EUR. J. INT'L L. 409, 427-37 (2005). See also Michael J. Piore & Andrew Schrank, *Trading Up: An Embryonic Model for Easing the Human Costs of Free Market*, BOSTON REV., Sept.-Oct. 2006, available at <http://bostonreview.net/BR31.5/pioreschrank.php> (critiquing the ILO's minimalist "core" labor standards agenda and calling on the Organization to take a more active role in developing regulatory practices that can mediate between the market and social needs).

man rights has been an effective way of talking about protections for workers in scholarly, activist, and policy-making circles.

The view that labor rights are human rights has been proposed by a variety of NGOs and civil society groups, such as student movements and consumer campaigns.⁶⁶ This view has enthusiastically been embraced and advanced by labor movements around the world. Furthermore, in an unusual alliance with civil society groups, international financial and development institutions have also embraced it, showing that they see these minima of rights as compatible with a flexible labor market.⁶⁷

In the case of Mexico, which has only recently begun a democratic transition, the appeal to individual rights has become common currency. The rights-based position constrains the debate by assuming that democracy and the democratic transition require a self-evident set of changes. The gradual transition to a fully democratic political system since 2000 has been accompanied by an emphasis on the importance of rights. Democracy in the labor system has come close to being equated with the right to freedom of association, which has been the basis for complaints before international and national fora.

In the debate concerning labor law reform, individual rights have become a proxy for democracy and have thus been portrayed as incompatible with institutions of the bequeathed corporatist labor system. The context of the Mexican political transition to democracy has made it very difficult to articulate criticisms of rights or of their dominant interpretations that are considered inherent to democracy. Despite the historical contingency of these rights, critiques to their current formulation are interpreted as an attack on

⁶⁶ See Leary, *supra* note 7, at 22 (arguing that workers' rights are human rights despite the lack of attention given to the rights of workers by the international human rights movement).

⁶⁷ See, e.g., Rittich, *supra* note 9, at 157 ("This paper . . . juxtaposes those efforts [to enhance labor protection in the global economy through the recognition of core labor rights] with the simultaneous effort of the international financial and economic organizations to promote market flexibility."); *DOING BUSINESS 2010*, *supra* note 50, at 22.

The ILO core labor standards—covering the right to collective bargaining, the elimination of forced labor, the abolition of child labor and equitable treatment in employment practices—are fundamental principles. The Doing Business employing workers indicators are fully consistent with the core labor standards but do not measure compliance with them.

Id.

democracy itself. This attitude hinders further investigation of their effects on workers. In the most notorious national case declaring closed shop agreements unconstitutional, the Supreme Court of Mexico held that the right to belong to an association "is exercised by each worker individually."⁶⁸ The potential impact of this decision may be enormous as it provides an incentive for employer anti-union practices. However, under the light of democratic transition, the overwhelming interpretation of labor scholars is that this reform will free the worker from union oppression and terminate the alliance of union leaders with the government in return for political positions.⁶⁹

In light of the reform alternatives, the closed shop is associated with its current institutional form and despised as anti-democratic. This effect precludes the institutional experimentation with the closed shop set against a different group of legal arrangements. However, in a world unrestrained by these discursive positions, we could imagine a collective bargaining regime that disentangles the union system from government control, and radically democratizes its internal organization while maintaining automatic unionization.⁷⁰ The result could be a comprehensive union scheme that could greatly increase the bargaining power of workers.

2.3.1. *The Mobilization of Democracy by Labor Actors*

The discussion about the democratic character of current labor law in Mexico is carried out between those who want to democratize the collective bargaining system in the country and those who prefer the status quo.⁷¹ Currently, those actors who want to change

⁶⁸ See *Semanario Judicial de la Federación y su Gaceta*, Novena Época, Tomo XII, Mayo de 2001, Tesis 2ª. LVII/2001, at 321; see also Victor Fuentes, *The Court puts an end to compulsory unionization*, REFORMA, Apr. 18, 2001.

⁶⁹ See, e.g., PATRICIA KURCZYN AND MARÍA CARMEN MACÍAS VÁZQUEZ, *LIBERTAD SINDICAL: CLÁUSULA DE EXCLUSIÓN* (2002).

⁷⁰ See generally Tamara Lothian, *The Political Consequences of Labor Law Regimes: The Contractualist and Corporatist Models Compared*, 7 CARDOZO L. REV. 1001 (1986) (proposing a hybrid between the Brazilian and the American labor models: the combination of the American, contractualist type of union organization, independent from government, with the Brazilian, corporatist type of automatic unionization).

⁷¹ See Graciela Bensusán, *Alternancia política y continuidad laboral: las limitaciones de la propuesta del CCE/CT*, in REFORMA LABORAL: ANÁLISIS CRÍTICO DEL PROYECTO ABASCAL A LA LEY FEDERAL DEL TRABAJO (2003) (analyzing the various labor law reform proposals and comparing the position of the most important unions, employer associations, and political parties over time); see also Graciela Ben-

the collective bargaining system include independent unions—which have split from the main corporatist union federations, non-governmental organizations (“NGOs”), and the PRD.⁷² Participants in the camp who prefer the status quo in this respect include the traditional corporatist unions such as the Confederación de Trabajadores de México (“CTM”) and, Confederación Revolucionaria de Obreros y Campesinos (“CROC”), several employer associations such as the Consejo Coordinador Empresarial (“CCE”), Confederación Patronal de la República Mexicana (“COPARMEX”), and Confederación de Cámaras Industriales (“CONCAMIN”), as well as political parties such as Partido de la Revolución Institucional and Partido Acción Nacional.⁷³

Those who want to effect change, but find the national labor institutions inaccessible or biased against them have tried to mobilize international support for their cause. NAFTA’s Labor Side Agreement is perhaps the best example of an international forum that has helped independent unions and labor-related NGOs to gain visibility and voice their grievances. Though it has been justly criticized for having highly ineffective enforcement mechanisms,⁷⁴

susán, *La reforma de la legislación laboral* (1988-2001), Nov. 21, 2001, <http://www.unt.org.mx/lft/reformalab.htm> (last visited Sept. 27, 2010) (proposing labor law reform); Enrique de la Garza Toledo, *La disputa por la Nueva Ley Federal del Trabajo*, in MÉXICO: HACIA UNA REFORMA INTEGRAL DEL ESTADO. PROPUESTAS Y ALTERNATIVAS 367 (Jorge A. Calderón and Alejandra Tello eds., 2005) (comparing the main labor law features between Mexico, the United States and Canada and discussing the ongoing labor law debate in Mexico); Enrique de la Garza Toledo, *Reflexiones acerca de la Reforma Laboral*, in ECONOMÍA, TEORÍA Y PRÁCTICA 92 (UAM 2004) (tracing the main agendas of employers, unions and the government in the long debate about labor law reform).

⁷² See generally Unión Nacional De Trabajadores & Partido de la Revolución Democrática, *Propuesta de la Unión Nacional de Trabajadores: Anteproyecto Reforma Ley Federal Del Trabajo*, June 2002, <http://www.unt.org.mx/lft/proprelft.htm> (last visited Sept. 27, 2010) (presenting the Labor Law Reform proposal by the Unión Nacional de Trabajadores (“UNT”) and Partido de la Revolución Democrática (“PRD”) in October 2002, with the support of several representatives from PRI, PAN, and PT).

⁷³ In 1995, the PAN presented to Congress an initiative for labor reform, prepared by Néstor de Buen and Carlos E. de Buen Unna, which sought to democratize the collective bargaining system. The proposal later lost the party’s support and since the PAN won the presidency in 2000, it has allied with the traditional corporatist unions, proposing a labor law reform that favors their interests. See generally *Appendix* in LA REFORMA LABORAL QUE NECESITAMOS: ¿CÓMO TRANSITAR A UNA AUTÉNTICA MODERNIZACIÓN LABORAL? (José Alfonso Bouzas Ortiz, coord., 2004).

⁷⁴ See Rainer Dombois et al., *Transnational Labor Regulation in the NAFTA - A problem of Institutional Design? The Case of the North American Agreement on Labor*

it has nevertheless served to mobilize transnational alliances and solidarity between unions and NGOs in Mexico and the United States. At its best, this forum has functioned as a mechanism for shaming Mexican labor institutions' ineffectiveness or blatant denial of justice as well as the traditional unions' abusive, gendered and illegal labor practices.⁷⁵

The substantive framework of the North American Agreement on Labor Cooperation ("NAALC")⁷⁶ is premised, generally, on rights⁷⁷ and, specifically, on individual rights.⁷⁸ Workers' organi-

Cooperation Between the USA, Mexico and Canada, 19 INT'L J. COMP. LAB. L. & INDUS. RELATIONS REL. 421, 434-35 (2003) ("[C]omplainants and their transnational networks frequently get caught in a trap of disillusionment . . . it should be clear that the institutional design puts specific limitations to the regulatory power and effects of the NAALC."); CANADA/MEXICO/UNITED STATES PUBLICATIONS, HUMAN RIGHTS WATCH, TRADING AWAY RIGHTS: THE UNFULFILLED PROMISE OF NAFTA'S LABOR SIDE AGREEMENT, April 2001, Vol. 13, No. 2(B), available at <http://www.hrw.org/en/reports/2001/04/01/canadamexicounited-states-trading-away-rights-unfulfilled-promise> (analyzing the structural weaknesses of the NAALC system, the timid use by the parties, the failure to institute sanctions against alleged labor rights violators in any of the twenty three complaints, and proposing reforms).

⁷⁵ See Lance Compa, *NAFTA's Labor Side Agreement and International Labor Solidarity*, 33 ANTIPODE 451, 453-54 (2001):

The NAALC is not a full-fledged international enforcement mechanism. Instead, [it] is intended as a review mechanism by which member countries open themselves up to investigation, reports, evaluations, recommendations, and other measures so that, over time, such enhanced oversight and scrutiny will generate more effective labor law enforcement.

Id.; Lance Compa, *NAFTA's Labour Side Agreement Five Years On: Progress and Prospects for the NAALC*, 7 CAN. LAB. & EMP. L. J. 1, 8-17 (1999) (detailing cases involving alleged workers' rights violations in Mexico); MARIA LORENA COOK, THE POLITICS OF LABOR REFORM IN LATIN AMERICA: BETWEEN FLEXIBILITY AND RIGHTS 189-90 (2007) (discussing NAFTA's agreement on labor issues, the NAALC, that "enabled citizens of Mexico, Canada, and the United States to file complaints relating to governments' ineffective enforcement of labor legislation . . . in many instances the use of the NAALC drew attention to persistent labor rights violations, and in some cases the publicity itself helped to end abusive practices.").

⁷⁶ North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 I.L.M. 1499 (1993), available at <http://www.naalc.org/naalc/naalc-full-text.htm>.

⁷⁷ This shift from a regulatory to a rights-based approach has permeated practically all areas of labor law. See, e.g., Michael Lynk, *Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in the Canadian Workplace*, in THE LAW SOCIETY OF UPPER CANADA, SPECIAL LECTURES 2007: EMPLOYMENT LAW (R. Echlin & C. Paliare eds., 2007) (noting how the conceptualization of disability and its remedies has shifted from welfare entitlements to individual rights).

⁷⁸ For a review of the NAALC, see Stephen F. Diamond, *Labor Rights in the Global Economy: A Case Study of the North American Free Trade Agreement*, in HUMAN

zations have complained of the many hurdles they face when trying to unionize or bargain collectively. The obstacles range from government institutional delays, aggressive resistance by traditional unions and employer anti-union practices. These grievances are often expressed as violations of the right to freedom of association.⁷⁹

The independent unions' agenda consists of demands directed against traditional unions, employers, and the government. To a great extent, independent unions and workers' organizations have come to see their democratic agenda as encompassed by the right to freedom of association. In their view, if the right to freedom of association were guaranteed, the conditions they seek would be greatly advanced. Their resort to the NAFTA mechanisms can be explained, at least partly, by the gridlock of national institutions—dominated by the unholy alliances between traditional labor, employers, and the government—which preserves the status quo. This gridlock explains the efforts of independent unions and sympathetic NGOs to frame their agenda around rights comprised in ILO conventions, and to demand their compliance as a matter of international law by which Mexico is bound.⁸⁰

In a relatively recent example, an alliance of independent Mexican unions and sympathetic unions and NGOs from the United States and Canada brought a claim before the NAALC's office in the United States. They argued that the labor law reform proposed by then President Fox breached several of Mexico's international

RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 199 (Lance Compa & Stephen Diamond, eds. 1996).

⁷⁹ See HUMAN RIGHTS WATCH, *supra* note 74, at 38:

By far, more NAALC cases have included allegations of violations of the right to freedom of association and the right to organize than any other labor principle recognized by the accord: fifteen out of twenty-three. In the NAALC context, ten cases have been aired in which Mexico has been accused of failing to effectively enforce its laws protecting freedom of association and the right to organize.

Id.

⁸⁰ A Supreme Court decision put an end to a long controversy about the hierarchical status of international treaties in domestic law. The court decided that international treaties—signed by the President and ratified by the Senate according to Article 133 of the Constitution—have primacy over federal legislation but are hierarchically inferior to the Constitution. See *Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo: X, Noviembre de 1999, Tesis P. LXXVII/99*, at 46.

obligations, most notably the right to freedom of association.⁸¹ Even though the independent unions initially participated in the discussions and negotiations of the proposed reform, they withdrew early, alleging that their interests were not represented. The U.S. government dismissed the petition and eventually the labor reform initiative failed in the Mexican Congress. The independent unions' sense of desperation brought about by the closure of national institutions and their marginalization is quite clear in the petition. Equally clear is their strategic use of international mechanisms, however ineffective they ultimately proved to be, to make their case domestically.

My point is that as helpful as a rights-based strategy has been in advancing the democratic agenda, it remains limited. It is perhaps a necessary component under current conditions, but it should not come to define the goals of or constitute the main aspirations of the agenda. This is especially so because the restrictive way in which freedom of association has been interpreted (freedom to associate equals freedom not to associate) threatens to delegitimize not just the corrupt cooptation of union leadership by the government and employers, but also the union powers that independent unions might themselves eventually need to invoke (such as the right to force workers to pay dues). It might be in the interest of workers to keep some of the existing rules that empower them vis-à-vis employers and focus instead on changing the legal and institutional context that makes those rules work in such undemocratic ways. So, the effort could be directed towards disentangling the unions' governance institutions from government control, or towards establishing conditions of fair competition among unions.

