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Labor Interests and Corporate Power

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LABOR INTERESTS AND CORPORATE POWER

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ABSTRACT

Labor unions exert significant power through collective bargaining, pension fund investing, and political advocacy. But in each of these areas, unions face inherent structural limitations that severely constrain these powers. Workers need participation rights in corporate governance to overcome the multiplicity of forces arrayed against them. And rather than obviating the need for unions, worker corporate power would facilitate a different kind of labor representation—a transition to labor power that advocates for occupational interests and forms coalitions across the shifting political interests of different worker groups.

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INTRODUCTION

Unions fight for workers. The 1935 Wagner Act created the obligation for employers to bargain collectively with worker representatives, and by the mid-1950s unions represented over one-third of the American workforce.¹ Even today, unions represent 16.4 million workers, and their members average over \$200 more a week in earnings than non-union workers.² Unions also have a say in the control of trillions of dollars in pension holdings through public-sector pension funds and multiemployer funds.³ And in the political sphere, unions are among the biggest institutional spenders: in 2016, they donated \$35 million to individual federal candidates and \$132 million to super-political action committees.⁴ No other organizations or institutions come close to matching the power of unions when it comes to advocating on behalf of workers.

At the same time, organized labor is now at its weakest—and the future seems bleak.⁵ Unions represent only 6.4% of all private-sector employees, a percentage which has continuously declined from its 1950s heyday.⁶ Corporate law in the United States has effectively removed workers from the governance of firms and given complete power to shareholders and C-suite management.⁷ Employee

¹ MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 10tbl.1 (1987) (illustrating that between 1950 and 1960 union membership was between 31.5% and 34.7% of nonagricultural workers); LEO TROY & NEIL SHEFLIN, *U.S. UNION SOURCEBOOK: MEMBERSHIP, STRUCTURE, FINANCE DIRECTORY* app. A at A-1 (1985) (illustrating that 32.5% of nonagricultural employment was unionized in 1953).

² Economic News Release, Bureau of Labor Statistics, U.S. Dept. of Labor, Union Member Summary (Jan. 18, 2019, 10:00 AM), <https://www.bls.gov/news.release/union2.nr0.htm> [<https://perma.cc/C4YU-8X95>] (“Among full-time wage and salary workers, union members had median usual weekly earnings of \$1,051 in 2018, while those who were not union members had median weekly earnings of \$860.”).

³ See DAVID WEBBER, *THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR’S LAST BEST WEAPON*, at xii (2018) (putting the valuation of worker pension funds at \$3-6 trillion).

⁴ Dave Jamieson & Paul Blumenthal, *Labor Unions Spent a Record Amount on the Elections. But Not as Much as These 5 People.*, HUFFINGTON POST (Nov. 8, 2016, 4:52 PM), https://www.huffingtonpost.com/entry/labor-union-election-2016_us_58223b92e4b0e80b02cd7259 [<https://perma.cc/LVU4-3EJW>]. Unions were five of the top fifteen organizational contributors to political campaigns in the 2016 election cycle. *Top Organization Contributors*, OPENSECRETS.ORG, <https://www.opensecrets.org/orgs/list.php?cycle=2016> [<https://perma.cc/EX8E-ZSWE>] (last visited Apr. 1, 2019).

⁵ See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1528 (2002) (“The labor laws have failed to deliver an effective mechanism of workplace representation, and have become nearly irrelevant, to the vast majority of private sector American workers.”); see also KATE ANDRIAS & BRISHEN ROGERS, *REBUILDING WORKER VOICE IN TODAY’S ECONOMY* 5 (2018), <http://rooseveltinstitute.org/wp-content/uploads/2018/07/Rebuilding-Worker-Voices-final-2.pdf> [<https://perma.cc/HN45-D6ZR>] (“The precipitous decline of labor unions over the last few decades has had devastating consequences for American workers.”).

⁶ See Economic News Release, Bureau of Labor Statistics, *supra* note 2.

⁷ Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1864 (2003) (“[I]n the course of the twentieth century, legal scholars

pensions have shifted from primarily defined-benefit plans to defined-contribution plans, which remove unions from the management of these funds.⁸ And changes to state, federal, and constitutional law have made it more difficult for unions to collect funds from the workers they represent, especially when such funds are earmarked for political advocacy.⁹ Meanwhile, fueled at least in part by labor's decline, income inequality continues to widen. Workers' wages have remained largely stagnant, while executive compensation and corporate profits climb higher. Rather than going into workers' pockets, the vast majority of the 2018 corporate tax cuts were plowed into stock buybacks.¹⁰

There are indications that, at long last, our New-Deal-era system of employee empowerment is primed for a redesign. The key is corporate power. Rather than remaining siloed outside of corporate governance, workers need a voice in the boardroom to provide a say in the management and control of the firm. Although such an approach has long been anathema to U.S. corporate law, recent developments have opened the door for a discussion of worker representation on corporate boards. Recent bills proposed by Senators Tammy Baldwin and Elizabeth Warren would provide workers with representation on the board of directors.¹¹ New managerial methodologies providing for participatory management and employee voice are increasingly popular around the globe.¹²

and political theorists helped remove the interests of workers (as differentiated from shareholders, officers, and directors) from the core concerns of corporate law and theory.”).

⁸ In 1981, 64.2% of all pension plan participants were in defined-benefit plans; that percentage declined to 27.7% in 2015. *See* EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LABOR, PRIVATE PENSION PLAN BULLETIN HISTORICAL TABLES AND GRAPHS: 1975-2016, at 5 (2018), <https://www.dol.gov/sites/default/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf> [<https://perma.cc/Z5HX-ZMZQ>].

⁹ *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448, 2449 (2018) (eliminating responsibility of represented public-sector employees to pay union dues); Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023, 1029-47 (2013) (discussing First Amendment rights of unions and dissenting union members).

¹⁰ Vanessa Fuhrmans, *Tax Cuts Provide Limited Boost to Workers' Wages*, WALL STREET J. (Oct. 2, 2018, 7:35 AM), <https://www.wsj.com/articles/tax-cuts-provide-limited-boost-to-workers-wages-1538472600> (“U.S. companies are putting savings from the corporate tax cut to use, but only a fraction of it is flowing to employees' wallets, new data show.”); Ben Popken, *What Did Corporate America Do with That Tax Break? Buy Record Amounts of Its Own Stock*, NBC NEWS (June 26, 2018, 3:21 PM), <https://www.nbcnews.com/business/economy/what-did-corporate-america-do-tax-break-buy-record-amounts-n886621> [<https://perma.cc/9E6Q-9GQP>].

¹¹ Accountable Capitalism Act, S. 3348, 115th Cong. § 6 (2018); Reward Work Act, S. 2605, 115th Cong. § 3 (2018).

¹² *See, e.g.*, FREDERIC LALOUX, REINVENTING ORGANIZATIONS: A GUIDE TO CREATING ORGANIZATIONS INSPIRED BY THE NEXT STAGE OF HUMAN CONSCIOUSNESS 55-61 (2014) (introducing “Teal Organizations” as new structure of organization that emphasizes “self-management,” “wholeness,” and “evolutionary purpose”); BRIAN J. ROBERTSON, HOLACRACY: THE NEW MANAGEMENT SYSTEM FOR A RAPIDLY CHANGING WORLD 16-26

The Walkout for Change by Google workers demanded the appointment of an employee representative to Google's board.¹³

Efforts at economic reforms to support worker power need organized labor's support and advocacy. But unions face a set of competing interests that make any move towards employee corporate power more complicated. This potential for dissonance is similar to the conflicts faced by union and public pension funds in their management of labor's capital. In both situations, unions have both convergence and divergence with the interests of the workers they represent. Of course, conflicts of interest are endemic to capitalism, and the current regulatory structure exacerbates the conflicts within labor interests. But these conflicts must also be recognized—and, to the extent possible, managed or ameliorated.

Part I of this Article will provide a brief taxonomy of labor interests and will discuss the possibility for conflicts within those interests in three distinct areas: collective bargaining, pension fund management, and political advocacy. Part II will discuss the effects of labor interests on labor, employment, and corporate law and policy, as well as efforts at reform in these areas. Part III will discuss the potential role for unions in reshaping the economic landscape to provide workers with greater voice and power within corporate governance while remaining their representatives and advocates. Even in a dramatically changed corporate governance landscape, labor would retain its vital role in representing worker interests on the shop floor, in boardrooms, in legislatures, and in courtrooms.

