THE YALE LAW JOURNAL

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An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act

ABSTRACT. There is a growing consensus among scholars and public policy experts that fundamental labor law reform is necessary in order to reduce the nation's growing wealth gap. According to conventional wisdom, however, a social democratic approach to labor relations is uniquely un-American—in deep conflict with our traditions and our governing legal regime. This Article calls into question that conventional account. It details a largely forgotten moment in American history: when the early Fair Labor Standards Act (FLSA) established industry committees of unions, business associations, and the public to set wages on an industry-by-industry basis. Alongside the National Labor Relations Act, the system successfully raised wages for hundreds of thousands of Americans, while helping facilitate unionization and a more egalitarian form of administration. And it succeeded within the basic framework of contemporary constitutional doctrine and statutory law.

By telling the story of FLSA's industry committees, this Article shows that collective labor law and individual employment law were not, and need not be, understood as discrete regimes—one a labor-driven vision of collective rights and the other built around individual rights subject to litigation and waiver. It also demonstrates that, for longer than is typically recognized, the nation experimented with a form of administration that linked the substantive ends of empowering particular social and economic groups to procedural means that solicited and enabled those same groups' participation in governance (to the exclusion of other groups). Ultimately, recovering this history provides inspiration for imagining alternatives to the current approach to worker participation in the American political economy and to administrative governance more broadly.

AUTHOR. Professor of Law, The University of Michigan Law School. For helpful feedback at various stages of this project, I am grateful to Sam Bagenstos, Nicholas Bagley, Richard Friedman, Scott Hershovitz, Ellen Katz, Sophia Lee, Nelson Lichtenstein, Nina Mendelson, Julian Mortenson, Bill Novak, Richard Primus, Daphna Renan, César Rosado Marzán, Benjamin Sachs, Ted St. Antoine, and Laura Weinrib. The project also benefited from conversation with Jeremy Kessler, David Madland, Brishen Rogers, and participants at the University of Chicago Constitutional Law Workshop, the Chicago-Kent College of Law Faculty Workshop, the American Political Economy Consortium at Columbia University ISERP, and the Michigan Law School Governance Workshop. For excellent research assistance, I thank Alison Doyle, John He, Marissa Perry, Tony Russo, Sarah Scheinman, Kenneth Sexauer, and the librarians and students at the Michigan Law School library, especially Virginia Neisler. Finally, special thanks to Ashraf Ahmed and the editors at the *Yale Law Journal*. Research for this project was funded in part by the Cook Endowment.

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INTRODUCTION

There is now widespread consensus that economic inequality in the United States poses a growing and grave problem.[1] Income disparities are the highest they have been since the 1920s, leading some commentators to proclaim a Second Gilded Age.[2] Indeed, the three wealthiest people in the United States now own more wealth than the entire bottom half of the population.[3] Over the last several decades, the share of income and wealth going to the top one percent of earners has grown substantially, while workers' real wages have barely budged.[4] Nearly one-third of workers earn less than twelve dollars an hour, often with unpredictable schedules and poor working conditions.[5] At the same time, social

1. Nelson D. Schwartz, *Economists Take Aim at Wealth Inequality*, N.Y. TIMES (Jan. 3, 2016), https://www.nytimes.com/2016/01/04/business/economy/economists-take-aim-at-wealth-inequality.html [https://perma.cc/W6K5-X7T3].
2. On the rise of inequality, see THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 23-24 (Arthur Goldhammer trans., 2014); and Estelle Sommeiller et al., *Income Inequality in the U.S. by State, Metropolitan Area, and County*, ECON. POLICY INST. 2, 7 (2016), http://www.epi.org/files/pdf/107100.pdf [https://perma.cc/YXK2-MRJ2]. On parallels between the first Gilded Age and our current political economy, see, for example, SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION (2016); and Paul Krugman, *Gilded Once More*, N.Y. TIMES (Apr. 27, 2007), https://www.nytimes.com/2007/04/27/opinion/27krugman.html [https://perma.cc/QS6Z-VJVL].
3. Chuck Collins & Josh Hoxie, *Billionaire Bonanza: The Forbes 400 and the Rest of Us*, INST. FOR POL'Y STUD. 2 (2017), https://ips-dc.org/wp-content/uploads/2017/11/BILLIONAIRE-BONANZA-2017-FinalV.pdf [https://perma.cc/DJ9Q-9XL5].
4. *See* Claudia Goldin & Lawrence F. Katz, *Long-Run Changes in the Wage Structure: Narrowing, Widening, Polarizing*, 2 BROOKINGS PAPERS ON ECON. ACTIVITY 135 (2007), https://www.brookings.edu/wp-content/uploads/2007/09/2007b_bpea_goldin.pdf [https://perma.cc/HF8P-24MN]; Lawrence Mishel et al., *Wage Stagnation in Nine Charts*, ECON. POL'Y INST. (2015), http://www.epi.org/files/2013/wage-stagnation-in-nine-charts.pdf [https://perma.cc/Q7BF-GFAX]; Thomas Piketty et al., *Distributional National Accounts: Methods and Estimates for the United States* 2-4 (Nat'l Bureau of Econ. Research, Working Paper No. 22945, 2016), http://www.nber.org/papers/w22945.pdf [https://perma.cc/44X2-AS4X]. Although economic indicators have improved since the Great Recession ended in 2009, over ninety percent of the growth in the U.S. economy over the subsequent three years inured to the benefit of the top one percent of the income distribution. *See* Emmanuel Saez, *Striking It Richer: The Evolution of Top Incomes in the United States (Updated with 2013 Preliminary Estimates)* 6 tbl.1 (Jan. 25, 2015), https://eml.berkeley.edu/~saez/saez-UStopincomes-2013.pdf [https://perma.cc/C2K3-CPYF].
5. Michelle Chen, *Trump's Budget Proposal Is an Attack on the Working Class*, NATION (Feb. 28, 2017), https://www.thenation.com/article/trumps-budget-proposal-is-an-attack-on-the-working-class [https://perma.cc/UR5K-4AP2]; *see also* U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2014, at 12, 13 tbl.3 (2015), https://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf [https://perma.cc/788Z-BF36] (providing demographic data on people in poverty).

mobility has declined, locking in the staggering economic divide.[6] These economic trends threaten political equality. As in the Gilded Age, democracy itself seems to be at stake, with a few megacompanies wielding outsized power and economic elites exercising disproportionate influence over nearly every facet of governance.[7]

The American system of labor relations is partly to blame for this situation.[8] Unions once bargained for more than a third of American workers, helping to raise wages and benefits throughout the economy and providing a collective voice for workers in politics and in the workplace.[9] They served as a countervailing force to corporate power in the political economy. Now, however, unions represent only about a tenth of the labor market and only about six percent of the private sector workforce.[10] As unions have shrunk to pre-New Deal levels, the United States has lost a key equalizing force in the economy and in politics. Yet features of American labor law, combined with intense employer resistance to unionization, make it nearly impossible to reverse unions' decline.[11] Meanwhile, federal employment law, under which workers are individually entitled to rights, does little to redress systemic inequality. The law guarantees very little, is

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6. *See* Raj Chetty et al., *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, 356 SCIENCE 398 (2017).

7. *E.g.*, LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE (2015); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012); KAY LEHMAN SCHLOZMAN ET AL., THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY (2012); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 576-77 (2014); *see also* Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419 (2015) (collecting and analyzing literature).

8. *See* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016) (detailing the failures of contemporary employment and labor law).

9. JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 1 (2014).

10. *See* Dylan Matthews, *Europe Could Have the Secret to Saving America's Unions*, VOX (Apr. 17, 2017), https://www.vox.com/policy-and-politics/2017/4/17/15290674/union-labor-movement-europe-bargaining-fight-15-ghent [https://perma.cc/Z7PB-VYG6]; *see also* ROSENFELD, *supra* note 9, at 10-30 (providing comparative unionization rates); *cf.* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984) (describing, as of the mid-1980s, the role of trade unions in the United States).

11. *See* Andrias, *supra* note 8; Kate Andrias & Brishen Rogers, *Rebuilding Worker Voice in Today's Economy*, ROOSEVELT INST. (Aug. 9, 2018), http://rooseveltinstitute.org/wp-content/uploads/2018/07/Rebuilding-Worker-Voices-final-2.pdf [https://perma.cc/M422-LQYP] (summarizing aspects of labor law that limit worker power and union growth); Sanford M. Jacoby, *American Exceptionalism Revisited: The Importance of Management*, *in* MASTERS TO MANAGERS 173 (Sanford M. Jacoby ed., 1991) (discussing intense opposition to unionism among American employers).

weakly enforced, and effectively excludes entire categories of workers from many of its protections.[12]

Demands for something new, something different, are gaining steam. Across the country, under such banners as the "Fight for $15," "Red for Ed," and "Domestic Workers Alliance," workers have been pressing governments to raise minimum wages, to increase pay and benefits for workers on a sector-wide basis, and to enact new employment law and social welfare protections, while demanding union rights not just for their particular workplace but for entire industries.[13] At the same time, labor scholars and policy makers have begun converging in their calls for a new, more social democratic system of labor law.[14] And administrative law scholars are increasingly urging new mechanisms to hold both government elites and private actors accountable—and in so doing, to create a more equitable political economy.[15]

Yet one of these mechanisms, sectoral bargaining—which would enable unions to negotiate for higher wages and better employment standards for all workers throughout the economy—still elicits skepticism.[16] There is a sense that

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12. *See infra* notes 101-106 and accompanying text.

13. *See* Andrias, *supra* note 8; Kate Andrias, Feller Memorial Labor Law Lecture, *Peril and Possibility: On Strikes, Rights, and Legal Change in the Era of Trump*, BERKELEY J. EMP. & LAB. L. (forthcoming 2019) [hereinafter Andrias, *Peril and Possibility*].

14. Andrias, *supra* note 8; Brishen Rogers, *Libertarian Corporatism Is Not an Oxymoron*, 94 TEX. L. REV. 1623, 1624 (2016); Dylan Matthews, *The Emerging Plan to Save the American Labor Movement*, VOX (Apr. 9, 2018), https://www.vox.com/policy-and-politics/2018/4/9/17205064/union-labor-movement-collective-wage-boards-bargaining [https://perma.cc/J5RW-5WY9]; Matthews, *supra* note 10; David Rolf, *Toward a 21st Century Labor Movement*, AM. PROSPECT (Apr. 18, 2016), http://prospect.org/article/toward-21st-century-labor-movement [https://perma.cc/GD3P-K46U]; *Clean Slate*, HARV. L. SCH. LAB. & WORKLIFE PROGRAM, https://lwp.law.harvard.edu/programs/clean-slate [https://perma.cc/3GTQ-6CBZ]; David Madland, *The Future of Worker Voice and Power*, CTR. FOR AM. PROGRESS (2016), https://cdn.americanprogress.org/wp-content/uploads/2016/10/06051753/WorkerVoice2.pdf [https://perma.cc/JA9C-8RDV]; David Madland & Alex Rowell, *How State and Local Governments Can Strengthen Worker Power and Raise Wages*, CTR. FOR AM. PROGRESS (May 2017), https://cdn.americanprogress.org/content/uploads/sites/2/2017/05/01144237/C4-StateLocalWorkerVoice-report.pdf [https://perma.cc/3ZY3-8V7S].

15. *See, e.g.*, RAHMAN, *supra* note 2; Andrias, *supra* note 7. On disparities of power in public law more generally, see GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC (2017); Kate Andrias, *Confronting Power in Public Law*, 130 HARV. L. REV. F. 1 (2016); and Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31 (2016).

16. *See* Chris Opfer, *White House Hopefuls Find Labor Reform Pickle*, BLOOMBERG BNA (Sept. 12, 2018), https://www.bna.com/white-house-hopefuls-n73014482499 [https://perma.cc/WA9D-Y5NW] (describing doubt within some quarters of the labor movement about the wisdom of a proposed bill that would expand collective action rights while establishing a new

a sectoral bargaining approach integrating labor and employment law is distinctly European, and therefore distinctly un-American.[17] This argument is not entirely unfounded. Virtually all European countries empower unions to negotiate employment rights for workers on a sectoral basis.[18] Through one method or another, the government extends—or facilitates extension of—union-negotiated standards to workers throughout the economy; workers also have rights of participation at the shop level through, for example, works councils, local unions, or competing minority unions.[19] Moreover, in most industrial democracies, unions have an official seat at the table when important questions about the workplace, social benefits, and the political economy more generally are up for debate. The American system, however, rejects this social democratic approach to labor law. It valorizes private contracting, permits significant employer resistance to unions, and provides only a marginal role for unions in a minimal social welfare state.[20] More broadly, American law does not empower representative organizations in administrative decision-making. It embraces judicial-like rule-of-law principles, technocratic decision-making, liberal pluralistic participation, and presidential control.[21]

The conventional wisdom holds that the United States briefly experimented with the social democratic, sectoral approach in the early 1930s, before abandoning it in 1935. According to this story, in the early years of the Depression, the United States Congress, pressed by President Roosevelt, enacted the National Industrial Recovery Act (NIRA).[22] The cornerstone of President Roosevelt's initial response to widespread poverty, labor unrest, and economic instability, NIRA gave unions, businesses, and consumers shared power to set industry codes, including minimum wages and maximum hours, while simultaneously providing workers the right to organize unions. NIRA, however, was short-

system of industry committees). For discussion of debate among academics, policy makers, and union leaders about the benefits of sectoral bargaining, and labor law reform more generally, see Andrias, *supra* note 8, at 44-46, 70-76.

17. *See, e.g.*, Matthews, *supra* note 10.

18. *See* STEVEN J. SILVIA, HOLDING THE SHOP TOGETHER: GERMAN INDUSTRIAL RELATIONS IN THE POSTWAR ERA 26-28, 38-48 (2013); Franz Traxler & Martin Behrens, *Collective Bargaining Coverage and Extension Procedures*, EURFOUND (Dec. 17, 2002), http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/collective-bargaining-coverage-and-extension-procedures [https://perma.cc/JG2D-MFMP].

19. *See* Madland, *supra* note 14; *see also* Andrias, *supra* note 8, at 6, 33-34, 77-80.

20. *See infra* Section I.A.

21. *See infra* Section I.B and notes 388-393 and accompanying text.

22. National Industrial Recovery Act, ch. 90, § 1, 48 Stat. 195, 195 (1933).

lived. Soon after its enactment, the law became mired in implementation challenges. Then, in 1935, the U.S. Supreme Court struck down the statute in *A.L.A. Schechter Poultry Corp. v. United States*,[23] concluding that NIRA delegated too much legislative power.

While *Schechter Poultry* is famous in the constitutional and administrative law canons as a rare exercise of the nondelegation doctrine, it is also widely understood to have ended the nation's brief, failed experiment with a form of social democratic power sharing in governance sometimes known as "tripartism" or "labor corporatism."[24] Tripartism is used in various forms in most industrialized democracies, particularly Europe's social democracies; it gives worker organizations, business groups, and sometimes consumer organizations a legally defined role in decisions about the direction of the economy generally and about social welfare policy in particular.[25]

According to the standard narrative, after *Schechter Poultry*, the United States switched course.[26] In 1935, Congress enacted what is now called labor law: the

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23. 295 U.S. 495 (1935).

24. Short-lived emergency boards that governed particular industries, particularly during both World Wars, are recognized exceptions. *See* MELVIN DUBOVSKY, THE STATE AND LABOR IN MODERN AMERICA 61-81, 182-91 (1994) (detailing the experience of war labor boards); Nelson Lichtenstein, *The Demise of Tripartite Governance and the Rise of the Corporate Social Responsibility Regime*, *in* ACHIEVING WORKERS' RIGHTS IN THE GLOBAL ECONOMY 95 (Richard P. Appelbaum & Nelson Lichtenstein eds., 2016) (defining terms). In this Article, I will use the term "tripartism" to describe formal power-sharing arrangements among labor, business, the public, and the state. Although sometimes known as "corporatism," I will avoid that freighted term because it also describes a range of different practices, including those practiced by fascist governments of the 1920s and 1930s. *See* HOWARD J. WIARDA, CORPORATISM AND COMPARATIVE POLITICS: THE OTHER GREAT "ISM" 12, 21-22, 66, 72-80 (1996) (describing varieties of corporatism).

25. WIARDA, *supra* note 24, at 5, 36-42; *see also* Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 589-90 (2007) (contrasting liberal pluralism, under which "[p]olicy outcomes are determined by competition for the votes of individuals in a political marketplace," with corporatism, under which groups are enfranchised as political actors as well as individuals, and are incorporated into governmental processes).

26. *See, e.g.*, 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 295-310 (2000) (describing President Roosevelt's turn away from the early New Deal approach); ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 31-64 (1995) (detailing debates within the Roosevelt Administration); JEFFERSON COWIE, THE GREAT EXCEPTION 104-11 (2016) (describing NIRA as the New Deal's false start and the subsequent New Deal laws as representing a "dramatic departure" from prior efforts); GEORGE E. PAULSEN, A LIVING WAGE FOR THE FORGOTTEN MAN 7 (1996) ("After the demise of the National Recovery Administration (NRA), the president abandoned further experimentation in government-sponsored industrial cooperation . . . ."); Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279, 2322 (1999) ("Roosevelt responded to *Schechter* by dropping full-blown corporatism

National Labor Relations Act (NLRA).[27] The NLRA, like NIRA, provided for the right to organize and bargain, but it no longer gave unions a seat at the table in federal administration, nor did it require sectoral bargaining.[28] Subsequently, Congress enacted what is now employment law, chiefly the Fair Labor Standards Act of 1938 (FLSA), which established a system of government-guaranteed minimum wages through traditional administrative law mechanisms.[29] On the conventional account, American tripartism following the demise of NIRA was limited to wartime emergencies and some industry-specific problems,[30] and the basic federal workplace regime that replaced NIRA separated private collective bargaining from individual employment law. The employment law regime aspired only to bare minima in wage protection, and, with respect to administra-

from the New Deal agenda and coming forward to the American People in 1936 with a qualitatively different program."); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1243-53, 1261 (1986) (describing the post-NIRA legislation as a second phase of the New Deal and emphasizing that NIRA, "the New Deal program that provided a framework for a genuine departure in regulation of the economic sector—a move either to the corporatist state or to a planned economy—was never resurrected to test the mettle of the 'new' Court"); Wachter, *supra* note 25, at 606-07, 610-13 (describing "the abandonment of a formal corporatist structure" following NIRA, though noting the brief return of corporatism with war boards in World War II). *But cf.* THEODORE J. LOWI, THE END OF LIBERALISM (1969) (viewing liberal pluralism as an extension of corporatism).

27. 29 U.S.C. §§ 151-169 (2018).

28. *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 128-30 (1991) (showing that encounters with courts at the turn of the century led dominant elements of the labor movement to demand private ordering of industrial relations between unions and employers rather than more radical political reform); Wachter, *supra* note 25, at 606 ("[T]he passing of the baton from the NIRA to the NLRA significantly reduced the public policy role of unions. Unions had no seat at the government's policy table because peak associations, including labor, were no longer invited."); *cf.* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1415 (1993) (describing the NLRA as a break from NIRA's corporatist approach but emphasizing the continuing embrace of cooperative democracy).

29. 29 U.S.C. §§ 201-219 (2018).

30. On the repeated use of tripartism in times of emergency, see DUBOVSKY, *supra* note 24, at 61-81, 182-91; NELSON LICHTENSTEIN, LABOR'S WAR AT HOME 51-53, 89-95 [hereinafter LICHTENSTEIN, LABOR'S WAR AT HOME]; NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 101-02 (2d ed. 2013) [hereinafter LICHTENSTEIN, STATE OF THE UNION]; ROBERT ZIEGER, THE CIO, 1935-1955, at 141-252 (1995); and Nelson Lichtenstein, *From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era*, *in* THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980, at 122, 122-34 (Steve Fraser & Gary Gerstle eds., 1989) [hereinafter Lichtenstein, *Corporatism to Collective Bargaining*]. On the use of tripartism in particular industries following the collapse of NIRA, see ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY 205-46 (1966).

tion, it embraced a technocratic, legalistic approach, rather than a system that affirmatively granted worker organizations power in political decision-making.[31]

This conventional narrative, however, occludes an important part of the history. Shared power over economic policy, in the service of raising living standards for American working people, remained an important feature of national and state policy well into the New Deal—not only through the important but anomalous war boards or the esoteric Railway Labor Act but also in the core employment law statutes that remain in force today. That is, after *Schechter Poultry*, when Congress enacted first the NLRA and then FLSA, it not only sought to protect workers' right to organize and to a subsistence wage but also affirmatively brought worker organizations into the governing process and empowered them to negotiate for all workers.

In particular, the original FLSA was more ambitious both procedurally and substantively than the low minimum wages and overtime protections for which it is known today. It created "industry committees" or wage boards composed of tripartite representatives—employers, unions, and the public—with discretion to set minimum wages on an industry-by-industry basis within a statutorily defined range. Supporters of FLSA saw the law as a means to end poverty wages, while extending the reach of unions throughout the nation and throughout the economy. Thus, even more so than the NLRA, FLSA embodied a commitment to empowering worker organizations in the political economy; in fact, many contemporaries saw FLSA as a direct outgrowth of NIRA and tripartite models abroad.[32] And together with the NLRA, FLSA created an interconnected system

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31. *See* Craig Becker, *Thoughts on the Unification of U.S. Labor and Employment Law: Is the Whole Greater than the Sum of the Parts?*, 35 YALE L. & POL'Y REV. 161, 162-63 (2016) (describing the enactment of the NLRA and FLSA and the bifurcation of labor and employment law at the time of the New Deal); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 328-29 (2005) (noting that "command-and-control mechanisms gained a foothold in the New Deal workplace with the Fair Labor Standards Act of 1938," and describing the New Deal as establishing "a floor on some basic economic terms of employment" but leaving "most terms and conditions to the newly established regime of [private] collective bargaining or, outside the union sector, to individual contract"); *see also infra* Sections I.A, I.B (describing the structure of modern workplace law and its administration).

32. *See infra* note 221 and accompanying text. For historical work complicating the traditional account of American exceptionalism and demonstrating that American progressivism and European social democracy were complementary and overlapping developments, see JAMES T. KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870-1920 (1986); and DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (2000). *See also* BRINKLEY, *supra* note 26 (describing a broader social democratic tradition of the early New Deal that gave way to less redistributive "rights-based" and "compensatory" liberalism).

of labor law and employment law and an American system of sectoral bargaining.[33]

For a brief period, the system was a notable though limited success—at least in the view of those who sought to create a more democratic and egalitarian political economy. FLSA officially incorporated worker organizations in administration. The resulting committees increased the wages of hundreds of thousands of workers during a short period, and, coupled with the NLRA's protections for organizing rights, FLSA helped facilitate the rapid rise of unionism in the New Deal period.[34] To be sure, the industry committees were limited in important ways. They had to set minimum wages within a statutorily prescribed dollar range and time period, lacked jurisdiction over working conditions or benefits,[35] and excluded groups of workers, in particular many African Americans in the rural south.[36] Nor did the FLSA boards permanently alter the character of American political economy, since they did not fundamentally change common law rights of employers and employees or the ownership of resources.[37] Nonetheless, during their existence, the FLSA industry committees represented a high-water mark of broadly inclusive, state-supported collective bargaining.

Moreover, the industry committees were widely considered efficient and effective during their time. The wage-board approach was abandoned during the postwar period not because of perceived self-dealing or inefficiency (the critiques leveled against NIRA), but for political reasons: rising hostility to unions, the opposition of Southern Democrats to extension of labor rights to African American workers, and divisions within the labor movement. By the late 1940s,

33. *See infra* Part III.

34. *See infra* Sections III.B.5, III.C.

35. *See infra* Sections III.B.1, III.C.

36. *See* IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME (2013) (describing how President Roosevelt repeatedly permitted Southern legislators to write discriminatory provisions into the New Deal programs, including by excluding agricultural laborers and domestic workers from the minimum wage laws); ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 106 (2001) (discussing disproportionate exclusion of women from FLSA and noting that "African-American women, more than a third of whom still worked as domestic servants in 1935, and African-American men, who constituted 80 percent of agricultural workers, almost completely lacked its protections"); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1336 (1987) (detailing how FLSA's agricultural exclusions were an effort to preserve "the social and racial plantation system in the South—a system resting on the subjugation of blacks and other minorities"). The exclusions may not be surprising given the history of race, gender, and class in the United States, but they were contested; and the outcome of that contest helped cement hierarchies in the labor market and in unions. For further discussion, see *infra* Part III.

37. *See infra* Section III.C.

a weakened Democratic Party and an embattled and divided labor movement were willing to trade off the committee system to ensure passage of a new minimum wage increase.[38] From that point to the present day, legally mandated sectoral bargaining has persisted only in particular industries and during specific crises.[39] As a form of governance, tripartism receded from the core of federal labor and employment statutes.

Examining FLSA's early history and its industry committees yields three key insights. First, the story offers a necessary broadening of scholarship about workplace law and its administration. Unlike the NLRA, whose history and ambition have been thoroughly plumbed, FLSA barely registers in contemporary legal scholarship,[40] perhaps because the statute is viewed as "much less transformative than the extraordinary Wagner Act."[41] FLSA's industry committees in particular have been almost entirely ignored by modern legal theory. They are not covered in textbooks and receive only a passing mention in law review articles.[42] This Article demonstrates, however, that industry committees were a cen-

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38. *See infra* Sections III.B.4, III.C.

39. *See supra* notes 24, 30 and accompanying text; *infra* notes 112, 353 and accompanying text.

40. Recent scholarly discussion of FLSA appears primarily in student notes and specialty journals, with almost no sustained discussion of the statute in leading law reviews. *See* David Freeman Engstrom, *"Not Merely There to Help the Men": Equal Pay Laws, Collective Rights, and the Making of the Modern Class Action*, 70 STAN. L. REV. 1, 11 (2018) (observing the absence of treatment of FLSA in law review literature). A few exceptions include Linder, *supra* note 36; Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2212-13 (1998); and Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2687-91 (2008). Several other recent articles touch on FLSA, including Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 263 (2013), which offers a synthesis of employment law that includes FLSA; and Judith Resnik, *Vital State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765, 1780-87 (2017), which offers a short history of FLSA's collective procedures.

41. Samuel Moyn, The Second Bill of Rights: A Reconsideration (Apr. 14, 2017) (unpublished manuscript) (on file with author); *see also* SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD 30 (2018) (describing the NLRA as "extraordinarily interventionist" in comparison with the later FLSA); Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012, 1020 (1984) (critiquing the Wagner Act system of collective bargaining and contrasting it with FLSA, which exemplifies a "system of free individual choice supplemented by minimally acceptable statutory terms" to correct market defects); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1778 (1983) (noting that many considered the Wagner Act "the most radical legislation of the New Deal").

42. Even Michael Wachter's excellent history of labor and corporatism in the United States, Wachter, *supra* note 25, fails to mention FLSA and the industry committees. For passing mentions, see JEROLD L. WALTMAN, MINIMUM WAGE POLICY IN GREAT BRITAIN AND THE UNITED STATES 59 (2008); Andrias, *supra* note 8, at 15 n.53; Seth D. Harris, *Conceptions of Fairness and*

tral component of the approach to labor and employment law in the Progressive and New Deal periods, and that FLSA, at the outset, was both ambitious and transformative.[43]

Second, this Article's analysis of FLSA and its relationship to the NLRA complicates the dominant narrative in the legal literature about the nature of the modern administrative state. On that view, administrative law won its legitimacy by 1940 through an embrace of a legalistic, technocratic, and ideologically neutral system of governance.[44] The history of the wage boards, however, is further evidence that, for nearly another decade, that vision was deeply contested and its valence far from neutral.[45] For longer than is typically recognized, the nation adopted a form of administration that linked the substantive ends of empowering particular social and economic groups to procedural means that solicited and enabled their participation in governance (to the exclusion of other groups). Courts, in reviewing such mechanisms, blessed such civil-society delegations, even when faced with objections that the system impermissibly empowered associations to negotiate on behalf of objecting individuals.[46] The decision in the

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the Fair Labor Standards Act, 18 HOFSTRA LAB. & EMP. L.J. 19, 139 & n.753 (2000); Bruce E. Kaufman, *John R. Commons and the Wisconsin School on Industrial Relations Strategy and Policy*, 57 INDUS. & LAB. REL. REV. 3, 23-24 (2003); and Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 69 n.72 (1991).

43. At the time of enactment and operation, the industry committees captured a tremendous amount of attention in both the popular press and law review literature. *See infra* Part III and sources cited therein.

44. *See, e.g.*, DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940 (2014) (arguing that lawyerly decision-making helped achieve the legitimation of the administrative state); Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 471 (2015) ("[T]he master metaprinciple of administrative law is that it has no single theoretical master principle, at least not with any kind of ideological valence."). For a cogent examination and critique of this position, see Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718 (2016) (reviewing ERNST, *supra*).

45. For illuminating accounts of the broader context over the shape of the American welfare state during this period, see LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA (2003), which traces the rise of mass consumption ideals in relation to economic recovery in the 1930s and the post-World War II era; MEG JACOBS, POCKETBOOK POLITICS: ECONOMIC CITIZENSHIP IN TWENTIETH-CENTURY AMERICA (2005), which provides a historical account of the role of redistributive economic policies in twentieth-century economic restructuring; and JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE (2003), which details the rise of a commercial welfare system post-New Deal and examines labor relations from the 1910s to the 1960s. *See also* Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462 (2017) (discussing the history of the Norris-LaGuardia Act and how it facilitated workers' countervailing power).

