

SUSTAINABLE ALT-LABOR

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INTRODUCTION

Contemporary labor organizing, with all its vibrance, variety, and vigor, seems to be in a virtuous cycle in which organizing success prompts favorable public attention, which in turn contributes to more organizing. More employees struck in 2019 than in any year since 1986.¹ Since 2010, support for unions has climbed from less than half of Americans polled to about three-fifths.² Some economists now believe that unions are “a critical check on the tendency of capital to vacuum up the gains from economic growth.”³

The institutions, movement, and organizing of labor today differ, in some ways quite markedly, from those that existed when the legal regimes governing work were developed. How organizations form and represent workers, how labor organizations relate to employers and consumers, what are desired subjects of labor negotiation, and how minimum standards laws

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1. Scott Horsley, *‘It’s Time To Get Something Back’: Union Workers’ Voices Are Getting Louder*, NPR (Oct. 23, 2019), <https://www.npr.org/2019/10/23/772760183/it-s-time-to-get-something-back-union-workers-voices-are-getting-louder> [https://perma.cc/U8QK-8C4E].

2. Shiva Maniam, *Most Americans See Labor Unions, Corporations, Favorably*, PEW RES. CTR. (Jan. 30, 2017), <https://www.pewresearch.org/fact-tank/2017/01/30/most-americans-see-labor-unions-corporations-favorably/> [https://perma.cc/P6YK-5BBW]; Drew Desilver, *Most Americans View Unions Favorably, Though Few Workers Belong to One*, PEW RES. CTR. (Aug. 30, 2018), <https://www.pewresearch.org/fact-tank/2018/08/30/union-membership-2/> [https://perma.cc/X59C-4NUZ]; *Favorability Ratings of Labor Unions Fall Sharply*, PEW RES. CTR. (Feb. 23, 2010), <https://www.people-press.org/2010/02/23/favorability-ratings-of-labor-unions-fall-sharply/> [https://perma.cc/6BGA-UWDK].

3. Noam Scheiber, *Candidates Grow Bolder on Labor, and Not Just Bernie Sanders*, N.Y. TIMES (Oct. 11, 2019), <https://www.nytimes.com/2019/10/11/business/economy/democratic-candidates-labor-unions.html> [https://perma.cc/XX2G-432R] (citing Henry Farber et al., *Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data* (Princeton Univ. Working Paper No. 620, 2018), <http://arks.princeton.edu/ark:/88435/dsp01gx41mm54w>). Among the prominent economists focused on the reasons for and the hazards of rising economic inequality, one might list Joseph Stiglitz, Thomas Piketty, and many others.

intersect with collective agreements are evolving as the nature of work evolves. Even where the organizational forms and tactics look similar—such as recent strikes by unionized teachers in Chicago, Los Angeles, and Oakland, auto workers at GM, or telecom workers at Verizon—many of the goals are radically different. Teachers, for example, have struck for the common good—an end to the disinvestment in public education—not just, or not even, a pay raise.⁴ Beyond the blue states with strong teachers’ unions, many of the strikes were led by groups formed on Facebook, not by union leaders.⁵ Worker centers nationwide are organizing millions of low-wage immigrant workers to demand compliance with minimum wage laws even where a union and collective bargaining are far beyond what the workers could imagine. And a host of organizations, working with and sometimes without unions, have supported the Google walkout, organizing

4. See, e.g., Holly Yan, *Oregon Teachers Are Walking Out, Forcing 600 Schools to Close. But They’re Not Demanding Raises*, CNN (May 8, 2019), <https://www.cnn.com/2019/05/08/us/oregon-teachers-walkout/> [<https://perma.cc/U8A9-VTVJ>]. In the negotiations that led up to the Los Angeles teachers’ strike of 2018, the United Teachers of Los Angeles made a package of proposals that the teachers labeled “Supporting our Students and Empowering our Community.” One was that the Los Angeles Unified School District (“LAUSD”) work toward creating 20 “community schools” in high-need areas. A second was that the district develop a plan to expand access to early education. A third proposal asked the district to remove unused bungalows on campuses to make room for more green space for student athletic activities. A fourth would require an “education impact report” and a “community impact report” as part of the authorization process for a new charter school or a new public school. A fifth asked the district to provide on campus support for homeless students, including counseling and contacts with nonprofit organizations on housing assistance. A sixth sought to require the district to collaborate with labor to develop a plan for certificated employees to support classified employees who are accessing the Training Fund to become teachers. A seventh sought support for immigrant students’ families by training district personnel on the protocols for district interactions with the U.S. Department of Immigration & Customs Enforcement, by creating a \$1,000,000 fund to support families of LAUSD students facing deportation of a student or family member, and developing a plan to locate immigrant support clinics that could provide on-site support at LAUSD schools. An eighth proposal was to cease subjecting students to “random” metal detector and locker searches, to provide fare-free ridership on all MTA buses and all trains for all LAUSD students, to support efforts to end the MTA’s disproportionate number of citations, fines, and “stop & frisks” for those under the age of twenty-one, and to offer support services for students who need help addressing legal issues arising from these situations relating to the MTA. The ninth, and perhaps most ambitious, proposal asked the district to approve a resolution in support of and to formally advocate that Los Angeles schools be funded at \$20,000 per pupil by the year 2020.

LAUSD filed an unfair practice charge against the Union that UTLA insisted to impasse on the Community Proposals and that they were outside the scope of bargaining. *Unfair Practice Charge, Los Angeles Unified School District v. United Teachers Los Angeles*, PERB Case No. LA-CO-1760-E (Aug. 28, 2018). The California PERB issued a complaint on the LAUSD charge, but the questions whether the LAUSD’s failure to inform UTLA whether it was willing to discuss the proposals, or whether some or all were outside the scope of the duty to bargain over mandatory subjects, were among the many legal issues left unresolved in the wake of the strike settlement.

