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## THE FALSE HOPE OF UNION DEMOCRACY

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### ABSTRACT

Over the course of the twentieth century, labor unions emerged across the globe in reaction to the widespread growth of industrial wage labor. The relative strength of unions saw a secular decline in the late twentieth century that has only continued in the early twenty-first century. Debates among sympathetic activists and scholars over the sources of this decline and how to reverse it have intensified alongside resurgent contemporary concern with economic inequality. This article argues that the recurrent focus of American labor scholars and activists within these debates on increasing internal union democracy as a means of revitalizing unions is fundamentally misguided. The promotion of liberal procedural rights, including broader and more direct elections, as a mechanism of accountability and source of renewed institutional dynamism will

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only further hasten the demise of labor unions in the United States and elsewhere.

By contrast, labor unions were historically founded in explicitly corporatist, group-based notions of democratic process. Following corporatist theories of politics which allow the state to legally identify and regulate collective bargaining agents, unions operate to centralize and aggregate labor interests to facilitate their core functions of wage-bargaining and the acquisition of political capital. Thus, unions' potential for achieving social influence and economic justice for their members is predicated on accumulating power through collective action. Collective action whose potency correlates with the effective strength of unions' powers of internal discipline in and outside the workplace – powers directly undermined by solely liberal conceptions of the union/worker relationship and are unavoidably sourced in performative loyalty rather than electoral accountability.

Following this corporatist logic, over the long-run, efforts to promote greater internal union democracy have failed to improve the performance of unions as wage-bargainers or as political agents. Unions have been key to movements for political democratization, but this effect has been achieved by channeling and disciplining class politics rather than serving as the foundation for the bottom-up creation of social movement capital. Following a misconception of the individual workplace as a source of class solidarity, procedural localism focuses labor conflict where workers are most vulnerable to retaliation and least likely to induce broad based solidarity, a mistake only worsened by contemporary workplace authoritarianism. As a result, internal union democracy campaigns over the long run have ultimately resulted in weakened unions later returning to corporatist strategies. Moreover, the emphasis on internal union democracy has left unions susceptible to judicial and political assaults across the globe which exemplify the limits of negative liberal rights to address social power asymmetries, especially in common law countries. This mistaken focus on union democracy is redoubled when the international influence of U.S. labor scholarship inspires calls for union democratization as a salutatory reform elsewhere.

To substantiate these claims, this article uses a trilateral comparison between the development of collective bargaining in the United States, Brazil, and China to demonstrate the inevitable pull of unions towards corporatist bargaining, even among nations with quite different regulatory regimes – but all where calls for greater union

democracy have at points been made. The article reinterprets the history of the decentralized U.S. labor union model, formally infused with liberal procedural norms, as one where the success of U.S. unions followed their ability to replicate corporatist behaviors through union mergers, pattern bargaining, sympathy strikes and other collective tactics, described as “aspirational corporatism.” By contrast, the relative success of the now-threatened Brazilian union model has been predicated on the elision of liberal norms, described as “hyper-corporatism,” even though calls for union democracy were a rallying cry during Brazil’s political democratization. These two examples are then contrasted with the Chinese Communist Party’s experiments with workplace proceduralism within its state labor union as a tactic to weaken the horizontal bonds of the ever-growing Chinese labor movement, while also seeking to designate collective bargaining units to ease labor unrest—described here as “simulated corporatism.”

This comparative and historical analysis is not meant to critique the role of unions as instruments for economic fairness, but it is meant to help guide efforts to best realize their capabilities. The corporatist function of unions naturally moves them away from more radical reforms to transform the modern workplace which would alienate other established economic and political actors. In this regard, no structural configuration of internal union procedure can substitute for the presence of a broader labor politics or specific labor party. Thus, efforts to create or foster workplace relations governed by deeper norms of participatory economic democracy should be directed elsewhere.

## TABLE OF CONTENTS

1.	Introduction .....	619
2.	The Inevitability of Labor Unions as Corporatist Bargainers .....	627
	2.1. <i>The Gravitational Pull of Union Corporatism</i> .....	627
	2.2. <i>Social Capital Formation and the Authoritarian Workplace</i> .....	635
	2.3. <i>Union Democracy and the Comparative Historical Frame</i> .....	644
3.	Corporatism as Informal Aspiration for U.S. Labor Unions .....	647
	3.1. <i>U.S. Labor from Republican Radicalism to Corporatist Peace</i> .....	647
	3.2. <i>Legal Deradicalization Amid Failed Corporatism</i> .....	653
	3.3. <i>Realism in Rebuilding the Corporatist Terrain of Labor Power</i> .....	666
4.	The Success of Union Hyper-Corporatism in Brazil .....	672
	4.1. <i>A New Unionism and Democratization</i> .....	672
	4.2. <i>The Iron Rule and Neo-Corporatism</i> .....	677
	4.3. <i>The New Reality of Union De-Corporatization</i> .....	681
5.	Simulating Union Corporatism to Manage Labor Unrest in China .....	685
	5.1. <i>Communist Failures and the Restlessness of Chinese Labor</i> .....	685
	5.2. <i>Elections as Authoritarian Innovation</i> .....	688
	5.3. <i>Union Democracy as a Siphon of Solidarity</i> .....	694
6.	Conclusion .....	700

## 1. INTRODUCTION

Early in 2015, the Teamsters for a Democratic Union (TDU) celebrated one in a series of hard-won victories in its struggle within the International Brotherhood of Teamsters (IBT), in this case preserving the right for IBT members to directly elect their national representatives.<sup>1</sup> As the largest union in the United States, the TDU's struggles have often served to symbolize the U.S. labor movement's long-standing preoccupation with the ideal of union democracy. Union democracy herein is generally conceptualized as how internal union structures replicate the participatory and liberal procedural norms, and most are often focused on elections as a form of institutional accountability. This American preoccupation with union democracy is not sourced solely in its parallels to political accountability but also the participatory spillover effects its proponents imagine for larger issues of economic and political equality. The replication of electoral dynamics within the union is argued to serve as a supportive microcosm of political democracy where citizens can develop democratic expectations and experience, all of which contribute to the groundwork for social movements promoting more radical workplace reforms in the future.

Arguments about the social utility of union democracy thus engage with broader ideals concerning the nature and sources of economic democracy, understood to mean either, in the general sense, the state of economic fairness in a society or, in the specific sense, the participation of workers in workplace decision-making. In parallel to concerns regarding the health of political democracy more generally,<sup>2</sup> growing economic inequality has been seen as an indication of the decline of economic democracy in the general sense and the advancement of technocratic conceptions of managerial expertise and authority in the workplace as tied to the decline of economic democracy in the specific sense. While the modern citizen is often assumed in her role as a consumer to effectively filter and process complex data in a world of growing financialization, in her role as a producer she is assumed to have little capacity to contribute

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<sup>1</sup> Alexandra Bradbury, *Teamsters Secure Their Right to Vote, In Time for 2016 Election*, LABOR NOTES (Jan. 28, 2015), <http://labornotes.org/2015/01/teamsters-secure-their-right-vote-time-2016-election> [<https://perma.cc/CZP7-D4AW>].

<sup>2</sup> Compare ANTHONY DOWN, *AN ECONOMIC THEORY OF DEMOCRACY* (1957), with BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER* (2007).

meaningfully to workplace decision-making and to have been rewarded with increasingly smaller shares of total economic production.

Current debates about inequality now occur as the global state of labor unions has been one of an almost universal secular decline in the late twentieth and early twenty-first century. Growing frustration has been expressed by labor scholars and activists that the decline of unions is a root cause of economic inequality and labor's political relevance. The extensiveness of this trend has induced what Guy Mundlak recently diagnosed as a deep anomie among labor scholars.<sup>3</sup> Beyond growing inequality, this anomie also reflects the continued rebuffing of hopes that the twentieth century rise of collective bargaining, alongside the growth of welfare state arrangements, would progressively assuage the dislocations of labor commodification that Karl Polanyi identified at the heart of industrial capitalism.<sup>4</sup>

In the context of this growing concern with economic inequality, it is not surprising then that in American debates over how to combat inequality union democracy is cited as a critical means to revitalize American unions and recapture the link between meaningful work and citizenship. Notably, intra-corporate forms of worker organization are illegal in the United States, even though workplace governance is also precluded as a topic of collective bargaining. Nonetheless, a tight association is believed to exist between union democracy and general economic democracy, or at least the expectation of a future inter-relationship, and as an asserted form of participatory specific economic democracy. In turn, the international influence of American labor scholarship has both directly suggested and indirectly inspired calls for union democracy abroad.

Yet, in many ways the American preoccupation with union democracy is an exceptional one. Labor unions first emerged in early nineteenth century Europe and then spread worldwide, not as liberal democratic institutions but as corporatist institutions. In its broadest terms, corporatism refers to a general theory of politics holding that group-based bargaining and negotiation over economic and social differences were the fulcrum of general economic democracy, often called social democracy. Many early forms of corporatism

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<sup>3</sup> Guy Mundlak, *Workplace – Democracy: Reclaiming the Effort to Foster Public and Private Isomorphism*, 15 THEOR. INQ. LAW 160 (2014).

<sup>4</sup> KARL POLANYI, *THE GREAT TRANSFORMATION* (1944).

were wholly illiberal in conception, most notably Italian fascism, but still made claim to democratic legitimacy by virtue of representing social interests through corporatist groups, including those predicated on economic, religious or other significant social cleavages. In most corporatist regimes the state took an active role in designating corporatist actors and regulating the structure of their bargaining. In the context of wage labor, labor unions were designated to represent the interests of workers in negotiations with employer groups. The very success of these corporatist regimes was then dependent on both channeling and disciplining workers collectively in order to strengthen unions' broader social bargaining power. This discipline was needed to make unions' bargaining credible, and centrally included the ability to induce strikes, but also included other forms of political discipline, such as voting, economic discipline, such as consumer boycotts, but also workplace discipline, in order to compete with managerial discipline over issues of performance. As such, unions' relationships with workers constituted intertwined channel of obligations and loyalty.

As a result of the European influence of corporatist theories, the place of individual procedural rights associated with American union democracy as a one-sided restraint of individual workers over unions is still largely absent from the majority of national labor union traditions. Pathways for workplace participation exist in these traditions, including work councils and forms of co-determination, but even here these institutions are distinct from labor unions and their internal procedures deviate significantly from norms of liberal representation. Moreover, the wage bargaining and political aggregation functions of corporatist unions are predicated on at least partial insulation from individual legal claims against their decisions and actions, and unions are thus often granted some combinations of the disciplinary powers cited above. In such context, a general distinction is easy to draw between union democracy and workplace democracy.

The corporatist roots of unions also reflect a presumption that unions would have an integral relationship with larger national labor movements and specific labor parties. Throughout the course of the twentieth century, corporatist unions played key roles as societies transitioned from feudalism or colonialism to political democracies. In the vast majority of these national histories, unions' power was directly tied to their ability to nurture political solidarity among diverse workers. However, even the crucial grassroots actions of

unions during times of democratic transitions were not organized at the level of individual workplaces. The effectiveness of unions as bargainers for their constituents was never uncontroversial, but mechanisms of accountability were presumed to exist not through elections or the litigation of other procedural legal rights but rather through external state regulation of labor union institutional design and the loyalty that unions inspired from their performance as collective bargainers. Moreover, the larger responsibility of actually engaging in social democratic political action was the purview of labor movements and parties which, no matter how strong the overlap, were distinct from unions themselves.

In contrast to the presumptions of American proponents of union democracy, for corporatist unions the introduction of procedural liberalism thus not only undermines union discipline but leaves them vulnerable to opportunistic judicial assault. Whenever unions are expected to reconcile their collective action on equal footing with negative individual rights, the consequence is deconstruction—already near completion in the United Kingdom and well in progress in the United States. Not surprisingly, this deconstruction has in recent decades been paired with the increasing insulation of unions' historical twin, the corporation, from these same claims of democratic proceduralism.

Even more acutely, the expectation that union democracy will fuel the systemic revitalization of unions fundamentally misconceptualizes how the social power of unions is generated. To link union democracy to collective action requires viewing the individual workplace as the motor force of labor activism. Yet, the generally transitory effects of union revitalization efforts in the United States and elsewhere reveal that such efforts are illusory and heavily dependent on the external infusion of social capital into unions from labor movements rather than the reverse. While unions were key to channeling worker interests into the social movements necessary to provoke political democratization, this success was rarely, if ever, dependent on intensifying intra-union participatory decision-making. And, in turn, most post-democratization unions either turned to embrace corporatism or faded from social influence.

Moreover, however one may imagine earlier industrial workplaces, the general social atomization of modern work, and the growth of managerial authority therein, has rendered individual workplaces even more unreliable as long-term generators of social capital for unions. The ideal of the workplace as a bottom-up



foundation for social democratic vitality is, unfortunately, fundamentally at odds with the logics of capital formation that now discipline the modern workplace. Further, any structural focus on the individual workplace aims at both where workers are most vulnerable to retaliation and least likely to inspire recognition of their larger social context and interests.

Following the global proliferation of what David Harvey has called flexible accumulation<sup>5</sup>—ever accelerated by the denationalization of financial capital—no human process of localized social capital formation can match the current logistical speed and scope of capital mobility.<sup>6</sup> In specific contexts over limited time horizons—most often involving intense general political mobilization or small homogenous nations—episodic union democracy campaigns can appear to transcend this mismatch. Yet, without a larger labor politics to sustain them these apparent successes are ground away by the steady-state operation of the mobility mismatch between human and financial capital. As a result, efforts at promoting union revitalization through the promotion of union democracy ultimately leave weakened unions and labor movements returning to corporatist patterns of formal and informal centralization. And such recurrence is especially prominent in spatially large and demographically diverse nations.

It is thus not surprising that the American norm of union democracy traditionally found little sustained purchase outside its national border. Regardless of variations in their specific institutional structure and legal regulation, the success of most every union tradition has been grounded in corporatism, identified over a century ago by Robert Michels as an example of his iron law of oligarchy.<sup>7</sup> While American labor union activists often decry these trends, the comparative and historical scholarship on labor unions reveals that collective bargaining systems that have been best able to serve the collective interests of their workers are those of corporatist variety. This is not a claim that labor unions, as part of their political and economic bargaining, do not, or should not, directly engage with workers, but that their need to operate collectively requires them to do so largely outside the bounds of the liberal proceduralism epitomized by elections and individual rights-claims. Corporatist unions are

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<sup>5</sup> DAVID HARVEY, *THE CONDITION OF POSTMODERNITY* (1989).

<sup>6</sup> Sanford Jacoby, *Finance and Labor: Perspectives on Risk, Inequality, and Democracy*, 30 *COMP. LAB. L. & POL'Y J.* 17 (2008).

<sup>7</sup> ROBERT MICHELS, *POLITICAL PARTIES* (1911).

susceptible to bureaucratic inertia, especially after eras of relative success, and many regimes may falter in their direct engagement and collective mobilization of workers. However, a strategic preoccupation with electoralism as a form of accountability often saps and localizes the very energy that sustains large forms of collective mobilization, a reality that the enemies of labor organization have learned well in the United States and elsewhere.

It is this corporatist reality of labor union organization and action that gives lie to the false hope of union democracy. To exemplify such, this article will explore the early twentieth to early twenty-first century trajectories of three labor traditions with very different modern institutional and legal arrangements, namely, those of the United States, Brazil and China. These comparative examples represent quite divergent economic and political contexts, but they represent not only large swaths of the workers globally, but each has also taken turns as promoted models of economic development. In addition, for all three countries a historical relationship exists between labor unions and movements towards or away from political democratization.<sup>8</sup> Of further concern, labor discourse in Brazil and China have shown signs of the influence of American labor scholarship's focus on union democracy, where its asserted promises are held out to energize the performance and social relevance of unions.

The ultimate aim of this comparative analysis is not to critique labor unions as instruments for great social equality or general economic democracy. Quite to the contrary, this article unabashedly does not attempt to persuade those currently unconvinced of the value of labor unions, but to reshape the orientation of those who do. Nor does it advance holistic indicia to comparatively evaluate union performance.<sup>9</sup> What it does seek, especially in the American context, is to properly orientate reforms that will improve labor union performance through recognition of their function as corporatist institutions. Furthermore, this corporatist nature does argue against expectations that labor unions themselves will act as the vanguard of more transformative economic reforms, especially those that

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<sup>8</sup> Jedidiah Kroncke, *Property Rights, Labor Rights and Democratization: Lessons from China and Experimental Authoritarians*, 45 N.Y.U. J. INT'L L. & POL. 1 (2013).

<sup>9</sup> One pitfall of competing agendas for labor reform is the different metrics of evaluation employed by researchers. Claudia Senik, *Income Distribution and Subjective Happiness: A Survey* (OECD Social, Employment and Migration Working Papers, Working Paper No. 96, 2009) (providing a subjective discussion on the issues of income inequality and income comparisons).

would promote genuine workplace democracy. Labor unions are, rather, at their best as creatures of social democracy. The need of unions to bargain with other social interests militates against such radicalism, as it would alienate its bargaining partners. While it is understandable that some may want to breath more radical dreams into unions, such often only speaks to the weakness in larger labor politics or the absence of a genuine labor party. But, again, this dream is ultimately self-defeating.

Refocusing on a larger labor politics in the context of Mundlak's global labor anomie eschews the defensive posture encouraged by the enervating trends of global labor politics. This article sees a lucid understanding of corporatism as itself part of a more aggressive or aspirational re-envisioning, and shows how at this point in history such attempts must be informed by comparative analysis. While comparative analysis is traditionally fraught with methodological challenges,<sup>10</sup> the empirical richness and general interconnection of the global economy militate against arguments asserting cultural exceptionalism.<sup>11</sup> Moreover, domestic labor politics invariably invoke the experience of foreign nations, and without active comparative analysis these invocations tend towards idealization and mutual misrepresentation.<sup>12</sup> Similarly, comparative historical work can draw out general dynamics from the long wave of twentieth century union development and activities. This long wave perspective helps to deconstruct domestic mythologies and to displace arguments that extrapolate from more transitory developments, of which union democracy is the most evident American example.<sup>13</sup>

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<sup>10</sup> See, e.g., Guy Mundlak & Matthew W. Finkin, *Introduction to the Comparative Labor Law Handbook*, in *COMPARATIVE LABOR LAW* 1 (Matthew W. Finkin & Guy Mundlak eds., 2015) (indicating the inherently comparative nature of the law and specifically, labor law).

<sup>11</sup> See Anita Chan, *The Fallacy of Chinese Exceptionalism*, in *CHINESE WORKERS IN COMPARATIVE PERSPECTIVE* 1, 3 (Anita Chan ed., 2015) (arguing that the concept of exceptionalism diverts researchers' attention away from similarities between national systems).

<sup>12</sup> Harry Arthurs, *Cross-National Legal Learning: The Uses of Comparative Labor Knowledge, Law, and Policy*, in *RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT* 357 (Katherine Stone & Harry Arthurs eds., 2013); Katherine Stone, *Green Shoots in the Labor Market: A Cornucopia of Social Experiments*, 36 *COMP. LAB. L. & POL'Y J.* 293 (2015).

<sup>13</sup> Compare Kim Voss & Rachel Sherman, *Breaking the Iron Law of Oligarchy: Union Revitalization in the American Labor Movement*, 106 *AM. J. SOC.* 303, 304 (2000) (examining union revitalization through the use of disruptive tactics), with Kate Bronfenbrenner, *The American Labour Movement and the Resurgence in Union Organizing*, in *TRADE UNIONS IN RENEWAL* 32 (Peter Fairbrother & Charlotte A. B. Yates eds.,

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To develop this general argument, this article progresses in four parts. Section 1 will provide background on theories of corporatism and the historical roots of labor unions' development as a central instantiation of corporatist politics. Section 2 will present a revisionist interpretation of the rise and fall of the U.S. labor union model, exemplar of the decentralized and privately-ordered variety, that has been undermined by the Sisyphean and ultimately counterproductive effort to prioritize liberal proceduralism. To wit, the one-time success of the U.S. labor movement was heavily dependent on creating informal corporatist dynamics through union mergers, pattern bargaining, sympathy strikes and other tactics to scale-up bargaining with employers, herein described as "aspirational corporatism." Section 3 discusses the modern Brazilian experience, perhaps the most successful contemporary large-scale labor movement. A central actor in the country's 1988 transition to political democracy, in Brazil unions had long promised greater union democracy in their rise to political relevance, but immediately turned to entrench a strong corporatist labor regime post-democratization with near zero internal democratic norms, described herein as "hyper-corporatism." Brazil now has a labor regime whose corporatist elements have been specifically targeted to undermine unions' political power. Section 4 engages the contentious role of the state labor union in contemporary China, where the communist presumption of perfect alignment between Party and worker interests left the state union scrambling for relevance after 1978. Local union elections have emerged in recent years as a permitted site of experimentation within the state union as a preemptive strike against broader labor mobilization that could fuel political democratization. Simultaneously, the central government has also allowed experimentation with large scale collective bargaining as a solution to growing labor unrest—described herein as "simulated corporatism." Section 5 concludes by arguing that these examples all demonstrate, in different ways, why labor union reform should always emphasize strengthening corporatism, and that union democracy is often a practical and rhetorical liability in contemporary labor politics. This is a pressing issue for clarity in the U.S. and elsewhere as the health

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2006) (discussing signs of resurgence in the American labor movement through grassroots education). The view of Michels' law as something ideologically distasteful often motivates focusing on short-term surveys and analysis within nations to find counterexamples. The latter is illustrative as it took the brief uptick in late 1990s' American union membership to extrapolate optimistic trends into the future.

of general economic democracy is at risk worldwide. To the extent that we may hope of a world where both general and specific economic democracy suffuses our economies, these hopes should look beyond unions to other alternatives and in a way that does not ultimately undermine labor unions' current, and pressing, utility in the present.

## 2. THE INEVITABILITY OF LABOR UNIONS AS CORPORATIST BARGAINERS

### 2.1. *The Gravitational Pull of Union Corporatism*

There exists a wide range of arguments traditionally advanced for why labor's empowerment in the workplace is a desirable social goal, ranging from the moral to the purely utilitarian.<sup>14</sup> In recent decades, labor politics has had to respond to the failure of communist regimes that presumed that ideological adherence to worker welfare in command and control economies was sufficient to achieve worker empowerment.<sup>15</sup> Within capitalist nations, most of these arguments are tied to variants of economic democracy, emphasizing either the fairness of income/wealth distribution or the empowerment of works in social politics.<sup>16</sup> Proponents of economic democracy take a wide range of positions on the welfare state, which provides direct subsidies to insulate workers from the vagaries of labor market turnover.<sup>17</sup> And there is an equally wide range of objections to arguments regarding such protections, including the neoclassical argument that such efforts are ultimately

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<sup>14</sup> See, e.g., Guy Mundlak, *Workplace – Democracy: Reclaiming the Effort to Foster Public and Private Isomorphism*, 15 THEOR. INQ. L. 159 (2014). Note that this article will not provide an independent defense of labor unions, as its audience is primarily labor scholars and activists who almost exclusively share a normative commitment to labor politics.

<sup>15</sup> Monty L. Lynn, Matjas Mulej & Karin Jurse, *Democracy without Empowerment: The Grant Vision and Demise of Yugoslav Self-Management*, 40 MGMT. DECISION 797 (2002).

<sup>16</sup> ROBERT A. DAHL, A PREFACE TO ECONOMIC DEMOCRACY (1956).

<sup>17</sup> James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825 (2001).

counterproductive for both social and individual welfare.<sup>18</sup> Such disagreements stem from quite fundamental disjunctions as to the goals of economic development, from maximizing measurable indices of leisure or income<sup>19</sup> to more aesthetic considerations of personal development or virtue.<sup>20</sup> And underlying these variations are often opposed visions of the very nature of social life itself.<sup>21</sup> Disentangling the relationship between economic freedom and liberty is as challenging as articulating the gaps between formal legal freedom and political liberty.<sup>22</sup> The recent revival of interest in theories of economic republicanism, which refute the private/public liberty distinction, reflects the ongoing turmoil to reconcile economic capitalism with political democracy.<sup>23</sup>

However, if we return to the late nineteenth and early twentieth centuries, we can see an even more diverse and contested range of possibilities than exist today about what regulation of the workplace should look like and what role the state should play therein. The historical emergence of labor unions was not based on any single vision of political economy. Fascism and communism were originally cast as “democratic” systems in a political vernacular very far from the presumptions of modern liberal democratic norms.<sup>24</sup>

Unregulated, privately organized labor movements were active in the nineteenth and early twentieth centuries in most every

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<sup>18</sup> See John Pencavel, *The Legal Framework for Collective Bargaining in Developing Economies*, in *LABOR MARKETS IN LATIN AMERICA* 27, 45 (Sebastian Edwards & Nora Claudia Lustig eds., 1999) (arguing that labor unions harm economic growth).

<sup>19</sup> Take, for example, the anthropological critique of Keynes’ optimistic view of industrial progress as yielding high levels of modern leisure in MARSHALL SAHLINS, *STONE AGE ECONOMICS* (1972).

<sup>20</sup> A popular meta-theory today is Amartya Sen’s concept of human capabilities. See Kevin Kolben, *Labour Regulation, Human Capacities and Industrial Citizenship*, in *LABOUR REGULATION AND DEVELOPMENT: SOCIO-LEGAL PERSPECTIVES* 60 (Shelley Marsh & Colin Fenwick ed., 2016).

<sup>21</sup> Perhaps no greater disjuncture exists between proponents and critics of labor unions than regarding the nature of social coercion. More libertarian conceptions see labor markets as places of natural freedom, where others see the need to participate in labor markets as itself the coercive effect of biology and industrial economics. The background presumption of this article falls toward the latter, seeing a lack of state intervention in creating or regulating labor markets as leading to private feudalism. See, e.g., MARK S. WEINER, *THE RULE OF THE CLAN* (2013).

<sup>22</sup> Compare the discussion of economic liberty versus economic freedom in Peter Levine, *The Libertarian Critique of Labor Unions*, 21 *PHIL. & PUBLIC POL’Y Q.* 17 (2001), with RAYMOND HOGLER, *THE END OF AMERICAN LABOR UNIONS* (2015).

<sup>23</sup> ROBIN HAHNEL, *ECONOMIC JUSTICE AND DEMOCRACY: FROM COMPETITION TO COOPERATION* (2005).

<sup>24</sup> Michael J. Hogan, *Corporatism*, 77 *J. AMER. HIST.* 153, 153-54 (1990).

industrializing nation, naturally incident to large scale transitions to wage labor. Such labor movements often advanced aggressive visions of economic democracy from those grounded in communism to those grounded in republicanism. Yet, as the contest between these new political visions played out in industrializing nations, the specific way in which the questions of how collective labor organizations were to be institutionalized in non-communist regimes took on a distinctly corporatist character.

In contrast to democratic theories that rest upon individual conceptions of rights and participation, corporatist theories of social organization were originally predicated on facilitating the bargaining of particular group interests.<sup>25</sup> Thus, in contrast to pluralist versions of democratic participation,<sup>26</sup> corporatist theories asserted that social harmony was best achieved through state designation of collective intermediaries to both formulate and express the interests of particular social forces.<sup>27</sup> The role of individual rights, both vis-à-vis the state and these groups, was peripheral at best in corporatist politics. In fact, the ability of corporatist agents—whether representing class, religious, ethnic, or other broad social interests—to bargain effectively with other designated groups was predicated on their ability to discipline their constituents in order to make good on the social pacts they achieved, as well as to effectively mobilize collective action in support of these bargaining processes in and outside of the workplace.

Following this logic, Robert Michels classically articulated his influential theory of social politics in what he called the iron rule of oligarchy.<sup>28</sup> Michels argued that the demands of centralization were inescapable in any new social movement as it moved into the realm of regular politics. Corporatist arrangements were the natural outgrowth of this tendency, and attempts to infuse these groups with liberal notions of democratic participation were doomed given the inevitable bureaucratization of any hierarchical organization and

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<sup>25</sup> Larry G. Gerber, *Corporatism and State Theory: A Review Essay for Historians*, 19 SOC. SCI. HIST. 313 (1995).

<sup>26</sup> Francesca Bignami, *Civil Society and International Organizations: A Liberal Framework for Global Governance*, 9 GLOBAL ENVTL. POL. 14 (2009).

<sup>27</sup> John Goldthorpe, *The End of Convergence: Corporatist and Dualist Tendencies in Modern Western Societies*, in NEW APPROACHES TO ECONOMIC LIFE 124 (Bryan Roberts et al. eds., 1985).

<sup>28</sup> ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* (Eden & Cedar Paul trans., Dover Publications) (1962).

would undermine their functioning in the regular politics after revolutionary moments.<sup>29</sup> While beyond the scope of this analysis, the resistance of corporations to liberal norms tells a parallel story as the historical corporatist twin of unions.