Consider for a moment an agenda that, instead of rallying around the right to freedom of association, focused on experimenting with the combinations of institutions and rules that can better

⁸¹ See U.S. NAO Public Submission US2005-01 from the Washington Office on Latin America, to U.S. Dep't of Labor, Bureau of Int'l Labor Affairs (Feb. 17, 2005), available at <http://www.dol.gov/ilab/media/reports/nao/submissions/Sub2005-01.htm> (requesting that, *inter alia*, the U.S. National Administrative Office work with the Mexican government to eliminate alleged NAALC violations in the labor law reform proposal); see also Letter from José Miguel Vivanco, Executive Director, Americas Division of Human Rights Watch, and Carol Pier, Labor Rights and Trade Researcher for Human Rights Watch, to Mexico's Chamber of Deputies, (February Feb. 9, 2005), available at <http://hrw.org/english/docs/2005/02/09/mexico10156.htm> (alleging that the reform proposal "not only fails to remedy key shortcomings in Mexican labor law, but it weakens existing protections").

guarantee conditions for unions' democratic life. By what yardstick will we measure democracy in the workplace? What are the effects and benefits we foresee in terms of workers' participation in their unions internal organization and in their unions' negotiations with management? What sort of remedies must be made available for workers against unions, for unions against other unions, and for unions against employers? This is a hard discussion to articulate, or even imagine, in terms of rights, let alone the right to freedom of association.⁸²

3. THE LIMITS OF THE LABOR LAW DEBATE AND THE NEED FOR A NEW ANALYTICAL FRAMEWORK

In this section, I illustrate the limits of these dominant discursive positions through an analysis of the closed shop agreement. The closed shop represents an extreme version of a labor law rule that has triggered much discussion and has polarized scholars, political parties, and a variety of actors in the labor market. This example illustrates how the discursive positions I have described frame the public discussion and foreclose an analysis that could look more carefully at the potential effects of reforms. Equally important, I argue that by framing the debate around these rigid positions, the realm of the possible appears as a menu of ready-made alternatives, which precludes a more imaginative debate that can lead to institutional innovation.

3.1. *Illustrating the Constraints in the Current Debate: The Constitutionality of the Closed Shop*

The discussion about democracy in labor relations has been largely carried out in the language of rights, and it is framed as an argument about the nature of constitutional rights. A prominent example is the controversial question of whether the exclusion

⁸² There are various private associations devoted to addressing these questions. The Association for Union Democracy, for instance, a non-profit association devoted to promoting union internal democracy and fighting union corruption throughout North America has an agenda that focuses on participation, freedom of press and representation in the everyday life of the unions. They provide advice to unions on how to strengthen democratic life within the union, focusing on fair and frequent elections, access to information, leadership accountability, and several other internal aspects of union life. See THE ASS'N FOR UNION DEMOCRACY, <http://www.uniondemocracy.org/index.htm> (last visited Nov. 7, 2010).

clause—which enables the closed shop⁸³—is consistent with the constitutional right to freedom of association.

A few years ago, Mexico's Supreme Court declared that the Federal Labor Law rule enabling the inclusion of the closed shop in collective agreements was unconstitutional because it violated workers' right to freedom of association.⁸⁴ In that case, the Court decided that the rule violated the negative aspect of that right. If and when that decision becomes binding,⁸⁵ it will severely undermine a rule giving workers considerable power against employers. The court determined that this right guarantees every worker the freedom to become part of a union, withdraw from a union, or not associate at all.⁸⁶

Advocates of the rights-based position oppose the closed shop agreement, arguing that it violates the individual right to freedom of association. Their view is that individual rights should prevail and that the Court does well in restricting any legislative clause that impinges upon individual liberty. The neoliberal position also

⁸³ Article 395 of the Federal Labor Law ("FLL") enables workers and employers to stipulate two types of clauses in collective contracts, commonly known as exclusion clauses. In the first clause (exclusion clause by admission), the employer agrees to hire union members exclusively. By virtue of the second clause (exclusion clause by separation, hereinafter "closed shop"), the employer agrees to dismiss workers who resign from the union or are expelled from it. See Ley Federal del Trabajo [LFT] [Federal Labor Law], art. 395, Diario Oficial de la Federación [DO], 1 de Abril de 1970 (Mex.).

⁸⁴ The Court held that Articles 395 and 413 of the Ley Federal del Trabajo ("LFT") are unconstitutional in their section enabling the establishment of the *exclusion clause by separation* in collective agreements. The Court declared that such provisions violate Articles 5, 9 and 123, title A, section XVI of the Political Constitution of the United Mexican States. Amparo directo en revisión 1124/-2000. See Abel Hernández Rivera y otros, Suprema Corta de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XII, Mayo de 2001, Tesis 2a. LVII/2001, Página 321 (Mex.).

⁸⁵ For a decision to become binding precedent upon all other tribunals, it needs to establish "jurisprudencia," which is formed when five subsequent decisions establish the same criterion of interpretation. See Ley Organica del Poder Judicial de la Federación [LOPJF] [Organic Law of the Federal Judiciary], as amended, Artículo Transitorio Decimo Quinto, Diario Oficial de la Federación [DO], 26 de Mayo de 1995 (Mex.). Jurisprudencia can also be established when the plenary of the Supreme Court resolves contradictory rulings by Supreme Court Chambers or by inferior courts. For an excellent discussion on how jurisprudencia is formed, see STEPHEN ZAMORA ET AL., MEXICAN LAW 84-87 (2004).

⁸⁶ See Amparo directo en revisión 1124-2000. Abel Hernández Rivera y otros, Suprema Corta de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XII, Mayo de 2001, Tesis 2a. LVII/2001, Página 321, 426 (Mex.).

opposes the closed shop as a mechanism that increases unionization rates and leads to inefficient outcomes. It must be noted, however, that opposing the closed shop is also in tension with the neoliberal defense of freedom of contract since a ban on the closed shop is an imposition on the unions' and employer's ability to contract.

In contrast, those espousing the social position usually support the closed shop. They argue that the Mexican Constitution should be interpreted in light of its underlying social objectives. Thus, collective rights should take precedence over individual rights. Supporters of the closed shop concede that the closed shop agreement impinges upon the individual right to freedom of association. However, in light of the constitution's social objectives, the closed shop agreement should be deemed consistent with a collective right to freedom of association and it should prevail even if it impinges upon individual rights. They point to much earlier Supreme Court decisions where this was indeed the predominant position.⁸⁷ Nevertheless, after years of the social interpretation's dominance, the winds now fill the sails of those favoring the precedence of individual rights.

Thus, the discussion about the closed shop revolves mainly around whether the different labor actors favor or resist democracy. Not much attention is given to whether eliminating the rule would facilitate or obstruct economically efficient outcomes or enhance workers' tangible freedom—both important concerns of the neoliberal position—or what effect eliminating the rule would have on workers' abilities to organize and voice their demands—of interest to advocates of the social position. The criterion to decide whether the rule enhances or hinders democracy seems to be based on whether the rule is constitutional or not. Under this standard, a labor law reform that eliminates the rule would be pro-democratic whereas one that keeps the closed shop would be deemed as corporatist or anti-democratic.

⁸⁷ There are more than sixteen decisions in which parties sought the Court's protection of their constitutional rights, allegedly breached in the application of the closed shop agreement, but in which the constitutionality of the closed shop was not challenged. These cases reveal the overwhelming extent to which the closed shop was assumed to be considered constitutional by both courts and lawyers since at least 1943. See *generally* Amparo directo en revisión 1124-2000; Abel Hernández Rivera y otros, Suprema Corta de Justicia [SCJN] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo XII, Mayo de 2001, Tesis 2a. LVII/2001, Página 321, 415-24 (Mex.).

It seems hard to move away from the narrowness of the rights-based position. As it is currently articulated, it promises to break up the corporatist heritage of present institutions but at the same time runs the risk of importantly weakening workers' power and capacity to organize. Moreover, these changes could also translate into deeper economic insecurity for large groups of workers and there is no guarantee that the economic effects for the country will be positive. The following section will show the rights-based positions' conceptual problems and suggest a better way to pursue the democratic aspiration while foregoing that position's current limitations.

In my view, the democratization of collective bargaining institutions should be embraced wholeheartedly. There is no reason why the manifestation of society's democratic ideals should be limited to periodic elections for government positions, the internal life of political parties, and their competition for public office. This democratic aspiration should reach the workplace. It should seek to transform the governance structure of firms making the workplace a meaningful sphere of action, where workers can participate in decisions, develop skills, and find personal fulfillment in the work they do. Furthermore, I do not support the closed shop per se, and if nothing were to change in the current Mexican collective relations system, I think abolishing this institution would probably enhance democracy. However, the knee-jerk rejection against the closed shop is a symptom of the poverty of our debate about democracy, rather than the solution that would advance it.

3.2. A Critique of the Equation of Democracy with the Right to Freedom of Association

By and large, scholars have taken the terms of the debate for granted and discussed the closed shop in terms of whether it is constitutional or not, and more concretely, whether it violates the right to freedom of association. Most scholars have argued that the court is right and that the decision is constitutional, with rare notable exceptions. However, this debate has been largely unproductive, with advocates and opponents ruminating over the nature of rights and fighting over which side holds the correct interpretation.

The Supreme Court pointed out several times in the Abel Hernández Rivera case that it was deciding a hotly contested issue

through an exercise of judicial interpretation.⁸⁸ While the Court admitted that it was deciding an issue for which the Constitution provided no definite answer, it nevertheless portrayed its interpretation as politically neutral and as coherent with the Mexican constitutional system. Alleging that it was interpreting the general principles of law contained in the Constitution and Mexican labor laws, the Court arrived at conclusions that were the polar opposites of what those very principles had been held to mean for decades.

The court explicitly refused to engage in questions of policy. It refused to consider claims defending the purpose of the closed shop agreement in light of its application in labor relations. Similarly, it declined to analyze the likely consequences of altering or eliminating the closed shop in the present case as well as in future cases. The Court stated that the foreseeable “abusive” conduct that could occur in the “incorrect” application of the constitution or when it was interpreted against its “authentic” meaning could not be considered in the analysis. These potential consequences were completely ignored in the legal analysis of the constitutionality of the laws in question.⁸⁹

The Court’s position in this case can be understood as a reaction against decades of governance by a State-party political regime that was able to exercise enormous control through legal mechanisms like the one the Court is reviewing. In the whole decision, there is only a brief passage where the Court refers to policy considerations. The Court considers arguments against preserving the closed shop referring to “[Union] leaders who seek only their personal benefit and not that of workers, which can be

⁸⁸ The Court laid out what it considered the correct method of constitutional interpretation. It affirmed that in order to decide whether the disputed provisions of the Labor Law breached the Constitution, they should be confronted with the relevant constitutional provisions and their legal interpretation. This required referring to the text of these constitutional provisions as well as to their meaning. This implies that meaning should be revealed by referring to the link between these provisions and other related provisions, previous judicial decisions, and the main principles governing Mexican labor law. In this interpretative process, the Court held that attention should be paid to the Constitutional Assembly and the legislator. The Court also noted that legal scholars’ writing can be helpful, especially when they are coherent with the previous elements. *See* Suprema Corta de Justicia [SCJN] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo XII, Mayo de 2001, Tesis 2a. LVIII/2001, Página 442 (Mex.).

⁸⁹ *See* Suprema Corta de Justicia [SCJN] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo XII, Mayo de 2001, Tesis 2a. LVII/2001, Página 322, 439-40 (Mex.).

reflected politically through mechanisms of corporatist manipulation.⁹⁰

The Court also referred to the potential consequences of eliminating the closed shop, such as the weakening of unions, which “could be used by firms to the detriment of workers”.⁹¹ To be sure, the Court vehemently emphasized that these effects should not be taken into account when deciding whether to keep or dispose of the closed shop.

In this section, I offer a critique of the constitutional rights framework based on legal realist analysis and public choice theory. The legal realist analysis explains the incompleteness and indeterminacy of the claim of unconstitutionality while public choice explains why workers actually need the closed shop if their right to freedom of association is to be meaningful. Both aspects of this analysis are based on U.S. scholarship, which has grappled with similar problems. In the United States, the closed shop has been significantly weakened on rights-based grounds, but there remains a lively scholarly tradition critiquing these grounds from which we can gain insight in order to evaluate the merits of the rights-based objection to the closed shop.

3.2.1. *Legal Realist Analysis*

The rights-based framework of analysis is likely to prove particularly unhelpful, in the larger – and more important – quest for a democratic workplace. The association of particular rights with freedom and democracy relies on a formalistic understanding of law that assumes that it is possible to deduce a determinate outcome from an abstract right and then equates that outcome with individual freedom and democracy. Using a legal realist approach,⁹² I critique the conflation of rights with democracy, instead

⁹⁰ See Suprema Corta de Justicia [SCJN] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta, Novena Época*, tomo XII, Mayo de 2001, Tesis 2a. LVII/2001, p. Página 322, 440 (Mex.) (author’s translation).

⁹¹ *Id.*

⁹² My analysis draws from the American legal realist tradition, challenging the possibility of a Langdellian legal science in which “correct” legal outcomes could be “discovered” or obtained from abstract legal principles. See generally Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); *Id.* *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894-1895) (criticizing “hollow deductions from empty general propositions”); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821-34 (1935); Llewellyn, *supra* note 26 at 1222; see also *Vegeahn v. Guntner*, 44 N.E. 1077, 1080 (1896) (Holmes, J., dissenting); Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27

suggesting that rights, and particularly the right to freedom of association, do not dictate the wholesale rejection of the closed shop per se.

Legal theory has long made us aware that rights are not absolute. They do not translate into absolute entitlements that all parties enjoy simultaneously at all times in a seamless world. Rather, rights consist of a "bundle" of entitlements whose enjoyment often brings parties into conflict with one another. Rights are relational. As with the analysis of any right, the real interest lies in the different entitlements that each party derives from it. In the case at hand, the right of a group of workers to unionize and to guarantee their continued association through the closed shop conflicts with the rights of those workers who do not want to unionize. In turn, by exercising their entitlement to not associate, those workers jeopardize the entitlement of the workers who want to unionize but fear employers' reprisal or discharge. The abstract right of everyone's freedom of association does not resolve the issue, and there is no way of deducing a concrete "correct" answer from this general right.

Besides analytical indeterminacy, this approach can backfire from a strategic point of view when workers start demanding the inclusion of rules or compulsory clauses in the employment contract deemed to increase their bargaining power vis-à-vis employers. Such clauses can just as likely be considered unconstitutional because they would violate the employers' right to freedom of contract. No doubt such restrictions impose limitations on employers' liberties. However, they do so aiming to guarantee workers' enjoyment of their liberties, when material conditions and the parties' asymmetry of bargaining power would otherwise render workers' liberties null. Indeed, the whole creation of labor legislation is a prime example of the recognition that freedoms, and their particular expressions, such as freedom of contract, are not absolute but relational. Thus, to articulate a democratic agenda solely in terms of rights is to reenergize a blind faith in the equation of formal rights with individual freedom, the limits of which labor legisla-

YALE L.J. 779 (1917-1918) (illustrating in two labor injunction cases how a policy decision was reached supposedly on merely logical grounds); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913-1914) (developing an analytical framework to challenge common misuses of logical deduction and clarify the relational character of rights and other legal entitlements); Kelman, *supra* note 30.

tion set out to expose a century ago. But more importantly, it is an agenda that might not deliver.

These policy questions are unavoidable, and courts and legislators will confront them, no matter how thickly veiled. By deciding whose right to freedom of association gets priority, the court is deciding these policy questions. Resorting to rights' interpretation does not end the political disagreement, as is made clear by the conflicting positions on what the constitutional right to freedom of association is supposed to mean. It only takes the debate to the rights' arena, where parties are compelled to channel their viewpoints in terms of plausible interpretations of the right to freedom of association.