I. LABOR INTERESTS

Unions are often imagined as the pure distillation of employee sentiment and desires—the American worker in institutional form. However, like all institutional actors, unions face conflicts of interest in each of the settings in which they operate. Some of these conflicts are subtle, but they take on heightened importance when considering potential workplace reforms that might change their role. The following is a brief taxonomy of labor's interests within their various spheres of influence and the potential for conflicts among these interests.

A. *Collective Bargaining Representation*

The most critical role for unions remains serving as the collective bargaining representative for workers who have chosen union representation. This role is established under the National Labor Relations Act (“NLRA”), which requires employers to bargain with labor organizations when a majority of the workers

(2015) (describing “holacracy,” new paradigm of organization which distributes authority to all individuals in organization).

¹³ Noam Scheiber, *Google Workers Reject Silicon Valley Individualism in Walkout*, N.Y. TIMES (Nov. 6, 2018), <https://www.nytimes.com/2018/11/06/business/google-employee-walkout-labor.html>.

in a particular bargaining unit have selected that representative.¹⁴ Although an employer has no obligation to reach an agreement with the union, it must continue to bargain in good faith until impasse.¹⁵ Unions also have certain protections, such as prohibitions on retaliation as well as a limited right to strike and engage in collective action, that enable them to exercise negotiating power.¹⁶ The NLRA envisions collective bargaining as the framework for labor-management relations and unions as the employees' agents within that framework.

In any agency relationship, there will be divergence between the interests of the principal and the interests of the agent. It is important to recognize that union representation is, at root, an agency relationship. A representation election is a decision to purchase group representation services.¹⁷ Employees agree to pay the union in return for the services that the union provides. By electing the union as their representative, employees essentially designate the union as their representative in exchange for the payment of dues. An economically rational decision to choose union representation would be based on whether the employee expects that the union will, in fact, improve terms and conditions.¹⁸ And the appeal of unions is their ability to get more for employees than the employees would get on their own.

Unions have a set of collective bargaining interests that converge and diverge from the interests of their employee members. As agents, unions are interested in getting the best deal for their employees under a collective bargaining agreement. However, like many agents, their interest in securing a given deal is likely stronger than their interest in fighting for the best possible deal. And the structure of the deals that unions negotiate is worth particular consideration. Collective bargaining agreements must cover the entire bargaining unit. As part of that agreement, unions generally demand a dues check-off provision whereby worker dues are automatically deducted from the employees' paycheck.¹⁹ Dues

¹⁴ 29 U.S.C. § 158(a)(5), (d) (2012).

¹⁵ *Id.* § 158(d).

¹⁶ *See, e.g., id.* § 158(a)(1), (3), (4), (b)(4)(i).

¹⁷ Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 35 (2008).

¹⁸ Or, put more precisely, "[i]f the expected utility from [the employees'] job becoming a union job is higher than from it not becoming a union job, then they will vote for the union." Henry S. Farber & Daniel H. Saks, *Why Workers Want Unions: The Role of Relative Wages and Job Characteristics*, 88 J. POL. ECON. 349, 351 (1980). Of course, different employees will have different perspectives on the potential costs and benefits of unionization. *See id.* at 367 (noting that individual employees vote for or against unionization "as if the effect of unionization on earnings is to raise average earnings and lower its dispersion").

¹⁹ In right-to-work states, employees can forego any payment to the union despite the union's required representation, while in non-right-to-work states, a collective bargaining agreement can require all represented employees to pay that portion of the union dues that covers collective bargaining services. In *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), the Supreme Court differentiated between components of the dues and ruled that nonmembers need not pay the union for services that are not directly related to collective

are the primary source of funds for unions, and the primary—and to some extent the only sustainable—way to secure them is through a collective bargaining agreement with a union security clause.

The need for dues sets up an obvious divergence between workers and unions. Like customers of any service, workers will want to pay as little as possible for union representation, while unions will want to charge higher rates. To some extent this conflict is ameliorated through regulation. Unions are almost always nonprofit associations due to antitrust, tax, and labor law.²⁰ Under the Labor-Management Reporting and Disclosure Act (“LMRDA”), a union must give its members “equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings”²¹ Dues can only be increased through a vote by the majority of the membership.²² The LMRDA also imposes strict fiduciary duties on union officers and employees in carrying out their responsibilities on behalf of the members.²³ At the same time, unions are independent institutions with their own sets of internal procedures, leadership, and employees. They generally have complete discretion in handling negotiations with employers. A union may even execute a collective bargaining agreement without any approval by the represented employees.²⁴ The union is the employees’ representative; it is not a representation of them.

Unions have engaged in a variety of worker-empowerment initiatives that help nonunionized workers, from efforts for guaranteed overtime pay during the New Deal up through the Fight for \$15 for fast-food workers.²⁵ But only dues secured through collective bargaining pay the bills. Unions are creatures of the NLRA and LMRDA—these statutes created the market for union representation, and they establish the parameters for it. These parameters include not only the

bargaining services. *Id.* at 762-63 (holding that the NLRA “authorizes the exaction of only those fees and dues necessary to ‘performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues’” (quoting *Ellis v. Bhd. of Ry., Airline & Steamship Clerks, Freight Handlers, Express & Station*, 466 U.S. 435, 448 (1984))).

²⁰ See Bodie, *supra* note 17, at 40. The Clayton Act provides antitrust exemption for those labor organizations “instituted for the purposes of mutual help, and not having capital stock or conducted for profit” 15 U.S.C. § 17 (2012). And nonprofit status affords tax benefits. 26 U.S.C. § 501(c)(5) (2012). For an argument for greater flexibility in union organizational design, see Samuel Estreicher, *Deregulating Union Democracy*, 2000 COLUM. BUS. L. REV. 501, 516.

²¹ 29 U.S.C. § 411(a)(1) (2012).

²² *Id.* § 411(a)(3).

²³ *Id.* § 501(a) (requiring, inter alia, that union agents “hold [the union’s] money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder”).

²⁴ See Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793, 810 (1984).

²⁵ Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 47-51 (2016).

restrictions discussed above, but also the limitations on collective bargaining imposed under federal law. Employers need to bargain only about terms and conditions of employment; they need not discuss product development, corporate governance, or other areas within the “core of entrepreneurial control.”²⁶ Collective bargaining in its design requires a divide between labor and management. Innovative forms of participatory management are unattractive to unions when such forms blur this division.

Unions also have an interest in representing a broad category of workers across firms. They seek to take wages out of competition by securing representation for all of the workers in a relevant labor market.²⁷ The larger percentage of workers that the union represents, the more market power the union has.²⁸ And this market power will of course inure to the advantage of individual represented workers. However, this solidarity also means that workers will be tied together across firms, deemphasizing their allegiance to their individual firms. In other words, unions have an interest in the economic fortunes of a group of workers across firms as a unit, whereas individual workers have an interest not only in their unionized cohort, but also in their individual firm. A union has strong incentives not to negotiate a deal for workers at one firm that would be better for represented workers at a competing firm—the union wants all of its members to have the same deal. Recent pro-union labor law reforms have suggested getting unions out of bargaining at the enterprise/firm level entirely, and instead putting in place sectoral bargaining at the local, state, or even national level.²⁹

The tension between in-group and out-group workers can also manifest itself between unions and their members. The AFL-CIO has enjoyed remarkable success in coalescing the labor movement into one collective group that pushes a pro-labor agenda, but even this success has had hiccups.³⁰ The idea of a “labor movement” by necessity must downplay the inherent tensions between the different types of represented workers. Workers within the same industry are competing directly against each other within their firms; increased market share at one firm will decrease the share of the others. Workers in different industries may compete as substitutes for one another. And higher pay for workers will lead to increased costs for consumers—who are, after all, generally workers themselves. Moreover, unions may at times compete within firms as different sets of workers try to improve their terms and conditions of employment. The

²⁶ SAMUEL ESTREICHER & MATTHEW T. BODIE, LABOR LAW 134-39 (2016).

²⁷ ALBERT REES, THE ECONOMICS OF TRADE UNIONS 60 (1962) (“Unions in highly competitive industries . . . will almost always pursue a standard wage policy within a given product market.”).

²⁸ See DAVID ROLF, CENTURY FOUND., A ROADMAP TO REBUILDING UNION POWER 37-42 (2018).

²⁹ ANDRIAS & ROGERS, *supra* note 5, at 26-33.