46. *See infra* Section III.B.3.

late 1940s to move to a regime based solely on technical expertise, judicial-like procedures, and more pluralistic participation, while also constraining collective action through the Taft-Hartley Act,[47] was neither ideologically neutral nor a result of consensus. Instead, it was a contested political decision that shifted the distribution of power in governance and the economy.

Third, the story of the wage boards unsettles assumptions about the nature and possibilities of workplace law. The account given here undermines the idea that a social democratic, sectoral bargaining approach is incompatible with American culture and contemporary statutes. It shows that within the broad statutory framework that still exists today, worker organizations were once granted formal power in policy making and the capacity to bargain for all workers in an industry. A more sectoral and social democratic form of labor law was part and parcel of the New Deal. In addition, the story of FLSA's industry committees blurs the bright line that today exists between labor and employment law. It shows that while the separate enactments of the NLRA and FLSA may have created the conditions for the bifurcation of labor and employment law, the division was only realized later. At the outset, labor law and employment law were intertwined—unions were given a role in the implementation of FLSA, and FLSA was seen as a way to advance unionization. This regime survived constitutional challenge, flourished past the early New Deal, and existed within the basic statutory framework that survives today. Finally, the history highlights the extent to which legal structures, and contests over those structures, shaped the role unions play in society. Amendments to FLSA, like those to the NLRA, played a critical role in constructing American unions as representative of particular members and not of the working class more generally.[48]

To be clear, my claim is not that American workplace law in the New Deal period achieved the social democratic approach prevalent in Europe—or the democratic-socialist approach urged by more radical components of the Progressive and New Deal Era movements or by activists today. Nor is my argument that powerful wage boards and broadly inclusive unions could have easily survived the twentieth century or could easily be recreated. Indeed, though a merged labor and employment law system of sectoral bargaining, benefiting all workers, is consistent with existing constitutional doctrine, it is in significant tension with the emerging agenda of the conservative majority on the Supreme Court.[49] Rather, my claim is that reformers sought to democratize the political

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47. Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 141-187 (2018) (amending the NLRA).

48. *See infra* Section III.C. For an account of how the NLRA and its amendments shaped the role of unions, see Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

49. *See infra* notes 117-118, 426-433 and accompanying text.

economy using an intertwined labor and employment law and an alternative administrative process; the laws they enacted, which bore the characteristic features of labor tripartism, persisted in the United States longer than is widely realized. They were abandoned not because of widespread dysfunction and failure, but because of ideological opposition and political choices. Moreover, much of the legal framework within which tripartism existed remains on the books today. That history shows our current system to be more contingent than it seems, and it enriches our view of what an "American" system of workplace law is or might be. Tripartism's longer historical pedigree should encourage greater institutional imagination.

Ultimately, this Article offers the forgotten history of FLSA's industry committees as inspiration for a fundamental rethinking of labor and employment law—and of democratic administration more broadly.[50] The history suggests that, with new political mobilization and struggle, a more social democratic approach to labor and employment law, and perhaps to administration more generally, could once again be understood as consistent with our governing institutions and culture.

I. FLSA AND THE STRUCTURE OF CONTEMPORARY LABOR AND EMPLOYMENT LAW

To understand the extent to which the original FLSA and its industry committees depart from contemporary approaches to workplace regulation and administrative law, a brief look at contemporary U.S. law is warranted. Such a survey also highlights the ways in which contemporary law reflects and contributes to a political economy strikingly similar to that of the first Gilded Age.

50. In prior work, I argued that the potential for a sectoral and social democratic labor law regime is emerging from the efforts of contemporary social movements, and I provided a defense of that approach. *See* Andrias, *supra* note 8, at 46-69. This Article does not reiterate those descriptive and normative arguments, nor does it describe critics who oppose unions, minimum wages, and broadly applicable employment laws. For examples of such critiques, see Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 990-91 (1984); and James Sherk, *$15 Minimum Wages Will Substantially Raise Prices*, HERITAGE FOUND. (Jan. 19, 2017), https://www.heritage.org/sites/default/files/2017-01/BG3160_0.pdf [https://perma.cc/F6N4-9JRN], which argues that minimum wages increase prices. For a normative defense of minimum wages, see Brishen Rogers, *Justice at Work: Minimum Wage Laws and Social Equality*, 92 TEX. L. REV. 1543 (2014).

A. The Labor/Employment Divide and Worksite Bargaining

Today, workplace law is generally understood to divide into two categories: employment law and labor law.[51] Employment law is the body of law that offers rights to workers on an individual basis, irrespective of their membership in a union.[52] Although employment law is thick and varied,[53] the Fair Labor Standards Act is a cornerstone statute. FLSA guarantees minimum wage, overtime pay, and maximum hours protections to workers who are covered by the Act and not exempt from its requirements.[54] Like other state and federal employment laws, FLSA operates largely independently of any collectivization in the workplace.[55] The law creates procedures through which employees can aggregate their claims, though rights under the law remain guaranteed to employees only as individu-

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51. *See, e.g.*, LICHTENSTEIN, STATE OF THE UNION, *supra* note 30, at 141, 171; REUEL E. SCHILLER, FORGING RIVALS: RACE, CLASS, LAW AND THE COLLAPSE OF POST WAR LIBERALISM 3, 5, 12 (2015); Becker, *supra* note 31; James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563 (1996); Estlund, *supra* note 31; Sachs, *supra* note 40, at 2700-05; Reuel E. 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, 4 (1999); Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575 (1992); *cf.* Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1319 (2012) (describing bifurcation between rights-based approaches and power-based approaches in other areas of law as well).

52. Brudney, *supra* note 51, at 1569-70. For accounts of how the division between labor law and employment law breaks down, see Estlund, *supra* note 31, at 328-30; and Sachs, *supra* note 40, at 2688-89. *Cf.* Sophia Lee, *Rights in the New Deal Order*, *in* BEYOND THE NEW DEAL ORDER (Gary Gerstle et al. eds., forthcoming) (challenging historical accounts that posit an opposition between economic collective rights and individual civil rights).

53. *See* Bagenstos, *supra* note 40, at 263 (offering a synthesis of employment law).

54. Initially, FLSA applied only to private employers; in 1966 and 1974 the law was extended to reach state and federal employers. Exempt employees include executive, administrative, or professional employees; individuals employed at retail stores that do not have interstate operations; and agricultural employees, as well as enterprises with annual sales of less than $500,000. 29 C.F.R. §§ 779.101-.102, 779.245, 779.401-.404, 780.300-.522, 779.258-.259 (2018).

55. *See* Sachs, *supra* note 40, at 2688-89.

als.[56] And while some unions have pursued FLSA claims on behalf of groups of workers, the statute grants them no official or formal role in its operation.[57]

Collective action among workers, meanwhile, is governed separately by labor law, chiefly the National Labor Relations Act. The NLRA is administered by an administrative agency, the National Labor Relations Board (NLRB), which oversees representation elections and determines whether employees' rights to organize and bargain under the statute, or to refrain from doing so, have been violated. Unlike legal regimes prevalent in Europe's social democracies, the NLRA does not grant unions particular power to participate in the process of drafting and implementing mandatory standards for all workers; nor does it empower unions to bargain on behalf of all workers in an industry or sector. Instead, the NLRA establishes a decentralized, voluntarist system, where collective bargaining is a private negotiation between individual employers and employees at worksites where a majority has chosen to unionize.[58]

The scholarly consensus on the distinction between employment law and labor law views each as embracing fundamentally different approaches to protecting workers: employment law bestows individual rights, whereas labor law facilitates collective power.[59] Recently, scholars have recognized that the two approaches can be mutually reinforcing.[60] Both aim to enhance the dignity of workers and to promote social equality.[61] Indeed, in some circumstances, individual employment statutes provide protection for collective action.[62] But more

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56. *See* 29 U.S.C. § 216(b) (2018) (providing for collective FLSA actions, but noting that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought"); Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523 (2012).

57. *See* Sachs, *supra* note 40, at 2709-15 (describing a worker center's campaign to use FLSA to facilitate collective action and protect individual employee rights).

58. Andrias, *supra* note 8, at 6, 16, 28-35. In the words of the Supreme Court, the NLRA is distinct from employment statutes because it "does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them." Terminal R.R. Ass'n of St. Louis v. Bhd. of R.R. Trainmen, 318 U.S. 1, 6 (1943).

59. *See* sources cited *supra* notes 51-52.

60. For examples of scholarship emphasizing the mutually constitutive relationship between collective labor law and individual employment law, see Lee, *supra* note 52; and Sachs, *supra* note 40, at 2705-09. *Cf.* NANCY MACCLEAN, FREEDOM IS NOT ENOUGH (2006) (showing how civil rights activists and feminists concluded that civil rights alone would not suffice, and arguing that access to jobs at all levels is a requisite of full citizenship).

61. *See* Bagenstos, *supra* note 40, at 231; David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523 (2009).

62. Sachs, *supra* note 40, at 2687.

frequently, labor and employment law have been understood to be in tension with one another. Scholars have highlighted how, at different points in American history, particular unions privileged majoritarian preferences and prejudices over the rights of minorities.[63] Conversely, other scholars have shown how the rise of rights-conscious liberalism, including the proliferation of individual employment rights, undermined trade unionism by favoring individual over collective rights.[64] Yet as the following Parts show, the original understanding of the two regimes and their relationship to one another was quite different.

B. Modern Administrative Governance

FLSA today is not only an exemplar of the contemporary bifurcated approach to workplace law but also a quintessential regulatory statute. A specific office, the Wage and Hour Division, within an expert agency, the Department of Labor (DOL), administers and enforces its provisions.[65] The agency issues rules, regulations, and interpretations under the Act, and it conducts inspections and investigations to determine compliance.[66] The leadership of the agency, like that of other executive agencies, is nominated by the President and confirmed by the Senate.[67] And like most other agencies, DOL is subject to the Administrative Procedure Act (APA), enacted in 1946, eight years after FLSA.[68]

The structure and procedures of the Department of Labor are designed to vindicate the basic commitments of modern administrative law. A thick set of procedures aims to "secur[e] the rule of law and protect[] liberty by ensuring

63. PAUL FRYMER, BLACK AND BLUE: AFRICAN-AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY (2008).

64. *See* LICHTENSTEIN, STATE OF THE UNION, *supra* note 30, at 171 ("By advocating state protection as opposed to collective action, American liberals implicitly endorsed the idea, long associated with anti-union conservatism, that the labor movement could not be trusted to protect the individual rights of its members or of workers in general."); SCHILLER, *supra* note 51, at 3, 5, 12 (analyzing tensions between labor law and fair employment law); *cf.* SOPHIA Z. LEE, WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT 5-6, 73-75 (describing how conservative antiunion lawyers marshaled individual rights claims of the civil rights movement to advance their vision of a "right to work" free from union dues).

65. Fair Labor Standards Act of 1938 §§ 4, 6-7, 29 U.S.C. §§ 204, 206-207 (2018).

66. *See, e.g.*, *id.* §§ 204, 206(a)(2), 212(b), (d), 213(a)(1). The Act also can be enforced by private employee lawsuits. *Id.* § 216.

67. *Id.* § 551 (establishing the Department of Labor and instructing that its head, the Secretary of Labor, will be appointed by the President with the advice and consent of the Senate); *see also id.* § 204 (requiring that the head of the Wage and Hour Division be appointed by the President with the advice and consent of the Senate).

68. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

that [the] agenc[y] follow[s] fair and impartial decisional procedures, act[s] within the bounds of the statutory authority delegated by the legislature, and respect[s] private rights."[69] Judges from the DOL Office of Administrative Law Judges, for example, "preside[] over formal hearings" and "render fair and equitable decisions under the governing law, the facts of each case, and the procedures mandated by the Administrative Procedure Act."[70] In administering FLSA, DOL's procedures also seek to promote two other core goals of the modern administrative state: (1) expert, effective, and efficient decision-making; and (2) democratic accountability.[71] These goals are reflected in the composition of the agency. Staff economists[72] engage in cost-benefit analysis in accordance with presidential orders before issuing significant regulations.[73] DOL is also subject to political control; agency heads at DOL are not only appointed by the President, but also serve at his discretion and under his direction (or at least his suggestion),[74] and they remain subject to congressional oversight.[75] As a result, the theory goes, the agency is derivatively responsive to the electorate.[76] On this view, democratic accountability is also achieved through processes like notice

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69. Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 438 (2003); *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331 (2001) (describing the basic aims of the modern administrative state).

70. Office of the Chief Info. Officer, *OALJ Case Tracking System (CTS) FY 2018*, U.S. DEP'T LAB., https://www.dol.gov/oasam/ocio/programs/PIA/OALJ/OALJ-CTS.htm [https://perma.cc/P8SW-JNPQ]; *see also* 29 C.F.R. § 18 (2018) (elaborating procedures).

71. Kagan, *supra* note 69, at 2331.

72. *See* Bureau of Labor Statistics, *About the U.S. Bureau of Labor Statistics*, U.S. DEP'T LAB. (Feb. 16, 2018), https://www.bls.gov/bls/infohome.htm [https://perma.cc/3TLH-DVW8].

73. *See, e.g.*, Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011); Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993); *cf.* Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017) (requiring two existing regulations to be identified for elimination for every one new regulation issued).

74. *Compare*, *e.g.*, Peter L. Strauss, *Foreword: Overseer, or "the Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704-05 (2007) (arguing that Presidents may oversee particular agency decisions but may not direct them), *with* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997) (arguing for a strong unitary executive with directive authority).

75. On Congress's powers, see JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017).

76. Kagan, *supra* note 69, at 2331-38 (arguing that presidential control promotes democratic accountability). *But see* Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1174-78 (2014) (questioning emphasis on democratic accountability and noting potential costs); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2076-83 (2005) (arguing that accountability is furthered not by occasional elections but by the complex chains of authority and expertise that characterize bureaucracy).

and comment.[77] DOL and other labor agencies hear from a wide range of affected interest groups and individuals before making decisions. The law grants no special authority to particular constituent groups, nor does it incentivize or encourage their growth.[78]

C. Labor and Inequality

From the vantage point of contemporary administrative law, the labor and employment agencies function relatively well—at least until recent partisan breakdowns.[79] Political appointees, along with diligent and expert civil servants,

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77. *See* Kagan, *supra* note 69, at 2253-55 (describing interest-group control as one of four evolving and overlapping methods of agency control); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670, 1713 (1975) (arguing that administrative law's purpose became, over time, "to ensure the fair representation of a wide range of affected interests in the process of administrative decision[making]"); *cf.* Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389, 1390-92 (2000) (describing the shift from "interest group pluralism" in the 1940s and 1950s to individual participation or "legal liberalism" beginning in the 1960s and analyzing the effect of this shift on administrative law).

78. The NLRB similarly embraces these cornerstone principles of administrative law. Also subject to the APA, it follows judicial-like procedures and allows for individual and interest-group participation on important policy matters, even though it performs most of its work through adjudication. *See Invitation to File Briefs*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/cases-decisions/invitations-file-briefs [https://perma.cc/QH4U-LCVN]. However, the NLRB is considered an independent agency; its five members are removable only for cause, and by tradition, are a mix of Democrats and Republicans, theoretically rendering the NLRB more sheltered from presidential control. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 769-71 (2013) (developing a taxonomy of agencies and identifying various indicia of independence of agencies, including for the NLRB). *But see id.* at 772-76 (explaining that the difference between "independent" and "executive" agencies is often exaggerated); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 491-92 (2008) (arguing that agencies' categorization as independent does not remove them from the political fray); Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 26-32 (2013) (describing powers other than removal that Presidents can use to influence agency leaders).

79. The NLRB has been criticized for frequent "flip-flops"—often changing its position with a change in administration, but few suggest it exceeds the bounds of proper administrative practice. *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, 2057 (2009) (describing and critiquing NLRB flip-flop and other procedures). Recent heightened partisanship has, however, resulted in its inability to operate for lack of confirmed members. NLRB v. Noel Canning, 134 S. Ct. 2550 (2014) (rejecting presidential recess appointments to the NRLB); New Process Steel, L.P. v. NLRB, 560 U.S. 674, 687-88 (2010) (noting that in the absence of a lawfully appointed quorum, the Board cannot exercise its powers).

work hard to vindicate the statutes' goals. Both the President and Congress provide oversight to ensure effective operation. The agencies follow a host of rules and procedures to ensure that rule-of-law and separation-of-powers values are respected.[80] Numerous and diverse stakeholders comment whenever an agency considers a particular rule.

Yet from the perspective of those who view labor and employment law and administrative law as tools to advance social, political, and economic equality—that is, to redistribute resources and democratize governance—the contemporary regime falls far short.[81] Inequality in the United States has reached a staggering level, nearly as high as it was during the Gilded Age. The top 1% of earners in the United States brings home 24% of the national income, and that group is estimated to hold about 40% of the nation's wealth.[82] The three wealthiest people in the United States—Bill Gates, Jeff Bezos, and Warren Buffett—now own more wealth than the entire bottom half of the American population combined, a total of 160 million people or 63 million households.[83] Workers' real income has barely grown during recent decades, even as productivity, total working hours, and educational attainment have increased.[84] Political inequality has soared as well.[85] As Martin Gilens observes, "when preferences between the well-off and the poor diverge, government policy bears absolutely no relationship to the degree of support or opposition among the poor."[86]

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80. On internal, administrative mechanisms that function to separate and check power within the government, see, for example, Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 436, 453 (2009); and Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 529-51 (2015).

81. For further elaboration of this critique, see Andrias, *supra* note 8, at 13-30. For the argument that the core purpose of employment law is to promote social equality, see Bagenstos, *supra* note 40.

82. *See* Bd. of Governors of the Fed. Reserve Sys., *Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances*, 103 FED. RES. BULL. 1, 10 (2017), https://www.federalreserve.gov/publications/files/scf17.pdf [https://perma.cc/A2N8-8DDY]. In some areas of the country, the numbers are even more stark. In New York, for example, the average family in the top one percent of earners has forty-five times more income than an average family in the bottom ninety-nine percent. *See* Sommeiller et al., *supra* note 2, at 7.

83. Collins & Hoxie, *supra* note 3, at 2.

84. LICHTENSTEIN, STATE OF THE UNION, *supra* note 30, at 12-16; Goldin & Katz, *supra* note 4, at 135; Mishel et al., *supra* note 4; Piketty et al., *supra* note 4, at 3.

85. Recent studies by political scientists such as Larry Bartels and Martin Gilens reveal that congressional policies reflect the views of the wealthy but not of the working class. LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (2010); GILENS, *supra* note 7, at 81.

86. GILENS, *supra* note 7, at 81.

Labor and employment law play an important role in structuring this political economy. Consider the NLRA. It categorically excludes from its protections some of the most vulnerable workers, including agricultural workers, domestic workers, and workers classified as independent contractors.[87] Meanwhile, weak enforcement mechanisms, slight penalties, and lengthy delays—all of which employers routinely exploit to resist unionization—fail to protect even covered employees' ability to organize and bargain collectively with their employers.[88] In addition, the NLRA's emphasis on worksite-based organizing and bargaining is mismatched with a globalized and increasingly fissured economy.[89] Unlike regimes in Europe, Australia, and other industrialized democracies, the NLRA does not provide worker organizations power to bargain for all workers in an economic sector, nor does it mandate multiemployer bargaining.[90] Rather, workers must organize unions worksite by worksite, facing significant resistance from both their direct employers and other employers in their supply chains, with little hope of building power throughout an industry. These features of American labor law have contributed to the decline of unions in the United States and to the rise of economic and political inequality. Between 1954 and 2017, union membership rates fell from about 35% of the workforce[91] to about 11%.[92] Today, less than 7% of the private sector workforce belongs to a union,[93] even though the majority of workers continue to report that they support unions.[94] Some scholars

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87. National Labor Relations Act § 2, 29 U.S.C. § 152 (2018).

88. *See* Weiler, *supra* note 41, at 1769-70.

89. *See* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 290 (2004); DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 10 (2014); Andrias, *supra* note 8, at 21-30.

90. *See* Andrias, *supra* note 8, at 32-36; *see also* Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1397 (1971) (describing the ways in which American labor law is uniquely underprotective of workers, as compared to other industrialized nations); Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws*,*"* 1990 WIS. L. REV. 1, 1 (describing how "American labor law codified and furthered the weakness of American labor").

91. GERALD MAYER, CONG. RESEARCH SERV., RL32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES 22-23 (2004); *see also* Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 513 (2011) (describing decline in the union membership rate).

92. Bureau of Labor Statistics, *Union Members—2017*, U.S. DEP'T LAB. (Jan. 19, 2018), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/57Y4-F9BF].

93. *Id.*

94. Danielle Paquette, *Republicans Suddenly Seem to Like Unions Again*, WASH. POST (Sept. 4, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/09/04/republicans-suddenly-seem-to-like-unions-again [https://perma.cc/7R93-7X5W].

estimate that this decline in unionization is responsible for up to one-third of the rise in income inequality in recent decades.[95] They also identify the decline in union strength as one critical factor in explaining the rise in political inequality.[96]

Meanwhile, individual employment rights, enacted and promulgated through traditional legislative and regulatory processes, do little to reduce inequality.[97] One problem is that the substantive rights provided by FLSA and other U.S. employment and social welfare laws are meager.[98] Most nonunion workers are employed "at will" with few protections against termination.[99] Federal law and most state laws lack guarantees of paid family leave, vacation, or sick time; and statutory minimums do not provide the wages or benefits necessary to keep workers out of poverty.[100] In addition, many of the most vulnerable workers are excluded from coverage.[101] Enforcement of employment law is lax and violations

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95. Western & Rosenfeld, *supra* note 91, at 513; *see also* Henry S. Farber et al., *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data* (Nat'l Bureau of Econ. Research, Working Paper No. 24587, 2018) (finding that "unions have . . . a significant, equalizing effect on the income distribution").

96. *See, e.g.*, JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 142 (2010); SCHLOZMAN ET AL., *supra* note 7, at 325-26.

97. Andrias, *supra* note 8, at 37-40.

98. *Id.*

99. Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 4 n.9, 5 n.10, 8 (2010); Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 8 (2002).

100. *See* CONG. BUDGET OFFICE, PUB. NO. 4856, THE EFFECTS OF A MINIMUM-WAGE INCREASE ON EMPLOYMENT AND FAMILY INCOME 11 (2014); KATHRYN J. EDIN & H. LUKE SHAEFER, $2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA (2015); David Cooper, *The Minimum Wage Used to Be Enough to Keep Workers Out of Poverty—It's Not Anymore*, ECON. POL'Y INST. (Dec. 4, 2013), https://www.epi.org/publication/minimum-wage-workers-poverty-anymore-raising [https://perma.cc/CV5D-5ED5].

101. For example, while FLSA defines "employ" and "employee" more broadly than does the common law, the statute does not extend to independent contractors. *See* 29 U.S.C. § 203 (2018); *see also* United States v. Rosenwasser, 323 U.S. 360, 362-63 (1945) (stating that a "broader or more comprehensive coverage of employees . . . would be difficult to frame," with the exception of those employees "specifically excluded"); U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2015-1 (July 15, 2015) (addressing the issue of employers evading FLSA's expansive definitions by misclassifying workers as independent contractors). Other statutes like the Family Medical Leave Act and the Migrant and Seasonal Agricultural Worker Protection Act adopt FLSA's definition of "employ." *See* 29 U.S.C. § 2611(3) (2018); *id.* § 1802(5). In addition, while FLSA's blanket exemptions for domestic workers were eliminated in 1974, the statute still exempts from its protections many domestic workers who provide companionship services as well as live-in domestic workers. *Id.* § 213(a)(15), (b)(21); *see also* Home Care Ass'n of Am. v. Weil, 799 F.3d 1084 (D.C. Cir. 2015) (upholding a Department

are rampant, particularly in low-wage workforces.[102] Inadequate resources hamper government enforcement, while employees' fear of suing their employers chills private enforcement.[103] And even when employees do sue, effective remedies are often unavailable because of mandatory arbitration clauses,[104] the difficulties of class certification,[105] and restrictions on remedies available to immigrants.[106]

Ultimately, the mechanisms of democratic accountability embraced by American governance have not enabled workers meaningfully to shape their own workplaces or to participate in economic policy making. A key problem is that the administration of employment law, like administrative governance and the legislative process more generally, takes as a given the resource and power imbalances that exist among different social and economic groups. Those inequalities then reverberate through processes that are formally equal. For example, workers can participate through the regulatory notice-and-comment process, and they can lobby their elected representatives or the President for new legislation. But they compete with business organizations and economic elites, who have disproportionate ability to engage the governing process at every level.[107]

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of Labor rule that extended overtime and minimum wage protections to employees of third-party providers and discussing FLSA's history with respect to domestic workers).

102. *See, e.g.*, KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT 6-22 (2009); WEIL, *supra* note 89, at 214-22; David Weil, *Regulating the Workplace: The Vexing Problem of Implementation*, *in* 7 ADVANCES IN INDUSTRIAL AND LABOR RELATIONS 247 (David Lewin et al. eds., 1996); Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, NAT'L EMP. L. PROJECT 50 (2009), https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf [https://perma.cc/U6KC-6GXD] ("[F]ront-line workers in low-wage industries in Chicago, Los Angeles and New York City lose more than $56.4 million *per week* as a result of employment and labor law violations.").

103. *See* Becker, *supra* note 31, at 171.

104. *See* Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71 (2014); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015); *see also* Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637 (2007) (describing employer-imposed arbitration and noncompete agreements, both of which require the employee to give up critical background rights to the advantage of the employer).

105. *See* Becker, *supra* note 31, at 171-72.

106. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (holding that federal immigration policy foreclosed the NLRB from awarding back pay to an undocumented immigrant who had not been authorized to work in the United States).

107. *See* sources cited *supra* note 7.

The use of technocratic expertise within agencies does not solve this fundamental problem. Indeed, the dominant framework for expert policy reasoning—cost-benefit analysis—approximates market pricing even where it does not exist, asking, for example, how much people are willing to pay to avoid harms in workplaces already shaped by inequality. Such methods can facilitate economic efficiency in decision-making, but they are not redistributive or egalitarian in aim and can actually work to reinforce inequality.[108]

In contrast, scholars have shown that more egalitarian outcomes are achieved when the law creates inclusive systems of sectoral bargaining, which enable power sharing in decisions about wages, benefits, and the economy more broadly. Unlike voluntary worksite-based bargaining, which tends to compress wages within individual firms, sectoral bargaining directly affects wages throughout the labor market.[109] It also reduces incentives for fissuring of the employment relationship and can ensure that all workers, whether classified as contractors or employees, receive the benefit of negotiated standards.[110] Indeed, comparative labor law studies suggest that if more equal distribution is the goal, then broadly inclusive union organizations empowered to negotiate on a sectoral basis are key.[111] Historical evidence from the United States similarly suggests that when unions have achieved enough density to force employers to agree to something akin to sectoral bargaining in particular industries—for example,

108. *See* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002) (arguing that regulation should be designed to maximize net benefits and increase economic wealth without regard to distribution). For a critique of the reigning approach, see Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489 (2018), which argues that distributional consequences should be a core concern of the regulatory state. *Cf.* ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (2017) (arguing that modern theories rationalize but do not justify our market society).

109. *See* Jonas Pontusson et al., *Comparative Political Economy of Wage Distribution: The Role of Partisanship and Labour Market Institutions*, 32 BRIT. J. POL. SCI. 281, 289-90 (2002); Michael Wallerstein, *Wage Setting Institutions and Pay Inequality in Advanced Industrial Societies*, 43 AM. J. POL. SCI. 649, 669, 672-76 (1999).

110. Andrias, *supra* note 8, at 78.

111. KATHLEEN THELEN, VARIETIES OF LIBERALIZATION AND THE NEW POLITICS OF SOCIAL SOLIDARITY 5, 9-10, 194, 203-07 (2014); *see also* SILVIA, *supra* note 18, at 27-28, 38-41 (describing elements of Germany's sectoral bargaining system); PETER SWENSON, FAIR SHARES: UNIONS, PAY, AND POLITICS IN SWEDEN AND WEST GERMANY (1989) (comparing Swedish and West German industrial relations practices); Lowell Turner, *Introduction* to NEGOTIATING THE NEW GERMANY: CAN SOCIAL PARTNERSHIP SURVIVE? 3-4 (Lowell Turner ed., 1997) (describing Germany's "social market" economy); Traxler & Behrens, *supra* note 18 (emphasizing the central role the law and state institutions play in sustaining the German industrial relations system); Einat Albin, Sectoral Norm-Setting in Labor Law (unpublished manuscript) (on file with author) (drawing on British historical examples to argue in favor of sectoral bargaining).

through multiemployer or pattern bargaining – they have had much greater success at raising economic standards for workers.[112] Sectoral bargaining also tends to increase workers' voice in the democracy by giving worker organizations an official seat at the table when important decisions about workplace policy and the political economy are made.[113] More generally, worker organizations' greater bargaining power and broader mandate may enhance their incentive and ability to serve as a counterweight to organized business interests in the political sphere.

