

5-2014

## Reimagining Collective Rights in the Workplace

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### Recommended Citation

Catherine L. Fisk, *Reimagining Collective Rights in the Workplace*, 4 U.C. IRVINE L. REV. 523 (2014).  
Available at: <http://scholarship.law.uci.edu/ucilr/vol4/iss2/3>

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# Reimagining Collective Rights in the Workplace

Catherine L. Fisk\*

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Scholars, lawyers, and activists have wondered for a decade or more whether either or both the National Labor Relations Act and employment law models of workplace protection, and the mix of private and public social insurance on which they depend, are viable in the twenty-first-century economy. Wealth inequality grows, real wages stagnate for all but the very top of the income distribution, unemployment and underemployment are endemic, and wage and hour violations, health and safety hazards, and other forms of exploitation are pervasive in the low-wage economy. Moreover, the U.S. economy is flooded with consumer goods produced under even worse conditions all around the world. Existing models of labor and employment regulation appear unable to guarantee safe and rewarding working conditions to millions of workers in the United States and in the global supply networks. While unionization has been demonstrated to reduce wage

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\* Chancellor's Professor of Law, University of California, Irvine School of Law. This symposium was jointly sponsored by the University of California, Irvine and the Labor Law Group. I am grateful to many people for the conceptualization and realization of the live and print symposium. My colleague, Sameer Ashar, brought his characteristic wisdom as a scholar, his connections as a lawyer, and his gifts as an organizer to the unique combination of scholars and activists that made this symposium such a rare blend of theory and practice, and his ideas are everywhere in this introduction and in the published papers. The Labor Law Group symposium planning committee—Marion Crain, Dennis Lynch, and Michael Selmi—also deserve credit for some ideas essayed here. Deborah Malamud's superb summation at the live symposium informed other ideas in this Foreword. I am extremely grateful to those who participated as discussants or presenters on panels, including Fran Ansley, Dan Clifton, Betty Hung, Wilma Liebman, Deborah Malamud, Chris Newman, David Rosenfeld, Judith Scott, Anthony Segall, Katherine Stone, Haeyoung Yoon, Chris Williams, and Noah Zatz. Finally, I thank the editors and staff of the *UC Irvine Law Review*, especially Jin Chong and Catriona Lavery, for their editorial and administrative work.

inequity and increase health and safety compliance, and has the promise of reducing arbitrary or discriminatory practices and enhancing self-determination, private sector union density appears unlikely to top ten percent of the workforce in the foreseeable future. Alternative forms of collective action by workers face organized legal opposition. Supreme Court decisions upholding class action waivers and narrowing systemic disparate treatment employment discrimination claims cast doubt on the future of collective litigation as a device to effect workplace transformation. If individual negotiation and command and control regulation cannot ensure decent work for many, and if collective action by workers is the rarity rather than the norm, and is under legal attack where it exists, what alternatives are there?

This symposium was organized to consider those alternatives. There have been other symposia on critiques and the future of labor law and, to a lesser extent, employment law. A group of eminent and rising scholars were invited to address fundamental questions: What are the alternatives to the Wagner Act model of majority unions, workplace collective bargaining, and the current regime of social welfare provision on which it depends? What institutional structures could be created to provide dignity, opportunity, and protection to work? Rather than focusing on the current regime, the authors were challenged to explore alternatives and not to take anything for granted, including the existing divisions between or structures of labor law and employment law.

The articles explore a variety of alternative legal and social regimes based in existing practice in the United States—including the hybrid union-community-worker organizations like Our Walmart and Fast Food Forward, sector-based worker groups like the National Day Laborer Organizing Network, Occupy initiatives, workers' centers, national progressive organizations like the National Employment Law Project, and community organizations like the Asian Pacific American Legal Center. Some are based on comparative studies, examining possibilities of creating in the United States institutional structures that show promise elsewhere in the world. Some generalize from careful studies of particular campaigns or organizations, with an eye toward scaling up successful efforts. Some examine different legal regimes—the First Amendment freedom of assembly clause, for example—and some examine different forms of representation and institutional structures, including worker centers. Some explore feasible legal strategies to address the marginalization of unauthorized migrant workers. Others propose legal reforms to invigorate private membership organizations that protect the interests of people at work, such as by reducing restrictions on the collection of voluntary political contributions through payroll deduction and liberating unions from some of the restrictions imposed by state right-to-work legislation.