However, an important gain from having a debate about labor reform is precisely to debate questions about the consequences and desirability of collective bargaining institutions openly. We should argue about the potential effects of keeping or eliminating the closed shop on different groups of workers and types of firms, rather than reproduce a discussion by reference to rights that does more to eschew than confront the choices and alternatives at hand.

Unfortunately, many legal scholars have generally followed suit, accepting the courts' terms and engaging in a debate as to whether the closed shop violates the constitutional right to freedom of association.⁹³ An important number of scholars agree with the court on the unconstitutionality of the closed shop.⁹⁴ A notable exception is Néstor De Buen, a preeminent labor law scholar, who has argued that the closed shop is constitutional. But most notable is his willingness to talk about the closed shop's effects. Thus, he has criticized the court for doing a very poor legal analysis but nevertheless celebrated the outcome of the decision. According to De Buen, "the exclusion clauses are constitutional but they are also a disgrace."⁹⁵ In this form, De Buen might be articulating what

⁹³ See, e.g., *LIBERTAD SINDICAL: CLÁUSULA DE EXCLUSIÓN* (Patricia Kurczyn and María Carmen Macías Vázquez eds., Univ. Nacional Autónoma de México, 2002).

⁹⁴ See Néstor de Buen, *Notas Perversas Sobre Una Ejecutoria Mal Concebida Sobre Cláusulas de Exclusión*, in *LIBERTAD SINDICAL: CLÁUSULA DE EXCLUSIÓN* 5, 20–25 (Patricia Kurczyn and & María Carmen Macías Vázquez eds., 2002) (analyzing the opinions of several noted labor scholars—before and after the court's decision—who think the closed shop is unconstitutional). See also José Manuel Lastra Lastra, *Inconstitucionalidad de la Cláusula de Exclusión*, in *LIBERTAD SINDICAL: CLÁUSULA DE EXCLUSIÓN* 39, 53–55 (Patricia Kurczyn & María Carmen Macías Vázquez eds., 2002) (sampling opinions on union-security agreements).

⁹⁵ Néstor de Buen, *supra* note 73, at 25 (author's translation).

many scholars think but do not want to say in the current debate. His most important critique is that the closed shop has enabled a corporatist alliance between employers and the leadership of traditional unions, with the government's approval and even encouragement, at the expense of workers.⁹⁶ Thus, De Buen regards the elimination of the closed shop as an important step toward decentralization of unions' power and the strengthening of union democracy.⁹⁷ But this view, and alternatives to it, about economic and social consequences of particular institutions can hardly be debated by reference to rights.

3.2.2. *Public Choice Theory Analysis*

To understand why the closed shop is so important to unions we need to look at the kinds of goods that unions provide. In *The Logic of Collective Action*, the late economist Mancur Olson explains that unions provide "public goods" that create a free-rider problem. This problem can be effectively addressed by the closed shop. For Olson, compulsory unionization is, in fact, a coercive mechanism but is also indispensable for unions' success and crucial to unions' existence. Furthermore, this compulsion is necessary for any organization that seeks to provide public or collective goods, because otherwise no individual would have incentives to contribute to the provision of goods that she would get regardless of her efforts. Olson remarks:

This general reliance on compulsory membership should be expected, for labor unions are typically large organizations that strive for benefits for large or latent groups. A labor union works primarily to get higher wages, better working conditions, legislation favorable to workers, and the like; these things by their very nature ordinarily cannot be withheld from any particular worker in the group represented by the union. [. . .] It follows that most of the achievements of a union, even if they were more impressive than the staunchest unionist claims, could offer the rational worker no incentive to join; his individual efforts would not have a

⁹⁶ *Id.* at 19.

⁹⁷ Néstor de Buen authored a constitutional amendment to Article 123A and a labor law reform proposal with Carlos E. de Buen Unna for PAN, presented on July 12th, 1995, in which both types of exclusion clauses were eliminated. See LA REFORMA LABORAL QUE NECESITAMOS, *supra* note 73.

noticeable effect on the outcome, and whether he supported the union or not he would still get the benefits of its achievements.⁹⁸

According to Olson, compulsory unionization was key to unions' growth in numbers and geographic influence and contributed to their success in becoming national organizations.⁹⁹ It is often argued that compulsory unionization undermines individual freedom. But the question should not be whether compulsory unionization restricts individual freedom—it certainly does—but rather, whose freedom does it restrict? Assume a unionized firm where there is no closed shop rule. There are a considerable number of workers who choose not to join the union. Imagine that the union goes on strike to demand better working conditions. If non-unionized workers decide to break the strike, union workers will be coerced to end the strike and forego better working conditions or lose their jobs. Non-unionized workers will have plenty of incentives to break the strike. For instance, they will not need to forego wages, which will probably become higher, and they are also likely to receive luring offers from employers to continue working. Thus, just as compulsory unionization coerces workers who otherwise would choose not to join the union, a prohibition against compulsory unionization coerces unionized workers to end strikes or settle for less than they would otherwise choose to.¹⁰⁰

⁹⁸ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 76 (2nd ed. 1971).

⁹⁹ See *id.* at 69 (“Compulsory membership . . . can account for the viability of the later, larger, national unions that the local unions ultimately created.”).

¹⁰⁰ See *id.* at 71 (“Should it be surprising, then, that coercion should be applied to keep individual workers from succumbing to the temptation to work during the strike?”); see, e.g., *Pattern Makers League of North America v. NLRB*, 473 U.S. 95 (1985) (ruling that workers can resign membership in their union at any time without penalty—even during an active strike—notwithstanding limits on resignation set forth in union governing documents). Justice Blackmun’s dissenting opinion sheds light on the Court’s reorientation toward individual rights at the expense of collective rights envisioned by the NLRA:

By focusing exclusively on the right to refrain from collective active, by assuming an arid and artificial conception of the proviso circumscribing that right, and by ignoring Congress’ intentions in promulgating the NLRA in the first instance, the Board and the Court abandon their proper role as mediators between any conflicting interests protected by labor laws. In the name of protecting individual worker’s rights to violate their contractual agreements, the Court debilitates the right of all workers to take effective collective action.

Pattern Makers League, 473 U.S. at 113 (J. Blackmun, dissenting).

In the United States, the claim that compulsory unionization undermines workers' freedom-of-association rights is usually framed in terms of workers' right to work. State laws prohibiting compulsory unionization are thus typically referred to as right-to-work laws. The right-to-work argument, Olson notes, relies on an analogy with private business and the underlying profit motive that animates businessmen and consumers. The idea is that just as a "firm must please its customers if it is to retain their patronage," a union should be able to resist the test of an open shop and attract potential members based on its performance and the goods it offers.¹⁰¹ But if that profit motive also stimulates workers, "the enforcement of 'right-to-work' laws would bring about the death of trade unions."¹⁰² No rational worker would willingly contribute to a union providing a collective benefit, since its individual contribution would not seem to make a difference and he would be able to enjoy the benefit anyway.¹⁰³ Thus, Olson dismisses the arguments against compulsory unionization that are based on "rights:"

Arguments about compulsory union membership in terms of "rights" are therefore misleading and unhelpful. There are of course many intelligent arguments against unions and the union shop. But none of them can rest alone on the premise that the union shop and other forms of compulsory unionism restrict individual freedom, unless the argument is extended to cover all coercion used to support the provision of collective services. There is no less infringement of "rights" through taxation for the support of a police force or a judicial system than there is in a union shop. Of course, law and order are requisites of all organized economic activity; the police force and the judicial system are therefore presumably more vital to a country than labor unions. But this only puts the argument on the proper grounds: do the results of the unions' activities justify the power that society has given them? The debate on the

¹⁰¹ Olson, *supra* note 98, at 88.

¹⁰² *Id.*

¹⁰³ See OLSON, *supra* note 98, at 88; Michael H. Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 100 YALE L.J. 2767, 2789-90 (1991) (arguing that the "public goods" nature of a variety of workplace goods would warrant imposing collective bargaining decisions, or state regulation, on non-consenting employees in order to reach efficient outcomes).

“right-to-work” laws should center, not around the “rights” involved, but on whether or not a country would be better off if its unions were stronger or weaker.¹⁰⁴

One might still argue that coercion by the government should be permissible whereas coercion by a union—a private entity—should not. But this is not an important distinction. The government is capable of providing non-collective goods, such as those traditionally provided by private enterprise without curtailing economic freedom. The crucial distinction, therefore, lies not on the character of the entity providing the good—whether it is public or private—but on the nature of the goods provided—whether they are collective or not.¹⁰⁵

There have been important theoretical responses to Olson’s analysis since the publication of *The Logic of Collective Action*. The most powerful ones rely on behavioral experiments that challenge the assumption that individuals are self-interested wealth-maximizers. Games have shown that individuals are willing to cooperate at the expense of greater potential personal benefits they would obtain from free-riding if they chose not to cooperate.¹⁰⁶ However, several studies suggest that the level of free-riding is higher in right-to-work states than in those that allow union-security agreements, seeming to confirm Olson’s analysis.¹⁰⁷ Higher levels of free-riding translate into lower demand for union membership, and higher costs for union members, potentially hindering union growth. In right-to-work states, unions are legally

¹⁰⁴ OLSON, *supra* note 98, at 88–89.

¹⁰⁵ *See id.* at 96. It is worth noting that in the United States, courts have long-considered the free-rider theory as a reason to support some form of union-security agreement. *See, e.g.,* *Railway Employees v. Hanson*, 351 U.S. 225 (1956); *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

¹⁰⁶ *See* Benjamin L. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685 (2007–2008) (discussing social science data that seems to challenge Olson’s theory); *see also* Ernst Fehr & Urs Fischbacher, *The Economics of Strong Reciprocity*, in *MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS OF COOPERATION IN ECONOMIC LIFE* 151, 165 (Herbert Gintis et al. eds., 2005) (analyzing the Prisoner’s Dilemma in the context of a discussion about conditional cooperation); Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 76–77 (2003) (exploring the dynamics of collective action problems and suggesting that promoting trust is a significant goal).

¹⁰⁷ *See, e.g.,* Joe C. David & John H. Huston, *Right-to-Work Laws and Free Riding*, 31 ECON. INQUIRY 52 (1993) (“[T]he effect of right-to-work laws remains statistically significant but of a smaller magnitude than found in previous studies.”).

forbidden to charge fees to non-union workers unwilling to pay. Therefore, in these states unions have less muscle to force all workers in the firm to pay for the goods that unions obtain and that by law they are required to provide to all workers. Moreover, a number of empirical studies have found that right-to-work laws have had a negative impact on union density.¹⁰⁸ Studies have found that right-to-work laws have a negative effect on unionization and on the decline of national union membership in the private sector.¹⁰⁹

The erosion of union-security agreements is only one of the many changes in the labor law and doctrine that has contributed to the dramatic decrease in unionization rates in the United States during the second half of the twentieth century.¹¹⁰ There are other

¹⁰⁸ See, e.g., Raymond Hogler et al., *Right-To-Work Legislation, Social Capital, and Variations in State Union Density*, 34 THE REV. OF REGIONAL STUD. 95, 109 (2004).

RTW [right-to-work] laws reduce the ability of unions to organize workers and to develop workplace institutions conducive to collective bargaining. Even after taking account of the social and labor relations contexts within which unions function, RTW laws significantly reduce union density. Our findings show that RTW laws exert an independent and strongly negative effect on union density, with a magnitude of 8.8 percentage point, *ceteris paribus*. This is a true legislative impact, not an artifact of underlying anti-union attitudes.

Id.

¹⁰⁹ See William J. Moore, *The Determinants and Effects of Right-To-Work Laws: A Review of the Recent Literature*, 19 J. LAB. RES. 445, 450 (1998) (finding that right-to-work laws tend to have an effect on unionization, free riding, and state industrial development in the short-run, but most likely not on wages, and identifying right-to-work laws as "an important factor causing the post-1950s decline in private sector national union membership"). William J. Moore and Robert J. Newman, *The Effects of Right-to-Work Laws: A Review of the literature*, 38 INDUS. & LAB. REL. REV. 571 (1985).

¹¹⁰ The importance of union security agreements on unionization rates depends on the institutional context in which they operate. In European countries with the Ghent model (Belgium, Denmark, Finland, and Sweden) where union density is significantly higher than the United States, there is no legislation providing for union-security agreements. However, union administration of national unemployment insurance provides powerful incentives for workers to join unions. See Matthew Dimick, *Paths To Power: Labor Law, Union Density, and The Ghent System*, Oct. 11, 2010, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680900. Some observers have argued that union-security agreements have made unions complacent and less responsive to the rank and file and non-union members in the United States. See, e.g., Thomas Geoghegan, *Ten Things Dems Could Do to Win*, THE NATION, Sept. 27, 2010 (arguing that one way to re-energize the labor movement would be "to let people opt out and make [union] membership voluntary" assuming the risk of free riders). According to Geoghegan, however, this reform would need to be accompanied by other institutional changes, like amending the Civil Rights Act of 1964 and ending the filibuster rule in the Senate to avoid blockage of labor-friendly laws. The right to join—or not to join—a

rules which have had an impact, possibly of greater magnitude, on the decline of unions, including rules governing unionization and employer opposition to it, and the employer's right to permanently replace employees on strike.¹¹¹ As labor protections decreased through a combination of statutes and judicial interpretation,¹¹² workers have less effective mechanisms to organize and unions have fewer means to encourage workers to join them. Workers' remedies to counter employers' anti-union practices have been weakened. As a result, it has become increasingly difficult to form unions and union membership has declined.

3.3. Proposed Model

The description of the three predominant positions in the first section of this paper can serve as a good roadmap with which to understand these debates in both the United States and Mexico. The model of institutional analysis that I develop retains some elements of each of these rhetorical positions and rejects others. From the "social" position, this analysis retains the fundamental notion that labor law should be concerned with the balance of power and the regulation of conflict between parties in the employment relationship. Therefore, the analysis preserves the interest in affecting the distribution between labor and capital. It rejects, however, the emphasis on the supposedly national origin and politically progressive character of labor regulation. Thus, it seeks to overcome the reluctance to analyze the intra-class and inter-gender distributive consequences of labor regulation that is veiled behind claims of nationalism and general welfare of the working class.

union would be a civil right that workers could exercise in court against employers' actions to block a union, under an amended Civil Rights Act. In this scheme, according to Geoghegan, unions would be more eager to promote themselves and please their members so they can collect dues.

¹¹¹ See Estlund, *supra* note 62, at 1536-38.

¹¹² See generally *id.* at 1530-35 (arguing that American labor law has become rigid due to its continued foundation in decades-old statutes kept in place by political gridlock, which prevents democratic renewal and local innovation); Getman, *supra* note 52 (proposing a legislative agenda that would be more worker-friendly and eliminate perceived weaknesses of the National Labor Relations Act); Karl E. Klare, *supra* note 52, at 293 (1978) (discussing how the Supreme Court's decisions interpreting the Wagner Act contributed to the integration of the American labor movement into the capitalist order in the years following World War II).