5. See Michael M. Oswald, *Alt-Bargaining*, 82 L. & CONTEMP. PROBS. 89 (2019). In California, the teachers’ union is pushing a ballot measure, which they call the “Schools and Communities First” initiative, that would close commercial property tax loopholes in order to increase revenues for schools. Julian Peoples, *CTA Kicks Off Campaign to Put Schools and Communities First*, CALIFORNIA EDUCATOR (Oct. 27, 2019), <https://californiaeducator.org/2019/10/27/cta-kicks-off-campaign-to-put-schools-and-communities-first/> [<https://perma.cc/7KVS-XBHT>].

of gig workers, a \$15 minimum wage, labor rights for domestic and home care workers, an end to misclassification as contractors, and an end to the tipped employees' subminimum wage so as to end sexual harassment for restaurant workers.⁶

These new forms and activities of labor organization and protest, and new forms of labor market intervention and intermediation are the Alt-Labor phenomenon.⁷ To build enduring worker power from the activism and organizations of Alt-Labor requires thinking about how law could help create institutional leverage for worker groups.⁸ Institutional leverage will make Alt-Labor gains sustainable. But history teaches that capitalists are patient and indefatigable whenever they think they can make more money if labor is cheaper. For example, the gains of the New Deal have been all but lost in the deregulation and union-busting since 1970.⁹ If today's organizing produces a new wave of labor power in blue states or nationally, those gains will be vulnerable to a pro-business counter-revolution.¹⁰

6. See generally SARU JAYARAMAN, *FORKED: A NEW STANDARD FOR AMERICAN DINING* (2016); DAVID ROLF, *THE FIGHT FOR FIFTEEN: THE RIGHT WAGE FOR A WORKING AMERICA* (2016); see generally Sameer M. Ashar & Catherine L. Fisk, *Democratic Norms and Governance Experimentalism in Worker Centers*, 82 L. & CONTEMP. PROBS. 141 (2019) (collecting citations to the literature on new forms of labor organizing, activism, and representation, especially in low-wage, immigrant, female-dominated work).

7. The literature on this is large and growing. See, e.g., M. Anne Visser et al., *From Economic Integration to Socioeconomic Inclusion: Day Labor Worker Centers as Social Intermediaries*, 38 URBAN GEOGRAPHY 243, 247 (2017); CHRIS ZEPEDA-MILLÁN, *LATINO MASS MOBILIZATION: IMMIGRATION, RACIALIZATION, AND ACTIVISM* (2017); Janice Fine, *Community Unions and the Revival of the American Labor Movement*, 33 POL. & SOC'Y 153 (2005); JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* (2006); SHANNON GLEESON, *CONFLICTING COMMITMENTS: THE POLITICS OF ENFORCING IMMIGRANT WORKER RIGHTS IN SAN JOSE AND HOUSTON* (2012); JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005); SANDRA LAZO DE LA VEGA & TIMOTHY J. STEIGENGA, *AGAINST THE TIDE: IMMIGRANTS, DAY LABORERS, AND COMMUNITY IN JUPITER, FLORIDA* (2013); RUTH MILKMAN ET AL., *WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY* (2010); RUTH MILKMAN & ED OTT, *NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT* (2014).

8. See Michael M. Oswalt & César F. Rosado Marzán, *Organizing the State: The "New Labor Law" Seen from the Bottom-Up*, 39 BERKELEY J. EMP. & LAB. L. 415 (2018) (asserting, based on ethnographic study of new forms of labor protection, there is need for more law urging or mandating collaboration between worker organizations, employers, and government agencies).

9. See Nelson Lichtenstein, *From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era*, in *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980* (Steve Fraser & Gary Gerstle, eds., 1989); JEFFERSON COWIE, *THE GREAT EXCEPTION: THE NEW DEAL AND THE LIMITS OF AMERICAN POLITICS* (2016); STEVEN GREENHOUSE, *BEATEN DOWN, WORKED UP: THE PAST, PRESENT, AND FUTURE OF AMERICAN LABOR* (2019).

10. On the fragility of social change that is achieved only through networked activism rather than through institutional change, see ZEYNEP TUFEKCI, *TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST* (2017) (analyzing how the internet and social media enabled protest movements to gain significant power around the globe, including in the Arab Spring uprisings of 2011 and elsewhere, but explaining why many such protests failed to achieve lasting change).

Some Alt-Labor formations use mobilization for legal change as a basis for forming sustainable sectoral organizations. Grassroots campaigns to push for new legislation, and to push for compliance with existing legislation, engage workers at a local level on sector-wide issues. As Kate Andrias has shown, it is a first step toward sectoral bargaining.¹¹ And there will always be the next campaign to improve labor standards through state and local legislation. But the key to long-term sustainability is to understand how organizations sustain engagement or otherwise exert power after the push for a particular piece of policy change has passed.

Looking at successful state campaigns to enact new labor laws—protections for informal workers (day laborers and domestic workers), improved minimum standards in food service, and litigation and legislative strategies to eliminate misclassification of workers as independent contractors—this essay considers how the campaigns that have mobilized workers have sought to institutionalize the gains of movement activism. The essay then draws on the experience of the United Farm Workers under the California Agricultural Labor Relations Act, which won a major legislative reform but failed (to this point) to build a sustainable union, and teachers' unions which have recently revolutionized public employee bargaining and activism, to raise questions about how the new generation of worker formations are addressing the sustainability challenge that all social movements face.

A successful labor organization is one that has a mechanism to transform the mobilized energy of a social movement into sustainable worker power. Unions have kept members mobilized to secure collective bargaining agreements and, in the interim, have offered the benefits of the contract. Collective bargaining agreements translate the power that is gained through activism into enduring improvements in working conditions, relying on institutional power as a partial antidote to activism fatigue. As Michael Oswald has shown, Alt-Labor has transformed collective bargaining in many ways.¹² But worker centers and nonprofits need more ways in which gains in worker power secured through the new wave of organizing and activism can be institutionalized and sustainable without constant social movement activism.