With these broad strokes in common, where most corporatist theories of politics diverged, especially in their normative frames, was in their view of the role of state. Philippe Schmitter, pioneering modern scholar of corporatism, argued that traditionally state-dominated forms of corporatism would give way to what he identified as societal corporatism. Schmitter's key distinction was that under state corporatism, the state legally designates and licenses the groups eligible to participate in political and economic bargaining. In contrast, under societal corporatism, such groups arise spontaneously from civil society.<sup>30</sup> The analytic frame of "neo-corporatism" emerged in the 1980s as scholars tried to divine the increasingly murky dynamics of formal and informal bargaining that characterized the relationship of the state to particular economic and social interests,<sup>31</sup> a term redeployed to help describe the persistence of bureaucratic authoritarianism<sup>32</sup> and financial corporatism in otherwise neoliberal economies.<sup>33</sup>

Yet, while most European nations eventually came to embrace liberal theories of political democracy to varying extents as they built up their post-World War II welfare states, the most lasting impact of corporatist theories in modern life was in the institutionalization of labor unions.<sup>34</sup> Labor corporatism was attractive to a

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<sup>29</sup> A dreary diagnosis from a more participatory democratic frame, and it is not surprising that Michels himself grew disenchanted with German social democracy and later became an apologist for Italian fascism. The coherence and general validity of Michels's work, in contrast to his common citation, is critiqued in Ewan McGaughey, *Democracy or Oligarchy? Models of Union Governance in the UK, Germany and US* (King's College London Law School Research Paper No. 35, 2017).

<sup>30</sup> Philippe C. Schmitter, *Still the Century of Corporatism?*, 36 REV. OF POL. 85 (1974).

<sup>31</sup> Klaus Von Beyme, *Neo-Corporatism: A New Nut in an Old Shell?*, 4 INT'L POL. SCI. REV. 173 (1983).

<sup>32</sup> See GUILLERMO A. O'DONNELL, MODERNIZATION AND BUREAUCRATIC AUTHORITARIANISM 51-53 (1973) (charting the degree of modernization in connection to the level of democracy in the political system in South American countries).

<sup>33</sup> Martin Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1 (1987); Mark Blyth, *The Ghosts of Corporatism's Past and Past Corporatists: Commentary on Three Articles*, 5 CAPITALISM & SOC'Y Art. 4 (2010).

<sup>34</sup> HARRY BRAVERMAN, LABOUR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY (1974); Ruth Dukes, *Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law*, 35 J. L. & SOC'Y 341 (2008).



variety of political regimes, especially those concerned with subverting more radical labor movements. Fascist and authoritarian regimes, even those that came into power with the support of labor movements, routinely acted to purge labor leaders and re-organize private labor unions under a single state-controlled union.<sup>35</sup> For liberal democratic regimes, creating systems of labor corporatism still served to quell and channel labor unrest while appealing to notions of social democracy.<sup>36</sup>

Today, ongoing state certification of labor unions continues to be popular, and reflects the general presumption that collective bargaining is an instrument for industrial peace and coordination. The common tripartite structure of union regulation in Europe and in many post-colonial nations developed macro-level variations in how, and through which institutions, unions were regulated—but the role of the state remained statistically central.<sup>37</sup> As a result, in the context of labor regulation, a transition from state to societal corporatism has been rare. Only a few Scandinavian labor unions operate outside of a formal system where they are directly sanctioned by the state as the formal bargaining representatives for workers. As such, labor corporatism continues to be a key feature of many varieties of capitalism,<sup>38</sup> even after nations have transitioned to formally non-corporatist political arrangements.<sup>39</sup> Today the legitimacy of labor unions has some overt constitutional recognition, even in liberal constitutional regimes, as associative rights validated by the need for collective action. It is thus not surprising that Michels used labor unions as a paradigmatic example of his iron rule.<sup>40</sup> For Michels the corporatist political ideas embedded in the

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<sup>35</sup> DIETRICH ORLOW, *THE HISTORY OF THE NAZI PARTY: 1919-1933* 103 (1969); PAUL W. DRAKE, *LABOR MOVEMENT AND DICTATORSHIPS: THE SOUTHERN CONE IN COMPARATIVE PERSPECTIVE* 192 (1996).

<sup>36</sup> Stephen McBride, *Corporatism, Public Policy and the Labour Movement: A Comparative Study* 33 *POL. STUD.* 439 (1985).

<sup>37</sup> For variations in state mechanisms for tripartite labor regulation, see Ralf Rogowski, *Meso-Corporatism and Labour Conflict Resolution: The Theory and its Application to the Analysis of Labour Judiciaries in France, the Federal Republic of Germany, Great Britain and the United States*, 1 *INT'L J. COMP. LAB. L. & INDUS. REL.* 143 (1985).

<sup>38</sup> PETER A. HALL & DAVID SOSKICE, *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE* (2001); Kathleen Thelen, *Varieties of Capitalism: Trajectories of Liberalization and the New Politics of Social Solidarity*, 15 *ANN. REV. POL. SCI.* 137 (2012).

<sup>39</sup> For the turn of the “Oxford school” of industrial relations to electoral politics following a loss of faith in democratic bargaining, see Ben Jackson, *Economic Democracy and the Labour Tradition*, *JUNCTURE* (May 22, 2014).

<sup>40</sup> MICHELS, *supra* note 28.

foundations of modern collective bargaining were not pathological, but desirable processes if labor unions were going to function properly as social bargainers.

A full examination of European labor corporatism is not needed here, as, contrary to some external perceptions, the official recognition of the value of corporatism is traditionally more secure in European labor discourse, if also under judicial and legislative assault.<sup>41</sup> Two of the most commonly cited examples by U.S. labor scholars as emulatable systems, German co-determination and Scandinavia social unionism, operate without emphasizing the liberal procedural norms of union democracy. German co-determination and most other forms of worker participation in corporate governance are, in fact, formally distinct from union governance,<sup>42</sup> even if there is significant informal overlap.<sup>43</sup> Additionally, it is notable that such attempts at intra-corporate participation have never fed into more radical social movements predicted by some of co-determination's or universal unionism's ideological opponents.<sup>44</sup>

And while the relatively small scale of many Nordic countries may often give the appearance of greater participatory dynamics, most of these countries have traditionally been strong examples of extensive corporatist social bargaining tied to strong union disciplinary powers.<sup>45</sup> The alignment of unions with political parties which took up the formal mantle of "Labor" has been increasingly uneasy in many countries; however, this has primarily been the result of more conservative economic ideologies emerging outside of labor unions rather than a result of changes in their internal organization.

Intellectual resistance to recognizing Michels' iron law by labor scholars or activists is often grounded in the hope that unions themselves would serve as a transitional compromise for more radical

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<sup>41</sup> Wolfgang Streeck, *Editorial Introduction to Special Issue on Organizational Democracy in Trade Unions*, 9 *ECON. & INDUS. DEMOCRACY* 310 (1988).

<sup>42</sup> Ingo Schmidt, *Can Germany's Corporatist Labor Movement Survive?*, 57 *MONTHLY REV.* 49 (2005).

<sup>43</sup> Ewan McGaughey, *British Codetermination and the Churchillian Circle* (UCL Lab. Rts. Inst. On-Line Working Papers, Working Paper No. 2, 2014); Walther Müller-Jentsch & Nicholas Levis, *Industrial Democracy: From Representative Codetermination to Direct Participation*, 25 *INT'L J. POL. ECON.* 50 (1995).

<sup>44</sup> Ruth Dukes, *Constitutionalizing Employment Relations*, 35 *J.L. & SOC'Y* 341, 342 (2008); Matthew Dimick, *Productive Unionism*, 4 *U.C. IRVINE L. REV.* 679, 689 (2014).

<sup>45</sup> Arend Lijphart and Markus M. L. Crepaz, *Corporatism and Consensus Democracy in Eighteen Countries: Conceptual and Empirical Linkages*, 21 *BRIT. J. POL. SCI.* 235 (1991).

shifts toward reworking democratic norms into economic production itself.<sup>46</sup> Thus, the classic analytical dichotomy between the requirements of institutional bureaucracy and member participation in unions is expressed as a subset of the general tension between democratic movements and democratic organizations.<sup>47</sup> The question of whether unions should themselves be internally democratic, and move away from their corporatist origins, has been debated across a wide range of nations.<sup>48</sup>

These forward-looking and ideologically aspirational debates have been recurrently matched by comparative empirical analysis which establishes that union behavior and organization is consistently driven by the corporatist desire to build political capital to effectively bargain at the social level.<sup>49</sup> In general, these studies point out that it was far more costly for unions to bargain at the employer level, especially as capital acquires higher levels of concentration and more extensive abilities to arbitrage local and national conditions.<sup>50</sup> While unattractive to more utopian visions of labor activism, scholars in corporatist systems have had to recognize that centrality of power accumulation, rather than individual empowerment, is necessary for unions' effective promotion of social democracy.<sup>51</sup>

The least utopian implication of this accumulative function is the need for unions to be able to discipline workers as their collective agents. Certainly, labor unions have had a difficulty truly representing the interests of all workers, especially those from minority groups, but the militancy that culminates in the organization of

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<sup>46</sup> Alan Hyde, *Democracy in Collective Bargaining*, 93 *YALE L.J.* 793 (1984); Michael Doherty, *Corporatism or Cop-out? The Impact of Social Partnership on Union-Member Relations* (Dublin City U. Socio-Legal Res. Ctr. Working Paper Series, Working Paper No. 01-07, 2007) (analyzing the Irish social partnership process and its relationship to union membership and workplace agreements).

<sup>47</sup> Richard Hyman, *Union Renewal: A View from Europe*, 45 *LAB. HIST.* 340 (2004); HEATHER CONNOLLY, *RENEWAL IN THE FRENCH TRADE UNION MOVEMENT: A GRASSROOTS PERSPECTIVE* (2010).

<sup>48</sup> Ulrich Mückenberger & Nicholas Levis, *Trade Union Difficulties with Participation*, 25 *INT'L J. POL. ECON.* 20 (1995).

<sup>49</sup> James A. Craft, *Unions, Bureaucracy, and Change: Old Dogs Learn New Tricks Very Slowly*, 4 *J. LAB. RES.* 393 (1991).

<sup>50</sup> Lars Calmfors & John Driffill, *Bargaining Structure, Corporatism and Macroeconomic Performance*, 3 *ECON. POL'Y* 13 (1988). But see John Driffill, *The Centralization of Wage Bargaining Revisited: What Have We Learnt?* (Paper for The European Inst. of Lab., 2006) (discussing the effects of collective bargaining on macroeconomic performance in growth and employment).

<sup>51</sup> S. Muthuchidambaram, *Democracy as a Goal of Union Organization: An Interpretation of the United States Experience*, 3 *INDUS. REL.* 579, 586 (1969).

strikes, the lynchpin of unions' ability to threaten industrial peace, requires the same sort of limited participation that still characterizes most political parties. Union discipline and striking are thus intimately intertwined, both to organize effective strikes and to limit strikes outside of the union control. Even Otto Kahn Freund's classic ideal of collective laissez-faire, which fully excluded the state from regulation of labor unions, was predicated on the need for unions to be able to discipline their membership.<sup>52</sup> And this discipline is not simply in regard to strikes, but bargaining power can be increased through discipline of workers' actions as voters and consumers – as well as a way to compete with managerial discipline.

As a result, the demands of collective bargaining led few systems to be remolded into internally democratic institutions where workers were actively engaged in electoral mechanisms or could make outside judicial claims against unions. Systems that have attempted to move toward greater local participation and less discipline have led to the routine observation of the inefficiencies of localism in comparison to the strength of broader labor politics.<sup>53</sup>

What is true is that the corporatist nature of labor unions imbues them with a decidedly conservative bend when it comes to more transformative visions of economic change. The clearest example of this conservatism was the purging or marginalization of members sympathetic to communism in a number of nations, who themselves held out hope that unions could help stage communist revolutions. Perhaps more illustrative of the limits/demands of corporatist bargaining is the beating back of Rudolf Meidner's proposal for "wage-earner funds" in Sweden during the 1970s.<sup>54</sup> Here, as powerful and successful as Swedish unions are often portrayed internationally, the idea that share levies could lead to increasing levels of corporate ownership by unions was fiercely resisted by Sweden's highly concentrated family owners. The threat of this system-breaking tactic essentially led to the threat that the Swedish corporatist system

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<sup>52</sup> Otto Kahn-Freund, *Trade Union Democracy and the Law*, 22 OHIO ST. L.J. 4, 10 (1961); JOHN HEMINGWAY, CONFLICT AND DEMOCRACY: STUDIES IN TRADE UNION GOVERNMENT (1978). See generally ADRIAN WILLIAMSON, CONSERVATIVE ECONOMIC POLICYMAKING AND THE BIRTH OF THATCHERISM, 1964-1979, Ch. 5 (2015).

<sup>53</sup> See Guy Mundlak, *Organizing Workers in 'Hybrid Systems': Comparing Trade Union Strategies in Four Countries - Austria, Germany, Israel and the Netherlands*, 17 THEORETICAL INQUIRIES L. 163 (2016) (explaining the gap that exists between local activism and social partnerships at higher levels).

<sup>54</sup> Philip Whyman, *Post-Keynesianism, Socialisation of Investment and Swedish Wage-Earner Funds*, 30 CAMBRIDGE J. ECON. 49 (2006).

would collapse through financial capital walking away from the bargaining table.<sup>55</sup> The very cooperative logic that corporatism feeds on restricts the range of positions labor unions could take. As such, unions have also generally stopped short of pushing participatory dynamics into core aspects of enterprise decision-making beyond the consultative.

As a result, while some labor scholars continue to imagine a relationship between unions and more transformative versions of the workplace,<sup>56</sup> hopes that unionization would lead to the growth of the more extensive forms of specific economic democracy,<sup>57</sup> such as direct ownership or co-governance, have not materialized. More successful have been calls for unions to participate in general economic re-democratization under the rubric of social unionism, which is predicated on union participation to include non-economic issues of social justice, and to serve as social movements actors engaged in politics far beyond the workplace.<sup>58</sup>

## 2.2. *Social Capital Formation and the Authoritarian Workplace*

The anomie of labor scholars cited earlier is not primarily sourced in the relative failure of unions to promote specific forms of participatory economic democracy, but instead springs from the impact of global economic and political trends on unions general effectiveness to represent the interests of workers at any level. In contrast to even the intermediary role of unions imagined under corporatist social theory, the ideal that workers or their representatives should play a role in state or corporate decision-making has become more difficult to realize in an environment where the very desirability of labor protections has been called into question.

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<sup>55</sup> Magnus Henrekson and Ulf Jakobsson, *Two Attacks on the Swedish Corporate Model: From Wage-Earner Funds to Corporatist Pension Funds*, RESEARCHGATE (Feb. 24<sup>th</sup>, 2003); Bengt Furåker, *The Swedish Wage-Earner Funds and Economic Democracy: Is There Anything to be Learned From Them?*, 22 EUR. REV. LAB. & RES. 121 (2016).

<sup>56</sup> Dionne M. Pohler & Andrew A. Luchak, *Balancing Efficiency, Equity, and Voice: The Impact of Unions and High-Involvement Work Practices on Work Outcomes*, 67 INT'L LAB. REV. 1063 (2014).

<sup>57</sup> Robert Charles Clark, *The Four Stages of Capitalism: Reflections on Investment Management Treatises*, 94 HARV. L. REV. 561, 565-67 (1981).

<sup>58</sup> See Stephanie Ross, *Social Unionism and Membership Participation: What Role for Union Democracy?*, 81 STUD. POL. ECON. 129 (2008) (arguing that social unionism is not necessarily the solution to more expansive and inclusive labor movements).

A great deal of contemporary scholarship on labor markets in recent decades has promoted the ideal of “labor flexibilization,” which asserts that all labor protections hamper GDP growth, and labor unions as the greatest threat to economic productivity.<sup>59</sup> Related but distinct from the traditional neoclassical idea that formal labor protection simply induces labor informalism, the flexibilization discourse has found resonance in developed and developing countries alike, especially due to its popularity among international financial institutions.<sup>60</sup>

The primarily efficiency-based arguments of flexibilization proponents is compounded by the continued, if not ever-strengthening, belief that democratic norms are inapposite to economic processes, including among corporate shareholders.<sup>61</sup> The idea that economic decision-making, again outside of consumption, is too complex for workers to participate in also reinforces the notion that economic success is tied to exceptional individual meritocratic performance.<sup>62</sup> While some impetus exists for expanding worker participation in corporate governance through stakeholder theories,<sup>63</sup> such theories have yet to be translated successfully into practice or reconciled with the quite divergent participatory logics of worker and shareholder democracy.<sup>64</sup> The same holds true after the formal recognition of

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<sup>59</sup> Jedidiah Kroncke, *Precariousness as Growth: Meritocracy, Human Capital Formation, and Workplace Regulation in Brazil, China and India*, 9 L. & DEV. REV. 321 (2016).

<sup>60</sup> Alvaro Santos, *Labor Flexibility, Legal Reform, and Economic Development*, 50 VA. J. INT'L L. 43, 52 (2009).

<sup>61</sup> See Robin Blackburn, *Economic Democracy: Meaningful, Desirable, Feasible?*, 136 DAEDALUS 36 (2007) (noting the general rise in director primacy in international corporate governance literature).

<sup>62</sup> See Bruce Baum, *Governing 'Democratic' Equality: Mill, Tawney, and Liberal Democratic Governmentality*, 65 POL. RES. Q. 714, 726 (2012). For a US-specific discussion of the excision of democratic norms from even government action, see SABEEL RAHMAN, *DOMINATION AGAINST DOMINATION* (2016).

<sup>63</sup> Timothy P. Glynn, *Communities and Their Corporations: Towards a Stakeholder Conception of the Production of Corporate Law*, 58 CASE W. RES. L. REV. 1067 (2008); Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RES. L. REV. 1043 (2008) (dealing with the collective action problems of investments). See also Marleen O'Connor, *Labor's Role in the American Corporate Governance Structure*, 22 COMP. LAB L. & POL'Y J. 97 (2000) (looking at the American model of corporate governance where employees do not have much of a voice, and arguing that corporate governance rights for workers are necessary as shareholders).

<sup>64</sup> Michael J. Goldberg, *Democracy in the Private Sector: The Rights of Shareholders and Union Members*, 17 U. PA. J. BUS. L. 393 (2015) (addressing corporate governance by comparing corporations and labor unions and the role of democracy in each). In fact, stakeholder theories of corporate governance are far closer to corporatist theories of politics than liberal models.

norms of economic democracy in international treaties, such as the European Union's Lisbon Treaty.<sup>65</sup>

Moreover, such derogation of worker competency reflects a broader disenchantment with participatory aspects of political democracy manifest in debates about transnational financial regulation and supranational political organization.<sup>66</sup> Many developed nations are now in a historical fugue about the centrality of labor unions to their processes of democratic transformation and consolidation.<sup>67</sup> Such developments are further exacerbated by the efforts of politically authoritarian regimes to proactively and openly delimit the scope of democratic norms within international legal regimes.<sup>68</sup>

Dovetailing once more with the rapid growth of capital mobility and denationalization, the modern workplace thus finds itself subject to increasing capital arbitrage of international and sub-national variations in labor protections. Thus, in countries with very different political and social demographics there has been a convergent emphasis on contractualist labor norms<sup>69</sup> and the proliferation of hyper-Taylorist management practices. Workers increasingly enjoy limited individual privacy as well as speech rights in and outside of the workplace, alongside growing use of other forms of automated workplace monitoring.<sup>70</sup> Elizabeth Anderson marked the rise of what she calls "private government" to convey how, in many cases,

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<sup>65</sup> Niklas Bruun, *Employees' Participation Rights and Business Restructuring*, 2 EUR. LAB. L.J. 27 (2011).

<sup>66</sup> Victor V. Magagna, *Representing Efficiency: Corporatism and Democratic Theory*, 50 REV. OF POL. 420 (1988); Alfred C. Aman, Jr., *Globalization, Democracy and the Need for a New Administrative Law*, 49 UCLA L. REV. 1687 (2002) (arguing that globalization affects markets and leads to less democratic rights for individuals).

<sup>67</sup> HA-JOON CHANG, *KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE* (2002).

<sup>68</sup> Stephen F. Diamond, *The 'Race to the Bottom' Returns: China's Challenge to the International Labor Movement*, 10 U.C. DAVIS J. INT'L L. & POL'Y 39 (2003).

<sup>69</sup> MARK FREEDLAND & NICOLA KOUNTOURIS, *THE LEGAL CONSTRUCTION OF PERSONAL WORK RELATIONS* (2011); *RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT* (Stone & Arthurs eds. 2013).

<sup>70</sup> See Chris Bertram, *Let It Bleed: Libertarianism and the Workplace*, *Out of the Crooked Timber* (Jul. 1, 2012), [crookedtimber.org/2012/07/01/let-it-bleed-libertarianism-and-the-workplace/](http://crookedtimber.org/2012/07/01/let-it-bleed-libertarianism-and-the-workplace/) [<https://perma.cc/3F6H-USSB>]. See also LEWIS MALTBY, *CAN THEY DO THAT?* (2009); Shelley Wallach, *The Medusa Stare: Surveillance and Monitoring of Employees and the Right to Privacy*, 27 INT'L J. COMP. LAB. L. & INDUS. REL. 189 (2011).

employers exert far greater regulatory power over the lives of their workers than any governmental agency.<sup>71</sup>

This growth of authoritarian norms within global workplaces and reforms focused on atomistic conceptions of labor/capital interactions has been resisted with varying degrees of success, but few evaluations of this resistance, perhaps outside of technological utopianism, are brightly optimistic.<sup>72</sup> The implications of these trends for social democracy are hotly debated today as a subset of debates over the sources of economic inequality. Yet, these trends have been even more devastating for the realization of specific economic democracy in the form of workplace participation. More radical visions of worker autonomy have generally been replaced with far milder calls for worker “voice” in corporate decision-making, much of which is framed in voluntary and consultative terms.

These trends render individual workplaces as increasingly difficult and inhospitable loci for generating worker solidarity, what David Weil calls the “fissured workplace.”<sup>73</sup> Such dislocation and alienation gives an ever-increasing advantage to employers over particularized or localized organizational tactics.<sup>74</sup> Critics that argue that unions should themselves be internally democratic take for granted that more localized participation will generate greater social capital for a union to draw on.

By contrast, such workplace alienation is compatible with corporatist politics which looks to aggregate and discipline the interests of diverse workers who are called into collective action outside of the workplace. Focusing on individual workplaces asks workers to participate in action which most easily indentifies them for specific employer retaliation, rather than more diffuse striking and protest actions. Moreover, the very shared interests that workers share as a social class are obfuscated when their individual actions are centered in more localized identities, without direct interaction with or

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<sup>71</sup> ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT)* (2017).

<sup>72</sup> KRONCKE, *supra* note 59, at 355.

<sup>73</sup> DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014). *Contra* CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003).

<sup>74</sup> *But see* Michael M. Oswalt, *Improvisational Unionism*, 104 CAL. L. REV. 597 (2016) (highlighting that the sociological premises of this argument are utopian, but it presents a useful entryway into thinking about how collective action can occur in systems which are traditionally organized at the enterprise level).



participation in broader union-organized actions. In this sense, one's identity as a worker as employee can be as narrow as their atomizing identity as a consumer.

Here, we should remember that Michels' Iron Law, as any political theory, constitutes a descriptive, not necessarily normative, theory of power. The inevitability of centralization and bureaucratization of political democratic movements is as much a response to financial capital's ability to agglomerate as it is a response to the general needs of large-scale action and hierarchy. While this overgeneralizes the homogenous interests of financial capital and underplays its own coordination issues, it is key to remember the inherently social nature of labor in its general dependence on consistently generating and utilizing social capital as the basis of its bargaining power.

Social capital formation is generally a fragile, organic process, whose inner workings are consistently reviewed by modern social science. Suffice it to say that even in formally democratic political systems with active civil society dynamics, it has been an ongoing challenge to create conditions conducive to its consistent production.<sup>75</sup> Part of this challenge is that while humans may thrive in high social capital settings, they are, on the whole, highly adverse cognitively to conditions of uncertainty and social unpredictability inherent in the commodification of labor.<sup>76</sup> Therefore, processes of social capital formation that are organized around sites of wage-labor will never be able to keep pace with forms of financial capital formation that are far more agnostic to their fungible translation from one institutional setting to another.<sup>77</sup> The fragmentation of the workplace, and thereby work itself, as a source of solidarity between workers beyond their general class interests refocuses the generation of social capital by unions into the more traditional collective venues imagined by corporatist politics.

Thus, while many studies have made strong claims about attempts to revitalize unions through re-democratizing their internal structures, over longer time frames these revitalizations are revealed to be driven by the larger social movements which infused unions

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<sup>75</sup> ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993).

<sup>76</sup> Carol Graham, *Happiness and Uncertainty*, *THE ECONOMIST*, Feb. 1, 2010, [https://www.economist.com/blogs/freexchange/2010/02/happiness\\_and\\_uncertainty](https://www.economist.com/blogs/freexchange/2010/02/happiness_and_uncertainty) [<https://perma.cc/565T-G4Q4>].

<sup>77</sup> John Peters, *Labour Market Deregulation and the Decline of Labour Power in North America and Western Europe*, 27 *POL'Y & SOC'Y* 83 (2008).

with social capital, rather than the reverse. Unions have many varieties of tools to engage and mobilize workers, but the legitimacy of this engagement has always been an interplay of performance and loyalty, rather than simple satisfaction with procedures of representation. There is committed psychological literature related to the force of procedural justice or the effects of empowerment within social movements, but such studies rarely point to electoral accountability as a long-term generator of social capital.<sup>78</sup>

Outside moments of acute crises, participation by individual workers in union management invariably wanes—even in comparatively active union systems.<sup>79</sup> For unions, bargaining with financial capital makes internal dissensus crippling on an already compromised terrain. Instead, the ability of unions to promote political consolidation and effective representation of worker interests requires that they organize themselves as political actors and promote general economic democracy as part of their external, not internal, actions.<sup>80</sup> It is telling that labor movements which contribute critically to democratic political transitions often find their power greatly diminished if they do not succeed in acquiring corporatist status in the resulting regime.<sup>81</sup>

Studies on smaller countries over short time frames often present the appearance of local participatory action being integral to specific bargaining successes. Perhaps Robert Putnam's most controversial claim regarding social capital formation is that it is easier

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<sup>78</sup> See Tom R. Tyler, *Procedural Justice, Legitimacy and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003) (discussing procedural justice); W. LANCE BENNETT & ALEXANDRA SEGERBERG, *THE LOGIC OF CONNECTIVE ACTION: DIGITAL MEDIA AND THE PERSONALIZATION OF CONTENTIOUS POLITICS* (2013). See also Sandra González-Bailón, *Networked Discontent: The Anatomy of Protest Campaigns*, 44 SOC. NETWORKS 95 (2016) (discussing further the limitations of individualized action for new social movements).

<sup>79</sup> Compare Michael Lynk, *Union Democracy and the Law in Canada*, 21 J. LAB. RES. 37 (2001) (suggesting that greater legal intervention in labor unions may ensure membership control and participation by regulating democratic behavior), with Jonathan Eaton & Anil Verma, *Does "Fighting Back" Make a Difference?: The Case of the Canadian Auto Workers Union*, 27 J. LAB. RES. 187 (2006) (arguing that organization, political action, and collective bargaining can also help revitalize labor unions).

<sup>80</sup> Barbara J. Fick, *Not Just Collective Bargaining: The Role of Trade Unions in Creating and Maintaining a Democratic Society*, 12 J. LAB. & SOC'Y 249 (2009).

<sup>81</sup> Eva Bellin, *Contingent Democrats: Industrialists, Labor, and Democratization in Late-Developing Countries*, 52 WORLD POL. 175, 180-81 (2000).

under conditions of social uniformity.<sup>82</sup> The dynamics in small, relatively homogenous countries where social capital formation is easier to consistently generate provides a deceptively hopeful comparison for geographically and demographically diverse countries.<sup>83</sup> Moreover, almost every study pointing to a success in local democratization in small countries can be matched by a longitudinal study revealing that even here, centralization is the far more durable artifact of labor mobilizations.<sup>84</sup>

Larger, comparatively homogenous, countries have to rely on intense cultural pressures to maintain labor representation over time.<sup>85</sup> The rise and fall of Australia's movement for industrial bargaining reflects this general dynamic, as well as the difficulties present in strong federalist systems that inherently fragment the scale of bargaining.<sup>86</sup> Still, small size or social homogeneity is not necessarily a panacea, as it also provides advantages to authoritarian actors, such as in Singapore, perhaps the most successful example of unionism as labor coordination institution,<sup>87</sup> and Vietnam, which has felt freer to allow union strike experimentation than its larger communist and semi-authoritarian cohort.<sup>88</sup> Among countries which possess strong union movements post-democratic transition,

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<sup>82</sup> Robert Putnam, *E Pluribus Unum*, 30 SCAN. POL. STUD. 137 (2007) (discussing the short and long terms effects of immigration and ethnic diversity, and stating that in the short run, these factors reduce social capital and social diversity).

<sup>83</sup> See Inyi Choi, *Creating Union Democracy, Workers' Consciousness and Solidarity: Decision-Making Process, Election, and Education in Korean Unions* (U.C. Irvine Center for the Study of Democracy and Development Paper Series, 2005); Itai Svirski, *Moving to Bottom-Up Representation*, 32 COMP. LAB. L. & POL'Y J. 915 (2011) (discussing trade union systems in Israel).

<sup>84</sup> Compare Andrienne Eaton & Kill Kriesky, *Decentralization of Bargaining Structures*, 2 INDUS. REL. 1 (1998) (discussing and applying the forces that determine bargaining structure), with Lucio Baccaro, *Centralized Wage Bargaining and the 'Celtic Tiger' Phenomenon*, 46 INDUS. REL. 426 (2007) (discussing centralized wage bargaining and its influence on the Irish growth).