Lacking such bargaining power, American workers have little ability to benefit from productivity gains or to shape effectively a host of critical issues – from conditions at their own workplaces, to employment law and social welfare policy, to trade and tax policy, and societal responses to automation. Recently, the picture for workers has only grown bleaker. The Trump Administration, with the support of members of Congress, has sought to reduce wage-and-hour protections,[114] roll back worker-safety rules,[115] and reverse rulings that protect workers' fundamental right to engage in concerted activity.[116] Meanwhile, in *Janus v. American Federation of State, County, & Municipal Employees*, the conservative majority on the Supreme Court overruled *Abood v. Detroit Board of Education*, the

112. *See* CATHERINE L. FISK, WRITING FOR HIRE: UNIONS, HOLLYWOOD, AND MADISON AVENUE (2016) (describing industry-wide bargaining in Hollywood); NELSON LICHTENSTEIN, THE MOST DANGEROUS MAN IN DETROIT 271-98 (1995) (describing United Auto Workers pattern bargaining); Mark Anner et al., *Learning from the Past: The Relevance of Twentieth-Century New York Jobbers' Agreements for Twenty-First-Century Global Supply Chains*, *in* ACHIEVING WORKERS' RIGHTS IN THE GLOBAL ECONOMY, *supra* note 24, at 239 (describing jobbers' agreements negotiated among workers, garment manufacturers, and purchasers in the U.S. garment sector in the early and mid-twentieth century); Catherine L. Fisk et al., *Union Representation of Immigrant Janitors in Southern California: Economic and Legal Challenges*, *in* ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 199 (Ruth Milkman ed., 2000); *see also* Andrias, *supra* note 8, at 19-20, 46-47 (discussing these models and the difficulty of replicating them under current law).

113. Rogers, *supra* note 90, at 40-43.

114. *See* Noam Scheiber, *Labor Dept. Plan Could Let the Boss Pocket the Tip*, N.Y. TIMES (Feb. 4, 2018), https://www.nytimes.com/2018/02/04/business/economy/tips-rule.html [https://perma.cc/W736-HGXY].

115. Timothy Noah, *Does Labor Have a Death Wish?*, POLITICO (Nov. 7, 2017), https://www.politico.com/magazine/story/2017/11/07/labor-movement-trump-betrayal-215796 [https://perma.cc/29AY-DNTL].

116. *See* PCC Structurals, Inc., 365 N.L.R.B. 160 (2017) (overruling Specialty Healthcare & Rehab. Ctr. of Mobile, 357 N.L.R.B. 934 (2011), and rescinding the right of smaller groups of workers to unionize); NLRB Office of Pub. Affairs, *NLRB Considering Rulemaking to Address Joint Employer Standard*, NAT'L LAB. REL. BOARD (May 9, 2018), https://www.nlrb.gov/news-outreach/news-story/nlrb-considering-rulemaking-address-joint-employer-standard [https://perma.cc/K7DK-E2VU] (presenting the question of whether to define joint employment through notice-and-comment rulemaking).

longstanding precedent that permitted public sector employers and unions to require workers to pay fair-share fees.[117] Those fees covered the costs of union representation, facilitated well-funded, independent worker organizations, and avoided the free-rider problem inherent in a system of exclusive representation. Only a few weeks prior, in *Epic Systems Corp. v. Lewis*,[118] the Court curtailed the ability of workers to engage in group legal action, holding that employers may force workers to sign arbitration agreements with class-action waivers. In so doing, it narrowed the meaning of section 7 of the NLRA, which protects concerted action among workers. Together, these decisions further weaken both unions as such and the ability of workers to take collective action.

II. THE INTELLECTUAL AND LEGISLATIVE ORIGINS OF FLSA'S INDUSTRY COMMITTEES

A century ago, Americans faced similar, if not greater, problems. Rampant inequality, dire working conditions, high unemployment, a judiciary hostile to labor rights, and ultimately the collapse of the American economy set the stage for the egalitarian reforms of the 1930s. By 1928, the share of wealth owned by the top one percent of American households had surged to more than fifty percent.[119] Not unlike today, American democracy itself seemed to be at risk. Workers' lack of basic workplace rights, combined with the disproportionate political power exercised by a few megabusinesses and the wealthy more generally, struck many as incompatible with a republican form of government.[120] Reforming labor law was widely understood to be essential both to solving the crisis of American capitalism and to reinvigorating democracy.[121] The ultimate response was the New Deal, when, under the leadership of President Roosevelt, Congress enacted the Fair Labor Standards Act, the National Labor Relations Act, and a host

117. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448 (2018) (overruling Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)).

118. 138 S. Ct. 1612 (2018).

119. SEAN WILENTZ, THE POLITICIANS & THE EGALITARIANS: THE HIDDEN HISTORY OF AMERICAN POLITICS 58 (2016).

120. RAHMAN, *supra* note 2; William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999); *cf.* DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY (2013) (exploring the relationship between democracy and inequality generally); SITARAMAN, *supra* note 15 (arguing that a strong middle class is a prerequisite to the American constitutional system and tracing its importance from the Founding Era).

121. LICHTENSTEIN, STATE OF THE UNION, *supra* note 30, at 20, 30-35. On the consumerist roots of the New Deal, see, for example, JACOBS, *supra* note 45.

of other statutes beyond the labor and employment field that remain in existence today and form the core of the modern administrative state.[122] But the New Deal came after decades of efforts to create a more just economy and democracy.[123] These efforts reflected an enduring idea that political problems and economic problems were inextricably linked, and that treating the latter required addressing the former. Revisiting the Progressive Era, in particular, provides a better sense of the scope of the reformers' ambitions and the assumptions underlying their worldview—and reveals a significant difference from contemporary notions of administrative governance.

A. The Progressive Era and the Vision of a Democratic Political Economy

As the United States rapidly industrialized in the years after the Civil War, many American workers resisted the transformation to wage labor. They viewed it as a form of "wage slavery" and sought to return to a system of "free labor" in which citizens were self-employed, small producers, or members of a "cooperative commonwealth."[124] By the turn of the century, however, it was increasingly clear that wage labor would be a permanent fact of working-class life for men and women, white and black. Labor responded by pushing for a "living wage."

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122. *See, e.g.*, 2 ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL 150-51 (1958).

123. In this sense, labor regulation further underlines the point, made powerfully in recent years by historians of the administrative state, that the New Deal did not represent a simple shift from laissez faire individualism to interventionist statecraft but rather was part of a long, energetic, and contested process of state building beginning as early as 1866. *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940 (2013); William Forbath, *Politics, State-Building, and the Courts, 1870-1920*, *in* 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 643 (Michael Grossberg & Christopher Tomlins eds., 2008).

124. ERIC FONER, THE STORY OF AMERICAN FREEDOM 60-68, 124 (1998); LAWRENCE B. GLICKMAN, A LIVING WAGE: AMERICAN WORKERS AND THE MAKING OF CONSUMER SOCIETY 11-13, 80 (1997); ALEX GOUREVITCH, FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY 96-137 (2015); ELIZABETH SANDERS, ROOTS OF REFORM 30-177 (1990); AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 244-45 (1998).

The Constitution's promise of political equality, they argued, required that all citizens have a level of material security and economic independence.[125]

Despite broad consensus on aims, the labor movement was deeply divided on strategy. The American Federation of Labor (AFL), for instance, opposed state intervention into the employment relationship.[126] On its view, wage arrangements for the "able-bodied"—a group that, for the AFL, was generally limited to white men—should be settled through voluntary collective bargaining.[127] The Federation and its members focused their energy on removing the state's coercive power from organizing and bargaining, particularly in craft occupations.[128] Other unions, by contrast, envisioned a greater role for the state and a more inclusive approach to labor rights. Emerging industrial unions joined with the waning Knights of Labor and Progressive women's reform groups like the National Consumers League (NCL) to urge legislation that would both guarantee workers' substantive rights and protect the right to bargain.[129]

The ambitions of unionists and social reformers with respect to labor conditions were part and parcel of a broader struggle to resist turn-of-the century laissez faire economics and to democratize the political economy. In the early decades of the twentieth century, Progressives developed a sweeping critique of

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125. GLICKMAN, *supra* note 124, at 11-54 (describing how, between the Civil War and the 1930s, working-class attitudes toward wage labor shifted from opposition to "wage slavery" to support for a "living wage"); Forbath, *supra* note 120 (discussing republican ideology and labor demands).

126. *See* LANDON R.Y. STORRS, CIVILIZING CAPITALISM 43 (2000). On the relationship of the labor movement to state intervention, see generally FORBATH, *supra* note 28; CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960 (1985); and William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989). On the AFL's craft approach and hostility to immigrants and nonwhite workers, see LICHTENSTEIN, STATE OF THE UNION, *supra* note 30, at 40-41. *See also* JULIE GREENE, PURE AND SIMPLE POLITICS: THE AMERICAN FEDERATION OF LABOR AND POLITICAL ACTIVISM, 1881-1917, at 217-41 (1998) (describing the complexity of the AFL's relationship to the state).

127. LICHTENSTEIN, STATE OF THE UNION, *supra* note 30, at 40-41.

128. Forbath, *supra* note 126. In 1913, Samuel Gompers, President of the AFL, was quoted as insisting that, "If it were proposed in this country to vest authority in any tribunal to fix by law wages for men, labor would protest by every means in its power." Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, MONTHLY LAB. REV., Dec. 2000, at 33.

129. STORRS, *supra* note 126, at 41-59; *see also* STEVEN FRASER, LABOR WILL RULE: SIDNEY HILLMAN AND THE RISE OF AMERICAN LABOR 114-45 (1991) (describing garment union president Sidney Hillman's ambivalence towards, but ultimate embrace of, political intervention, as well as his commitment to industrial organizing over a craft focus). On the Knights of Labor, see GOUREVITCH, *supra* note 124, at 1-7.

Lochner Era liberalism.[130] Intellectuals like John Dewey and Herbert Croly, activists like Florence Kelley and Josephine Goldmark, and future jurists like Louis Brandeis and Felix Frankfurter all rejected the formalist common law approach that granted extensive power to judges, that defined liberty as a negative right,[131] and that, in Roscoe Pound's words, "force[d] upon legislation an academic theory of equality in the face of practical conditions of inequality."[132] The Progressives also argued against what they believed to be an excessively individualist American culture, urging a renewed and more fundamental commitment to democracy.[133] In so doing, they set out to redefine democracy itself. In their view, though electoral democracy was important, it was not enough. Democracy required a much thicker set of institutional commitments than the franchise.[134] As Dewey argued, "The problem of democracy was . . . not solved, hardly more

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130. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992); KLOPPENBERG, *supra* note 32; NOVAK, *supra* note 123, at 279-90; RODGERS, *supra* note 32; MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 101-03 (1976); *see also* DONALD R. BRAND, CORPORATISM AND THE RULE OF LAW: A STUDY OF THE NATIONAL RECOVERY ADMINISTRATION 50 (1988).

131. *See* John Dewey, *Individualism, Old and New*, *in* 5 THE LATER WORKS, 1925-1953, at 41-123 (Jo Ann Boydston ed., 1984); Brief for Defendants in Error upon Re-Argument, Stettler v. O'Hara, 243 U.S. 629 (1917) (Nos. 25, 26) [hereinafter *Stettler* Brief], *reprinted in* NAT'L CONSUMERS' LEAGUE, OREGON MINIMUM WAGE CASES (1917), https://babel.hathitrust.org/cgi/pt?id=uc1.b3116228; Brief for Defendant in Error, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107) [hereinafter *Muller* Brief], 1908 WL 27605. Both briefs were authored by Louis Brandeis and Josephine Goldmark. *See also* KATHRYN KISH SKLAR, FLORENCE KELLEY AND THE NATION'S WORK: THE RISE OF WOMEN'S POLITICAL CULTURE, 1830-1900 (1995); *cf.* DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY 472-519 (2013) (complicating the history of legal formalism).

132. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1909).

133. BRAND, *supra* note 130, at 50.

134. NOVAK, *supra* note 123. Recent work in law and political economy echoes this commitment. *See* Kate Andrias, *Building Labor's Constitution*, 94 TEX. L. REV. 1591 (2016); Kate Andrias, *Hollowed-Out Democracy*, N.Y.U. L. REV. ONLINE 48 (2014); K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329 (2016); *cf.* Joseph Fishkin & William E. Forbath, *Wealth, Commonwealth, and the Constitution of Opportunity*, *in* WEALTH: NOMOS LVIII 45 (Jack Knight & Melissa Schwartzberg eds., 2017) (seeking to revive a "discourse of *constitutional political economy*"); Jeremy K. Kessler, *The Political Economy of "Constitutional Political Economy*,*"* 94 TEX. L. REV. 1527 (2016) (emphasizing the need to attend to material factors when analyzing constitutional political economy).

than externally touched, by the establishment of universal suffrage and representative government."[135] Rather, democracy—and liberty—required that principles of equality be extended beyond the formal boundaries of the political sphere so as also to engage the gritty realities of the socioeconomic sphere.[136]

Indeed, Progressives understood politics as inseparable from the economy.[137] They became convinced that, in the context of great disparities in wealth and power, democracy could not function.[138] Only fundamental structural changes in the mode of economic organization could guarantee both individual liberty and a genuinely democratic regime.[139] Brandeis and others, for instance, were particularly concerned about the "curse of bigness"—megacorporations, trusts, monopolies, and the threats these private actors posed to economic well-being and the public good—and they sought to break up monopoly power.[140] Yet antitrust measures were not the only measures Progressives pursued to democratize the economy. The more radical Progressive Era thinkers, like Dewey, developed a broad critique of capitalism and sought to lay the foundations for a democratic-socialist alternative.[141]

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135. John Dewey, *Liberalism and Social Action*, *in* 11 THE LATER WORKS, 1925-1953, at 25 (Jo Ann Boydston ed., 1987).

136. KLOPPENBERG, *supra* note 32, at 6.

137. NOVAK, *supra* note 123, at 4.

138. *See* JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 118-21, 125 (1927); ROBERT LEE HALE, COERCION AND DISTRIBUTION IN A SUPPOSEDLY NON-COERCIVE STATE (1923); John Dewey, *The Imperative Need for a New Radical Political Party*, COMMON SENSE 2, 6 (1933); *see also* BRAND, *supra* note 130, at 50; MORTON J. HORWITZ, *The Legacy of Legal Realism*, *in* HORWITZ, *supra* note 130, at 193-212; MARC STEARS, DEMANDING DEMOCRACY: AMERICAN RADICALS IN SEARCH OF A NEW POLITICS 94-97 (2010); ROBERT B. WESTBROOK, JOHN DEWEY AND AMERICAN DEMOCRACY 434-36 (1991).

139. STEARS, *supra* note 138, at 94-97; WESTBROOK, *supra* note 138, at 435-38.

140. LOUIS D. BRANDEIS, THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS (Osmond K. Fraenkel ed., 1935); *see* RAHMAN, *supra* note 2; Robert Pitofsky, *Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051-52 (1979).

141. WESTBROOK, *supra* note 138, at 434-39 (describing Dewey's critique of capitalism based in liberal democratic ideals). To be sure, the Progressives were a diverse group. Not all shared the commitment to radical redistribution of economic and political power; much of the movement was committed to diffusing class tensions and purifying democracy through a range of technocratic reforms. RAHMAN, *supra* note 2, at 11, 55; STEARS, *supra* note 138, at 23; SHELTON STROMQUIST, REINVENTING "THE PEOPLE": THE PROGRESSIVE MOVEMENT, THE CLASS PROBLEM, AND THE ORIGINS OF MODERN LIBERALISM 8-10 (2006). Others took a crabbed view of the political community entitled to democratic rights. In particular, elements of the movement have rightly been criticized for embracing racially exclusionary views. *See* THOMAS C. LEONARD, ILLIBERAL REFORMERS: RACE, EUGENICS, AND AMERICAN ECONOMICS IN THE PROGRESSIVE ERA (2016); MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870-1920 (2003). *But see* Herbert Hovenkamp, *The*

To that end, the Progressives sought to realign in fundamental ways the power of labor and capital. They believed that the working class needed to be organized and that the state needed to ensure the ground rules to enable such organization.[142] Reformers like John Commons, the "father" of modern industrial relations, and others from the Wisconsin School, joined trade unions in seeking to bring to the industrial sphere the basic democratic practices and due process protections enjoyed by workers in the political sphere.[143] Unions and collective bargaining, Commons argued, would help establish the material conditions under which democracy could flourish while delivering on the Constitution's promise of liberty.[144] Collective organization at work would also enable Americans to engage in democratic decision-making on a daily basis, shifting power away from capital and building democracy and equality from the ground up.[145]

Progressives: Racism and Public Law, 59 ARIZ. L. REV. 947 (2017) (arguing that although the Progressives inherited racist ideas from their predecessors, over time they increasingly promoted racial inclusion and diversity). My focus is on the ideological commitments of the more radical Progressives.

142. KLOPPENBERG, *supra* note 32, at 386; STEARS, *supra* note 138, at 109-10.

143. *See* Kaufman, *supra* note 42, at 3, 23 (describing work of Commons); *see also* LAURA WEINRIB, THE TAMING OF FREE SPEECH 22 (2016) (discussing Croly's view of unions); Howell John Harris, *Industrial Democracy and Liberal Capitalism, 1890-1925*, *in* NELSON LICHTENSTEIN & HOWELL JOHN HARRIS, INDUSTRIAL DEMOCRACY IN AMERICA 43, 43-60 (1996) (tracing the development of the idea of industrial democracy among different groups in the Progressive Era); Nelson Lichtenstein, *Great Expectations: The Promise of Industrial Jurisprudence and Its Demise, 1930-1960*, *in* LICHTENSTEIN & HARRIS, *supra*, at 113-22 (discussing the industrial democracy theory advanced by Sumner Slichter and the Brookings Institution, which was ultimately more focused on industrial discipline than democratic rulemaking). On the Progressive Era labor movement's ideology of industrial democracy, see JOSEPH A. MCCARTIN, LABOR'S GREAT WAR: THE STRUGGLE FOR INDUSTRIAL DEMOCRACY AND THE ORIGINS OF MODERN AMERICAN LABOR RELATIONS, 1912-1921 (1997); DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925, at 22-44 (1987); and David Montgomery, *Industrial Democracy or Democracy in Industry?: The Theory and Practice of the Labor Movement, 1870-1925*, *in* LICHTENSTEIN & HARRIS, *supra*, at 22 [hereinafter Montgomery, *Industrial Democracy*].

144. JOHN R. COMMONS & JOHN B. ANDREWS, PRINCIPLES OF LABOR LEGISLATION 373-74 (4th rev. ed. 1936); *see also* Daniel R. Ernst, *Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915-1943*, 11 LAW & HIST. REV. 59, 59-68 (1993) (describing the ideology of Commons and his mentees).

145. KLOPPENBERG, *supra* note 32, at 45, 92, 264-65; WESTBROOK, *supra* note 138, at 434-39.

At the same time, the Progressives had faith in government; they envisioned expanded state institutions to achieve greater democratic control over the economy.[146] For example, they created public utilities to regulate key social goods at risk of subversion or corruption if left to private or market forces.[147] Well known for their commitment to technocratic expertise, Progressives argued that such expertise was useful only if subject to democratic control.[148] In their view, experts should advise the people and serve the popular will, not themselves make value judgments.[149]

To enable the public, and labor in particular, to exercise its will against the will of capital, Progressives sought to create new mechanisms for democratic participation. In Dewey's view, public institutions could serve as "structures which canalize action," providing a "mechanism for securing to an idea [the] channels of effective action."[150] Politics could provide the spaces, practices, institutions, and associations for enabling the collective action necessary to create more egalitarian social and economic systems. Public opinion and the ballot, however, were insufficient tools to achieve such change. For the public to solve its problems, organizations of citizens, and organizations of workers in particular, needed concrete ways to exercise power over the range of economic and political decision-making.

Progressives thus envisioned a broad role for worker organizations and other civic associations in government—and a robust role for the state in enabling such

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146. *See* NOVAK, *supra* note 123, at 311-69; STROMQUIST, *supra* note 141, at 23; Daniel Carpenter, *Completing the Constitution: Progressive-Era Economic Regulation and the Political Perfection of Article I, Section 8*, *in* THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE 291, 291-310 (Stephen Skowronek et al. eds., 2016).

147. *See* BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 160-204 (1998); William J. Novak, *Law and the Social Control of American Capitalism*, 60 EMORY L.J. 377, 399-400 (2010); William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 139, 154-60 (Naomi R. Lamoreaux & William J. Novak eds., 2017). For a discussion of modern implications of the public utility concept, see K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621 (2018).

148. *See* KLOPPENBERG, *supra* note 32, at 386; *see also* LEON FINK, THE LONG GILDED AGE: AMERICAN CAPITALISM AND THE LESSONS OF A NEW WORLD ORDER 10 (2015) (arguing that the social democratic promise of progressivism was only later given over to technocratic elites); KLOPPENBERG, *supra* note 32, at 383-84 (describing Croly's view that reformers who emphasized results more than popular control were illegitimately imposing their will on the people but also his significant faith in science as a means to cabin possible policy choices).

149. *See* KLOPPENBERG, *supra* note 32, at 383-86.

150. DEWEY, *supra* note 138, at 54, 143.

involvement. The goal was to redistribute power over decision-making and thereby ensure more egalitarian outcomes.[151] They imagined a society of citizens whose equality was guaranteed by their "direct and active participation" in the governance process.[152] Writing for the *Independent* in 1918, Dewey explained:

> [I]n Great Britain and this country, . . . the measures taken for enforcing the subordination of private activity to public need and service have been successful only because they have enlisted the voluntary coöperation of associations which have been formed on a non-political, non-governmental basis, large industrial corporations, railway systems, labor unions, universities, scientific societies, banks, etc.[153]

Tripartism became an increasingly attractive institutional form. Throughout the pre-New Deal period, Dewey, along with Commons and others, advocated for shared power between labor, business, and the public through boards and councils.[154] They recognized that, to succeed, tripartism required not only voluntarism but also active state support for associational life, and worker organization in particular.[155] Dewey wrote: "It does not intimate that the function of the state is limited to settling conflicts among other groups, as if each one of them had a fixed scope of action of its own."[156] Herbert Croly went so far as to argue what would in today's discourse be unthinkable: that "the non-union industrial laborer should, in the interest of a genuinely democratic organization of labor, be rejected."[157] Moreover, reformers envisioned an expansive sort of tri-

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151. *See, e.g.*, *id.* at 73; *see also* BRAND, *supra* note 130, at 52 (describing Dewey's commitment to encouraging broad participation in economic decision-making in order to achieve fundamental structural changes in the economy); WESTBROOK, *supra* note 138, at 434-39 (discussing Dewey's efforts to develop a workable form of democratic socialism).

152. WESTBROOK, *supra* note 138, at 188.

153. John Dewey, *What Are We Fighting for?*, INDEPENDENT (N.Y.C.), June 22, 1918, at 474, 482.

154. JOHN R. COMMONS, MYSELF 153 (1934); COMMONS & ANDREWS, *supra* note 144, at 66-67; Dewey, *supra* note 153, at 482; *see also* BRAND, *supra* note 130, at 50 (describing Dewey's evolving views on corporatism). Labor corporatism was embraced by British intellectuals at the time as well, for similar reasons. *See generally* G.D.H. COLE, LABOUR IN THE COMMONWEALTH: A BOOK FOR THE YOUNGER GENERATION (1918); HAROLD J. LASKI, THE STATE IN THE NEW SOCIAL ORDER (1922). On the parallels between American progressivism and European social democracy more generally, see KLOPPENBERG, *supra* note 32; and RODGERS, *supra* note 32.

155. BRAND, *supra* note 130, at 50-51, 80; WESTBROOK, *supra* note 138, at 439; Rogers M. Smith, *The Progressive Seedbed: Claims of American Political Community in the Twentieth and Twenty-First Centuries*, *in* THE PROGRESSIVES' CENTURY, *supra* note 146, at 264, 269-70.

156. DEWEY, *supra* note 138, at 73; *see also* BRAND, *supra* note 130, at 52.

157. HERBERT CROLY, THE PROMISE OF AMERICAN LIFE 387 (1918); *see id.* at 39, 138-39, 277, 386-87; Herbert Croly, *The Future of the State*, NEW REPUBLIC, Sept. 15, 1917, at 179; *see also* BRAND,

partism—a system of social democracy not limited to a narrow set of issues. Tripartism was instead a way of governing the economy more broadly. And they saw no divide between individual employment rights and collective labor action, nor did they confine labor law to collective bargaining. Commons, for example, defined the field of labor relations to include not only bargaining rights and wages, but also benefits, social security, and even corporate governance. In his view, active involvement of representatives of employers, workers, and the public would lead to better-formulated and better-enforced legislation and less ex post litigation, while also advancing fundamental democratic aims.[158] Over time, the more radical democratic Progressives like Dewey also became convinced that the ability to take direct political action, through strikes and other collective action, was an essential part of achieving a democratic political economy; deliberation alone was insufficient.[159]

Together, the Progressives and their contemporaries formed an intellectual world in which politics and the economy could not be disentangled and institutional reform of one entailed attention to the other. Their rich and sophisticated picture of political economy also enabled them to imagine institutional reforms that by contemporary lights might seem impossibly radical. But in this era of radical rethinking, proposals for tripartism and robust social democracy became possible, indeed plausible, ways of reorganizing American life.

B. Early Wage Boards

Change in the early twentieth century was not merely intellectual; across the country concrete reform began to be realized, especially at the state level. Pressed by reformers of different stripes, numerous states across the nation began to enact wage-and-hour legislation protecting women and children.[160] Contrary to

supra note 130, at 57-60 (describing Croly's rejection of "overbearing legalism" and embrace of a more communitarian philosophical framework). Croly was more committed than Dewey to administration by technocrats and experts. Joel M. Winkelman, *Herbert Croly on Work and Democracy*, 44 POLITY 81, 99-100 (2012). Yet, he too was convinced that state building had to occur in conjunction with association building and that the latter project could both assist and constrain the state. BRAND, *supra* note 130, at 58, 70.

158. Kaufman, *supra* note 42, at 23.

159. JOHN DEWEY, LIBERALISM AND SOCIAL ACTION 93 (1935); STEARS, *supra* note 138, at 96-99.

160. Nebraska was first to propose a state minimum wage statute in 1909, and it ultimately passed the law in 1913; Massachusetts enacted its minimum wage law in 1912; California, Oregon, and Washington quickly followed with stronger statutes in 1913. GLICKMAN, *supra* note 124, at 135; William P. Quigley, *"A Fair Day's Pay for a Fair Day's Work": Time to Raise and Index the Minimum Wage*, 27 ST. MARY'S L.J. 513, 531-32 & nn.9-15 (1996); Clifford F. Thies, *The First Minimum Wage Laws*, 10 CATO J. 1 (1991); *see also* FINK, *supra* note 148 (describing the role

conventional wisdom, these laws were not simply about guaranteeing subsistence, nor were they conceived as guaranteeing individual rights. While more conservative, middle-class reformers viewed minimum wage and maximum hours legislation as ways to ensure subsistence for women workers, labor leaders and leftist feminist reformers, including the NCL's leaders, hoped that these laws would begin a transformation toward greater social and political equality.[161] From the outset, the efforts to pass wage-and-hour legislation were intertwined with collective labor activity. For example, the dramatic textile strike in Lawrence, in which women workers played a prominent role, aided passage of the very first minimum wage law in Massachusetts in 1912.[162] Indeed, the NCL, known primarily for its commitment to improving minimum conditions for women and children, was fiercely committed to the principle of organizing workers, despite intransigence from the AFL.[163] Feminist-socialist reformers like Florence Kelley, who served as General Secretary of the NCL, saw wage-and-hour laws and the industry commissions as means to achieve economic safeguards for women while building a nascent form of representation in industry for women.[164] In briefs to the Supreme Court and in public statements, NCL

of labor in Progressive Era experiments); JEROLD L. WALTMAN, THE POLITICS OF THE MINIMUM WAGE 11-15 (2000) (describing the role of the NCL in advocating for minimum wage laws). Not all women reformers at the time supported gender-specific protective legislation; deep divisions existed between the Women's Party, for example, which opposed sex-based laws, and the NCL, which saw the gender-specific legislation as a step towards broader legislation. Exploration of the relationship between feminism and labor rights is beyond the scope of this Article. For further discussion of these issues, see STORRS, *supra* note 126, at 43-59, 287-92 nn.7-61.

161. WALTMAN, *supra* note 160, at 53; *see also* GLICKMAN, *supra* note 124, at 21, 61-77, 131-32, 136-40 (analyzing the differences between labor and middle-class conceptions of a living wage).

162. STORRS, *supra* note 126, at 46. The Lawrence textile strike began when textile employers cut women workers' pay in response to a state law requiring a shorter workweek. Led by the Industrial Workers of the World, almost thirty thousand workers, many of them women and immigrants, walked off their jobs. The strike lasted more than two months, through brutally cold weather, with workers at nearly every mill in Lawrence participating. *See* Ardis Cameron, *Bread and Roses Revisited: Women's Culture and Working-Class Activism in the Lawrence Strike of 1912*, *in* WOMEN, WORK AND PROTEST: A CENTURY OF U.S. WOMEN'S LABOR HISTORY 42, 43-46 (Ruth Milkman ed., 1985).

163. *See* STORRS, *supra* note 126, at 46; *see also* PHILIP S. FONER, WOMEN AND THE AMERICAN LABOR MOVEMENT: FROM COLONIAL TIMES TO THE EVE OF WORLD WAR I 293, 301, 306-23 (1979) (discussing the Women's Trade Union League).