As described in Part III, two state or local legal changes would facilitate sustainability and could operate as a form of proto-sectoral bargaining. One is co-enforcement, which gives alt-labor formations an institutional

11. Kate Andrias, *The New Labor Law*, 126 *YALE L.J.* 2, 8 (2016).

12. Oswald, *supra* note 5, at 96.

role in enforcing labor standards laws. A second is the expansion of hiring halls, perhaps even a requirement that any job-matching service involves worker formations in its operation. They are, in a sense, proto-sectoral bargaining that will enable worker formations to keep members engaged and build a sustainable organization to combat the activism fatigue that can weaken social movements over the long term.

I. THE SECTORAL AND CAMPAIGN MODELS OF WORKER ORGANIZING

The dominant mode of alt-labor action has been organizing, and in particular the campaign around creating new law or enforcing existing law. Yet the social movement literature cautions advocates of progressive law reform to beware the backlash that often follows the in-the-streets and in-the-courts phase of social movement organizing.¹³ The dangers of backlash and exhaustion are compounded in the area of labor standards because repressive immigration law, the multidimensional nature of socioeconomic inequality, and the fissuring and informalization of work generate social exclusion and demand more labor market intermediation.¹⁴ Alt-labor formations have in many cases effectively combatted social exclusion through activism. But a regulatory regime should not depend on constant activism and should instead create structures that normalize compliance.

Legal reforms can both create sustainability and facilitate social and economic inclusion by giving worker organizations a formal role to play in regulating, not just an informal role in labor market regulation.

As immigration law has become ever harsher and economic restructuring and deregulation have rendered immigrant and low-wage workers ever more marginalized, worker organizations and other community formations have scored some notable successes in demarginalizing vulnerable workers. They also play a role in improving the skills of the workforce and regularizing the labor market in ways that benefit employers and consumers. In this section, I explore how worker organizations in three sectors—“informal” work (day labor and domestic work), food service, and the app-based gig economy—have forged their role. Yet, their role remains focused on activism and campaigns, and the long-term viability and power of these organizations may depend on their development into sustainable labor mar-

13. For a recent discussion of the backlash thesis and a response to it in the case of same-sex marriage litigation, see Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 *UCLA L. REV.* 1728 (2017).

14. Social exclusion is “the marginalization of individuals and groups from ‘mainstream’ social, economic, and political . . . structures.” Visser et al., *supra* note 7, at 243.

ket and social institutions for the benefit of workers, employers, and the public.

A. “Informal” Work

The emergence of local, regional, and nationwide organizations of domestic workers and day laborers that exercise real power is, scholars have said, “unexpected.”¹⁵ The work has been regarded as informal, at most, and even as not work at all. It is decentralized and isolated in private residences, invisible to the public, poorly paid, and dominated by immigrant people of color who often have no legal status in the United States. That these organizations have succeeded in enacting minimum labor standards laws and in fending off legal attacks on their members is astonishing.

A threshold challenge in domestic worker organizing was convincing policymakers that domestic work is labor, not “help,” and that as labor it is worthy of legal protection. Although domestic worker organizations formed before the 1960s both as worker-led unions and as elite or middle-class feminist-led nonprofit associations,¹⁶ the last decade or more of organizing has been an immigrant female worker-led campaign spearheaded by the sixty-plus local organizations that have affiliated to become the National Domestic Worker Alliance (NDWA). NDWA, through its affiliates in more than thirty cities, has secured the enactment of domestic worker bills of rights in ten jurisdictions, and is developing online platforms to facilitate the hiring of in-home care and cleaning workers and to provide portable benefits for workers.¹⁷

Contemporary domestic worker organizations came out of the local immigrant community organizations.¹⁸ The campaign’s law reform goal

15. Hugo Sarmiento et al., *The Unexpected Power of Informal Workers in the Public Square: A Comparison of Mexican and US Organizing Models*, 89 INT’L LAB. & WORKING-CLASS HIST. 131, 132 (2016) (explaining why, “[d]espite their apparent vulnerability,” Mexican street vendors and U.S. day laborers “have built perhaps the most powerful informal worker organizations in their countries.”).

16. Chris Tilly, Georgina Rojas-García & Nik Theodore, *Intersectional Histories, Overdetermined Fortunes: Understanding Mexican and US Domestic Worker Movements*, in GENDERING STRUGGLES AGAINST INFORMAL AND PRECARIOUS WORK, POLITICAL POWER AND SOCIAL THEORY 121 (Rina Agarwala & Jennifer Jihye Chun eds., vol. 3 2019); see also Eileen Boris & P. Nadasen, *Domestic Workers Organize!*, 11 WORKINGUSA: J. LAB. & SOC’Y 413 (2008).

17. See NATIONAL DOMESTIC WORKERS ALLIANCE, <http://domesticworkers.org> [https://perma.cc/PS7F-2848] (last visited Jan. 7, 2020) (describing the goals and successes of the NDWA); NDWA LABS, <http://ndwalabs.org> [https://perma.cc/RAM3-GK6A] (last visited Jan. 7, 2020) (developing new approaches to improving labor standards in domestic work); MY ALIA, <http://myalia.org> [https://perma.cc/4WPL-WUH7] (last visited Jan. 7, 2020) (online platform to provide portable benefits).