The articles that appear in print in this issue are only a part of the larger conversation that the symposium actually sparked. The live symposium featured a convening of lawyers and activists working with unions, worker centers, and other worker organizations across the United States. Some sessions were organized

thematically and, although they did not produce written papers, they produced insightful discussions. One such session focused on new initiatives and challenges for organizing and representing workers in nontraditional work relations at the high- and low-end of the pay spectrum. It featured a discussion among the General Counsel of the Service Employees International Union, a lawyer who worked with Fast Food Forward, and the General Counsel of the Writers Guild of America, West. That panel revealed surprising similarities between efforts to organize low-wage and immigrant workers and efforts to collect residual payments for writers of American film and TV programs that are shown, downloaded, or streamed online around the world. In addition, lawyer-activists participated on panels with paper authors, serving as discussants to bring an on-the-ground perspective to the ideas essayed in the papers. The printed articles are, in my mind, much the better for the critical engagement with the activists. As good as they are, though, the printed papers suggest Plato's allegory of the cave: they are the shadows on the wall and do not fully capture the richness of discussions that occurred at the live symposium. I am extremely grateful to Professor Sameer Ashar for collaborating in the conceptualization of the overlap of the academic and activist meetings and for assembling a superb group of lawyers, and I and all the article authors are grateful to the many lawyers and activists who read drafts and participated in the discussions.

The articles in this symposium collectively argue three important propositions. First, collective activism will be crucial to any revitalization of labor. Labor law reform should aspire to enable the organizing that is essential to effective collective activism. Each of the papers proposes a different way that law can either facilitate such organizing and activism or avoid thwarting it. Second, and related, institutional design matters a great deal to whether worker activism will occur and, if it does occur, whether it will be effective in improving working conditions. Third, legal rules should be crafted to facilitate collective worker action by making worker collectives sustainable and scalable institutions; by giving them crucial roles in existing legal regimes to empower worker voice in many important legal and political forums; by leveraging power at the local, state, and national level; and by thwarting efforts to use legal doctrines like preemption or legal bureaucracies like criminal justice to eviscerate organizing gains.

The third step of the argument is where the authors strike out on four different but intersecting paths. The paths are: (1) empowering collectives, especially at the local level; (2) creating mechanisms to enhance leverage through local, national, and international frameworks; (3) improving access to information to enhance worker power; and (4) strengthening the institutional power of unions by protecting the ability of unions and worker collectives to fund their operations. The first two of these offer macro perspectives on how law facilitates and thwarts worker activism. The third and fourth examine the ways that law creates (or destroys) the institutional frameworks that empower workers to act collectively in organizing, in negotiating and administering agreements over conditions of employment, and in political action.

## I. EMPOWERING COLLECTIVES

In one way or another, many of the articles in this issue were written, or at least imagined, in the shadow of the Occupy Movement and the ongoing series of one-day strikes, marches, rallies, and other actions of Fast Food Forward, Our Walmart, and Warehouse Workers United. Though, by 2013, Occupy seemed to have fizzled as a movement, the fact that workers and students had—in this contemporary period of apathy—become so fed up with rising inequality that they would find common cause and form a recognizable nationwide movement was too important—too hope inspiring—to ignore, even if the fizzling meant that no one could build a law reform proposal around it. The activism around low-wage and erratic part-time work in the fast food industry and at all parts of Walmart’s supply chain also inspires scholars to think about what legal regime will protect worker demands for improved conditions even when it is apparent that there is no realistic near-term prospect of majority bargaining. Many of these articles essay ideas about the kinds of legal theory and institutional structures it will take to make the next such uprising a catalyst of legal and institutional change.

Chris Tilly and Marie Kennedy offer a vision of worker activism drawn from their interviews with new left activists in South America in 2002–2009 and activists in the housing rights movement in the United States in the 1960s and 1970s.<sup>1</sup> The Latin American Third Left movement, like the U.S. housing rights movement and the Occupy Movement, are and were characterized by bottom up decision making, autonomy from the state, and pursuit of claims on territory by direct action.<sup>2</sup> Tilly and Kennedy consider the legal and social movement strategies that could make such an approach feasible in the American workplace. They make it seem plausible to imagine a synthesis between the recent labor activism of Latin America and the earlier similar types of activism around housing in the United States and to explore the ways in which such activism might change labor law.

In *Beyond Unions, Notwithstanding Labor Law*, Marion Crain and Ken Matheny argue that a wide swath of American law of work (not just labor law) has become hostile to group rights and they propose that robust legal protection for workers’ mobilization can be found in the freedom of assembly clause of the First Amendment.<sup>3</sup> Drawing on recent constitutional scholarship arguing for a revived focus on freedom of assembly (not freedom of speech), Crain and Matheny remind us that in the period of vibrant union and leftist activism in the 1930s and 1940s the right to assemble was the crucial protection for unions and other groups seeking to empower the dispossessed.<sup>4</sup> Noting the correlation between the decline of labor and the decline of independent constitutional protection for assembly (as opposed

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1. Chris Tilly & Marie Kennedy, *Latin America’s “Third Left” Meets the U.S. Workplace: A Promising Direction for Worker Protection?*, 4 U.C. IRVINE L. REV. 539, 540–41 (2014).