<sup>85</sup> Dennis McNamara, *Corporatism and Cooperation among Japanese Labor*, 28 COMP. POL. 379 (1996); Kenneth Dau-Schmidt & Benjamin Ellis, *The Relative Bargaining Power of Employers and Unions in the Global Information Age*, in ENTERPRISE L. 81 (Zenichi Shishido ed., 2010).

<sup>86</sup> See Bradley Bowden, *The Rise and Decline of Australian Unionism*, 100 LAB. HIST., 50 (2011); Mark Barenberg, *Constitutional Constraints on Redistribution Through Class Power*, 5 COLUM. J. EUR. L. 313 (1999).

<sup>87</sup> Chris Leggett, *Trade Unions in Singapore: Corporatist Paternalism*, in TRADE UNIONS IN ASIA: AN ECONOMIC AND SOCIOLOGICAL ANALYSIS 102 (Benson & Zhu eds., 2008); Chew Beng & Rosalind Chew, *A New Form of Union Representation to Meet the Challenges of a Globalized World* (Paper, 16<sup>th</sup> ILERA World Congress, 2012).

<sup>88</sup> Anita Chan, *Strikes in China's Export Industries in Comparative Perspective*, 65 CHINA J. 27 (2011).

it is their ultimate strength relative to other social actors that drives their success rather than any specific internal democratic features,<sup>89</sup> and most acute when able to lead to the formation of a specific labor party.

The issue of scale and social capital formation also helps explain the disappointing track record of transnational labor organizing.<sup>90</sup> Even when labor rights have been conceptualized as human rights,<sup>91</sup> the recurrent challenge of disciplining diverse worker interests is replicated exponentially in transnational labor organizing.<sup>92</sup> While no doubt inhibited by the marginalization of class as an organization framed by the international NGO community,<sup>93</sup> it is nonetheless true that few national unions have taken large risks for international partners.<sup>94</sup> Labor organizations rarely find abroad what they cannot find in their own states.<sup>95</sup> In the European Union, the progress that has been made in constructing a regional labor regime has worked not through democratic processes, but through corporatist processes.<sup>96</sup>

If we return to the global discourse on labor flexibilization, we can find the unsurprising result that labor flexibilization reforms have hit countries that lack corporatist labor regimes the hardest.<sup>97</sup>

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<sup>89</sup> Yoonkyung Lee, *Labor's Political Representation*, in *WORKING THROUGH THE PAST* (Teri Caraway et al. eds, 2015).

<sup>90</sup> See Mark Barenberg, *Sustaining Workers' Bargaining Power in an Age of Globalization* (EPI Institute Briefing Papers, Paper No. 246, 2009); *TRANSNATIONAL COOPERATION AMONG LABOR UNIONS* (Gordon & Turner eds., 2000) (presenting transnational cooperation among labor unions as effective weapon against the exploitation of workers); JAMIE MCCALLUM, *GLOBAL UNIONS, LOCAL POWER: THE NEW SPIRIT OF TRANSNATIONAL LABOR ORGANIZING* (2013) (examining an important campaign by the Service Employees International Union ("SEIU") in 2007).

<sup>91</sup> PHILIP ALSTON, *LABOUR RIGHTS AS HUMAN RIGHTS* (2005).

<sup>92</sup> CARSTEN ECKEL, *THE DILEMMA OF LABOR UNIONS: LOCAL OBJECTIVES VS. GLOBAL BARGAINING* (2011).

<sup>93</sup> See, e.g., Joseph Roman, *The Trade Union Solution or the NGO Problem?*, 14 *DEV. IN PRAC.* 100 (2004).

<sup>94</sup> See Dean Frutiger, *AFL-CIO China Policy: Labor's New Step Forward or The Cold War Revisited?*, 27 *LAB. STUD. J.* 67 (2002) (discussing the dynamic between China's trade relations with other countries and with international entities such as the WTO and World Bank given its human rights record).

<sup>95</sup> PAUL BUCHANAN, *STATE, LABOR, CAPITAL* (1987).

<sup>96</sup> Tonia Novitz & Phil Syrpis, *Assessing Legitimate Structures for the Making of Transnational Labour Law*, 35 *IND. L.J.* 367 (2006).

<sup>97</sup> See Kevin Kolben, *Transnational Labor Regulation and the Limits of Governance*, 12 *THEORETICAL INQ. L.* 403 (2011) (suggesting that transitional labor regulation may be achieved by an integrated approach that coupled governance theory with developing state capacity for a comparative advantage); Baldur Thorhallsson and Rainer Kattel, *Neo-Liberal Small States and Economic Crisis*, 44:1 *J. BALTIC STUD.* 83 (2012)

We can see this dynamic illustrated in tandem by the experience of Mexico, where critiques of the oligopic, undemocratic nature of unions were popular,<sup>98</sup> but subsequently absent after de-corporatization reforms ultimately led not to a renewed labor movement, but simply to greater subjection to workplace authoritarianism.<sup>99</sup>

But such focus on corporatist politics raises the question of exactly how labor unions gain the loyalty of workers and motivate them to participate in collective action, if not through direct election or decertification. On the level of institutional design this may be through making unions as broad and undemocratic as possible. Many European labor unions that are still active politically are financed through mandatory due payments by sectors of workers who may only interact with their union representatives during times of strikes. The Scandinavian examples represent, even when fully deregulated by the state, highly concentrated corporatist actors with no formal mechanisms of electoral accountability.<sup>100</sup>

The ability of such unions to gain legitimacy and maintain loyalty is then completely driven by a combination of general faith that unions are loyal to workers demonstrated by economic and political outcome performance. Other design elements, such as a devolving provision of social welfare subsidies to unions, can strengthen these linkages, but there is little sustained cross-national evidence that a specific lack of participatory legitimacy weakens high-performing unions.<sup>101</sup> Labor politics are ultimately sustained by the same principles that spur and sap social/political movements more broadly, and can be facilitated or delimited, but never fully determined, by particular issues of institutional design. While elections seem like a

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(arguing that corporatist features play an important role in a country's survival during a neo-liberal era).

<sup>98</sup> Jorge Ventura de Morais, *Rejane Medeiros and Luis Esparza Source, México Dinámica de la Política Interna del "Nuevo" Sindicalismo Brasileño*, 59 REV. MEX. DE SOC. 205 (1997).

<sup>99</sup> See Andra Miljanic, *Union-Party Links and the Reconfiguration of the Labor Movement: Brazil and Mexico* (2010) (Dissertation, U.C. Berkeley), <https://cloudfront.escholarship.org/dist/prd/content/qt2144t6bs/qt2144t6bs.pdf?t=mtfvgy> [<https://perma.cc/E63R-P3UR>] (last visited Jan. 15, 2018) (looking at the reconfiguration of labor movements in Latin America, particularly within the automotive industry, and the link between labor unions and political parties); Trudie Coker, *Globalization and Corporatism*, 60 INT'L LAB. & WORKING-CLASS HIST. 180 (2001) (discussing the historical development of Venezuela's labor forces).

<sup>100</sup> Matthew Dimick, *Paths to Power*, 50 N.C. L. REV. 473, 476-27 (2012).

<sup>101</sup> *Id.* This is also a key lesson of the comparative example of Brazil discussed below, *infra* (Section 4.).

natural form of accountability in political democracies, the limits of elections as such has been well-explored in recent decades, and elides the possibility that wide-spread worker resistance to union discipline is far from indicative of genuine problems in representation than individual workplace elections or individual judicial challenges.

In turn, simply creating a formally corporatist systems is no guarantee of such worker loyalty. It must be earned through social engagement and programming, but cannot be simply designed. The post-communist experience in Eastern Europe is indicative of a wide-range of possible worker viewpoints on unions in such systems. David Ost has called many of the post-Soviet systems variations of "illusory corporatism."<sup>102</sup> Russia's state union survived democratization and it claims to be in social partnership with the current regime; however, in part reflecting the general failure of worker oriented reforms,<sup>103</sup> it currently has one of the lowest global rates of social legitimacy.<sup>104</sup> The fate of labor in most post-Soviet countries has depended on the actual bargaining power of corporatist unions,<sup>105</sup> the weakest of which are those organized around enterprise level bargaining.<sup>106</sup>

### 2.3. *Union Democracy and the Comparative Historical Frame*

It is in this general theoretical and empirical context that this article seeks to make its contribution. It does so by placing in a comparative historical frame three nationally large and globally significant labor union systems – those of the United States, Brazil, and

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<sup>102</sup> David Ost, 'Illusory Corporatism' *Ten Years Later*, 2 WARSAW F. ECON. SOC. 19 (2011).

<sup>103</sup> Joel Moses, *Worker Self-Management and the Reformist Alternative in Soviet Labour Policy*, 39 SOVIET STUD. 205 (1987).

<sup>104</sup> SARAH ASHWIN & SIMON CLARKE, *RUSSIAN TRADE UNIONS AND INDUSTRIAL RELATIONS IN TRANSITION* (2002); Calvin Chen & Rudra Sil, *Communist Legacies, Post-communist Transformations, and the Fate of Organized Labor in Russia and China*, 41 STUD. COMP. INT'L DEV. 62, 82 (2006); Tim Pringle, *Trade Union Reform in Russia and China*, in CHINESE WORKERS IN COMPARATIVE PERSPECTIVE 210 (Anita Chan ed., 2015).

<sup>105</sup> Paul Kubicek, *Civil Society, Trade Unions and the Political Economy of Post-communist Transformation in ORGANIZED LABOR IN POSTCOMMUNIST STATES: FROM SOLIDARITY TO INFIRMITY* (Kubicek, 2004).

<sup>106</sup> Stephen Crowley, *Explaining Labor Weakness in Post-Communist Europe*, 18:3 EAST EUROPEAN POL. & SOCIETIES 394 (2004).

China. Each union system represents quite different, if at times interrelated, historical trajectories.

The relative parochialism of U.S. labor scholarship is one of the reasons it has remained uniquely preoccupied with the promotion of union democracy as salve for union weakness, with U.S. labor scholars openly celebrating union democracy as a universally held value.<sup>107</sup> As discussed in depth later, these calls fundamentally shape proposed agendas for union revitalization and reform in the U.S., with even harsh critics of the current system focusing on union electoral processes as the motor force for stimulating a grassroots revival of the labor movement.<sup>108</sup> Moreover, while U.S. labor scholarship and the concept of union democracy are not unknown in Europe, the comparative impact of U.S. scholarship is much stronger across the general asymmetries of international academia and policy discourse. In this case, while far from determinative of union discourse in Brazil or China, threads of the union democracy literature in U.S. scholarship have given rise to its presence in those countries' discourses and also help prefigure, for the worst, comparative analysis of those systems by U.S. scholars.

In contrast, comparative examination of the modern labor histories of each country reinforces the notion that corporatism is the state of affairs to which all labor unions hew, even if the formal legal design of their systems is quite different. Moreover, the solidarities that such corporatism requires to work in practice makes it a desirable structural dynamic from the perspective of social democracy. This common development pattern is significant precisely because these three countries represent distinct political regimes and span the two primary axes of labor union formation: from public to private aegis, and from sectoral to enterprise organization. The United States is an established liberal democracy whose decentralized system of private unionization ideally operates at the enterprise level. Brazil is a young social democracy with a centralized system of

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<sup>107</sup> George Strauss, *Union Democracy*, in *THE STATE OF THE UNIONS* 201 (George Strauss et al. eds., 1991) ("That unions *should* be democratic almost everyone agrees."). See also Catherine Fisk, *Workplace Democracy and Democratic Worker Organizations*, 17 *THEORETICAL INQ. L.* 101, 169 (2016).

<sup>108</sup> See Samuel Estreicher, *Deregulating Union Democracy*, 21 *J. LAB. RES.* 247 (2000) (arguing that union democracy regulation is ineffective and counterproductive); Michael Goldberg, *Derailing Union Democracy*, 23 *BERKELEY J. EMP. & LAB. L.* 137 (2002) (reviewing Estreicher's propositions as incorrect in that unions are not strictly economic entities and the current regulatory scheme as not necessarily ineffective).

formally private but hyper-corporatist unionization. And China is governed by a modern bureaucratic authoritarian regime with a state union structure which is trying to promote industrial peace through an informal corporatization of labor politics. In each of these systems, aspects of their general political logics are under stress, but these stresses reinforce the general corporatist principles herein argued for.

As in any area of law, the granularity of comparative legal analysis suffers when global trends are at issue. For each point in this triadic analysis there are points of convergence and divergence that will be elided. However, as stated earlier, given the state of economic globalization, comparative legal analysis is both empirically necessary<sup>109</sup> and the best disruptive intervention for spurring national labor intellectuals to escape intellectual and strategic ossification. Parochialism is in some sense necessary for understanding the cultural frameworks required to communicate effectively with workers and build social solidarity, but it also encourages the tendency to pursue narrow tactical solutions to those that are in modern labor politics.<sup>110</sup>

Fortunately, the methodological sophistication of labor studies has progressed significantly in recent decades, applying empirical techniques—ethnographic,<sup>111</sup> historical,<sup>112</sup> and statistical<sup>113</sup>—to move beyond the belabored laments of traditional comparative legal formalism or cultural over-determination. The relevance of comparative legal experience in labor law cannot be ignored on almost any facet of labor research which presumes to be honestly engaged in a search for novel solutions. For those committed to notions of economic democracy, the comparative analysis presented herein is meant not as another biting wound, but as a way to help face the harsher reality that some old battles, no matter the emotional or intellectual energy hereto committed, have to be retasked.

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<sup>109</sup> William Gould, *Labor Law Beyond U.S. Borders: Does What Happens Outside of America Stay Outside of America*, 21 STAN. L. & POL'Y REV. 401, 409 (2010).

<sup>110</sup> Harry Arthurs, *Compared to What? The UCLA Comparative Labor Law Project and the Future of Comparative Labor Law*, 28 COMP. LAB. L. & POL'Y J. 591, 596-97 (2007).

<sup>111</sup> THE ANTHROPOLOGY OF LABOR UNIONS (Paul Durrenberger & Karaleigh Reichart eds., 2010).

<sup>112</sup> John Witt, *Rethinking the Nineteenth-Century Employment Contract, Again*, 18 LAW & HIST. REV. 627 (2000).

<sup>113</sup> ROBERT KARASEK & TORES THEORELL, HEALTHY WORK (1990).



## 3. CORPORATISM AS INFORMAL ASPIRATION IN U.S. LABOR UNIONS

3.1. *U.S. Labor from Republican Radicalism to Corporatist Peace*

In many ways, the modern structure of union organization and regulation in the United States is the exception that proves the corporatist rule. In contrast to bargaining structures that emerged out of social democratic movements in Europe or post-authoritarian and post-colonial regimes elsewhere, the legal formalization of U.S. labor unions in 1935 followed a distinctly decentralized vision of labor union formation and operation. It became one of the few union systems that formally set bargaining agents at the enterprise level – between individual employers and a single, exclusive union formed by its employees. Moreover, the type of social bargaining that defined corporatist political process elsewhere was explicitly barred, limited to an enumerated list of wage and benefits questions and accompanied by a ban on any form of intra-corporate participatory representation.

This particular and relatively exceptional form was the outgrowth of decades of struggle to reconcile U.S. ideals of a republican government with the dislocations of industrialization.<sup>114</sup> From the outset, finding a place for labor unions in U.S. law faced the hurdle of the common law's traditional adherence to notions of contractual equality and preference for private ordering of economic affairs.<sup>115</sup> Thus, much employer resistance to labor organization in the early American industrial era was formally articulated through legal challenges to labor organization as a form of combinatory conspiracy.<sup>116</sup> Up until 1935, even when unions succeeded in discrete moments of bargaining with employers, there was little clarity as to how and under what doctrinal categories collective agreements would be

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<sup>114</sup> ALEX GOUREVITCH, *FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH* (2015); Anna di Robilant, *Populist Property Law*, 49 CONN. L. REV. 936 (2017) (emphasizing that ordinary people can become participants in the creation of property law, which in turn improves access to essential economic resources).

<sup>115</sup> JOHN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLE WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* (2004).

<sup>116</sup> See WILLIAM FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991); VICTORIA HATTAM, *LABOR VISIONS AND STATE POWER* (1993).

enforced under existing U.S. law.<sup>117</sup> General judicial hostility, along with the traditional private self-help of employers and their political allies,<sup>118</sup> were initially matched by quite radical critiques of wage-labor which sought to challenge worker subordination economically and politically.<sup>119</sup> None of these movements were able to successfully institutionalize themselves as a labor party within U.S. politics, and bitter internecine conflicts expressed key divergence as to what a particularly American labor movement should represent.

Central to these conflicts was the extent to which class conflict was at the heart of different labor visions. This divergence is classically analogized to the competing philosophies of Samuel Gompers and Eugene Debs, with the former's conciliatory "business unionism" contrasted with the latter's more radical vision of industrial democracy.<sup>120</sup> Reading the labor debates of this era through the lens of union democracy is difficult, as political-economic thinking was roundly focused on the issue of remediating the social and political status of employer power.<sup>121</sup> Yet, the practical legal issue always remained as to how any particular labor vision would be entrenched in U.S. law given its lack of a specific constitutional provision.

It was not until the administration of Franklin Roosevelt reacted to the Great Depression that unions were presented with a genuine opportunity to gain formal legal and political endorsement.<sup>122</sup> During World War II, FDR had attempted to pass legislation, notably the National Recover Administration (NRA), to more openly coordinate industrial and worker interests. The Supreme Court ruling that the NRA was unconstitutional highlighted the resistance of American liberal legal thought to the group democratic logic of

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<sup>117</sup> See William Gorham Rice, *Collective Labor Agreements in American Law*, 44 HARV. L. REV. 572 (1930).

<sup>118</sup> See AHMED WHITE, *THE LAST GREAT STRIKE* (2016); Alex Gourevitch, *Police Work*, 13 PERSP. ON POL. 762 (2015) (discussing the role of formal state violence in support of strikebreaking).

<sup>119</sup> See Stephen McFarland, *With the Class Conscious Workers Under One Roof* (2014) (Diss. CUNY); Rebecca Tarlau, *Education and Labor in Tension*, 36 LAB. STUD. J. 363, 364 (2011).

<sup>120</sup> See ROSANNE CURRARINO, *THE LABOR QUESTION IN AMERICAN* 105 (2011).

<sup>121</sup> See Bruce Kaufman, *The Early Institutionalists on Industrial Democracy and Union Democracy*, 21 J. LAB. RES. 189, 207 (2000).

<sup>122</sup> Woodrow Wilson, one of the leading progressive thinkers of his generation, was also attracted to corporatist ideas and during World War I he tried unsuccessfully to set up a Tri-Partite War Labor Board to manage growing labor tensions. See generally Joseph McCartin, *LABOR'S GREAT WAR* (1997).

corporatism that had then become entrenched in Europe.<sup>123</sup> The defeat of the NRA prompted a constitutional crisis over the role of the Supreme Court in reviewing economic legislation, and ultimately FDR was undeterred. Drawing in part on fears that social unrest surrounding the Great Depression could empower calls for European-style socialism, Roosevelt subsequently advanced a series of social reforms dubbed the New Deal as a solution to economic stagnation and industrial conflict.

The resulting passage of the National Labor Relations Act (NLRA) in 1935, while still contested by the Republican Party and most business interests, was explicitly infused with notions of procedural liberalism absent from its European analogs. Drawing on Gomper's more conciliatory view of employer/employee relationships, the NLRA enshrined a labor vision where economic production within individual companies resulted in profits that could then be allocated through a bargaining process, whose proper functioning could itself facilitate what Kenneth Dau-Schmidt calls the "cooperative surplus."<sup>124</sup> At the same time, this bargaining process would ideally facilitate a type of implicit psychological contract between individual owners and workers that would appropriately respect dignitary claims regarding workplace management.<sup>125</sup>

Many U.S. politicians and intellectuals had been drawn to ideas about labor corporatism then popular in Europe, especially given that corporatism was then articulated as a pathway to achieve both industrial peace and systematically organize the allocation of labor.<sup>126</sup> Yet, James Whitman has detailed how in the U.S., in contrast to the European experience which saw industrial peace as a resolution of class conflict, this corporatist view of group bargaining was re-cast as an expression of liberal democracy,<sup>127</sup> with the aim of

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<sup>123</sup> See Jeffrey Haydu, *MAKING AMERICAN INDUSTRY SAFE FOR DEMOCRACY* 93 (1997).

<sup>124</sup> 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, 424 (1992).

<sup>125</sup> See generally Denise M. Rousseau, *PSYCHOLOGICAL CONTRACTS IN ORGANIZATIONS: UNDERSTANDING WRITTEN AND UNWRITTEN AGREEMENTS* (1995).

<sup>126</sup> See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1454-55 (1993) (explaining that collective empowerment became an important tool to elicit workers' sense of responsibility for efficient operations and provide discipline when individuals detracted from the group's interests).

<sup>127</sup> See James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 AM. J. COMP. L. 747, 774-75 (1991) (describing that unlike Europeans, Americans never perceived class warfare as a defining political problem within society).

creating a private system of welfare as an alternative to the public welfare states emerging in Europe.<sup>128</sup>

During the 1930s, the reception of labor corporatism from Europe was mediated by the influx of European intellectual émigrés fleeing fascism and communism. These intellectuals were influential in part by providing an account of labor organization that would be distinguishable from that which operated under these anti-liberal regimes, and this representation helped them appear relevant to a genuinely American political conversion. Many of these émigrés had originally placed their hope that European labor unions would be a pathway to greater socialism, and then had to translate their arguments for American audiences.<sup>129</sup> Franz Neumann was perhaps best known for his attempt to reconcile liberal legalism with economic corporatism, helping to popularize the substitute notion of “industrial pluralism.”<sup>130</sup> Though some debate exists over the influence of these particular thinkers on U.S. labor regulation, they clearly present the need to repackage even formally corporatist ideas into the American political milieu.<sup>131</sup>

The U.S. system was still formally one of state corporatism given that the NLRA, or Wagner Act, established the electoral procedures that employees at an individual enterprise needed to follow in order to enjoy legal recognition for a union as well as specific regulations of the bargaining process—all in exchange for state enforcement of collective bargains. The regime was regulated through a then novel grant of legal power to an American federal administrative agency, the National Labor Relations Board (NLRB). The focus on the NLRB’s oversight was the integrity of the electoral process that certified unions and to ensure that both unions’ and employees’

<sup>128</sup> See Nelson Lichtenstein, *STATE OF THE UNION* (2002).

<sup>129</sup> See generally Alfred Kähler, *The Trade Union Approach to Economic Democracy*, in *POLITICAL AND ECONOMIC DEMOCRACY* (Max Ascoli & Fritz Lehmann eds., 1937); Gerhard Colm, *Is Economic Planning Compatible with Democracy?*, in *POLITICAL AND ECONOMIC DEMOCRACY* 21 (Max Ascoli & Fritz Lehmann eds., 1937).

<sup>130</sup> Franz Neumann, *ON THE PRECONDITIONS AND LEGAL CONCEPT OF AN ECONOMIC CONSTITUTION* (1931); Franz Neumann, *The Change in the Function of Law in Modern Society*, in *THE DEMOCRATIC AND AUTHORITARIAN STATE: ESSAYS IN POLITICAL AND LEGAL THEORY* (Herbert Marcuse ed., 1957).

<sup>131</sup> Compare Matthew W. Finkin, *Revisionism in Labor Law*, 43 *MD. L. REV.* 23, 88-90 (1984) (discussing the work of Karl Klare, who despite disagreeing with the labor organization system in the U.S., celebrates the intellectual elites who formulated it), with Reuel Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 *BERKELEY J. EMP. & LAB. L.* 1, 12-14 (1999) (explaining that American political thinkers belonged to too many interest groups to be considered members of any single “class”).

bargaining tactics fell within the delimited scope laid out in the NLRA. Critically, this concern with procedural democracy was restricted to union formation itself, and through its regulation of the topics and tactics collective bargaining process, the NLRA enforced the wage and benefit focus of Gompers in contrast to labor leaders who wanted unions to participate in corporate decision-making. The NLRA also cut out huge swaths of workers, as it sanctioned unions only for its definition of non-supervisory workers, and omitted most agricultural labor.<sup>132</sup>

The NLRA's designation of the workplace as a microcosm of political democracy was held out politically to labor organizations as rejecting the distinction between economic and political democracy.<sup>133</sup> Such institutionalization was still resisted by a range of unconvinced existing labor organizations,<sup>134</sup> many of whom wanted to avoid the requirement of formal state certification and saw the limitation on bargaining topics as too complete a concession over the role of democratic norms in the workplace itself. Yet, the weakening of the labor movement in the early 1930s paved the way for general acquiescence to the Wagner Act in relatively short order.

Even with this particularly decentralized and procedurally-oriented view of collective bargaining, from the outset of the NLRA, regime labor unions struggled to find sustained acceptance within the U.S. legal and political culture. What was, in practice, a functional political bargain that lacked a particular constitutional foundation, subjected it to easy legislative and judicial revision.<sup>135</sup> There were continuous arguments advanced that the collective action of labor unions violated norms of U.S. liberty and individualism. Defenders of unionization disagreed but they did so in consonant ideological terms,<sup>136</sup> or made recourse to more inchoate invocations of

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<sup>132</sup> See generally Jean-Christian Vinel, *THE EMPLOYEE: A POLITICAL HISTORY* (2013).

<sup>133</sup> See Katherine van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 *YALE L.J.* 1509 (1981) (identifying the "industrial pluralism" model, which shaped the collective bargaining process towards a legislative system with political representation and democratic participation); Clyde W. Summers, *From Industrial Democracy to Union Democracy*, 21 *J. LAB. RES.* 1, 4-5 (2000).

<sup>134</sup> Christopher L. Tomlins, *AFL Unions in the 1930s: Their Performance in Historical Perspective*, 65 *J. AMER. HIST.* 1021 (1979).

<sup>135</sup> See Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 *MICH. L. REV.* 169 (2015) (noting the relative flexibility and ease with which U.S. legislature and courts could shape labor relations).

<sup>136</sup> See Thomas I. Emerson, *Toward A Democratic Labor Policy*, 7 *L. GUILD REV.* 6 (1947) (describing the labor movement's decision to seek advancement through

“economic nationalism” popular during times of war.<sup>137</sup> The particular historical aperture that allowed Roosevelt to pass the NLRA and avoid annulment by the Supreme Court was, in retrospect, exceptional.<sup>138</sup>

While the U.S. government would promote this regime of collective bargaining as an expression of liberal democracy in the workplace abroad for decades – especially in its post-World War II reconstruction projects,<sup>139</sup> broad social and legal hostility to unions would persist and grow in the following decades.<sup>140</sup> As a result, the vision of labor corporatism used to initially justify the NLRA would rarely come to fruition in practice.<sup>141</sup> However, the institutionalization of labor unions did serve to eventually sideline more radical visions within the labor movement,<sup>142</sup> as symbolized by the merger of the AFL and CIO in 1955.<sup>143</sup>

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existing political channels); Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394 (1970) (detailing the United States' path towards the development of a unique labor relations, collective bargaining, and trade unionism system); Thomas C. Kohler, *The Notion of Solidarity and the Secret History of American Labor Law*, 53 BUFF. L. REV. 883 (2005) (discussing the shaping of the American labor system by existing norms around the understanding of “liberties” and “solidarity”).

<sup>137</sup> See William Hard, *National Policy Toward Labor*, 224 ANNALS AM. ACAD. POL. & SOC. SCI. 152 (1943) (advocating for the development of “economic patriotism,” which requires active collaboration among labor to achieve national advancement).

<sup>138</sup> See Whitman, *supra* note 127; Jefferson Cowie, *Reframing the New Deal: The Past and Future of American Labor and the Law*, 17 THEORETICAL INQUIRIES L. 13 (2016) (identifying the period from 1935 to 1973 as a “long exception” to a sustained pattern of legal hostility to labor organizing in the United States).

<sup>139</sup> See generally Anthony Carew, *LABOUR UNDER THE MARSHALL PLAN: THE POLITICS OF PRODUCTIVITY AND THE MARKETING OF MANAGEMENT SCIENCE* (1987); *AMERICAN LABOR AND THE COLD WAR: GRASSROOTS POLITICS AND POSTWAR POLITICAL CULTURE* (Robert W. Cherny et al. eds., 2004).

<sup>140</sup> See generally Christopher L. Tomlins, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* (1985); Robert J. Watt, *Collective Bargaining as a Basis for Labor Co-Operation*, 224 ANNALS AM. ACAD. POL. & SOC. SCI. 84 (1942).

<sup>141</sup> See Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 604, 612 (2007) (describing that neither management nor labor wanted to adopt and implement labor corporatist ideals).

<sup>142</sup> For an attempt to recover some of this earlier history today, see Gourevitch, *supra* note 114.

<sup>143</sup> See Judith Stepan-Norris & Maurice Zeitlin, *Union Democracy, Radical Leadership, and the Hegemony of Capital*, 60 AM. SOC. REV. 829 (1995).