18. Hina Shah, *Notes from the Field: The Role of the Lawyer in Grassroots Policy Advocacy*, 21 CLIN. L. REV. 393, 403 (2019); Ashar & Fisk, *supra* note 6.

has been to secure enactment of federal or state domestic worker bills of rights and to get administrative action interpreting existing wage and hour laws to cover domestic workers.¹⁹ More important than law reform, however, has been its goal of empowering domestic workers.²⁰ Both the social agenda and the legal agenda have involved building worker-led organizations, but the goal has not been collective bargaining that federal labor law envisions as the goal of worker organizing. The major recent legislative wins have been the enactment of bills of rights in New York, Hawaii, and California, and an Obama Administration Department of Labor determination that extended minimum wage protections to home care workers.²¹ And yet some criticize the process and results of these legislative campaigns, arguing that the legislation still excludes too many workers, “does little to change the actual conditions of domestic workers, while at the same time lending credibility to the legislative and legal regime.”²²

Day labor organizations take a variety of forms. Scholars have distinguished between worker centers that educate and organize day laborers (among many other workers) in legislative, judicial, and policy advocacy, and day labor centers which serve primarily to match day laborers with employers.²³ Organizations of domestic workers and day laborers have three different levels: the very local (perhaps even neighborhood), the city or regional, and the national, which is typically a federation of local organizations.²⁴ They affiliate with other organizations, including unions and NGOs. They operate as labor intermediaries that regularize and make jobs transparent to both job-seekers and employers, and offer work-related training and other services to upgrade the skills of the workforce. They act like unions in seeking to raise wages and improve safety and other working conditions by organizing and advocating (although not typically by bargaining directly with employers in a formalized way), and by conducting public protests when necessary. And they act like community organizations in engaging and educating workers over a range of political and social issues, including politics, immigration, and leadership development.²⁵

19. See generally NATIONAL DOMESTIC WORKERS ALLIANCE, *supra* note 17.

20. Ashar & Fisk, *supra* note 6, at 167.

21. Shah, *supra* note 18, at 394.

22. Terri Nilliasca, *Some Women's Work: Domestic Work, Class, Race, Heteropatriarchy, and the Limits of Legal Reform*, 16 MICH. J. RACE & L. 377, 409 (2011).

23. See, e.g., Nik Theodore, *Rebuilding the House of Labor: Unions and Worker Centers in the Residential Construction Industry*, 18 WORKINGUSA: J. LAB. & SOC'Y 59 (2015).

24. Sarmiento et al., *supra* note 15, at 141.

25. *Id.* at 142.

B. Food Service

Organizing focused on low-wage work has concentrated on food service, as it is an area of extremely low wages (in many states, the hourly minimum wage is the federal subminimum wage of \$2.13 for tipped employees), rampant noncompliance with minimum labor standards, and sexual harassment.²⁶ Organizing in food service has taken many forms over the last decade; most illustrate core aspects of the Alt-Labor models.

The organizing is multifaceted, multi-institutional, and sectoral. And, importantly for purposes of considering sustainability, it aims to link policy or legislative campaigns to the formation of organizations that will last beyond a legislative win. ROC United's strategy is illustrative. Its approach is "rooted in people" and works by engaging restaurant workers, high road employers, and consumers in campaigns and organizations simultaneously.²⁷ ROC engages workers through job training and placement (it has restaurants and a job training program) and through civic engagement and leadership development by involving workers in its One Fair Wage campaigns in various states to eliminate the subminimum wage for tipped employees. It engages employers through its employer association, RAISE, which provides training, technical assistance, and a peer network. And it engages consumers through Diners United, a "conscious consumer association."²⁸

Other organizations too are organizing or have organized in food service. The Fight for 15 campaign scored huge successes in raising the minimum wage in many states to \$15 per hour and in challenging legal structures that allow franchisors to disclaim any liability for labor violations in restaurants operated by franchisees.²⁹

The Culinary Workers Union Local 226 in Las Vegas has achieved a level of sustainability that has yet to be achieved by worker formations elsewhere in food service in the contemporary moment.³⁰ Part of its success

26. See JAYARAMAN, *supra* note 6; Andrew Elmore, *Franchise Regulation for the Fissured Economy*, 88 GEO. WASH. L. REV. 101 (2018).

27. *Our Work*, RESTAURANT OPPORTUNITIES CTRS. UNITED, <https://rocunited.org/mission/> [<https://perma.cc/M5VH-2L5Z>] (last visited Mar. 24, 2020).

28. *Id.*

29. This is not to overlook the significant organizing that has occurred in food production and distribution. And, indeed, the Coalition of Immokalee Workers' Fair Food Program, which is based on supply chain contracts that ensure that a tiny price increase paid by consumers is passed down through the many levels of contracts to result in higher pay for Florida farmworkers who tend and harvest tomatoes, has achieved remarkable durability in the production and distribution, but it has not yet grown to encompass the food supply chain generally. FAIR FOOD PROGRAM, <http://www.fairfoodprogram.org>.

30. See Dorothy Benz, *Labor's Ace in the Hole: Casino Organizing in Las Vegas*, 26 NEW POL. SCI. 525, 526 (2004) (stating that, at the time of the study, union density in Las Vegas was 65% and

and sustainability comes from its provision of benefits on a sectoral basis, but its real power comes from organizing and representing workers at each and all of the major enterprises in the Las Vegas hospitality and gaming industry.³¹

C. Misclassification

A third type of campaign has been to end misclassification of workers as independent contractors. The campaign in California got a kickstart in May 2018 when the California Supreme Court decided, unanimously, that a logistics company called *Dynamex* was the employer of its drivers.³² The Court's adoption of the employee-protective ABC test in place of the more easily evaded multi-factor test under California wage and hour law did not immediately change working conditions for the tens of thousands of Uber, Lyft, or Door Dash drivers, Amazon delivery people, or other misclassified workers, as companies seemed to ignore it.³³ Thus, *Dynamex* looked like the litigation that resulted in *Brown v. Board of Education*. But the story did not stop there. Building on that litigation victory, organized labor groups in California, with nationwide support, supported legislation (Assembly Bill 5) to extend the *Dynamex* ABC rule to all provisions of the California labor code.³⁴

Neither *Dynamex* nor AB 5 has yet to have any major effect on the working conditions of app-based ride hailing drivers, as Uber's general counsel publicly announced the company has no intention of complying with the law when it went into effect on January 1, 2020.³⁵ It appears that

90% on the Strip at a time when private sector union density nationwide was about 8%); Courtney Alexander, *Rise to Power: The Recent History of the Culinary Union in Las Vegas*, in *THE GRIT BENEATH THE GLITTER: TALES FROM THE REAL LAS VEGAS* 145–46 (Hal K. Rothman & Mike Davis eds., 2002) (describing the success of the Culinary Workers Local 226).