2. *Id.* at 539.

3. Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C. IRVINE L. REV. 561, 564 (2014).

4. *See id.* at 561, 564, 571–76.

to associational speech), Crain and Matheny propose four respects in which assembly rights should be “revived and harnessed in lieu of speech rights.”<sup>5</sup> First, the right of assembly should protect the process of forming and maintaining groups.<sup>6</sup> Second, the greatest First Amendment assembly rights should be conferred on groups that challenge prevailing consensus norms.<sup>7</sup> Third, assembly rights should extend to “all forms of peaceable group action, including nonphysical gatherings and assemblies for the purpose of litigation.”<sup>8</sup> And fourth, the constitutional protection for assembly should focus on the assembly itself, rather than on the speech or message of those who assemble.<sup>9</sup> In doctrinal terms, their theory would extend constitutional protection to a variety of labor and worker group strategies and practices that are currently illegal or unprotected by law, including recognitional, organizational, and secondary picketing and boycotts, strikes, union-funded or class action litigation, members-only bargaining, and union appeals to workers at the worksite.

Lance Compa’s *Not Dead Yet: Preserving Labor Law Strengths While Exploring New Labor Strategies* reminds us of the value and potential of existing labor law to protect at least certain forms of local activism, as well as the political impossibility of radical federal legislative reform in the foreseeable future.<sup>10</sup> It describes significant recent organizing successes in NLRB-supervised elections in many industries, including among school bus drivers and nurses.<sup>11</sup> It lists small-scale legal changes that might make a big difference. And it makes the same point as many articles in the symposium: unions are almost alone among worker collectives in having become “enduring organizations with experienced leadership and secure financing,”<sup>12</sup> and that the challenges of creating and maintaining such sustainable institutions are daunting.

A number of the articles address the aspirations of the Crain-Matheny, Tilly-Kennedy, and Compa articles for more robust collective labor activism by describing the institutional conditions that have led or can lead to it. The most detailed such account is offered by Scott Cummings in his article *Preemptive Strike: Law in the Campaign for Clean Trucks*, which was part of the live symposium but, because of its encyclopedic length, will appear as a following issue of this law review.<sup>13</sup> One of his signature case studies of low-wage worker organizing in Southern California, his article describes the evolution of the economic structure

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5. See *id.* at 597–98.

6. *Id.*

7. *Id.* at 598.

8. *Id.* (citation omitted).

9. *Id.*

10. See Lance Compa, *Not Dead Yet: Preserving Labor Law Strengths While Exploring New Labor Law Strategies*, 4 U.C. IRVINE L. REV. 609, 610–12 (2014).

11. See *id.* at 614–15.

12. *Id.* at 622.

13. See Scott L. Cummings, *Preemptive Strike: Law in the Campaign for Clean Trucks*, 4 U.C. IRVINE L. REV. (forthcoming 2014).

and working conditions at the ports of Los Angeles and Long Beach. It is an exhaustively researched and extremely detailed account of the economic structure of transport of goods from the ports to distribution centers sixty miles away. On the basis of this sophisticated account of the sector, Cummings builds a rich analysis of the political and legal strategy developed by labor and environmental groups to improve air quality in the region and working conditions for the truckers by using the City of Los Angeles' control over all port business (the ports are city property and, therefore, shippers are technically a sort of city contractor) as a site of leverage. In response to a long and ongoing organizing campaign among truckers to improve their working conditions, the city imposed requirements on the shippers that they employ truckers rather than use independent contractors in order to internalize the full costs of maintaining the fleet of trucks, labor, and pollution into the cost of transporting the goods.<sup>14</sup> The strategy achieved legislative success and seemed like a solution to the poor labor and environmental conditions, until the trucking companies got the Ninth Circuit Court of Appeals and the United States Supreme Court to hold the law preempted by federal law.<sup>15</sup> As Cummings points out, the port causes pollution and other negative externalities and the city has the political will to force the companies to internalize these costs, but the federal courts held that the city lacks the authority to act.<sup>16</sup> Congress has the authority, but lacks the political will.<sup>17</sup> Labor advocates, Cummings says, resorted to "Plan B": suing companies that misclassify drivers as independent contractors in order to prevent them from shifting the fixed cost of running a trucking business (maintaining a fleet of nonpolluting trucks) onto their workers, and then organizing drivers and increasing union density one company at a time.<sup>18</sup>