### 3.2. *Legal Deradicalization Amid Failed Corporatism*

The rise and fall of the influence of American labor unions after the Wagner Act is one that has been retold many times, with the turn to Gompers' more depoliticized vision of collective bargaining seen by more critical scholars as something akin to an original sin.<sup>144</sup> Yet, one aspect of this history often taken for granted was how, almost instantly, union mergers and coordination beyond individual workplaces became the core dynamics of union activity. Even though enterprise-level union affiliation with larger union organizations, such as the AFL-CIO, was purely voluntary in the NLRA scheme, in practice, the strength of the labor movement was always recognized as lying in its potential for collective solidarity. Attempts to utilize collective labor power emerged with tactics such as "whipsawing," "fractional bargaining," or "pattern bargaining," all of which were some variations of replicating and leveraging collective bargains across various industries.<sup>145</sup> Through union mergers and these collective tactics, union leaders aggressively aspired to the type of political influence enjoyed by their European counterparts - thus, the label "aspirational corporatism."

Following the dynamics outlined by Michel's iron law, American unions *de facto* pursued corporatism in practice. As a result, while the decentralized Wagner system ideally represented a victory for liberal procedural norms, the type of democracy at stake was ever-contested. Almost every judicial and legislative assault on unions was made by attacking the strategies and tactics that would transform voluntary union mergers into real collective, corporatist power.<sup>146</sup> While calls for greater internal union democracy would later become a rallying cry for activists sympathetic to the labor

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<sup>144</sup> See Christopher L. Tomlins, *The New Deal, Collective Bargaining, and the Triumph of Industrial Pluralism*, 39 *INDUS. & LAB. REL. REV.* 19, 20 (1988) (discussing the development of labor laws to "integrate the labor movement into the mainstream contours of pressure-group politics and to institutionalize, regulate, and thereby dampen industrial conflict."); George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 *BERKELEY J. EMP. & LAB. L.* 187 (1994) (explaining that labor's challenge collapsed due to the traditional hostility that they received in courts for challenging fundamental societal institutions).

<sup>145</sup> For a discussion of these tactics in the U.S., and their decline in comparative frame, see Margaret Goralski et al., *International Difference in Labor Conflicts*, 6 *J. BUS. MANAG. & CHANGE* 75 (2011).

<sup>146</sup> See Joel Seidman, *Democracy in Labor Unions*, 61 *J. POL. ECON.* 221, 231 (1953).

movement, it was much more effectively wielded as a weapon by critics of unionization.

The Wagner Act initially gave little attention to the internal affairs of unions once they were formed. Yet, this relative freedom was short lived. Judicial doctrine had already begun to develop prior to the 1930s, limiting union discipline of workers.<sup>147</sup> The passage of the Labor Management Relations Act in 1947, popularly known as the Taft-Hartley Act, placed greater procedural restrictions on union bargaining, as did the Labor Management Reporting and Disclosure Act of 1959. The LMRDA, popularly known as the Landrum-Griffin Act, was explicitly justified on the basis of promoting union democracy in the wake of a variety of union corruption scandals.<sup>148</sup> These new legislative actions were a response to how quickly unions had grown in influence by centralizing their operations. The relative success of the AFL-CIO merger fueled arguments that labor unions were powerful enough to oppress other legitimate social interests.<sup>149</sup> It was further true that in union workplaces, dissenting workers were often left with little legal recourse or voice when faced with individual miscarriages of justice,<sup>150</sup> though exceptions like that did persist at the local level.<sup>151</sup>

In 1956, Lipset, Trow and Coleman's work on the decentralized and democratically vibrant International Typographical Union held

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<sup>147</sup> See Miller D. Steever, *Control of Labor through Union Discipline*, 16 CORNELL L.Q. 212 (1931).

<sup>148</sup> See Kurt L. Hanslowe, *Individual Rights in Collective Labor Relations*, 45 CORNELL L.Q. 25 (1959) (describing legal restrictions placed upon membership rights within unions); Clyde W. Summers, *American Legislation for Union Democracy*, 25 MOD. L. REV. 273 (1962) (detailing the extensive investigative efforts spent towards identifying union corruption and improper practices in the field of labor management relations).

<sup>149</sup> See Alfred W. Blumrosen, *Group Interests in Labor Law*, 13 RUTGERS L. REV. 432, 482 (1958) (articulating the belief that labor organizations had become so powerful that legal measures would have to be taken to ensure protection against their influence).

<sup>150</sup> See Clyde W. Summers, *Legal Limitation on Union Discipline*, 64 HARV. L. REV. 1049 (1950) (highlighting that union discipline represents a double-edged sword as it is both necessary for union effectiveness but may be a tool of oppression); Paul H. Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by His Union*, 41 U. CIN. L. REV. 55 (1972) (exploring union-employee relations through the case of an employee who the union refuses to represent in his wrongful discharge arbitration).

<sup>151</sup> See, e.g., Lon W. Smith, *An Experiment in Trade Union Democracy: Harold Gibbons and the Formation of Teamsters Local 688, 1937-1957* (Dec. 1993) (unpublished Ph.D. dissertation, Illinois State University) (on file with University Microfilms International).



the ITU as a validation of the promise of unions as bottom-up generators of democratic civil society and was written as an open counterpoint to Michel's iron law.<sup>152</sup> Most U.S. labor scholars were sympathetic to critiques of insufficient participatory norms within unions regardless of their effectiveness as collective bargainers, often directly criticizing, à la Gerald Frug, the necessity of bureaucratic norms and processes on efficiency grounds.<sup>153</sup> Many openly claimed that union membership had grown exactly because of their particularly American internally democratic nature and their consonance with norms of individual democratic rights,<sup>154</sup> and even the localism of U.S. federalism.<sup>155</sup>

Yet, the impact of Taft-Hartley and the LMRD was not a reinvigoration of the democratic potential of unions, but central to the ongoing judicial assault on the collective tools that unions relied on to simulate corporatist dynamics, such as sympathy strikes. These developments placed pro-union democracy activists in the awkward position of finding their loyalty to the large union movement questioned.<sup>156</sup>

The scholarship of Clyde Summers, key contributor to the Landrum-Griffin Act, would for decades try to reconcile this commitment to union democracy with the progressive weakening of the labor movement.<sup>157</sup> Summers' exchanges with Archibald Cox during this era often circled around the role of union discipline in

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<sup>152</sup> Though often cited as a pure counter-point to Michels, Lipset, Trow and Coleman recognized the risk that a more localized union culture would distract from larger issues of worker interest. See Seymour Martin Lipset, Martin Trow & James Coleman, *UNION DEMOCRACY: THE INSIDE POLITICS OF THE INTERNATIONAL TYPOGRAPHICAL UNION* 431-32 (1956).

<sup>153</sup> Frug noted that his general critique of bureaucracy necessity applied to workplace dynamics. See Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1278 n.29 (1983).

<sup>154</sup> See Seidman, *supra* note 146 (explaining that American labor organizations garnered support by adhering to democratic representative ideals); Hanslowe, *supra* note 148, (highlighting that labor participation depended, in large part, on unions' concessions over absolute discipline ideologies).

<sup>155</sup> See Harry H. Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327 (1958) (discussing the presence of local investigative efforts aimed at combatting problems inherent in labor management collusion, misuse of union funds, and suppression of civil rights by labor leaders).

<sup>156</sup> See Clyde Summers, *Disciplinary Powers of Unions*, 3 INDUS. & LAB. REL. REV. 483, 491 (1949) (articulating the intricacies of union priorities, which included both active efforts against the employer and rival unions).

<sup>157</sup> See generally Michael J. Goldberg, *Present at the Creation: Clyde W. Summers and the Field of Union Democracy Law*, 14 EMP. RTS. & EMP. POL'Y J. 121 (2010).

promoting labor power.<sup>158</sup> Others were explicit that the search for union democracy was a distraction to the core issue of bargaining power that the turn to more corporatist operations at the national level had quickly revealed.<sup>159</sup> Industrial relations scholars outside of law schools would continue to be far more sympathetic to more European notions of labor corporatism that often saw internal democracy as antithetical to collective labor union power.<sup>160</sup>

The passage of the Taft-Hartley and Landrum-Griffin Acts showed how, whatever initial opening the NLRA had provided for the recognition and expansion of U.S. labor unions, the corporatist conception of industrial peace imagined during the New Deal was not in sync with the general organization of the U.S. economic or political arenas.<sup>161</sup> The social movements that sustained labor organization up until this point fed into a system that demanded greater centralization to achieve any economic results through collective bargaining. This distinct structural weakness left unions recursively less powerless to resist repeated losses at the judicial and legislative levels, even as they increasingly turned to electoral politics without the corporatist underpinnings enjoyed by their European counterparts—most specifically as a distinct labor party. Retelling and reinterpreting what Karl Klare has called the “deradicalization” of the NLRA has become a staple among contemporary labor law scholars,<sup>162</sup> culminating in perhaps the most

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<sup>158</sup> Compare Summers, *Legal Limitation*, *supra* note 150 (describing the issue of union discipline to be an internal challenge for labor organizations to resolve), with Archibald Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819 (1960) (underscoring the importance of federal regulation of unions due to the misbehavior of several union leaders).

<sup>159</sup> See C. Peter Magrath, *Democracy in Overalls: The Futile Quest for Union Democracy*, 12 INDUS. & LAB. REL. REV. 503 (1959).

<sup>160</sup> See generally HERBERT S. PARNES, *UNION STRIKE VOTES: CURRENT PRACTICE AND PROPOSED CONTROLS* (1956); JACK BARBASH, *AMERICAN UNIONS: STRUCTURE, GOVERNMENT, AND POLITICS* (1967); DEREK C. BOK & JOHN T. DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* (1970).

<sup>161</sup> See Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013 (2009) (reviewing the deficiencies of the NLRB and its inability to re-shape U.S. attitudes toward labor organization).

<sup>162</sup> Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978). See also William B. Gould, *Union Organizational Rights and the Concept of “Quasi-Public” Property*, 49 MINN. L. REV. 505 (1965) (describing the difficulty faced by unions to resist public antagonism while ensuring employee persuasion); Daniel R. Ernst, *LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM* (1995)

restrictive and regulated collective bargaining regime among industrial democracies.<sup>163</sup>

Foundationally, while the Wagner Act itself was deemed constitutional, its constitutional justification was achieved incidentally to the federal power to regulate interstate commerce rather than through a positive articulation of constitutionalized labor rights.<sup>164</sup> At one point, some hope had existed that the success of civil rights legislation in penetrating the traditional insulation of economic organizations from rights-based claims could empower the NLRB to articulate a more substantive vision of associative labor rights,<sup>165</sup> but, as Sophia Lee has recently demonstrated, the use of racial discrimination as a constitutional bridge into the workplace failed to materialize.<sup>166</sup> Some unions themselves openly resisted this development by attempting to shield their internal operations from critiques of racial discrimination,<sup>167</sup> and such a choice still stands today as one of the greatest lost opportunities for the U.S. labor movement to expand on the positive precedents of black labor activism.<sup>168</sup>

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(examining the agency of lawyers within the American Anti-Boycott Association, which litigated and lobbied against organized labor).

<sup>163</sup> See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002); Paul C. Weiler, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990) (examining the social and economic changes that have led to the deterioration of labor representation within the U.S.); Lance Compa, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (HUMAN RIGHTS WATCH ed., 2000) (reviewing the range of U.S. workers seeking to exercise their right to freedom of association).

<sup>164</sup> See Barenberg, *supra* note 86, at 315-16 (explaining that the Supreme Court has interpreted the Commerce Clause of the Constitution to mean that states cannot excessively regulate matters of interstate commerce).

<sup>165</sup> See Archibald Cox, *Labor Law and the American Constitution*, 3 U. QUEENSLAND L.J. 5 (1956) (identifying that the NLRB's acquisition of power to make unreviewable rulings exercising or refusing to exercise NLRA jurisdiction limited labor's ability to associate and organize).

<sup>166</sup> Sophia Lee, *The Workplace Constitution: From the New Deal to the New Right* (2014).

<sup>167</sup> See Harry H. Wellington, *The Constitution, the Labor Union and "Governmental Action"*, 70 YALE L.J. 345 (1960) (discussing union disagreement over incorporation of diverse racial memberships).

<sup>168</sup> See William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 81 (1999) (identifying black labor organization as among the most unified within the labor movement of the mid-twentieth century); see, e.g., Reuel E. Schiller, *Singing "The Right-to-Work Blues": The Politics of Race in the Campaign for "Voluntary Unionism" in Postwar California* in THE RIGHT AND LABOR IN AMERICA: POLITICS, IDEOLOGY, AND IMAGINATION 139 (Nelson Lichtenstein & Elizabeth Tandy Shermer eds., 2012) (covering the failed attempt to pass a right-to-work proposition in 1958).

The lack of a distinct constitutional basis for labor organizing found in many other countries did not simply enable later legislative encroachment, but directly enabled a litany of decisions by the courts and the NLRB that hearkened back to the common law treatment of unions during the 19<sup>th</sup>-century.<sup>169</sup> Progressively, the scope of legal and political contests over unions was narrowed to focus almost exclusively on procedural formalities, the evaluation of which is weighed against the implicitly constitutionalized common law property rights of owners,<sup>170</sup> and with an unrestrained and overt hostility to forms of collective action such as secondary strikes,<sup>171</sup> sit-ins,<sup>172</sup> and even the right to strike itself.<sup>173</sup> The frame of union democracy led to labor unions becoming the most regulated private associations in American society.<sup>174</sup>

Today, private unionization in the U.S. exists at an all-time low today.<sup>175</sup> No gains to better facilitate collective action have ever been

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because union activists could not gain African Americans support because unions engaged in discriminatory practices).

<sup>169</sup> See Patrick Macklem, *Property, Status, and Workplace Organizing*, 40 U. TORONTO L.J. 74 (1990) (arguing that liberal attitudes toward property and status continue to limit the transformation of organized labor in western economies); Ken Matheny & Marion Crain, *Disloyal Workers and "Un-American" Labor Law*, 82 N.C.L. REV. 1705 (2004) (exploring the relationship between common law's historical vision of the employment-at-will doctrine and the emerging redefinition of labor organization in the mid-twentieth century).

<sup>170</sup> See Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305 (1994) (examining the Supreme Court decision in *Lechmere, Inc. v. NLRB*, in which the Court held that employers may lawfully prohibit union organizers from soliciting on private property unless the organizers faced "unique obstacles" to communication); Jeffery M. Hirsch, *Taking State Property Rights Out of Federal Labor Law*, 47 B.C.L. REV. 891 (2006) (reviewing the NLRB's current formulation of employers' "right to exclude" union organizers from private property); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004) (underlining the lengthy history of legal decisions supporting employers' rights); Nathan S. Newman, *The Legal Foundations for State Laws Granting Labor Unions Access to Employer Property*, 62 DRAKE L. REV. 689 (2013).

<sup>171</sup> See Howard Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962) (discussing the Supreme Court's decision to outlaw secondary boycotts because of its effects on third parties who are not involved in the actual labor dispute).

<sup>172</sup> See Ahmed A. White, *The Depression Era Sit-Down Strikes and the Limits of Liberal Labor Law*, 40 SETON HALL L. REV. 1 (2010).

<sup>173</sup> See Ahmed A. White, *The Crime of Staging an Effective Strike and the Enduring Role of the Criminal Law in Modern Labor Relations*, 11 WORKINGUSA 23 (2008) (linking criminal law's role in limiting basic labor rights to organize, strike, and provoke collective bargaining).

<sup>174</sup> See Fisk, *supra* note 107 (examining the development of workplace democracy and regulations of labor organization).

<sup>175</sup> See Harry G. Hutchinson, *Liberty, Liberalism, and Neutrality: Labor*

achieved for unions at the federal level, even after multiple economic and financial crises.<sup>176</sup>

Over time, the response of labor intellectuals to this judicial assault has been to articulate alternative constitutional frames that would better support collective labor actions, largely grounded in anti-subordination readings of the 13<sup>th</sup> Amendment<sup>177</sup> or more expansive readings of the associative content of the First Amendment.<sup>178</sup> However, such arguments still face the reality that the original compromise of the Wagner Act was the result of losses at the level of cultural imagination as much as they were legislative. The

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*Preemption and First Amendment Values*, 39 SETON HALL L. REV. 779 (2009) (pointing to employers and anti-organizing activists' ability to ground their efforts on First Amendment free speech grounds as a crucial factor towards their relative power in modern labor relations); Lonnie K. Stevans, *The Effect of Endogenous Right-to-Work Laws on Business and Economic Conditions in the United States: A Multivariate Approach*, 5 REV. L. & ECON. 595 (2009) (commenting on the effects of "right-to-work" laws and their effects on unions' efficacy).

<sup>176</sup> See Samuel Estreicher, "Come the Revolution": *Employee Involvement in the Workers' State*, 1 U. PA. J. LAB. & EMP. L. 87, 87 (1998) (presenting the possibility of labor transformations during economic downturn).

<sup>177</sup> See James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 YALE L.J. 1474 (2010) (discussing the relationship between labor rights claims and the Involuntary Servitude Clause); Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459 (2012) (addressing the narrowly tailored use of the Thirteenth Amendment and its definition of "slavery" and "involuntary servitude"); Mark Dudzic, *Saving the Right to Organize: Substituting the Thirteenth Amendment for the Wagner Act*, 14 NEW LAB. F. 59 (2005) (articulating the possibility of using the Thirteenth Amendment to push forward modern labor movements); William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 220-1 (2001) (arguing that Wagner missed an opportunity to rest labor rights on the Reconstruction Amendments).

<sup>178</sup> See Kenneth Cloke, *Mandatory Political Contributions and Union Democracy*, 4 BERKELEY J. EMP. & LAB. L. 527 (1981) (discussing the Supreme Court's restrictions for unions to compel contributions from members for political expenditures due to first amendment rights); Charlotte Garden, *Labor Law Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617 (2011) (linking labor speech to the same weight as civil rights speech); Charlotte Garden, *Citizens United and the First Amendment of Labor Law*, 43 STETSON L. REV. 571 (2013) (applying the *Citizens United* decision to labor unions and judicial interpretation of unions); Benjamin I. Sachs, *Unions, Corporations and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800 (2012) (labeling the *Citizens United* decision as an asymmetrical decision to existing application of political opt-out rights for union members); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011) (questioning the triumphalism of *Citizens United* as a First Amendment victory and predicting further incoherence on issues of campaign financing); Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023 (2012) (attempting to reconcile the *Citizens United* decision with *Knox*, in which the Court continued to limit unions' ability to levy special assessments for members due to First Amendment rights).

compromise itself never represented a genuine renegotiation of the U.S. social compact.<sup>179</sup> Such is the inevitable consequence of James Atleson's classic *Values and Assumptions in American Labor Law* and Catherine Fisk's critique of Karen Orren's *Belated Feudalism*—that the Wagner Act did not ward off socialism as much as it failed to deracinate the feudal presumptions of the common law regarding the basic property/commodity divide in employee-employer relations.<sup>180</sup>

Yet, while some of these larger cultural arguments are recognized by labor scholars, it is most common for reforms to embrace the basic proceduralism of labor union certification and advance modifications either to union formation<sup>181</sup> or to further decentralize labor regulation to the state level.<sup>182</sup> Some of these calls directly critique union reactions to changing labor market conditions<sup>183</sup> or, especially those looking to remove the ban on intra-corporate worker representation, seek more conciliatory engagement with

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<sup>179</sup> See Stone, *supra* note 133, at 1580 (emphasizing the need for any new approach to include a "more accurate description of the industrial world and a more viable analysis of the impediments to democracy built into it").

<sup>180</sup> See James B. Atleson, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983) (expressing misgivings about the political orientation, legislative history, and contemporary practice of American labor law); Catherine Fisk, *Still "Learning Something of Legislation": The Judiciary in the History of Labor Law*, 19 L. & SOC. INQ. 151 (1994) (examining the fall of collective bargaining from its NLRA roots).

<sup>181</sup> See Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47 (2009) (labeling the underenforcement of employees' statutory right to bargain as a significant failure of the law governing unions); William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F.L. REV. 291 (2009) (raising alternative factors for unions' decline and explaining that a shift in union participation requires more than just reform of existing labor laws).

<sup>182</sup> See Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law: Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97 (2009) (articulating the positive impacts that increased state influence of labor relations may have); Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153 (2011) (exploring states and cities' persistent efforts to impact labor relations in their domains); Michael M. Oswald, *The Grand Bargain: Revitalizing Labor Through NLRA Reform and Radical Workplace Relations*, 57 DUKE L.J. 691 (2007) (arguing for grand legislative reform of NLRA); Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857, 858-59 (2014) (examining the conflict between state right-to-work laws and federal labor laws).

<sup>183</sup> See Samuel Estreicher, *Labor Law Reform in a World of Competitive Markets – The Kenneth M. Piper Lectureship Series*, 69 CHI.-KENT L. REV. 3, 39-42 (1993); Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97, 124-5 (1993).

employers.<sup>184</sup> Some take up more abstract arguments about the framing of workplace justice arguments,<sup>185</sup> but again, almost all have the often open assumption that better altering union elections will lead to significant progress. This need to anchor proposals to the ideal that unions properly express the U.S. liberal democratic tradition remains,<sup>186</sup> enabled by the corollary faith that removing such roadblocks would allow U.S. workers to achieve the greater level of union representation that they desire.<sup>187</sup>

Again, most all of these legal proposals are accompanied by a critique of current union operations – in particular those that reflect and encourage greater corporatist behavior.<sup>188</sup> Many scholars still trace the decline of union democracy with the progressive shift of expenditures from organizing to legislative lobbying<sup>189</sup> and a debilitating focus on short-term electoral politics.<sup>190</sup> Such observations

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<sup>184</sup> See John Pencavel, WORLD BANK, WPS NO. 1469 (1995) (explaining that legal frameworks should neither encourage nor discourage unionism but should keep unions in a domain where they can be an effective intermediary between employers and employees).

<sup>185</sup> See David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523 (2009) (describing the state of American employment relations to be at a “critical juncture” due to a prolonged history of anti-employment); Brishen Rogers, “Acting Like a Union”: Protecting Workers’ Free Choice by Promoting Workers’ Collective Action, 123 HARV. L. REV. F. 38 (2010) (highlighting the American labor discussion has been rooted upon the normative preference against unionization).

<sup>186</sup> Even Samuel Estreicher, a proponent of reforming union elections through systemic deregulation and simplification instead of various “procedural niceties,” still works normatively within the enterprise level election paradigm. See Estreicher, *supra* note 108. But see Goldberg, *supra* note 108 (articulating that Estreicher fails to give enough credit to the current approach towards unions and does not factor in sufficient guarantees of democracy and basic civil liberties).

<sup>187</sup> See generally RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* (2006).

<sup>188</sup> See, e.g., Teresa Sharpe, *Union Democracy and Successful Campaigns: The Dynamics of Staff Authority and Worker Participation in an Organizing Union*, in *REBUILDING LABOR: ORGANIZING AND ORGANIZERS IN THE NEW UNION MOVEMENT* 62, 63 (Ruth Milkman & Kim Voss eds., 2004) (arguing that labor revitalization requires tactical innovation from union leaders and active participation in actual organizing campaigns from rank and file members); Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11 (2005).

<sup>189</sup> See James B. Atleson, *Law and Union Power: Thoughts on the United States and Canada*, 42 BUFF. L. REV. 463, 488-89 (1994).

<sup>190</sup> See, e.g., Emily J. Charnock, *The Rise of Political Action: Labor Unions and the Democratic Party* (Working Paper, Annual Meeting of the American Political Science Association, 2012) (examining the role of Political Action Committee (P.A.C.) and exploring its role in underpinning the labor-Democratic alliance); Paul C. Mishler, *Trade Unions in the United States and the Crisis in Values*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 861 (2006) (proposing labor reforms to increase efficiency including

inform arguments that union democracy and the effectiveness of the U.S. labor movement are linked,<sup>191</sup> even when such claims call for otherwise more radical reforms, such as abandoning striking.<sup>192</sup> Of great current popularity, labor scholars have attempted to adapt to labor contractualism by imagining organizing around individual employment rights so that unions can use aggregate litigation as a new source of worker solidarity.<sup>193</sup> At the local level, there has certainly been a range of internal union innovations on these grounds, but they have only achieved for a short time the hoped for renewed democratic energy.<sup>194</sup>

Ironically, arguments about union democracy harken back to the social unionism of earlier eras, or even in systems abroad.<sup>195</sup> It is in

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reforms to union representation); HERBERT B. ASHER ET AL., *AMERICAN LABOR UNIONS IN THE ELECTORAL ARENA* (2001). *But see* Bob Master, *Engaging with Democrats*, 19 *NEW LAB. FOR.* 16 (2010) (describing the limitations of labor's strategic shift toward member based political mobilization).

<sup>191</sup> See, e.g., Matthew J. Parlow, *Lessons from the NBA Lockout: Union Democracy, Public Support, and the Folly of the National Basketball Players Association*, 67 *OKLA. L. REV.* 1 (2014) (looking at the NBA to highlight the critical importance of intra-union communications, public relations campaigns, and union democracy when unions negotiate); Stewart J. Schwab, *Union Raids, Union Democracy and the Market for Union Control*, 1992 *U. ILL. L. REV.* 367 (1992) (using an efficiency analysis to conclude that perfect interest alignment between members and leaders is not always optimal).

<sup>192</sup> See, e.g., STANLEY ARONOWITZ, *THE DEATH AND LIFE OF AMERICAN LABOR: TOWARD A NEW WORKERS' MOVEMENT* (2014).

<sup>193</sup> See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 *CARDOZO L. REV.* 2685, 2687 (2008) (explaining that workers and lawyers have increasingly turned to employment statutes such as the Fair Labor Standards Act to secure their substantive employment rights); KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004) (exploring the changing nature of the employment relationship and its implications for labor and employment law); Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 *BERKELEY J. EMP. & LAB. L.* 57, 58 (2002) (identifying that most modern workplace protections for employees stem from statutes and common law, not from collective bargaining agreements); Ann C. Hodges, *Trilogy Redux: Using Arbitration to Rebuild the Labor Movement*, 98 *MINN. L. REV.* 1682, 1684 (2014) (analyzing the possibility of creating a program that provides representation to workers who are bound to arbitrate their legal disputes with their employers).

<sup>194</sup> See Paul M. Secunda, *The Wagner Model of Labour Law is Dead, Long Live Labour Law!*, 38 *QUEEN'S L.J.* 549 (2013).

<sup>195</sup> See Ian Robinson, *Neoliberal Restructuring and U.S. Unions: Toward Social Movement Unionism?*, 26 *CRIT. SOC.* 109 (2000) (identifying pathways in which neoliberal policies have promoted shifts toward social movement unionism); Kyle Albert, *Labor Union Political Strategy in an Era of Decline and Revitalization*, 84 *SOC. INQUIRY* 210 (2014) (analyzing union appearances in congressional hearings and unions' legislative advocacy activities); Scott L. Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 *CAL. L. REV.* 1927 (2007) (using the Inglewood Wal-Mart case to illustrate unions' use of legislative advocacy to achieve their goals); Ann C. Hodges, *Avoiding Legal Seduction:*



calls for social unionism that more biting critiques do emerge regarding the Wagner Act regulatory framework,<sup>196</sup> but again on the level that it inhibits not internal union democracy but the capacities of unions to engage in broader forms of social activism,<sup>197</sup> especially so as to remediate its historical errors of racial or gender exclusion<sup>198</sup> or hostility to immigrant labor.<sup>199</sup> Social unionism is seen as providing the link between unions and the participation of those workers outside of the traditional industrial employment.<sup>200</sup> And at their apex, calls for social unionism expand to the transnational level.<sup>201</sup>

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*Reinvigorating the Labor Movement to Balance Corporate Power*, 94 MARQ. L. REV. 889 (2011) (reviewing the ways that legal and political action have become central strategies for labor unions).

<sup>196</sup> See Orly Lobel, *Orchestrated Experimentalism in the Regulation of Work*, 101 MICH. L. REV. 2146 (2003) (reviewing PAUL OSTERMAN ET AL., *WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET*; Catherine Fisk and Xenia Tashlitsky, *Imagine a World Where Employers Are Required to Bargain with Minority Unions*, 27 A.B.A. J. Lab. & Emp. L. 1 (2012).

<sup>197</sup> See, e.g., Richard R. Carlson, *Citizen Employees*, 70 LA. L. REV. 237 (2009) (defining a new type of employee - one who focuses more on their public duty than their loyalty to corporations). *But see* Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001) (focusing on the internal effects of labor changes when assumptions of long term attachment between employer and employee are not present).

<sup>198</sup> See Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 BERKELEY J. EMP. & LAB. L. 211 (2002) (addressing unions' historical membership and structure around blue-collar white males); Charlotte Garden and Nancy Leong, *"So Closely Intertwined": Labor and Racial Solidarity*, 81 GEO. WASH. L. REV. 1135 (2013) (presenting a nuanced view against the conventional narrative of rivalry between unions and people of color). *But see* Angela Onwuachi-Willis and Mario L. Barnes, *The Obama Effect: Understanding Emerging Meanings of "Obama" in Anti-Discrimination Law*, 87 IND. L.J. 325 (2012) (exploring the significance of having a biracial, black-white president to the enforcement of anti-discrimination law); Harry G. Hutchison, *Employee Forced Choice? Race in the Mirror of Exclusionary Hierarchy*, 15 MICH. J. RACE & L. 369 (2010) (tracing the disproportionate impact that key labor legislation had on African Americans).