31. See Matthew Ginsburg, *Nothing New Under the Sun: "The New Labor Law" Must Still Grapple with the Traditional Challenges of Firm-Based Organizing and Building Self-Sustainable Worker Organizations*, 126 *YALE L.J. F.* 488, 490 (2017) (arguing that "[t]here is simply no way to rebuild the labor movement at scale without facing [the] challenge" of organizing workers at each enterprise where they work).

32. *Dynamex Operations West v. Superior Court*, 4 Cal. 5th 903, 966–67 (2018).

33. Levi Sumagaysay, *Uber Defiant as Gig Workers on Verge of Becoming Employees Under AB 5*, *SAN JOSE MERCURY NEWS* (Sept. 11, 2019), <https://www.mercurynews.com/author/levi-sumagaysay/> [<https://perma.cc/U7EU-3ZWN>].

34. CAL. LAB. CODE § 2750.3 (WEST 2019); *AB-5 Worker status: employees and independent contractors*, CAL. LEGIS. INFO. (Sept. 19, 2019, 4:00 AM), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5 [<https://perma.cc/E6KS-3TNW>].

35. See *supra* note 34; Shirin Ghaffary, *Uber and Lyft Say They Don't Plan to Reclassify Their Drivers and Employees*, *VOX* (Sept. 11, 2019, 6:50 PM), <https://www.vox.com/2019/9/11/20861599/ab-5-uber-lyft-drivers-contractors-reclassify-employees> [<https://perma.cc/LQL4-FWAX>].

neither Uber nor any of the other app-based service companies (Lyft, Task Rabbit, DoorDash, etc.) have altered their labor practices, even though California law has required them to pay the minimum wage since May 2018, when the state supreme court handed down *Dynamex*.

When the California governor signed AB 5 into law in September 2019, worker organizing entered a new part of the path to end misclassification because they secured a broad and decisive legal victory. But the legal fight is not over. Uber, Lyft, and Door Dash announced they are funding an effort to repeal AB 5 and overturn *Dynamex* by ballot initiative, and various industry groups sued to invalidate it.³⁶

The legal fight may be long, perhaps endless.³⁷ Meanwhile, the struggle is to translate a legal win into a changed reality on the ground. That raises a question of institutionalization—how does a legal reform become institutionalized in such a way that it changes the law in action as well as the law on the books? It also raises a question of sustainability—if the history of the New Deal is that capitalists will seek to erode labor gains as soon as they are written into law and that eternal vigilance on labor’s part is the price of equality (to paraphrase), unions have the most to contribute to the question of sustainability of an equitable political economy.

II. DECLINE AND REVIVAL AFTER THE LEGISLATIVE WIN

The heady days after the legislative wins of domestic worker bills of rights, local minimum wage increases, and AB 5 have prompted some who have been around the world of labor to recall the story of the California Agricultural Labor Relations Act and the tragic story of the United Farm Workers (UFW). How can labor ensure that the activism that produces these legislative successes will translate into sustainable and scalable improvements in working conditions and gains in worker power?

Alt-Labor organizations today, like the UFW, are fundamentally sectoral, not enterprise-based. They focus on enacting and enforcing minimum standards legislation in low wage sectors, not enterprises (the grape fields and strawberry fields, restaurant, domestic work, day labor, app-based gig

36. Kate Conger, *Uber, Lyft, and DoorDash Pledge \$90 Million to Fight Driver Legislation in California*, N.Y. TIMES, (Aug. 28, 2019), <https://www.nytimes.com/2019/08/29/technology/uber-lyft-ballot-initiative.html> [https://perma.cc/Z35B-SD97]; Scott Rodd, *Uber, Lyft, Postmates Refuse to Comply with California Gig Economy Law*, NPR (Jan. 4, 2020, 6:01 AM), <https://www.npr.org/2020/01/04/793142903/as-california-tries-to-make-contract-workers-employees-industries-push-back> [https://perma.cc/8WH5-5CDJ].

37. Janet Burns, *Will Uber and Lyft Ever Stop Fighting Laws, Or Their Workers?*, FORBES (Nov. 8, 2019, 11:22 PM), <https://www.forbes.com/sites/janetwburns/2019/11/08/will-platforms-like-uber-and-lyft-ever-stop-fighting-the-law-or-their-workers/#7be4e4407bd7> [https://perma.cc/RYP6-X5B2].

work, etc.). They rely on mobilizing workers in campaigns to publicize, stop, and remedy labor standards violations in sectors, and on campaigns to seek legislative or other legal change. Their goal is to use these proto-sectoral forms of representation and law to end social exclusion. This is quite different from the nature of organizations envisioned by federal labor law.

The problem is what happens after the campaign ends. Enduring worker power requires some form of institutionalization. Unions used to achieve that through enterprise-based collective bargaining and, occasionally, sectoral multi-employer bargaining or established pattern bargaining relationships. But in the more flexible and fissured labor market of today and the future, it is necessary to develop other structures.

Consider what happened to a labor movement success (the United Farm Workers) that failed to achieve institutional sustainability as a labor organization and a labor organization that gained and expanded power through movement activism (teachers' unions). Both of these are long and complicated stories that I sketch only briefly. And it is fair to say that significant controversy swirls around both the decline of the UFW and the evolution and strategy of teachers' unions. The point of these sketches is to gesture toward the interdependence of movement activism and institutional power in sustaining labor power in the modern economy.