³⁰ In 2005 several unions broke out of the AFL-CIO and the former “Change to Win” coalition. See Matt Bai, *The New Boss*, N.Y. TIMES MAG., Jan. 30, 2005, at 38.

airline industry, for example, has three primary sets of unionized workers: flight attendants, machinists, and pilots. Although these workers all share common cause against management and shareholders, they are also competing against each other for a larger share of wages.³¹ Private-sector workers see their taxes go to pay for public services provided by workers who are unionized at a significantly higher rate. Ultimately, the notion that “American workers” have a monolithic set of interests is belied by the many ways in which such workers and their industries are caught in capitalism’s eternal competition. And unions, as the representatives for a particular group of workers, will find themselves caught at times between the shifting sets of economic allies and adversaries for that particular group.

B. *Pension Fund Management*

Labor unions play an important role in the management of certain pension funds. On the private-sector side, union representatives serve as fiduciaries for pension plans provided through union funds as well as multiemployer plans.³² These pensions are generally defined-benefit plans, which means that the plan is responsible for paying retirees a fixed stipend for the remainder of the employee’s life.³³ The plan must manage the funds so as to ensure that the plan can pay for the retiree benefits that come due. As a result, defined-benefit plans must carefully manage the contributions to the plan to make sure that they match up with the plan’s future obligations. In the public sector, unions similarly play a role in managing the funds of government-provided, defined-benefit plans. Although the plans are government entities, their managerial structures generally include representatives for the unions whose members receive the pensions.³⁴ In contrast, unions do not manage defined-contribution plans, which provide individual employee accounts into which the employer and the employee contribute set amounts. These accounts, generally managed through a private institution such as a mutual fund company, are controlled by the individual employee and provide no assurance that sufficient funds will be available upon retirement.

³¹ See, e.g., Henry Hansmann, *Employee Ownership and Unions: Lessons from the Airline Industry*, in EMPLOYEE REPRESENTATION IN THE EMERGING WORKPLACE: ALTERNATIVES/SUPPLEMENTS TO COLLECTIVE BARGAINING 573, 577-78 (Samuel Estreicher ed., 1998) (discussing power of pilots’ union).

³² Plans administered by unions alone were common prior to the Taft-Hartley Act. Ewan McGaughey, *Democracy in America at Work: The History of Labor’s Vote in Corporate Governance*, 42 SEATTLE U. L. REV. (forthcoming 2019) (manuscript at 24), <https://ssrn.com/abstract=3246974>. Fearful of consolidated union power in pensions, Congress prohibited employers from funding union-managed plans, instead requiring pensions to be jointly managed by management and labor. See 29 U.S.C. § 186(c)(5) (2012); COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW 4-5 (5th ed. 2018).

³³ MEDILL, *supra* note 32, at 129-30.

³⁴ WEBBER, *supra* note 3, at xiv-xv.

The incentives of union pension-fund representatives are aligned with the interests of their beneficiaries in that both want to see the fund sufficiently funded to pay future benefits. A union will often represent current employees as well as retirees, and its current members would lose faith if promises to retirees were not kept. But to the extent there is discretion in assuring that current investment strategies meet future demand, unions have an interest in pursuing investments that at the least do not harm the economic interests of their current members. To this extent, union interests may diverge from those of the beneficiaries, who may care only about maximizing the probability of receiving their defined benefit by maximizing the funds in the plan.

Another potential for divergence has captured the imaginations of a significant segment of corporate law scholars, as well as one court.³⁵ They fear that unions and state and local governments may have nonshareholder interests, such as more jobs or higher wages, that outweigh their common interests with other shareholders.³⁶ Because of their “special” interests, union and public-sector pension funds may “pursue self-interested objectives rather than the goal of maximizing shareholder value.”³⁷ However, union members could make a similar charge against union pension fund managers who do *not* take union interests into account. The money collected for these funds came from union workers, and it would be unfair for the plan to turn its back on the concerns of members who are still working their way through the system. As Professor David Webber has persuasively argued, union and public-sector pension fund managers have at least some obligation to all of their constituents to pursue policies that benefit the organization and its movement.³⁸ But this divergence in

³⁵ See, e.g., *Bus. Roundtable v. Sec. Exch. Comm’n*, 647 F.3d 1144, 1144 (D.C. Cir. 2011) (holding that the SEC “acted arbitrarily and capriciously” by not evaluating costs potentially imposed upon companies from shareholders representing special interests, such as union and government pension funds, based on an Securities and Exchange Commission (“SEC”) rule that required public companies to provide shareholders with information about, and the ability to vote for, shareholder-nominated candidates for the board of directors); STEPHEN BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 229 (2008) (“Public employee pension funds are vulnerable to being used as a vehicle for advancing political/social goals of the fund trustees that are unrelated to shareholder interests generally.”); Joseph A. Grundfest, *The SEC’s Proposed Proxy Access Rules: Politics, Economics, and Law*, 65 *BUS. LAW.* 361, 378-83 (2010) (singling out labor unions and public pension funds as special-interest shareholders); Mark J. Roe, *The Corporate Shareholder’s Vote and Its Political Economy, in Delaware and in Washington*, 2 *HARV. BUS. L. REV.* 1, 30 (2012) (“[D]ecisionmakers at the SEC may indeed see agenda-driven activists . . . as having pernicious and costly side-agendas, but see these costs as more than offset if access improves the accountability of managers and boards. Or, less charitably, decisionmakers at the SEC may simply be captured by these Washington-savvy interests.”); Roberta Romano, *Less is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 *YALE J. ON REG.* 174, 231-32 (2001) (arguing that union and public pension fund managers use shareholder proposals to accrue “private benefits”).

³⁶ *Bus. Roundtable*, 647 F.3d at 1151-52.

³⁷ *Id.* at 1152.

³⁸ WEBBER, *supra* note 3, at 254.

economic interests between shareholders, pension funds, and union members remains a recognized and persistent potential conflict.

C. *Political Advocacy*

Unions have developed into political actors that operate beyond the specific concerns of the workers they directly represent. For example, unions have come out in force to fight against right-to-work laws, most recently undoing Missouri legislation through a voter referendum.³⁹ In theory, protection for fair-share union dues disadvantages individual workers by taking away their choice to pay dues or not. Protection for required collective-bargaining fees favors unions as institutions, rather than unions as agents for workers. Similarly, the Employee Free Choice Act, which came closest to passage in 2009-2010, provided for recognition through card-check and neutrality agreements that made it easier for unions to organize.⁴⁰ Certain aspects of union advocacy necessarily focus on unions as institutions rather than the workers they represent.

Perhaps counterintuitively, there are also numerous instances of unions acting against their short-term political and economic interests to support political causes that help workers generally. Unions have consistently supported “mandatory minimums” in the form of minimum-wage laws, overtime protections, occupational safety regulations, health and pension benefits, and protected employee leave.⁴¹ In all of these instances, the labor movement supported mandatory minimums that benefit all workers—not just those in unions. With each improvement in employment law, the need for individual workers to unionize weakened. But nevertheless unions pursued these reforms.⁴²

Unions also enter into coalitions that may not always align with the spectrum of views held by individual members. Union political spending has primarily

³⁹ Kris Maher, *Missouri Overturns ‘Right-to-Work’ Law in Referendum*, WALL STREET J. (Aug. 8, 2018, 12:33 AM), <https://www.wsj.com/articles/missouri-overturns-right-to-work-law-in-referendum-1533699871>.

⁴⁰ Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 2 (2009) (amending National Labor Relations Act to expedite process of choosing representative for group of employees by immediately certifying the representative if no previous representative existed); Employee Free Choice Act of 2009, S. 560, 111th Cong. § 2 (2009) (same). However, that legislation also included the boosting of damages paid to individual employees, as well as required interest arbitration for failed first-contract negotiations. H.R. 1409 §§ 3-4 (facilitating initial collective bargaining agreements and strengthening enforcement against unfair labor practices); S. 560 §§ 3-4 (same).

⁴¹ See, e.g., Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 170-71 (2013).

⁴² As a counterexample that illustrates the union interests, a union official in Los Angeles initially argued that union workplaces should be exempt from a proposed minimum wage law so as to allow the unions more flexibility to bargain for higher benefits in lieu of the wage increase. Jana Kasperkevic, *LA Unions Call for Exemption from \$15 Minimum Wage They Fought for*, GUARDIAN (Apr. 12, 2016, 9:22 AM), <https://www.theguardian.com/us-news/2016/apr/12/los-angeles-15-dollar-minimum-wage-unions> [<https://perma.cc/T5CT-W5BF>].

gone to Democratic candidates.⁴³ Even if they like their union, some members likely have other political preferences that align more with Republicans, such as lower taxes, pro-life policies, or opposition to gay marriage. These preferences might be more important to an individual member than the candidates' positions on labor. But unions are generally single-issue political actors and align their political activity with the party or coalition that best represents those interests. As a result, there may be dissonance between a union's political support and the political preferences of individual union members.⁴⁴

II. LABOR STRUGGLES

The past fifty years have been difficult for labor. Unions have faced obstacles in all three of their areas of engagement: collective bargaining, pension fund activism, and political advocacy. These troubles point to the need for a new direction in worker empowerment—a direction that leads through corporate governance, rather than collective bargaining.