<sup>199</sup> See, e.g., Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007).

<sup>200</sup> See Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251 (2006) (identifying that laws and courts' interpretations of employment protections for atypical workers have largely been based on workplaces and employment relationships that no longer exist); Lisa J. Bernt, *Suppressing the Mischief: New Work, Old Problems*, 6 NE. U. L.J. 311 (2014) (assessing legal distinctions between employees and independent contractors).

<sup>201</sup> See Jeffrey M. Hirsch, *Making Globalism Work for Employees*, 54 ST. LOUIS U. L.J. 427 (2010) (reviewing the forms of collective action that have arisen due to globalism). *But see* James Atleson, *The Voyage of the Neptune Jade: The Perils and Promises of Transnational Labor Solidarity*, 52 BUFF. L. REV. 85 (2004) (analyzing shifts in labor rights due to increasing globalization); Kolben, *supra* note 97 (discussing the

The focus on union democracy has often left U.S. labor activists rediscovering the next new precedent for union revitalization among what essentially amounts to tactical victories.<sup>202</sup> The broadest action taken under the renewed union democracy rubric was the split of several unions from the AFL-CIO to form the Change to Win Federation in 2005. However, in just a few years, several of the unions re-affiliated with the AFL-CIO, and what studies have been done have shown little success by the remaining Change to Win affiliates in new member organizing.<sup>203</sup> This only replays the general and consistent trend toward union mergers that has characterized the U.S. labor movement even prior to the Wagner Act.<sup>204</sup> Recent case studies of some of the most hopeful, committed and sophisticated local union organizing drives shown them ultimately stymied by but one unfavorable aspect of the current regulator regime.<sup>205</sup> The normal dissipation of social capital derived from exceptional moments of crisis flows directly into John Godard's claim that systems with more decentralized forms of organizing, such as in the U.S., are doomed to perpetual cycles of conflict and contention.<sup>206</sup> Yet, the legacy of union democracy is so strong that even dedicated activists who seek to shift the view of unions from legal to social actors still decry their aspirational corporatism as an impediment to their revitalization.<sup>207</sup>

The apotheosis of the individual rights frame underlying the core metaphor of union democracy has been the near-complete decimation of U.S. union's financial base through litigation attacking

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disconnect between existing transnational labor regulation systems within developing states).

<sup>202</sup> Melvin J. Rivers and Tim Truitt, *A Union Representative's Perspective of Declining Union Membership*, 3 INT'L J. MANAG. ECON. & SOC. SCI. 125 (2014).

<sup>203</sup> See Tracy Roof, *CTW vs. the AFL-CIO: The Potential Impact of the Split on Labor's Political Action*, 10 INT'L J. ORG. THEORY & BEHAV. 245 (2007); Rachel Aleks, *Estimating the Effect of "Change to Win" on Union Organizing*, 68 INDUS. & LAB. REL. REV. 584 (2015).

<sup>204</sup> See Jasmine Olivia Kerrissey, *Union Mergers in the United States, 1900-2005* (2012) (Ph.D. dissertation, University of California, Irvine) (analyzing the causes and effects of union mergers in the twentieth century).

<sup>205</sup> The exhaustive case study carried out by Scott Cummings after the dynamic Clean Truck Program campaign in L.A. ends with its derailment by federal pre-emption after a variety of local strategic and tactical innovations. Scott L. Cummings, *Preemptive Strike: Law in the Campaign for Clean Trucks*, 4 U.C. IRVINE L. REV. 939 (2014). See also VIRGINIA DOELLGAST, *DISINTEGRATING DEMOCRACY AT WORK: LABOR UNIONS AND THE FUTURE OF GOOD JOBS IN THE SERVICE ECONOMY* (2012).

<sup>206</sup> John Godard, *The Exceptional Decline of the American Labor Movement*, 63 INDUS. & LAB. REL. REV. 1 (2009).

<sup>207</sup> ARONOWITZ, *supra* note 192.

the ability of unions to require mandatory dues from the shrinking number of workers they represent.<sup>208</sup> The 2014 decision of *Harris v. Quinn* demonstrated the continuing trend of using free speech norms to attack union spending on political lobbying, almost culminated in 2017 in a complete rejection of agency fees narrowly, and potentially only temporarily, avoided in the case of *Friedrichs v. California Teachers Association*.

Notably, this trajectory of judicial and legislative deconstruction of labor power is not unique to the United States. In many ways, the modern history of labor unions in many common law countries parallels the centrality of employer property rights in the feudal origins of the common law itself.<sup>209</sup> The decline of unions during and after Thatcherism in the United Kingdom anticipated much of the constitutional language of recent U.S. Supreme Court decisions about the illiberalism of corporatist politics.<sup>210</sup> The comparatively stronger history of corporatist arrangements has led to some pushback outside the U.S., even as the frame of individual employee choice has led to similar unsuccessful scrambles for organizing strategies around employment law.<sup>211</sup>

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<sup>208</sup> See Sachs, *supra* note 178 (assessing opt-out rules and their effects on unions); Garden, *supra* note 178. See generally Elizabeth Sepper, *Free Exercise Lochnerism*, 116 COLUM. L. REV. 1453 (2015) (examining courts' growing incorporation of *Lochner* premises into religious liberty doctrine); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. (2016) (discussing the revitalization of *Lochnerism* and "liberty of contract" jurisprudence).

<sup>209</sup> See Anthony Honeybone, *Introducing Labour Flexibility: The Example of New Zealand*, 134 INT'L LAB. REV. 493 (1997) (exploring change within the industrial relations system in New Zealand); Roger Undy, *New Labour's 'Industrial Relations Settlement': The Third Way?*, 37 BRIT. J. INDUS. REL. 315 (1999) (discussing the U.K.'s election of a Labour government in 1997 and its impact on British industrial relations); Sandra Fredman, *The Ideology of New Labour Law*, in THE FUTURE OF LABOUR LAW: LIBER AMICORUM BOB HEPPLE QC 9 (Catherine Barnard et al. eds., 2004); Peter Waring et al., *Comparing Patterns of Re-regulation of Labour in Three Liberal Market Economies* (Paper, 29<sup>th</sup> Conference of the International Working Party on Labour Market Segmentation, 2008).

<sup>210</sup> See Bob Jessop, *From Thatcherism to New Labour: New-liberalism, Workfarism and Labour-market Regulation*, in THE POLITICAL ECONOMY OF EUROPEAN EMPLOYMENT: EUROPEAN INTEGRATION AND THE TRANSNATIONALIZATION OF THE (UN)EMPLOYMENT QUESTION 137 (Henk Overbeek ed., 2003).

<sup>211</sup> See Trevor Colling, *Caught In A Trap? Legal Mobilisation by Trade Unions in the United Kingdom* (Warwick Papers in Industrial Relations No. 91, 2009) (exploring the idea of "legal mobilization" and unions' role in pressuring employers and galvanizing support amongst members); Mark Bray and Pat Walsh, *Different Paths to Neo-Liberalism? Comparing Australia and New Zealand* 37 INDUS. REL. 358 (1998) (reviewing Australia and New Zealand's shift from compulsory arbitration towards neo-liberalism in the twenty-first century); Ingrid Landau and John Howe, *Trade Union Ambivalence Toward Enforcement of Employment Standards as an Organizing*

### 3.3. *Realism in Rebuilding the Corporatist Terrain of U.S. Labor Power*

It is important to note that even as the Wagner system is ostensibly infused with liberal democratic norms, in fact regional and national unions in the U.S. have been relatively conservative social actors when it comes to more aggressive participatory visions of the workplace.<sup>212</sup> Whatever corporatist power labor unions have achieved through electoral politics is similarly restrained by the bargaining dynamics of corporatism more generally. For example, in the 1980s when popular interpretations arose that the Japanese workplace was more participatory and successful than those in the U.S.,<sup>213</sup> hopes were expressed that the next wave of corporate governance reforms would move teleologically toward greater employee voice if not outright ownership.<sup>214</sup> Such optimism located a new flaw in the Wagner Act regime, the ban on in-house unions and other forms of non-union employee representations.<sup>215</sup> Yet, union leadership aggressively resisted these claims – a resistance partially validated by the adoption of such individual rights rhetoric by anti-union activists in the form of the TEAM Act of 1995.<sup>216</sup>

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*Strategy*, 17 THEOR. INQ. L. 201 (2016) (assessing shifting roles for Australia trade unions towards enforcement of minimum employment standards).

<sup>212</sup> See Charles B. Craver, *The Vitality of the American Labor Movement in the Twenty-first Century*, U. ILL. L. REV. 633, 696 (1983) (arguing that the U.S. labor movement will need to implement innovative cooperative techniques in place of conventional adversarial tactics in the near future); Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149 (1993) (asserting that voluntary and informal employee caucuses will emerge as a new model for protecting employees' rights).

<sup>213</sup> See *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1736 (1984) (reflecting on social commentators' call for American enterprises to adopt Japanese management techniques following the Japanese economic miracle).

<sup>214</sup> Lipton, *supra* note 33, at 44.

<sup>215</sup> See Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753 (1994) (examining President Clinton's establishment of the Commission for the Future of Worker-Management Relations and its investigation of whether U.S. labor law required a major overhaul); Karl G. Nelson, *Moving Beyond the Zero-Sum Game: Joint Management-Employee Committees in the Twenty-First Century*, 87 IND. L.J. 119 (2012) (reviewing the impact of the Employee Free Choice Act on labor law).

<sup>216</sup> See Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827 (1996).

Newer scholarship on workplace participation now largely presumes a tangential relationship between unions and the promotion of a participatory workplace, placing their hopes instead on voluntary employer self-regulation, popularly known as “new governance” approaches.<sup>217</sup> These approaches present unions as obstacles as often as allies,<sup>218</sup> and such approaches further individualize workplace justice by emphasizing employee voice<sup>219</sup> or actively portraying worker participation as not a social or dignitary good, but as efficiency-enhancing.<sup>220</sup>

Yet, in the U.S., as elsewhere, arguments extolling the virtues of employee voice have not won over employers, who have only further sought extensive powers over their workers through increased monitoring and demands for demonstrations of workplace loyalty in workers’ private and public lives.<sup>221</sup> Moreover, arguments about employee voice and participation have fed into an entire industry devoted to manipulating the psychology of workers to improve productivity through creating the illusion of individual empowerment.<sup>222</sup> All of which further undermines the capacity of individual

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<sup>217</sup> See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004) (introducing the “Renew Deal,” in which innovative approaches to law is preferred to promote collaborative and dynamic planning); REGULATING LABOUR IN THE WAKE OF GLOBALISATION: NEW CHALLENGES, NEW INSTITUTIONS (Brian Bercusson and Cynthia Estlund eds., 2008) (proposing new labor regulatory schemes that shift power away from national governmental regulation and towards smaller units of governance).

<sup>218</sup> See John Godard and Carola Frege, *Labor Unions, Alternative Forms of Representation and the Exercise of Authority Relations in U.S. Workplace*, 66 INDUS. & LAB. REL. REV. 1 (2013).

<sup>219</sup> See Orly Lobel, *Agency and Coercion in Labor and Employment Relations: Four Dimensions of Power in Shifting Patterns of Work*, 4 U. PA. J. LAB. & EMP. L. 129 (2001) (exploring the multidimensional structure of workplace hierarchy and the possibilities of employee voice in various settings).

<sup>220</sup> See Andrew B. Dawson, *Labor Activism in Bankruptcy*, 89 AM. BANKR. L.J. 97 (2015); Matthew T. Bodie, *Workers, Information, and Corporate Combinations: The Case for Nonbinding Employee Referenda in Transformative Transactions*, 85 WASH. U. L. REV. 871 (2007).

<sup>221</sup> See Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765 (2011) (discussing the benefits of granting employees more agency within the workplace setting); Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. DAVIS L. REV. 1091 (2011) (conveying that despite holding rights to engage in collective action, workers commonly face barriers to act together against employers).

<sup>222</sup> See, e.g., Jon L. Pierce and Donald G. Gardner, *Self-Esteem Within the Work and Organizational Context: A Review of the Organization-Based Self-Esteem Literature*, 30 J. MGMT 591 (2004) (reviewing organizations’ active efforts to promote self-esteem among the workforce and improve workplace productivity).

workplaces to serve as generators of bottom-up social capital for collective action.<sup>223</sup>

Unions' original post-Wagner Act turn to corporatism, and its consistent pull since, can thus be read not as a failure of union democracy but as an inevitable defensive measure in a system with irresolvable internal logistical conflicts that amplifies Michels' institutional necessities of hierarchy.<sup>224</sup> Yet, union leadership in the U.S. is thus ultimately left in a double-bind. Trying to organize individual workplaces as a starting point for collective action is increasingly difficult, and organizing investments have not led to significant returns. At the same time, when unions attempt to engage in electoral politics, the only genuinely corporatist activity they can still simulate, they also now receive fewer and fewer returns.

Such developments have seeded new calls to sidestep union democracy and facilitate, rather than fight, the centralization of labor power, either within the current system<sup>225</sup> or through the formation of a labor party.<sup>226</sup> These minority arguments recall earlier labor scholars who saw union growth prior to the Landrum-Griffin Act as already fragile.<sup>227</sup> Their arguments track both the empirical record of union decline following the Landrum-Griffin Act and the fact that the one consistent stronghold of unionization in the public sector operates on a de facto sectoral basis and has, hereto, been largely insulated from the contemporary logic of workplace

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<sup>223</sup> But see Oswalt, *supra* note 74, (discussing the impact of improvisational unionism in promoting workers' rights).

<sup>224</sup> A further example is the total failure of more anarchical versions of economic democracy to translate into any effective form of social organization following the Occupy Movement. TOM MALLESON, *AFTER OCCUPY: ECONOMIC DEMOCRACY FOR THE 21ST CENTURY* (2014) (discussing alternatives to economic organizational schemas like neoliberalism and social democracy in the wake of the Occupy movement's participatory democratic promise).

<sup>225</sup> See, e.g., Kim Voss, *Democratic Dilemmas: Union Democracy and Union Renewal*, 16 *TRANSFER* 369 (2010) (arguing that union revitalization is largely due to central consolidation, contrary to prevailing scholarly opinion); Dimick, *supra* note 44 (arguing for the importance of centralization to achieving union goals).

<sup>226</sup> See, e.g., Secunda, *supra* note 194 (explaining the insufficiency of the Wagner model of labor law, but does not advocate for a political party, instead noting that while a political party would be the "best" path, it is likely impossible in the current political environment).

<sup>227</sup> See, e.g., Cox, *supra* note 158 (pointing to deficiencies among union leadership as a source for weak unionization). See also Theodore J. St. Antoine, *The Regulation of Labor Unions*, 30 *AM. J. COMP. L. SUPP.* 299 (1982) (discussing the Labor Reform Act of 1959 with respect to the internal affairs of these organizations and corrupt practices that sometimes occur).

authoritarianism.<sup>228</sup> Furthermore, attempts under the current paradigm to expand union membership to unorganized workers now faces the popular perception that unions are themselves weak,<sup>229</sup> and unable to compete with the increasingly rapid regulatory arbitrage that employers can engage in, often directly subsidized by local and state governments.<sup>230</sup> Again, this fosters the calculus by union leadership that the costs of organizing new populations are less cost-effective than defensive legislative expenditures.<sup>231</sup>

There is little doubt that many of wholesale pro-union electoral reforms popularly argued for under the union democracy would improve the state of union membership. However, the Wagner system still requires intensive and constant processes of social organization and social capital formation to overcome its localized logic no matter how extensive union membership might become—almost catching up to an economic system whose steady-state operations agitate against solidarity and participation.

These tensions have left U.S. labor scholars and activists on an uneasy ground between defensive calls for continued pragmatism and more aggressive attempts to imagine more systemic change.<sup>232</sup> Naturally, some calls for reform address social or technological changes in the workplace through modulated aspects of the current regime.<sup>233</sup> For labor activists, it is increasingly attractive for new initiatives that actively side-step the NLRA system in its entirety.<sup>234</sup> It

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<sup>228</sup> See, e.g., Cory R. Fine and Paul Baktari, *Public Sector Union Democracy: A Comparative Analysis*, 22 J. LAB. RES. 391 (2001) (arguing that state protections for those employees not covered by national labor law—namely public sector employees—in a majority of U.S. states is insufficient); Joseph E. Slater, *Public Sector Labor Law in the Age of Obama*, 87 IND. L.J. 189 (2012) (surveying the state of public employee labor law and relations in the past decade).

<sup>229</sup> See, e.g., Barenberg, *supra* note 215 (arguing for an expanded labor law system that encourages collaboration and organic growth among the workforce).

<sup>230</sup> Chris Brooks, *Why Did Nissan Workers Vote No?*, LABOR NOTES; DETROIT 1 (2017).

<sup>231</sup> Leticia M. Saucedo, *Everybody in the Tent: Lessons from the Grassroots about Labor Organizing, Immigrants, and Temporary Worker Policies*, 17 HARV. LATINO L. REV. 65 (2014) (discussing the obstacles—perceived and actual—to organizing immigrant workers).

<sup>232</sup> Secunda, *supra* note 194.

<sup>233</sup> See, e.g., Jeffrey Hirsch and Joseph A. Seiner, *A Modern Union for the Modern Economy*, FORD. L. REV. (forthcoming 2018) (discussing the collective bargaining status of the Uber Guild (comprised of Uber drivers), as well as other non-traditional forms of labor organization whose members are technically not protected by the NLRA).

<sup>234</sup> See, e.g., Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232 (2009) (explaining

is an open question whether its full collapse would simply accelerate the very outcomes for workers which such innovations seek to prevent.<sup>235</sup>

While not explicitly rejecting union democracy, the continued decline of labor power in U.S. society has led in recent years to calls to look more directly at labor as social movement than merely an extension of workplace elections.<sup>236</sup> The lack of a formal constitutional frame for labor regulation continues to spur new arguments based on free speech,<sup>237</sup> civil rights,<sup>238</sup> or direct constitutionalization.<sup>239</sup> Furthermore, some labor scholars are becoming more aggressive arguing for the need to add formal elements of centralization into collective bargaining.<sup>240</sup> These calls have been more consistent from industrial relations lawyers outside of law schools,<sup>241</sup> but not uncommon among comparative labor scholars.<sup>242</sup> The pace of this shift has been accelerating, with established labor

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how traditional labor laws, such as the NLRA and LMRDA should apply to worker centers); Michael C. Duff, *ALT-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. UNIV. L. REV. 837 (2014) (addressing legal problems that might arise from ALT-labor coordination).

<sup>235</sup> *Id.*

<sup>236</sup> See, e.g., Benjamin I. Sachs, *Enabling Employee Choice: Structural Approach to the Rules of Union Organizing*, 123 HARV L. REV. 655 (2010) (addressing whether enabling employees to limit managerial intervention in union campaigns is an appropriate goal for federal law in the context of the EFCA); Rogers, *supra* note 185 (stressing that U.S. labor discourse has been predicated on anti-union themes).

<sup>237</sup> Catherine Fisk and Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERK. J. EMPLOY. & LAB. L. 277 (2015).

<sup>238</sup> RICHARD D. KAHLBERG AND MOSHE Z. MARVIT, *WHY LABOR ORGANIZING SHOULD BE A CIVIL RIGHT: REBUILDING A MIDDLE-CLASS DEMOCRACY BY ENHANCING WORKER VOICE* (2012).

<sup>239</sup> See James A. Gross, *Worker Rights as Moral Rights: Wagner Act Values and Moral Choices*, 4 U. PA. J. LABOR & EMP. L. 479 (2002) (asserting that U.S. domestic labor law needs to be re-examined through the lens of international human rights principles); Marion Crain and Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C. IRVINE L. REV. 561, 564 (2014) (developing a new framework to support labor representation within a healthy democracy).

<sup>240</sup> One illustrative shift is the normative move toward centralization in the empirical scholarship of Matthew Dimick. Compare Matthew Dimick, *Revitalizing Union Democracy: Labor Law, Bureaucracy, and Workplace Association*, 88 DEN. UNIV. L. REV. 1 (2010) (arguing that the triumph of oligarchy over democracy in U.S. labor unions is not inevitable), with Dimick, *supra* note 44 (proposing ways that unions can uproot their organizational structures and avoid the pitfalls of decentralized bargaining structures).

<sup>241</sup> BRUCE WESTERN, *BETWEEN CLASS AND MARKET: POSTWAR UNIONIZATION IN THE CAPITALIST DEMOCRACIES*, 29 (1997) (reviewing differences and advantages of centralized and non-centralized labor markets).

<sup>242</sup> Daniel J. Gifford, *Labor Policy in Late Twentieth Century Capitalism: New Paradoxes for the Democratic State*, 26 Hofstra L. Rev. 85 (1997).



law scholars now making a variety of argument for mandatory sectoral bargaining<sup>243</sup> and returning their focus to social unionism.<sup>244</sup> Younger scholars are openly positing the question of abandoning the Wagner Act model,<sup>245</sup> though not without detractors who claim that the risks are too high,<sup>246</sup> or that their ideas are not necessarily new.<sup>247</sup> From a comparative and historical perspective, it is not so important that such ideas are new or feasible in the near-term, but that such a conversation shifts the discourse away from its preoccupation with union democracy as a near or long-term solution.

What remains clear is that the Wagner system represents a flawed system that could only be propped up by attempts to re-create genuine corporatist dynamics – which then could only achieve any real political clout when sustained by a larger labor movement. Hope that the system's own anti-corporatist design features can lead it out of this fundamental conundrum only exacerbates this weakness. If an existing or newly imagined future labor movement should walk away from the Wagner Act, and the aspirational corporatism it induces, it cannot be simply for some as-of-yet unrealized model of union democracy.

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<sup>243</sup> MARK BARENBERG, WIDENING THE SCOPE OF WORKER ORGANIZING: LEGAL REFORMS TO FACILITATE MULTI-EMPLOYER ORGANIZING, BARGAINING, AND STRIKING (2015).

<sup>244</sup> Gillian Lester, *Beyond Collective Bargaining*, in *THE IDEA OF LABOUR* Law 320 (Guy Davidov & Brian Langille eds., 2011).

<sup>245</sup> Brishen Rogers, *Libertarian Corporatism is Not an Oxymoron*, 94 *TEX. L. REV.* 1642 (2016) (considering a labor law regime that can mediate tensions within broad-level goals to disperse economic and political power through robust secondary associations).

<sup>246</sup> Matthew Ginsburg, *Nothing New Under the Sun: The New Labor Law Must Still Grapple with the Traditional Challenges of Firm-Based Organizing and Building Self-Sustainable Worker Organizations*, 126 *YALE LAW J. F.* 488 (2017).

<sup>247</sup> Marion Crain and Kenneth Matheny, *The 'New' Labor Regime*, 126 *YALE L.J.F.* (2017) (linking new calls for worker mobilization across entire sectors with pre-NLRA labor goals).

#### 4. THE SUCCESS OF UNION HYPER-CORPORATISM IN BRAZIL

##### 4.1. *A New Unionism and Democratization*

Among contemporary labor intellectuals, the international reputation of Brazilian unions has been quite high in recent decades.<sup>248</sup> While aspects of Brazil's legal system have traditionally been subject to critique by some foreign legal scholars on efficiency grounds,<sup>249</sup> the contemporary success of Brazilian unions in playing a central role in Brazilian politics has not gone unnoticed by labor scholars looking for comparative successes.<sup>250</sup> Moreover, in Latin America labor scholars have routinely idealized Brazilian unions in their search for institutional exemplars,<sup>251</sup> especially in countries with pro-labor administrations in power.<sup>252</sup> In contrast to the decline of unions in the U.S., Brazil has presented to the initial observer what many consider to be purely aspirational elsewhere—a labor party in power for over a decade, broad and mandatory sectoral unionization, and little to no constitutional restrictions on collective bargaining. Economically liberal observers lament the influence of unions in Brazil much as social democrats decry the powers of corporations in the United States.

Yet, as recently as 2014, street-sweepers in Rio de Janeiro were sanctioned by a Brazilian labor court (Justiça do Trabalho) for carrying out an illegal strike during the peak tourist season of Carnival

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<sup>248</sup> Ladislau Dowbor, *Economic Democracy - Meeting Some Management Challenges: Changing Scenarios in Brazil*, 8 PROBS. OF SUSTAINABLE DEV. 17 (2013) (pointing to the Brazilian approach as a productive way to expand internal consumption and open new opportunities for businesses and laborers).

<sup>249</sup> Keith S. Rosenn, *Trends in Brazilian Regulation of Business*, 13 Law. Am. 169 (1981).

<sup>250</sup> See Chris Tilly and Marie Kennedy, *Latin America's "Third Left" Meets the U.S. Workplace: A Promising Direction for Worker Protection?*, U.C. IRVINE L. REV. 539, 552-55 (2014) (identifying successes of Latin American labor organization and assessing their viability for implementation within the U.S. labor system).

<sup>251</sup> See Graciela Bensusán, *Organizing Workers in Argentina, Brazil, Chile and Mexico: The Authoritarian-Corporatist Legacy and Old Institutional Designs in a New Context*, 17 THEORETICAL INQUIRIES L. 131 (2016). This idealization often leads to some descriptive errors, especially as to the right to strike and the nature of Brazilian internal democracy.

<sup>252</sup> See Maria Lorena Cook and Joseph C. Bazler, *Bringing Unions Back In: Labour and Left Governments in Latin America* (Cornell Univ. ILR School, Working Paper No. 3, 2013) (using a labor lens to review the rise of left-party victories in presidential elections across Latin America in the 2000's).

and they were subsequently dispersed by police using tear gas. The strike was deemed illegal as it was neither initiated nor endorsed by the street-sweepers union.<sup>253</sup> Six months later, another strike was held by subway workers in Sao Paulo prior to the World Cup, which was again declared illegal and dispersed by the police under orders from the administration of President Dilma Rousseff—a former communist rebel and putative head of the Workers Party (Partido dos Trabalhadores, or PT).<sup>254</sup> In recent years as Brazil had witnessed some of its most active and robust instances of public protest, this civil society unrest did not proclaim the PT as the conduit through which to voice its discontent, but was rather, in many cases, the object of it—leaving unions in a politically ambivalent position.<sup>255</sup> This ambivalence belies a more complicated relationship between unions, workers and political power than the reputation that Brazilian unionism has built up over the past two decades—diagnoses of which have begun to emerge in more critical scholarship on Brazilian unions, often informed by U.S. labor scholarship.<sup>256</sup>

The origins of this critique are far from purely foreign-inspired.<sup>257</sup> During the rise of the PT in the 1980s, the labor history of Brazil was often presented as tightly linked to failures of union democracy, wherein corporatist labor unions ignored their rank-in-file members and neglected truly agitating for their interests.<sup>258</sup> While there were moments in the 19<sup>th</sup> and 20<sup>th</sup> centuries when Brazilian workers organized for political change, such movements were either directly repressed by the state or their energy siphoned away by the

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<sup>253</sup> Benjamin Parkin, *Rio Trash Workers Stay on Strike Through Carnival*, RIO TIMES, (Mar. 24, 2014), <http://riotimesonline.com/dev2/brazil-news/rio-politics/rio-trash-workers-stay-on-strike-through-carnival/> [<https://perma.cc/N9L5-P9AB>].

<sup>254</sup> *Transport Chaos in Sao Paulo Following Second Day Running of Metro Strike*, MERCOPRESS (June 7, 2014), <http://en.mercopress.com/2014/06/07/transport-chaos-in-sao-paulo-following-second-day-running-of-metro-strike> [<https://perma.cc/6W2Y-WCFF>].

<sup>255</sup> See, e.g., Luciana Tatagiba and Karin Blikstad, *The Left and the June Protests in Brazil*, MOBILIZING IDEAS (Sept. 4, 2013, 7:00 AM), <https://mobilizingideas.wordpress.com/2013/09/04/the-left-and-the-june-protests-in-brazil/> [<https://perma.cc/K5CT-BQHN>] (suggesting that the political articulation of the Political Left that emerged in the 1970s and 1980s is fading because it is no longer connecting with people of lower classes and the youth).

<sup>256</sup> See *infra* (Section 4.3).

<sup>257</sup> Alvaro Santos, *The Trouble with Identity and Progressive Origins in Defending Labour Law*, in CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE 207 (Gráinne de Búrca et al. eds., 2014).

<sup>258</sup> MAURICIO BARROS, LABOUR RELATIONS AND THE NEW UNIONISM IN CONTEMPORARY BRAZIL (1999).

machinations of corrupt and unaccountable union leaders. Much of the early 20<sup>th</sup> century history of Brazilian labor is told through the plight of the Confederação Operária Brasileira (COB), a radical labor union which first attempted to form a Brazilian labor party and was central to the historic 1917 general strike in Sao Paulo.<sup>259</sup> Yet, in the following decades a variety of socialist, communist and anarchist-inspired labor organizations were unable to coalesce into a political force sufficient to challenge the rural landowners who had taken power after the end of the post-colonial monarchy.<sup>260</sup>

The major early 20<sup>th</sup> century turning point in Brazilian history was the military coup that brought the dictatorship of Getulio Vargas to power in 1930. Vargas's consolidation of power over the next decade culminated in his overt adoption of corporatism as a general political model for Brazil, known as the New State (Estado Novo). In contrast to the lack of genuine corporatism underlying the Wagner Act, Vargas's corporatist model for labor functioned in the context of his general reshaping of the entire Brazilian state under corporatist logics.<sup>261</sup> The labor code that Vargas's regime adopted in 1943 (the Consolidação das Leis do Trabalho, or CLT) would serve as the foundational labor law of Brazil throughout the 20<sup>th</sup> century and, many would say, today. The brand of nationalism that the Vargas dictatorship promoted in Brazil was far removed from the republican ideologies of the U.S., and the CLT system was unapologetically centralized and state-directed. Overseen by a Ministry of Labor, only one union was recognized by the government in each industry, in which membership was mandatory and to which all workers were required to pay mandatory dues (imposto sindical). Following the general corporatist logic of the New State, unions did not need to organize workers through elections or bargaining with

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<sup>259</sup> KENNETH ERICKSON, *THE BRAZILIAN CORPORATIVE STATE AND WORKING CLASS POLITICS* (1977).