After nearly twenty years of intense and creative organizing, the UFW secured the enactment of the California Agricultural Labor Relations Act (ALRA),³⁸ which protects farmworkers' right to unionize, and they used the power of the law to win recognition and contracts from some of the major growers across the state.³⁹ But both before and after the ALRA went into effect in 1975, the UFW won elections and negotiated contracts for farmworkers up and down the state.⁴⁰

But the power and the contracts did not last. For good or bad reasons, in the late 1970s and through the 1980s, the UFW focused more on personal transformation of its staff and on building Latinx political power and less on organizing farmworkers for collective bargaining or direct improvement working conditions.⁴¹ A decade before Cesar Chavez died in 1993, the

38. CAL. LAB. CODE § 1140 (WEST 1995)

39. See generally MIRIAM PAWEL, *THE CRUSADES OF CESAR CHAVEZ* (2014); MIRIAM PAWEL, *THE UNION OF THEIR DREAMS: POWER, HOPE, AND STRUGGLE IN CESAR CHAVEZ'S FARM WORKER MOVEMENT* (2009) [hereinafter PAWEL, *THE UNION OF THEIR DREAMS*]; FRANK BARDACKE, *TRAMPLING OUT THE VINTAGE: CESAR CHAVEZ AND THE TWO SOULS OF THE UNITED FARM WORKERS* (2011).

40. PAWEL, *THE UNION OF THEIR DREAMS*, *supra* note 39, at 206.

41. *Id.* at 317.

union had few members and even fewer contracts imposing minimum labor standards and wages, and working conditions were as bad as ever. Although the ALRA remains on the books and the California Agricultural Labor Relations Board still exists, it is an empty shell.⁴² Although the UFW claims just over 10,000 members, its strategies focus more on legislation to protect workers than on collective bargaining.⁴³ While the story of how the UFW collapsed in the late 1970s and 1980s has been told and many causes contributed, one factor all can agree upon is the failure to transform effectively from a social justice campaign to a union, and a failure to continue the work of being a movement that engages workers in self-governance. It remains unclear why it has yet to achieve a revival.

The moral of the UFW story is that enacting protective labor law and creating an accessible enforcement framework to protect unions as collective bargaining entities are not by themselves enough to protect labor. A certain amount of movement activism is necessary to prevent the power of capitalists from crushing labor, and a certain amount of institutional leverage is necessary to provide the economic, political, social, and psychological resources to sustain the movement.⁴⁴

In contrast, the upsurge of activism of teachers since the Chicago teachers' strike of 2012, and especially the Red for Ed movements that sprang into the news in April 2018, show that the revival of movement activism can be greatly facilitated by the institutional power and resources of labor unions, even where there is no legal right to bargain and, therefore, a relatively weak union.⁴⁵ As Michael Oswalt and others have observed, recent teachers' strikes, and the dramatic change in the goals and tactics of teachers—bargaining for the common good, focusing on taxation and disinvestment in education—are classic examples of Alt-Labor goals and tactics. Whether the union is leading from the front, as in Chicago, Minnesota, and California, or from behind, as in West Virginia and red states in spring 2018, the resources of a union helps with publicity, media relations, and organizing.⁴⁶ And bargaining relationships help protect against a quick

42. In 2019, the ALRB issued eight decisions. In the first four months of 2020, it issued one. In contrast, in 1975 (its first year of operation), it issued 27 decisions and in 1976 it issued 63. See *Case Decision Index*, AGRIC. LAB. REL. BOARD, <https://www.alrb.ca.gov/legal-searches/decision-index/> [<https://perma.cc/3RWA-ENSP>] for an annual index of ALRB decisions.

43. See, e.g., *Campaign News*, UNITED FARM WORKERS, <https://ufw.org/campaign-news/> [<https://perma.cc/W82K-Y9B3>] (last visited Dec. 6, 2019) (reporting legislative campaigns and no bargaining campaigns).

44. See generally MARSHALL GANZ, *WHY DAVID SOMETIMES WINS* (2009).

45. Michael M. Oswalt, *Alt-Bargaining*, 82 L. & CONTEMP. PROBS. 89 (2019).

46. *Id.*

rollback of the strike's gains once the TV cameras and social media fueled awareness fades.⁴⁷

III. SUSTAINABLE ORGANIZATIONS AND PROTO-SECTORAL BARGAINING

Scholars and activists have explored a variety of legal frameworks and organizational forms that will enable effective regulation and sustainable worker empowerment.⁴⁸ I discuss two reforms that can be implemented at a very local level, at a state level, or through federal legislation—co-enforcement and hiring halls.

A. Co-Enforcement

State and local labor standards agencies in California have been experimenting with collaborations with worker centers and other community groups as part of their enforcement efforts. The goal of these co-enforcement programs is to improve compliance and enforcement by training workers and community groups in the law and using their networks and cultural and linguistic competence, along with their years of base-building and member organizing, to improve outreach to marginalized workers and increase worker awareness of their legal rights. Likewise, co-enforcement increases the effectiveness of enforcement officials by educating them about the problems faced by low-wage workers and the myriad ways in which employers avoid compliance. Co-enforcement also supports organizing and builds sustainable organizations by providing a formal role for worker and community groups in administering the law. Co-enforcement initiatives in the San Francisco Office of Labor Standards Enforcement (OLSE) and the California Division of Labor Standards Enforcement (DLSE) have not only improved compliance and enforcement and enhanced the professional development, sophistication, and commitment of enforcement officials, they have modestly strengthened the finances of community groups, enhanced their legitimacy, and given low-wage work-

47. See Dana Goldstein, *West Virginia Teachers Walk Out (Again) and Score a Win in Hours*, N.Y. TIMES (Feb. 19, 2019), <https://www.nytimes.com/2019/02/19/us/teachers-strikes.html> [<https://perma.cc/VAT9-38JG>] (teachers struck twice in a year to block legislation that would reduce public school funding).