164. RODGERS, *supra* note 32, at 237-38.

leaders defended wage-and-hour laws, and tripartite boards in particular, as a way both to improve material conditions and to remedy power differentials.[165]

The experience of World War I, including the use of war labor boards, strengthened the resolve of Progressive union leaders and reformers who rejected the craft unions' antipolitical orientation. Having witnessed the significant impact the government could have on economic activity and industrial relations, Progressives deepened their commitment to achieving social democracy.[166] They began to advance even more ambitious political and social goals. In addition to new wage-and-hour laws, the United Mine Workers of America, for example, urged nationalization of the coal mines, public ownership of the railroads, legislation to make employer interference with unions a criminal offense, and national health insurance.[167]

Though unions suffered significant defeats and loss of membership during the 1920-22 depression,[168] minimum wage campaigns remained successful. By 1920, a total of thirteen states, as well as the District of Columbia and Puerto Rico, had enacted minimum wage programs.[169] By 1938, twenty-five states had some form of minimum wage law.[170] Unlike today's FLSA, nearly all of these early wage-and-hour statutes used some form of industry committee, modeled in part on Great Britain's wage boards, enacted just a few years prior.[171] The committees or wage boards required the participation of labor, business, and the public in the administrative process. For the feminist and Progressive reformers, wage boards reflected a commitment to direct worker participation in political decision-making. As Goldmark and Frankfurter wrote in their brief to the Supreme Court defending Oregon's minimum wage law:

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165. *Stettler* Brief, *supra* note 131, at 10-15, 29-32, 47-48, 686; 2 Brief for Defendant in Error at 332, 620, 943-59, Bunting v. Oregon, 243 U.S. 426 (1917) (No. 228); *Muller* Brief, *supra* note 131, at 11-12, 18, 47, 89; STORRS, *supra* note 126, at 47.

166. Montgomery, *Industrial Democracy*, *supra* note 143, at 35.

167. *Id.* at 36.

168. DUBOVSKY, *supra* note 24, at 87-97; MCCARTIN, *supra* note 143, at 221; Montgomery, *Industrial Democracy*, *supra* note 143, at 42.

169. Quigley, *supra* note 160, at 516 n.12.

170. *Id.* at 517 n.15.

171. *See* Frank T. de Vyver, *Regulation of Wages and Hours Prior to 1938*, 6 LAW & CONTEMP. PROBS. 323, 326-27 (1939); *see also* JOHN A. RYAN, A LIVING WAGE: ITS ETHICAL AND ECONOMIC ASPECTS 38-39, 315-18 (1906) (describing wage laws of New Zealand and Victoria, Australia); Harry Weiss, *British Wage Boards and the American Fair Labor Standards Act*, 47 AM. FEDERATIONIST 33, 34-35 (describing the British wage-board system); *House vs. Senate Version*, N.Y. TIMES, May 25, 1938, at 22 (noting that by 1938, tripartite committees were considered "the standard practice in State minimum wage laws"). *See generally* FINK, *supra* note 148 (emphasizing the international dimensions of the Progressive movement).

> Certain intangible results, equally as important as the wage determinations, have been brought about through the operation of the law. The method of administration—boards composed of employers, employees and representatives of the public—has brought employer and employee together on common ground and has given each a realization of the other's difficulties, while the employee has been made to feel her value as an individual to the community.[172]

For the fledgling industrial unions, the legislation was part and parcel of a "new unionism" that would transcend narrow class perspectives and help create a new political economy.[173] While the AFL's craft unions continued to focus on removing the state from union activity, the industrial unions saw wage laws generally, and the industrial commissions in particular, as a means of providing rights to all workers, while strengthening workers' collective power in the economy and in politics.[174]

The reaction from employers and the judiciary was strong and negative. Employers resisted unions intensely and courts frequently enjoined collective action among workers.[175] The Supreme Court even resisted the more modest goal of providing for subsistence wages, repeatedly striking down the early state wage-and-hour statutes, including most famously in *Lochner v. New York*[176] and *Adkins*

172. *Stettler* Brief, *supra* note 131, at 686 (quoting Caroline J. Gleason, *For Working Women in Oregon*, SURVEY, Sept. 9, 1916, at 586).

173. *See, e.g.*, FRASER, *supra* note 129, at 136, 171, 215-21; *cf.* FINK, *supra* note 148, at 96, 102-08, 111-16 (describing labor-movement ideology and its relationship to Progressive Era experiments with industrial commissions and dispute resolution from 1880 to 1920).

174. *See* FINK, *supra* note 148, at 96, 102-08, 111-16; FORBATH, *supra* note 28; FRASER, *supra* note 129; GLICKMAN, *supra* note 124, at 61-77; 2 SCHLESINGER, *supra* note 122, at 141-42. The AFL's skepticism was both ideological and practical. As the AFL pointed out, some of the early wage boards actually constrained unions' power. Colorado's board, for example, was empowered to enjoin strikes. *See* Earl Hoage, *Meeting Wage Cuts in Colorado*, 38 AM. FEDERATIONIST 1332, 1332-34 (1931).

175. *See* TOMLINS, *supra* note 126; Forbath, *supra* note 126. For an example of judicial resistance, see *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 233, 253 (1917), which sanctioned yellow-dog contracts that authorized employers to insist on pledges by their workers not to join a union as a condition of employment, thus making it impossible to organize without the consent of target firms. For a history of the success of lawyers litigating against labor on behalf of the American Anti-Boycott Association, see DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM (1995).

176. 198 U.S. 45 (1905). For background on the *Lochner* Era, see, for example, HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE (1935); and PAUL KENS, *LOCHNER V. NEW YORK*: ECONOMIC REGULATION ON TRIAL (1998).

v. Children's Hospital.[177] Importantly, however, the Court's concern was not that the laws delegated authority to private organizations. Indeed, between the end of the nineteenth century and the beginning of the twentieth, states and localities delegated lawmaking power to associations of citizens in a range of ways—often to groups of businesses or property owners—and courts upheld nearly all such mechanisms.[178] According to historian James Willard Hurst, "[b]elief in the release of private individual and group energies . . . furnished one of the working principles which give the coherence of character to our early nineteenth-century public policy."[179] Instead, the *Lochner* Court struck down the law at issue for a different reason: it purportedly interfered with employers' freedom to contract with their employees, and thereby violated liberty interests protected by the Fourteenth Amendment's Due Process Clause.[180] Nonetheless, numerous laws escaped or survived the Court's review, including laws regulating conditions of women and children in dangerous workplaces,[181] as well as some maximum hour legislation[182] and workers' compensation laws.[183] In short, though the

177. 261 U.S. 525 (1923).

178. *See, e.g.*, Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 531 (1917) (upholding an ordinance prohibiting billboards except upon permission of a majority of neighboring property owners); St. Louis & Iron Mountain Ry. v. Taylor, 210 U.S. 281, 287 (1908) (upholding a statute authorizing a private railway association to establish standard drawbar heights); Butte City Water Co. v. Baker, 196 U.S. 119, 125-28 (1905) (upholding a statute making rules developed by miners binding on all mining claims); *Ex parte* Gerino, 77 P. 166 (Cal. 1904) (upholding a statute empowering private medical societies to name the members of the state Board of Medical Examiners). For further discussion of the role of private delegation in the nineteenth and early twentieth centuries, see MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD (2002); Elisabeth S. Clemens, *Lineages of the Rube Goldberg State: Building and Blurring Public Programs, 1900-1940*, *in* RETHINKING POLITICAL INSTITUTIONS: THE ART OF THE STATE 187 (Ian Shapiro et al. eds., 2006); Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 231-34 (1937); and Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1501-02 (2003). For background on a related transformation in American government, from profit-seeking officials to salaried ones, see PARRILLO, *supra* note 123.

179. JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 32 (1956).

180. *See Lochner*, 198 U.S. at 64.

181. *See, e.g.*, Muller v. Oregon, 208 U.S. 412 (1908); *see also* S. DOC. NO. 77-10, pt. 1, at 1 (1941).

182. *See* Bunting v. Oregon, 243 U.S. 426 (1917) (upholding an Oregon statute providing that, with certain exceptions, "[n]o person shall be employed in any mill, factory or manufacturing establishment in this state more than ten hours in any one day").

183. *See* Mountain Timber Co. v. Washington, 243 U.S. 219 (1917); Hawkins v. Bleakly, 243 U.S. 210 (1917); N.Y. Cent. R.R. v. White, 243 U.S. 188 (1917). For a discussion of the development

Court's formalistic approach to liberty posed a significant obstacle, reformers throughout the nation successfully persisted in experimenting with new forms of labor regulation, including approaches that brought worker organizations into administration while guaranteeing substantive rights.[184]

C. NIRA and Its Demise

The economic crisis of the 1930s offered a unique opportunity for institutional experimentation and the first major federal attempt at tripartism. Initially, as the Depression worsened, public support for wage-and-hour laws increased, along with public opposition to judicial intervention.[185] The AFL came to support, albeit tepidly, generally applicable wage-and-hour laws,[186] while leaders of the newer industrial unions like Sidney Hillman, president of the garment workers' union, and John Lewis, President of the United Mine Workers and soon-to-be head of the emerging Congress of Industrial Organizations (CIO), openly sought to harness state power to guarantee a set of social and economic rights for all workers, including women, immigrants, and African Americans.[187] Economists and economic elites more generally also began to support a minimum

of workmen's compensation law and the relationship between tort law and the emerging regulatory state, see JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2004).

184. For work that complicates the "era of *Lochner*" narrative, demonstrating the extent to which law and regulation persisted despite the Court's formalistic laissez faire jurisprudence, see BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT (1998); NOVAK, *supra* note 123, at 245-48, 308; and Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63, 84 (1985). *Cf.* DAVID E. BERNSTEIN, REHABILITATING *LOCHNER* (2011) (arguing that *Lochner* was well grounded in precedent and has been unfairly maligned).

185. *See* LIZABETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919-1939 (1990).

186. *See* PAULSEN, *supra* note 26, at 30-31.

187. *See* FRASER, *supra* note 129, at 259-323 (discussing Hillman's role in the early New Deal administration, as well as his recognition that state intervention could only work if combined with militant organizing); GARY GERSTLE, AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY 154 (2001) (discussing the CIO's commitment to racial inclusion); LICHTENSTEIN, STATE OF THE UNION, *supra* note 30, at 42-46 (discussing Lewis and Hillman's desire to push the New Deal toward an embrace of social democratic politics); Forbath, *supra* note 120, at 70-71 (describing the CIO's call for jobs, security, and industrial democracy as every citizen's right); *cf.* GLICKMAN, *supra* note 124, at 156 (arguing that labor came to see a republican language of politics as consistent with an emphasis on wages and consumption). *But see* TOMLINS, *supra* note 126, at 243 (arguing that government support ultimately undermined worker power).

wage on the theory that it would lead to more robust consumption and a healthier economy.[188]

Reform, however, would soon go beyond a minimum wage and embrace a dramatic rearrangement of economic power. NIRA, passed in June 1933, was President Roosevelt's response to the demand for a new framework of social and economic rights—the centerpiece of his initial New Deal.[189] Notably, NIRA did not attempt to set a national minimum wage, nor did it create an independent board of experts to set and administer a wage. Rather, it delegated to associations of workers and businesses the role of policy making and allowed those groups to play a representative role, subject to presidential approval. Specifically, NIRA enabled trade associations and unions to negotiate entire industries' codes of conduct, which were then to be approved by the President. If a trade association failed to adopt a code, the National Recovery Administration (NRA) itself could do so.[190] At the same time, the law protected workers' right to organize and bargain collectively.[191] In so doing, NIRA realized a long-held dream of Progressive reformers—a direct and institutionalized role for labor in the administrative state. These intellectuals and labor leaders had profoundly influenced President Roosevelt's initial approach to economic regulation.[192] But those who urged tripartism leading up to the New Deal were not all on the left. Centrists believed that some scheme of business-government cooperation could further industrial peace.[193] And on the right, though many business leaders opposed any expansion of the administrative state and infringement on their right to contract, others believed that business benefited from a greater formal role in governing decisions.[194]

NIRA capitalized on such broad political support to inaugurate the most ambitious experiment in tripartism in American history.[195] The new statute had a significant impact on workers' wages and workers' power. In 1932, prior to the statute's enactment, unions suffered from declining membership, little economic

188. GLICKMAN, *supra* note 124, at 147-48, 155.

189. National Industrial Recovery Act, ch. 90, § 1, 48 Stat. 195, 195 (1933).

190. *Id.* § 3(d), 48 Stat. at 196.

191. *Id.* § 7(a), 48 Stat. at 198-99.

192. Corporatism undergirded corporate and antitrust theory and policies of the era as well, with Roosevelt Administration officials arguing for a system of fair competition, not just free competition, and—in the context of corporate law—in favor of a system of community and social obligations. Wachter, *supra* note 25, at 593-97.

193. HAWLEY, *supra* note 30, at 13.

194. *Id.*

195. BRAND, *supra* note 130, at 92.

power, and niche involvement in the economy.[196] After enactment, they saw a rapid gain in membership,[197] increasing thirty-three percent in just the two years that NIRA was in operation.[198] New industrial unions offered a sweeping vision of economic democracy and began to organize aggressively. The law facilitated their efforts: section 7(a) provided a right to organize and prohibited interference by employers.[199] Moreover, to be approved, industry codes "had to meet specific conditions regarding the rights of employees to participate in union activities."[200] NIRA thus legitimized unions, making them central actors on the national political and economic stage. Unions capitalized on this position, campaigning with the slogan that "[t]he President wants you to unionize."[201]

At the same time, however, NIRA had significant problems that frustrated its redistributive aims. The statute lacked procedures to sufficiently cabin the influence of the most powerful economic actors. Corporations used the code process, which covered prices and industry practices, as well as wages, to gain advantage against business competitors.[202] They also were loath to deal with unions, shutting them out of decision-making processes with no penalty. Making matters worse, the statute lacked a clear egalitarian mission to guide agency and committee action; it established no clear benchmarks for wage increases or employment rights; and it lacked effective enforcement mechanisms. Initial wage rates were low, barely improving conditions for workers and producing significant frustration in labor circles.[203] Even before the Court invalidated NIRA, the Act was collapsing under its own weight.[204]

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196. Wachter, *supra* note 25, at 588.

197. *Id.*; *see* IRVING BERNSTEIN, A HISTORY OF THE AMERICAN WORKER 1933-1943: TURBULENT YEARS 37-125 (1970) (summarizing unionization campaigns provoked by the passage of section 7(a) of NIRA); FRASER, *supra* note 129, at 290 (describing Hillman's commitment to organizing in the wake of NIRA).

198. Wachter, *supra* note 25, at 604.

199. National Industrial Recovery Act, ch. 90, § 7(a), 48 Stat. 195, 198-99 (1933).

200. Wachter, *supra* note 25, at 601.

201. *Id*. at 602; *see also* BRAND, *supra* note 130, at 237-40 (describing how the mineworkers capitalized on the NRA and emphasizing Roosevelt's interventions on their behalf); FRASER, *supra* note 129, at 290, 295-96 (detailing organizing by garment workers following NIRA's enactment).

202. BRAND, *supra* note 130, at 94-95.

203. FRANCES PERKINS, THE ROOSEVELT I KNEW 224 (1946).

204. BRAND, *supra* note 130, at 94-95; HAWLEY, *supra* note 30, at 130; Wachter, *supra* note 25, at 604; *see also* Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 241-42 (1994) ("When the Supreme Court invalidated the NIRA in May of 1935, the program had few friends, and prospects for congressional extension of its two-year charter were gloomy.").

In *A.L.A. Schechter Poultry Corp. v. United States*, the Court brought NIRA to a conclusive end.[205] The Court's holding focused on excessive delegation from Congress to the executive branch, and not on executive delegation to citizen associations.[206] In particular, the Court objected to section 3 of the statute, which allowed the President to give industry-developed codes of fair competition the force of law, holding that the provision ceded too much legislative power to the President.[207] Writing for the majority, Chief Justice Hughes explained that Congress had provided no meaningful standards to restrict the President's discretion, leaving industry to "roam at will and the President [to] approve or disapprove their proposals as he may see fit."[208] Justice Cardozo, ordinarily a champion of Progressive causes, concurred: "No such plenitude of power is susceptible of transfer."[209]

Despite its focus on interbranch delegation, the *Schechter Poultry* Court also gave various indications that tripartism raised constitutional concerns. The majority emphasized that NIRA did not follow the traditional independent commission model,[210] and it worried that the industry codes bound even those parties that failed to assent.[211] Justice Cardozo again agreed on this point, noting, "[A]nything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot."[212]

Shortly thereafter, in *Carter v. Carter Coal Co.*,[213] the Court rejected tripartite bargaining more directly. It struck down a law enabling a majority of the coal miners and large coal producers in a region to negotiate binding wage-and-hour standards for all regional miners and producers. According to the Court, the law constituted a most "obnoxious" legislative delegation because it allowed the majority of coal producers and miners in the industry to bind other private parties "whose interests may be and often are adverse to the interests of others in the

205. 295 U.S. 495 (1935).

206. *Id.*; *cf.* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928).

207. *Schechter Poultry*, 295 U.S. at 537-39.

208. *Id.* at 538.

209. *Id.* at 553 (Cardozo, J., concurring).

210. *Id.* at 533 (majority opinion); *see also id.* at 537 ("Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives . . . of Congress.").

211. *Id.* at 529.

212. *Id.* at 553 (Cardozo, J., concurring).

213. 298 U.S. 238 (1936).

same business."[214] "The delegation is so clearly arbitrary," wrote Justice Sutherland, "and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question [of its constitutionality]."[215] According to the Court, "in the very nature of things, one person may not be entrusted with the power to regulate the business of another."[216] Permitting a majority of private participants in an industry to determine the rules for the minority constituted a "clearly arbitrary" delegation of power that interfered with personal liberty and private property in violation of due process.[217] After *Carter Coal*, the doctrinal viability of tripartism, its political appeal notwithstanding, was in serious doubt.

III. FLSA'S AMBITION AND ITS INDUSTRY COMMITTEES

For many commentators, the invalidation of NIRA and other early New Deal efforts represents a critical turning point—the end of the nation's brief experiment with a method of governance that formally involved labor in the development of economic policy.[218] Labor scholars have demonstrated that, in enacting the Wagner Act of 1935, the labor movement and its allies in government sought similar ends through different means.[219] But studying the Wagner Act on its own

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214. *Id.* at 311.

215. *Id.*

216. *Id.*

217. *Id.* The Court also held that the Bituminous Coal Conservation Act exceeded Congress's commerce power because it regulated intrastate coal production. *Id.* at 308-10. With respect to its Commerce Clause holding, *Carter Coal* is widely considered to have been abrogated. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). The Court's evolution on private delegations and tripartite bargaining, as well as on the Commerce Clause and the right to contract, is discussed *infra* Section III.B.3 and notes 405, 430 and accompanying text.

218. *See supra* notes 22-31 and accompanying text. While the legal literature emphasizes the rejection of corporatism, historians have underscored the continued importance of tripartite structures during World War II and in particular industries. *See* HAWLEY, *supra* note 30, at 187-280; LICHTENSTEIN, STATE OF THE UNION, *supra* note 30, at 100-03; *see also supra* notes 24, 30 and accompanying text.

219. *E.g.*, Barenberg, *supra* note 28, at 1412-27 (emphasizing continuity between Dewey's ideas and Senator Wagner's normative understanding of collective bargaining, which aspired to achieve industrial democracy and an egalitarian employment relationship); Forbath, *supra* note 120, at 60-61 & n.265 (detailing the citizenship rights-based arguments for the Wagner Act); William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 174-75 (2001) (describing New Dealers' efforts, through the NLRA, to achieve "democratic, not juridical, construction of the ground rules of economic life"); *cf.* James Gray Pope, *Labor's Constitution of Freedom*,

yields a blinkered picture of labor law at the time, making it seem privatized and voluntarist. By contrast, examining FLSA alongside the NLRA produces a different vision.[220] Far more explicitly than the NLRA, FLSA's first incarnation embodied a commitment to directly involving worker organizations in governance—and to enabling unions to bargain for all workers. Indeed, many commentators at the time saw FLSA as a direct outgrowth of NIRA and tripartite models abroad.[221]

More generally, contemporaries understood FLSA not as an unambitious and minimalistic statute as oft-described today, but rather as part of a broader social democratic project aimed at shifting power over the economy. FLSA's advocates aspired to universalize labor rights, rejecting the line between the collective and the individual, and they sought to democratize governance and the economy. The statute ultimately fell short of these aspirations, but it nonetheless created a dialectic between popular mobilization and regulation. The regime achieved, in limited form, an approach to administration that married the substantive ends of empowering worker organizations and guaranteeing worker rights to procedural means that solicited and enabled those same organizations' participation in governance.[222] The passage, operation, and demise of FLSA's industry committees are well worth revisiting: they offer a picture of an effective tripartite institution whose birth and death were products of changing and changeable political forces.

106 YALE L.J. 941 (1997) (detailing laborers' invocation of constitutional freedoms, especially those of the Thirteenth Amendment); James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1 (2002) (lamenting the use of the Commerce Clause instead of the Reconstruction Amendments as the basis for upholding the NLRA).

220. *See supra* notes 40-42 and accompanying text (describing the relative lack of attention to FLSA in the literature).

221. *See* John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 464 (1939) ("The roots of the Federal Fair Labor Standards Act of 1938 are deep in a movement that extends back over a period of years, yet it is evident that the closest relationship exists with the wage and hour standards established under the National Industrial Recovery Act." (footnote omitted)); *The New NRA*, NEW REPUBLIC, June 2, 1937, at 88, 88 (emphasizing the relationship of the draft bill to NIRA and to the British model). Efforts to continue tripartism were not limited to FLSA. *See* JAMES GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW (1974) (noting that the NLRB initially employed a soft form of tripartism).

222. For an excellent examination of another way in which labor and its allies pursued a more social democratic approach to regulation during this period, see KLEIN, *supra* note 45, at 158-61 which shows that labor saw health security as part of a broader economic security project and sought universal health benefits and participation rights in elaboration of those programs.

A. The Legislative Debate

Following the enactment of the Wagner Act and amid massive CIO organizing drives, President Roosevelt made both economic security and collective labor rights a key part of the 1936 Democratic Platform and his subsequent program.[223] After a year of CIO-led strikes,[224] President Roosevelt's Solicitor General, Robert Jackson, declared in 1938 that the Administration's goals included "the ending of the oppression of starvation wages and sweatshop hours" as well as "collective bargaining for labor."[225] Ending these practices, the Roosevelt Administration claimed, entailed protecting interrelated workplace rights that belonged to all Americans.

The Fair Labor Standards Act was, in the view of President Roosevelt and his labor secretary Frances Perkins, a critical next step in that process. Supporters of FLSA in the Administration and beyond hoped it would do more than what it does today, ensure subsistence-level wages. Rather, the bill's drafters saw it as a way to deliver on a set of "fundamental rights"[226] and to ensure a "system of basic equality, extending into political, economic, and social realms."[227] In a significant departure from the modern view of FLSA, the bill's supporters saw its guarantee of individual rights as part of a broader project in democracy.[228] Indeed, FLSA's backers in Congress expressly claimed that the law would expand the role of unions in politics and the economy, particularly in the nonunion South, and would provide a minimalist surrogate labor union for still-unor-

223. Franklin D. Roosevelt, "We Are Fighting to Save a Great and Precious Form of Government for Ourselves and the World"—Acceptance of the Renomination for the Presidency, Philadelphia, Pa. (June 27, 1936), *in* 5 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 230, 232-34 (Samuel I. Rosenman ed., 1938); *see* JACOBS, *supra* note 45, at 150-53; KLEIN, *supra* note 45.

224. KATZNELSON, *supra* note 36, at 273 (describing the sit-down strikes of 1937).

225. RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 27 (2007) (quoting Robert H. Jackson, *The Call for a Liberal Bar*, 1 NAT'L LAW. GUILD Q. 88, 88-91 (1938), *reprinted in* THE NATIONAL LAWYERS GUILD: FROM ROOSEVELT THROUGH REAGAN 23-24 (Ann Fagan Ginger & Eugene M. Tobin eds., 1988)).

226. 83 CONG. REC. 7310 (1938) (statement of Rep. William Fitzgerald) ("The wage and hour bill is an honest and sincere effort to meet and not to avoid the just demands of the workingman that his fundamental rights be observed.").

227. *Id.* at 7312 (statement of Rep. William Sirovich); *see also id.* at 7311 (arguing that the bill embraced a civilized capitalism based on firm economic rights of citizenship).

228. *See, e.g.*, *id.* at 7322 (statement of Rep. Herbert Bigelow) (stating that the "very life of the Nation as a democracy depends on this bill").

ganized workers.[229] Senator David Walsh, chairman of the Labor Committee and a Democrat from Massachusetts, announced that "the Government is attempting to set up machinery which . . . ought to be helpful in providing collective bargaining through a Government agency for the men and women who are not organized."[230] In his view, FLSA promised that unorganized workers "will not be left helpless . . . . We will see to it that you, too, are given some of the benefits and some of the privileges of collective bargaining."[231]

Labor generally embraced FLSA's approach, though not without important exceptions. In particular, the AFL sought to exempt unionized workplaces from coverage under FLSA, on the ground that labor conditions were better left to private negotiation than to governmental supervision.[232] But the CIO and leaders of the industrial unions lauded the more universal and social democratic approach. They welcomed the idea of an intertwined labor and employment law; in their view, FLSA would serve as a mechanism to enhance collective bargaining and help reduce downward wage pressure on organized shops.[233] Sidney Hillman, for example, argued that in industries such as textiles, garments, and shoes, private collective bargaining could not cover the whole industry, and the only way to raise standards uniformly was to have it done by the government. Forcing high standards on a few employers at a time would drive those employers out of business before the rest of the industry could be effectively organized.[234]

Liberal voices in the contemporary press adopted a similar position. The editorial board of the *New Republic*, for instance, wrote in support of FLSA:

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229. *Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the S. Comm. on Educ. & Labor and the H. Comm. on Labor, Part 1*, 75th Cong. 180-82 (1937) [hereinafter *Joint Hearings on the Fair Labor Standards Act of 1937*] (statement of Frances Perkins, Secretary of Labor); 81 CONG. REC. 7800 (1937) (statement of Sen. David Walsh); Marc Linder, *The Minimum Wage as Industrial Policy: A Forgotten Role*, 16 J. LEGIS. 151, 161 & n.60 (1990). The need to shore up collective bargaining was apparent to the Administration; by this point, the NLRB was already under fire from conservatives, and President Roosevelt's power was waning. ERNST, *supra* note 44, at 63, 75, 101-04; BARRY D. KARL, THE UNEASY STATE: THE UNITED STATES FROM 1915 TO 1945, at 168-69 (1983); PERKINS, *supra* note 203, at 256-61.

230. 81 CONG. REC. 7652 (1937) (statement of Sen. Walsh).

231. *Id.* at 7800.

232. *See* PAULSEN, *supra* note 26, at 83, 89; PERKINS, *supra* note 203, at 258; Murray Edelman, *New Deal Sensitivity to Labor Interests*, *in* LABOR AND THE NEW DEAL 157, 188 (Milton Derber & Edwin Young eds., 1957); Samuel, *supra* note 128, at 35-36.

233. *See* PAULSEN, *supra* note 26, at 83, 89; Forsythe, *supra* note 221, at 467; Samuel, *supra* note 128, at 32-34. All of the CIO unions favored higher rates and fewer exemptions. Notably, they did not favor tying minimum wage increases to the cost of living as they believed that would "forever shackle" labor to its current status. *League Favors New Wage-Hour Measure*, CIO NEWS, Apr. 9, 1938, at 2.

234. PAULSEN, *supra* note 26, at 89; Forsythe, *supra* note 221, at 478.

> [T]here are other industries and regions where, for one reason or another, unions cannot make much headway, or severe competition prevents localized advances, and where as a consequence the conditions of labor lag behind the general standards. It is desirable to aid the workers in these sweated industries for their own sakes.[235]

FLSA had to be understood in conjunction with the Wagner Act, the *New Republic* editors continued, since real gains in wages and administration could only be made with strong labor organizations.[236] The editorial board of the *Nation* similarly emphasized the relationship of the draft bill to collective bargaining, concluding that the AFL approach of keeping all labor relations private had been "discarded" and that "[t]he new labor movement recognizes that government has a useful function in providing the machinery for collective bargaining."[237]

FLSA's procedural mechanisms reflected these commitments.[238] From the beginning, the draft bill included tripartite committees of labor, business, and the public in order to engage affected parties in the governance process and to extend collective bargaining through employment law.[239] Initially, tripartism was available on an optional basis; the first draft bill provided for an independent

235. *The New NRA*, *supra* note 221, at 88-89.

236. *Id.* at 89 ("More important still, the administration of the NRA proved again what the experience of other nations had shown, that real and permanent gains could be made only when labor organization was strong enough and well enough led to achieve good conditions and enforce them in practical administration.").

237. *Ceiling and Floor*, NATION, Dec. 11, 1937, at 632-33; *see also A White Milestone for Labor*, NEW REPUBLIC, June 22, 1938, at 174 ("Once again, the American people through their Congress have recognized a collective responsibility in regard to a matter heretofore considered a private and personal affair between worker and boss.").

238. Between the first draft of the Black-Connery bill in 1937 and the subsequent enactment of FLSA thirteen months later, Congress reworked the entire statute about ten times and its administrative procedures at least five times. Forsythe, *supra* note 221, at 466, 475; *see also* PAULSEN, *supra* note 26, at 82-129 (providing a detailed description of FLSA's legislative history and of the unexpected difficulties Roosevelt faced in passing the bill).