The tension between national and local strategies for harnessing law to leverage organizing power charted out in the Tilly-Kennedy and Cummings articles is exemplified in thinking about labor organizing among unauthorized immigrant workers. Here, Jayesh Rathod and Stephen Lee illustrate the challenges facing immigrant worker activists. Like Cummings, Rathod and Lee see law as a site of leverage for both workers and employers. And all three scholars recognize that both worker advocates and employer lawyers see local, state, and national legislation as weapons in the fight to raise or lower labor standards and costs, and a victory for one side in one forum is likely to provoke an effort by the other side to gain the advantage through legislation or litigation at another level of government.

Jayesh Rathod argues in *Riding the Wave: Uplifting Labor Organizations Through Immigration Reform* that comprehensive immigration reform provides an opportunity to "position[] unions and worker organizations as key actors in immigration processes" by, for example, specifying in the legislation that they can play a role in

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14. *See id.*

15. *See id.* (discussing *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (2013)).

16. *See id.*

17. *See generally id.*

18. *See id.*

sponsoring visa applications, facilitating the portability of employment-related visas, training people to meet immigration requirements, and assisting with legalization applications and integration programs.<sup>19</sup> A major regulatory trend has been to harness private institutions for various legal administrative processes. For example, employers are required by the Family and Medical Leave Act and many other statutes to notify employees of their statutory rights.<sup>20</sup> They are required by the Supreme Court's workplace harassment jurisprudence and by some state laws to make efforts to prevent and redress harassment through training and whistleblowing programs.<sup>21</sup> Unions are required by the Court's union dues jurisprudence to notify employees of their rights to opt out of payment of union dues and to maintain administrative structures to handle dues objections.<sup>22</sup> These are just a few examples of the many ways in which statutes and judicial decisions have required private organizations to develop policies and procedures to comply with legal mandates and have taken the existence of an internal procedure as partial compliance with a substantive mandate.<sup>23</sup> One consequence of such legal provisions is to institutionalize the human resources department as a powerful entity within the firm.<sup>24</sup> Rathod's proposal similarly would institutionalize unions, worker centers, and other worker groups as—perhaps—powerful entities within the massive immigration apparatus. Institutionalizing unions and worker groups in this role also provides immigrant workers opportunities for leadership development, information about legal rights, a community of similarly situated people, and assimilation into American society. Because immigration law is national, but is implemented locally, Rathod's proposal envisions a way that immigrant worker organizations can be made players in national policymaking while also remaining deeply rooted in local policy implementation.

Stephen Lee examines the relationship between the local and the national in the legal regulation of labor markets for immigrant low-wage workers from the other end of the telescope, as it were. In *Policing Wage Theft in the Day Labor Market*, Lee questions the wisdom of using criminal law enforced by local police as a strategy

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19. Jayesh M. Rathod, *Riding the Wave: Uplifting Labor Organizations Through Immigration Reform*, 4 U.C. IRVINE L. REV. 625, 625 (2014).

20. See Family and Medical Leave Act of 1993 § 109, 29 U.S.C. § 2619 (2012).

21. See CAL. GOV'T CODE § 12950.1(a) (West 2011) (requiring employers with fifty or more employees to provide "at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees in California"); *Faragher v. City of Boca Raton*, 524 U.S. 775, 803, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 758, 765 (1998).

22. See *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 739 (1988); *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 302 (1986); *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 230–31 (1995) (detailing the procedures unions must follow to notify employees of their rights to refuse to pay union dues or full fees and the processes unions must use to handle employee objections).