<sup>260</sup> See JOEL WOLFE, *WORKING WOMEN, WORKING MEN* (1993) (describing the active, if unsettled, labor politics of this early era); Samuel Baily, *The Italians and the Development of Organized Labor in Argentina, Brazil, and the United States, 1880-1914*, 3 J. SOC. HIST. 123 (1969) (providing a comparative study of immigrant influences during this era).

<sup>261</sup> See Fernando Silva, *The Brazilian and Italian Labor Courts: Comparative Notes*, 55 INT'L REV. SOC. HIST. 381 (2010) (comparing the Brazilian and Italian labor courts while critiquing past discussion of the Labor Court as either a typically national product or as the transcription of an international model); Melissa Teixeira, *Law, Race, and Development in the Writings of Oliveira Vianna* (Paper, Commerce, Corporations and the Law at Princeton University, 2013) (analyzing the works of Oliveira Vianna to understand how race shaped corporatist movements in Brazil).

individual enterprise owners. Furthermore, unions were a conduit for state benefits rather than a bargaining instrument for private welfare. Although not technically members of the government, union leaders (pelegos) were deeply embedded in the state as a result and gained a notorious reputation for corruption. The success of the New State in dampening labor unrest was significant, and even allowed the military regime to relax the CLT's initial ban on striking in 1946 without fear of political reprisal.

Brazilian political history over the following decades was far more systemically contested than that of the U.S. post-New Deal, but the integration of the corporatist labor system within the general logic of the corporatist Brazilian system gave it a durability far greater than that of the progressive disintegration of the NLRA founded during the same historical era.<sup>262</sup> Many local Brazilian labor movements still organized and resisted inclusion in the corporatist system, but more often than not they ended up settling for trying to reform unions from within. Similar on the surface to U.S. discourse, the rallying cry of such reform was union democracy as unions' pre-democratic corporatist bargaining not only failed to provide workers with wage increases commensurate with productivity gains,<sup>263</sup> but also failed to transcend urban/rural and racial divides that cleft the working classes in Brazil.<sup>264</sup> Clearly, under an authoritarian regime, state corporatism was far more effective as a tool of social control than as a collective force for worker welfare.

In contrast to narratives popular later in the 20<sup>th</sup> century, Brazilian labor activists were never quiescent during this time and often their efforts were quashed not only by the seductive corruption of the corporatist system, but also by direct military violence.<sup>265</sup> At the same time, even these more militant challenges from outside of the system were as susceptible to ignoring union democracy in practice, especially when broader working class sympathies were given over to the variety of nationalist populism Vargas promoted.<sup>266</sup>

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<sup>262</sup> See JOHN FRENCH, *THE BRAZILIAN WORKERS' ABC* (1992) (emphasizing a narrative of opportunism in the success of the corporatist model while deemphasizing the issue of union democracy).

<sup>263</sup> Renato Colistete, *Productivity, Wages, and Labor Politics in Brazil, 1945-1962*, 67 J. ECON. HIST. 93 (2007) (noting the issues with corporatist bargaining in Brazil).

<sup>264</sup> Sheldon Maram, *Labor and the Left in Brazil, 1890-1920: A Movement Aborted*, 57 HISP. AM. HIST. REV. 254 (1977) (discussing the failures of pro-democratic corporatist bargaining regarding class and regional divides).

<sup>265</sup> See ERICKSON, *supra* note 259.

<sup>266</sup> *Id.*

One of the more telling transnational moments from these mid-century decades was the failed attempt of government sponsored attempts by the AFL-CIO to move Brazilian labor regulation towards the U.S. model, often marketed during the Cold War as “business unionism,” in order to “democratize” Brazilian labor unions.<sup>267</sup> Such efforts fared poorly, like most attempts to reshape foreign legal systems based on stylizations of U.S. law. Specifically, this attempt suffered from misunderstanding the nature of the corporatist Brazilian state.<sup>268</sup>

While scholarly revision of this era continues, it is undisputed that the corporatist model of unionization remained dominant in Brazil up until the 1980s. However, during this era, the Brazilian labor movement began to take on the role common to unions in the 20<sup>th</sup> century, that of a key actor in mobilizing for the political democratization.<sup>269</sup> The notion of a “new unionism” emerged, with union leaders in southern urban Brazil arguing that they would bring about a new era of union democracy with true union accountability.<sup>270</sup> Central to this movement was the interrelated formation in the early 1980s of the PT and the reformist national trade union organization CUT (Central Única dos Trabalhadores), bringing together leftist intellectuals and disaffected members of the labor movement. Luiz Inácio Lula da Silva, popularly known as Lula, had been the leader of several successful strikes in the 1970s by the powerful ABCD Steelworkers Union in Sao Paulo. He became the figurehead of both the PT and CUT.<sup>271</sup>

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<sup>267</sup> See George Bass, *Organized Labor and U.S. Foreign Policy*: (2012) (Diss., Walden University, 2012); Cliff Welch, *Labor Internationalism: U.S. Involvement in Brazilian Unions, 1945-1965*, 30 *LATIN AM. RES. REV.* 61 (1995); Larissa Correa, *AIFLD in Brazil Under the Military*, in *AMERICAN LABOR'S GLOBAL AMBASSADORS* 177 (Van Goethem et al. eds., 2013); Larissa Correa, *International Solidarity and Foreign Interventionism*, 57 *LAB. HIST.* 92 (2016). See, e.g., Martha Riche, *The American Institute for Free Labor Development*, 88 *MONTHLY LAB. REV.* 1049 (1965) (arguing that the United States should abandon the practice of law and development, where it exports American laws in an effort to catalyze foreign legal development, and instead adopt a comparative law model).

<sup>268</sup> Jedidiah Kroncke, *Law and Development as Anti-Comparative Law*, 45 *VAND. J. TRANSNAT'L L.* 477 (2012) (highlighting the issues of transporting US legal systems abroad).

<sup>269</sup> See BARROS, *supra* note 258; JOHN HUMPHREY, *CAPITALIST CONTROL AND WORKERS' STRUGGLE IN THE BRAZILIAN AUTO INDUSTRY* (1982).

<sup>270</sup> ROBERT ALEXANDER, *A HISTORY OF ORGANIZED LABOR IN BRAZIL* (2003).

<sup>271</sup> Jose Moises, *Current Issues in the Labor Movement in Brazil*, 6 *LATIN AM. PERSP.* 51 (1979).

CUT specifically championed the idea that it represented an alternative to the corporatist labor regime and criticized the attributes of the CLT that left unions more dependent on the state than on workers for their legitimacy. Indeed, the creation of unions outside of the corporatist system, which elected their own leaders, was an open break with the corporatist politics of the extant military regime. Much of CUT's contribution to the democratization movement was its broadening of the inclusiveness of the labor movement, incorporating both middle class professionals as well as rural and ethnically diverse constituents symbolized by its alliance with the Landless Workers' Movement (Movimento dos Trabalhadores Sem Terra). The victories of CUT in the political arena were significant,<sup>272</sup> and it initially succeeded in gaining concessions for workers well beyond those of the traditional corporatist unions.<sup>273</sup> The effusive praise for CUT from international observers was encouraged by efforts of labor intellectuals with the PT, many of whom contributed to writing the narrative of union democracy's ascendance in this era of the "new unionism."<sup>274</sup>

#### 4.2. *The Iron Rule and Neo-Corporatism*

The success of CUT and the PT in pressuring the military regime to hold elections for a national Constituent Assembly and paving the way for democratic transition is undeniable. However, the crucial point in evaluating modern Brazilian labor unionism is interpreting the process of forming the 1988 Constitution and the PT's subsequent rise to power. In the course of broadening its social appeal during democratization, CUT had already jettisoned much of its more radical ideological elements and embraced the type of social unionism of other successful labor parties in Europe and Latin America.<sup>275</sup> Its emphasis on union democracy, rather than more extensive forms of social revolution or economic redistribution,

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<sup>272</sup> MARGARET KECK, *THE WORKERS' PARTY AND DEMOCRATIZATION IN BRAZIL* (1992)

<sup>273</sup> Silva, *supra* note 261.

<sup>274</sup> Marco Santana, *Brazil: The Swinging Pendulum: Between Labor Sociology and Labor Movement*, 36 *WORK AND OCCUPATIONS* 96, 104 (2009).

<sup>275</sup> See Marco Santana, *Entre a Ruptura e a Aontinuidade: Visões da História do Movimento Sindical Brasileiro*, 14 *REV. BRAS. CI. SOC.* 1 (1999); Ricardo Antunes & Laurence Hallewell, *The World of Work, the Restructuring of Production, and Challenges to Trade Unionism and Social Struggles in Brazil*, 27 *LATIN AM. PERSP.* 9, 18 (2000).

provided a broader political basis for building a democratic movement. After 1988 it notably retreated from the land redistribution called for by its one-time ally, the Landless Workers Movement.<sup>276</sup>

CUT's most immediate impact on the 1988 Constitution was the removal of the discretionary powers of union recognition from the Ministry of Labor, and thus towards greater union self-regulation — formal privatization.<sup>277</sup> Yet, the basic corporatist structure created under Vargas's New State was not undone.<sup>278</sup> With some semantic alterations, the main components of the CLT remained unchanged: only a single union could be formed within any economic sector, membership and dues were mandatory, and there was no new requirement for the direct election of representatives.<sup>279</sup> The lack of reform within the labor system reflected the highly negotiated nature of the transition to democracy that gave rise to the 1988 Constitution, as was seen in the election of more economically liberal presidents until 2002.<sup>280</sup>

As a result, while the authoritarian logic of the Brazilian political system was weakened through this transition, in the context of labor this privatization simply allowed for the proliferation of unions who could make a legal claim (through litigation) to a new category of economic activity and then reap the guaranteed rewards of such representation.<sup>281</sup> Unions still were not charged with bargaining to create a system of private welfare, but again engaged with employers on a sectoral and national basis while serving as conduits for social welfare benefits granted by the state.<sup>282</sup> Yet, the scale and scope

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<sup>276</sup> Rebecca Tarlau, *Thirty Years of Landless Workers Demanding State Power*, 58 BERK. J. SOC. ART. 1 (2014).

<sup>277</sup> See Ana Gomes & Mariana Prado, *Flawed Freedom of Association in Brazil*, 32 COMP. LAB. L. & POL'Y J. 843, 867 (2011) (discussing the role of labor unions as private associations representing private interests, and the shift of power to these unions after the 1988 Constitution)

<sup>278</sup> See, e.g., Graciela Bensusán, *Organizing Workers in Argentina, Brazil, Chile and Mexico*, 17 THEOR. INQ. L. 131, 153 (2016) (noting that there were some path-dependent "advantages of the ongoing authoritarian legacy")

<sup>279</sup> Richard Buchanan, *The Future of Brazilian Labor Law under the Federal Constitution of 1988*, 10 COMP. LAB. L.J. 214 (1988).

<sup>280</sup> See, e.g., Margaret Keck, *Update on the Brazilian Labor Movement*, 11 LATIN AM. PERSP. 27 (1984) (noting, for example, the politicians at the time who put pressure on the Labor Ministry to withdraw or defeat legislation that hurts workers); Leigh Payne, *Working Class Strategies in the Transition to Democracy in Brazil*, 23 COMP. POL. 221 (1991).

<sup>281</sup> Helio Zylberstajn, *President Lula's Union Reform*, in SOCIAL DIMENSIONS OF GLOBALISATION (International Industrial Relations Association ed., 2005).

<sup>282</sup> Álvaro Dias et al., *Pension Funds and Brazilian Unions*, 2 REV. BRASIL. PREVIDENCIA Art. 2 (2013).



of these benefits far outstripped any enjoyed under the old labor regime. Trade union groups like CUT and others continue to reap the reciprocal rewards of this performance, and engage in a range of social programming and mobilizations both routine and episodic.

When the PT finally won the national presidency after Lula's third campaign, a new opportunity arose again to revisit these earlier calls for union democracy. By this point, the power of the PT relied heavily on existing unions, and CUT itself benefited from cementing its place within the new corporatist structure. One of Lula's first moves as President was to form a corporatist consultative body drawn from representatives across society, the Council for Economic and Social Development (Conselho de Desenvolvimento Econômico e Social, or CDES), and to establish a related commission on labor reform, the National Labor Forum (Forum Nacional do Trabalho, or FNT). However, the union reforms that emerged from this did not, once again, advance union democracy as liberal proceduralism beyond requiring older unions to meet the low threshold of 20% direct worker representation.<sup>283</sup> Later in 2008, Lula moved to guaranteeing the existing central trade unions 10% of all trade union dues.<sup>284</sup> In essence, the PT under Lula created a hyper-corporatist labor regime with even less internal democracy and more entrenchment than before he was in office. These developments did not sit comfortably with some members of CUT and defections have occurred at different moments since 1988, most notably in the formation of Coordenação Nacional de Lutas (Conlutas) in 2004 and the later splintering of formally communist and socialist unions.<sup>285</sup>

As of yet, very few new or older Brazilian unions have embraced union democracy or have developed formal systems for the workers they represent to lodge complaints.<sup>286</sup> The bargaining that does go on between unions and employers, even when highly splintered sectors of the economy, need not involve any of the actual employees affected unless striking is called for.<sup>287</sup> But, as the recent

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<sup>283</sup> Mahrukh Doctor, *Lula's Development Council Neo-Corporatism and Policy Reform in Brazil*, 34 *LATIN AM. PERSP.* 131 (2007).

<sup>284</sup> See Gomes & Prado, *supra* note 273, at 878.

<sup>285</sup> See, e.g., Danilo Corregliano, *O Sistema de Controle Social do Direito do Trabalho no Brasil* (Thesis, University of Sao Paulo, 2014); BERNARD EDELMAN, *LA LÉGALISATION DE LA CLASSE OUVRIÈRE* (1978) (positing a Marxist critique of labor unions).

<sup>286</sup> See Iram Rodrigues, *O Modelo Sindical Corporativo Mudou?*, 15 *REV. BRASILEIRA DE CI. SOC.* 184 (2004).

<sup>287</sup> Jorge Arbache, *Unions and the Labor Market in Brazil* (IPEA-World Bank Brazil Jobs Report, 2002); Gomes & Prado, *supra* note 273, at 843.

unauthorized strikes in Rio and Sao Paulo illustrate, unions in Brazil have a primarily disciplinary relationship to workers.

Representatively, Brazil under the PT has continued to refuse signing major ILO conventions guaranteeing freedom of association.<sup>288</sup> When two preeminent contemporary Brazilian labor law scholars were asked by a U.S.-based journal to describe restrictions on union speech in the workplace, their initial reaction was puzzlement—there are no restrictions, for why would a Brazilian union need to speak to the workers in their own workplace?<sup>289</sup>

The tangential bureaucratic relationship of many unions to their workers also helps explain why so many workers have turned to Brazil's specialized labor courts to resolve their individual employment problems. In practice, routine labor disputes have been effectively judicialized<sup>290</sup> and expose the gap between the aspirational and real conditions of many workers.<sup>291</sup> And while Brazilian labor courts are often seen as favoring employees over employers,<sup>292</sup> they have not only grown less protective of union strikes, but act consistently to reinforce incumbent union organization.<sup>293</sup>

This lack of reform and CUT's close ties to the PT have inspired calls for recognizing the operation of "neo-corporatism" and open laments that the PT has succumbed to Michels' iron rule.<sup>294</sup> This critique found adherents from the both the left and right, and benefited from the growth of critical empirical studies of Brazilian labor unions over the past twenty years.<sup>295</sup> Although much of the critique

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<sup>288</sup> Ana Gomes, *The Effects of the ILO's Declaration on Fundamental Principles and Rights at Work on the Evolution of Legal Policy in Brazil* (Thesis, University of Toronto, 2009) (noting that Brazil has not succeeded in including agreed upon principals into its Constitution. "As of June 2009, the constitutional amendment proposal is still in Congress, without any sign of the necessary political momentum to move it through to approval").

<sup>289</sup> Roberto Filhot & Ronaldo Lobdott, *Captive Audience Speech in the Brazilian Labor Law*, 29 COMP. LAB. L. & POL'Y J. 341 (2007).

<sup>290</sup> See, e.g., Roberto Filhot, *Employment Litigation on the Rise? A Brazilian Perspective*, 22 Comp. Labor Law & Pol'y J. 281 (2001) (describing how the litigation explosion the Brazilian judicial labor system has experienced).

<sup>291</sup> JOHN FRENCH, *DROWNING IN LAWS LABOR LAW AND BRAZILIAN POLITICAL CULTURE* (2004).

<sup>292</sup> Carolina Mercante, *As Raizes Autoritarias da Atual Lei Greve Brasileira*, 7 REV. DIR. MACKENZIE 42 (2014).

<sup>293</sup> Gomes & Prado, *supra* note 273.

<sup>294</sup> Pedro Floriano, *Robert Michels e a Oligarquia do Partido dos Trabalhadores*, 19 TEORIA & PESQUISA 119 (2010); Mario Ladosky, *CUT and Corporatism in Brazil*, 3 LAB. SCI. J. 109 (2014).

<sup>295</sup> NADYA CRUZADOS, *ESTRATÉGIAS DE EMPRESAS E TRAJETÓRIAS DE TRABALHADORES* 43 (2004).

from the right focuses on more traditional arguments about the negative impact of labor unions in growth and efficiency terms,<sup>296</sup> among some labor scholars the focus has been on the unfulfilled promise of union democracy and the effective continued enmeshment of unions with the state rather than direct electoral accountability to workers.<sup>297</sup>

It would elide too much to claim that these critiques are simply tied to views that union democracy is a good in itself. Many critiques tie a lack of union accountability to concrete issues stemming from the natural conservatism of corporatist unions regarding other issues of social reform, such as environmental degradation.<sup>298</sup> Furthermore, the primarily industrial membership (and thus financial) base of unions left employment conditions in many rural areas, especially outside of the South, neglected even in the post-1988 era.<sup>299</sup> Brazil's informal sector also has little trade union representation,<sup>300</sup> as well as many other low-wage sectors of employment.<sup>301</sup> There are still exceptions to these general rules, but exceptions they remain.<sup>302</sup>

#### 4.3. *The New Reality of Union De-Corporatization*

A number of reasonable and often technically measured reform proposals emerged from the new critiques of labor neo-corporatism

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<sup>296</sup> FORÇA SINDICAL, UM PROJETO PARA O BRASIL: A PROPOSTA DA FORÇA SINDICAL (1993).

<sup>297</sup> See, e.g., Karen Lang & Mona-Josée Gagnon, *Brazilian Trade Unions*, 64 *INDUS. REL.* 250, 252 (2009) (reporting results from field enquiries into the daily lives of two Brazilian unions to show the relationship between unionism and labour legislation).

<sup>298</sup> See, e.g., Bruno Dobrusin, *Sustainability in Brazil and Argentina: The Trade Unions Within the Commodity Consensus* (Paper, Ninth Global Labour University Conference, 2014) (arguing that both Argentina and Brazil have undergone socio-economic improvements, but that their development has been based mainly on the extractive industries); Carolina Mercante, *As Centrais Sindicais e o Neocorporativismo à Brasileira*, 5 *REV. ESTUD. POLIT.* 301 (2014).

<sup>299</sup> Anthony Pereira, *Regime Change Without Democratization* (Diss., Harvard University, 1991).

<sup>300</sup> Lorenzo Frangi and Supriya Routh, *From Employee to Home Faber?*, 21 *Just Labour* 42 (2014).

<sup>301</sup> Ana Gomes & Patrícia Bertolin, *Regulatory Challenges of Domestic Work: The Case of Brazil* (LLDRL Working Paper Series, Paper No. 3, 2010).

<sup>302</sup> See, e.g., RENATO COLISTETE, *TRADE UNIONS AND THE ICFTU IN THE AGE OF DEVELOPMENTALISM IN BRAZIL, 1953-1962* (2010) (discussing recent auto-industry election and strikes).

in contemporary Brazil.<sup>303</sup> Some of this moderation reflects a kind of resignation that the existing political power of corporatist unions would be difficult to overcome. At the same time, it is important to recognize that not only have some areas of Brazilian labor regulation improved dramatically in recent years, such as labor inspection,<sup>304</sup> but the centralized power of Brazilian unions have also allowed them to provide some of the better examples of transnational labor action to date. CUT alone participates in fifty transnational partnerships as part of its CUTMulti project.<sup>305</sup> Brazilian unions have been active in bringing lawsuits against foreign employers attempting to enforce stricter forms of Taylorist discipline into the Brazilian workplace,<sup>306</sup> with their globally rare successes serving as a noticeable deterrent to private equity takeovers.<sup>307</sup>

But perhaps most importantly, since democratization, and intensified during the national reign of the PT, corporatist strikes and bargaining have garnered significant above-inflation wage increases for workers unprecedented for a country at Brazil's level of economic development.<sup>308</sup> Beyond wage-bargaining, the PT has used its political clout to successfully expand welfare state protections on a number of fronts, including those to make Brazil's traditionally feudal social order more open to minoritized groups.<sup>309</sup> In other areas of Brazilian governance, the rhetoric of participatory citizenship has yielded experiments that are now studied worldwide, such as

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<sup>303</sup> Gomes & Prado, *supra* note 273, at 43.

<sup>304</sup> ROBERTO PIRES, FLEXIBILITY, CONSISTENCY AND RESULTS IN THE MANAGEMENT OF BUREAUCRATIC PERFORMANCE (2010).

<sup>305</sup> See, e.g., Chad Gray, *Riding Bicycles When We Need Cars: The Development of Transnational Union Networks in Brazil*, (Diss., Cornell University, 2015) (discussing vale and metal workers' unions of Canada)

<sup>306</sup> See, e.g., Neil Munshi, *McDonald's Franchisee Sued by Brazilian Unions*, FINANCIAL TIMES (Feb. 24<sup>th</sup>, 2015) (noting that Brazilian lawsuits against McDonalds also provide an interest moment of transnational regulatory interaction, as the NRLB has recently ruled McDonald a "co-employer" for workers at its franchises.)

<sup>307</sup> See also José Gonçalves & Maria Caporale, *Private Equity Investment and Labour*, in TRADE UNIONS AND THE GLOBAL CRISIS: LABOUR'S VISIONS, STRATEGIES AND RESPONSES (Serrano et al. eds., 2011) (noting that many of the limited union pension funds invest in private equity).

<sup>308</sup> Armando Boito, Paula Marcelino & Laurence Hallewell, *Decline in Unionism? An Analysis of the New Wave of Strikes in Brazil*, 38 LATIN AM. PERSP. 62, 71 (2011).

<sup>309</sup> WENDY HUNTER, THE TRANSFORMATION OF THE WORKERS' PARTY IN BRAZIL, 1989-2009 (2010).

participatory budgeting.<sup>310</sup> And, in contrast to the more reactionary positions of union movements elsewhere, Brazilian unions have been much more supportive of the development of fourth-way modes of cooperative management and capital spreading.<sup>311</sup> Yet, to the extent that Brazilian unions have made Brazilian workplaces less subject to employer authoritarianism, they have not done so by directly empowering workers' participation in the workplace or within their own operation.

In the wake of these gains, the drive for union democracy must again be weighed against the current relative success of Brazilian unions in material terms. What Pedro Ribeiro has called the "amphibian" nature of the PT would not be an inherently negative attribute if the alternative was, for example, less labor participation in the democratization process.<sup>312</sup> Again, one of the common outcomes of labor union stimulation of democratization movements is how little they gain afterwards and how often they are then politically marginalized.<sup>313</sup> The very process of the CUT's deradicalization and depluralization followed exactly the track of Michels' iron law, not solely because of raw opportunism but the necessity of effective coalition politics.<sup>314</sup> Here again, we confront the issue that generating social capital to inspire democratization is far different from putting in place a steady-state system of union organization that requires constant social capital formation derived from the workplace.

Until very recently, potential reforms of critics of Brazilian union hyper-corporatism were theoretical and aspirational. No doubt, the great success of the PT in pluralizing Brazil politically and economically had begun to create expectations far more hopeful than in earlier points in Brazilian history. Many of the pressures that had beset unions globally had also been far less acute, especially as the Brazilian economy is still relatively insulated from the forces of globalization and the arbitrage of capital mobility that have made labor

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<sup>310</sup> See GIANPAOLO BAIOCCHI, *MILITANTS AND CITIZENS: THE POLITICS OF PARTICIPATORY DEMOCRACY IN PORTO ALEGRE* (2005).

<sup>311</sup> Paul Singer, *The Recent Rebirth of the Solidarity Economy in Brazil*, in *ANOTHER PRODUCTION IS POSSIBLE 1* (Boaventure de Sousa Santos ed., 2006).

<sup>312</sup> Pedro Ribeiro, *An Amphibian Party? Organisational Change and Adaptation in the Brazilian Workers' Party, 1980–2012*, 46 *J. LATIN AM. STUD.* 87 (2014).

<sup>313</sup> See, e.g., María Cook, *Labor Reform and Dual Transitions in Brazil and the Southern Cone*, 44 *LATIN AM. POL. & SOC'Y* 1 (2002) (contrasting the experiences of organized labor efforts in Argentina and Brazil with Chile, which consolidated its market economic policies and labor reform under military dictatorship).

<sup>314</sup> See JEFFREY SLUYTER-BELTRAO, *RISE AND DECLINE OF BRAZIL'S NEW UNIONISM* (2010).

organizing difficult elsewhere. It is notable that beyond critics who claim that unions depress Brazilian productivity more generally,<sup>315</sup> some have already claimed that Brazilian unions will suffer the same fate once the economy more extensively internationalizes.<sup>316</sup> Moreover, the demographics of Brazil's workforce are only growing more diverse, making the traditional recourse to social unionism more challenging.<sup>317</sup> And in those areas of the Brazilian economy that have already witnessed trade liberalization, unions' power to bargain effectively has been diminished.<sup>318</sup>

Thus, as appealing as union democracy may be in theory, and as imperfect as Brazilian labor unions are, the paramount question for Brazilian labor scholars just a few years ago would be whether diminishing their current corporatist privileges solve these problems or simply leave workers as helpless as those in the United States today? Did CUT's open embrace of the logistical advantages of Michels' iron rule avoid a much worse fate for Brazilian labor after 1988? If workers have benefited under a hyper-corporatist regime, what does this say about the necessary relationship, if any, between general and specific economic democracy?

Unfortunately, these questions are being answered, but in a form that no one sympathetic to labor unions in Brazil would desire. The economic and political crises that began to roil Brazil in 2013 culminated in the empowerment of a new regime under former vice-president Michel Temer after the impeachment of Dilma Rousseff.<sup>319</sup> Central to Temer's asserted legitimacy, and reflective of his membership in the far more centrist Partido da Social Democracia Brasileira (PSDB), was a reform agenda that would supposedly help bring Brazil out of recession. Like many conservative regimes in

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<sup>315</sup> Naércio Menezes-Filho, José Chahad, Hélio Zylberstajn & Elaine Pazello, *Trade Unions and the Economic Performance of Brazilian Establishments*, 38 EST. ECON. SÃO PAULO 55 (2008).

<sup>316</sup> See LEONCIO RODRIGUES, DESTINO DO SINDICALISMO 301 (2002).

<sup>317</sup> David Flores et al, *Social Movement Unionism and Neoliberalism in São Paulo, Brazil*, 6 SOC. WITHOUT BORDERS 73, 97 (2011).

<sup>318</sup> See Jorge Arbache, *Does Trade Liberalization Always Decrease Union Bargaining Power?*, 5 ECONOMIA 99 (2004).

<sup>319</sup> Ruy Braga, *The End of Lulism the Palace Coup in Brazil*, 6 GLOBAL DIALOGUE (2016), available at <http://globaldialogue.isa-sociology.org/wp-content/uploads/2016/08/v6i3-english.pdf> [<https://perma.cc/P3BK-XJLU>].

time of economic crisis, Temer's constituency cast labor reform as key to this reignition.<sup>320</sup>

In mid-2017, Temer and his allies were successful in significantly rolling back labor protections for Brazilian workers across the board. And when it came to unions, the labor reform possessed only one key element – removing the system of mandatory union dues under a rhetoric of worker choice and freedom. The enemies of Brazilian labor choose to strike exactly at the base of its corporatist power. Critiques about the democratic character of Brazilian unions are now resoundingly absent from the public discourse, even as workers resist the formal authority of current union leaders. The future of the Brazilian labor movement is now far more uncertain than those of the halcyon days of hyper-corporatism.