239. *See, e.g.*, 81 CONG. REC. 7798-7800 (1937) (statement of Sen. Walsh); PAULSEN, *supra* note 26, at 84-86. Writing years later and reflecting on NIRA, Perkins explained her belief in including union leaders in administration: "Some industries had labor well organized. If they did not have large membership, at least they had a corps of thoughtful, competent people able to see better than any government economist what the terms of a code ought to be." PERKINS, *supra* note 203, at 224. Perkins was influenced by Dorothy Sells, an expert in the British model, who argued that granting power to administrators alone was paternalistic; in Sells's view, the process of tripartite administration in Britain had helped promote collective bargaining, as well as industrial peace and compliance with law. *See* PAULSEN, *supra* note 26, at 84. *See generally* DOROTHY SELLS, BRITISH WAGE BOARDS: A STUDY IN INDUSTRIAL DEMOCRACY (1939) (providing background on Sells's views on collective bargaining and wage boards).

board that could, in its discretion, appoint an advisory committee.[240] But the debate soon pushed in favor of industry committees with greater power.[241] Congress ultimately settled on a mandatory tripartite system modeled on a New York statute that had been struck down in *Morehead v. New York ex rel. Tipaldo*—one of the last of the *Lochner* Era cases.[242] According to members of the conference committee, mandatory industry committees consisting of unions, business, and the public would serve as a democratic check on power delegated to the FLSA Administrator and would guard against arbitrariness in regulation.[243]

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240. Forsythe, *supra* note 221, at 466, 475. Subsequent drafts replaced the independent board as numerous senators expressed concern about so much power being granted to an independent administrative board. *Id.* at 475-76; *see also, e.g.*, 81 CONG. REC. 7793-94 (1937) (statement of Sen. William Borah) ("I have a very strong feeling that the employees of this country, who most need protection, will never see the proposed board, and the board will never see them . . . ."). AFL President William Green, who viewed the NLRB as too sympathetic to the CIO, drafted a letter announcing the bill had lost his support because of its use of an independent board. *Green Urges Halt on Wage-Hour Bill*, N.Y. TIMES, Nov. 23, 1937, at 1.

241. The AFL's worries about an overempowered agency resulted in its support for mandatory committees. Forsythe, *supra* note 221, at 477. Ironically, Southern Democrats who opposed FLSA altogether also temporarily lent their support to mandatory committees, opining that they would be more democratic. Senator Walter George, for example, a conservative Democrat from Georgia, argued that the advisory nature of the committee system was insufficient to render the scheme democratic; in his view, reports of an advisory committee were "immaterial . . . when it is written into the law that the board may reject the report of any advisory committee." 81 CONG. REC. 7785 (1937) (statement of Sen. George). His critique of the advisory committees did not indicate support for the bill, however. Senator George also opposed the bill on the ground that it gave government too much power to determine "life or death" of industry, and that it reached the agricultural industry despite purporting not to. *Id.* at 7785-89. For accounts of widespread Southern opposition to FLSA, see Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 STUD. AM. POL. DEV. 1, 14 (2005); and Robert K. Fleck, *Democratic Opposition to the Fair Labor Standards Act of 1938*, 62 J. ECON. HIST. 25, 31-32 (2002). *See also* PAULSEN, *supra* note 26, at 139 (describing industry efforts to obtain exemptions).

242. 298 U.S. 587 (1936); *see* S. DOC. NO. 77-10, pt. 1, at 18 (1941). In *Tipaldo*, the Court had suggested it might have upheld the New York law had the petitioners sought reversal of earlier precedent. 298 U.S. at 604-05. Just a year after *Tipaldo*, *Adkins* was overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), leading officials in the Roosevelt Administration to conclude that Chief Justice Hughes's dissent in *Tipaldo* must "be accepted as the law of the land." *Joint Hearings on the Fair Labor Standards Act of 1937*, *supra* note 229, at 11 (statement of Robert H. Jackson, Assistant Att'y Gen.).

243. H.R. REP. NO. 75-2738, at 31 (1938) (Conf. Rep.); *see also* 83 CONG. REC. 9163-64 (1938) (statement of Sen. Elbert Thomas) (describing reasoning of committee); Walter D. Murphy, *Federal Legislation: The Fair Labor Standards Act of 1938*, 27 GEO. L.J. 459, 461 (1939) ("This device was provided in order to protect employers and the public from arbitrary action by administrative officials and to remove any possibility of such action."). Some members of the legal academy were skeptical of this argument. *See, e.g.*, Z. Clark Dickinson, *The Organization and Functioning of Industry Committees Under the Fair Labor Standards Act*, 6 LAW & CONTEMP.

Unsurprisingly, industry groups like the Chamber of Commerce and conservatives in Congress vigorously opposed the goal of using FLSA to support a government-backed form of collective bargaining.[244] Many in the business community still objected to the very notion of legislating wages, but more specifically they rejected the committee system. They argued it would create a morass of government bureaucracy[245] and would be controlled by particular interests that could not possibly provide fair representation for all.[246]

Conservatives also framed their arguments in constitutional terms, focusing on claims about impermissible bureaucracy, forced representation, and excessive

PROBS. 353, 360 (1939) ("Although it is always the industry committee which proposes a wage order, the Administrator evidently has large indirect powers of initiative through his freedom of choice of committee men and his express power to reject the recommendations of any committee and to discharge that committee and appoint a new one for the same industry."). So were some Republicans. *See, e.g.*, 83 CONG. REC. 9258 (1938) (statement of Rep. Fred Hartley) (referring to the Administrator as an "industrial dictator . . . because he will have the authority to appoint industry committees . . . . If their conclusions do not suit him, he can fire them and appoint a new one . . . ."). Notably, the debate centered on the extent to which the industry committees would check the Administrator's power, not on how best to check arbitrary action. On that point, the industry committees were widely favored.

244. PAULSEN, *supra* note 26, at 88. Some members of the business community, in light of the broader political climate, concluded that minimum wage legislation was inevitable and the goal was to minimize its reach. PERKINS, *supra* note 203, at 257 (describing the political climate and resignation of industry to the bill). Others, particularly Northern business groups, supported the bill, recognizing that it would help reduce competition from low-wage Southern industries. PAULSEN, *supra* note 26.

245. *Joint Hearings on the Fair Labor Standards Act of 1937*, *supra* note 229, at 144 (statement of Paul S. Hanway, Executive Secretary-Treasurer, National Fibre Can and Tube Association) (warning of "innumerable complaints and delays originated solely to continue the paid employment of [the industry committees'] multitudinous staffs"); 83 CONG. REC. 9258 (1938) (statement of Rep. William Lambertson) (expressing concern that the FLSA Administrator would create hundreds of industry committees); *Dies Claims Votes to Beat Wage Bill by Recommittal*, N.Y. TIMES, Dec. 13, 1937, at 1 (reporting that many House leaders worried about "a quick growth of a cumbersome government wage supervision through scores of [industry] committees").

246. *Joint Hearings on the Fair Labor Standards Act of 1937*, *supra* note 229, at 144 (statement of Paul S. Hanway) (cautioning that "the scheme is bad. It lends itself to political pressure [and] it develops a type of pork-barrel regulation . . . . "); 82 CONG. REC. 1586 (1937) (statement of Rep. Francis Case) (arguing that industry committees "will be bodies of partisans contesting for the interests of the persons on the committees"); 81 CONG. REC. 7723 (1937) (statement of Sen. Arthur Vandenberg) (urging members of the Senate to recall how code committees under NIRA were dominated by large corporations at the expense of small businesses). Southern conservatives in particular worried they would lack representation on the committees, and Southern Democrats acceded only once they had assurances that the core Southern industries, employing black laborers, would be exempt. Farhang & Katznelson, *supra* note 241, at 14; Andrew Seltzer, *Causes and Consequences of American Minimum Wage Legislation, 1911-1947*, 55 J. ECON. HIST. 376, 377 (1995).

delegation. At the time, their strategy made sense: the Court's 1937 *NLRB v. Jones & Laughlin Steel Corp.* decision to uphold the NLRA limited the salience of Commerce Clause and liberty-of-contract arguments.[247] During legislative debates, conservatives thus emphasized the similarities between FLSA's industry committees and the two major pieces of tripartite New Deal legislation that had been struck down in *Schechter Poultry* and *Carter Coal* for violating the nondelegation and due process doctrines.[248] Supporters of FLSA countered that industry committees would operate within narrow constraints established by statute, unlike the committees at issue in *Schechter Poultry* and *Carter Coal*, and that the proposed Administrator of the Wage and Hour Division at the Department of Labor would retain ultimate veto power.[249] In short, tripartism could coexist

247. 301 U.S. 1 (1937).

248. The *New York Times* reported that many House leaders saw industry committees "as a step that would virtually revive the NRA system of codes as applying to wages and hours." *Dies Claims Votes to Beat Wage Bill by Recommittal*, *supra* note 245, at 1. The *Chicago Daily Tribune* reported that the wage bill would "reestablish a large part of the machinery of the defunct NRA." Arthur Sears Henning, *Slam Lewis; Pass Wage Act*, CHI. DAILY TRIB., June 15, 1938, at 1; *see also* Bernard Kilgore, *Modified "NRA" Codes Proposed by House Group*, WALL ST. J., Dec. 8, 1937, at 1 ("[T]he whole proposal strongly resembles the old NRA code-making machinery."). Representative Robert Ramspeck, Democrat from Georgia, for example, repeatedly argued that industry committees existed "outside any department of the Government," creating a situation

> similar to the Carter Coal case and to the code authorities under [the National Industrial Recovery Act], that is, delegation of power to an agency not within the Government, not an official of the Government, or not an agent of the Government. This goes beyond the power of Congress to delegate its authority.

82 CONG. REC. 1788 (1937) (statement of Rep. Ramspeck). This sentiment was widely shared among conservative members of the House. On more than one occasion Representative Ramspeck's argument was met with applause. *See, e.g.*, *id.* at 1498.

249. *Joint Hearings on the Fair Labor Standards Act of 1937*, *supra* note 229, at 10-15 (statement of Robert H. Jackson, Assistant Att'y Gen.); 83 CONG. REC. 9263 (1938) (statement of Rep. Hamilton Fish). In an attempt to win over his conservative colleagues, Representative Hamilton Fish noted that both the *New York Times* and "a conservative Republican paper," the *Boston Herald*, were cautiously in favor of the conference committee's bill. 83 CONG. REC. ,263 (1938) (statement of Rep. Fish); *see also id.* at 7302 (statement of Rep. Ramspeck)(reading a statement made to the subcommittee by Benjamin Cohen, an advisor to the President); S. Harold Shefelman, *Fair Labor Standards Act of 1938: The Recent Congressional Enactment Pertaining to Wages, Hours, and Child Labor*, 14 WASH. L. REV. & ST. B.J. 66, 80 (1939) ("It is to be noted that Congress heeded the admonition of Mr. Justice Cardozo in his concurring opinion in the *Schechter* case by setting up standards and guides for the determinations of the Industry Committees and of the Administrator."); Note, *Constitutional Aspects of the Fair Labor Standards Act of 1938*, 87 U. PA. L. REV. 91, 101 (1938).

with the Court's nondelegation jurisprudence, they successfully argued.[250] Ultimately, FLSA passed by a 291 to 89 vote in the House and a similar margin in the Senate, with the vote dividing more along North/South lines than Republican/Democrat lines. President Roosevelt signed the bill into law on June 27, 1938.[251]

B. Wage Boards in Operation

In its final version, the Fair Labor Standards Act of 1938 empowered tripartite negotiation on an industry-by-industry basis, within defined statutory limits. The Act defined universally applicable minimum wage requirements and an upper bound above which minimum wages could not rise.[252] But unlike the Act today, the enacted statute required a wage-and-hour administrator in the Department of Labor to appoint industry committees comprised of representatives from labor, business, and the public to set wages.[253] And unlike NIRA's committees, the FLSA committees were tasked with a clear goal: they were to propose industry-specific minimum wage standards, which could be greater than the universal minimum but less than the upper bound.[254] Also unlike under NIRA, big business did not have the upper hand—the committees were evenly divided among labor, business, and public representatives (who frequently supported labor).

The industry committees' task was thus substantially constrained by law—to set wages above a minimum but below a maximum by October 1945, when the forty-cent minimum wage figure would take effect automatically.[255] Yet

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250. Indeed, lawyers in the Roosevelt Administration had resisted the President's calls to simplify the bill with just this challenge in mind. PERKINS, *supra* note 203, at 261; Forsythe, *supra* note 221, at 467 n.21.

251. PAULSEN, *supra* note 26, at 128-29; President Franklin D. Roosevelt, Fireside Chat No. 13 (June 24, 1938), https://millercenter.org/the-presidency/presidential-speeches/june-24-1938-fireside-chat-13-purging-democratic-party [https://perma.cc/HAD7-3PNJ] (proclaiming that the law was perhaps "the most far-reaching, the most far-sighted program for the benefit of workers ever adopted here or in any other country").

252. Forsythe, *supra* note 221, at 478-97.

253. *Id.* at 477.

254. *Id.*

255. Section 8(a) stated the policy of the Act to reach forty cents per hour in each sector "as rapidly as is economically feasible without substantially curtailing employment," and section 8(b) required the boards to "recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry." Fair Labor Standards Act of 1938, ch. 676, § 8(a), (b), 52 Stat. 1060, 1064.

within these statutory limits, the tripartite committees had substantial authority. They were charged with making specific wage recommendations to the Administrator, who was then required to hold a public hearing and, as long as the recommendations were found to be in accordance with the statutory standards, was bound to adopt them.[256] Only if the recommendations failed to comply with the statute could the Administrator request that the committee reconsider, or appoint a new committee to make a new recommendation; and even then, the Administrator had no discretion to alter the committee proposal.[257]

The reaction to FLSA fell along predictable political and class lines. CIO unions and Progressives generally were disappointed with the final bill's low wage rates and exclusion of agricultural and domestic workers, but they agreed that the bill was a significant victory.[258] And despite the AFL's earlier reluctance, the more conservative Federation vied with the CIO in claiming responsibility for the law's passage.[259] Meanwhile, business, particularly from the South, continued to voice staunch opposition to the bill generally and to the wage committees in particular.[260]

1. *Who Speaks for Whom?*

Against this background, the Department of Labor and its wage committees began their work. At first, Elmer Andrews, the newly appointed Administrator of the Department's Wage and Hour Division, moved cautiously, appointing members to only seven industry committees by mid-June 1939.[261] When pressed by the garment unions, however, he included the textile industry; he then turned

256. Forsythe, *supra* note 221, at 482.

257. *Id.* at 482-83.

258. *See, e.g.*, *Ceiling and Floor*, *supra* note 237, at 632.

259. Samuel Herman, *The Administration and Enforcement of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 368, 377 (1939); *see also Labor's Power Seen in Wage-Hour Victory*, CIO NEWS, June 18, 1938, at 1; *Labor's Strength Wins Wage-Hour Bill Action: CIO Leads in Fight for Progressive Legislation*, CIO NEWS, May 7, 1938, at 1; *Predict Wage-Hour Bill Will Curb Sweatshops, Give Aid to Unions*, CIO NEWS, June 18, 1938.

260. *See infra* notes 289, 302-315, 319 and accompanying text.

261. John W. Tait, *The Fair Labor Standards Act of 1938*, 6 U. TORONTO L.J. 192, 208-09 (1945); *see also* Elmer F. Andrews, *The Tribulations of a Wage-Hour Administrator*, 4 PUB. OPINION Q. 25, 27-29 (1940) (describing the extensive process involved in establishing the first industry committee).

to tobacco, shoes, and hats, among others.[262] By the end of 1940, twenty committees had been established, primarily in large low-wage industries.[263]

Defining industries and ensuring fair representation—difficulties in any tripartite labor regime—presented a particular challenge for Andrews. The statute defined "industry" broadly as "a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed."[264] It left the Administrator almost total discretion to enumerate the industries.[265] Likewise, the Administrator was required to appoint employee, employer, and public members to the committees with "due regard to the geographical regions," but otherwise he had full discretion as to how to choose members.[266] Some worried that the discretion to define industries would result in a proliferation of committees, as in the case of NIRA, while the discretion to pick members would result in the committees becoming an arm of the Administrator.[267] In practice, however, Andrews and his successors prioritized both efficiency and principles of democratic engagement. They defined industries broadly to limit the number of committees, thereby avoiding some of the pitfalls of NIRA, and they sought input from stakeholders, as well as from economists, on the structure and scope of committees.[268] They appointed employee and employer members based on the suggestions made by trade unions and industry associations, choosing representatives with knowledge of and broad-based membership from the relevant

262. PAULSEN, *supra* note 26, at 135; Harold November, *Industry Committees Under the Fair Labor Standards Act*, 47 AM. FEDERATIONIST 271, 271 (1940).

263. John I. Kolehmainen & John C. Shinn, *Labor and Public Representation on Industry Committees*, 31 AM. LAB. LEGIS. REV. 175, 176 (1941); *see also* S. DOC. NO. 77-10, pt. 1, at 5 (1941) (describing establishment of ten committees as of February 12, 1940).

264. Fair Labor Standards Act of 1938, ch. 676, § 3(h), 52 Stat. 1060, 1060 (codified as amended at 29 U.S.C. § 203(h) (2018)).

265. *See id.* §§ 5(a), (b), 8(a), 52 Stat. at 1062, 1064; S. DOC. NO. 77-10, pt. 1, at 5-7; Elroy D. Golding, *The Industry Committee Provisions of the Fair Labor Standards Act*, 50 YALE L.J. 1141, 1151 (1941).

266. Fair Labor Standards Act of 1938 § 5(b), 52 Stat. at 1062; Dickinson, *supra* note 243, at 355-56.

267. *See* S. DOC. NO. 77-10, pt. 1, at 7 (describing how concerns regarding the experience of NIRA shaped the Administrator's approach to industry definition); Dickinson, *supra* note 243, at 360 (expressing concern that the law gave the Administrator too much power to shape the committees).

268. S. DOC. NO. 77-10, pt. 1, at 7-8 (contrasting the FLSA and NIRA approaches); Andrews, *supra* note 261, at 27 (describing the decision to form larger industry committees based on economists' advice and to solicit input from industry members).

workforce and industry.[269] The existence of robust labor unions and organized business groups made this approach feasible.

More specifically, on the employer side, Andrews sought to select members that would represent both a range of geographic interests and a range of industry segments; the more broadly defined industries thus resulted in larger committees.[270] Still, employers, especially from the South, frequently charged that their interests were not represented.[271] On the worker side, the Administrator chose representatives only from noncompany, democratic unions.[272] But the deep ideological and membership differences between the AFL, CIO, and unaffiliated independent unions meant that each union federation demanded representatives from its own leadership. The Administrator responded by choosing representatives based on the proportion of membership that each organization could claim in a particular industry.[273] Thus, in the absence of formal criteria, the Administrator fell back on an accepted democratic rationale: giving each union a say corresponding to its share of worker representation in the industry. Unions also pushed for influence throughout the new agency beyond the committees, with AFL President Green emphasizing that, to ensure "democratic" administration, the Administrator needed to have a staff "of seasoned experience in representing organized workers."[274]

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269. Dickinson, *supra* note 243, at 356; Kolehmainen & Shinn, *supra* note 263, at 176-77; Arthur J. Riggs, *The Administrative Process of Fixing Wages Under the Fair Labor Standards Act of 1938*, 14 MISS. L.J. 369, 377-79 (1942).

270. Andrews, *supra* note 261, at 28; Harry Weiss, *Minimum Wage Fixing Under the United States Fair Labor Standards Act*, 51 INT'L LAB. REV. 17, 25 (1945).

271. *See* Andrews, *supra* note 261, at 27; *see also infra* notes 302-315, 319 and accompanying text.

272. The Wagner Act prohibited employers from dominating or interfering with the formation or administration of any labor organization, or contributing financial or other support to it, ending the widespread practice of employer-established company unions. National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (2018); *see* Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 798-824, 860-74 (1994).

273. S. DOC. NO. 77-10, pt. 1, at 12; Andrews, *supra* note 261, at 28-29; Kolehmainen & Shinn, *supra* note 263, at 176. Out of the 123 employee-members from the first 20 industry committees, 61 were affiliated with the AFL, 42 with the CIO, and 20 with independent unions. Kolehmainen & Shinn, *supra* note 263, at 176. For an illustration of the divide between the unions, see, for example, *Shall Government Control Unionism*, 45 AM. FEDERATIONIST 801, 801-02 (1938), which objects that the NLRB was giving too much access to the CIO and accuses the CIO of being a government-endorsed union.

274. William Green, *Representation a Democratic Right*, 46 AM. FEDERATIONIST 1052, 1053 (1939); *see also id.* ("Labor experience is one of the groups of experience which should be included as a basis for administrative policies and that experience is gained only in the ranks of Labor. . . .

But what of unorganized workers? Though the statute did not require that those representing labor in the wage committees be union leaders, in practice, all employee representatives were chosen from unions. No unorganized workers were appointed.[275] Some observers criticized this approach as unfair to unorganized labor, whose interests would not be effectively represented.[276] Labor's response to the criticism was rooted in both pragmatism and principle. In its view, unions could adequately represent nonunion workers and selection of nonunion employee-members would, in any event, make little sense. The AFL's newspaper, *American Federationist*, asserted:

> It is inconceivable that individual workers can be represented without organization. To represent means the authority and responsibility to act for workers in an industry . . . . For the Administrator to select an individual worker from a plant and make him a member of an industry committee would be absurd. The person so selected would have neither ability nor authority to speak for anyone else but himself. One worker can represent many employees only through an organization of employees.[277]

Unions may also have feared that allowing nonunion workers to serve would risk reviving the company unionism predominant before the enactment of the NLRA and banned by section 8(a)(2) of that statute.[278] Unspoken in this debate, however, was the racially exclusionary nature of many AFL unions, as well as the fact that most unions were male dominated. Still, whether out of principled agreement or unwillingness to take on the unions, Elmer Andrews and successor Administrators accepted the union view.[279] Most academic commentators, writing contemporaneously, agreed that unions were well suited to represent even unorganized workers.[280]

Representation in administrative decisions is as essential to democracy as representation in legislative decisions.").

275. Golding, *supra* note 265, at 1157. This differs from the contemporaneous practice of the British wage boards, which included unorganized labor members. Weiss, *supra* note 171, at 34.

276. Dickinson, *supra* note 243, at 364; Golding, *supra* note 265, at 1157; Virginia Grace Cook, The Administration of the Fair Labor Standards Act with Special Reference to Enforcement 287-88 (1953) (unpublished Ph.D. dissertation, Columbia University) (on file with author).

277. November, *supra* note 262, at 279.

278. *Cf.* Barenberg, *supra* note 272, at 798-824, 860-74 (discussing the history of section 8(a)(2)).

279. Andrews, *supra* note 261, at 29.

280. *See, e.g.*, Riggs, *supra* note 269, at 379.

Selecting representatives for the "public" seats proved even more challenging, with critics pointing out the difficulty of evaluating the merit of any particular selection.[281] Initially, the Wage and Hour Division consulted with the NCL and other civic organizations to populate the industry committees.[282] Later, the Division compiled a list of suggestions from a range of groups and individuals, and selected public members from this list;[283] though increasingly, the Division turned to professors of economics.[284]

2. *Bargaining Versus Administration*

The industry committees' operation was a mix between collective bargaining and administrative decision-making, blending democratic deliberation with technocratic analysis.[285] The committees conducted fact finding and grounded their conclusions using the statutory criteria,[286] while at the same time, the decision-making emerged from compromise between business and labor with the public members acting as referees.[287] For example, the first committee, representing much of the garment industry, met for over six months. Chaired by Donald Nelson, the Vice President of Sears, Roebuck, it counted among its members Sidney Hillman, President of the Amalgamated Clothing Workers, and several leaders from AFL and CIO locals, as well as industry leaders from around the

281. *See* Dickinson, *supra* note 243, at 356; Weiss, *supra* note 270, at 27-28.

282. *See* Golding, *supra* note 265, at 1158; Weiss, *supra* note 270, at 28 n.1.

283. S. DOC. NO. 77-10, pt. 1, at 12 (1941); Weiss, *supra* note 270, at 28. Employers and employees were not involved in the selection process except in one case. S. DOC. NO. 77-10, pt. 1, at 12-13.

284. *See* Weiss, *supra* note 270, at 28 (noting that, on average, "each public member served on two committees"). Out of the 123 public-member appointments to the first 20 industry committees, 59 were professors (35 of which were economics professors). By the conclusion of the industry-committee program, 314 out of 438 public-member appointments went to professors (204 of which were economics professors). *Id.* The remainder of the public-member appointments included lawyers, business executives, newspaper editors and publishers, social workers, representatives of consumer or industrial organizations, and labor mediators. *Id.*

285. S. DOC. NO. 77-10, pt. 1, at 18-19 ("Observers generally agree that the committee's deliberative process is, in practice, little more than collective bargaining."); *see* Murray Edelman, *Interest Representation and Policy Choice in Labor Law Administration*, 9 LAB. L.J. 218 (1958); Cook, *supra* note 276, at 308.

286. Weiss, *supra* note 270, at 32-33, 41.

287. Riggs, *supra* note 269, at 382; *see* S. DOC. NO. 77-10, pt. 1, at 18-19; Golding, *supra* note 265, at 1177; *cf.* November, *supra* note 262, at 278 (noting similarities between the industry-committee process and collective bargaining).

country.[288] The committee issued a comprehensive report filled with economic data. The report detailed problems in the industry that still resonate today, including competition from abroad and the movement of capital from the organized and higher-wage North to the unorganized, low-wage South. Ultimately, the committee recommended a minimum wage for the whole industry of 32.5 cents an hour. Southern members dissented in a separate report, objecting in particular to the committee's treatment of the "cotton growing" states and their insufficient representation.[289]

Consistent with the collective-bargaining approach, committees over time cut down the amount of evidentiary material that went into their reports, providing only statements of reasons and minimal discussion of the evidence considered.[290] Also in line with the nature of collective bargaining, proceedings involved considerable disagreement and ultimate compromise.[291] Many recommendations were approved unanimously,[292] but only because the practice was to retake votes after preliminary polling revealed the minority had "no chance of changing the decision."[293]

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288. INDUS. COMM. NO. 1, U.S. DEP'T OF LABOR, REPORT AND RECOMMENDATION OF INDUSTRY COMMITTEE NO. 1 FOR THE TEXTILE INDUSTRY TO THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR (1939), *reprinted in* 1 Transcript of Record at 66, 74, Opp Cotton Mills, Inc. v. Adm'r of the Wage & Hour Div. of the Dep't of Labor, 312 U.S. 126 (1941) (No. 330).

289. INDUS. COMM. NO. 1, U.S. DEP'T OF LABOR, STATEMENT OF THE MINORITY OF INDUSTRY COMMITTEE NO. 1 SUBMITTED TO THE ADMINISTRATOR OF THE FAIR LABOR STANDARDS ACT OF 1938 (1939), *reprinted in* 1 Transcript of Record, *supra* note 288, at 162, 164-65; *see also* KATHERINE RYE JEWELL, AS DEAD AS DIXIE: THE SOUTHERN STATES INDUSTRIAL COUNCIL AND THE END OF THE NEW SOUTH, 1933-1954, at 226 (2010).

290. S. DOC. NO. 77-10, pt. 1, at 17; *see, e.g.*, INDUS. COMM. NO. 15, U.S. DEP'T OF LABOR, REPORT AND RECOMMENDATIONS OF INDUSTRY COMMITTEE NUMBER 15 FOR THE ESTABLISHMENT OF A MINIMUM WAGE RATE IN THE EMBROIDERIES INDUSTRY TO THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION U.S. DEPARTMENT OF LABOR 2-3 (1940). The entirety of the report submitted by the embroideries industry committee in September 1940 is three pages; by contrast, the textile industry committee's report spanned sixty-one pages in the transcript of record of the *Opp Cotton Mills* case, in addition to thirty-three pages of appendices and sixty-one pages of minority statement.

291. Weiss, *supra* note 270, at 36, 38.

292. Of the 114 recommendations made by 71 committees, 73 were adopted unanimously; only a few committees had adopted their recommendations by a close vote. *Id.* at 37-38.

293. *Id.* at 36.

Committee recommendations did not have the force of law until the Administrator approved them after a public hearing, but the scope of the Administrator's power during this process was limited.[294] He could not alter a recommendation; he could merely veto it, and only for failure to meet statutory standards. To be sure, the public hearings were taken seriously. They resembled traditional administrative hearings—quasi-judicial, often adversarial,[295] with significant public comment over several days.[296] Ultimately, however, the primary work was done by the committees, with executive officials taking a backseat. Indeed, the Administrator rejected only two committee recommendations during the life of the industry committees, reflecting the limited nature of his review.[297]

The committees' impact extended beyond minimum wage increases, functioning to empower labor more broadly. Unions used the hearings to mobilize support for higher wages and to raise the profile of their organizations. They also took seriously their responsibility to represent nonunion workers, viewing the process as a way to undertake a form of collective bargaining for unrepresented workplaces. The AFL's newsletter exhorted that "[a]lthough high wage employers and public representatives frequently support labor's demands, it is the job of the employee [union] members of the committee to get the majority of the committee to accept the facts and figures substantiating the highest minimum wage."[298] During the textile industry hearing, for example, union witnesses provided extensive testimony about sweatshop conditions in unorganized shops, particularly in the South; they introduced comprehensive data; and they responded to employer objections at length.[299] They emphasized the connection between minimum wages and collective bargaining. The Vice President of the Textile Workers Union explained that conditions in Southern mills made it impossible to organize: "There is one town in the south where they won't let me come within 10 miles of the plant."[300] Southern employers responded to labor's

294. *See* Fair Labor Standards Act of 1938, ch. 676, § 8(d), 52 Stat. 1060, 1064-65.

295. *See* Weiss, *supra* note 270, at 38; Comment, *Wage Order Procedure Under the Fair Labor Standards Act*, 35 ILL. L. REV. 840, 853 (1941).