A. *The Limitations of Collective Bargaining*

Collective bargaining is the *raison d'être* of unions. Under the NLRA, employees can select a collective representative to negotiate terms and conditions of employment, and the employer must bargain with this representative in good faith.⁴⁵ The employer need not agree to any specific set of terms, but it must bargain in good faith and abide by the complex legal system for managing this bargaining relationship.⁴⁶ The duty to bargain forces employers to come to the table and has had a demonstrable effect on employee fortunes. Although the exact economic ramifications are contested, there is a consensus that collective bargaining increases wages among employees on an individual-firm level.⁴⁷

⁴³ *Top Organization Contributors*, *supra* note 4 (noting that 90% of union campaign contributions in 2016 went to Democrats).

⁴⁴ See, e.g., Steven Greenhouse, Opinion, *What Unions Got Wrong*, N.Y. TIMES, Nov. 27, 2016, at SR2 (noting that in the 2016 presidential election, Clinton received only narrowly more support from voters in union households, despite receiving bulk of union political spending on presidential race).

⁴⁵ 29 U.S.C. §§ 158(a)(5), (d), 159(a)-(b) (2012) (setting forth duty to bargain and establishing process to select employees' collective representative).

⁴⁶ *Id.* § 158(d).

⁴⁷ See RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 43-60 (1984) (discussing studies of union wage effect); David G. Blanchflower & Alex Bryson, *What Effect Do Unions Have on Wages Now and Would Freeman and Medoff Be Surprised?*, 25 J. LAB. RES. 383, 391 (2004) (finding 17% private-sector union wage effect and 14.5% public-sector union wage effect in late 1990s).

Unions were able to change the income-distribution dynamics in the mid-twentieth century by economic force.⁴⁸ They collectivized employees throughout important industries such as auto-manufacturing, truck driving, and steel production, and they used strikes and other forms of economic pressure to push up the employees' wages and benefits.⁴⁹ However, collective bargaining is no longer a vehicle for anything more than a small percentage of workers to interact and bargain with management. The percentage of unionized private-sector employees has been steadily shrinking since its 1950s heyday, from a high of about 35% to the current 6.4%.⁵⁰ And there is not much chance of that trend reversing. The failure of labor-friendly legislation to pass during the first Obama Administration, when Democrats controlled both houses of Congress, indicates the improbability of pro-union statutory change.⁵¹ Indeed, the recent political climate has seen erosion in union membership, as states such as Michigan and Wisconsin become right-to-work states and also make it more difficult for public-sector workers to organize.⁵²

Moreover, there is a larger structural problem with labor law. The NLRA clearly creates zones of power and influence that exist outside the internal business organizational structure. Employers are only required to bargain on specific topics that could be considered "mandatory" subjects of bargaining.⁵³ Mandatory subjects are limited primarily to the terms of the employment contract; management has no duty to negotiate over issues such as product development, executive compensation, financial structuring, and firm

⁴⁸ See Nicholas Kristof, Opinion, *The Cost of a Decline in Unions*, N.Y. TIMES, Feb. 19, 2015, at A25 (describing how unions have been integral to maintaining middle class and suggesting that decline in unions has led to income inequality).

⁴⁹ See JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 1-2 (2014) (describing how unions were "the core equalizing institution" for income equality).

⁵⁰ Economic News Release, Bureau of Labor Statistics, *supra* note 2 (observing that 6.4% of private-sector workers are members of unions in 2018); see also TIMOTHY NOAH, THE GREAT DIVERGENCE: AMERICA'S GROWING INEQUALITY CRISIS AND WHAT WE CAN DO ABOUT IT 128 (2012) (discussing decline in union membership).

⁵¹ See Harold Meyerson, Opinion, *Under Obama, Labor Should Have Made More Progress*, WASH. POST (Feb. 10, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/09/AR2010020902465.html> (discussing failure of Employee Free Choice Act).

⁵² See Monica Davey, *Unions Suffer Latest Setback in Midwest*, N.Y. TIMES, Mar. 10, 2015, at A1 (discussing how Democratic Party and Republican Party view right-to-work legislation). This leaves out the policy changes that are making public-sector union membership more difficult and less desirable. See, e.g., Paul M. Secunda, *The Wisconsin Public-Sector Labor Dispute of 2011*, 27 ABA J. LAB. & EMP. L. 293, 293-94 (2012) (describing Wisconsin's "unprecedented attack on public-sector bargaining").

⁵³ NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (discussing mandatory subjects of collective bargaining).

governance.⁵⁴ The idea that the “core of entrepreneurial control”⁵⁵ is reserved to the employer itself is central to the federal system of collective bargaining. Employers may be forced to talk with unions about wages and benefits, but they have no duty to talk about how they run the business.⁵⁶ In creating these divided fields of engagement, the NLRA fenced employees and their representatives out of any real participation in the firm’s management.⁵⁷

Labor law scholars and advocates have proposed idea upon idea, program after program, to revitalize and resurrect union membership.⁵⁸ One current reform agenda focuses on the importance of sectoral bargaining and the potential for new legal frameworks that would foster a sectoral approach.⁵⁹ I am hopeful that this new wave of reform, championed by academics and labor leaders, will stick. However, any effort to reconstruct the past history of union representation would be built upon a collective-bargaining structure that would retain its inherent weaknesses, with unions and their represented members separated from the seat of true power within their companies.

B. *The Inefficacy of Pension Fund Activism*

Partisans on both sides agree on the power of union pension funds. Supporters of the funds believe this power is exercised primarily to salutary effect, whereas critics claim that pension fund activism causes a variety of distortions and contortions in corporate governance. In reality, union and public-sector pension funds have been important advocates for shareholder democracy and have not

⁵⁴ See *id.* (emphasizing party’s freedom to bargain or not bargain over other subjects).

⁵⁵ *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring) (discussing mandatory subjects’ limitations, including how managerial decisions lie outside scope of mandatory subjects); see also James Gray Pope, *Class Conflicts of Law II: Solidarity, Entrepreneurship, and the Deep Agenda of the Obama NLRB*, 57 *BUFF. L. REV.* 653, 658 (2009) (“The doctrine [of entrepreneurial control] provides the focal point for a coherent and positive conception of employer interests that has come to permeate the labor law.”).

⁵⁶ See *Fibreboard Paper Prods. Corp.*, 379 U.S. at 223 (explaining how every decision made that may affect job security does not trigger mandatory bargaining).

⁵⁷ See Edward Silver & Joan McAvoy, *The National Labor Relations Act at the Crossroads*, 56 *FORDHAM L. REV.* 181, 187 (1987) (explaining criticisms of the NLRA and NLRB, including that the NLRA provides inadequate protection against management).

⁵⁸ To name just a few of the books, see, for example, ELLEN DANNIN, *TAKING BACK THE WORKERS’ LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS* 2-15 (2006); CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 165-69 (2010); JULIUS G. GETMAN, *RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT* 269-70 (2010); PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 226-27 (1990).

⁵⁹ ANDRIAS & ROGERS, *supra* note 5, at 26-33 (arguing that sectoral bargaining removes collective-action problems, is democratic, and can improve working conditions more effectively than firm-based bargaining); ROLF, *supra* note 28, at 37-44 (analyzing success of sectoral bargaining in Europe and suggesting potential success of sectoral bargaining in United States).

used their power opportunistically. But neither has this activism been all that successful in increasing the power of the funds or their beneficiaries. Ultimately, the funds have done more for shareholder-oriented corporate governance than they have for union workers.

In their 1998 study of corporate governance activity by union pension funds, Professors Stewart Schwab and Randall Thomas found not “a socialist or proletarian plot,” but rather “a model for any large institutional investor attempting to maximize return on capital.”⁶⁰ Unions had become model shareholder activists, using their power to drive a message that benefitted their fellow shareholders. In particular, Schwab and Thomas praised “the innovative methods unions have developed to get corporations to listen to traditional shareholder complaints.”⁶¹ Pension funds may have been louder—and at times more effective—than their mutual-fund counterparts, but they were seeking the same goals. And this approach has remained the pension funds’ playbook for the last twenty years. Pension-fund managers have been at the forefront in governance efforts to strengthen shareholder voting rights,⁶² rein in the power of the CEO,⁶³ and fight fraud and abuse by insiders.⁶⁴ These efforts all redound to the benefit of shareholders as a group.