23. See generally CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 75–88 (2010).

24. See, e.g., Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888, 892, 898 (2011).



to address the pervasive problem of wage theft.<sup>25</sup> Wage theft is endemic in the low-wage labor market: some studies of employment in major urban areas have found that workers who experienced wage violations lost over twelve percent of their weekly pay to unlawful failures to pay wages.<sup>26</sup> Labor activists have grown frustrated with the inefficacy of state and federal legal enforcement, and their pleas to do something about weak or nonexistent civil remedies for wage theft have persuaded local governments to enact and local police to enforce laws making it a crime to fail to pay earned wages.<sup>27</sup> As Lee explains, the allure of local criminal law and the local police for labor activists is that they can work: calling the police doesn't require an immigrant day laborer to hire a lawyer, produce pay stubs, figure out which corporate entity was the legal employer, and navigate the mysteries of an understaffed and overwhelmed local court or state labor commission.<sup>28</sup> A credible complaint to the police may be all it takes to launch an investigation against a fly-by-night landscaping service, construction contractor, or carwash operator that employed the complaining worker, and an arrest or the filing of criminal charges by the local prosecutor may be all it takes to spur the recalcitrant employer into paying back wages. Local governments and law enforcement officials feel they are doing something good for the community. Businesses that compete in the labor market and that do pay all workers feel that their unscrupulous competitors lose their competitive advantage. It's a win-win-win. Except, as Lee explains, local police are now encouraged and, using fingerprints, required to provide information about every arrested person to a federal database which then automatically cross-checks the worker's information against a Department of Homeland Security database with immigration-related information.<sup>29</sup> Thus, "even minimal contact with the police can lead to removal," which discourages workers from contacting the police and, even if the victim of wage theft has no reason to fear arrest and is confident the police will not mistakenly arrest him, he may be unwilling to take action against an immigrant employer.<sup>30</sup> The theft of a week's wages is catastrophic for a worker living in poverty, but he may nevertheless be unwilling to launch a criminal investigation that will result in the removal of an employer.

The complex interweaving of local and federal law, the ways that interaction affects worker activism, and the incentives it creates for advocates of both labor and management are major themes in contemporary labor law. The dynamic one may

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25. Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655, 656–58 (2014).

26. See RUTH MILKMAN ET AL., UCLA INST. FOR RESEARCH ON LABOR & EMP'T, WAGE THEFT AND WORKPLACE VIOLATIONS IN LOS ANGELES: THE FAILURE OF EMPLOYMENT AND LABOR LAW FOR LOW-WAGE WORKERS 4 (2010).

27. See Lee, *supra* note 25, at 656.

28. See *id.* at 657.

29. *Id.* at 667; see also Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1582–86 (2010); Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 94–95 (2013).

30. Lee, *supra* note 25, at 668.

discern through reading the Cummings, Rathod, and Lee articles together is that a regulatory gain obtained by one side at the local level will spur the other to challenge it as preempted by federal legislation. This is the story of the clean trucks campaign in Los Angeles and also the story of local measures banning the employment of unauthorized immigrants. A perceived regulatory failure at the federal level—whether the failure to enforce minimum wage laws or to enforce prohibitions on unauthorized migration—will inspire a campaign for local regulation. The loser in that local campaign will turn to federal law and argue that the local regulation is preempted.<sup>31</sup> Judicial decisions on preemption tend to track the judges' policy views about the desirability of the regulation in question, as scholars have argued for years that federalism arguments have been used as a purportedly value-neutral cover for decisions reached on other grounds. This dynamic has been going on for a century and under the analytical framework of *laissez-faire* economic substantive due process, labor preemption of state laws prohibiting union activity, Civil Rights Act preemption of laws allowing racial discrimination, ERISA preemption of laws mandating or regulating pensions and health benefit plans, Immigration and Nationality Act preemption of regulation of immigrant labor, and so on.<sup>32</sup> There is no reason to expect that the fight between local and national authority to make workplace policy will change.

## II. ENABLING LABOR TO USE LOCAL AND NATIONAL LEVERAGE (WITHOUT MANAGEMENT THWARTING LABOR GAINS)

Although all of the first group of articles recognize that effective collective action is always to some extent a local phenomenon and that bottom-up organizing is a necessary foundation for any powerful national worker movement, national and international connections are necessary to obtain leverage and to create a sustainable force even in the local economy. The articles by Matthew Dimick and César Rosado Marzán provide rich theoretical and empirical analyses, based on sophisticated interdisciplinary and international comparative research, of structural features that American unions require to operate effectively in the global economy.

In *Productive Unionism*, Matthew Dimick argues that centralization of bargaining is necessary for union strength.<sup>33</sup> After tracing the origin of centralized bargaining

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31. In California, for example, concerns about the inadequacies of the federal and state minimum wage laws prompted many localities to enact their own living wage laws, which in turn prompted business interests to file litigation arguing that localities lack authority under state law to regulate wages. The California Legislature enacted California Labor Code section 1205, which empowers local governments to enact labor legislation that is more employee-protective than state law. See CAL. LAB. CODE § 1205(c) (West 2011) (“[L]abor standards established by the local jurisdiction . . . shall take effect . . . so long as those labor standards are not in explicit conflict with, or explicitly preempted by, state law.”).

32. See Catherine L. Fisk, *The Anti-Subordination Principle of Labor and Employment Law Preemption*, 5 HARV. L. & POL'Y REV. 17, 18–19 (2011) (describing preemption arguments in labor, immigration, and civil rights law).