From the social position, we could retain the proposition that any workplace regulation must be attentive to the actual asymmetries of power between the parties to the employment contract, rather than assume formal equality. To a great extent, labor regulation is about the management of conflict between employers and workers. This conflict arises from competing interests in the control of production, workplace organization, and distribution of resources. Thus, according to social advocates, labor regulation must be concerned with conflict management and distribution in the pursuit of social justice. These are all considerations worth taking into account in the analysis.

However, the social position should be opened to important criticisms concerning the effects of labor regulation. It should accept that there are often competing interests within the working class and take up the challenge to respond to critics of labor regulation who argue that it hurts the people it is trying to help. In short, the social position needs to overcome its reluctance to analyze intra-class and inter-gender distributive consequences of labor regulation. Unfortunately, it has often failed to do so, attempting instead, to appeal to the unity and welfare of the working class as a whole. Moreover, those defending current regulation in Mexico, frequently resort to the supposedly national origin of social and labor rights and their inherently progressive character.¹¹³ They refer to the original social aspirations of the Constitution in support of the status quo. The existing regime is thus treated as a matter of national and cultural pride that should be preserved.¹¹⁴ Critiques of the current regulation are thus often dismissed as being motivated by foreign transplants, as inherently conservative, or both. These claims of originalism and progressiveness preclude a serious engagement with these criticisms and should be discarded.

From the “neoliberal” position, my analysis maintains the emphasis on the importance of looking at intra-class and inter-gender distributive consequences of collective bargaining regulation. It seeks to explore the effects of a union regime on non-unionized workers and on informal workers and the effect in each of these

¹¹³ It should be noted that even if labor regulation was indeed a national creation and politically progressive for its time—claims that are contestable—these reasons alone are insufficient to defend it today.

¹¹⁴ This is Mexico’s own version of originalism and an example of how originalism need not have a determinate political tilt: politically left in the case of Mexico and right in the United States.

categories across gender lines. Moreover, the analysis retains the focus on economic growth in the evaluation and design of labor norms. The analysis, however, rejects the reductionist understanding of how the law affects the relative bargaining power of workers. Finally, it also resists the simple-minded economic analysis that assumes that a one-time increase in efficiency will generate growth, rather than just another efficient equilibrium level.

From the “rights-based” position, I retain the fundamental proposition that the legal system needs to be open to the political aspirations of multiple actors in society. Regulation of the workplace and of collective bargaining is part of the governance structure of society and needs to be open to and justified by what a democratic process defines as society’s ideals. However, my analysis rejects the formalist and pre-realist understanding of law that assumes that it is possible to deduce a determinate outcome from rights.

In the example of the closed shop, the “social” approach helps us stress the need to preserve the rules that guarantee the closed shop and empower workers. It focuses on the effective enforcement of law against employers’ anti-union practices. A “neoliberal” analysis urges us to consider the effects of the closed shop on non-unionized workers and on workers in the informal economy. The “rights-based” position encourages us to think of mechanisms that transform the workplace into a sphere where workers can voice their views and participate meaningfully. It is a bid for the workers’ involvement in the governance of workplace institutions.

Thus far, this Article has focused on analyzing the discursive positions and challenging the assumptions that frame the debate in order to pave the way for an investigation of alternative reform proposals. In the remaining part of this Article, I seek to illustrate how this legal realist and post-realist analysis of the closed shop can help us move the debate beyond these entrenched positions. I adopt the legal realists’ insights about the role of the state in “private law-making” and the structure of the market in order to clarify the distributive effects of the law in labor relations.¹¹⁵ The first step in this analysis is to identify the different groups involved in the market and propose some categories, such as men and women,

¹¹⁵ I appropriate here a post-realist methodology as developed by Duncan Kennedy. DUNCAN KENNEDY, *The Stakes of the Law, or Hale and Foucault*, in *SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* 83, 86-87 (1993).

white and non-white, juniors and seniors, urban and rural, unionized and not unionized. The second step consists of identifying the institutional arrangements that affect these actors. For this kind of analysis, two types of norms become relevant: first, "the rules governing the conduct of the parties during bargaining" that directly increase or decrease their power, and second, "the rules that structure the alternatives to remaining in the bargaining situation."¹¹⁶

Following this conceptual framework, we can imagine a substantially different debate. We can see that the rules that guarantee security and those which enhance flexibility are not in simple opposition with regard to their distributive effects on workers and employers. Rather, these rules can be deemed to have asymmetric effects among different groups of workers and employers. For instance, the relaxation on dismissal restrictions accompanied by a proliferation of part-time employment contracts could potentially benefit young workers and women but jeopardize the job security of senior workers.

It would be important to analyze the effects of norms protecting specific groups of workers and their interaction with norms that impose restrictions on the levels of employment and wages. The consequences of these protective norms will largely depend on how stringent the resulting restrictions on employment and wages are. Their effects would be felt asymmetrically between the protected and the unprotected workers with benefits accruing to some workers at the expense of others rather than just to the employers.¹¹⁷ This discussion, however, is almost impossible to have under the current debate because workers and employers are conceptualized as solidly coherent groups with interests that clash between them and not within them.

At the same time, the regulation's effect on different kinds of workers will largely depend on the structure of collective bargaining. The common argument that labor costs need to be reduced to increase competitiveness often assumes that labor should bear the costs of increased productivity. However once a given productivi-

¹¹⁶ *Id.* at 87.

¹¹⁷ See generally Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000-2001) (outlining a new model analyzing distributive effects of protections on specific groups). Jolls analyzes how restrictions on relative wages and relative employment levels imposed by antidiscrimination law fundamentally alter how special protections—the accommodation mandates—affect the wages and employment levels of accommodated workers as well as non-protected workers. *Id.*

ty level assures competitiveness, the joint product can be divided into a myriad of different ways and this partition will be greatly determined by the bargaining power of labor and capital, which is in turn influenced by the background legal rules.¹¹⁸

4. AN EXERCISE IN INSTITUTIONAL IMAGINATION¹¹⁹

Imagine what debates about labor reform would be like if we were to move beyond the blind spots caused by the discursive positions. Imagine, for example, that we retain the closed shop in labor regulation while at the same time radically democratizing collective labor relations. Let me emphasize that this is only a thought-experiment, intended to illustrate how, even in the more extreme cases, adopting a different analytical framework can help us to imagine a set of alternative institutions and trigger a discussion where the effects of the institutional choices are more overtly disclosed.

Those rejecting the institution of the closed shop usually consider the system of collective bargaining as a whole and assume it to be indivisible. They associate the current negative effects of the collective labor relations system with each of its constitutive parts. Under this perspective, the system should be replaced wholesale to democratize collective labor relations. But there is no logical reason why this should be the case. Elements of the current system can be preserved and combined with new ones to achieve democratic objectives.

4.1. *Union Security Clauses (the Closed Shop) Revisited*

Discussion about the merits of the closed shop provokes very strong reactions among different groups in society. It is a rule that deliberately allocates power among labor actors in ways that are subject to political and normative disagreement. There are high stakes for the different groups involved. The prominence of rights'

¹¹⁸ See generally Kenneth G. Dau-Schmidt, *A Bargain Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419 (1992) (presenting an alternative economic analysis of unions and collective bargaining to demonstrate that increasing gains for workers can be obtained under competitive conditions).

¹¹⁹ My interest in institutional experimentalism has been greatly stimulated by the work of Roberto Unger. See generally ROBERTO M. UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* (1987); ROBERTO M. UNGER, *DEMOCRACY REALIZED, THE PROGRESSIVE ALTERNATIVE* (1998).

discourse in this debate might be an indication that actors in this debate prefer to talk about rights that individuals have as mandated by a higher authority, such as the Constitution, which is deemed to stand above political disagreement. In other words, referring to constitutional rights might be a way to avoid directly confronting the hard choices that the closed shop raises.

The closed shop has acquired a bad name in Mexico because it has served to empower the leaders of official unions, who have negotiated with employers at the expense of the rank and file. This rule has allowed union leaders to extract personal rents from employers in exchange for industrial peace in a way that has little to do with workers' needs. At the same time, it has made it very hard for workers to form independent unions. There is, however, nothing necessary or inherent in the way the closed shop has developed. I now proceed to explain the background setting in which the closed shop operates and highlight the way in which the goals of the closed shop have been perverted.

The paramount mechanism through which employers and union leaders have colluded is the so-called protective contract ("*contrato de protección*"). The name was coined to reflect the protection it grants to employers from workers' collective action in practice.¹²⁰ This type of contract involves an employer signing a collective agreement with a union before the firm has even hired any employees. Unions signing these agreements frequently exist only on paper, and the "union representatives" who broker and manage these agreements with employers treat them as licenses that they can sell or trade for good money.¹²¹ Employees working for firms under these contracts rarely know they are part of a union. When they try to organize they find out that a union already exists, that they form part of it, and that their union is the title-holder of a collective agreement stipulating their working conditions. Under this framework, the exclusion clause works against the interests of workers. They are dependent upon a leadership they did not elect and whose main interest is not to represent workers but to keep labor costs at a minimum in exchange for rents. If workers decide to

¹²⁰ See José Alfonso Bouzas Ortiz, *Los Contratos de Protección y el Proyecto Oficial de Reforma Laboral*, in *AUGE Y PERSPECTIVAS DE LOS CONTRATOS DE PROTECCIÓN: ¿CORRUPCIÓN SINDICAL O MAL NECESARIO?* 159 (Inés González Nicolás, ed., 2006).

¹²¹ See generally *AUGE Y PERSPECTIVAS DE LOS CONTRATOS DE PROTECCIÓN: ¿CORRUPCIÓN SINDICAL O MAL NECESARIO?* (Inés González Nicolás, ed., 2006) (providing an overview of how protective contracts function).

leave the union, say to form a new one, the employer will fire them. So, it is understandable that a number of activists and commentators regard the exclusion clause as an important instrument of control that employers, employer-friendly unions and official unions use against independent-minded workers and unions.

This diagnosis is important to understand the closed shop's current detrimental effects. In doing so, we must resist the knee-jerk reaction against the closed shop and instead think about the combination of rules and practices that make the closed shop work in such pernicious ways. On the one hand, workers are not represented by these unions and have no say in whatever conditions are agreed upon. On the other hand, employers buy control and stability, making sure there will be no strikes or demands for higher wages and benefits.¹²²

One of the main objectives of labor law is the facilitation of workers' organization. "Protective contracts" can be understood as an abuse of the relative easiness to organize provided by the legal regime. "Protective contracts" lock in the workplace making it harder, not easier, for workers to effectively organize and negotiate their employment conditions. The problem lies not on the objective to ease workers' organization, but on the current legal and institutional regime that makes practices like "protective contracts" possible. Thus, the solution needs to focus on eradicating the practices that subvert the aim of easing organization, rather than disposing of that aim. A doctor in charge of a patient with an autoimmune disease needs to target the defense system to cure the illness. His aim is to cure the illness by changing the conditions under which the defense system operates, not to destroy the defense system itself. A patient without an immune system will have a hard time surviving. By the same token, workers will have a hard time forming unions—of any type—and advancing their interests successfully without an institutional setting that facilitates their association and provides defenses against the legitimate, but conflicting, interests of employers.

¹²² Not surprisingly, defenders of these contracts consist of corporatist unions and business leaders. The former argue that due to their experience and expertise, they are the best sort of union to represent workers' interests. The latter argue that they are necessary to counteract lack of investment and job creation. See Francisco Zapata Schaffeld, *Los contratos de Protección: ¿Crisis del Sindicalismo Tradicional u Opción de Cambio?*, in *AUGE Y PERSPECTIVAS DE LOS CONTRATOS DE PROTECCIÓN: ¿CORRUPCIÓN SINDICAL O MAL NECESARIO?* 47, 50 (Inés González Nicolás coord., 2006).

4.2. *The U.S. and Mexican Collective-Bargaining Systems in Perspective*

Following the model I outlined in Part 3.3 above, this section will discuss some key elements of the current collective bargaining system in Mexico and compare it to the United States. The objective of this section is to highlight the bargaining rules that structure the behavior between employers and workers. These are the rules of the game that govern the relationships between employers and workers, firms and unions every time they interact for purposes of deciding what the conditions at work should be. By and large, these are procedural rules that establish what mechanisms are available to workers and employers to negotiate. These are rules that define what "fair" game is: what kind of moves are allowed in the game, who determines when there is a fault, and what consequences might follow from breaking the rules.

It is common to think about these bargaining rules as forming part of a more or less coherent system of collective bargaining. Comparative labor law literature has made use of ideal types to contrast the differences between countries' collective bargaining systems as a whole, as well as between particular institutions or rules. Drawing on political science and industrial relations theory, comparative labor law scholars often classify collective bargaining systems in two main categories: corporatist and pluralist.¹²³ These categories are by no means exclusive and indeed, there are other related classifications, such as centralized and contractualist, or voluntaristic. As soon as we take a comparative perspective, it becomes evident that there is important variation in the rules of the game adopted by other countries and thus, in the conditions under

¹²³ See Hugh Collins, *Capitalist Discipline and Corporatist Law – Part I*, 11 *INDUS. L.J.* 78 (1982); Hugh Collins, *Capitalist Discipline and Corporatist Law – Part II*, 11 *INDUS. L.J.* 170 (1982). In both articles, Collins distinguishes between three types of labor regulation: floor of rights, pluralistic, and corporatist. The latter two structure different types of collective bargaining regimes. For a definition of corporatism, see Philippe C. Schmitter, *Corporatism (Corporativism)*, in *THE ENCYCLOPEDIA OF THE SOCIAL SCIENCES* (1988). See Wolfgang Streeck & Philippe C. Schmitter, *From National Corporatism to Transnational Pluralism: Organized Interests in the Single European Market*, 19 *POL. & SOC'Y* 133 (1991) (discussing the effects of corporatism on European capitalism). For studies of corporatism in political theory, see ALAN CAWSON, *CORPORATISM AND POLITICAL THEORY* (1986); HOWARD J. WIARDA, *CORPORATISM AND COMPARATIVE POLITICS* (1997); HARMON ZEIGLER, *PLURALISM, CORPORATISM, AND CONFUCIANISM* (1988). For studies on the pluralist type of collective bargaining, see ALAN FOX, *BEYOND CONTRACT: WORK, POWER, AND TRUST RELATIONS* (1974).

which the parties play elsewhere. Looking at a country's institutions in comparative perspective also challenges the "necessity" of what we often consider a fixed institutional arrangement.

The analysis I propose relies on the insight that a collective bargaining system is not indivisible. Rather, its constitutive elements can be changed and recombined to achieve a variety of objectives. Collective bargaining institutions do not need to be adopted or replaced in toto. They are also amenable to gradual changes that can be deepened as they are subjected to further revisions. Thus, we can try to identify combinations of rules that could positively transform the current institutional expression of the closed shop.