Despite the rock-solid evidence of pension fund support for shareholder interests, the bogeyman of unions and pension funds running amok is popular in a certain segment of corporate law literature.⁶⁵ These funds have been singled out for having interests different than other shareholders—namely, interests in worker rights. One example of this predilection is almost always trotted out in support of the theory: the 2004 campaign by CalPERS to withhold shareholder support for certain Safeway directors.⁶⁶ The campaign allegedly targeted these directors because of Safeway’s hard-line negotiations with the United Food and

⁶⁰ Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018, 1019-20 (1998).

⁶¹ *Id.* at 1022.

⁶² WEBBER, *supra* note 3, at 45-78.

⁶³ *Id.* at 111-51.

⁶⁴ *Id.* at 172.

⁶⁵ One empirical study has found that AFL-CIO affiliated shareholders are more likely to support director-nominees by the incumbent board once the AFL-CIO no longer represents workers at a given firm. See Ashwini K. Agrawal, *Corporate Governance Objectives of Labor Union Shareholders: Evidence from Proxy Voting*, 25 REV. FIN. STUD. 187, 187 (2012). The study focused on the split between the AFL-CIO and the Change to Win coalition of unions, and examined the behavior of AFL-CIO funds with respect to directors at Change to Win companies. *Id.* at 188. Overall, Professor Agrawal found that the AFL-CIO funds voted for director nominees 65% of the time and a Change to Win union (the Carpenters) voted 75% of the time, while three different index funds supported the director-nominees 89 to 98% of the time. *Id.* at 195 tbl.1. Among other issues, Agrawal assumes that the index funds’ votes reflect a policy of shareholder wealth maximization. He does not demonstrate why a vote for incumbent directors equals a vote for shareholder wealth maximization; it could, in fact, represent the opposite.

⁶⁶ See Grundfest, *supra* note 35, at 382-83.

Commercial Workers (“UFCW”). In the end, however, only 17% of the shares voted against the directors targeted by CalPERS.⁶⁷ The CalPERS-Safeway example has been used over and over to demonstrate the potential for unions and pension funds to pressure directors into caving to specialized labor demands.⁶⁸ But the example itself demonstrates the *lack* of such potential. CalPERS and the other pension funds involved had legitimate corporate governance concerns to raise along with their union-oriented concerns; they did not nakedly assert nonshareholder interests.⁶⁹ And even if the drive were simply a naked pursuit of union interests, their exercise of power netted only 17% of the total shareholder vote, and also led to the ouster of the CalPERS chair who had orchestrated the campaign.⁷⁰ The imbroglio was a complete fiasco for CalPERS. It is hardly evidence that unions and pension funds exercise their ballot-box power to crush their fellow shareholders.⁷¹

In my view, union pension funds have not done enough to push a pro-worker agenda. There are opportunities for unions to advocate for, as an example, worker referenda on transformative corporate transactions.⁷² But getting

⁶⁷ *Id.* at 383. Moreover, the directors would have still been reelected, even if a majority had voted to withhold their votes, because no other candidates were running against them.

⁶⁸ See, e.g., Agrawal, *supra* note 65, at 193; Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1285-86 (2008) (characterizing CalPERS-Safeway proxy battle as “high profile” example of “ways activist investors can use their shareholder status to push for favorable treatment in their other dealings with the firm”); Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1755 n.100 (2006) (“In what may be the best known recent example of this phenomenon, the pension fund of the union representing Safeway workers used its position as a Safeway shareholder in an attempt to oust the CEO, who had stood up to the union in collective bargaining negotiations.”); Jill E. Fisch, *Securities Intermediaries and the Separation of Ownership from Control*, 33 SEATTLE U. L. REV. 877, 883 (2010) (“CalPERS’s activism at Safeway was criticized as resulting from President Sean Harrigan’s personal pro-union sympathies.”); John F. Olson, *Reflections on a Visit to Leo Strine’s Peaceable Kingdom*, 33 J. CORP. L. 73, 76-77 (2007) (“[T]he 2004 Safeway-CalPERS fiasco demonstrates the conflicts of interest union pension funds may harbor.”); Mark J. Roe, *Delaware’s Politics*, 118 HARV. L. REV. 2491, 2524-25 (2005) (“The press, or at least the conservative press, thought that CalPERS was not acting in its beneficiaries’ interest as stockholders, but rather was motivated by a desire to change Safeway’s labor policy.”).

⁶⁹ Marc Lifsher, *CalPERS to Withhold Votes on Safeway CEO*, L.A. TIMES, Apr. 8, 2004, at C2 (“CalPERS said it would withhold its votes for Safeway Chairman and Chief Executive Steven Burd because of a 60% drop in Safeway’s stock since early 2001 that the pension fund said wiped out \$20 billion in market value. CalPERS officials also cited what they described as conflicts of interest and a lack of responsiveness to shareholder concerns.”).

⁷⁰ Tom Petrino, *Business Applauds Shake-Up at CalPERS*, L.A. TIMES, Dec. 2, 2004, at A1.

⁷¹ David Webber frames the episode more hopefully in his book. See WEBBER, *supra* note 3, at 30-31. However, Webber acknowledges that none of the incumbent Safeway directors lost, Safeway CEO Steven Burd stayed on in his position until 2013, and CalPERS chair Sean Harrigan was forced out of his position by the end of the year. *Id.*

⁷² See generally Matthew T. Bodie, *The Case for Employee Referenda on Transformative Transactions as Shareholder Proposals*, 87 WASH. U. L. REV. 897 (2010).

sufficient shareholder support for a worker-oriented agenda would admittedly be challenging. “Special interest” shareholders have supported reforms that support overall shareholder value because only items on the shared shareholder agenda will get majority votes. Efforts by one group of shareholders to elect a director who would cater to their unique interests would be met with indifference or hostility from their fellow shareholders. At most, pension funds could repeatedly force incumbent boards to incur costs in defending themselves—and then go on to lose.⁷³ Similar to Professor Webber, I am more optimistic that there might be some narrow ground for pension funds to push for more worker-friendly policies, perhaps through horse-trading with other investor groups.⁷⁴ But the strategy of shareholder politics remains difficult for pension funds.

Even if union pension funds were successful shareholder advocates for worker interests, it may already be too late to successfully push a pro-worker agenda. As noted above, the collective-bargaining relationships that engendered these funds have been dwindling over time. While the funds can outlast the representation, at some point the lack of ongoing union representation catches up with the amount in the funds. In addition, the trend in pensions has been away from defined-benefit plans towards defined-contribution plans. Defined-benefit plans provide specified benefits to retirees, generally based on a formula that includes years of service, while defined-contribution plans put a certain amount of money into an individual account that the retiree then has access to upon retirement.⁷⁵ Over the years, defined-contribution plans, particularly 401(k) plans, have become a much more popular option for private companies.⁷⁶ Because individual account holders manage their own accounts in most defined-contribution plans, they wield significantly less power in corporate governance than do participants in defined-benefit pension funds.⁷⁷ Defined-benefit plans still enjoy robust support in the public sector. But these funds have been under attack from conservative activists like the Koch brothers, who contend that

⁷³ Professor Joseph Grundfest has provided a theory arguing that union and pension fund shareholders could use SEC Rule 14a-11 as a “megaphone” to get across their message and, in some cases, secure concessions from sensitive boards. Grundfest, *supra* note 35, at 378-83. Grundfest asserts that these shareholders can use the nomination process to gain additional publicity “at very little cost” and “need not even come close to winning.” *Id.* at 379. His parade of horrors includes union-nominated board candidates who want to “limit the export of jobs to foreign factories, or to close down foreign factories in order to bring manufacturing jobs back to America,” or candidates who want to “cap all executive salaries at a multiple of the average hourly wage of the rank and file,” or who want to “comply with emissions standards that reduce global warming but that place the corporation at a competitive disadvantage in the marketplace.” *Id.* at 381.

⁷⁴ See WEBBER, *supra* note 3, at 246-50.

⁷⁵ MEDILL, *supra* note 32, at 126-30.

⁷⁶ *Id.* at 133-35.