33. Matthew Dimick, *Productive Unionism*, 4 U.C. IRVINE L. REV. 679, 681 (2014).

in Europe, Dimick explains how greater centralization of bargaining—at the industry or sector level rather than at the workplace level—enables unions to respond more efficiently to labor market risk (by enabling workers to obtain reemployment after economic change causes job loss). Centralized bargaining allows unions to cooperate with employers in investing in productivity enhancement and human capital development.<sup>34</sup> Dimick also contends that centralized bargaining tends to reduce employer opposition to unions by taking wages out of competition and by enabling employers to capture the productivity gains from greater workplace flexibility and investment in human and physical capital.<sup>35</sup> Interestingly, Dimick argues that decentralized bargaining in the United States is neither caused nor compelled by the National Labor Relations Act and, therefore, “currently existing labor law probably does not place that many constraints on efforts to reform the nature of union and bargaining organization.”<sup>36</sup>

César Rosado Marzán explores the local, national, international issue through his study of four cases in which American workers create organizing leverage through International Framework Agreements (IFAs). In his ambitious empirical study, *Organizing with International Framework Agreements: An Exploratory Study*, Rosado Marzán explores the question of whether IFAs promising employer neutrality concerning unionization facilitate unionization.<sup>37</sup> He describes organizing campaigns at the U.S. operations of four different multinational corporations that had signed IFAs: security services firms Securitas and Group 4 Securicor, and automakers Daimler and Volkswagen.<sup>38</sup> He finds the unionization gains to be quite modest. Each one of these is an interesting case study, and Rosado Marzán’s approach contrasts nicely with that of Tilly and Kennedy in that Rosado Marzán focuses his interview research on corporate leaders and they focus theirs on labor activists; read together, the articles show that different methodologies are different paths to similar findings about the possibilities of organizing strategies. In the context of an article about whether an institutional structure—an international agreement between a multinational corporation and a European labor organization—Rosado Marzán also shows that local culture and the particular structure of an industry still matter. As he explains, in the security services industry, unionized service providers must constantly face the threat of replacement of their company (and its higher wage, unionized labor force) by lower-cost nonunion competitors.<sup>39</sup> The threat of labor substitution has long been a formidable obstacle to organizing labor supplied through labor contractors in the service, manufacturing, garment, and agricultural industries. Even in the automotive

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34. *Id.* at 694–98.

35. *Id.* at 698–700.

36. *Id.* at 702–03.

37. César F. Rosado Marzán, *Organizing with International Framework Agreements: An Exploratory Study*, 4 U.C. IRVINE L. REV. 725, 725, 770–71 (2014).

38. *Id.* at 729.

39. *Id.* at 750.

industry, in which replacement of a unionized contractor with a nonunion contractor is not a threat, the local political culture of hostility to unions by management, labor, and elected officials and the dearth of comparably high-wage jobs makes unionization a tough sell to workers.

Although the organizational gains under these four IFAs were modest, Rosado Marzán argues that they could be the basis for formation of members-only unions. His analysis predicts the development of members-only unions at European car manufacturing plants in the American South, an exciting development in the history of American unions.<sup>40</sup> The international union could impose by contract a requirement that the employer bargain with a minority union, could also give the minority union the right to strike, and could waive the employer's right to sue for violations of secondary boycott laws. Such IFAs, Rosado Marzán argues, would "need to be policed by the unions and works councils in the home countries of the signatory firms," which would empower minority unions through global solidarity.<sup>41</sup>

### III. PROVIDING INFORMATION AND OPPORTUNITIES TO CHOOSE COLLECTIVE ACTION

A third approach to reimagining labor law is to build the power of worker collectives through institutionalizing practices that enable worker activism. Two specific proposals are made here. Cynthia Estlund proposes mandatory disclosure of salary and wage information.<sup>42</sup> Michael Oswald proposes annual elections for workers to select bargaining representatives.<sup>43</sup> Each of these proposals to enhance transparency and to increase possibilities for meaningful employee engagement and collective action in the workplace may increase the likelihood that unions will be important institutions in governing the workplace.

In *Extending the Case for Workplace Transparency to Information About Pay*, Cynthia Estlund expands on her previous argument that effective regulation of the workplace and efficient operation of labor markets require mandatory public disclosure of accurate information about working conditions.<sup>44</sup> In this article, she explores the application of her theory about transparency to the case of pay, which she had set aside in the earlier article because of the difficulty of the issue.<sup>45</sup> She acknowledges the controversy that would surely surround any proposal to require disclosure of employees' wages and salaries to coworkers and to the public, but finds that pay transparency has potential benefits in promoting enforcement of legal mandates about discrimination and wage and hour laws. Transparency might also

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40. *Id.* at 778–79.