To see this point more clearly it would be useful to compare the Mexican collective-bargaining system with that of the United States. While the Mexican system exhibits most elements of a corporatist model, the U.S. system is based on a contractualist model.¹²⁴ Tamara Lothian has made a compelling comparative analysis of the United States and Brazilian collective bargaining regulatory systems, contrasting the U.S. contractualist model with the Brazilian corporatist one.¹²⁵ Her typology is useful to underscore the different objectives that each model pursues and the institutional setting each has developed to achieve such aims. Even though she

¹²⁴ For additional studies on the contractualist nature of American labor law, see Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394 (1971), Neil W. Chamberlain, *Collective Bargaining and the Concept of Contract*, 48 COLUM. L. REV. 829 (1948), and Klare, *supra* note 52. For an excellent study of the Mexican, corporatist model of labor regulation, see generally Graciela Bensusán, *EL MODELO MEXICANO DE REGULACIÓN LABORAL* (2000) See also Stephen Zamora et al., *MEXICAN LAW* (2004). I use these characterizations without passing a value judgment over them. Each of these ideal types has its virtues and its problems. Even though some analysts would be tempted to attribute to the contractualist system the economic and democratic advantages of the United States over Mexico in the comparison between these two countries, there is nothing inherent in the types of regulation that would warrant this conclusion. Many European countries, for instance, have a corporatist collective-bargaining system and enjoy vibrant democratic societies and high levels of economic growth.

¹²⁵ See Lothian, *supra* note 70, at 1011–34. Compare Stanley A. Gacek, *Revisiting the Corporatist and Contractualist Models of Labor Law Regimes: A Review of the Brazilian and American Systems*, 16 CARDOZO L. REV. 21 (1994) (accepting Lothian's ideal types but arguing that the emerging labor movement in Brazil was anti-corporatist and "contractualist" and that the American labor law system was a "deviant" case of contractualism), with Tamara Lothian, *Reinventing Labor Law: A Rejoinder*, 16 CARDOZO L. REV. 1749 (1995) (reasserting her original characterization and furthering the analysis of a hybrid model composed of unitary unionization and independent union structure).

focuses on the case of Brazil to illustrate the corporatist system, her analysis can be extended to other countries, which, like Mexico, are a species of the corporatist genre.

These models present interesting points of contrast. The contractualist model is characterized by voluntary and pluralist unionization. Collective agreements are modeled after individual contracts and labor relations and assume a private exchange dictated by individual self-interest. In contrast, the corporatist model presents a unified and comprehensive union structure in which all workers are enrolled. The union structure is subordinated to the national government's guidance, and it is an integral part of the public organization of society.¹²⁶

In Lothian's analysis, the contractualist model exhibits a relatively moderate economic style of industrial militancy—concentrating on obtaining wages and benefits—rather than on the organization of the economy and society. The corporatist model in turn, favors the extremes of passivity and prostration when a robust authoritarian system is in place or politicized and all-inclusive labor militancy when that system begins to fracture, in which worker's economic demands become inseparable from attempts to transform society's basic institutional structure.¹²⁷

It might be helpful to compare these models according to how they regulate two main aspects of labor relations: 1) worker organization leading to the formation of unions, and 2) the regulation of union relations once they have been constituted. Union relations can be external—establishing the bargaining framework between unions and employers, and internal—establishing the conditions of the union governance system.

On the first aspect of the collective bargaining regulation, namely, worker organization to form a union, the contractualist model insists on the free will of the parties. In the United States, government intervention at this stage aims to ensure that the employees have freely agreed to be represented by a union without any coercion. Unions are not given any privileges in the process and they have to bear the burden and the cost of a union organiz-

¹²⁶ See Lothian, *supra* note 70, at 1008.

¹²⁷ See *id.* at 1035 ("My argument is that the link between unions and the state establishes a fulcrum for the swing between the extremes of politicization and complacency.").

ing drive under uneven conditions against employer resistance.¹²⁸ By contrast, the corporatist model offers mechanisms that facilitate the organization of workers. In Mexico, union recognition does not depend on certifying the existence of workers' majority will to form a union. Union organization is facilitated by a set of statutory norms setting out the requirements to form a union. When employees fulfill these requirements the state is supposed to automatically recognize the union.¹²⁹

¹²⁸ In the United States, the employer has a legal obligation not to interfere with the formation and administration of labor unions and to bargain in good faith with a union that represents the majority of employees. See National Labor Relations Act §§ 8(a)(2), 8(d), 29 U.S.C. § 151 (2006). In practice, these obligations have proven weak in the face of employer resistance, both legal and illegal. See PAUL C. WEILER, *GOVERNING THE WORKPLACE* 111-12 (1990). Under current law, employers can effectively express their opposition to union organizing, compel employees to attend meetings where the employer voices its objections and exclude union representatives from the firm premises. The law has also been ineffective at providing remedies for illegal employer opposition to unionization, such as anti-union discharges. Finally, the employer's right to permanently replace workers engaged in a strike presents a huge obstacle for unions to organize and for employees to decide to join a union. Estlund, *supra* note 62, at 1536-38. See also CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 165-166 (2010); Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 557 (1993) (arguing that employers have a right to compel employees to hear their opposition to unionization in a "captive audience" meeting while union representatives have no correlative right). In addition, employer resistance has been found to influence worker desire to unionize the workplace in the first place. See WHAT WORKERS WANT, *supra* note 61, at 86-87 (2006). See also Gacek, *supra* note 125, at 88-90 (arguing that in practice, workers' formation of a union heavily depends upon an employer's willingness to recognize the union). The employer can require a representation election conducted by the National Labor Relations Board. Employers' aggressive anti-union campaigns between the time of the union petition to the NLRB and the election are a well-documented practice. See generally Paul C. Weiler, *Promises To Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (arguing that the only way to effectively implement the NLRA's mission is through "instant elections" as applied in the Canadian labor law regime); Paul C. Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984) [hereinafter Weiler, *Striking a Balance*] (discussing employers' use of hardball tactics to prevent the attainment of first contracts by newly certified unions). It is worth noting that Canada, which also has a predominantly contractualist system, presents a different face. In most provinces, a union is certified without a representation election. See, e.g., Weiler, *supra*, at 1806-19 (comparing the United States and Canada and discussing how not requiring a representation election has positive effects on unionization).

¹²⁹ In the case of Mexico, a minimum of twenty employees is required to apply for union registration. There is no majority vote requirement for union formation. If the union fulfills the legal requirements, which include submitting copies

Regarding the second aspect of the collective-bargaining system—that of union activity once it is recognized—there are important points of contrast too. At the level of unions' relations with employers, reaching a collective agreement has turned out to be very hard for unions in the United States despite employers' legal duty to bargain in good faith. In the United States even when a union has obtained recognition to be the exclusive bargaining representative, there is no assurance that it will actually get an agreement.¹³⁰ In the case of Mexico, the employer has a legal obligation to enter into a collective agreement at the union's request. If the employer refuses to sign an agreement the union can exercise its right to strike.¹³¹ Since the employer has no right to replace employees engaged in a strike, unions can exert considerable pressure to reach an agreement.

The contractualist model thus places burdens on workers' collective organization and bargaining. Workers spend significant energy and resources trying to organize and obtain recognition. In the United States, scholars have harshly criticized the collective bargaining system for favoring employers by imposing numerous

of the minutes of the constitutive meeting, members' contact information, union by-laws, and of the minutes of the meeting in which the union's board of directors was elected, the administrative authority cannot deny registration. See Ley Federal del Trabajo [LFT] [Federal Labor Law], arts. 364-366, Diario Oficial de la Federación [DO], 1 de Abril de 1970 (Mex.).

¹³⁰ See Weiler, *Striking a Balance*, *supra* note 128, at 354 (calculating that "slightly more than 60% of newly certified units achieve a [first] collective agreement"); Catherine Fisk, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47, 56 (2009):

Although Section 8(a)(5) of the NLRA imposes a duty to bargain in good faith, the United States Supreme Court long ago decided that the Board lacks the authority to force a recalcitrant—even an illegally recalcitrant—party to reach agreement. Nor will the Board impose monetary remedies to compensate for an employer's illegal refusal to bargain, even when it is quite clear what monetary harm occurred. All it will do is order the party that bargained in bad faith to bargain more and to do so in good faith. An employer determined to resist the lawful right of its employees to unionize and bargain collectively can thwart their rights simply by refusing to enter into a collective bargaining agreement. Eventually, after the employer drags out the negotiations for years and makes plain its refusal to enter into an agreement with the union, the employees or the union give up. The employer can then withdraw recognition and remain union-free.

Id.

¹³¹ See Ley Federal del Trabajo [LFT] [Federal Labor Law], art. 387, Diario Oficial de la Federación [DO], 1 de Abril de 1970 (Mex.).

hurdles on workers' organization and ability to bargain.¹³² As activists and NGOs have documented, the U.S. model prevents workers from associating to pursue their interests. They claim that the U.S. labor law system fosters and enables practices that infringe upon internationalized rights of freedom of association, even though many of these practices are, in fact, legal under United States law.¹³³ Thus, many voices appeal for labor law reform that would enable workers to organize effectively.¹³⁴

Finally, at the level of union internal governance, the contractualist system grants unions more independence over their internal affairs than the corporatist one. In the United States, the government has passed regulation aimed at assuring the internally democratic functioning of unions.¹³⁵ However, this is qualitatively a different kind of relation than the one existing in Mexico where the government intervenes to control union leadership, influence union activity and ensure union support of government policy.¹³⁶

¹³² See, e.g., WEILER, *supra* note 128; ESTLUND, *REGOVERNING THE WORKPLACE*, *supra* note 128. See also Lothian, *supra* note 125, at 1758.

The Contractualist regime of purely voluntary unionization consumes the greater part of the effort of the labor movement in the struggle to unionize, and to maintain union, in the face of employer coercion and seduction. It also helps to give a purely economic tilt—wages and benefits rather than power in an outside the workplace to whatever labor militancy it allows to subsist.

Id.

¹³³ See HUMAN RIGHTS WATCH, *DISCOUNTING RIGHTS: WAL-MART'S VIOLATION OF US WORKERS' RIGHT TO FREEDOM OF ASSOCIATION 16-23* (May 2007), available at <http://www.hrw.org/reports/2007/us0507/> (finding that although Wal-Mart often violates labor laws, a considerable number of the firm's aggressive anti-union practices are legal in the United States).

¹³⁴ See, e.g., Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655 (2010). For an example of legislative reform, see Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009); AFL-CIO, available at <http://www.aflcio.org/joinaunionvoiceatwork/efca/> (last visited Oct. 5, 2010) (urging support for the Employee Free Choice Act and introducing the AFL-CIO's labor law reform proposal and its main lobbying agenda).

¹³⁵ The Labor-Management Reporting and Disclosure Act of 1959 amended the NLRA to include provisions that regulate the internal affairs of unions. The Landrum-Griffin Act requires that unions periodically hold elections for local and national union officers, and that union members be assured a right to vote, to run for union office, and to comment upon and nominate candidates. Additionally, the Act imposed heavy reporting requirements on unions regarding their internal financial affairs.

¹³⁶ The government intervenes in the life of unions in several ways. One notable example is the "toma de nota" ("taking of note" or legal acknowledgment).

4.3. Rearranging Elements of the Collective Bargaining Systems

The Mexican collective bargaining system could thus seek to preserve one important aspect of the corporatist system, namely the easiness of workers to organize, form and maintain unions, while adopting some elements of the contractualist system such as the independence of the union system from the government. To the extent that compulsory unionization, in the form of the closed shop, can enhance workers' capacity to organize, it is an institution that could be worth retaining.

In this sense, the Mexican system can preserve its social objectives, modifying the perverse incentives that have given rise to current practice. It can uphold the objective of easing the process of organization and shielding employees from employers' resistance. At the same time, in response to democratic aspirations, the government's control in the determination of union existence and its intervention on union life could be removed. The analysis begins to take an altogether different form. It is no longer a discussion about the closed shop in isolation, but considered in context, as it interacts with other institutional arrangements in the system. It is also an analysis that demands—attentive to the neoliberal critiques—a consideration of the potential economic consequences of any particular institutional combination.

Consider now the institutional backdrop against which the closed shop currently operates, generating an unflattering list of perverse results. High on the list of problems is the process of union registration. As it is currently established, the Ministry of Labor discretionarily decides whether a union meets the minimum legal requirements of membership and internal organization and ultimately whether to grant registration or not. Thus, unions that are not politically favored by the Ministry have a hard time being officially recognized. At the same time, the Ministry can recognize

Article 377, section II of Mexico's Federal Labor Law ("LFT") requires unions to "communicate to the authority with whom they are registered, within a period of ten days, the changes of their leadership and modifications of the statutes, accompanied by two authorized copies of the respective documents." Article 692, section IV of the LFT states: "the representatives of the unions shall accredit their personality with the certification extended by the Secretariat of Labor and Social Welfare, or the Local Conciliation and Arbitration Board, once the union leadership has been registered." See *Ley Federal del Trabajo [LFT] [Federal Labor Law]*, arts. 377, 692, *Diario Oficial de la Federación [DO]*, 1 de Abril de 1970 (Mex.). In practice, the government uses this mechanism to oppose leaders it regards as hostile and favor those who will be supportive of its policies.

a union that has no real membership. This Ministry is also in charge of certifying that a union is the title-holder of a collective agreement, monitoring elections whenever there is a challenge to an incumbent union, and also serves as a depository of such agreements. Paradoxically, the Ministry zealously keeps the registry of unions and does not disclose this information.

Some scholars and independent unions have proposed the creation of an independent registry, in charge of certifying union existence and certifying title over collective agreements.¹³⁷ Such a registry would be transparent, making all this information available to the general public. The registry would also be in charge of monitoring union voting, both for important decisions regarding union actions, such as initiating a strike or for challenges to incumbent unions. At present, voting generally takes place under conditions of extreme intimidation and pressure, with no secret ballots, so that workers cannot express their wishes freely. These conditions favor the incumbent traditional unions, often in alliance with employers.¹³⁸

Finally, the authority in charge of hearing disputes arising from these matters is the labor Conciliation and Arbitration Board, comprised of representatives from government, employers and traditional unions who are likely to be biased against independent unions. Some scholars have argued for the need to substitute these administrative tribunals with new labor courts, which would be part of the judiciary branch rather than the executive. Independent judges would sit on these courts, removing its formerly tripartite character, but also the vices and biases that developed with it.

A discussion about these different categories of the collective bargaining regime would seek to bring about a substantive democracy and not only a formal one. The goal would be to guarantee the effective power of workers' freedom of association, the relatively equal bargaining between unions and firms, and an accountable union representation. Such a discussion would consider what would be effective ways to achieve a union governance system where the leadership is won by competition and remains open to

¹³⁷ See Graciela Bensusán, *Una Reforma Laboral para la Libertad, la Democracia y la Transparencia sindicales; la Agenda Mínima*, in *LIBERTAD SINDICAL* 89 (Alfonso Bouzas et al. eds., 1st ed. 1999).

¹³⁸ *Id.*; see Arturo Alcalde Justiniani, *Hacia Una Concertación Laboral Transparente y Responsable*, in *LIBERTAD SINDICAL* 73 (Alfonso Bouzas et al. eds., 1st ed. 1999) (suggesting the creation of an independent agency to monitor union elections modelled after the Federal Electoral Institute).

challenges—where unions compete fairly with one another and where the government remains disentangled from union life and union decisions.