## 5. SIMULATING UNION CORPORATISM TO MANAGE LABOR UNREST IN CHINA

### 5.1. *Communist Failures and the Restlessness of Chinese Labor*

Like many post-socialist countries, China in the past three decades has witnessed dramatic shifts in the nature of work during its rapid pace of economic reform. The lingering ideological commitment to worker welfare that adorned its communist-era practices of complete state ownership of industry and full-employment has been progressively transformed after 1978 through a range of hybridized economic actors who used wage labor to structure employment relations.<sup>321</sup> The future shape of labor relations in China was initially unclear as the Chinese Communist Party (CCP) sought to promote market logics while maintaining its tight grip on a legitimacy provided by quite a different economic ideology. The CCP cautiously

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<sup>320</sup> Brazil Senate Passes Controversial Labour Reform, BBC NEWS (July 12, 2017), available at <http://www.bbc.com/news/world-latin-america-40577868> [https://perma.cc/G28J-EM9D].

<sup>321</sup> Daniel Ding et al., *The Impact of Economic Reform on the Role of Trade Unions in Chinese Enterprises*, 13 INT'L J. HUM. RESOURCE MGMT. 431 (2002).

loosened its traditional opposition to private property in land and industry,<sup>322</sup> but fully embraced the commodification of labor.<sup>323</sup>

In fact, while many contemporary observers in and outside of China are rightly critical of the CCP's current treatment of labor, in the 1980s there was a great deal more excitement about the possible outcomes of the reforms for workers. One object of this interest was Township Village Enterprises (TVEs), where partial privatization resulted in communal ownership and regulation of local industry.<sup>324</sup> As Teemu Ruskola has shown, the productivity of TVEs often eclipsed that of much larger State Owned Enterprises (SOEs),<sup>325</sup> but they were abandoned by the CCP for reasons unrelated to worker welfare.<sup>326</sup>

Nonetheless, creating a new labor law regime to manage its massive mixed state-private economy became one of the many facets of the CCP's rapid legalization strategy.<sup>327</sup> The CCP's massive buildup of legal infrastructure and personnel beginning in the 1980s has sought to use law as an intermediary logic for strengthening regulatory capacity while shoring up the regime's domestic and international legitimacy.<sup>328</sup> In recent decades, the varieties of Chinese workplaces has proliferated,<sup>329</sup> and designing legal rules to govern this diversity has presented one of the great challenges of the CCP's project of legal reconstitution.

At the outset of the 1978 reforms, the CCP had a pre-existing state union, known as the All-China Federation of Trade Unions (ACFTU) (Zhonghua Quanguo Zonggong Hui). Formally, the

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<sup>322</sup> CHIH-JOU CHEN, *TRANSFORMING RURAL CHINA* 74 (Routledge, 2004); PROPERTY RIGHTS AND ECONOMIC REFORM IN CHINA 10 (Oi and Walder eds., 1999) and Yingyi Qian, *How Reform Worked in China*, in *IN SEARCH OF PROSPERITY* 297 (Dani Rodrik ed., 2003).

<sup>323</sup> Hilary Josephs, *Measuring Progress Under China's Labor Law*, 30 *COM. LAB. L. & POL'Y J.* 373 (2009).

<sup>324</sup> Xiao-Yuan Dong et al., *Share Ownership and Employee Attitudes*, 30 *J. COMP. ECON.* 812, 814-5 (2002).

<sup>325</sup> Philip Huang, *Chongqing: Equitable Development Driven by a "Third Hand"?*, 37 *MOD. CHINA* 569 (2011).

<sup>326</sup> Teemu Ruskola, *A Tale of Two Chinas: The Law and Politics of Economic Development* (unpublished paper, on file with author).

<sup>327</sup> KEVIN O'BRIEN, *REFORM WITHOUT LIBERALIZATION* (Cambridge University Press, 1990).

<sup>328</sup> Margaret Woo, *Law and Discretion in Contemporary Chinese Courts*, in *THE LIMITS OF THE RULE OF LAW IN CHINA* 163 (Karen Turner et al. eds., 2000); Robert Ber- ring, *Chinese Law, Trade, and the New Century*, 20 *NW. J. INT'L L. & BUS.* 425 (2000) and Pitman Potter, *China and the International Legal System*, 191 *CHINA Q.* 699 (2007).

<sup>329</sup> *WORKING IN CHINA: ETHNOGRAPHIES OF LABOR AND WORKPLACE TRANSFORMATION* (Ching Kwan Lee ed., 2007).



ACFTU predates the CCP, having its historical roots in labor organizations of the 1920s during the rule of Chiang Kaishek's authoritarian regime.<sup>330</sup> When the CCP rose to power in 1949, it folded the ACFTU into its new regime – promising worker empowerment after decades of repression by Chiang's administration. However, many labor leaders objected to the vision of a single state union advanced by the CCP, wherein the independence of unions was unnecessary given the traditional communist assertion that state and worker interests were perfectly aligned. As a result, after 1949 many original ACFTU leaders were purged and suffered various forms of retaliation.<sup>331</sup> In contrast to the corporatist social theories that influenced the U.S. and Brazilian labor regimes of the early 20<sup>th</sup> century, the ACFTU was clearly seen as solely an instrument for transmitting labor policy without a need to balance worker interests with that of other social groups, as the state union neither needed to bargain on behalf of workers nor represent their distinct interests.

After 1978, the role of the ACFTU – which had been temporarily disbanded during the Cultural Revolution – was less clear as the CCP shifted away from complete state ownership and its membership levels fell. The TVE experiment and the widespread persistence of SOEs showed that the CCP lacked a coherent vision of how it wanted labor markets to operate, and it was not until the early 1990s that there was any significant legislation passed related to future intentions for the ACTFU.

In 1992, a new Trade Union Law communicated that the CCP wanted the ACTFU to play an expanded role in labor markets, but still as a unitary actor from within the state.<sup>332</sup> As such, the ACTFU operates like many state agencies, with a vertical legal relationship to a relevant Ministry, here the Ministry of Labor, and a horizontal political relationship with parallel party organs.<sup>333</sup> Critically, chief ACTFU personnel continue to be CCP members and its leadership holds positions in these same parallel party organs.<sup>334</sup>

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<sup>330</sup> JACKIE SHEEHAN, *CHINESE WORKERS: A NEW HISTORY* (1998).

<sup>331</sup> Ching Kwan Lee, *Pathways of Labor Insurgency*, in *CHINESE SOCIETY* 48 (Perry & Selden eds., 2000).

<sup>332</sup> CHANG KAI (常凯) & DERONG ZHANG (张德容), *GONGHUI FA TONGLUN (工会法通论)* [A General Theory of Trade Union Law] (1993).

<sup>333</sup> Bill Taylor & Qi Li, *Is the ACFTU a Union and Does it Matter?*, 49 *J. INDUS. REL.* 701, 703-5 (2007).

<sup>334</sup> Miao Qingqing, *An Urge to Protect is Not Enough*, 2 *TSINGHUA CHINA L. REV.* 159, 179 (2010).

The CCP's legal re-institutionalization of the ACTFU, reinforced again through amendments to the revised Trade Union Law in 2001, reflected a need to respond to growing labor unrest following economic liberalization. The dislocations of new insecure employment patterns and the fallout from intense industrialization and urbanization left many workers facing harsh working conditions with little to no legal or political recourse.<sup>335</sup> Labor protest grew in tandem with the speed of Chinese economic growth, stimulating labor unrest that elicited sharply divided responses in Chinese intellectual and policy debates regarding labor law and the ACFTU.<sup>336</sup> The scope of this unrest only continues to intensify, and is today considered one of the major systemic challenges to CCP rule.<sup>337</sup>

Recently, this unrest has come to greater global attention with strikes and other forms of collective protest highlighting abuses at Foxconn, one of the largest private manufacturers in the world and supplier to well-known U.S. consumer electronics firms such as Apple and Microsoft.<sup>338</sup> In such cases, the priorities and aims of the ACFTU demonstrate what Feng Chen has called its "double institutional identity": both disciplinary agent of the state and putative representative of workers' interests.<sup>339</sup>

## 5.2. Elections as Authoritarian Innovation

Defining China's economic or political regime after 1978 has claimed the energy of many scholars, all of whom try to reconcile the CCP's simultaneous monopoly on political power with the

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<sup>335</sup> Feng Chen, *Privatization and Its Discontents in Chinese Factories*, 185 CHINA Q. 42 (2006) and Stephen Frenkel & Chongxin Yu, *Chinese Migrants' Work Experience and City Identification*, 68 HUM. REL. 261 (2015).

<sup>336</sup> CHANG KAI (常凯), LAOQUAN BAOZHANG YU LAOZI SHUANGYING (劳权保障与劳资双赢) [Protecting Labor Rights and Workplace Cooperation], (2009) and DONG BAOHUA (程延园), LAODONG HETONG FA DE ZHENGMING YU SIKAO (劳动合同法教程) [Debate and Deliberation on the Labor Contract Law], (2011).

<sup>337</sup> CHING KWAN LEE, AGAINST THE LAW: LABOR PROTESTS IN CHINA'S RUSTBELT AND SUNBELT (2007) and Dorothy Solinger, *Labor Discontent in China in Comparative Perspective*, 48 EURASIAN GEO. & ECON. 413 (2007). For the recent intensifications, CHINA ON STRIKE (Zhongjin Li et al. eds, 2016).

<sup>338</sup> Hilary Josephs, *Productions Chains and Workplace Law Violations*, 3 GLOBAL BUS. L. REV. 211, 216 (2013).

<sup>339</sup> Feng Chen, *Between the State and Labour*, 176 CHINA Q. 1006, 1007-8 (2003).

dizzying complexity of Chinese social and economic development.<sup>340</sup> Corporatism has had its share of proponents in this effort, as well as its critics. Anita Chan and Jonathan Unger influentially argued during the mid-1990s that China was corporatist because the CCP designated group representatives for collective interests who were allowed to bargain with or become included in the state.<sup>341</sup> They also claimed that China was undergoing a transition from state to societal corporatism, as defined earlier by Schmitter – a claim they have recently retracted.<sup>342</sup>

Critics of the corporatist label do not deny the aspiration of the CCP to use corporatist-like policies to manage its close relation with private businesses and new social actors. They do argue that such policies do not capture the diversity of relations that escape direct corporatist inclusion,<sup>343</sup> especially following the often highly decentralized nature of legal and political administration.<sup>344</sup> In the economic realm, Holbig has called this “fragmented corporatism”<sup>345</sup> and Bruce Dickson has described the relationship of private sector elites and the party as one of coopted inclusion rather than true negotiation.<sup>346</sup> The corporatist frame continues to be popular as a way of describing local state-business relationships as well.<sup>347</sup>

What remains evident is that whatever complexities exist within Chinese society, the CCP has pursued a strategy of simulating corporatist structures as it constructs what many consider the most

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<sup>340</sup> The corporatist term has a longer history in Chinese studies, especially in describing guild and family based businesses of the pre-CCP era and in the Chinese diaspora. Daniel Fitzpatrick, *Chinese Family Firms in Indonesia and the Question of ‘Confucian Corporatism,’* in *LAW AND THE CHINESE IN SOUTHEAST ASIA* 150 (Hooker ed., 2002).

<sup>341</sup> Jonathan Unger & Anita Chan, *China, Corporatism, and the East Asian Model*, 33 *AUSTRALIAN J. CHINESE AFF.* 29, 38 (1995).

<sup>342</sup> Jonathan Unger & Anita Chan, *State Corporatism and Business Associations in China*, 10 *INT’L J. EMERGING MKTS.* 12 (2015).

<sup>343</sup> Ray Yep, *The Limitations of Corporatism for Understanding Reforming China*, 9 *J. CONT. CHINA* 547, 548 (2000).

<sup>344</sup> ZHENG YONGNIAN, *DE FACTO FEDERALISM IN CHINA* (2007). *Contra* Thomas Foley, *A Devolution Revolution?*, 37 *HONG KONG L.J.* 951 (2007).

<sup>345</sup> HEIKE HOLBIG, *FRAGMENTED CORPORATISM INTEREST POLITICS IN CHINA’S PRIVATE BUSINESS SECTOR* (Paper, ECPR Joint Sessions, 2006).

<sup>346</sup> Bruce Dickson, *Cooptation and Corporatism in China*, 115 *POL. SCI. Q.* 517 (2000) and JIE CHENG & BRUCE DICKSON, *ALLIES OF THE STATE* (Harvard University Press, 2010).

<sup>347</sup> Jean Oi, *Fiscal Reform and the Economic Foundations of Local State Corporatism in China*, 45 *WORLD POL.* 99 (1992) and Melanie Manion, *Authoritarian Parochialism*, 218 *CHINA Q.* 311 (2014).

durable instance of modern bureaucratic authoritarianism.<sup>348</sup> The recent CCP slogan of promoting a “harmonious society” directly echoes the corporatist sentiments of Vargas and other early 20<sup>th</sup> century authoritarians.<sup>349</sup> While disconnected from the intellectual currents that influenced the U.S. and Brazilian union models, the CCP is a partial inheritor to the type of group based democratic theories that inspired the nomenclature of the “democratic republic” of various communist regimes. The messiness of attempts to categorize Chinese governance as “corporatist” stems from the fact that, in contrast to a formally corporatist system, this is no overarching institutionalization that defines legal bargaining units, their powers, or facilitates their bargaining. The struggle to reconcile centralized CCP political power with the sheer transactional volume of modern Chinese society has produced any number of ongoing experiments by a variety of often-opposed intra-CCP stakeholders. Instead, the CCP is introducing corporatist dynamics to simulate the social and political effects of corporatist they desire, without formally devolving any legally independent power to designated bargainers. Thus, the emergent dynamics of interest group bargaining are best characterized as “simulated corporatism.”

Emerging CCP policy regarding the ACFTU reveals that it sees labor as one issue where experiments with simulating corporatism will be most pronounced as collective wage-bargaining can serve both as an indirect instrument of state policy and, most critically, as a manager of labor unrest.<sup>350</sup> In drawing comparisons between historical U.S. and contemporary Chinese labor relations, Cynthia Estlund concludes that the CCP hopes these reforms can achieve

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<sup>348</sup> Baogang He, *China's Responses to the Arab Uprisings*, in DEMOCRACY AND REFORM IN THE MIDDLE EAST AND ASIA: SOCIAL PROTEST AND AUTHORITARIAN RULE AFTER THE ARAB SPRING 161 (Saikal & Amitav eds., 2014). The other call China's reaction the Arab Spring an “ingenious neo-Foucauldian approach to policing, monitoring and controlling society.”

<sup>349</sup> LI HUAN (李环主编), *HARMONIOUS SOCIETY AND CHINA'S LABOR RELATIONS* (和谐社会与中国劳动关系) [The Harmonious Society and China's Labor Relations] (2007). See LAURA NADER, *HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE* (Stanford University Press, 1990).

<sup>350</sup> Mingwei Liu, *Union Organizing in China*, 64 *INDUS. & LAB. REL. REV.* 30 (2011); Chris Chan & Elaine Hui, *The Dynamics and Dilemma of Workplace Trade Union Reform in China*, 54 *J. INDUS. REL.* (2012) and Xian Huang, *Collective Wage Bargaining and State-Corporatism in Contemporary China*, in *THE CHINESE CORPORATIST STATE* 50 (Jennifer Hsu & Reza Hasmath eds., 2013).

exactly the promise of “labor peace” that Roosevelt sought to quell more radical reforms with the NLRA.<sup>351</sup>

It is often forgotten today that the formation of a private labor organization in the late 1980s, the Workers Autonomous Federation, was the primary motivation for the CCP’s violent repression of the Tiananmen Protests in 1989.<sup>352</sup> This fear of labor protest reflects the CCP leadership’s long-standing recognition of labor solidarity’s role in other democratization movements.<sup>353</sup> The CCP has similarly moved to actively undermine the independent labor unions of Hong Kong after the British turnover, who remain a foundation of political resistance to the Mainland.<sup>354</sup>

In this vein, the CCP has promoted new organizing drives by the ACFTU and made total workplace representation an open policy goal, including foreign owned enterprises.<sup>355</sup> In these drives, the CCP has remained relatively agnostic as to the specific organizational forms and tactics of unions, allowing both industrial and enterprise, or grassroots, unions to be formed, as well as other unions based on a variety of demographic and geographic frames. These flexible organizing rubrics also reflect the incentives provided by the mandatory fees paid by members to these often overlapping unions.<sup>356</sup>

While far from legally mandatory, the CCP has encouraged broad ACFTU-sanctioned collective bargaining at the sectoral level as a form of *de facto* administrative negotiation in order to secure workplace concessions and depress private labor mobilization.<sup>357</sup>

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<sup>351</sup> CYNTHIA ESTLUND, *A NEW LABOR LAW FOR CHINA’S WORKERS* (Harvard University Press, 2017).

<sup>352</sup> Kai Chang (常凯), *Gongchao wenti de diaocha yu fenxi* (工潮问题的调查与分析) [A Survey and Analysis of the Strikes], 1 DANGDAI GONGHUI (当代工会文丛) [Contemporary Trade Unions] 1 (1988) and Andrew Walder & Gong Xiaoxia, *Workers in the Tiananmen Protests*, 29 AUSTRALIAN J. CHINESE AFF. 1 (1993).

<sup>353</sup> Masaharu Hishida, *Introduction*, in CHINA’S TRADE UNIONS xvi (Masaharu Hishida et al. eds., 2010).

<sup>354</sup> Robert Berring, *Farewell to All That*, 19 LOY. L.A. INT’L & COMP. L. REV. 431, 446 (1997) and Andy Chan, *Trade Unions in Hong Kong: Worker Representation or Political Agent?*, in TRADE UNIONS IN ASIA 81, (John Benson & Jing Zhu eds., 2008).

<sup>355</sup> Tomoaki Ishii, *Trade Unions and Corporatism Under the Socialist Market Economy in China*, in CHINA’S TRADE UNIONS 1, 12 (Masaharu Hishida et al. eds., 2010) and Zana Bugaighis, *What Impact Will the Revised Trade Union Law of China Have on Foreign Business?*, 16 PAC. RIM L. & POL’Y J. 405 (2007).

<sup>356</sup> Wu Qingjun, *Corporate Governance and Trade Unions in Foreign Companies in China* (Paper, Proceedings of the 7th International Conference on Innovation & Management, 2014).

<sup>357</sup> Eli Friedman, *Economic Development and Sectoral Unions in China*, 67 INDUS. & LAB. REL. REV. 481 (2014).

The new collective agreements are contracts in name only, as they are more accurately understood as political settlements containing broad employment contract minimums of the industrial or geographic area implicated.<sup>358</sup> At the highest level, the Ministry of Human Resource and Social Security represents national government interests and the Chinese Enterprise Directors' Association those of employers.<sup>359</sup> These negotiations rarely contain robust private welfare provisions, but can provide supplements to the basic level of welfare state benefits available from national and local government.<sup>360</sup> Yet, these bargains have yet to be robustly enforced, and it is important to remember that the CCP primarily views them as administrative labor coordination devices.<sup>361</sup> Notably, during the Global Financial Crisis such agreements were no bar to the quick renegotiation of wage freezes and rollbacks.<sup>362</sup> Some observers have expressed optimism that such consultative arrangements will lead

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<sup>358</sup> For example, in 2014 a joint agreement among a variety of unions and business associations formed a "Food and Beverage" collective wage agreement that formally covered 22 million workers and detailed wage minimums, benefits and job training programs. Eli Friedman, *Experimentation and Decentralization in China Labor Relations*, 68 HUMAN REL. 181 (2015).

<sup>359</sup> CEDA describes itself as a "bridge and link" to government. CHINA ENTERPRISE CONFEDERATION/CHINA ENTERPRISE DIRECTORS ASSOCIATION, [www.cceda.org.cn/english](http://www.cceda.org.cn/english) [<https://perma.cc/X4JM-D93L>]

<sup>360</sup> *A Complete Guide to China's Minimum Wage Levels by Province, City, and District*, CHINA BRIEFING (Jan. 28, 2013), available at <http://www.china-briefing.com/news/2013/01/28/a-complete-guide-to-chinas-minimum-wage-levels-by-province-city-and-district.html> [<https://perma.cc/7JF5-JMVA>]; Mark Frazier, *After Pension Reform*, 39 STUD. COMP. INT'L DEV. 45 (2004); Robert Guthrie & Mariyam Zulfa, *Occupational Accident Insurance for All Workers: The New Challenges for China*, 3 E. ASIA L. REV. 1 (2008); China Labour Bulletin, *Beijing to Increase Municipal Minimum Wage, Pensions and Welfare Benefits* (Dec. 28, 2010), available at <http://www.clb.org.hk/content/beijing-increase-municipal-minimum-wage-pensions-and-welfare-benefits> [<https://perma.cc/PBU9-FQTZ>].

<sup>361</sup> TIM PRINGLE, *TRADE UNIONS IN CHINA* (Routledge, 2011). Also see Xin He, *Administrative Law as a Mechanism for Political Control in Contemporary China*, in BUILDING CONSTITUTIONALISM IN CHINA 143 (Stephanie Balme & Michael Dowdle eds., 2010).

<sup>362</sup> Sarah Biddulph, *Responding to Industrial Unrest in China: Prospects for Strengthening the Role of Collective Bargaining*, 34 SYDNEY L. REV. 35 (2012).

to meaningful gains for workers,<sup>363</sup> but as an empirical question this is still quite open-ended.<sup>364</sup>

Moreover, new ACFTU expansion has not changed the basic fact that Chinese workers enjoy no right to strike or anti-retaliation protections. Like Brazil, the CCP has never signed ILO treaties acknowledging a private right of labor association.<sup>365</sup> Strikes are not *per se* illegal, but without these protections workers assume huge risks to engage in collective action of any form. Employers and local governments often ally with the ACTFU to actively suppress privately organized strikes.<sup>366</sup>

While the CCP fear of labor solidarity attracts national attention to collective labor actions,<sup>367</sup> even when administrative bargaining results in employer concessions this is fundamentally a self-interested longitudinal calculation by the government actors involved.<sup>368</sup> The essentially non-legal characteristic of these bargains is core to the nature of simulated corporatism. Their negotiated status also in part explains why the once lauded symbol of the ACFTU's organizing at Walmart stores was met with little final resistance by perhaps the most well known anti-union corporation in the United States.<sup>369</sup> Similarly, the facilitative function of the ACFTU was also well

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<sup>363</sup> Tim Pringle, *Labour as an Agent of Change*, in POLARISING DEVELOPMENT 192 (Lucia Pradella & Thomas Marois, eds., 2015) and Fuxi Wang & Mingwei Liu, *Collective Consultation in China*, in A LABOUR PROCESS PERSPECTIVE ON THE TRANSFORMATION OF WORK AND EMPLOYMENT IN CHINA 233 (Mingwei Liu & Chris Smith eds., 2016).

<sup>364</sup> Xian Huang, *Collective Wage Bargaining and State-Corporatism in Contemporary China*, in THE CHINESE CORPORATIST STATE 50 (Jennifer Hsu & Reza Hasmath eds., 2013).

<sup>365</sup> Pitman Potter, *China and the International Legal System: Challenges of Participation*, 191 CHINA Q. 699 (2007). The participation of the ACFTU in the ILO has remained a point of contention within and without the organization.

<sup>366</sup> Yang Su & Xin He, *Street as Courtroom*, 44 L. & SOC'Y REV. 157, 162 (2010) and Chen Feng, *Trade Unions and the Quadripartite Interactions in Strike Settlement in China*, 201 CHINA Q. 104, 108 (2010).

<sup>367</sup> Jidong Chen, Jennifer Pan & Yiqing Xu, *Sources of Authoritarian Responsiveness: A Field Experiment in China*. (MIT Political Science Department Research Paper Series, Paper No. 11, 2014).

<sup>368</sup> Feng Chen, *Legal Mobilization by Trade Unions*, 52 CHINA J. 27, 44 (2004) and Feng Chen, *Union Power in China*, 35 MOD. CHINA 662 (2009).

<sup>369</sup> The meaning of Walmart's unionization is still a key symbol in evaluations of the future ACFTU activism. Baogang He & Yuhua Xie, *Wal-Mart's Trade Union in China*, 32 ECON. & INDUS. DEMO. 1 (2011); Anita Chan, *The Fallacy of Chinese Exceptionalism*, in CHINESE WORKERS IN COMPARATIVE PERSPECTIVE 1, 11-12, 12 (Anita Chan ed., 2015) and Chunyun Lu & Mingwei Liu, *A Pathway to a Vital Labour Movement in China*, in CHINA AT WORK 278 (Mingwei Liu & Chris Smith eds., 2016).

demonstrated in the Foxconn agreement to allow union representatives to help guide self-monitoring proposals.<sup>370</sup>

### 5.3. *Union Democracy as a Siphon of Solidarity*

Labor scholars in, and especially outside, of China have begun to argue that the nascent corporatist character of the ACFTU should be infused with representative mechanisms or replaced with a regime of independent democratic organizing.<sup>371</sup> Some observers were and still are optimistic that the expansion of the ACFTU can pave the way for its re-orientation as a more representative institution,<sup>372</sup> while others remain doubtful that it can ever unmoor itself from its state dependence.<sup>373</sup> It is certainly an open question as to whether the CCP's will be able to sufficiently simulate corporatist dynamics to quell labor unrest and ward off destabilization of its regime. Thus, while the CCP clearly has a corporatist future in mind for the ACFTU, the basic fact remains that its ability to manage local social and political actors is one of its core governance dilemmas.

Hope emerges from the fact that local chapters of the ACFTU have been empowered by recent organizing campaigns, greatly bolstered from increased dues payments. New spaces for innovation have opened up at the local level.<sup>374</sup> Grassroots unions in provincial industrial hubs such as Zhejiang and Guangdong have been the sites of experimentation with direct cadre elections, including in foreign companies.<sup>375</sup> Such elections would constitute a significant intervention in local unions, as generally enterprise union leaders are

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<sup>370</sup> Ying Zhu et al., *Employment Relations 'With Chinese Characteristics'*, 150 INT'L LAB. REV. 127 (2011); Tony Fang, Ying Ge & Youqing Fan, *The Cooperative Roles of Chinese Unions in Multinational Corporations* (unpublished paper, 2003) and Jeffrey Huvelle & Cecily Baskir, *A Fair Labor Future for Foxconn? The 2012 FLA Audit of Apple's Largest Chinese Supplier*, 1 PEKING U. TRANSNAT'L L. REV. 212 (2013).

<sup>371</sup> Toby Merchant, *Recognizing ILO Rights to Organize and Bargain Collectively*, 36 CASE W. RES. J. INT'L L. 223 (2004) and Mayoung Nham, Note, *The Right to Strike or the Freedom to Strike*, 39 GEO. WASH. INT'L L. REV. 919 (2007).

<sup>372</sup> Bill Taylor, *Trade Unions and Social Capital in Transitional Communist States*, 33 POL'Y SCI. 341 (2000).

<sup>373</sup> Mingwei Liu, *Union Organizing in China*, 64 INDUS. & LAB. REL. REV. 30 (2010).

<sup>374</sup> Youqing Fan & Peter Gahan, *What Are Chinese Unions Doing?: Explaining Innovation and Change in Grassroots Unions* (available at: [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2113221](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2113221)).

<sup>375</sup> Anita Chan, *Trade Union Elections in Foreign-Owned Chinese Factories*, 13 CHINA: INT'L J. (2015).



members of the local business community who are either appointed or who run unopposed.<sup>376</sup> More controversially, provincial-level unions have introduced potential reforms to protect limited strikes.<sup>377</sup> The reinvention of the worker congress system as a form of in-house consultation popular in the era of greater state-ownership has also garnered attention as a potential new focal point for more representative dynamics within Chinese companies.<sup>378</sup>

Yet, as much as the CCP has frequently allowed experimentation in local governance, even plainly illegal improvisations,<sup>379</sup> it has from the outset closely monitored local unions for any sign of horizontal worker solidarity.<sup>380</sup> While it is likely that discrete experiments in intra-union democracy may be allowed to the extent that it increases internal ACFTU effectiveness and external legitimacy, it is equally unlikely to foster logics of representation related to collective action.<sup>381</sup> So as experiments with internal elections continue, the proposals for a protected right to strike in Guangdong was withdrawn, even when labor unrest remained relatively unabated.<sup>382</sup> The takeaway here is that focusing the energies of aggrieved workers anywhere but collective action is a worthy experiment to an authoritarian looking to sap the energies of the labor market.

It is important to remember that one of the CCP's core political strategies has been to portray its intentions in populist terms and leave the administration of unpopular practices to local

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<sup>376</sup> Jude Howell, *All-China Federation of Trades Unions Beyond Reform? The Slow March of Direct Elections*, 196 CHINA Q. 845, 863 (2008).and Anita Chan, *Challenges and Possibilities for Democratic Grassroots Union Elections in China*, 34 LAB. STUD. J. 293 (2009).

<sup>377</sup> *Guangdong Regulations on the Democratic Management of Enterprises* [Guangdong Sheng Qie Minzhu Guanli Tiaoli Cao'an Xiugai]; Shenzhen Jingji Tequ Hexie Laodong Guanxi Cujin Tiaoli [Regulations to Shenzhen Special Economic Zone on the Promotion of Harmonious Labor Relations]).

<sup>378</sup> Cynthia Estlund, *Will Workers Have a Voice in China's "Socialist Market Economy"?* 36 COMP. LAB. L. & POL'Y J. 89, 96n27 (2015).