⁷⁷ WEBBER, *supra* note 3, at 214-20.

generous public sector pensions are too much of a drain on the public fisc.⁷⁸ Although the recent bull market has buoyed many public-sector pension funds, a crash would likely put many funds underwater—raising concerns about their continuing viability.⁷⁹

Funds like CalPERS will continue to be important players—both because of the size of California and its government, as well as the lack of hostility towards public-sector unions in that state. But even in California, an ongoing stream of ballot initiatives proposes an end to defined-benefit plans for public employees.⁸⁰ Stasis would seem to be the best possible outcome—and stasis may be optimistic.

C. *The Diminishing Power of Political Advocacy*

Unions have significant political power in the United States—as an interest group, they have no equal when it comes to worker advocacy. But even though unions provide significant financial and manpower support to political campaigns, their funding is ultimately dwarfed by funding from Wall Street. Corporate leaders and financiers provide significantly more money to political campaigns than do unions.⁸¹ In fact, a relatively small number of families have provided a huge chunk of the overall political donations.⁸² Battling these titans of modern capital is a losing proposition.

The federal government's campaign-funding regime regulates union political activity in much the same way as it regulates the activity of corporations.⁸³ So, just as *Citizens United v. FEC*⁸⁴ allowed for corporate political spending on individual campaigns, the case also allows for new possibilities for unions.⁸⁵

⁷⁸ *Id.* at 221-25; see also David A. Skeel, Jr., Address, *Is Bankruptcy the Answer for Troubled Cities and States?*, 50 HOUS. L. REV. 1063, 1084 (2013) (discussing “unsustainable pension promises”).

⁷⁹ See WEBBER, *supra* note 3, at 226-27 (discussing debate about underfunding of public pensions).

⁸⁰ *Id.* at 222-23 (discussing proposed act to “change the California constitution to end defined-benefit pension plans for all California public employees hired on or after January 1, 2019”).

⁸¹ Jamieson & Blumenthal, *supra* note 4.

⁸² Nicholas Confessore, Sarah Cohen & Karen Yourish, *The Families Funding the 2016 Presidential Election*, N.Y. TIMES (Oct. 10, 2015), <https://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html> (“These donors’ fortunes reflect the shifting composition of the country’s economic elite. . . . Most built their own businesses, parlaying talent and an appetite for risk into huge wealth: They founded hedge funds in New York, bought up undervalued oil leases in Texas, made blockbusters in Hollywood.”).

⁸³ Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 4 (2011) (noting that “*Citizens United* also applies to labor unions, freeing them to spend general treasury funds on electioneering”).

⁸⁴ 558 U.S. 310 (2010).

⁸⁵ See *id.* at 324; Matthew T. Bodie, *Labor Speech, Corporate Speech, and Political Speech: A Response to Professor Sachs*, 112 COLUM. L. REV. SIDEBAR 206, 207 (2012) (“The

However, unions face an additional set of federal and constitutional restrictions on their freedom as political actors that do not encumber corporations. Unlike corporations, unions cannot spend on politics whatever they have in their treasury. In a series of cases interpreting both the Railway Labor Act (“RLA”) and the NLRA, the Supreme Court held that unions cannot require objecting nonmembers to pay for costs outside those incurred in collective bargaining.⁸⁶ Outside of states with right-to-work provisions, unions may require both members and nonmembers to pay for the union’s costs of representing the bargaining unit.⁸⁷ However, there are limitations on the types of expenses that can be charged to nonmembers. Objecting nonmembers must only pay their portion of those expenses that were “necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.”⁸⁸ Political spending is the quintessential type of expenditure that cannot be charged to objectors.⁸⁹

This line of jurisprudence requiring a separation between collective-bargaining expenses and “unrelated” expenses has been roundly attacked by legal academia.⁹⁰ Much of the commentary has focused on statutory interpretation and congressional intent, arguing that Congress did not mean to curtail the union’s political activity.⁹¹ But on a broader level, the notion that political spending is somehow external or superfluous to the core representation obligation is misguided. Unions need to lobby to protect their institutional interests, just as corporations often engage in extensive lobbying in order to

Citizens United decision opened up the potential for corporations and unions to give unlimited amounts of money in support of politicians and their campaigns for office.”).

⁸⁶ See *Comm’ns Workers of Am. v. Beck*, 487 U.S. 735, 763 (1988); *Ellis v. Bhd. of Ry., Airline & Steamship Clerks, Freight Handlers, Express & Station Emps.*, 466 U.S. 435, 455 (1984); *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 768-70 (1961).

⁸⁷ *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 744-45 (1963) (permitting “agency shop” agreements whereby unions charge nonmembers for the costs of collective representation).

⁸⁸ *Ellis*, 466 U.S. at 448.

⁸⁹ *Beck*, 487 U.S. at 740 (finding that objectors need not participate in “the union’s expenditure of their fees on activities such as . . . lobbying for labor legislation, and participating in social, charitable, and political events”); *Int’l Ass’n of Machinists*, 367 U.S. at 766-69 (construing statute as “not vesting the unions with unlimited power to spend exacted money”).

⁹⁰ See, e.g., Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court’s Opinion in Beck*, 27 HARV. J. ON LEGIS. 51, 103-18 (1990) (criticizing Court’s interpretation of NLRA in *Beck*); George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 187, 230 (1994) (stating that there is “much to criticize” when discussing *Beck*); Charles R. Virginia, Comment, *Communications Workers v. Beck: Supreme Court Throws Unions Out on Street*, 57 FORDHAM L. REV. 665, 666 (1989) (concluding that Court’s interpretation of NLRA was “flawed”).

⁹¹ See, e.g., *Beck*, 487 U.S. at 768 (Blackmun, J., dissenting) (arguing that the Court’s holding “simply cannot be derived from the plain language of the statute”); Dau-Schmidt, *supra* note 90, at 74-76 (arguing that Court’s decision ran contrary to congressional intent).

further their corporate objectives.⁹² Given the pervasive and fluctuating schemes of government regulation, it would be foolhardy for companies *not* to be engaged in the political process.⁹³ The same logic arguably applies even more to unions, whose business is subject to intense regulation. Such regulation plays a role even outside the core provisions of the NLRA; state law covers such critical topics as right-to-work status, public-sector unionization, and the regulation of public demonstrations.⁹⁴ Recent anti-labor efforts in Michigan and Wisconsin show what can happen when unions lose political support at the state level.⁹⁵

Public-sector unions now face a more existential threat after *Janus v. American Federation of State, County, & Municipal Employees*.⁹⁶ Finding that *all* activities of public-sector unions related to matters of public interest, the Court ruled that unions cannot negotiate with state governments for the collection of dues at any level without the permission of individual workers.⁹⁷ In essence, the Court held that the Constitution requires that all public-sector employment be right-to-work.⁹⁸ Up until summer 2018, the Court had held that unions could bargain for the automatic collection of dues for expenses-related collective bargaining, while employees could opt out of non-collective-bargaining expenses such as political donations.⁹⁹ At this point, states still allow workers to opt out of collective-bargaining fees entirely and still be represented. Although this dynamic may change, the *Janus* decision has, at the very least, made it harder for unions to raise funds under traditional and settled mechanisms

⁹² See *McConnell v. FEC*, 540 U.S. 93, 147-48 n.46 (2003) (“Labor and business leaders believe—based on experience and with good reason—that such access gives them an opportunity to shape and affect governmental decisions and that their ability to do so derives from the fact that they have given large sums of money to the parties.” (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 498 (D.D.C. 2003))), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010); Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495, 1500 (2005) (“[C]orporate demand for political activity is a natural response to the effect of legal rules on business operations.”).

⁹³ Fisch, *supra* note 92, at 1570 (“Regulation has become an important factor for U.S. businesses. As a result, corporate political activity must be integrated within a corporation’s overall business strategy, and corporations need to develop and manage their political capital in the same way that they manage other business assets.”).

⁹⁴ Christopher L. Erickson et al., *Justice for Janitors in Los Angeles and Beyond*, in *THE CHANGING ROLE OF UNIONS: NEW FORMS OF REPRESENTATION* 38, 38-42 (Phanindra V. Wunnava ed., Routledge 2015).

⁹⁵ Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 HOFSTRA LAB. & EMP. L.J. 511, 532-36 (2013).

⁹⁶ 138 S. Ct. 2448 (2018).

⁹⁷ *Id.* at 2478.