This Article warns against resorting to “exit” or the ability of employees to opt out from unions under the negative right to freedom of association, as if it was the obvious solution to the many serious problems of collective bargaining.¹³⁹ Instead, the Article proposes to give “voice” serious consideration and explore the ways in which it can be made effective as a mechanism to improve workers’ economic conditions and their meaningful participation in the workplace.

To reiterate, this Article does not propose the preservation of the closed shop as an obvious solution or as desirable on its own. Furthermore, the closed shop itself is divisible and it is possible to imagine it in different forms. In the context of Mexico the closed shop has two current forms: the exclusion clause by admission and the exclusion clause by separation. One might foresee a scenario of keeping the exclusion clause by admission, setting in effect a default rule of union membership and eliminating the exclusion clause by separation, enabling employees to opt out of union membership without losing their job.¹⁴⁰ This alternative scenario would have to be debated and evaluated according to its risks and potential effects.¹⁴¹

¹³⁹ I use the concept of exit and voice as developed by Albert O. Hirschman. See ALBERT O. HIRSCHMANN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINES IN FIRMS, ORGANIZATIONS, AND STATES* (1970) (exploring the comparative advantages of exit and voice options as mechanisms of recuperation in deteriorating firms and other organizations).

¹⁴⁰ A number of reform proposals have advanced this particular combination. See, e.g., Unión Nacional de Trabajadores & Partido de la Revolución Democrática, *Propuesta de la Unión Nacional de Trabajadores: Anteproyecto Reforma Ley Federal Del Trabajo*, *supra* note 72.

¹⁴¹ For instance, Hirschman argues that in some cases:

[A] no-exit situation will be superior to a situation with some limited exit on two conditions: 1) if exit is ineffective as a recuperation mechanism, but does succeed in draining from the firm or organization its more quality-conscious, alert and potentially activist customer or members; and 2) if voice could be made into an effective mechanism once these customers or members are securely locked in.

HIRSCHMANN, *supra* note 139, at 55. The point is that enabling some degree of exit, such as requiring union membership as a condition of employment but allowing employees to opt out, is not necessarily superior to a no-exit situation. Which of the alternatives is preferable would depend on the particular context, and particu-

These are all important aspects of the collective bargaining system that need to be opened for discussion and debate. However, in thinking of how to reform the Mexican regulation, it would be a mistake to get rid of elements of the current collective-bargaining system, such as the relative easiness of workers to organize, only because they are associated with the corporatist model. There is nothing inherently antidemocratic in facilitating workers' organization. On the contrary, the question would be how we can keep elements of the corporatist system that empower workers while at the same time instilling genuinely democratic forms of governance.

4.4. Effects of Bargaining Rules

Thus far we have considered some of the rules of the game that govern the conduct of parties during their bargaining interaction. These are, for the most part, labor law rules, which speak directly to what parties can or cannot do in their employment relationship. Further, these rules establish how workers can coalesce and be recognized as a union; what mechanisms the union and the employer can use to negotiate with one another; which forms of pressure are fair play and which ones are not; and what ways are allowed for the union to govern itself.

By delimiting how parties conduct themselves and restricting what they can do to one another, these rules produce important consequences. Neoliberal advocates have persistently argued that social regulation generally has negative economic effects. In other words, this regulation ultimately hurts the people it intends to help.

Suppose you agree with a proposal to empower workers by keeping the closed shop in place while democratizing the collective-bargaining system. We would still need to address its economic implications analyzing who would be the potential winners and losers. It is on this aspect that the neoliberal critique of social regulation needs to be engaged. Ignoring the critiques in the name of preserving a regulation closely related with the country's national identity or in the name of the broadly defined working class' progressive cause might offer some consolation, but it does not offer any economic criterion to decide whether indeed the regulation is worth preserving.

larly on whether voice could be exercised effectively without an exit threat. *Id.* at 55-56.

Neoliberal theory would suggest that by increasing the power of unions and their chances to obtain better wages and working conditions, the closed shop would be bad for workers. Unions increase the costs of labor. They drive prices up through demands on higher wages and benefits and consequently decrease hiring, at the expense of other workers.¹⁴² By making it harder and more costly to dismiss workers through the requirement of a "just cause," unions create incentives for firms to hire fewer workers than they would otherwise. As a result, unemployment is higher and for those who have lost their jobs, the unemployment duration is longer. The winners, according to this argument, are the already unionized workers. They form a group of insiders creating a high entry-barrier for those outside the labor market. The losers are young workers entering the labor force and a large group of women who, for a variety of economic, social and cultural reasons have remained outside the formal labor market.

Moreover, neoliberal advocates argue that employment conditions that unions negotiate, most notably job tenure and benefits, are highly inefficient. Employers pass the costs of these conditions to workers, who ultimately pay for them through lower wages and to consumers through higher prices. This arrangement hurts workers who would prefer higher wages instead of the long-term job security. It also hurts young and skilled workers, who could otherwise command higher wages and who would be able to move around firms if they so wished. It benefits risk-averse workers, who would tend to be senior workers and workers whose productivity is equal or low relative to their wages.¹⁴³

These are all important criticisms, but are articulated as if labor regulation is always bad for workers. Neoliberal advocates often take a simplistic approach to regulation, easily dismissing any regulatory attempt as an undue intervention in the market.¹⁴⁴ Al-

¹⁴² See, e.g., MILTON FRIEDMAN & ROSE D. FRIEDMAN, *FREE TO CHOOSE* 228-47 (1979) (arguing the benefits unions secure for their members are paid by other workers); Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 *YALE L.J.* 1357, 1399 (1983) (discussing the common fear that unions will discriminate to benefit some members at the expense of others); see also VELASCO, *supra* note 46 (arguing that labor regulation produces bad economic effects).

¹⁴³ See, e.g., Andrew P. Morris, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 *TEX. L. REV.* 1901 (1995-1996).

¹⁴⁴ Legal Realists have long challenged the assumption that the market can somehow be free from state intervention. The very rules that shape the market, such as those rules governing property and contract, are a form of regulation in

though it is true that sometimes labor regulation can have bad consequences, a general claim that labor regulation always harms workers is unwarranted. As several law and economics scholars have shown, it is simply unjustifiable to dismiss labor regulation *a priori*. A variety of market failures, transaction costs, and externalities¹⁴⁵ can call for regulation to make the market more, not less, efficient.¹⁴⁶

Working within the tradition of neoclassical economics, scholars have disputed the overall negative effects on workers of employment regulations such as anti-discrimination laws,¹⁴⁷ accommodation mandates,¹⁴⁸ and other mandated benefits.¹⁴⁹ These scholars call for a more cautious approach, looking at the regulation's interaction with other laws that affect employment levels and wages, paying attention not only to the effects on the protected class but also on workers who were not protected by it. A clearer view of the economic effects of regulation on different groups of workers, which account for cross-subsidization among them, emerges from this analysis. Thus, the regulation will benefit intended workers via wages or jobs at the expense of other workers in some cases. To be sure, this scholarship does not offer unconditional support for regulation, but it rejects the *a priori* dismissal of regulation as always bad for employees. Instead, this scholarship offers a clearer map of the policy trade-offs involved.

which the state is deeply implicated and has intervened either by action or omission. See, e.g., Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470, 471 (1923); Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 542 (1988).

¹⁴⁵ For an excellent summary of the failures of individual bargaining to accommodate employers' and employees' preferences, see Kenneth G. Dau-Schmidt, *Employment Security: A Comparative Institutional Debate*, 74 TEX. L. REV. 1645 (1995-1996).

¹⁴⁶ See Simon Deakin & Frank Wilkinson, *Labour Law and Economic Theory: A Reappraisal*, in LEGAL REGULATION OF THE EMPLOYMENT RELATION 29 (Hugh Collins et al. eds., 2000) (showing that labor regulation can have positive economic effects in the market).

¹⁴⁷ See John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583 (1991-1992); see also John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1985-1986).

¹⁴⁸ See Jolls, *supra* note 117, at 240. See also Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001-2002).

¹⁴⁹ See generally John J. Donohue III, *Understanding the Reasons for and Impact of Legislatively Mandated Benefits for Selected Workers*, 53 STAN. L. REV. 897 (2000-2001) (analyzing positive and negative economic effects of statutory labor rights).

In the area of collective bargaining, scholars have also challenged the neoliberal contention that unions are inevitably bad for the labor market because by increasing wages and non-wage labor costs they reduce labor demand and cause unemployment.¹⁵⁰ Kenneth Dau-Schmidt has challenged the traditional union cartel model, which assumes that unions' gains in wages and benefits derive from unions' ability to control the labor supply, to which employers respond by increasing prices, cutting production, substituting capital for labor and firing workers.¹⁵¹ Under this model, union benefits come at the expense of other workers, consumers, and efficiency. Instead, Dau-Schmidt shows that unions often obtain their gains from employers' rents and productivity increases—which unions contribute to and which constitute the cooperative surplus—and which they divide through collective bargaining. By promoting coordination between workers and employers and preventing waste from escalating economic conflict, labor regulation can yield important benefits for both parties.

All this is not to say that economic efficiency is the only normative criterion that should be considered when deciding about regulation.¹⁵² It is undoubtedly not. There are of course important considerations of equity, justice, and fairness that are equally worthy of attention. These are values that may conflict with economic efficiency and for which people may legitimately sacrifice greater wealth maximization. The point is to emphasize that even within the framework of economic efficiency, regulation cannot be dismissed out of hand and can often have positive economic effects for the targeted groups.

In the following section, I turn to a more specific analysis of labor regulation's distributive consequences in Mexico, looking at different groups of workers and paying particular attention to the differences between men and women. The effects of these labor law rules are no doubt important, but they are only a first step to-

¹⁵⁰ See generally RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?: A TWENTY-YEAR PERSPECTIVE* (James T. Bennett and Bruce E. Kaufman eds., 2007).

¹⁵¹ See Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 512 (1992-1993) (highlighting the deficiencies in the traditional monopoly model of unions and collective bargaining).

¹⁵² See Gottesman, *supra* note 103, at 2790-93 (analyzing why wealth redistribution can be a legitimate basis of regulation even if it conflicts with wealth maximization).

ward understanding the distributional effects of regulation. Following my proposed model, I consider not only the labor law rules, but also rules from different legal regimes that shape the alternatives to the parties' bargaining situation.

4.4.1. *Winners and Losers Among Workers*

What would be the distributive consequences for different groups of workers if we kept the closed shop intact while radically democratizing its structure? This part of the analysis seriously considers the neoliberal claim that labor laws may have different consequences for different groups of workers, specifically by trying to hypothesize such consequences in the specific case of women.

As a preliminary observation, women in Mexico face discrimination and other obstacles in the market. Scholars have documented important gender disparities in the Mexican labor market. These disparities are reflected on several fronts, including the rate of women's participation in the market compared to men's. Out of an economically active population of 40 million, the gap in the economic participation between men and women ages 25-49 was about 47% in the period of 1991 to 2003.¹⁵³ There are important differences in job tenure, with women performing considerably more part-time and temporary jobs than men.¹⁵⁴

Similarly, there are differences in wages, with women earning less on average than men.¹⁵⁵ This difference seems to be relatively small when similar jobs are compared, controlling for level of skills and occupation.¹⁵⁶ However, gender comparisons within high-skilled and well-paid occupations, such as financial services, appear to show vertical segregation, erecting a barrier that prevents women's access to jobs that are higher in status and wages and are usually performed by men.¹⁵⁷ What seems to account for overall

¹⁵³ See Marina Ariza, *Mercados de Trabajo Urbanos y Desigualdad de Género en México a Principios del Siglo XXI*, in *LA SITUACIÓN DEL TRABAJO EN MÉXICO* 393 (Enrique de la Garza & Carlos Salas eds., 2003) (noting large disparity in economic earning power between men and women).

¹⁵⁴ See *id.* at 393-95 (analyzing the differing job prospects of men and women).

¹⁵⁵ See Teresa Rendón, *Empleo, Segregación y Salarios por Género*, in *LA SITUACIÓN DEL TRABAJO EN MÉXICO* 137 (Enrique de la Garza & Carlos Salas eds., 2003).

¹⁵⁶ Even though average wages have leveled in recent years, this seems to be due more to a general decrease in wages of men than a dramatic increase in women's wages. *Id.* at 138-39.

¹⁵⁷ See *id.* at 139.

wage asymmetry is significant occupational segregation, which results in women doing jobs that, on average, have lower wages?¹⁵⁸

Gender disparities are especially high among workers within the age group of 25 to 39, which happens to coincide with women's reproductive age. It is, of course, no coincidence. Rather, this fact shows crudely the tension between reproductive care work on the one hand, and market work on the other.¹⁵⁹ Labor market prospects for women decrease most dramatically during their reproductive and child rearing age, showing that for market purposes, this work is still a liability for women.

How are unions implicated in the perpetuation of these gender patterns? And if unions have a negative influence in this regard, is the abolition of the closed shop in particular likely to improve women's condition in the market? I believe that the answer to this question is "no." While it may be true that traditional labor regulation may have assumed a traditional breadwinner/homemaker household,¹⁶⁰ protecting the wages and interests of its male mem-

¹⁵⁸ See *id.* at 129, 137-38; Ariza, *supra* note 153, at 399.

¹⁵⁹ Ariza, *supra* note 153 at 391.

¹⁶⁰ While this breadwinner-homemaker model may have produced positive economic results for the household in the past, it created serious disparities for women. See, e.g., LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN & CHILDREN IN AMERICA* 362 (1985) (concluding that divorced wives' standard of living fell by 73% during the first year following a divorce, while divorced men's standard of living rose by 42%). Weitzman's figures have been discredited due to errors in her data set, but corrected estimates still show an important disparity in post-divorce incomes: men's rise 10%, while women's drop 27%. See Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 532 (1996) (conducting an analysis of Weitzman's data and concluding that the results are in error). But see Sanford L. Braver, *The Gender Gap in Standard of Living After Divorce: Vanishingly Small?*, 33 FAM. L.Q. 111, 131 (1999) (arguing that the gender gap in post-divorce incomes has been "seriously overestimated" because the studies have not considered disparate taxation benefits and shared child expenses). Furthermore, the economic conditions that supported the breadwinner-homemaker model no longer seem to hold today. See, e.g., VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* (1988); Judy Fudge & Brenda Cossman, *Introduction to Privatization, Law, and the Challenge to Feminism*, in *PRIVATIZATION, LAW, AND THE CHALLENGE TO FEMINISM* 3, 26 (Judy Fudge & Brenda Cossman eds., 2002) (concluding that, because men's average wages are declining, women are forced to take on feminized employment opportunities that only exacerbate income inequalities); ARLIE HOCHSCHILD WITH ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 241 (1989) (pointing out the changing nature of women's lives with the advent of service jobs and the need for their wages at home); KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004) (analyzing fundamental changes in the workplace due to the emergence of the new economy); BARBARA

bers to the exclusion of female co-workers, the abolition of the closed shop would not necessarily benefit female workers. In fact, it would make it harder for female workers to unionize and, consequently, it would be harder for workers to demand better working conditions.