48. Among them are sectoral bargaining, the Ghent system, wage boards, and tripartism. See NO ONE SIZE FITS ALL: WORKER ORGANIZATION, POLICY AND MOVEMENT FOR A NEW ECONOMIC AGE (Janice Fine et al. eds., LERA Research Volume series, 2018); Kati Griffith & Leslie Gates, *Worker Centers: Labor Law as Carrot, Not a Stick*, 14 HARV. L. & POL'Y REV. (forthcoming 2019); Kate Andrias & Benjamin Sachs (forthcoming 2019); Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 N.C. L. REV. 319 (2012).

ers most vulnerable to wage theft and other substandard working conditions a role in governance.⁴⁹

There has long been a consensus in the literature that involvement of a worker group (usually a union) improves labor law compliance and enforcement.⁵⁰ Formal involvement of a worker representative in enforcement also creates an institutional role for a labor organization by legitimizing the organization in the eyes of workers, which is especially important either when employer opposition to the organization is vociferous and intense or when worker ignorance of the benefits of organizational affiliation makes it difficult to recruit committed and dues-paying members. In a seminal article, Janice Fine and Jennifer Gordon proposed augmenting labor standards enforcement agencies by giving groups like unions and worker centers a formal, ongoing role in enforcement.⁵¹ Since then, the growing literature on co-enforcement has documented its effect in improving compliance and enforcement, especially in economic sectors with substantial immigrant populations where labor standards violations are endemic and difficult to eradicate.⁵²

California has significant experience with co-enforcement at both the state and local level.⁵³ In San Francisco, which has laws requiring a higher minimum wage, paid sick days, employer-provided health care, secure scheduling for retail workers, paid parental leave, pay equity, lactation accommodation, and more, the city Office of Labor Standards Enforcement

49. See Ken Jacobs & Michael Reich, "When Do Mandates Work?," in *WHEN MANDATES WORK: RAISING LABOR STANDARDS AT THE LOCAL LEVEL* 35 (Michael Reich, Ken Jacobs & Miranda Dietz eds., 2014).

50. See generally DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014); Lawrence Mishel & Matthew Walters, *How Unions Help All Workers*, ECON. POL. INST. 13 (2003), <http://www.epi.org/files/page/-/old/briefingpapers/143/bp143.pdf> [<https://perma.cc/42GA-BZEC>]; Alison D. Morantz, *What Unions Do for Regulation*, 13 ANN. REV. L. & SOC. SCI. 515, 520 (2017).

51. See generally Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552 (2010).

52. See, e.g., Janice Fine, *Enforcing Labor Standards in Partnership with Civil Society: Can Co-enforcement Succeed Where the State Alone Has Failed?* 45 POL. & SOC'Y 359, 359 (2017); Janice Fine & Gregory Lyon, *Segmentation and the Role of Labor Standards Enforcement in Immigration Reform*, 5 J. ON MIGRATION & HUM. SEC. 431, 431 (2017); Matthew Amengual & Janice Fine, *Co-Enforcing Labor Standards: The Unique Contributions of State and Worker Organizations in Argentina and the United States*, 11 REG. & GOVERNANCE 129, 129 (2017); DAVID MADLAND, *THE FUTURE OF WORKER VOICE AND POWER*, CTR. FOR AM. PROGRESS (2016); DAVID MADLAND & ALEX ROWELL, *HOW STATE AND LOCAL GOVERNMENTS CAN STRENGTHEN WORKER POWER AND RAISE WAGES*, CTR. FOR AM. PROGRESS (2017); NAT'L EMP'T L. PROJECT, *WINNING WAGE JUSTICE: AN ADVOCATE'S GUIDE TO STATE AND CITY POLICIES TO FIGHT WAGE THEFT* (Jan. 2011).

53. Tia Koonse et al., *Enforcing City Minimum Wage Laws in California: Best Practices and City-State Partnerships*, UCLA CTR. LAB. RES. & EDUC., U.C. BERKELEY CTR. LAB. RES. & EDUC. (Oct. 23, 2015), <http://laborcenter.berkeley.edu/pdf/2015/minimum-wage-enforcement.pdf>.

(OLSE) has partnered with a number of community organizations in enforcing the municipal labor standards laws.

Co-enforcement in San Francisco originated in its minimum wage ordinance, as amended in 2006, which requires that OLSE “establish a community-based outreach program to conduct education and outreach to [San Francisco] employees.”⁵⁴ As the program evolved over time, OLSE sought partnerships with groups that could provide “education and outreach to workers in immigrant communities with limited English proficiency . . . in as many of the languages spoken by employees in San Francisco as possible.”⁵⁵ One goal, OLSE explained, was “creating conditions in which these workers are more likely to report labor law violations.”⁵⁶ OLSE structured co-enforcement in a series of multi-year contracts to provide sustained investment in community organizations that sought to build worker power.⁵⁷

The Chinese Progressive Association (CPA), which had a long experience organizing in San Francisco’s low-wage and immigrant communities, became the prime contractor with the city on the co-enforcement initiative.⁵⁸ CPA had prevailed in several discrete high-profile wage theft recovery cases,⁵⁹ but wage theft remained rampant.⁶⁰ To reach beyond CPA’s own cultural, linguistic, and sectoral network, CPA subcontracted with seven other community partners in the monolingual Spanish-speaking community, the Filipino community, a number of Asian communities, a multi-racial and bilingual membership organization of young and immigrant workers, and a local chapter of the National Day Laborers Organizing Network (NDLON).⁶¹ Quarterly meetings of OLSE and community partner

54. S.F. Admin. Code § 12R.25.

55. Seema N. Patel & Catherine L. Fisk, *California Co-Enforcement Initiatives that Facilitate Worker Organizing*, HARV. L. & POL’Y REV. 7 (2018), <https://harvardlpr.com/wp-content/uploads/sites/20/2017/11/Patel-Fisk-CoEnforcement.pdf> [<https://perma.cc/G2EM-PAL9>] (citation omitted).