⁹⁸ *See id.*

⁹⁹ *See* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223-24 (1977) (finding agency shop clauses authorizing unions to automatically collect dues from nonmember public employees constitutionally valid), *overruled by* *Janus v. Am. Fed. of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448 (2018).

such as union security fees.¹⁰⁰ There is even some speculation that the Court might next turn to collective-bargaining fees in the private sector.¹⁰¹

III. LABOR AND CORPORATE POWER

We can no longer expect collective bargaining to empower most American workers. That model no longer works. We need a new system of corporate empowerment that puts workers directly at the center of firm governance. At the same time, however, we must recognize that unions are the primary institutional bulwark for workers' economic and political power in the United States, with decades of negotiating, legal, and political experience in getting workers a better deal. Unions will still retain a critical role in our economic ecosystem, even if we radically change our approach to worker power. This Part offers a preliminary sketch of how this transition may work.

A. *Worker Power Within the Firm*

The ultimate goal for worker empowerment should be participating in the governance structure of the business. Even though labor and equity contributors are the two primary sets of ongoing participants in the economic firm, firms are generally governed solely by equity.¹⁰² Employees should have governance rights that provide access to, engagement with, and some degree of control over the management of the business. The most obvious example of a robust set of participatory governance structures is Germany's system of codetermination. Codetermination requires that employees at large companies choose 50% of the company's supervisory board.¹⁰³ The supervisory board is akin to the U.S. corporation's board of directors, in that both play primary roles in choosing the company's upper management and making organizational decisions such as mergers, acquisitions, and dissolution. Shareholders elect the other 50% of supervisory board members, and the board's otherwise nonvoting chair has the

¹⁰⁰ Alana Semuels, *Is This the End of Public-Sector Unions in America?*, ATLANTIC (June 27, 2018), <https://www.theatlantic.com/politics/archive/2018/06/janus-afscme-public-sector-unions/563879/> [<https://perma.cc/2QCM-2MU8>].

¹⁰¹ Alexia Elejalde-Ruiz, *Janus Ruling Could Undercut Private Sector Unions Too*, CHI. TRIB., July 10, 2018, at C1.

¹⁰² For further discussion of the role of the employee within the economic firm, see Matthew T. Bodie, *Employment As Fiduciary Relationship*, 105 GEO. L.J. 819, 830-36 (2017).

¹⁰³ Katharina Pistor, *Codetermination: A Sociopolitical Model with Governance Externalities*, in EMPLOYEES AND CORPORATE GOVERNANCE 163, 174-75 (Margaret M. Blair & Mark J. Roe eds., 1999). The 50% requirement applies to companies with more than 2,000 employees. Companies with between 500 and 2,000 employees must have 30% employee representation on the supervisory board. See Otto Sandrock & Jean J. du Plessis, *The German System of Supervisory Codetermination by Employees*, in GERMAN CORPORATE GOVERNANCE IN INTERNATIONAL AND EUROPEAN CONTEXT 167, 178 (Jean J. du Plessis et al. eds., 3d ed. 2017).

tie-breaking vote.¹⁰⁴ Recently, two bills have proposed American versions of codetermination, in which employee representatives would serve on corporate boards of directors. The Accountable Capitalism Act, proposed by Senator (and presidential candidate) Elizabeth Warren, would require companies with more than \$1 billion in average revenue to have employees select at least 40% of the seats on the board.¹⁰⁵ Senator Tammy Baldwin has authored the Reward Work Act, which proposes that one-third of directors be selected directly by employees.¹⁰⁶ Both of these proposals reflect the work of progressive corporate law scholars who have advocated for more direct employee involvement in corporate governance.¹⁰⁷

Putting employee representatives onto boards of directors would give workers real power within the corporation, and it would avoid many of the problems that inhere in a system that relies solely on collective bargaining. With workers in power on the board, they would have a say in all issues relating to the firm—not just those issues related to their own terms and conditions of employment. The benefits of this expanded scope would be two-fold. First, workers would have more power to steer the corporation’s “entrepreneurial” decisions (such as mergers and acquisitions, new product lines, and advertising) in ways that look out for their own interests. Second, corporations would get the benefit of employee expertise at the director level.¹⁰⁸ Giving employees a voice in corporate governance will completely shift our current oligarchical approach

¹⁰⁴ See Sandrock & du Plessis, *supra* note 103, at 178. One notable exception to this structure is Volkswagen, in which the German state of Lower Saxony also was given seats on the supervisory board, giving workers de facto control. JACK EWING, FASTER, HIGHER, FARTHER: THE VOLKSWAGEN SCANDAL 57 (2017).

¹⁰⁵ Accountable Capitalism Act, S. 3348, 115th Cong. § 6(b)(1) (2018).

¹⁰⁶ Reward Work Act, S. 2605, 115th Cong. § 2 (2018).

¹⁰⁷ See, e.g., MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY 16 (1995) (arguing that boards of directors should take into account the effects of their decisions on all of the corporation’s stakeholders, including employees); Matthew T. Bodie, *Income Inequality and Corporate Structure*, 45 STETSON L. REV. 69, 84-89 (2015) (advocating for corporate governance reform to provide employees with larger voice); Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 287 (1998) (“[W]orkers should have some kind of representation on the board of directors or have some role in electing directors, and . . . directors of companies should be held to have some kind of fiduciary duties to workers in the employ of their firm.”); Robert Hockett, *Why (Only) ESOPs?*, 12 STAN. J.L. BUS. & FIN. 84, 85 (2006) (arguing for a broader approach to the “ownership society” through employee ownership); Brett H. McDonnell, *Strategies for an Employee Role in Corporate Governance*, 46 WAKE FOREST L. REV. 429, 429-30 (2011) (discussing possible strategies for creating a role for employees in corporate governance).

¹⁰⁸ See Matthew T. Bodie, *Workers, Information, and Corporate Combinations: The Case for Nonbinding Employee Referenda in Transformative Transactions*, 85 WASH. U. L. REV. 871, 898-913 (2007) (discussing insights provided by employee input about board-level corporate decisionmaking).

and will open up the possibility of greater synergy between employers and employees.¹⁰⁹

Employee board representation would change, but not obviate, the role of unions within the workplace. Board representation would provide employees with a platform from which to build a stronger position within company governance. Unions could play an important role in working with employees to develop the expertise and strategies necessary to play their new supervisory role. Labor organizations have already worked closely with shareholder advocacy groups in promoting corporate governance reform; board representation would enable these groups to work even more closely together in pursuing their joint interests of firm wealth maximization and managerial oversight.¹¹⁰ Further, board representation would lead naturally to some version of collective bargaining, as management—still controlled by shareholders under Senators Warren’s and Baldwin’s proposals—would need to establish workers’ terms and conditions of employment. With employee board representation, labor will feel less like a cost to be managed and more like part of the team to be included. Board representation will facilitate union influence, not replace it. It is not surprising that labor leaders have supported it.¹¹¹

Complementary reforms could also help ensure a more robust role for unions on the traditional shop-floor level. Germany is one of several European countries that provide for works councils—firm-level or worksite-level organizations that consult with management on issues of day-to-day employment.¹¹² As stand-alone bodies, works councils give employees more voice, but they provide little power, as they cannot negotiate on behalf of workers and generally are not empowered to change corporate policy.¹¹³ But as part of a larger framework of worker empowerment, works councils could allow workers—with the expertise and experience of unions—to translate the governance power into concrete results in workers’ daily lives.

¹⁰⁹ For a discussion of innovative managerial structures that provide for more employee empowerment, see LALOUX, *supra* note 12, at 55-61; ROBERTSON, *supra* note 12, at 16-31.

¹¹⁰ See Schwab & Thomas, *supra* note 60, at 1023 (claiming that “much union-shareholder activity represents an alignment of shareholder and worker interests that attempts to prod management to increase the overall worth of the firm”).

¹¹¹ Jake Johnson, *To Curb Capitalism’s Toxic Impacts, Warren Unveils Plan to Give Workers More Control Over Corporate Decisions*, COMMON DREAMS (Aug. 15, 2018), <https://www.commondreams.org/news/2018/08/15/curb-capitalisms-toxic-impacts-warren-unveils-plan-give-workers-more-control-over> [<https://perma.cc/Q5WL-HA82>] (“Applauding Warren’s new bill in a tweet on Wednesday, AFL-CIO president Richard Trumka declared, ‘It’s time to rewrite the rules so our economy works for working people, not just those at the top.’”).

¹¹² ANDRIAS & ROGERS, *supra* note 5, at 25.

¹¹³ Some U.S. companies have used versions of works councils that do in fact have de facto power within the internal hierarchy. See *Crown Cork & Seal Co.*, 334 N.L.R.B. 699, 701-02 (2001) (describing de facto power of one such set of internal committees).