Neoliberals, however, argue that flexibility would create part-time or fixed-term contracts that would better fit women's needs, specifically women who cannot take on full-time or permanent jobs. This argument only glosses over the problem, though. The reason why these women do not take those jobs in the first place is largely a response to the issues that emerge from the interaction between labor law and other legal regimes. These issues include those raised by family law and the social norms that consider caregiving the exclusive duty of women.

Moreover, labor flexibility may hurt women, particularly those bearing housework responsibilities, performing childcare, or planning to have children. Under current legislation, which makes permanent employment contracts the norm, employers are obliged to provide for a twelve-week paid maternity leave for female employees, which they do through their contribution to social security.¹⁶¹ Employers also pay a share of their employees' compulsory health insurance.¹⁶² Doing away with these benefits—which are reflected in current overall wage levels—would shift the financial costs of child bearing and childcare to households with children or to women themselves.¹⁶³ Making labor rules more flexible might

EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 224 (2001) (providing a journalist's perspective on the impact of welfare reform on women by going undercover as a low-paid worker).

¹⁶¹ See Ley Federal del Trabajo [LFT] [Federal Labor Law], *as amended*, art. 170-II, Diario Oficial de la Federación [DO], 174 de Enero de 2006 (Mex.) (mandating the right to maternity leave six weeks prior to birth and six weeks after birth); LFT art. 170-III (Mex.) (mandating that maternity leave shall be extended for the time necessary if a woman is unable to work because of pregnancy or delivery); *Id.* art. 170-V (Mex.) (mandating the right of individuals on maternity leave to receive full pay for the twelve-week period referred to in art. 170-II and half pay for a limited period of sixty days after that in case of incapacity).

¹⁶² See Ley del Seguro Social [LSS] [Social Security Law], *as amended*, art. 15, Diario Oficial de la Federación [DO], 7 de Septiembre de 2009 (Mex.) (outlining employers obligations to provide insurance to their employees).

¹⁶³ See KERRY RITTICH, RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM 19 (2002) (arguing that women are systematically disadvantaged economically because labor markets are not arranged in a manner that permits an individual to effectively perform both types of labor- market work and childcare duties).

encourage employers to hire more women in part-time jobs with no benefits. However, this could ultimately force mothers to bear serious costs by requiring them to take several part-time jobs while also performing care-giver duties. To the extent that firms undergo restructuring to cut benefits, the change would also affect women already in the market who would otherwise enjoy maternity leave and childcare benefits.¹⁶⁴

In fact, as de facto labor flexibility has spread in the country, many married women find themselves working in the household and in the market. Often, these flexible jobs are poorly paid and offer no benefits. Labor flexibility, understood as the elimination of employers' responsibility for workers' benefits and protections, might encourage employers to hire more women. However, flexibility often becomes a synonym for precariousness.¹⁶⁵ Making labor laws more flexible may end up driving down wages and working conditions for the male insiders without necessarily making things better for women. Married women would find themselves needing to enter the labor market because their husband's wages are no longer enough to support the household, yielding negative consequences for their housework and the duration and quality of their childcare.

Flexibility will shift these costs, which employers currently bear, or which are absorbed by male and female workers as a whole, to mothers and would-be mothers. Disentangling the costs of workers' benefits from employers does not entail the elimination of such costs but merely shifts them to other actors. Even if one accepts the argument that reducing costs for employers may encourage them to create more jobs, this should not mean that the costs should be borne by workers alone or by female workers more specifically. Perhaps those protections could be provided in a different form and paid by different actors through the state via social security. The point is that flexibility is a short word for a shift in costs and that we need to have an idea about how those costs would be distributed and what effects they would have.

¹⁶⁴ See *id.*; Fudge & Cossman, *supra* note 160, at 27 ("The problem . . . is that women's greater independence has not been matched by greater economic equality, especially when there are children to care for.").

¹⁶⁵ See generally Guy Standing, *Global Feminization Through Flexible Labor: A Theme Revisited*, 27 *WORLD DEVELOPMENT* 583 (1999) (arguing that the changing character of labor markets around the world led to a rise in female labor force participation, a relative if not absolute fall in men's employment, and a "feminization" or deterioration of many jobs traditionally held by men).

As far as unionization is concerned, even if we recognize the need for making part-time and fixed-term jobs more widely available, there is no reason to couple this with obstacles to unionization. Unions can make an important difference. They can help provide better compensation and conditions in flexible jobs, which would benefit women by spreading the costs of the benefits obtained by unions among all the members. Thus, the solution is not to make union organization and collective bargaining more difficult in order to achieve a precarious flexibility that would supposedly benefit women.

Union practices that disfavor women need to be confronted too. The closed shop gives considerable power to the union in firms' hiring decisions. In this and other aspects of unions' internal governance, there is potential to establish more effective remedies for women who are discriminated against. But these changes will more likely come with effective unions, which are pressed to compete for membership, and with leaders who are democratically elected.

In contrast, a gender-conscious radical democratization of unions might do more to unravel the traditionally patriarchal profile of unions. It would require that unions take positive measures—like representational quotas—to include women in their ranks, and, most importantly, it would require them to include traditional “women’s problems” in the core of their agenda. Included in this project would be the need to specify and prohibit as discriminatory a variety of practices such as: encroachments on women’s privacy (requests for no-pregnancy certificates when hiring or considering promotion, for example), reprisals against women who take maternity leave (e.g. refusal to reinstate the women to the same job position after maternity leave) or family care leave, and sexual harassment.¹⁶⁶

However, even if we were to retain the closed shop with this gender conscious radical democratization component, it is unlikely that it would positively affect women without a transformation of the host of background legal regimes and social norms that currently affect women’s bargaining position in the market. The next

¹⁶⁶ See Patricia Kurczyn Villalobos, *Propuestas para Reformar la Ley Federal del Trabajo en Temas de Equidad y Género* [Proposals to Amend the Federal Labor Law in regard to Equity and Gender Concerns], in *LA REFORMA LABORAL QUE NECESITAMOS* [LABOR REFORM WE NEED] 145 (José Alfonso Bouzas Ortiz ed., 2004) (discussing ways to promote gender equality in the labor market).

step in the analysis is to turn to these background regimes. What becomes relevant is a legal realist analysis that takes into account not only labor regulation, but also other legal regimes, like family law, that form the background against which labor rules operate.¹⁶⁷ This is the analysis to which I now turn.

4.4.2. *Considering Background Legal Regimes*

Neoliberals seem to assume that if labor regulations were made more flexible, women would automatically benefit. They believe that easing the barriers to entry in the labor market, either directly—with part time and temporary contracts—or indirectly—by eliminating firing restrictions—would allow women to enter the labor market as easily as men.¹⁶⁸ However, it may be that even after lowering these barriers, women find it harder than men to get jobs equivalent to those offered to men. Or, even if they get the jobs, they might find it harder to keep them. In this regard, neoliberals fail to see that it is the combination of labor rules and other legal norms that produce such inequitable results for women. Consider, for instance, those norms that create incentives for women to marry and perform care-giving work as opposed to entering the labor market. These norms also assume the marriage as a life-term contract. We would need to look at the incentives created by family-law rules concerning marriage, divorce, property regimes within marriage, property partition upon divorce, child care responsibilities, alimony rules, and so on. Then we would need to analyze how these rules interact with labor laws to create different incentives for men and women, and for different kinds of women.

We might find that married women have strong incentives to stay at home. They bear disproportionate legal and social responsibilities for housework and childcare relative to men. To the extent that men can financially compensate women for their contribution to household production, women have fewer economic incentives to enter the labor market. In addition, family rules that consider wealth accumulated during marriage as the product of only the wage earner provide additional incentives against divorce. At the same time, women who do enter the market are dis-

¹⁶⁷ For an analysis of the immigration legal regime as providing a background upon which labor laws operate, see Alvaro Santos, *Working Borders: Linking Debates about Insourcing and Outsourcing of Capital and Labor*, 40 *TEX. INT'L L.J.* 691, 732-36 (2005).

¹⁶⁸ See, e.g., *DOING BUSINESS 2004*, *supra* note 42, at 36-38.

advantaged when competing with other women or men who do not perform home or care work. In the market, employers rarely try to accommodate women who perform care-giving work because that entails greater costs.¹⁶⁹

What effect would the abolition of the closed shop have for women seeking to enter the labor market against these background conditions? It would probably be mixed. Neoliberals are probably right to say that more “flexibility” would allow more women to find work, but the work that they would find would be part-time and lacking the benefits to grant them independence from an additional wage earner. By contrast, abolishing the closed shop might actually hurt married women with children who rely on their spouse’s wage for sustenance and might force them into this stratified market for part-time, precarious work.

I do not mean to suggest that there is a consensus on what is best for women, let alone what kind of legal arrangement would be most desirable. Feminists reach different conclusions on how the market and the family should interact depending on their views about what is best for women and how society should be organized.¹⁷⁰ There is of course no easy answer to these questions. But if we are concerned about how labor regulation and its interaction with other legal regimes affect women, we need to raise them. The

¹⁶⁹ See generally JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000) (discussing ways to alleviate the conflict between domestic and workplace responsibilities by altering labor market opportunities); Chai R. Feldblum & Robin Appleberry, *Lawmaking: A Case Study of the Family and Medical Leave Act*, in THE WORK AND FAMILY HANDBOOK: MULTIDISCIPLINARY PERSPECTIVES, METHODS, AND APPROACHES (Marcie Pitt-Catsouphes et al. eds., 2006) (discussing the Medical Leave Act and its effect on the domestic environment). For an example of proposals to make the workplace more flexible and accommodate it to the needs of women and families, see NATIONAL ADVISORY COMMISSION ON WORKPLACE FLEXIBILITY, GEORGETOWN UNIV. LAW CENTER, PUBLIC POLICY PLATFORM ON FLEXIBLE WORK ARRANGEMENTS (Nat’l Adv. Comm’n on Workplace Flexibility 2010), available at http://workplaceflexibility2010.org/images/uploads/reports/report_1.pdf.

¹⁷⁰ See, e.g., MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995) (arguing for direct public support of care work but not through marriage); Robin L. West, *Do We Have a Right to Care?*, in THE SUBJECT OF CARE: FEMINIST PERSPECTIVES ON DEPENDENCY 88-114 (Ellen K. Feder & Eva Feder Kittay eds., 2003) (advocating for a publicly supported right to care). But see Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions about Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI-KENT. L. REV. 173, 588 (2000-2001) (expressing reservation about the idea that care work should be publicly supported); Vicky Shultz, *Life’s Work*, 100 COLUM. L. REV. 1881 (2000) (reasserting the centrality of market work for women).

debate about labor law reform—that is, the reform of the labor market—cannot omit an analysis of how the market interacts with the family. There is no doubt that different groups in society would hold different views. But the debate needs to highlight what the stakes are and press those groups to make their views clear.

4.5. The Effects of Labor Regulation in the Country's Economic Growth

The model I propose, based on an intra-class and inter-gender distributional analysis that explores how labor regulation has affected different groups of workers, takes seriously the first aspect of the neoliberal critique to social regulation. There is a second aspect of the neoliberal critique that is concerned with the general negative impact of labor regulation on the country's economic performance. If it is correct, then retaining the closed shop might have negative effects on the country's growth and be undesirable after all. The desirability of the closed shop would ultimately depend on whether the economic consequences of unions are generally negative. We would need to evaluate whether the economic benefits of having effective unions are outweighed by the benefits of having fewer and weaker unions.

Neoliberal advocates argue that labor regulation has impeded the country's economic growth. They do not support the existence of unions as negotiating parties because they increase labor costs by entering into collective agreements that raise wages, benefits and working conditions. Neoliberals argue that a rigid regulation also scares away investment, both domestic and foreign. According to this view, the end result is a huge opportunity cost in economic growth. In contrast, countries that have liberalized their labor regulations, they argue, fare better. Flexible labor laws contribute to a favorable "investment climate," which attracts new firms. Furthermore, existing firms also become more productive and competitive, which helps create jobs and makes the economy as a whole grow. Thus, neoliberals conclude with a familiar argument regarding the overall effects of labor regulation, just articulated at a more general level: rigid labor regulation hurts the coun-

try's economic performance and, as a result, workers' prospects for more and better jobs.¹⁷¹

These claims have been met with powerful criticism that challenges both the theoretical conclusions and empirical evidence of the neoliberal arguments.¹⁷² Summarizing the state of the debate, labor economist Richard Freeman argues that critics of the orthodoxy have successfully demonstrated that the data is more ambiguous than what neoliberal supporters maintain.¹⁷³

More importantly, some economists have highlighted that labor regulation can enhance efficiency by reducing transaction costs and increasing productivity.¹⁷⁴ The initial confidence in the neoliberal arguments has waned in light of these theoretical disagree-

¹⁷¹ See generally Stephen Nickell, *Unemployment and Labor Market Rigidities: Europe versus North America*, 11 J. ECON. PERSPECTIVES 55 (1997) (arguing that labor market regulation explains the increasing asymmetry between European and U.S. employment rates); Stephen Nickell et al., *Unemployment in the OECD since the 1960s: What do we Know?*, 115 ECON. J. 1 (2005) (concluding that labor market regulation explains the increasing asymmetry between European and U.S. employment rates examining "the proposition that the dramatic long-term shifts in unemployment seen in the OECD countries over the period from the 1960s to the 1990s can be explained simply by changes in labour market institutions in the same period").

¹⁷² See, e.g., DEAN BAKER, *supra* note 49; Gøosta Esping-Andersen & Marino Regini, *Introduction*, in *WHY DEREGULATE LABOUR MARKETS?* (Gøosta Esping-Andersen & Marino Regini eds., 2000) (arguing that the deregulatory agenda is only tenuously anchored in economic theory or empirical research); See also *The 1996-97 ILO Jobs Report: There's Plenty of Work to Do!!*, THE JOBS LETTER, Dec. 20, 1996), available at <http://www.jobletter.org.nz/jbl05210.htm> (summarizing *ILO World Employment 1996/97, National Policies in a Global Context*, which argues that unemployment rates have increased independently of the degree of market regulation).

¹⁷³ See Richard B. Freeman, *Labour Market Institutions Without Blinders: The Debate over Flexibility and Labour Market Performance*, 19 INT'L ECON. J. 129, 129-30 (2005) (arguing that the debate over whether labor institutions impair aggregate performance is inconclusive).

¹⁷⁴ See, e.g., DIAMOND ASHIAGBOR, *THE EUROPEAN EMPLOYMENT STRATEGY: LABOR MARKET REGULATION AND NEW GOVERNANCE* 48-50 (2005) ("The normative framework supplied by labour law not only reduces transaction costs, but also . . . facilitates a higher degree of internal—namely, functional—flexibility and acceptance of technological change . . . thus improving productivity and competitiveness."); Christoph F. Buechtemann, *Introduction: Employment Security and Labor Markets*, in *EMPLOYMENT SECURITY AND LABOR MARKET BEHAVIOR: INTERDISCIPLINARY APPROACHES AND INTERNATIONAL EVIDENCE* 3, 3 (Christoph F. Buechtemann ed., 1993) (discussing employment security and stability in relation to labor markets noting that unregulated U.S. employment sectors are far from efficient).

ments and mixed empirical evidence.¹⁷⁵ Thus, it is reasonable to argue that the a priori claim that labor deregulation—or the dismantling of protections in the form of flexibility—will be necessarily good for the country's economic performance is unfounded. Those proposing reform on the basis of this assumption have important theoretical challenges and empirical evidence to rebut.