296. *See* Weiss, *supra* note 270, at 39; *see also, e.g.*, J.C. Atchison, *Apparel Pay Floor Draws Fire at Hearing*, WOMEN'S WEAR DAILY, Mar. 15, 1940, at 1, 6.

297. *See* Weiss, *supra* note 270, at 39. One, from the jewelry industry committee, was rejected because the definitions of subclassifications adopted by the committee were "too confusing," and the other, from the first apparel industry committee, because of "substantial overlapping" of subclassifications that were given different treatment by the committee. *Id*.

298. November, *supra* note 262, at 272.

299. *See* Lamar Q. Ball, *Dixie Dialect Disappears at Andrews Textile Hearing*, ATLANTA CONST., June 28, 1939, at 1; *see also* November, *supra* note 262, at 276-77.

300. Ball, *supra* note 299, at 1.

arguments with the same hostility they expressed toward unionization, warning of shuttered plants and unemployment if wages were raised.[301]

In this way, the public hearings became a microcosm of broader debates about the role of labor and capital—and the role of race and national power—in the United States. Debate typically divided not only between employers and employees but also regionally, between North and South. The *Atlanta Constitution* evoked the Civil War in describing the textile hearings, and Southern governors testified against the recommended wage increases.[302] At the shoe industry hearing, representatives from a St. Louis manufacturing association clashed with the head of the New England Shoe and Leather Association. While the St. Louis businessmen complained that wage increases would increase unemployment, the Boston businessman asked whether "chiselers" should be able to jeopardize legitimate members of the industry.[303] Other hearings showed divisions between high-road and low-road employers within a single region. William Dubin, of the New Jersey Washable Dress Contractor's Association, testified that "chiselers and law-evaders in small towns located throughout Massachusetts, Rhode Island, New Jersey and Pennsylvania" were forcing law-abiding companies out of business.[304] In short, for both FLSA's supporters and its detractors, the wage committees symbolized the national government's effort to extend labor rights to low-wage, immigrant industries in the North and, even more controversially, to limit (albeit only partially) the ability of Southern industry to gain advantage using a system of exploited labor and racial hierarchy.

3. *Constitutional Challenge*

Low-wage and Southern employers, who registered their dissent throughout the industry-committee and hearing processes, also challenged the regime in court.[305] Invoking previously successful arguments from the *Lochner* Era, they

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301. *See id.*

302. *Id.* (invoking the Confederacy, describing how union witnesses painted a "tragic picture of how northern unions are suffering" with Northern capital taking advantage of low wages in the South, and detailing Southern response); *see also 40-Cent Shoe Wage Minimum Recommended*, WOMEN'S WEAR DAILY, Aug. 26, 1941, at 1; Atchison, *supra* note 296, at 1; J.C. Atchison, *Differential Argued at Shoe Wage Hearing*, WOMEN'S WEAR DAILY, May 29, 1939, at 1; *Sharp Conflicts at Wage Hearing*, WOMEN'S WEAR DAILY, Dec. 15, 1939, at 16.

303. *Sharp Conflicts at Wage Hearing*, *supra* note 302, at 16.

304. J.C. Atchison, *Apparel Wage Categories Again Debated*, WOMEN'S WEAR DAILY, Mar. 14, 1940, at 1.

305. *See* Farhang & Katznelson, *supra* note 241; Richard S. Salant, 49 YALE L.J. 1140, 1141 (1940) (reviewing SELLS, *supra* note 239). Opposition was not limited to FLSA; employers brought

charged that FLSA violated their liberty-of-contract rights and exceeded Congress's commerce power. As is well known, those arguments were roundly rejected in *United States v. Darby*.[306] FLSA's wage-and-hour provisions, the Court held, were within Congress's powers under the Commerce Clause and consistent with the Fifth and Tenth Amendments.[307]

Employers also framed their objections in rule-of-law terms, targeting the Administrator's considerable discretion. They challenged in particular the industry-committee system, objecting to the wage-board process of representation and negotiation. In *Opp Cotton Mills, Inc. v. Administrator of the Wage & Hour Division*, for example, a Southern cotton mill employer argued that the wage-board system unconstitutionally delegated legislative power.[308] Further, the employer charged both that the tripartite system was insufficiently representative and that the procedures were insufficiently judicial to guarantee due process.[309]

The Court rejected these claims, upholding the wage-committee procedure without dissent. The statute, the Court concluded, adequately cabined the discretion of the wage boards and the Administrator. After all, the system established a clear policy to reach a certain wage within each sector by a certain date, and it required the committees to recommend the highest possible minimum wage rate that would not substantially curtail employment in the industry.[310] Moreover, due process, the Court reasoned, did not require that the industry committee conduct a judicial-like hearing, especially given that the Administrator was subsequently required to hold a public hearing.[311] Nor did it require that employers have representatives of their choosing on the wage board. As long as the Administrator had fairly chosen individuals to represent employer interests, process was adequate.[312]

Employers' objections to the wage-committee procedure fared no better in the lower courts. In a series of cases, judges deferred to the wage boards' decision-making processes. For example, in *Andree & Seedman, Inc. v. Administrator*

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countless challenges to the NLRA. *See* Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. ILL. L. REV. 547, 549-67 (describing changes in doctrine in response to employer resistance); Klare, *supra* note 48, at 286-87, 292-93, 301-10, 322-25, 327-34, 337 (detailing employer resistance to the NLRA and how the Court responded by curtailing worker rights).

306. 312 U.S. 100 (1941).

307. *Id.*

308. 312 U.S. 126, 142 (1941).

309. *Id.*

310. Fair Labor Standards Act of 1938, ch. 676, § 8(a), 52 Stat. 1060, 1064.

311. *See Opp Cotton Mills*, 312 U.S. at 152-53.

312. *See id.* at 150.

of the Wage & Hour Division, petitioners challenged the legality of industry committees on the grounds that they were not properly representative and did not adequately follow rules regarding witnesses.[313] The court rejected both claims, giving great deference to the agency's construction of the committees and holding that the statute required neither the committees nor the Administrator to consider all relevant evidence, so long as they considered the economic, competitive, and employment factors prior to making a finding.[314] Other lower courts similarly rejected challenges to the construction of the committees and to the scope of their procedures.[315]

Commentators were conscious of the effect of court decisions on tripartism. They divided, for example, on whether *Gemsco, Inc. v. Walling* was a victory or defeat for the industry committees.[316] In that case, the Supreme Court upheld against employer challenge the Wage and Hour Administrator's authority under FLSA to prohibit industrial homework in the embroideries industry—i.e., garment work performed in the worker's own home—without an industry committee having expressly recommended such a rule.[317] Some argued that this move weakened the authority of the industry committees by effectively authorizing the Administrator to rewrite a wage order without submitting it to committee review.[318] Other observers disagreed, emphasizing that the Court's ruling was solicitous of the committees. The conditions in the industry, one *Harvard Law Review* writer opined, "would have made the committee more rather than less willing to recommend a forty-cent minimum wage, at that time a rather high minimum wage for the industry."[319] The defenders' view tracked that of the Court's. Ultimately, while *Gemsco* may have presaged employment law's subsequent turn to technocracy over popular control, the Court in *Gemsco* sought to make the committees' work effective and to further the statute's ultimate goal of raising wages. Noting that homework was integral to the embroideries industry, the Court explained that the Administrator's intervention was merely ensuring

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313. 122 F.2d 634, 636 (D.C. Cir. 1941).

314. *See id*. at 636-37.

315. *See* S. Garment Mfrs. Ass'n v. Fleming, 122 F.2d 622 (D.C. Cir. 1941); Nat'l Ass'n of Wool Mfrs. v. Fleming, 122 F.2d 617 (D.C. Cir. 1941).

316. 324 U.S. 244 (1945).

317. *See* Cook, *supra* note 276, at 279.

318. *Id.*

319. E. Merrick Dodd, *The Supreme Court and Fair Labor Standards, 1941-1945*, 59 HARV. L. REV. 321, 350 (1946).

the efficacy of the committees' rates and guarding against circumvention of the statute.[320]

4. *Efficiency and Stability*

In the end, all seventy of the industry committees established between 1938 and 1941 recommended a forty-cent minimum—and the wage orders covered twenty-one million workers.[321] The last industry committee was appointed in September 1943,[322] and the last wage order for a forty-cent minimum went into effect in July 1944,[323] more than a year before October 1945, when the forty-cent minimum wage figure would have taken effect automatically.[324]

Liberal commentators and academic observers were generally positive in their assessments of the wage committees. Some complained that the collective-bargaining approach meant that the committees' progress was "slow and halting."[325] The process, these critics lamented, was led by amateurs with opposing viewpoints, rather than by experts.[326] Yet because the industry committees' deliberation was a mix between collective bargaining and administrative deliberation, the detractors' arguments gained little traction. One measure of success was the timeliness of the committees' actions and the scope of the ultimate coverage. The universal minimum wage of forty cents an hour was achieved almost two years before the date it would have become effective automatically, and, for many

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320. 324 U.S. at 257-59, 263.

321. WAGE & HOUR & PUB. CONTRACTS DIV., U.S. DEP'T OF LABOR, FAIR LABOR STANDARDS IN WARTIME: ANNUAL REPORT 20 (1944) [hereinafter WAGE AND HOUR DIVISION 1944 ANNUAL REPORT]; Weiss, *supra* note 270, at 18, 21.

322. Weiss, *supra* note 270, at 23.

323. WAGE AND HOUR DIVISION 1944 ANNUAL REPORT, *supra* note 321, at 21.

324. *See* Fair Labor Standards Act of 1938, ch. 676, § 6(a)(3), 52 Stat. 1060, 1062 (codified as amended at 29 U.S.C. § 206(a) (2018)); *see also* WAGE AND HOUR DIVISION 1944 ANNUAL REPORT, *supra* note 321, at 20; Weiss, *supra* note 270, at 18.

325. S. DOC. NO. 77-10, pt. 1, at 18 (1941).

326. *Id.* at 19 (collecting criticisms and responding); *cf.* Salant, *supra* note 305, at 1141-42 (questioning whether the amateur behavior of the representatives was surprising and emphasizing that the lack of representatives' objectivity and diligence was inevitable given the structure of the committees).

industries, the increase was established at a much earlier date.[327] The wage orders directly raised wages for approximately 2.7 million workers[328] and had an indirect effect on workers who earned a wage above the ordered minimum.[329]

"Never before," wrote a Columbia University graduate student in 1949, "had the wage order technique been used in a country in which industries were so large, so diverse, and scattered over so vast an area."[330] Notably, the orders covered approximately the same number of workers (twenty-one million) as the scheme under the NRA, which required around five hundred and fifty industry codes.[331] In addition, while the British wage boards took an average of two years between their first meetings and the effective dates of recommendation, it took the fifteen earliest industry committees only about one year to order raises and the later committees between six and eight months.[332]

Commentators in the academy and the legal profession celebrated the industry committees not only for their efficacy in raising wages, but also for their ability to advance industrial democracy and stability—a product of the boards' hybrid technocratic and participatory approach. According to a Justice Department report, the committee device was widely considered by contemporaries to be "flexibl[e]," "careful," and "democratic," facilitating participation of those most affected, while also ensuring a role for experts.[333] One contemporary described the alternative system of "wage fixation by administrative officials unchecked by the action of industry committees" as "undesirable." Writing in the *Yale Law Journal*, he concluded: "The road to stable industrial democracy is in the long run traversed, not by excluding from industrial government persons whose interests are affected, but by educating them to assume governmental responsibility."[334]

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327. Weiss, *supra* note 270, at 18.

328. WAGE AND HOUR DIVISION 1944 ANNUAL REPORT, *supra* note 321, at 20; Weiss, *supra* note 270, at 45. Approximately 1.6 million workers received wage increases at the time the forty-cent wage orders went into effect. WAGE AND HOUR DIVISION 1944 ANNUAL REPORT, *supra* note 321, at 20; Weiss, *supra* note 270, at 46.

329. Weiss, *supra* note 270, at 46. For example, the Wage and Hour Division estimated in 1941 that the minimum wage orders for the hosiery industry (requiring a 32.5-cent minimum) contributed to a 9.3 percent increase of the average wage (from 38.6 cents to 42.4 cents). The Division observed similar effects in the cotton-goods industry as well. WAGE AND HOUR DIVISION 1944 ANNUAL REPORT, *supra* note 321, at 22-24, 35-36.

330. Cook, *supra* note 276, at 323.

331. Weiss, *supra* note 270, at 24; *see also* Cook, *supra* note 276, at 323.

332. Weiss, *supra* note 270, at 43-44.

333. S. DOC. NO. 77-10, pt. 1, at 18 (1941).

334. Golding, *supra* note 265, at 1179.

5. *Union Growth and a "Decency Standard of Living"*

Union interaction with the boards was complex. Unions were often frustrated with aspects of the committee system, complaining that the process was too slow; that the wages ultimately ordered, as cabined by statute, were too low; and that too many workers were excluded.[335] At the same time, they vigorously backed the industry-committee process, recognizing that increasing wages depended on their active involvement and "militant support."[336] Moreover, almost immediately, the unions came to exploit the wage boards and FLSA more generally as a means of enhancing workers' collective power—a synergy that helped to shape an intertwined system of labor and employment law.

For example, despite its initial criticism, the AFL developed strategies to marshal FLSA and the wage boards in support of its organizing campaigns. It prepared detailed interpretative bulletins explaining the rights FLSA conferred upon employees.[337] In the *American Federationist*, AFL President William Green wrote several columns in which he emphasized that wage boards were a reason that unorganized workers should join unions. The unorganized, he emphasized, had no access to knowledge about FLSA and could not make the statute function on their behalf; access to industry committees, effective use of their proceedings, and enforcement of their orders required the help of the union. Ultimately, Green concluded, FLSA was an instrument of unionism for it both required that workers organize in order to take full advantage of the statute and, combined with the Wagner Act, made organization "much more possible for all workers."[338]

On the ground, local AFL union leaders who served on industry committees used the resulting orders to mobilize support for their unions and framed the enforcement of FLSA as a union responsibility. When the forty-cent minimum wage went into effect in the millinery industry, Max Zaritsky, President of the United Hatters, Cap and Millinery Workers International Union, commented:

335. Boris Shishkin, *Wage-Hour Administration from Labor's Viewpoint*, 29 AM. LAB. LEGIS. REV. 63, 63 (1939) (complaining that the progress in the work of the wage committees "has been slow and halting" and that "[t]here has been a tendency to arrive at wage recommendations blindfolded by drawing lots rather than by careful weighing of all available facts"); *see also* November, *supra* note 262, at 277.

336. Harold November, *Enforcement of the Wage and Hour Law*, 47 AM. FEDERATIONIST 144, 144 (1940).

337. Herman, *supra* note 259, at 385.

338. Editorial, *Wages and Hours Law*, 45 AM. FEDERATIONIST 806, 806-07 (1938); *accord* Editorial, *New Union Function*, 45 AM. FEDERATIONIST 918, 918-19 (1938).

"It took seven long months of hard effort and bitter struggle to obtain this minimum. I consider the establishment of the 40-cent minimum one of the most significant gains of our organization and our people in recent years."[339] Zaritsky warned employers that the workers would not wait upon the government to enforce the forty-cent minimum, but would themselves guard against employer violations. To members of the Union he said: "We must appoint ourselves enforcement agents, the law gives us that right and offers us the opportunity."[340] Moreover, the forty-cent minimum wage spurred a new organizing drive among the Hatters. Union organizers visited homes of workers and "pointed out that for the enforcement of the order they must depend not only on the government whose facilities are limited, but upon a strong union which would see to it that there were no violations or that if there were violations, those guilty would be punished."[341]

The CIO was similarly aggressive in capitalizing on FLSA to promote organizing. Its weekly newspaper regularly featured stories about FLSA and the wage boards.[342] Local CIO unions created a system for educating workers about the wage orders and for enforcing them. They urged workers to submit any FLSA complaints through the union, emphasizing that such a method would trigger protections provided by section 7 of the NLRA;[343] and they initiated wage recovery suits on behalf of large groups of employees.[344] The CIO also organized

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339. November, *supra* note 262, at 276-77.

340. *Id.*

341. *Id.*

342. *See, e.g.*, *1,600,000 Gain Through Wage-Hour Act*, CIO NEWS, Jan. 23, 1939, at 2; *Andrews OKs Hosiery Wage Rates*, CIO NEWS, Aug. 21, 1939, at 7; *Ask Higher Textile Pay Base*, CIO NEWS, Oct. 13, 1941, at 5; Lee Pressman, *Fixing Minimum Wages and Maximum Hours*, CIO NEWS, Aug. 13, 1938, at 7 (explaining in detail the new bill, including the operation of industry committees, in an article drafted by the CIO General Counsel).

343. Herman, *supra* note 259, at 385; Henry C. Fleisher, *Building "A Floor Under Wages": Uncle Sam Makes Ready to Enforce Complex Pay-Hour Statute*, CIO NEWS, Oct. 15, 1938, at 5 ("Unions should be on guard against employer efforts to disregard the terms of the law.").

344. *Million Dollar Wage Suit Filed by CIO Steel Workers*, CIO NEWS, Oct. 18, 1943, at 4 (describing a suit filed by the union under the wage-and-hour law and emphasizing role of the union in protecting workers' rights under employment law); *accord Miners Win Wage Hour Case*, CIO NEWS, Apr. 7, 1941, at 3; *Shoe Union to Sue Pay Law Chiselers*, CIO NEWS, Jan. 20, 1941, at 2; *see also* MARC LINDER, "MOMENTS ARE THE ELEMENTS OF PROFIT": OVERTIME AND THE DEREGULATION OF WORKING HOURS UNDER THE FAIR LABOR STANDARDS ACT 283 (2000) (noting that the CIO "may have viewed the mass filing of portal-pay suits as furnishing additional bargaining strength"); *Bata Shoe Co. Faces New Wage-Hour Case*, CIO NEWS, Mar. 25, 1940, at 2 (announcing that "following a complaint by the CIO United Show Workers," the DOL took action to force compliance with FLSA by a company that practiced "wage slavery").

picket lines and strikes to oppose violations of FLSA, focusing on notorious violators.[345]

These efforts to capitalize on FLSA paid off. The unions experienced a period of rapid expansion during the period in which FLSA's wage committees were in existence.[346] To be sure, the tripartite committees were by no means the only, or even the primary, cause of the unions' growth.[347] But they were one piece of a broader legal and cultural landscape that encouraged organization among workers and then gave those organizations a privileged position in the governing process. Combined with the Wagner Act and the wartime labor boards, FLSA's administrative scheme made clear that employers would have to negotiate as equals with unions both in the marketplace and in government. In this way, FLSA and the NLRA together "provided the most hospitable climate ever fashioned in American history for trade unions and for decent enforceable conditions of employment."[348]

At the same time, the limitations of FLSA and the industry committees were substantial. In the years after passage, the CIO, its affiliate unions, and reform groups like the NCL campaigned to amend FLSA to cover exempt workers and raise its minimum wages, while also seeking state legislation.[349] They sought to guarantee "that all American workers are entitled, in return for their labor, to at least a health-and-decency standard of living."[350] Resistance was fierce, in the committee hearings and in the courts. Southern employers routinely failed to comply with the law, while pressing Congress for amendments to curtail both

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345. *See* Herman, *supra* note 259, at 385 n.107; "*Pecan King" Bows to CIO, Strikers Get $57,000 Raise*, CIO NEWS, Oct. 27, 1941, at 6.

346. *See* Lichtenstein, *Corporatism to Collective Bargaining*, *supra* note 30, at 122-23. During the two decades beginning with the New Deal, unions grew rapidly, with a peak annual growth rate in 1937 of 45%, and with most years exhibiting expansions in membership of between 4 and 20%. In 1948, growth slowed to under 1%. *See* Irving Bernstein, *The Growth of American Unions*, 44 AM. ECON. REV. 301, 303-04 tbl.I (1954); *see also It's NOT the Same Old South as CIO Makes a Stand in Dixie*, CIO NEWS, Nov. 17, 1941, at 14-15 (describing successful organizing drives in the South).

347. Maintenance of membership through dues check-off and union shops became the norm during this period, representing key drivers of the increase in members. *See* LICHTENSTEIN, LABOR'S WAR AT HOME, *supra* note 30, at 80-81.

348. Farhang & Katznelson, *supra* note 241, at 2.

349. *See* Louise Stitt, *State Fair Labor Standards Legislation*, 6 LAW & CONTEMP. PROBS. 454, 458 (1939) (describing CIO-backed state legislation that would cover domestic and professional workers); *CIO Resolutions Urge Security, Liberty, Peace*, CIO NEWS, Nov. 25, 1940, at 2; *Defend the Wage-Hour Law*, CIO NEWS, Apr. 29, 1940, at 4; *Hillman, Mrs. Norton Ask Consumers' Support for Wage-Hour Law*, CIO NEWS, Dec. 18, 1939, at 3.

350. *Defend the Wage-Hour Law*, *supra* note 349, at 4.

FLSA and the NLRA.[351] In a prescient speech delivered before a Farmer-Labor Party gathering in Duluth, Minnesota in August of 1941, CIO Legislative Director John Jones warned: "No one can observe the legislative record of our times without recognizing that virtually all the gains won by labor through its trade unions may be taken away through repressive anti-labor legislation."[352]

C. *Wartime Growth, Postwar Retrenchment, and the Emergence of Contemporary Workplace Administration*

Despite these difficulties, by the mid-1940s it looked like the United States might expand its system of labor tripartism beyond the limited scope of the wage boards and build a more social democratic economy. Wartime mobilization was a critical turning point. The 1937 "Roosevelt Recession" had increased unemployment, weakening union organizing efforts and emboldening employers and local police to repress labor action. But the war brought an employment boom and the establishment of the new War Labor Board (WLB), which saw the advance of trade unionism as essential to the war effort. The WLB and other new wartime agencies forced employers to bargain with unions and consumers over national wage and economic policy, subject to administrative oversight. Indeed, the aggressive orders of the tripartite WLB went far beyond those of the FLSA industry committees, while other agencies, like the Office of Price Administration, engaged different constituencies on the goals of price stability.[353]

Against this background, by 1945, American labor unions reached their historical apogee. One in three nonagricultural workers were members of a union—and organized labor increasingly functioned as a powerful social movement that

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351. *See Farmers Hit Wage-Law Amendments*, CIO NEWS, May 13, 1940, at 3; *Labor & Politics*, CIO NEWS, Aug. 25, 1941, at 4; *Labor Girds for Wagner Act Test; Wage-Hour Law Saved*, CIO NEWS, May 13, 1940, at 1; *Labor Saves Wage Law, Girds for Defense of Wagner Act*, CIO NEWS, May 13, 1940, at 3.

352. *Labor & Politics*, *supra* note 351.

353. On the War Labor Board, see NELSON LICHTENSTEIN, A CONTEST OF IDEAS: CAPITAL, POLITICS, AND LABOR 80-84 (2013); LICHTENSTEIN, LABOR'S WAR AT HOME, *supra* note 30, at 51-53; LICHTENSTEIN, STATE OF THE UNION, *supra* note 30, at 56, 63, 101-02; and Wachter, *supra* note 25, at 610-13. On the role of the government in this period more generally, see Meg Jacobs, *"How About Some Meat?": The Office of Price Administration, Consumption Politics, and State Building from the Bottom Up, 1941-1946*, 84 J. AM. HIST. 910 (1997); and Theda Skocpol & Kenneth Finegold, *State Capacity and Economic Intervention in the Early New Deal*, 97 POL. SCI. Q. 255 (1982). As the history of wage boards indicates, however, tripartism in the United States was not simply a wartime phenomenon.

reached far beyond its members.[354] In the aftermath of the war, leaders like Walter Reuther of the United Auto Workers pushed for a more permanent social democratic system in which unions would be granted formal power to bargain over economic and social welfare policy.[355] Meanwhile, black workers, with support from the CIO, continued to press for an expansion of labor rights to African Americans.[356]

This success, however, was short-lived, due to opposition to tripartism from within the labor movement as well as from external forces. In particular, the AFL opposed making the WLB's tripartism permanent, reviving its longstanding opposition to state involvement in labor relations. This position also found support from business and conservative forces, particularly white Southerners hostile to the empowerment of black laborers, who successfully mobilized in opposition to existing labor rights. They sought to dismantle state-sponsored bargaining and to curtail workers' rights more generally.[357] Then, in 1947, Congress decisively changed the statutory and regulatory landscape by passing the Taft-Hartley Act over President Truman's veto.[358] No longer did federal policy favor concerted

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354. *See* LICHTENSTEIN, STATE OF THE UNION, *supra* note 30, at 56, 63, 100-05. For more on the expansive political role of unions, see generally GEORGE LIPSITZ, RAINBOW AT MIDNIGHT: LABOR AND CULTURE IN THE 1940S (1994); THE RISE AND FALL OF THE NEW DEAL ORDER, *supra* note 30; ROBERT H. ZIEGER, AMERICAN WORKERS, AMERICAN UNIONS, 1920-1985 (1986); and ROBERT H. ZIEGER, THE CIO, 1935-1955 (1995). *But see* FRASER, *supra* note 129, at 441-94 (exploring Sidney Hillman's largely sidelined role in FDR's Administration by World War II).

355. *See* LICHTENSTEIN, *supra* note 112, at 220-47, 270.

356. *See* Farhang & Katznelson, *supra* note 241, at 7; Forbath, *supra* note 120, at 82-83; *A Fake Minimum Wage*, NEW REPUBLIC, Apr. 22, 1946, at 567; *see also* LEE, *supra* note 64, at 35-56 (describing legislative and NLRB efforts).

357. *See* Lichtenstein, *Corporatism to Collective Bargaining*, *supra* note 30, at 134; *see also* JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937-1947, at 251-59 (1981) (describing the conditions that gave rise to Taft-Hartley); TOMLINS, *supra* note 126, at 148-50 (describing divisions within the labor movement, as well as opposition from the business community); Farhang & Katznelson, *supra* note 241, at 6 ("Where southern members approved of policies in tandem with their nonsouthern Democratic colleagues, these policies became law; where they dissented, they could exercise a veto rejecting the modal policy positions of the Democratic Party."); Forbath, *supra* note 120, at 83 (describing how "the Dixiecrats defeated the civil right to work with filibusters and the social right to work by gutting the administration's bill in committee"); *cf.* LEE, *supra* note 64, at 56-78 (describing the first wave of right-to-work laws in the early 1940s).

358. Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 141-187 (2018) (amending the NLRA). On the passage of Taft-Hartley, see generally KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE BUSINESSMEN'S CRUSADE AGAINST THE NEW DEAL 31-32 (2010); and ARCHIBALD COX, *The Evolution of Labor-Management Relations*, *in* LAW AND THE NATIONAL LABOR POLICY 13-18 (1960). Labor historians disagree as to whether the Taft-Hartley Act was a

action and collective bargaining. Instead, it took on the voluntarist and privatized orientation it maintains today, guaranteeing employees' "full freedom" to *refrain* from engaging in union activity while only weakly protecting their right to engage in it.[359] Moreover, the Act limited unions' ability to effect power over the economy, channeling their activity to individual worksites and firms. For example, the Act forbade unions from engaging in secondary boycotts, a practice wherein workers had successfully exerted economic pressure and won significant gains across industries by refusing to handle goods from firms where other workers were embroiled in a union dispute.[360] In addition, courts came to interpret the Act as permitting individual states to enact "right-to-work" laws.[361] This key change weakened unions by creating a classic collective action problem in which workers could obtain the benefits of unionism without paying for it. More fundamentally, the embrace of right to work affirmed a position analogous to the one pressed by employers against the wage committees: that individuals have the right to object to, and exit from, representative bodies.

codification and consolidation of preexisting legal restrictions or a turning point. *See* TOMLINS, *supra* note 126, at 250-51 (discussing the extent to which reorientation was present in prior NLRB and Supreme Court decisions); Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763, 763-65 (1998) (reviewing the debate). On the anticommunist campaigns that eventually culminated in the Taft-Hartley loyalty oath, see LANDON R.Y. STORRS, THE SECOND RED SCARE AND THE UNMAKING OF THE NEW DEAL LEFT (2013).

359. 29 U.S.C. § 151.

360. *Id.* § 158(b)(4); *see also* JULIUS GETMAN, THE SUPREME COURT ON UNIONS 90-100 (2016) (detailing the law on secondary boycotts and picketing); Kate Andrias, *The Fortification of Inequality*, 93 IND. L.J. 5, 12-15 (2018) (describing how the Court upheld the restrictions on secondary boycotts despite earlier precedent protecting workers' right to picket).

361. The law banned closed-shop provisions that require union membership as a condition of being hired. 29 U.S.C. § 158(a)(3). Subsequent court decisions interpreted the Act also to permit laws prohibiting agreements under which unions obtain a "union security clause" obliging all employees to pay any fees as a requirement of employment. For reasons eloquently explained by Judge Wood, this statutory interpretation is questionable. *See* Sweeney v. Pence, 767 F.3d 654, 671 (7th Cir. 2014) (Wood, C.J., dissenting) (explaining that the best reading of the statute is that it permits states to bar agreements that require nonmembers to pay the same dues and fees as members pay, and perhaps to pay anything more than the pro rata cost of activities "germane" to collective bargaining and contract administration); *see also* Brief of Law Professors Andrias, Estlund, Fisk, Lee & Weinrib as Amici Curiae in Support of Appellants/Cross-Appellees, Int'l Union of Operating Eng'rs Local 139 v. Schimel, 863 F.3d 674 (7th Cir. 2017) (Nos. 16-3736, 16-3834), 2017 WL 468135, at *1 (arguing that "the NLRA broadly preempts state laws regulating union-management relations and provides the exclusive source of law governing the interpretation and validity of collective bargaining agreements"). At the same time, the law did not alter the union's duty to represent all employees, even nonpayers. 29 U.S.C. §§ 158(a)(3), 164(b).