Collective bargaining has a rich history and proud tradition within our economic framework. However, time has shown that it cannot subsist on its own. Most labor advocates have pushed for more of the same when it comes to labor-law reform—changes that make it easier for unions to represent more workers.¹¹⁴ In my view, we need reform at the corporate level to expect the dynamics to shift.¹¹⁵ Unions will play a critical role not only in advocating for this shift, but also in translating employee governance power into worker economic gains.

B. *Worker Power Across Firms*

If workers are given more power within firms, then that power will become more contested. Specifically, there is significant potential for workers to fight among themselves when they have a voice in critical corporate decisions.¹¹⁶ Hierarchies and markets will continue to cause certain professions and occupations to hold greater economic power than others. Unions have played, and will play, an important role in providing collective market power not just to workers as an undifferentiated whole, but also to specific groups of workers who engage in particular types of jobs. As employees get more power within firms, unions should provide more collective power for subsets of employees across firms as a counterbalance to firm and industry power.

Many unions are already fulfilling this role of a professional- or occupational-trade association. It is the old American Federation of Labor model—unions represent particular trades and crafts, rather than employer-wide wall-to-wall industrial units.¹¹⁷ A more trade- or occupational-oriented union movement would have several advantages moving forward. First, different unions would be better positioned to represent separate groups of employees within a corporation. Rather than expecting one union to represent the needs of a variegated set of workers, unions representing a particular occupation would better know the needs of that occupation and could provide informed advice about the issues that come up at the workplace. Second, these organizations would have a message for employees across the nation: join us as part of your professional and occupational identity. Just as attorneys have the American Bar

¹¹⁴ See, e.g., ANDRIAS & ROGERS, *supra* note 5, at 6-8; GETMAN, *supra* note 58, at 257-301 (arguing for reforms aimed at improving efficient organization of unions).

¹¹⁵ Matthew T. Bodie, *The Next Iteration of Progressive Corporate Law*, 74 WASH. & LEE L. REV. 739, 764-65 (2017) (“The progressive corporate law agenda must include changes to the statutory structure that would better accomplish the distribution of power within the firm.”).

¹¹⁶ The internecine warfare at United Airlines in the 1990s between flight attendants, mechanics, and pilots provides one example. See Christopher Mackin, *United It Was Not*, OWNERSHIP ASSOCIATES (Jan. 1, 2003), <https://www.ownershipassociates.com/united.shtm> (“There are not many industries that are more occupationally segregated than the airline industry.”).

¹¹⁷ See ESTREICHER & BODIE, *supra* note 26, at 36-39 (discussing the differences between the craft-based approach of the American Federation of Labor and the industrial-oriented approach of the Congress of Industrial Organizations).

Association and mechanical engineers have the American Society of Mechanical Engineers, unions could adapt themselves to serve not only as collective-bargaining representatives, but also networks of continuing education, vocational identity, and political advocacy. Members of the occupation could join the union even if they were not represented, providing another source of funds for the organizations that could be earmarked for lobbying and campaign donations.¹¹⁸ Third, unions would be in a better position to aim for sectoral bargaining—bargaining with all of the employers in a particular sector. Sectoral bargaining has received significant attention as a new direction in labor law reform, and a guild-oriented approach would provide unions with a weightier argument to represent a set of workers across the sector.¹¹⁹

A specific occupational focus would also enable unions to use their pension funds more effectively in support of their membership. An ongoing dilemma for union leadership at pension funds is how to balance the plan's need to maximize wealth for its beneficiaries with leadership's desire to advance the interests of union members past, present, and future. Webber argues eloquently for the possibility of a combined approach, where the fund pursues opportunities that do not actively depress wages or encourage outsourcing while still pursuing profitable investment strategies.¹²⁰ But a fund focused on a particular type of employee—and one that may even allow buy-in from members who are not within bargaining units—may have a stronger argument that it needs to follow the mission of the overall organization. A fund sponsored by the Carpenters Union should be able to say that it will invest its funds in a way that benefits its membership. Examples of programmatic investing include the Union Labor Life Insurance Company, which invests in jobs-related investment funds, and the National Electrical Benefit Fund, which serves as an investment manager for the International Brotherhood of Electrical Workers.¹²¹ Pension funds could join together for pro-worker and pro-shareholder initiatives, while at the same time pursuing investments that would benefit their own particular members. Care would need to be taken to avoid nepotism, kickbacks, or pet political projects.¹²² But there is a wide range of potential investments that avoid these pitfalls while still pursuing the interests of the organization as a whole.

¹¹⁸ An occupational or professional orientation would open up the possibility of non-employee associations for independent contractors. One such example is the Dramatists Guild, which provides model contracts and negotiating advice to dramatists and playwrights. See Matthew T. Bodie, *Lessons from the Dramatists Guild for the Platform Economy*, 2017 U. CHI. LEGAL F. 17, 20-22 (2017). A more recently-created example is the Uber Guild, which provides Uber drivers with driving advice and a forum for the expression of workplace-related concerns. For a discussion of the pros and cons on nontraditional representation strategies such as the Uber Guild, see Jeffrey M. Hirsch & Joseph A. Seiner, *A Modern Union for the Modern Economy*, 86 FORDHAM L. REV. 1727, 1765-82 (2018).

¹¹⁹ ANDRIAS & ROGERS, *supra* note 5, at 26-33; ROLF, *supra* note 28, at 37-44.

¹²⁰ WEBBER, *supra* note 3, at 197-98.

¹²¹ *Id.* at 246-47.

¹²² *Id.* at 195.

C. *Worker Power in Society*

Worker power within corporate governance would change two important dynamics in our current political firmament. First, managers and shareholders would not be free to use corporate funds to assist political parties or candidates who seek to attack worker power and rights. FedEx, for example, has lobbied assiduously to escape labor-oriented regulation.¹²³ If worker representatives were on the FedEx board, those directors could prevent, or at least frustrate, the use of company funds for anti-worker efforts. Second, worker representation would likely cut into the income inequality generated when management and capital control the operation of the business.¹²⁴ Workers would be significantly better positioned to demand higher compensation and object to excessive compensation for executives, shareholders (through buybacks), and outside consultants, investment bankers, and attorneys. Workers' representatives would have the market, moral, and governance authority to actually question why the CEO has a golden parachute, why stock buybacks are not accompanied by wage increases, and why a fancy law firm is getting \$1,000 an hour for its services. The reduction in income inequality would mean that founders, shareholders, and executives have smaller pools of wealth from which to draw. This would leave them with less money for, among other things, political donations. Certainly, other steps to address the huge campaign funding gap—such as additional campaign finance reform or a wealth tax—would have an even stronger effect. But a return to the income distributions of the 1950s would mean that staggering wealth would not be able to play the same role in our politics that it does today.

Within this new political ecosystem, unions would still have a vital role. As suggested above, they would individually represent the interests of their memberships—workers who share a particular occupation or profession. They would be joined, on some matters, by the companies in their industry; for example, a nurses' union could jointly advocate with hospitals to secure more funding for health care, nursing home care, or medical research—funding that helps both employers and employees.¹²⁵ But at other times, when nurses' interests are in conflict with hospitals, they would advocate separately. One can imagine this dynamic playing out against a wide variety of issues: each one will create a new kaleidoscope of different players supporting, opposing, or horse-trading on the issue with other worker and industry groups. But when worker board representatives bring better balance to corporate and capitalist political

¹²³ See Fisch, *supra* note 92, at 1538-47 (highlighting FedEx's attempts to argue its status as "exempt from the NLRA" and its regulation); Frank N. Wilner, *RLA or NLRA? FedEx and UPS Follow the Money Trail*, FED. LAW., Jan. 2010, at 40, 40.

¹²⁴ See Bodie, *supra* note 107, at 88-89.

¹²⁵ ANDY STERN, A COUNTRY THAT WORKS: GETTING AMERICA BACK ON TRACK 72 (2006) (discussing how SEIU Local 1199 worked with its political supporters in the state government to win "billions of dollars of reimbursements for the hospitals, which translated into stable balance sheets for the employers and excellent wages and the gold standard of benefits for hospital workers, including multi-million dollar training and upgrading funds for workers").

spending, unions will be freed from the burden of representing all workers, in all ways and at all times, through their political activity.

CONCLUSION

Our current system of collective bargaining is beset with endemic flaws that make it unrealistic to expect a return to the labor union heydays of the 1950s. Attempting to restore union glory solely through labor-law reforms would be a Sisyphean task. We can only break through if we provide workers with power directly in the governance of their firms. That power is critical to providing unions with the ability to represent a broader swath of workers, build strong and coherent organizations from within, and fill roles in the political ecosystem consistent with their organizational identities. Corporate power for workers is the surest route to protecting labor's interests.