On the question of unions' effects on economic growth, there is no conclusive evidence that they have a negative influence.¹⁷⁶ The scholarly debate shows that the unions' impact on a country's economy is more indeterminate than its proponents and detractors usually admit.¹⁷⁷ What is clear from the available evidence is that the impact varies according to context in which the unions operate, a point that Freeman often emphasizes. In his view, unions are "mutable social institutions that operate differently in different institutional settings."¹⁷⁸

There are of course less controversial union effects, like decreases in wage inequality, low turnover, increases in benefits, and decreases in profits. People might legitimately disagree about whether these effects are desirable or not. These economic effects present trade-offs and raise important policy considerations for any society thinking about how to reform its labor market institutions. However, it seems that the neoliberal claim that strong unions have an overall negative effect on the economy has been seriously challenged and would not be a sufficient argument against a radically democratized version of the closed shop.

4.6. The Application of the Model to the Mexican Context

Much has been said about the country's generous twentieth-century labor regulation policies. Social advocates point to its protections not only as an achievement in and of itself, but as a key

¹⁷⁵ Witness the OECD's retreat from its initial labor flexibility reform agenda in the 1994 Job Study to a more ambivalent position about the economic effects of labor regulation. See ORG. FOR ECON. CO-OPERATION AND DEVELOPMENT, OECD EMPLOYMENT OUTLOOK 2004, 81 (OECD ed., 2004) ("Evidence of the role played by EPL [employment protective legislation] on aggregate employment rates remains mixed . . ."); see also ORG. FOR ECON. CO-OPERATION AND DEVELOPMENT, OECD EMPLOYMENT OUTLOOK 2006 (2006).

¹⁷⁶ See generally RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO?: A TWENTY-YEAR PERSPECTIVE (James T. Bennett & Bruce E. Kaufman eds., 2007) (discussing the effects of unionization on economic performance).

¹⁷⁷ Richard B. Freeman, *supra* note 62, at 617.

¹⁷⁸ *Id.*

element in the country's industrialization and development during the "Mexican miracle," also known as "desarrollo estabilizador" or stabilizing development.¹⁷⁹ Neoliberals decry labor's costly protections as impediments to the country's economic growth. However, there is also considerable agreement that enforcement of the law is lax. For social advocates, this is a reason to reinvigorate the social protections. For neoliberal advocates, this is proof that protections are too costly and provides all the more reason to deregulate or to formalize the flexibility that already exists in practice. However, these claims are in need of serious reconsideration based on the analysis of the economy's situation on the ground.

The law-on-the-ground in Mexico seems to confirm some of the skepticism towards the neoliberal claim that labor law flexibility would help create jobs and generate investment and growth. Scholars have argued that there is already widespread flexibility in Mexican labor law institutions and that this flexibility has been achieved through gaps in legislation, lack of enforcement, and most tellingly, deals between employers and the traditional union leadership.¹⁸⁰ Even though there is an outcry over the rigidities of labor regulation, employers have, in reality, found ingenious and effective means of non-compliance. Weak enforcement of labor regulation is due to a variety of factors. Employers' bargaining power has increased due to the conditions of international competition where capital can move more easily than labor, especially in labor-intensive sectors. Weak unions are unable to bargain effectively and unrepresentative unions are not interested in ensuring labor law enforcement.¹⁸¹ The government does not have the capacity to ensure closer inspection of labor practices and labor courts, which consist of tripartite administrative organs often described as captured by the leadership of traditional unions and employers.

¹⁷⁹ See, e.g., MIDDLEBROOK, *supra* note 41 (discussing the contribution of organized labor to the process of industrialization in Mexico).

¹⁸⁰ See ARTURO ALCALDE & BERTHA LUJÁN, *COMO VIVEN LA DEMOCRACIA DE LOS ABAJO* 91, 103 (Jorge Alonso & Juan Manuel Ramírez eds., 1997); see also GRACIELA BENSUSÁN, *DISEÑO LEGAL Y DESEMPEÑO REAL: INSTITUCIONES LABORALES EN AMÉRICA LATINA* 326 (2006). See also Alvaro Santos, *Labor Flexibility, Legal Reform and Economic Development*, *supra* note 50.

¹⁸¹ See BOUZAS ORTIZ, *supra* note 120.

Furthermore, labor market flexibility also exists in the form of worsening wages and working conditions.¹⁸² Despite this downward flexibility, gained through a dramatic decrease—often with union acquiescence—in real wages and benefit cuts, employment growth rates have not increased substantially in the last two decades. Even under this flexible scenario, the economy has been unable to create jobs for youths becoming economically active.

On the other hand, the country's generous labor protections, honored largely in the breach, do not seem to have fulfilled their ambitious aspirations in recent decades. Labor regulation has not fared well when measured against its self-declared objectives: leveling the playing-field between employers and workers, ensuring decent jobs, providing fair treatment in the resolution of conflict, and guaranteeing workers' participation in decisions that concern their workplace.

One way to measure how much workers have been empowered is to look at what they are usually most concerned about—wages and benefits. These results can serve as indicators of how even the playing field has been for workers in their negotiation with employers over time. Take, for instance, the overwhelming evidence showing a deep decline in real wages during the last three decades.¹⁸³ By 1998, "real wages and real minimum wages equaled only an estimated 57.0 percent and 29.5 percent of their respective levels in 1980."¹⁸⁴ Furthermore, the share of wages as a percentage of GDP has also fallen sharply, from "40 per cent of GDP in 1976 to just 18.9 in 1999."¹⁸⁵

¹⁸² See BENSUSÁN, *supra* note 124 (discussing the decline of protections for workers in Mexico); see also ENRIQUE DUSSEL PETERS, POLARIZING MEXICO: THE IMPACT OF LIBERALIZATION STRATEGY 160-61 (2000) (quantifying the trends in the decline of real wages in Mexico as liberalization of policies progressed). See generally Carlos Salas & Eduardo Zepeda, *Empleo y Salarios en el México Contemporáneo*, in LA SITUACION DEL TRABAJO EN MÉXICO 37, 55 (2003) (México: Instituto de Estudios del Trabajo 2003) (discussing the 2001 recession's effects on Mexican wages and employment rates).

¹⁸³ See DUSSEL PETERS, *supra* note 182, at 160-61.

¹⁸⁴ *Id.* at 161.

¹⁸⁵ Gabriel Palma, *Trade Liberalization in Mexico: its Impact on Growth, Employment and Wages* 50 (Int'l Lab. Office: Geneva, Employment Paper No. 2003/55, Apr. 30, 2003), available at http://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_142466.pdf. See also DUSSEL PETERS, *supra* note 182, at 160:

Although labor leaders have been able to negotiate their continued participation in PRI and the government, the labor movement as a whole has lost dramatically. Wages in the total economy as a percentage of

The country's average economic growth during the period 1980–2007, although low, has been positive reaching about 2.9%. Accordingly, while the economy has grown during the last three decades, real wages have dramatically decreased. This suggests an important redistribution of resources from workers to employers through the decline in the cost of labor.¹⁸⁶ Using this metric, workers do not seem to have been very effective in negotiating favorable wages with employers under a regime meant to empower them.

Consider employment conditions, as measured by security and stability of employment. How have benefits or guarantees of a long-term employment fared? There is evidence showing a significant fall in long-term and well-paid jobs with benefits and a surge in the contingent workforce—characterized by part-time or temporary, low-paid jobs with few or no benefits. This development may reflect an important downsizing of the public sector and the ensuing elimination of a considerable number of well-paid jobs. At the same time, the private sector has undergone an important change as well, with the increasing substitution of stable and secure employment for low-paid and part-time jobs. Finally, there is the rapidly-growing informal sector, composed by hundreds of thousands of micro-firms, often family-based, where jobs are highly unstable and offer no benefits. Thus, using a stability and security metric, labor regulation does not seem to have helped workers in recent decades either.

This evidence should force a reconsideration of the neoliberal and social positions. On the one hand, social regulation has failed to deliver its promises. While insisting on further protections or tighter enforcement, social advocates often ignore the costs of regulation on the groups they wish to protect. The neoliberal critiques of labor regulation, on the other hand, fail to account for a wide

GDP fell from levels above 40 percent during the 1970s to 31.74 percent in 1996. Similarly, and in spite of significant successes in increasing labor productivity in manufacturing, real wages have continued to decline in this sector . . . Thus, in contrast to 1940–1970, real wages have not increased along with labor productivity.

Id.

¹⁸⁶ See Enrique Hernández Laos, *La productividad en México: Origen y Distribución 1960–2002*, in *LA SITUACION DEL TRABAJO EN MEXICO* 161, 168–69 (Carlos Salas ed., 2006) (arguing that although productivity has remained low in Mexico from 1988–2002, workers have transferred much of their productivity gains to employers).

range of already existing flexibilities in the labor markets and their relative failure in bringing about a cycle of economic growth.

5. CONCLUSION

In this Article, I have traced what I see as the three main transnational discursive positions in the analysis and debate of labor law and labor relations. Each of these rhetorical positions has an intellectual tradition and a legal, theoretical, and doctrinal expression that allows it to stand on its own as a plausible and coherent position from which to view and pass judgment upon the organization of labor relations.

Each of these positions translates into the defense of certain principles over others (i.e. security or flexibility, welfare or individual autonomy) and certain rules over others (i.e. just cause dismissal or contract at will, union security clauses or individual freedom of association). My claim is that these three discourses—the social, the neoliberal, and the rights-based approaches—have come to dominate the way we think about labor relations. They dominate our discussion in ways that prevent an analysis of labor regulation's current and future distributional consequences while limiting how we think about our legal institutions.

The social position so equates current labor regulation and social protections with progressive politics that to criticize it is to challenge the historic aspirations of workers and the labor movement. The neoliberal position calls for dismantling labor protections if a country is ever to compete successfully in the global economy and achieve prosperity. It so equates its flexibility reform with the market that to challenge its program is to oppose the market, as if that was its only possible institutional manifestation. To resist the neoliberal program is to long for the state's control of the economy. The rights-based approach has so narrowed its aspirations for freedom and democracy to the pursuance of a rights agenda that it equates freedom and democracy with the attainment of such rights. To challenge its formalism is to be a supporter of the old statist regime.

It is hard not to get a sense of exhaustion on seeing how these conceptual positions dominate the debate. This impasse is often attributed to an unfortunate alignment of political forces, whose interests sharply conflict, and to the lack of political will by any particular government. However, my call to transcend these entrenched positions is not necessarily intended to urge a specific

reform. Instead, I have sought to draw attention to the blind spots in this debate. I have aimed to transcend the way we think of labor regulation and the familiar dogmas we are ready to subscribe to because of conceptual comfort or political affiliation.

This Article shows that these discourses are truly transnational in character. Although these rhetorical positions are often thought to be peculiarly local and are sometimes presented as such, they are visible in debates about labor law reforms in both developed and developing countries. From labor regulatory debates in the United States, China, and Mexico, to debates about the future of Social Europe, to debates over the inclusion of labor rights in free trade agreements, different groups resort to these rhetorical positions to advance their interests.

In this Article, I sought to test each of the three dominant discursive positions by critiquing their assumptions. The Article engages in a comparative analysis that highlights the shortcomings of each of these positions when put in perspective. A comparative analysis illustrates how in any given country, each of these discursive positions advocates a very narrow repertoire of legal and institutional options in the regulation of labor relations. It helps us understand the contingency of the connection between the goals of a discursive position and the present institutional shape it has come to inhabit. By doing a comparative analysis, I show how we can imagine alternative legal arrangements and engage in institutional experimentation.

I use a comparison between the collective-bargaining systems of the United States and Mexico to show what each country can learn from the other in light of ongoing debates about labor reform. Mexico struggles with social rules and institutions that intervene in unions' governance structures, undermine unions' ability and willingness to represent their members, and imperil workers' ability to participate meaningfully in the workplace. The United States struggles with rules and practices that, in the name of individual rights, have substantially weakened unions and made it incredibly hard for workers to organize and bargain collectively. Studies confirm that many more workers would like to be represented and have some kind of collective voice at the workplace than those who are currently represented.

In the debate about reforming the social rules in Mexico, I argue that the weaker American social position shows the benefits of a collective bargaining system that is disentangled from the government and gives unions greater independence. However, I warn

against embracing a narrow interpretation of the rights-based approach that may throw away rules that enable workers' organization and ability to bargain. Similarly, I claim that the United States can widen its restrictive negative-rights approach and thereby lift burdensome hurdles for workers' representation. It can do so while guarding against the interventionist practices that have ossified unions in Mexico.

Challenging the assumptions of the three discursive positions and relying on a comparative analysis, this Article proposes an alternative analytical framework for thinking about labor regulation. This framework takes some key aspirations of each of the discursive positions but rejects the link between such aspirations and its prevailing legal and institutional expressions. For instance, using the example of the closed shop in the case of Mexico, my approach embraces the rights-based approach's aspirations to promote workers' freedom and self-government in their organizations. The goal is to foster workers' expression and participation in decisions that concern their workplace, promote organizations that are responsive to workers' interests, and ensure accountable leadership. However, the rights-based approach's challenge to the authoritarian aspects of the current corporatist collective bargaining system need not take the form of particular interpretations of rights, like the Supreme Court's interpretation of the right to freedom of association that undermines the power of workers' organizations. The point of the proposed framework is to show that there is greater room for institutional change and experimentation in the current collective bargaining system than the narrow alternatives outlined by the rights-based discourse. Mexico's labor relations system can be radically democratized while transforming, rather than dismantling, the power of unions.

Using this framework, I examine the debate in Mexico and outline a model of institutional analysis that embraces the legal realists' insights about law's effects on the distribution of power and wealth in society. This approach identifies labor law rules of engagement between employers and workers that dictate how they can bargain and what they can do to one another in their employment relationship. It also analyzes the actors' alternatives to the bargaining situation provided by other legal regimes that remain in the background and shape the parties' options.

As an example, I analyzed labor law's interaction with family law in order to understand the current regime's asymmetrical effects on men and women and among different groups of women.

The analysis does not render concrete policy solutions. Rather, it helps identify the implicit choices embedded in the current legal arrangements and in possible alternatives. What emerges are difficult choices that reflect different and often competing normative views about the relationship between work in the market and in the family, how to value it, and who should perform it.

Finally, this Article is not an attempt to propose, or even defend some specific policy proposals, but rather an attempt to break conceptual ground. What I propose is a different way of analyzing and debating labor regulation. One in which we move away from the entrenched prejudices that the discursive positions reflect and engage in an exercise of institutional imagination. I hope to foster a mode of analysis that is attentive to questions of distribution—both inter-class and intra-class—and of efficiency and growth. A mode of analysis that does more to illuminate trade-offs and to tease out hard choices, than to obscure them by referring to the old myths from which we have learnt to invoke certainty.

TABLE 1: DISCURSIVE POSITIONS IN THE DEBATE ABOUT LABOR LAW REFORM