In the same year that it enacted Taft-Hartley, Congress also amended FLSA by passing the Portal-to-Portal Act.[362] That Act is known for limiting suits seeking pay for "off-the-clock" time, imposing a two-year statute of limitations for all FLSA claims and reducing available damages.[363] But the Act was not only about limiting the ability of individual workers to obtain relief. Its proponents' chief aim was to reduce collective litigation brought by the CIO on behalf of workers.[364] This strategy proved successful: not only did it result in an overall decline in enforcement, but it also largely removed unions from the business of mass enforcement of statutory employment rights.[365]

The resurgent hostility to labor affected FLSA's industry committees as well, with Congress ending the system of tripartism in 1949. The original FLSA amendments sponsored by the Truman Administration at the beginning of the Eighty-First Congress would not have repealed the industry committees. Rather, the Administration urged using industry committees to establish higher industry minimum rates, above and beyond a new floor of seventy-five cents an hour.[366] Moreover, some congressmen urged an expansion of the committees' powers, including authorizing them to set differentials for skilled workers.[367] Others sought to maintain the committees but give them more discretion, including the power to reduce wages if economic conditions were to change.[368] Throughout the initial legislative debates, committees were generally discussed favorably,[369] garnering support not only from administrative officials and unions, but also from the NCL.[370]

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362. 29 U.S.C. §§ 251-262.

363. Farhang & Katznelson, *supra* note 241, at 19.

364. *Id.* at 21.

365. In 1947, the last year before Portal-to-Portal rules came into effect, 3,772 enforcement actions were filed in federal court, the most in any single year before or since. After the amendments, the number of enforcement actions plummeted; in 1948, the number fell by seventy-two percent to 1,062. During the decade following enactment the average annual number of suits filed was 754—a decline of some eighty percent from the high-water mark of 1947. *See id.*

366. H.R. 2033, 81st Cong. (1949).

367. Linder, *supra* note 42, at 69 n.72.

368. H.R. REP. NO. 81-1453 (1949); H.R. REP. NO. 81-267 (1949); 95 CONG. REC. 11011 (statement of Rep. Brooks Hays).

369. *See, e.g.*, 95 CONG. REC. 12553 (statement of Sen. Allen Ellender).

370. Elizabeth Magee, Letter to the Editor, *Seventy-Five Cent Minimum*, WASH. POST, May 1, 1949, at B4 (letter from General Secretary of the National Consumer League supporting an increase in the minimum wage to $0.75 and praising the industry-committee role in the operation of FLSA); *see also Amendments to the Fair Labor Standards Act of 1938: Hearings Before the Comm. on Educ. & Labor*, 81st Cong. 15 (1949) (testimony of Maurice J. Tobin, Secretary of Labor);

Yet opposition predictably emerged, from Southern Democrats as well as from Republicans and industry representatives, setting the stage for the demise of tripartite representation. By this time, Southern Democrats had abandoned support for FLSA and the New Deal agenda, and Southern industry had crushed the CIO's effort to organize workers in the South.[371] The conservative coalition objected to any increase in the minimum wage, and it sought to exclude more businesses, particularly those employing black workers, from FLSA's coverage.[372] Soon it became clear that one way to win a wage increase would be to trade-off the industry committees.[373] Divisions within the labor movement contributed to the decision to take the deal. According to one commentator, "Had organized labor taken a stronger, more united position, perhaps it would have been possible to have obtained both a seventy-five cent minimum and the wage order procedure." But "[t]he AFL preferred to rely on collective bargaining to raise wages above the seventy-five cent minimum."[374] This left the CIO alone in defending the committees, while still pushing for a higher minimum.

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id. at 87 (testimony of Harry Weiss, Director, Wage Determinations and Exemptions Branch); *id.* at 1680 (statement of Rep. Thomas Burke).

371. *See* Farhang & Katznelson, *supra* note 241 (discussing role of Southern Democrats in opposing labor law legislation after the early years of the New Deal); *see also* BARBARA S. GRIFFITH, THE CRISIS OF AMERICAN LABOR: OPERATION DIXIE AND THE DEFEAT OF THE CIO (1988); F. RAY MARSHALL, LABOR IN THE SOUTH (1967).

372. *See, e.g.*, *Amendments to the Fair Labor Standards Act of 1938: Hearings Before the Comm. on Educ. & Labor*, *supra* note 370, at 87-88 (statement of Rep. Samuel McConnell); *id.* at 1138 (statement of J. Raymond Tiffany, General Counsel, National Small Businessmen's Association; General Counsel, Book Manufacturer's Institute); *id.* at 1147-48 (testimony of Richard P. Doherty, Director, Employer-Employee Relations Department, National Association of Broadcasters); *id.* at 1428 (statement of Charles H. Merideth, Executive Vice President, Industrial Association of Quincy, Ill.); *see also Fair Labor Standards Act Amendments of 1949: Hearings Before a Subcomm. of the Comm. on Labor & Pub. Welfare*, 81st Cong. 207 (1949) (statement of Carl B. Jansen, President, Dravo Corp.) (arguing that industry committees granted the Secretary too much power over raising or lowering wages).

373. Cook, *supra* note 276, at 290-91; *see also Retailers Win Concessions in New Wage Bill*, WOMEN'S WEAR DAILY, Mar. 4, 1949, at 1; Robert F. Whitney, *75-Cent Base Wage in Danger in House*, N.Y. TIMES, Mar. 7, 1949, at 1.

374. Cook, *supra* note 276, at 290-91; *see also Fair Labor Standards Act Amendments of 1949: Hearings Before a Subcomm. of the Comm. on Labor & Pub. Welfare*, *supra* note 372, at 100 (statement of Walter J. Mason, National Legislative Rep., American Federation of Labor); *Amendments to the Fair Labor Standards Act of 1938: Hearings Before the Comm. on Educ. & Labor*, *supra* note 370, at 19 (statement of Rep. Graham Barden) ("I am just wondering if you are not stepping in here and throwing a tremendous stumbling block right in the way of collective bargaining, when you take an industry committee and give them jurisdiction over a particular field that we have . . . placed in the field of collective bargaining.").

In the end, the proposal to expand the committees' role was abandoned, and they were effectively abolished. Section 5 was rewritten to limit the function of industry committees to the recommendation of minimum wages for employees in Puerto Rico and the Virgin Islands, below the federal level.[375] The result, contemporary observers concluded, ultimately harmed not only unions but also unorganized workers, who "would probably have gained more by adoption of a sixty-five cent minimum and retention of the wage order procedure in [the] continental United States."[376]

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After the demise of FLSA's industry committees, the dismantling of the wartime boards, and the adoption of the other late-1940s reforms, workplace law slowly solidified into its current shape.[377] Tripartite models persisted in a few sectors of the economy and in some states,[378] but they disappeared from the core federal statutes. Labor law and employment law became more clearly separated.

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375. Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393, 52 Stat. 1060; H.R. REP. NO. 81-1453, at 17 (1949). At the same time, in a victory for FLSA's supporters, the Administrator was given more power, including expanded enforcement power. For a discussion of the experience of wage boards in Puerto Rico, see MILES GALVIN, THE ORGANIZED LABOR MOVEMENT IN PUERTO RICO (1979); and César F. Rosado Marzán, Dependent Unionism: Resource Mobilization and Union Density in Puerto Rico 30, 44-47, 63-65, 71-78 (June 2005) (unpublished Ph.D. dissertation, Princeton University) (on file with author).

376. Cook, *supra* note 276, at 280.

377. The retrenchment of a social democratic vision for FLSA and workplace law parallels developments in civil rights law and public benefits law. *See* GOLUBOFF, *supra* note 225, at 1-15 (showing how, in the 1930s, the petitions of black agricultural workers in the American South and industrial workers across the nation, along with efforts of the DOJ Civil Rights Division, called for a civil rights law that would redress economic as well as legal inequalities, but how this vision was abandoned in the years leading up to *Brown v. Board of Education*, 347 U.S. 483 (1954), resulting in the contemporary understanding of civil rights); KLEIN, *supra* note 45, at 4-5 (showing how "[i]n the 1930s and 1940s, trade unionists, leftists, African Americans" and others pushed for state-provided economic security programs, but how corporations eventually succeeded, in the post-World War II period, in severing connections between workers and the state); *cf.* LEE, *supra* note 64, at 81-114, 135-54 (showing how an integrated view of collective and individual rights was never fully abandoned).

378. *See* Andrias, *supra* note 8, at 84-88 (discussing state wage boards); Kate Andrias, *Social Bargaining in States and Cities: Toward a More Egalitarian and Democratic Workplace Law*, HARV. L. & POL'Y REV. ONLINE (2017), http://harvardlpr.com/wp-content/uploads/2018/01/Andrias-Social.pdf [https://perma.cc/3S57-AVNR] [hereinafter Andrias, *Social Bargaining*]; *supra* notes 24, 30 and accompanying text (citing the examples of the tripartite war board and tripartism in particular industries). The Davis-Bacon Act, 40 U.S.C. §§ 3141-3148 (2018), could be viewed as another example of a persistent form of government-facilitated collective bargaining.

FLSA came to be regarded not as a way to extend the fruits of collective bargaining, but rather as a separate regime among a patchwork of proliferating individual employment law statutes. Relatedly, the statute was no longer viewed as a critical piece of a broader egalitarian and collective program, but as a way to ensure bare minima on an individual basis—a much more modest goal.

Unions continued to advocate for minimum wage increases and a host of other employment and social welfare reforms.[379] And for several decades, due to their market power, unions were able to engage in pattern bargaining in certain industries, effectively forcing multiemployer agreements and influencing wages even for nonunion workplaces.[380] But the law no longer granted worker organizations formal power in wage setting for nonunionized workers.[381] Increasingly, unions came to be understood as representing existing members at particular workplaces—not as leading social partners empowered to represent the interests of the working class more broadly.[382] Meanwhile, union growth stalled in the face of unrelenting employer resistance, globalization, and the fissuring of the employment relationship, along with union complacency and, in some unions, corruption and discrimination; as a percentage of the workforce, union density declined.[383] By the 1990s, workers' collective power throughout the political economy was much diminished.[384]

Although wage boards remained on the books in several states and in the U.S. territories, they largely fell into disuse.[385] Where they were used, they did not involve quasi-bargaining between labor and business on a statewide basis, nor were they coupled with efforts to expand the membership of unions. Rather, they functioned much like other executive agencies, implementing the policy goals of the state's chief executive, who appointed the swing vote to the boards.[386]

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379. *See* LICHTENSTEIN, STATE OF THE UNION, *supra* note 30, at 185-86.

380. Throughout the 1950s and 1960s, soft sectoral bargaining persisted, in the form of "pattern bargaining," in industries like auto and steel despite the absence of a legal regime mandating such activity. *Id.* at 126-28.

381. *See id.* at 185-86.

382. *See* Andrias, *supra* note 8, at 32-35; Klare, *supra* note 48, at 318-25.

383. *See* Andrias, *supra* note 8, at 13-32 (discussing reasons for the decline of unions). Union density declined almost immediately after the 1940s reforms. *See* Bernstein, *supra* note 346, at 302-08 (documenting the rise and fall of union density).

384. *See* HACKER & PIERSON, *supra* note 96, at 27-28; ROSENFELD, *supra* note 9, at 170-81; Andrias, *supra* note 8, at 21-36.

385. *See* Andrias, *supra* note 8, at 84-85 & n.446 (collecting state wage-board statutes and describing their use).

386. *Id.* at 87.

Alongside changes in labor law and representation, there was a broader shift in administrative process away from the social democratic power sharing to which the FLSA industry committees aspired. Indeed, the enactment of the Administrative Procedure Act in 1946 was, in large part, a response to demands from the legal and business communities who objected to the government's muscular intervention in the economy during the New Deal and World War II.[387] By the end of the 1940s, administrative process had embraced the "rule of lawyers," a commitment to due process, and judicial-like proceedings—in part to limit popular rule like that encouraged by the earlier workplace regime.[388] Over the next decades, various additional developments created the administrative state as we know it today: agencies moved away from adjudication and towards rulemaking; technocratic expertise became more important; multiple new procedural requirements restrained the ability of agencies to act and enhanced judicial review of their actions; and cost-benefit analysis became a critical component of administration.[389] Regardless of whether one views lawyers or technocrats as predominant in today's system,[390] the notion, articulated by Frances Perkins many years ago, that the best experts for determining labor policy are workers' representatives and their employers, no longer finds great support in administrative process.

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387. *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1560 (1996); Nicholas S. Zeppos, *The Legal Profession and the Development of Administrative Law*, 72 CHI.-KENT L. REV. 1119, 1131 (1997).

388. *See* ERNST, *supra* note 44, at 125; JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE 5 (2012) (emphasizing the extent to which legalism and fairness were tightly linked and arguing that the emphasis on law and procedure made administrative governance acceptable to Americans); Kessler, *supra* note 44, at 725, 757-58 (describing and critiquing Ernst); Stewart, *supra* note 77, at 1670-76 (describing statutory and procedural limitations on agency action).

389. For a defense of the move toward the use of cost-benefit analysis in the Office of Information Regulatory Affairs, see, for example, Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 824, 873-76, 879-82 (2003); and Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1082 (1986). On the turn towards rulemaking, see GRISINGER, *supra* note 388, at 253-55; on the embrace of proceduralism, sometimes at the expense of efficacy, see Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 420 (1996); and Nicholas Bagley, The Procedure Fetish (Oct. 19, 2018) (unpublished manuscript) (on file with author).

390. Lawyering remained important in later decades. Movements concerned about industry capture of government pressed for new forms of accountability through litigation, and they won new judicial constraints on the administrative state. *See* Paul Sabin, *Environmental Law and the End of the New Deal Order*, 33 LAW & HIST. REV. 965, 968 (2015). Lawyers also continued to play a critical role in the technocratic apparatus. *See* Kessler, *supra* note 44, at 761.

Notions of democracy in administration also shifted dramatically. As then-Professor Elena Kagan and others have demonstrated, in the 1980s and 1990s, and continuing through subsequent decades, presidential control over administration increased considerably.[391] Proponents defended the move as a means to achieve democratic accountability.[392] On this account, because the President's constituency is national, he or she can represent competing interests when developing regulatory policy.[393] This is a very different conception of democracy in administration than the one that dominated during the era of the FLSA industry committees. The prevailing view today is that political accountability is maintained through open comment and presidential control—instead of through the direct involvement of select, but important, groups in the polity.

To be sure, in the years after the demise of the industry committees, public participation in the administrative state remained important, but it occurred largely through expansion of, and reforms to, liberal pluralism. Increasingly, all citizens were invited to provide comments in the formulation of policy. The law no longer affirmatively granted worker organizations, or other civil society groups, a seat at the table, nor did it encourage their expansion.[394] Meanwhile, as unions and other civil society organizations declined in strength, corporate political activity grew.[395] As a result, business entities were increasingly able to capture, or at least dominate, the administrative process.

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391. *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND 6-7 (2011); Kagan, *supra* note 69, at 2246, 2272-2315; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 6-7 (1994); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3 (1995); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 185 (1986); *see also* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031 (2013) (describing presidential control over enforcement policy).

392. *See, e.g.*, Kagan, *supra* note 69, at 2331-39 (arguing that presidential control over administration serves the goal of democratic accountability); Pildes & Sunstein, *supra* note 391, at 3 ("Some degree of presidential review of the regulatory process is probably necessary to promote political accountability . . . ."); *cf.* Andrias, *supra* note 391, at 1083 (discussing how presidential control may or may not enhance accountability).

393. *See* Croley, *supra* note 389, at 831 (describing the theory of presidential accountability).

394. *See* Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1308-10 (2016) (summarizing existing vectors for participation); Stewart, *supra* note 77, at 1723-56 (describing how, during the 1960s, courts concluded that the right to participate in agency decision-making and to obtain judicial review should no longer be limited, as it had been under the traditional model, to regulated firms and extended these rights to the new public interest advocacy groups).

395. *See* DRUTMAN, *supra* note 7, at 47-72; THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE 127-74 (2003).

Reformers responded with a range of tactics. They sought to insulate agencies from capture through design and disclosure[396] and to encourage citizen participation through e-rulemaking and other mechanisms.[397] Under the banner of "new governance" or "experimentalism," they tried to engage citizens and associations in policymaking through mechanisms of decentralized participation and experimentation.[398] But unlike the early New Deal workplace regime, these contemporary approaches did not affirmatively seek to build associations of citizens as a means to redistribute power in the political economy.[399] Moreover, market efficiency, rather than egalitarianism, tended to be the guiding philosophy, leading to increasing reliance on privatization as a governing strategy.[400] Ultimately, by most scholars' and public commentators' estimations, the reforms did little to redistribute power in administrative governance away from dominant, wealthy interests.[401]

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396. *See, e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 21-23 (2010) (discussing the relationship between capture and agency design); David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 115-23 (2018) (arguing that transparency was redirected from private entities to government in the 1960s-1970s).

397. *See, e.g.*, Nina A. Mendelson, *Foreword: Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1380 (2011); Wendy Wagner, *The Participation-Centered Model Meets Administrative Process*, 2013 WIS. L. REV. 671, 677, 692. *But cf.* Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 948-49, 964-68 (2006) (expressing skepticism about the promise of e-rulemaking).

398. *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004). Another response was the development of "negotiated rulemaking," created in the 1990s but used successfully only a few times; it engaged representatives from regulated firms, trade associations, and citizen groups in agency-established committees. Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1256-57 (1997); *see also* William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1386 (1997); Peter H. Schuck & Steven Kochevar, *Reg Neg Redux: The Career of a Procedural Reform*, 15 THEORETICAL INQUIRIES L. 417 (2014).

399. *See* Coglianese, *supra* note 398, at 1257 (describing goals of negotiated rulemaking as "saving time and reducing litigation").

400. *See* JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC (2017).

401. *See* Lisa T. Alexander, *Reflections on Success and Failure in New Governance and the Role of the Lawyer*, 2010 WIS. L. REV. 737, 739-40 (concluding that "many new governance experiments . . . [have] fail[ed] to achieve th[eir] central normative objective of distributive justice"); Andrias, *supra* note 7 (detailing political science and law review studies).

IV. INDUSTRY COMMITTEES: CONSTITUTIONAL VIABILITY, WORKER POWER, AND A NEW DEMOCRACY

In the end, the FLSA industry committees were at once remarkably successful and fatefully limited at achieving the aim of the early twentieth-century Progressive reformers and unionists. Not surprisingly, the successes and failures reflect both the particular political conditions that produced FLSA and persistent challenges of power-sharing regimes. Understanding the extent to which the regime succeeded in building worker power and rendering the economy more egalitarian and democratic—and the extent to which it did not—can help inform thinking about future reforms.

A. Constitutional Viability

The FLSA system survived judicial review because it struck a balance between modern administrative practice and alternative conceptions of fairness, expertise, and democracy advanced by reformers, Progressive theorists, and industrial unionists. According to some observers, there were functional advantages to this approach.[402] By maintaining a decision-making role for the Administrator, as well as providing a role for the general public and agency experts, the FLSA industry-committee system recognized the values of expertise, rule of law, and political accountability—even as it privileged the involvement of unions and business in negotiating standards. The advice of economic experts, the open public hearing, and the ultimate decision-making check provided by the Administrator limited the risk that the committee members would protect themselves at the expense of others in the industry or at the expense of the public, as NIRA boards were accused of doing.[403] At the same time, granting unions and business a privileged seat at the table gave affected parties influence over the policy decisions that shaped their lives. Worker and business leaders brought a particular form of concrete, day-to-day expertise to the decision-making process. They were able to engage in that process in a more deliberative and sustained way than would have been permitted had the statute provided only a public hearing or open comment process. The tripartite approach also strengthened the position of unions in society and may have facilitated industrial peace and cooperation.

On the other hand, FLSA's mixed approach, designed to comply with constitutional limitations, meant that the committees fell short of reformers' most ambitious goals. Final authority rested with government officials, not with

402. *See supra* Section III.B.4 (discussing commentary at time of industry-committee operation).

403. *See supra* notes 202-204, 248-290, 294-297.

worker organizations themselves. The role of the Administrator and the appointed public representatives meant that, had the system continued, the partisan flip-flop that characterizes many administrative agencies, including the NLRB, could have plagued the committee system as well.[404] Still, under the private nondelegation doctrine that has governed since the New Deal, the decision to vest final decision-making authority in executive branch officials and to limit the role of private actors was essential to enable the committees to survive constitutional review.[405]

Another constitutional requirement—the existence of an "intelligible principle" to guide and cabin the decision-making of the executive[406]—more obviously advanced Progressive goals. The clear statutory charge to the committees was to raise worker wages as high as possible without substantially curtailing employment in an industry—not a more contestable and amorphous goal like promoting efficiency in industry, overall wealth maximization, or even labor peace. The statute also required the committees to achieve the goal by a certain date and within a statutorily prescribed range.[407] This unambiguous mandate distinguished the FLSA committees from NIRA for constitutional purposes, and it helped minimize conflict and achieve statutorily intended outcomes.[408] To be sure, class and regional conflict persisted: business opposition remained high throughout the industry committees' existence, particularly from Southern employers. The companies that unsuccessfully pressed their arguments in the

404. *But see infra* Sections IV.B and IV.C for a discussion of how the combination of tripartite structures with robust organizing and concerted action rights minimized partisan control and enabled more fulsome democratic engagement.

405. In the late 1930s, in addition to upholding the FLSA industry committees, *see supra* notes 308-312 and accompanying text, the Court upheld several other administrative schemes that required participation and consent by affected organizations and parties. *See* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 388 (1940) (upholding a scheme under which boards comprised of coal producers would propose fixed prices to a government agency, the National Bituminous Coal Commission, which could "approve[], disapprove[], or modif[y]" those proposals); United States v. Rock Royal Coop., Inc., 307 U.S. 533, 577-78 (1939) (upholding a statutory scheme that required the two-thirds approval of milk producers before the Secretary of Agriculture could fix milk prices); Currin v. Wallace, 306 U.S. 1, 6, 15-16 (1939) (upholding a statute that required the approval of two-thirds of tobacco growers before the standard for tobacco sales imposed by the Secretary of Agriculture would take effect).

406. Mistretta v. United States, 488 U.S. 361, 372 (1989) (citing J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928)).

407. *See supra* note 255 and accompanying text.

408. Harry Weiss, *The Enforcement of Federal Wage and Hour Regulations*, 43 AM. FEDERATIONIST 930, 937 (1936) (discussing the failure of NIRA and opining that "[i]t is imperative that future wage and hour regulations be written simply and clearly").

courts ultimately succeeded in dismantling the committees in Congress.[409] But despite the persistent opposition, during the committees' short lifetime, they functioned with clear goals—raising wages in a timely fashion—and achieved them.

At the same time, the particular intelligible principle chosen meant that FLSA industry committees were constrained in their ability to achieve a more egalitarian economic regime. They negotiated only about minimum wages, without jurisdiction over hours, working conditions, health care, vacation time, sick time, family leave, or other social welfare policies. In addition, FLSA imposed a statutory ceiling on the wage increases the committees could recommend. This defined scope was necessary to obtain enough Southern and Republican support to win passage of the Act and helped assuage the AFL's concern that the law not displace private bargaining. But a more redistributive statutory mandate, so long as it was clearly defined, could have better advanced the ambitious goals of reformers like John Dewey, John Commons, Frances Kelley, and the more progressive unions of the CIO.[410]

B. Formalizing Labor Power

The industry committees were also successful in helping build labor's power in the political economy, albeit less so than the more radical Progressives and industrial unionists had desired. The committee work occurred at the same time as massive industrial organizing drives and successful strikes, protected by the NLRA. The two regimes were interdependent. Unions used the FLSA structure to aid their organizing and strike efforts. They invoked the industry committees to legitimize their organizations and engaged in strikes to protest violations of FLSA. They also used the process to gain more power in administration, sitting down as equals with some of the largest companies in the United States.[411] This redistribution of power was short-lived due to limitations imposed by the Taft-Hartley Act (which proved nearly fatal to unions over time), the repeal of the committees themselves, and long-term, aggressive resistance by business. But for a time, the combination of administrative power sharing and labor organiz-

409. *See supra* Section III.B.3.

410. *See* Kaufman, *supra* note 42. For examples of the broad scope of some European tripartite models, see SWENSON, *supra* note 111; THELEN, *supra* note 111; and Andrias, *supra* note 8, at 35.

411. *See supra* Section III.B.

ing substantially increased worker wages while suggesting the possibility of a fundamental redistribution of power in both politics and the economy.[412]

That FLSA's industry committees existed alongside and operated synergistically with the NLRA's union-organizing protections distinguished the regime from the liberal pluralistic approach that eventually replaced it. As Dewey pointed out, simply allowing existing organizations to participate in administration, even pursuant to a broad statutory mandate, does not change the underlying power dynamics.[413] Interest-group pluralism, without a mechanism for building organizational strength, is unlikely to equalize the playing field: "[I]t is difficult to see how even occasional intervening action of the general public is to be made effective . . . until the group activities upon which it is to operate are better organized and more open to recognition."[414] In contrast, taken together, the NLRA and FLSA's industry committees offered more than a means to participate on already uneven territory. They encouraged new organization among workers and facilitated those organizations' ability to exercise power in the democracy. The mixed system also helped distinguish the regime from subsequent state-level tripartism that was controlled by the partisan executive. Because FLSA's tripartite deliberations operated with broad-based union and business participation and occurred against the background of significant worker organizing and strike activity, no single executive-picked committee member could play a decisive role.

Still, Dewey worried that tripartite systems enacted in the early twentieth century were not accompanied by sufficient changes in the background common law rights of employers and employees, or in the ownership of capital, and therefore would not fundamentally change the character of the American economy or democracy.[415] His concern ultimately proved prescient both at the federal level, where the FLSA experiment was narrow and short-lived, and at the state level,

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412. Indeed, the experience of other localities, including Puerto Rico, supports the view that wage boards, if accompanied by reforms that encourage organization and permit collective action, can facilitate a broader redistribution of power in the economy. *See* GALVIN, *supra* note 375; Marzán, *supra* note 375, at 30, 44-47, 50-51, 63-65, 71-78 (discussing the Puerto Rico minimum wage laws, which established a wage board and ultimately stated that the public policy of the Commonwealth was to support collective bargaining and examining the relationship between the board and union organizing efforts). Experience with broader tripartite regimes in Europe and elsewhere supports this account as well. *See* THELEN, *supra* note 111; Albin, *supra* note 111.

413. John Dewey, *Practical Democracy*, NEW REPUBLIC, Dec. 2, 1925, at 52, 53.

414. *Id.* (critiquing Walter Lippman).

415. WESTBROOK, *supra* note 138, at 440-41, 452. Dewey came to urge more fundamental reforms, including nationalization of major industries and changes to property entitlements. BRAND *supra* note 130, at 52; WESTBROOK, *supra* note 138, at 452.

where tripartism's redistributive scope has been minimal and has depended almost entirely on the ideological commitments of the given executive.[416] Once the rights to organize and to strike were curtailed, the state's affirmative encouragement of unionization eliminated, and a market efficiency approach to regulation adopted, the remaining tripartite systems no longer operated to build worker power. Rather, they functioned much like any other executive administrative agency.

Moreover, the scope of the reforms was too narrow in another, related way: industries dominated by African American and female workers were excluded. These exemptions reflected not only Southern opposition, but also conservative impulses among some Progressives and labor-movement leaders as well.[417] Ultimately the exclusions inhibited FLSA's ability to further an egalitarian political economy for all workers and helped to perpetuate racial and gender segmentation that persists in the labor market today.[418] Had the CIO and the more radical Progressives prevailed in broadening the scope of FLSA's coverage, expanding its egalitarian mission, and achieving other reforms in the background rights of capital and labor, a different picture of labor power might have emerged.

C. Building Democracy

From the perspective of creating new mechanisms for democracy, FLSA's industry committees were again successful, but temporarily and partially so. The industry-committee process involved both union leaders and ordinary workers in governmental processes. Workers testified in great numbers, engaged their employers and other employers in deliberation and debate about proper wage

416. For example, California's state wage board is empowered to negotiate over a range of topics, but its agenda and the extent of its egalitarian impulses have depended almost entirely on the political party of the Governor, who appoints its members. CAL. LAB. CODE §§ 70, 70.1 (West 2011); *see also* Marjorie Fochtman, *From the Experts: Will the Revival of California's Industrial Welfare Commission Reduce the Explosion of Wage and Hour Litigation for California Employers?*, HR DAILY ADVISOR (Mar. 1, 2007), http://hrdailyadvisor.blr.com/2007/03/01/from-the-experts-will-the-revival-of-california-s-industrial-welfare-commission-reduce-the-explosion-of-wage-and-hour-litigation-for-california-employers [https://perma.cc/7EBP-LBWV].

417. *See supra* notes 36, 126, 141, 241, 246, 289, 302-305 and accompanying text.

418. *See supra* note 36 and accompanying text. So too, independent contractors and other less traditional workers were exempt, enabling employers to structure operations in ways that still leave large numbers of workers unprotected by wage-and-hour and collective-bargaining law. *See* David Weil, *Lots of Employees Get Misclassified as Contractors. Here's Why It Matters*, HARV. BUS. REV. (July 5, 2017), https://hbr.org/2017/07/lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters [https://perma.cc/G6CU-FLL7].

rates, and made use of the administrative processes as a collective. They practiced democracy from the ground up, beyond the franchise, much in the way that Dewey, Commons, and others had theorized.