41. *Id.* at 730.

42. Cynthia Estlund, *Extending the Case for Workplace Transparency to Information About Pay*, 4 U.C. IRVINE L. REV. 781, 782–83 (2014).

43. Michael M. Oswald, *Automatic Elections*, 4 U.C. IRVINE L. REV. 801, 804 (2014).

44. Estlund, *supra* note 42, at 781–83; *see also* Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 355 (2012).

45. Estlund, *supra* note 42, at 782; *see also* Estlund, *supra* note 44, at 365 n.46.

improve the operation of labor market by enabling employees to assess their situation in their current job and their prospects for advancement within the firm or for switching firms, and it might promote corporate social responsibility with respect to pay equity as well as overall pay amounts. Importantly, for purposes of the theme of this segment of papers, “information about salaries—their overall level as well as the rationality and fairness of salary disparities—might be relevant to an employee’s decision whether to support unionization.”<sup>46</sup> Assessing the case for pay secrecy, Estlund notes the difficulty and complexity of determining the consequences of salary transparency and acknowledges the legitimate objections to it. Nevertheless, she asserts pay transparency likely would promote pay equity and fairness; workers “seem to prefer greater wage equality and perhaps greater wage transparency, and attempt to seek both when they have the collective economic power to do so,” which is why unionized workplaces tend to have greater wage compression than nonunion workplaces.<sup>47</sup>

In *Automatic Elections*, Michael Oswald responds to the familiar argument that labor law fails workers by pointing out that the legal regime was built to contain extreme worker agitation in an era in which it was reasonable to assume that labor activism would “push labor law’s core procedural process along its way.”<sup>48</sup> Now, he contends, in the absence of powerful worker activism, the law is “a cage built for a lion that instead confines a lamb.”<sup>49</sup> Observing that the existing electoral machinery does not serve workers and is embraced by management mainly for its power in thwarting unionization, and that alternative organizing options are inadequate and legally precarious, Oswald argues that regular union authorization elections will serve the purposes of the NLRA, will have “culturally transformative potential,” and could be implemented with relatively modest statutory and regulatory changes.<sup>50</sup> Oswald envisions “[t]housands of secret ballot contests held all over the country”; labor board election results would be published in newspapers like baseball box scores; television news would report unionization election results at behemoth New Economy companies like Microsoft and Google; all of this would “represent a momentous change: American life reinfused with the talk—and even the expectation—of collective workplace activism.”<sup>51</sup> His article has already sparked debate among labor scholars about whether reducing the barriers to union elections will result in more unions winning or losing bargaining rights. This is an important debate to have, and only if labor is willing to risk losing will it have the chance to make significant gains.

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46. Estlund, *supra* note 42, at 788.

47. *Id.* at 795.

48. Oswald, *supra* note 43, at 803.

49. *Id.* at 804.

50. *Id.* at 805, 842–46.

51. *Id.* at 841.

## IV. PROTECTING THE INSTITUTIONAL POWER OF UNIONS

The final two articles in the symposium address the institutional power of worker collectives. Unlike the other articles in this symposium, which focus on union power vis-à-vis employers, these articles focus on union power vis-à-vis their members. Unlike most other worker collectives, which are subject to the rise and fall of voluntary contributions of time and money from workers, unions have developed a powerful national institutional presence and a model for sustaining themselves through automatic dues collection through payroll deduction. For over fifty years, the National Right to Work Committee (NRTWC) has waged a litigation and lobbying campaign to limit the ability of unions and both private sector and governmental employers to agree to union security provisions in collective bargaining agreements and to restrict the collection of union dues.<sup>52</sup> Although framed as a civil rights campaign to protect the rights of dissident workers in unionized workplaces, NRTWC is financed by business and employer organizations.<sup>53</sup> Whatever the benefits to *workers* of laws limiting the ability of unions and employers to agree to contracts providing for the collection of dues through payroll deduction, or for employees to be required to pay dues or fees for the union's representation services, such laws have the obvious benefit to *employers* by limiting union fundraising. Not coincidentally, business groups favor them because they limit the power of unions in both workplace negotiations and in local, state, and national political forums.