<sup>379</sup> Eva Pils, *Waste No Land: Property, Dignity and Growth in Urbanizing China*, 11 ASIAN-PAC. L. & POL'Y J. 1, 41 (2010) (describing illegal "sales" of land between peasants and villagers).

<sup>380</sup> Chang Kai (常凯), *Laoquan Lun (劳权论: 当代中国劳动关系德法律调整)* [Theory of Worker's Rights], 26 (2004).

<sup>381</sup> Youqing Fan, *Worker Participation and Union Revitalization: A Comparison of "Bottom-Up" and "Top-Down" Workplace Unions in RetailCo* (available at: [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2128003](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128003)).

<sup>382</sup> Aaron Halegua, *Strike a Balance*, SOUTH CHINA MORNING POST, Feb. 26, 2015, at A15.

governments.<sup>383</sup> In the context of labor, this had led to what Eli Friedman called the “insurgency trap,” whereby national political and legal organs like the Ministry of Labor claim to be responsive to labor unrest, produce national legislation and intervene when labor protests grow intense. Yet, subsequent day-to-day administration is still left to local governments where intimate relations among unions and local business are most intense and the enforcement of legal rights is costly.<sup>384</sup> Friedman’s thesis is supported by the continued exertion of authority over the ACFTU by the Ministry of Labor,<sup>385</sup> and the structural fact that the career trajectories of ACFTU members are still determined by promotion policies dictated by the Ministry.<sup>386</sup> Thus, even reforms that appear analogous to representative dynamics in other systems are in practice, more akin to the type of internal party discipline with which many modern authoritarians use to improve their administrative capacity.<sup>387</sup> Some of these experiments do open space for bottom-up forms of worker representation,<sup>388</sup> but the CCP has no particular aversion to improved worker welfare—just the means by which it can be achieved while maintaining their political power.<sup>389</sup> More critically, for all of the ACFTU’s recent organizing activity, few studies have shown an actual wage premium associated with new union representation that would reflect any genuine bargaining power and potentially generate worker loyalty to these institutions.<sup>390</sup>

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<sup>383</sup> Diana Fu, *Fragmented Control Governing Contentious Labor Organizations in China*, 30 *Governance* 445 (2017).

<sup>384</sup> Eli Friedman, *The Insurgency Trap* (Cornell University Press, 2014).

<sup>385</sup> David Metcalf & Jianwei Li, *Chinese Unions: Nugatory or Transforming?* (CEP Discussion Paper Series, Paper No. 708, 2005).

<sup>386</sup> Chelsea Chia-chen Chou, *The Expansion of Social Rights in Authoritarian Regimes: The Politics of Labor Policy Reform in China, 1978–2009* (Diss., Cornell University, 2009).

<sup>387</sup> Some sub-national unions have attempted to learn about collective bargaining from foreign unions, including the AFL-CIO. The Guangdong Provincial Federation of Trade Unions and the Guangzhou Federation of Trade Unions have done so in the past, but exhibited little interest in actually bringing workers into their consultative processes with employer groups. Katie Quan, *One Step Forward, in Chinese Workers in Comparative Perspective*, 174 (Anita Chan ed., 2015).

<sup>388</sup> Tom Mitchell, *Union Star Rises from Walmart China Labour Dispute*, *FINANCIAL TIMES* (Apr. 7th, 2014); Katie Quan, *One Step Forward, in Chinese Workers, in Comparative Perspective*, 174 (Anita Chan ed., 2015).

<sup>389</sup> A Labour Process Perspective on the Transformation of Work and Employment in China (Mingwei Liu & Chris Smith eds., 2016).

<sup>390</sup> Chang Lee & Mingwei Liu, *Collective Bargaining in Transition, in The Role of Collective Bargaining in the Global Economy*, 205 (Susan Hayter ed., 2011). *Contra* Yi Lua, Zhigang Taoa, & Yijiang Wang, *Union Effects on Performance and Employment*

In a similar fashion, the CCP has been mixing its new top-down administrative bargaining strategy alongside the ACFTU with legislation aimed at remediating labor unrest through re-emphasizing employment rights based on individual labor contracts.<sup>391</sup> This dual-strategy reflects the larger CCP pattern of governance through simultaneous individuation and state-dependence, with a bias for mechanisms that are effective for high-skilled workers, and especially those with the resources to enforce them.<sup>392</sup> Chinese workers have been undoubtedly eager to litigate based on their new rights,<sup>393</sup> and while enforcement of employment rights has been traditionally very uneven,<sup>394</sup> at least one recent study argues for an empirical link below employment law reforms and the positive economic outcomes for some workers.<sup>395</sup> The CCP has allowed foreign labor NGOs to operate in the employment law realm, signaling that it sees employment law as a more open site for experimentation than labor organizing,<sup>396</sup> much like its formal embrace of corporate social responsibility campaigns.<sup>397</sup> When employment law innovations do occur at the local level, the CCP has been eager to embed those deemed successful into its formal administrative structure.<sup>398</sup>

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*Relations*, 21 *China Econ. Rev.*, 202 (2010) (finding that union participation had a moderate positive effect on labor productivity, contrary to the conclusions of the majority of studies examining this link). There are many local union leaders who have been more aggressive in their attempts to represent workers. Unfortunately, they have been ultimately met with the same fate as many social activists in China.

<sup>391</sup> Mary Gallagher et al., *China's 2008 Labor Contract Law: Implementation and Implications for China's Workers* (World Bank Policy Research Working Paper Series, Paper No. 6542, 2013), and Hilary Josephs, *Labor Law in China* (2003).

<sup>392</sup> Eli Friedman, *Alienated Politics*, 45 *DEV. & CHANGE*, 1001 (2014), and Lu Zhang, *Inside China's Automobile Factories* (2015).

<sup>393</sup> Timothy Webster, *Ambivalence and Activism: Employment Discrimination in China*, 44 *VAND. J. TRANSNAT'L L.*, 643 (2011) and Jenny Chan, *Meaningful Progress or Illusory Reform?*, 18 *NEW LAB. F.*, 42, 51 (2009).

<sup>394</sup> Ronald Brown, *China's Employment Discrimination Laws During Economic Transition*, 19 *COLUM. J. ASIAN L.* 361 (2006) and Virginia Harper Ho, *From Contracts to Compliance?*, 23 *COLUM. J. ASIAN L.* 35 (2009-2010).

<sup>395</sup> Zhiming Cheng, Russell Smyth & Fei Guo, *The Impact of China's New Labour Contract Law On Socioeconomic Outcomes for Migrant and Urban Workers*, 68 *HUM. REL.* (forthcoming 2015).

<sup>396</sup> Anita Chan, *Revolution or Corporatism? Workers and Trade Unions in Post-Mao China*, 29 *AUSTRALIAN J. CHINESE AFF.* 31 (1993) and Feng Chen, *Individual Rights and Collective Rights*, 40 *COMMUNIST & POST-COMMUNIST STUD.* 59 (2007).

<sup>397</sup> Lance Compa, *Corporate Social Responsibility and Workers' Rights*, 30 *COMP. LAB. L. & POL'Y J.* 1, 9 (2008).

<sup>398</sup> Joseph Cheng, Kinglun Ngok, & Wenjia Zhuang, *The Survival and Development Space for China's Labor NGOs*, 50 *ASIAN SURV.* 1082 (2010).

Before hopeful parallels are drawn to arguments made by U.S. labor scholars regarding the social unionism potential of employment rights-based organizing, it should be noted that the CCP has universally prohibited class action procedures,<sup>399</sup> and that such rights are often not available to China's substantial migrant and informal labor sectors.<sup>400</sup> Employers have also themselves been quick to innovate to avoid new employment law protections, including the use of labor sub-contracting and other forms of non-standard workers.<sup>401</sup> SOEs and unionized workplaces often exhibit higher than average use of contingent workers.<sup>402</sup> Alongside the same genre of authoritarian workplace monitoring regimes increasingly found in U.S. workplaces,<sup>403</sup> Chinese workers face increasingly irregular, or precarious, work patterns. These practical delimitations again help explain why even foreign companies have provided little pushback against new employment rights legislation.<sup>404</sup>

In sum, the CCP has to date prevented any legal processes of interest aggregation from occurring around labor.<sup>405</sup> Again, whether it will continue to do so successfully is unresolved. In recent years, the CCP has begun to exhibit a loss of faith in its capacity to use legal regulation as an effective force to combat social unrest, and the costly surge of labor cases into the court system has been one significant factor in the CCP's redeployment of more traditional authoritarian forms of repression.<sup>406</sup> As strong as the CCP incentives have

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<sup>399</sup> Yin Zheng, Note, *It's Not What Is on Paper, but What Is in Practice*, 8 WASH. U. GLOBAL STUD. L. REV. 595 (2009).

<sup>400</sup> From *Iron Rice Bowl to Informalization* (Sarosh Kuruvilla et al eds., 2011) and Lu Zhang, *From Detroit to Shanghai?: Globalization, Market Reform, and Dynamics of Labor Unrest in the Chinese Automobile Industry* (Indiana University Research Center for Chinese Politics & Business Working Paper Series, Paper No. 3, 2010).

<sup>401</sup> Pun Ngai & Lu Huilin, *A Culture of Violence*, 64 CHINA J. 143 (2010) and Yojana Sharma, *Vocational Students Face Exploitation in Sweatshops*, 209 University World News (Feb. 19, 2012). But see Virginia Ho & Huang Qiaoyan, *The Recursivity of Reform*, 37 FORDHAM INT'L L.J. (2014).

<sup>402</sup> Xiangmin Liu, *How Institutional and Organizational Characteristics Explain the Growth of Contingent Work in China*, 68 INDUS. & LAB. RES. REV. 372 (2015).

<sup>403</sup> Yang Cao & Beth Rubin, *Market Transition and the Deinstitutionalization of Standard Work Hours in Post-Socialist China*, 67 INDUS. & LAB. REL. REV. 864 (2014).

<sup>404</sup> William Hurst et al., *Implementing China's Labor Law Reforms: Interests and Obligations at the Firm Level*, in LAW AND POLICY FOR CHINA'S MARKET SOCIALISM 118 (John Garrick ed., 2012) and Aaron Halegua, *The Debate Over Raising Chinese Labor Standards Goes International*, 1 HARV. L. & POL'Y REV. ONLINE (2007).

<sup>405</sup> Eli Friedman, *Experimentation and Decentralization in China's Labor Relations*, 68 HUM. REL. 181 (2015).

<sup>406</sup> Carl Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935 (2011); Pierre Landry, *The Institutional Diffusion of Courts in China: Evidence from Survey Data*, in

been to move labor NGOs into the employment law realm,<sup>407</sup> many have turned to try and promote collective bargaining.<sup>408</sup> Yet, the CCP response, as in other areas of public interest legal work, has been to continue to actively repress any private horizontal solidarity,<sup>409</sup> and has begun to match this repression by increasing government legal aid lawyers to limit the demand for private labor NGO representation.<sup>410</sup>

Still, workers have remained uncowed by a lack of ACFTU reform, and have even begun to engage in offensive strikes against employers.<sup>411</sup> All of these changes recall the democratizing precedent that the CCP fears. Yet, here again the focal concerns of the still inchoate Chinese labor movement seem tangential to outside calls for union democracy. Ching Kwan Lee has directly criticized the seduction of voluntarism in labor organizing, what she calls a “politics of freedom” in contrast to a more grounded “politics of necessity.”<sup>412</sup> As such, procedural formalism within unions seems to be an experiment that only the CCP seems consistently concerned with, and the existence of this permitted experimentation is evidence itself of how the broader potential of union elections is perceived. Chinese workers seem far more taken with organizing collective action on a popular basis and gaining substantive concessions, than with ACFTU reform itself.<sup>413</sup>

Centralization and hierarchy, the products of Michels’ iron rule, is exactly what the CCP fears and what the labor movement is denied. The view of the CCP is clarifying to the extent that it sees labor

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RULE BY LAW 207 (Ginsburg & Moustafa eds., 2008), and Benjamin Liebman, *Legal Reform: China’s Law-Stability Paradox*, 143 DAEDULUS 96 (2014).

<sup>407</sup> Anita Chan, *The Fallacy of Chinese Exceptionalism*, in *Chinese Workers in Comparative Perspective* 1, 16 (Anita Chan ed., 2015).

<sup>408</sup> Chunyun Lu, *Unmaking the Authoritarian Labor Regime* (Jan. 2016) (unpublished Ph.D. dissertation, Rutgers University) (on file with author).

<sup>409</sup> Aaron Halegua, *Who Will Represent China’s Workers?*, U.S.-Asia Law Institute New York University of School of Law (2016).

<sup>410</sup> Aaron Halegua, *Legal Preemption in China: How Government Legal Aid Squeezed Out Barefoot Lawyers and Labor Non-Governmental Organizations*, in LABOR LAW RESEARCH NETWORK (LLRN) CONFERENCE (2017), [https://economics.harvard.edu/files/economics/files/halegua-aaron\\_legal\\_preemption\\_in\\_china\\_ec2342\\_25oct2017.pdf](https://economics.harvard.edu/files/economics/files/halegua-aaron_legal_preemption_in_china_ec2342_25oct2017.pdf) [<https://perma.cc/VQ33-ML8K>].

<sup>411</sup> Manfred Elfstrom & Sarosh Kuruvila, *The Changing Nature of Labor Unrest in China*, 67 INDUS. & LAB. REL. REV. 453 (2014).

<sup>412</sup> Ching Kwan Lee, *Precarization or Empowerment?*, 75 THE J. ASIAN STUD. 317 (2016).

<sup>413</sup> Dorothy Solinger has claimed that even without traditional unions Chinese workers were able to agitate for better concessions than established corporatist unions in Mexico and France. Dorothy Solinger, *States’ Gains, Labor’s Losses* (2009).

organizing purely through a social movement lens. Without a labor movement, no amount of legal change will transform the fundamental reality of Chinese workers, even if the CCP manages to increase their social welfare over time through simulated corporatism.<sup>414</sup> The recent reassertion of central authority in China, alongside systemic and violent crackdowns on legal activism, has only made the CCP's simulated corporatism a more likely site of further investment. But it also shows that the terrain of resistance must match this scale, lest it be mired in more myopic views of workplace justice that only feed that power and legitimacy of new corporatist bargainers.

If a Chinese labor movement does rise to challenge the CCP, it would need to engage the same process of establishing internal discipline rather than formal democratic process—bringing workers out of the myopia of their disheartening workplace realities. Especially for outside observers, union democracy seems as easy as a self-evident ideal to promote as it was in Brazil, but is far less attractive in a practical sense, if not destructive, to the political bargaining power of an even more genuinely representative Chinese labor movement.

## 6. CONCLUSION

The national labor law traditions of the 20<sup>th</sup> century are almost universally beset by the need to re-institutionalize the outcome of acute political struggles, a process that invariably leaves them with substantial gaps between ideal and real functions.<sup>415</sup> The collective bargaining inherent in most such systems has also been essentially reactive to other social and economic pre-conditions—it requires constant energetic inputs and is subject to intense feedback from labor market dynamics and ongoing political contests.

The aspiration for economic justice that gives rise to calls for strong and active labor unions recurrently confronts how, in the context of labor commodification, there will always be mismatches between the present and any desired future. The preoccupation with union democracy under the decentralized and privately ordered form of U.S. unionization may, at first blush, serve as an ideal

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<sup>414</sup> Chunyun Lu & Mingwei Liu, *A Pathway to a Vital Labour Movement in China, in China at Work* 278, 285-6 (Mingwei Liu & Chris Smith eds., 2016).

<sup>415</sup> Gary Vause & Dulcine de Holanda Palhano, *Labor Law in Brazil and the United States*, 33 COLUM. J. TRANSNAT'L L. 583 (1995).

platform for better facilitating the emergence of a more radical economic change. Yet, in practice it only exacerbates this underlying mismatch by engaging with capital through its ideological presumptions of free individual contracting than by engaging its practical tactics of agglomeration and delocalization. The relative success of the Brazilian system and regulatory tactics of China's authoritarian regime posit the hard-to-swallow possibility that embracing, rather than fleeing from, Michels' iron law of oligarchy may be the better strategy. This is in essence a claim about institutional ecology—truly democratically organized workplaces struggle to thrive in an economic system that otherwise operates on authoritarian governance norms,<sup>416</sup> or will only form to the limited extent they can find specific occupational niches.<sup>417</sup>

This dynamic may seem dismal to those that hold to more aspirational functions for labor unions, but it is quite understandable how the social unionism underlying the most successful labor movements has been invariably tied to moments when labor unions, whatever their formal structures, could produce high-levels of social capital needed to overwhelm the operational logics of wage-labor markets.<sup>418</sup> The production of this social capital is not centered in workplaces as microcosms of political democracies, or produced through variations of liberal electoral proceduralism. It is built through the work of social engagement, performance and internal discipline necessary for any political agent and at the heart of any non-utopian social movement.

Especially for labor law scholars, the creative use of legal strategies within an existing legal framework is always attractive—it is inherent in the nature of legal intellectual work. But such tactical constraints risk continuing the reality Harry Arthurs noted for labor intellectuals, where the “disjuncture between good ideas and bad outcomes is deeply disturbing.”<sup>419</sup>

It may seem that at points in this paper, comparative examples have been used only to implicitly critique U.S. labor law and

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<sup>416</sup> David Laycock, *Representative Economic Democracy and the Problem of Policy Influence*, 22 CAN. J. POL. SCI. 765 (1989).

<sup>417</sup> Henry Hansmann, *The Ownership of Enterprise* (1996).

<sup>418</sup> George Feldman, *Unions, Solidarity, and Class*, 15 BERKELEY J. EMP. & LAB. L. 187 (1994); Joel Rogers, *Divide and Conquer*, 12 GERMAN L.J. 210 (2011); Reuel E. Schiller, *From Group Rights to Individual Liberties*, 20 BERKELEY J. EMP. & LAB. L. 1 (1999).

<sup>419</sup> Harry Arthurs, *Mining the Philosophers Stone* (Osgoode Legal Studies, Research Paper No. 58, 2016).

scholarship. But the recent and growing challenges to Brazilian labor unions signal that no system, however comparatively successful to date, is safe. Certainly, even the most lucid analysis of Chinese labor unrest yields no clear answers, and points to dark future possibilities. While the more genuinely corporatist legacy of many European labor systems has gained a great deal for their workers, even the historically strongest unions have begun to buckle under decades of pressure from globalization.<sup>420</sup> The cultural and occupational diversification of Europe has made convincing workers of their common cause more difficult,<sup>421</sup> and many systems have already been seriously weakened by efforts to decentralize bargaining structures.<sup>422</sup> Some see labor unions as a bridge to a re-democratized European Union,<sup>423</sup> but even the recognition of a right to collective bargaining by the European Court of Human Rights has not staved off the growth of nativist movements which seek to cleave the class solidarities built by earlier labor movement.

The discussion over labor union design thus cannot be a simple retelling of the victories of the past, but must delve into how to recreate and most durably re-entrench them. As Herbert Hoovenkamp noted in his study of labor conspiracies, once the assumption that combinations of labor and capital are functionally equivalent is accepted in legal doctrine or social analysis, labor will always face devising compensatory and defensive strategies.<sup>424</sup> The fight for labor power and social democracy will thus always be a combination of cultural messaging and legal tactics—as with any social movement.<sup>425</sup> And it also involves centralization, hierarchy and internal self-discipline in order to achieve political change—not satisfy idealisms.

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<sup>420</sup> Wolfgang Streeck and Philippe Schmitter, *From National Corporatism to Transnational Pluralism*, 19 POL. & SOC'Y 133 (1991); Kathleen Thelen, *Beyond Corporatism*, 27 COMP. POL. 107 (1994); Federico Fabbrini, *Europe in Need of a New Deal*, 43 GEO. J. INT'L L. 1175 (2012).

<sup>421</sup> Magnus Rasmussen & Øyvind Skorge, *The Determinants of Trade Union Centralization* (CES Conference, 2014).

<sup>422</sup> Paul Windolf, *Productivity Coalitions and the Future of European Corporatism*, 28 INDUS. REL. 1 (1989) and Henning Jørgensen, *The Role of Trade Unions in Social Restructuring in Scandinavia in the 1990s*, 4 REVUE FRANÇAISE DES AFFAIRES SOCIALES 151 (2003).

<sup>423</sup> Roland Erne, *European Unions* (2008).

<sup>424</sup> Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919 (1988).

<sup>425</sup> Cassandra Engeman, *Social Movement Unionism in Practice*, 29 WORK, EMPLOYMENT AND SOCIETY 444 (2015). *Contra* Karl Von Holdt, *Social Movement Unionism*, 16 WORK, EMPLOYMENT & SOCIETY 283 (2002).



There is no shortage of reforms possible to improve the lives of workers that do not involve unions.<sup>426</sup> There has been a drive in the past decade to more aggressively imagine possibility for social reform beyond that deemed immediately feasible. Erik Olin Wright has coined the term “real utopias” to capture the fusion between intelligent institutional design and social aspiration.<sup>427</sup> Some such reforms can still fall into the old category of legal transplant, such as attacks on at-will employment.<sup>428</sup> But today, the sense of ongoing crisis in economic organization has made the common contemplation of ideas that were considered irresponsibly unrealistic just a few years ago, most notably renewed calls for job guarantees or basic minimum incomes.<sup>429</sup>

Various corporate governance reforms continue to try to reconcile worker empowerment with owner self-interest, from modes of direct representation<sup>430</sup> to private governance reforms aimed at maximizing Dau-Schmidt’s cooperative surplus.<sup>431</sup> Just as with collective bargaining, these are compensatory measures whose ambition starts from the assumption that labor commodification is an inevitability. Whatever their individual capacity to improve the lives of workers, it is notable that most of these reforms no longer argue in the language of class conflict, but do so increasingly in a non-conflictual language of productive efficiency or technological utopianism.

The diagnosis of the counterproductive aspiration of union democracy presented in this article casts overlapping doubts on the power of these reforms.<sup>432</sup> Such doubts do not return us to communist visions of labor that degenerated on their own terms, but to

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<sup>426</sup> A concise overview is present in *Partnership at Work* (Paul Gollan & Glenn Pattmore eds., 2002).

<sup>427</sup> Erik Olin Wright, *Envisioning Real Utopias* (2009).

<sup>428</sup> Zev Eigen, Nicholas Menillo & David Sherwyn, *Shifting the Paradigm of the Debate*, 87 IND. L.J. 271 (2012).

<sup>429</sup> Ive Marx, *A New Social Question? On Minimum Income Protection in the Postindustrial Era* (1992).

<sup>430</sup> Margaret Blair and Mark Roe, *Employees and Corporate Governance* (1999).

<sup>431</sup> Marleen O’Connor, *The Human Capital Era*, 78 CORNELL L. REV. 899 (1993) and Leo Strine, *Toward Common Sense and Common Ground* 33 J. Corp. L. 1, 20 (2007). *Contra* Stephen Bainbridge, *Privately Ordered Participatory Management*, 23 DEL. J. CORP. L. 979 (1998).

<sup>432</sup> A thorough defense of the new governance paradigm is provided by David Doorey, *A Model of Responsive Workplace Law*, 50 OSGOODE HALL L.J. 47 (2012). These reforms are antithetical to the corporatist principles argued for in this article, but they do reflect how the sense of powerlessness has pushed many committed labor scholars to try and find new solutions.

the radical republican visions which embrace cooperative or employee ownership.<sup>433</sup> The ideal of either expanding the extensivity and intensivity of capital ownership to allow for widespread employee ownership or promoting various forms of mandatory profit-sharing have always garnered formal, if superficial, endorsement by often antagonistic political interests. But whatever episodic support has been given to such efforts, attempts to systemically promote such alternative configurations have remained quite weak.<sup>434</sup>

Some of this weakness reflects a variation of the ecological problem—developing truly different forms of economic organization from within logically antagonistic systems leads to unpredictable mutations<sup>435</sup> and often incredibly high interface costs with existing legal and economic institutions.<sup>436</sup> The non-replication of even successfully run employee-owned business and the less-than-stellar global track-record of employee stock ownership plans (ESOPs) speaks to this difficulty.<sup>437</sup> At their core, conceptions of labor are about the basic distribution of power in any society, and systemic changes, as with Meidner's wage-fund proposal, cannot be expected to be met without enduring resistance.<sup>438</sup>

Following their function as corporatist bargainers, unions have historically devoted little effort to expanding capital ownership as a long-term solution,<sup>439</sup> and leading ownership advocate Robert Hockett does not even mention unions in his review of possible "ownership spreading" mechanisms.<sup>440</sup> Even pro-union advocates

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<sup>433</sup> For a more extensive view of the possibilities of co-determination, see Isabelle Ferreras, *On Economic Bicameralism* (Thesis, MIT, 2004).

<sup>434</sup> Saioa Arando et al., *Efficiency in Employee-Owned Enterprises*, 68 INT'L LAB. REL. REV. 398 (2015).

<sup>435</sup> Aditi Bagchi, *Varieties of Employee Ownership: Some Unintended Consequences of Corporate Law and Labor Law*, 10 U PA. J. BUS. & EMPLOY. L. 305 (2008).

<sup>436</sup> Abby Scher, *This Rust-Belt Town's Survival Strategy Is All About Giving Workers Control*, YES! Magazine (Jan. 13, 2015).

<sup>437</sup> Jedidiah Kroncke, *ESOPs and the Limits of Fractionalized Ownership*, U. CHI. LEGAL F. (Forthcoming, 2018).

<sup>438</sup> Peer Zumbansen, *The Law of Society: Governance Through Contract*, 14 IND. J. GLOBAL LEGAL STUD. 191 (2007) and Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, (2009). *Contra* Richard Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983).

<sup>439</sup> Exceptional but also telling is Michele Robert's comment that players' unions in modern sport leagues could do exactly the same thing—render owners unnecessary. Pablo Torro, *NBPA Director: 'Let's Stop Pretending.'* ESPN ONLINE (Nov. 13, 2014).

<sup>440</sup> Robert Hockett, *Whose Ownership? Which Society?*, 27 CARDOZO L. REV. 1 (2005)

across the globe who seek to constitutionalize more radical anti-subordination principles stop short of the historical radical republican arguments about wage-labor,<sup>441</sup> in what James Pope would call full “constitutional insurgency.”<sup>442</sup>

Perhaps any proposal that conceptualizes the workplace as an instance of shared property or argues that labor can gain property rights in the workplace by accretion are considered unworkable as much as they may be consonant with populist sentiments.<sup>443</sup> Yet, even if more radical reforms regarding the property/commodity divide are deemed unrealistic or unattainable, union democracy is not a productive long-term solution to achieving any future desired state.

In many ways, this is again an old argument about the goals of labor movements and the possibilities of radical reform.<sup>444</sup> Naturally, to proponents of end of history arguments about the rise of modern corporate capitalism claims that union democracy is a distraction from radical economic change may seem obtuse.<sup>445</sup> Nonetheless, for those labor advocates caught up in Mundlak’s anomie, the diagnosis in this article is offered as an empirical point about how to think about labor unions as they are, not as we might hope them to be. We should not despair that labor unions are not working to render themselves obsolete; they are valuable for too many other reasons.

If unions are to transition away from corporatism, or even away from electoral politics, it should not be to perform experiments in procedural democracy, but to better build and aggregate political capital. As divergent from the social and legal context of the U.S. Brazil and China may appear to be,<sup>446</sup> they all point to the fact that solidarity and power are the core aim of any labor movement, and great liability exists when idealism about the nature of the

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<sup>441</sup> Eric Tuckert, *Labor’s Many Constitutions (and Capital’s Too)*, 33 COMP. LAB. L. & POL’Y J. 355 (2012).

<sup>442</sup> James Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941 (1997).

<sup>443</sup> Katherine Stone, *The Future of Labor and Employment Law in the U.S.* (UCLA School of Law, Law & Economics Research Paper Series, Paper No. 08-11, 2008).

<sup>444</sup> DEMOCRATIC WEALTH (White & Smith eds., 2014).

<sup>445</sup> Henry Hansmann & Reinier Kraakman, *Reflections on the End of History for Corporate Law*, in CONVERGENCE OF CORPORATE GOVERNANCE (Rasheed & Yoshikawa eds., 2012).

<sup>446</sup> Anita China, *The Fallacy of Chinese Exceptionism*, in CHINESE WORKERS IN COMPARATIVE PERSPECTIVE 1 (Anita Chan ed., 2015).

workplace, or even labor itself, overwhelms this concern.<sup>447</sup> And perhaps there can never be a substitute for a genuine labor party that is related to, but independent from, labor unions themselves to serve as the final locus of labor power.

When we want to imagine labor unions as something beyond collective bargainers, such imagining is only responsible if it serves to give workers what labor markets invariably do not. Not power against individual employers, but solidarity. This form of pragmatism, where labor corporatism is the least-worst form of collective bargaining, frees us to think more directly about how to achieve this solidarity without conceptual or intellectual distraction.

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<sup>447</sup> Even given their very different political contexts, the common challenges and interconnection of U.S. and Chinese labor are increasingly hard to ignore. Mingwei Liu et al., *Globalization and Labor in China and the United States: Convergence and Divergence*, in *CHINESE WORKERS IN COMPARATIVE PERSPECTIVE* 44 (Anita Chan ed., 2015).