The mechanics of such democratic practice presented a number of challenges, however. One persistent difficulty of administrative power-sharing arrangements is that governmental empowerment of associations and organizations can render representation too static. The law may not evolve to reflect actual interests and evolving organizations but rather may empower bureaucracies that become unrepresentative and antidemocratic. Power sharing can thus entrench the power of established organizations at the expense of weaker interests, leaving, for example, minority or immigrant workers unrepresented. Another concern is that groups empowered by the government to bargain nationally can be co-opted by the government, becoming unrepresentative of their members, insufficiently militant, or simply unconcerned with more local issues. All of these concerns might render participation rights purely nominal, carrying little real power to influence outcomes.[419]

The FLSA wage boards attempted to answer these challenges by pairing administrative wage bargaining with mechanisms oriented to the enterprise level: the Wagner Act's protection of organizing and collective bargaining at the firm level. The combination of social bargaining and energetic firm-based bargaining permitted local activity that provided a more accessible forum for employee participation and gave workers power to bargain over the vast array of issues they faced locally.[420] And, for a time, the government's active endorsement of unions helped enable organizing drives in unorganized workplaces that expanded the reach of participating organizations, engaged workers in their local organizations, and, in turn, rendered the tripartite system more representative. Thus, administrative participation came with real economic power, as workers simultaneously built organizations at the workplace. With the state's active endorsement, the on-the-ground workplace democracy that theorists like Dewey and Commons envisioned flourished despite employer opposition.

Meanwhile, the FLSA Administrator worked to address concerns about representation by choosing committee members only from democratically selected

419. On the challenges and advantages of involving associations in government and other power-sharing arrangements, see, for example, JOSHUA COHEN & JOEL ROGERS, ASSOCIATIONS AND DEMOCRACY (1995); Archon Fung, *Associations and Democracy: Between Theories, Hopes, and Realities*, 29 ANN. REV. SOC. 515 (2003); and Levinson, *supra* note 15.

420. In the post-Taft-Hartley period, however, according to some critics, union bureaucracies ossified such that unions no longer provided a true forum for workplace democracy and expression. Klare, *supra* note 48; *see also supra* notes 381-382 and accompanying text.

unions, even though the statute did not so require. He also informally established a selection method that considered the extent to which particular unions represented workers in a given region or sector.[421] The Administrator did not, however, create a system to provide representation to unorganized workers. As discussed, many observers—including the unions themselves—concluded that unorganized workers were well represented by existing unions. Other contemporaries disagreed, concluding that "[b]y failing to secure participation of unorganized labor on industry committees, the Wage and Hour Administrator has established a procedure which is potentially unfair."[422] Underlying the disagreement, however, was a deeper divide about the necessary conditions for effective worker representation. During the early and mid-twentieth century, the notion that organization was a precondition for effective political participation was a live and popular idea, though it may seem foreign in our world, where workers are often conceived as atomized individuals vindicating personal rights.

Similar challenges applied to the representation of business. Here again, the Administrator sought to achieve fair representation by choosing from trade associations and leading companies, but the statutory guidance could have been more substantial in requiring diverse representation.[423] Even more challenging was the question of how to represent the diffuse public—and how not to have the "public" vote reduce the committees to executive control. The British system upon which FLSA was modeled avoided the problem by not including public representatives in bargaining over labor issues at all.[424] FLSA took a different approach: it provided for public hearings and included public representatives on the committees. At first, that system worked well for workers, as the public representatives came from civil society organizations with broad-based working-class membership. Over time, however, the public representatives were drawn less from civic organizations and more from the ranks of economists, with selection driven by the executive branch. The evolution reflected the development in both associational life and administrative practice that occurred over the 1940s.

421. *See* Weiss, *supra* note 270 and accompanying text.

422. Golding, *supra* note 265, at 1157; *see* Cook, *supra* note 276, at 689*; see also supra* notes 275-279 and accompanying text.

423. *See* Michael Barry & Adrian Wilkinson, *Reconceptualizing Employer Associations Under Evolving Employment Relations: Countervailing Power Revisited*, 25 WORK EMP. & SOC'Y 149 (2011). On the complicated and contingent nature of the corporate firm, see Henry Hansmann, *Ownership of the Firm*, 4 J.L. ECON. & ORG. 267 (1988), which argues that the investor ownership model of capitalism, which puts shareholders and creditors at the center, is contingent on the economics of enterprise, legal and political structures, changing technologies, and cultural differences.

424. *See* WALTMAN, *supra* note 42, at 25-26.

An alternative approach, reflecting the more radical democratic aspirations of Dewey and others, would have required development of new legal frameworks to encourage the creation and growth of representative civil society organizations. Such an approach would have allowed the industry-committee model to travel more easily to other areas of administrative law, where diffuse interests are unorganized—and could therefore have been more transformative of democracy generally.[425]

D. Reimagining Workplace Law's Future

Today, the Progressive and early New Deal vision of shared power over economic policy seems anachronistic at best. The Court's ruling in *Janus* along with recently enacted right-to-work laws in former union bastions will, in all likelihood, sharply diminish union funding while further reducing the political power of working people.[426] Indeed, *Janus* is just one component of a burgeoning First Amendment doctrine that would render much more labor activity and regulation unconstitutional while protecting corporate "speech."[427] The picture is bleak with respect to administrative law as well. Arguments rejecting the legitimacy of

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425. Full examination of the transferability of the wage-board model to other areas of law is beyond the scope of this Article. It is important to note, however, that the model likely works most easily when there are a limited number of well-defined stakeholders. The New Deal did include examples of broader association building through agency action. For example, Meg Jacobs explores how the Office of Price Administration engaged consumers and helped facilitate their organizing. *See* Jacobs, *supra* note 353.

426. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448 (2018); *see* LEE, *supra* note 64 (detailing the long history of the right-to-work movement); James Feigenbaum et al., *From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws* (Nat'l Bureau of Econ. Research, Working Paper No. 24259, 2018), http://www.nber.org/papers/w24259.pdf [https://perma.cc/4AWN-42Z3] (exploring the political effects of right-to-work laws). *But see* Noam Schreiber, *Missouri Voters Reject Anti-Union Law in a Victory for Labor*, N.Y. TIMES (Aug. 7, 2018), https://www.nytimes.com/2018/08/07/business/economy/Missouri-labor-right-to-work.html [https://perma.cc/U3KQ-6GAE] (discussing the recent decision of voters in Missouri to reject the Republican state legislature's attempt to impose open-shop or "right to work" on all workplaces).

427. In addition to *Janus*, see, for example, *National Ass'n of Manufacturers v. NLRB*, 717 F.3d 947, 959 n.18 (D.C. Cir. 2013). For a critique of recent developments in this area, see Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2015); Jedediah Purdy, *Neoliberal Constitutionalism:* Lochner*ism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 198-203 (2014); and Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133. On the long history of libertarian First Amendment arguments, see LEE, *supra* note 64, at 115-32; WEINRIB, *supra* note 143; and Jeremy K. Kessler, *The Early Years of First Amendment* Lochner*ism*, 116 COLUM. L. REV. 1915 (2016).

the administrative state have gained currency among conservative academics,[428] politicians,[429] and judges, including several Supreme Court Justices.[430] One strand of argument sounds in originalism and the structure of government: the current administrative state is unconstitutional because it purportedly violates the Founders' conceptions of the separation of powers, federalism, and due process.[431] Another is more expressly libertarian: the regime purportedly burdens due process and economic liberty—or it impinges on expression protected by the First Amendment.[432] Some critics, including Justice Gorsuch, appear to embrace both strands and would impose new limits on both public and private delegations, as well as inclusive systems of representation.[433]

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428. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

429. *See, e.g.*, Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017); Mike Lee, *Speeches: The Time for Regulatory Reform in Congress*, MIKE LEE U.S. SENATOR FOR UTAH (Mar. 7, 2017), https://www.lee.senate.gov/public/index.cfm/speeches?ID=2ED7B201-8099-406A-A872-A07C7ADE9D36 [https://perma.cc/Q4BK-W3XA].

430. *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring); *id.* at 1240-42 (Thomas, J., concurring in the judgment); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211-13 (Scalia, J., concurring in the judgment); *id.* at 1213-25 (Thomas, J., concurring in the judgment); *see also* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring) (questioning whether *Chevron* deference to administrative agencies' interpretations of federal statutes violates the separation of powers); Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666 (D.C. Cir. 2013) (adopting an expansive view of the nondelegation doctrine with respect to private parties), *vacated and remanded*, 135 S. Ct. 1225. For a comprehensive analysis of the conservative judicial attack on the administrative state, see Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: The 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

431. *See* HAMBURGER, *supra* note 428.

432. BERNSTEIN, *supra* note 184; RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 247-84 (2014).

433. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1224-27 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (offering a due process argument); Caring Hearts Pers. Home Servs., Inc. v. Burwell, 824 F.3d 968, 969 (10th Cir. 2016) (Gorsuch, J.) (expressing concern that an expansive administrative state involves excessive delegation and "raises troubling questions about due process and fair notice"); *see also* Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 973-81 (2014) (arguing that delegation of coercive power to private parties can amount to a due process violation). Judges on the D.C. Circuit, as well, have been urging a more robust nondelegation doctrine that would limit delegation to private parties, as well as one that would limit delegation from Congress to the Executive Branch. *See Ass'n of Am. R.Rs.*, 721 F.3d 666 (taking narrow view of permissible private delegation). For discussion of the pre-New Deal nonprivate delegation doctrine, see *supra* notes 205-217 and accompanying text.

Against this background, the early years of FLSA could be dismissed as little more than a historical curiosity. But doing so would be a mistake. Broadly speaking, the current political economy bears striking similarity to that of the Gilded Age, with its vast inequalities in wealth, concentrated political power, and a corporate-friendly judiciary. And as in the Progressive Era, workers, sympathetic political leaders, and intellectuals are once again searching for solutions, exploring alternatives to the private, market-based, "neoliberal" solutions that dominated recent decades.

To be sure, any immediate move toward empowering organizations of workers to negotiate over expansive labor and social welfare regulation at the federal level is unrealistic at best.[434] But reforms along the lines of the early New Deal vision are possible at the state and local level in blue jurisdictions. Though federal labor law preemption forecloses nearly all state and local labor law legislation, employment law does not confront preemption hurdles.[435] Several states, including California and New York, already vest the power to set wages or other standards with tripartite commissions, and these commissions have intermittently operated to bring labor and management together under state administrative supervision and to set standards on an industry-by-industry basis.[436]

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434. More limited labor law reform has repeatedly failed, even under Democratic governments. Dorian T. Warren, *The Politics of Labor Policy Reform*, *in* THE POLITICS OF MAJOR POLICY REFORM IN POSTWAR AMERICA 103-28 (Jeffery A. Jenkins & Sidney M. Mikis eds., 2014); Dorian T. Warren, *The Unsurprising Failure of Labor Law Reform and the Turn to Administrative Action*, *in* REACHING FOR A NEW DEAL: AMBITIOUS GOVERNANCE, ECONOMIC MELTDOWN, AND POLARIZED POLITICS IN OBAMA'S FIRST TWO YEARS 191-229 (Theda Skocpol & Lawrence R. Jacobs eds., 2011). For accounts of labor law's failure in the law review literature, see Andrias, *supra* note 8, at 27 & n.127; Cynthia L. Estlund, *Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002); and Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1163-64 (2011).

435. *See* Andrias, *supra* note 8, at 89-92.

436. *See* CAL. LAB. CODE §§ 70-74, 1173, 1178 (West 2011) (authorizing an Industrial Welfare Commission appointed by the governor and composed of two representatives of employers, two from recognized labor organizations, and one from the general public; requiring commission to review adequacy of minimum wage every two years; and providing for industry specific wage boards); N.Y. LAB. LAW § 655 (McKinney 2016) ("A wage board shall be composed of not more than three representatives of employers, an equal number of representatives of employees and an equal number of persons selected from the general public."); *see also* COLO. REV. STAT. ANN. § 8-6-109 (West 2013) (authorizing a wage board comprised of an equal number of employer, employee, and public representatives); N.J. STAT. ANN. § 34:11-56a4.7 (West 2011) (establishing the "New Jersey Minimum Wage Advisory Commission" with "five members as follows: the Commissioner of Labor and Workforce Development, ex officio, who shall serve as chair of the commission, and four members appointed by the Governor as follows: two persons who shall be nominated by organizations who represent the interests of the business community in this State and two persons who shall be nominated by the New Jersey

More recently, Seattle enacted a domestic workers' bill of rights that includes a mechanism for tripartite sectoral bargaining.[437] New York City enacted a law that facilitates efforts of nonunion workers to collectively engage in the political process.[438] Similar mechanisms could be enacted elsewhere.[439]

The tide could soon turn at the federal level as well. At least within academic circles, the idea of sectoral bargaining has assumed a new prominence, as concern about economic and political inequality mounts. Public policy experts and legal academics have begun to urge new forms of labor law in which unions would bargain at the sectoral level for all workers,[440] and in which both unions and the state would play a larger role in guaranteeing social welfare benefits.[441] Scholars are also mounting new critiques regarding the bifurcation of labor and employment law, arguing that unions and other worker organizations could once again play a critical role in shaping and enforcing employment law.[442] Meanwhile, administrative law scholars are reexamining the problem of democracy in administration, reflecting on Progressive Era approaches and offering new strategies that could give citizen groups more power in the articulation of policy.[443] And, most recently, a few scholars have begun not only to defend the

State AFL-CIO"); N.J. STAT. ANN. §§ 34:11-56a8 to -56a9 (West 2011) (providing that commissioner may establish a wage board to set minimum rates for employees in particular occupations; such boards shall be composed of equal numbers of employer, employee, and public representatives). *But see* 2016 N.Y. Laws, ch. 54, pt. K, § 4 (limiting board's authority with regard to wages).

437. Office of the City Clerk, *CB 11926*, CITY SEATTLE (July 27, 2018), http://seattle.legistar.com/LegislationDetail.aspx?ID=3532201&GUID=232AE887-44C6-4450-A040-84225AD4F11D [https://perma.cc/4GAU-3TWN]; Associated Press, *Seattle Approves New Rights for Nannies, Domestic Workers*, WASH. POST (July 23, 2018), https://www.washingtonpost.com/business/seattle-approves-new-rights-for-nannies-domestic-workers/2018/07/23/befoff7e-8ed1-11e8-ae59-01880eac5f1d_story.html [https://perma.cc/EQ4E-99VS].

438. A possible model is a recent New York City law that gives employees the option of contributing to qualified nonprofit organizations that will advocate for workers in government and politics. N.Y.C., N.Y., ADMIN. CODE §§ 20-1301 to -1310 (2017); *see* Justin Miller, *In New York City, Fast-Food Workers May Soon Have a Permanent Voice*, AM. PROSPECT (June 15, 2017), http://prospect.org/article/new-york-city-fast-food-workers-may-soon-have-permanent-voice [https://perma.cc/P52V-H3L6].

439. Andrias, *supra* note 8; *see also* Andrias, *Social Bargaining*, *supra* note 378.

440. *See* sources cited *supra* note 14.

441. Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 N.C. L. REV. 319 (2012).

442. Andrias, *supra* note 8; Becker, *supra* note 31; Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552, 558-60 (2010).

443. *E.g.*, NOVAK, *supra* note 123; RAHMAN, *supra* note 2; Andrias, *supra* note 8; K. Sabeel Rahman, *Policymaking as Power-building*, 27 S. CAL. INTERDISC. L.J. 315 (2018).

legality of agency fees, but also to question both the First Amendment and the NLRA doctrine that prohibited unions from charging for political expenses in the first place.[444]

Finally, there are indications of rising demands for higher wages and union rights within the broader public. Since 2012, in response to organizing by the Fight for $15 worker movement, over two dozen states and many more localities have raised their minimum wages.[445] Several of these, including California and New York, have enacted minimum wage increases to fifteen dollars an hour—nearly eight dollars an hour more than the federal minimum, to be phased in over time.[446] Even during the election that brought President Trump to victory, minimum wage increases prevailed when they were on the ballot. So too have regulations providing for paid leave and other benefits.[447] These new laws are not just about individual employment rights. Rather, they have emerged out of organizing campaigns that frame the demand for better employment rights and social welfare benefits as part and parcel of the demand for union rights.[448] Some have even emerged from tripartite bargaining, either formal or informal, among

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444. Brief of Professors Eugene Volokh & William Baude as Amici Curiae in Support of Respondents, Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448 (2018) (No. 16-1466); Brief of Law Professors Andrias, Estlund, Fisk, Lee & Weinrib as Amici Curiae in Support of Appellants/Cross-Appellees, *supra* note 361; Andrias, *supra* note 360, at 9-17; William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171 (2018); Nikolas Bowie, *The Government Could Not Work Doctrine*, 105 VA. L. REV. 1 (forthcoming 2019); *cf.* Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1046 (2018).

445. *Minimum Wage Basics: City Minimum Wage Laws: Recent Trends and Economic Evidence*, NAT'L EMP. L. PROJECT (Apr. 26, 2015), https://www.nelp.org/publication/city-minimum-wage-laws-recent-trends-and-economic-evidence-on-local-minimum-wages [https://perma.cc/88NR-RMC5]; *Minimum Wage Tracker*, ECON. POL'Y INST. (July 12, 2018), http://www.epi.org/minimum-wage-tracker [https://perma.cc/2ZFX-64T4]; *State Minimum Wages: 2018 Minimum Wage by State*, NAT'L CONF. ST. LEGISLATURES (Jan. 2, 2018), http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx [https://perma.cc/X5S5-89J5]. *But see* Alan Blinder, *When a State Balks at a City's Minimum Wage*, N.Y. TIMES (Feb. 21, 2016), http://www.nytimes.com/2016/02/22/us/alabama-moves-to-halt-pay-law-in-birmingham.html [https://perma.cc/88SA-FLKW] (describing Alabama state legislature's efforts to overrule Birmingham's local minimum wage).

446. *See* S.B. 3, 2016 Leg., Reg. Sess. (Cal. 2016); *Minimum Wage Basics*, *supra* note 445; N.Y. Governor's Press Office, *Governor Cuomo Signs $15 Minimum Wage Plan and 12 Week Paid Family Leave Policy into Law*, N.Y. ST. (Apr. 4, 2016), http://www.governor.ny.gov/news/governor-cuomo-signs-15-minimum-wage-plan-and-12-week-paid-family-leave-policy-law [https://perma.cc/G9TJ-5T5Z].

447. Andrias, *supra* note 8, at 55-56.

448. *Id.* at 57-69.

unions, employers, and the state.[449] Meanwhile, the recent teacher strikes in West Virginia, Arizona, Colorado, and Oklahoma have taken direct aim at austerity politics, demanding not just fair wages and good benefits for teachers throughout the state, but also adequate education funding and a more progressive tax code.[450] As I have previously argued, from these efforts, the outline of a new, or revitalized, model of labor law is emerging that would combine a political, social form of sectoral bargaining with both old and new forms of worksite representation.[451] These labor efforts are of a piece with other growing political movements urging a more egalitarian and democratic political economy.[452]

They are also of a piece with the aspirations of workers, intellectuals, and reformers of the Progressive and early New Deal Eras. To be sure, the wage-board approach detailed in this Article is neither a panacea nor directly transferable to our present context. Yet the history suggests the plausibility of an alternative model of labor, employment, and administrative law—and one with an American pedigree. On this basis, we might again begin to imagine a workplace administration that shares the egalitarian and democratic aspirations of John Dewey, John Commons, Frances Kelley, the CIO, and other reformers—a workplace administration that shifts power in the political economy by encouraging the growth of worker organizations and incorporating them into the governing process; a workplace administration that expressly embraces redistributive goals and that commits the state, in social partnership with unions and business, to work toward those goals.[453] As with the FLSA committees, and as with earlier calls for reform, the aim would be not "government determination or imposition of all of the terms of the employment relationship," but rather "systematic revision of the background legal context in which employees participate through

449. *Id.* at 64-67, 84-87.

450. Andrias, *Peril and Possibility*, *supra* note 13.

451. *See* Andrias, *supra* note 8.

452. *See, e.g.*, Alexander Burns, *There Is a Revolution on the Left. Democrats Are Bracing.*, N.Y. TIMES (July 21, 2018), https://www.nytimes.com/2018/07/21/us/politics/democratic-party-midterms.html [https://perma.cc/N3CJ-4LSF]; Michelle Goldberg, *The Millennial Socialists Are Coming*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/opinion/democratic-socialists-progressive-democratic-party-trump.html [https://perma.cc/M79B-9ML9]; Steve Peoples, *Democratic Socialism Surging in the Age of Trump*, ASSOCIATED PRESS (July 21, 2018), https://www.apnews.com/a1770fd620d94bf58d0ff1035d3e0eea [https://perma.cc/6L5A-3D9V]; *see also* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018) (analyzing the contemporary law reform project of Black Lives Matter).

453. For any contemporary statute, there would be many details to work out and many ways to improve on past efforts. For some preliminary thoughts, see Andrias & Rogers, *supra* note 11.

self-organization and otherwise in making the decisions that affect their working lives."[454]

CONCLUSION

Ultimately, the history of FLSA's industry committees forces the reconsideration of widely held assumptions about both workplace law and administrative law. In recent years, numerous scholars and labor law experts have bemoaned the "dichotomy between U.S. labor and employment law," emphasizing that it consists of "two distinct forms of workplace regulation [that] are arguably in tension."[455] The history presented in this Article is further evidence that the sharp divide between labor law and employment law that seems natural today is in fact historically contingent.[456] The reformers and unionists who pushed for the NLRA and FLSA, along with the drafters of these statutes, conceived of labor and employment law without clear bifurcation. In their view, collective rights were to be vindicated through public law mechanisms as well as through private bargaining. Conversely, individual rights could not be vindicated without collective power; workers' involvement in employment law must also be collective.[457] Ultimately, the intertwined scheme they enacted was successful in enabling workers to raise wages throughout industries while building their collective power and practicing democracy from the ground up.

The history also complicates the conventional wisdom that FLSA was unambitious and inconsequential in comparison to the NLRA.[458] The New Dealers and their antecedents saw minimum wage laws not as a way to achieve mere subsistence, but as an essential component of a broader project aimed at building worker power and a more egalitarian political economy. And for a period they succeeded in realizing this vision, albeit partially. In this way, the history suggests the transformative potential of universal employment law. It also shows that sectoral bargaining has more of an American pedigree than is known today.

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454. Karl E. Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 42 (1988).

455. Becker, *supra* note 31, at 164; *see supra* notes 51-52 and accompanying text.

456. *Cf.* Lee, *supra* note 52 (challenging the historical account of a bifurcation between individual and collective rights).

457. In that way, the Court's recent decision in *Epic Systems Corp. v. Lewis* fundamentally errs. 138 S. Ct. 1612 (2018). As Justice Ginsburg rightly points out in dissent, *id.* at 1636-38 (Ginsburg, J., dissenting), and as the history presented in this Article supports, the New Dealers believed collective action rights were to be pursued through legal processes as well as through collective bargaining.

458. *See* sources cited *supra* notes 40-42.

Bargaining was not limited to the work site, and it was undertaken with affirmative governmental support. Within the broad statutory framework of labor and employment law that still exists today, worker organizations were granted formal power in policy making and the capacity to bargain for all workers in an industry. A more social democratic form of labor law was in the marrow of the New Deal.

Perhaps even more significantly, the history draws into question several widely shared beliefs about administrative law. Scholars date administrative law's turn toward legalism and technocratic expertise to the late 1930s.[459] On this account, "[b]y the end of the 1930s, the bureaucrats were in charge."[460] But the wage boards show that well past NIRA, and well beyond the war boards and the Railway Labor Act, a different form of administration persisted. Significant elements of the labor movement, along with Progressive reformers and allies in Congress and the executive branch, favored alternative conceptions of fairness and democracy in administration, along with more substantial guarantees of rights.[461] Technocratic expertise was important, but only in support of the popular will. Rather than locating decision-making authority primarily with technocrats, the reformers sought arrangements that located power with associations of citizens. Rather than relying primarily on judicial-like procedures and ultimately court review to ensure fairness, they favored a system of negotiation among social partners, cabined by particular redistributive aims. And rather than encouraging a free marketplace of liberal pluralistic participation, they self-consciously linked regulation and social mobilization in order to redistribute power among social groups. They were successful in implementing and expanding their approach well into the 1940s, past the immediate economic crisis of the Depression, beyond the confines of the war boards, and within the framework of contemporary labor and employment law.

Administrative law scholars tend to celebrate the turn toward legalism and technocracy. According to Cass Sunstein and Adrian Vermeule, the APA emptied administrative law of "any kind of ideological valence."[462] According to Daniel

459. *See supra* notes 26, 44 and accompanying text.

460. GRISINGER, *supra* note 388, at 1.

461. Kessler, *supra* note 44, at 773.

462. Sunstein & Vermeule, *supra* note 44, at 471; *see also* Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 CHI.-KENT L. REV. 953, 954 (1997) ("The [APA], a reaction to the politicization of some agencies, such as the National Labor Relations Board, imparted a considerable measure of political and ideological neutrality to administrative law, much as the Taft-Hartley Act, enacted in the following year, imparted a considerable measure of political and ideological neutrality to labor law, correcting to a degree the pro-union bias of the Wagner

Ernst, the "'rule of lawyers' insulated the administrative state from becoming a weapon in the hands of any particular social or economic group."[463] While administrative law allows for, even embraces, political influence by the particular President in office or by Congress,[464] and while judges' own ideologies inevitably inflect their review of administrative cases,[465] administrative law, as a discipline, does not adhere to any particular ideology—or so the theory runs. Rather, for leading scholars, the embrace of politically impartial legal principles legitimizes the administrative state.[466] So too labor law claims the mantle of neutrality.[467] With Taft-Hartley, Congress declared, labor law would no longer favor unionization but rather would protect workers' "right to self-organize" equally with their "right to refrain" from organization.[468]

But the history of the FLSA wage boards, in the context of the broader labor law regime, not only underscores the contested origins of the lawyerly, technocratic, and liberal pluralistic approach to workplace administration; it also undermines the contemporary regime's claim to neutrality. Congress voted to end the tripartite industry committees in favor of an administrative process more in line with APA values just after it enacted a host of restrictions on union rights. The change in procedure, as well as the change in substantive rights, curtailed the power of worker organizations. That is, the reforms to FLSA's procedural

Act."). *But see* GRISINGER, *supra* note 388 (emphasizing the political nature of administrative law).

463. Kessler, *supra* note 44, at 725.

464. *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009); *see also* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 33-45 (2009) (describing the political-control model and arguing for a role for politics in arbitrary and capricious review).

465. Sidney A. Shapiro & Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 19 GEO. MASON L. REV. 319, 323-31 (2012) (reviewing evidence tying judges' political and ideological proclivities to administrative law outcomes).

466. ERNST, *supra* note 44; Sunstein & Vermeule, *supra* note 44, at 471; *see also* Posner, *supra* note 462, at 954-55 (arguing that the APA imparted a considerable degree of political and ideological normalcy to administrative law, and thereby temporarily quelled disputes about the appropriate role of administrative agencies); Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463 (2017) (arguing that James Landis, Louis Jaffe, and Elena Kagan all have emphasized the independence of the administrative state as the source of its legitimacy, with Landis finding legitimation in agencies independent of the President, Jaffe finding it in courts independent of all executive officers, and Kagan finding it in a presidency independent of line agencies, interest groups, and the congressional committees that influence the independent agencies); *cf.* GRISINGER, *supra* note 388.

467. *See* Posner, *supra* note 462, at 954; Sunstein & Vermeule, *supra* note 44, at 471.

468. *See* 29 U.S.C. § 157 (2018).

and administrative mechanisms made clear that unions no longer had a special role to play in governance, and they effectively reduced worker organizations' power in the political economy. Indeed, the late 1940s reforms returned the political economy closer to the vision that prevailed before the New Deal. Workers and employers were free to marshal their existing resources while participating in the liberal pluralistic administrative state. But administration did not bestow power on worker organizations. The existing distribution of power was treated as both natural and neutral, not unlike the liberty that the Court protected during the *Lochner* Era.[469] As with any claim of neutrality, the dispute lies in the baseline.[470]

The contemporary approach to both labor law and administrative process essentially takes as a given the resource and power imbalances that exist among different social and economic groups. In contrast, workplace administration prior to passage of Taft-Hartley and repeal of the FLSA industry committees invested in redistributing power by protecting workers' rights to organize and strike, empowering unions to represent workers generally, and giving labor unions a privileged voice in the administrative domain. Business interests, particularly from the South, objected that this approach distorted both labor law and administrative law by stacking the deck among competing interests—picking winners in advance—and forcing certain individuals to comply with a system with which they disagreed. But so too does the existing system, which greatly limits the power of worker organizations in both the economy and the democracy.

In short, the history of the FLSA industry committees suggests that it is a myth to think one can ever do workplace law, or administrative law, without making choices about distributions of power. Different choices about power distribution remain possible. Law's future, like its past, is contingent on social mobilization and political developments. For those who wish for a system of administration that fosters worker power in the political economy, the industry committees should serve as a reminder that such things were once possible in the United States—and that they could be achieved again.

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469. *See* Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873 (1987).

470. Of course, the baseline critique runs both ways. Conservatives argue that the administrative state is a violation of the separation of powers, and that labor market intervention is both inefficient and an impingement on expressive rights, property rights, and liberty of contract. Indeed, the contemporary regulatory state, including in the field of labor and employment law, intervenes a great deal ostensibly to protect the public interest against market forces, while the APA helps to level the playing field among regulated entities. STEPHEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT (2008).