In *Restoring Equity in Right-to-Work Law*, Benjamin Sachs and I argue for a reinterpretation of the relationship between federal and state law on the ability of unions to collect money from the employees they represent to defray the cost of services they provide.<sup>54</sup> Because a union has a duty under federal law to represent all employees in the bargaining unit, we contend, the union should also have a right to negotiate an agreement with the employer requiring employees to pay for the services the union is required by law and contract to provide.<sup>55</sup> In the twenty-four states that have enacted so-called "right-to-work" laws, we assert there is an inequity in requiring unions to provide services to employees but prohibiting the union from charging employees for those services.<sup>56</sup> We propose three alternative approaches to resolving the inequity: (1) reinterpret the provision of federal law that allows states to pass right-to-work laws to prohibit agreements under which nonmembers are compelled to pay fees lower than what union members pay; (2) allow unions in

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52. See *About NRTWC*, NAT'L RIGHT TO WORK COMMITTEE, <http://nrtwc.org/about-2/> (last visited March 14, 2014) (describing the history and mission of the NRTWC).

53. See, e.g., Al Shaw et al., *How Dark Money Flows Through the Koch Network*, PROPUBLICA (Feb. 14, 2014), <http://projects.propublica.org/graphics/koch> (illustrating a \$1,000,000 grant from the Freedom Partners Chamber of Commerce to the NRTWC).

54. Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857, 858–59 (2014).

55. *Id.* at 859.

56. *Id.* at 857–58.

states with right-to-work legislation to bargain on behalf of only those workers who join the union and pay dues; or (3) change NLRB law to allow unions to charge non-dues paying nonmembers for the cost of representation in grievances and other individualized contract administration matters.<sup>57</sup> We believe our article will have significant impact as states sort out the implications of new and existing right-to-work laws.

In *Paycheck Protection or Paycheck Deception?: When Government “Subsidies” Silence Political Speech*, Brian Olney argues that state laws restricting the way in which unions collect voluntary political contributions from the workers they represent violates the First Amendment.<sup>58</sup> He demonstrates that state limits on payroll contributions to fund union political speech pose an even greater threat to union political speech than the rights of nonmembers to refuse to pay dues (or, in right-to-work states, to pay anything for union representation) because payroll restriction laws limit speech not just by nonmembers but also by union members who support their union’s political activities.<sup>59</sup> After a thorough analysis of Supreme Court and lower court cases on the First Amendment protection for political contributions, including through payroll deduction, Olney explains why laws restricting or prohibiting payroll deductions for political activity are viewpoint discriminatory, are not government subsidies, and regulate speech in designated public forums and, therefore, violate the First Amendment.<sup>60</sup>

#### CONCLUSION

Of all the fundamental principles of labor law that are criticized in these papers, two that emerge most often are the principles of exclusivity and majority rule and, relatedly, the prohibition on employer bargaining with minority unions or employer-dominated unions. Dimick speculates that exclusive representation, union security, and the prohibition on employer-dominated unions play some role, but not a determinative one, in sustaining the U.S. regime of decentralized bargaining.<sup>61</sup> Rosado Marzán urges in this paper and elsewhere that the strictures of section 8(a)(2) be relaxed in order to allow unions—even the United Auto Workers at the Volkswagen factory in Tennessee—to enter into contracts with willing employers before majority status is established so that at least those employees who wish to have union representation can have it.<sup>62</sup> Crain and Matheny note that “a robust freedom of assembly doctrine could be deployed to challenge the majority rule and exclusivity doctrines,” as well as the ban on company unions, but they do not find

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57. *Id.* at 859–60, 879.

58. Brian Olney, Note, *Paycheck Protection or Paycheck Deception? When Government “Subsidies” Silence Political Speech*, 4 U.C. IRVINE L. REV. 881, 886–87 (2014).

59. *Id.* at 894–95.

60. *Id.* at 936.

61. Dimick, *supra* note 33, at 705–06.

62. See Rosado Marzán, *supra* note 37, at 772.

that prospect to be troublesome.<sup>63</sup> As they say, “union organizing would no longer be an all-or-nothing proposition: unions might gain a foothold in some workplaces where they are unable to mobilize a majority of the workers.”<sup>64</sup> Sachs and I argue the same thing, at least for right-to-work states, and likewise find some benefit in allowing those employees who want a union to have one regardless of whether a majority of their coworkers share their preference.<sup>65</sup>

On this, as on every issue addressed in this symposium, the articles argue the benefits of experimentalism. That willingness to try new ideas reflects what is already going on in the world. Workers—with and without the assistance of unions—are trying all sorts of strategies to find common cause with their colleagues, community members, consumers, and others. The scholars and activists who participated in the symposium are reimagining labor law in a huge variety of ways and imagination is the first step on a path of modest (or radical) change.

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63. Crain & Matheny, *supra* note 3, at 604.

64. *Id.* at 605.

65. Fisk & Sachs, *supra* note 54, at 867.