56. *Id.* at 7–8 (emphasis in original).

57. *Id.* at 13.

58. *Mission and History*, Chinese Progressive ASS’N., <http://www.cpasf.org/mission> [<https://perma.cc/37FR-PDGM>] (last visited Nov. 15, 2019).

59. CPA won \$525,000 in back pay and penalties for workers at Dick Lee Pastry. News Release, City Attorney of San Francisco, Wage theft lawsuit seeks to recover \$440K in back pay, interest for cheated workers (July 12, 2011), <https://www.sfcityattorney.org/2011/07/12/wage-theft-lawsuit-seeks-to-recover-440k-in-back-pay-interest-for-cheated-workers/> [<https://perma.cc/3DV2-SF3N>]; Janice Fine, *Co-Production: Bringing Together the Unique Capabilities of Government and Society for Stronger Labor Standards Enforcement*, LAB. INNOVATIONS FOR THE 21ST CENTURY FUND 27 (Sept. 2015) http://theliftfund.org/wp-content/uploads/2015/09/LIFTRreportCoproductioOct_ExecSumm-rf_4.pdf [<https://perma.cc/Q9GL-YW4X>].

60. Patel & Fisk, *supra* note 55, at 7.

61. Fine, *supra* note 59, at 24.

staff provided a forum for discussion of progress in enforcement activities, for relationship-building, and for discussion of new developments in law or policy.

Because co-enforcement is implemented by a government contract, the relationship is governed by the exacting requirements of government contracts, which required community organizations to provide objective measures of enforcement success. But it requires creativity to figure out how to measure the deliverables in access to justice and in building trust among fearful low-wage immigrant workers. San Francisco phrased deliverables in terms of community partners having specific numbers and types of contacts with low-wage workers in each partner's linguistic or ethnic community (Chinese, Filipino, Latino, Vietnamese, Middle Eastern, Muslim, and South Asian, and young workers).⁶² The community contractors were required to "resolve" or "refer" to OLSE, the California DLSE, or the federal DOL a specified number of "labor law complaints" per quarter.⁶³ A specified number of worker consultations were required per year. Community partners were also required to speak to a specified number of workers "directly and sharing linguistically and culturally appropriate information on San Francisco and California labor laws," and to "conduct workshops designed to educate low-wage San Francisco workers on their rights under local and state labor law."⁶⁴

An early and significant co-enforcement success involved the workers at an upscale San Francisco dim sum restaurant known as Yank Sing in 2013 and 2014. The community partners worked with the San Francisco OLSE and the California DLSE to negotiate the largest monetary settlement either agency had achieved at that point in time (\$4.25 million) for nearly 300 workers.⁶⁵ With the support of the nonprofit groups and city and state agencies' close scrutiny, the workers walked out during peak restaurant hours—an unusual display of concerted activity for a non-union workplace. The employees got the company to agree to provide meal and rest breaks, paid sick days, wages that were higher than the local minimum (including a 5% raise for non-tipped workers), holiday pay and vacation pay, full health coverage for employees with no deductibles, and, because most workers have family in China, the right to take up to four weeks of approved time-off without risking their jobs. The settlement included im-

62. Patel & Fisk, *supra* note 55, at 13-14.

63. *Id.* at 13.

64. *Id.*

65. Twilight Greenway, *SF Restaurant Yank Sing Workers Earn Historic \$4 Million Settlement*, CIVIL EATS (Nov. 19, 2014), <http://civileats.com/2014/11/19/sf-restaurant-yank-sing-workers-earn-historic-4-million-settlement/> [https://perma.cc/46SU-8729].

portant nonmonetary elements—an admission of guilt, an apology, and a commitment by the employer to righting the wrongs going forward—that sent a powerful message to both the worker community and industry players that organizing compels employers to comply with minimum standards and to treat their workers with respect. For the community organizers, the Yank Sing campaign represents the power of tying enforcement to organizing.⁶⁶

California has a state-wide co-enforcement program that is in many ways similar to San Francisco's.⁶⁷ Through a partnership among DLSE, its Bureau of Field Enforcement (BOFE), the California affiliate of the National Employment Law Project, and local worker organizations, the state has provided grants to several community organizations in San Francisco, Los Angeles, and rural Ventura County to target sectors with endemic wage theft. In the California program, as in San Francisco's, each community organization is responsible for identifying cases and bringing them to BOFE for enforcement action. BOFE and the community organization then work together on every step of the case.

Unlike in San Francisco, which has OLSE in direct partnership with a handful of community organizations and worker centers, at the state-wide level, DLSE/BOFE partners with NELP and with community organizations. A NELP lawyer works with the community groups to identify wage theft cases, which the community group then presents to BOFE. BOFE then takes over prosecuting the case but relies on the community group for assistance with identifying witnesses, gathering documentary evidence about wage practices, building trust among the workers (many of whom are undocumented and distrustful of government agencies), and ensuring that the workers understand, participate in, benefit from, and are not retaliated against because of the enforcement activity. The program has provided annual retreats for BOFE staff and investigators to meet with worker activists to learn about labor practices in the low wage economy.

The DLSE co-enforcement program has some structural features that give greater potential to support organizing than San Francisco's model. Co-enforcement at DLSE is funded as a pilot project by the Irvine Foundation. The private funding gives greater flexibility in how community groups can integrate outreach on labor standards with other outreach that the

66. Patel & Fisk, *supra* note 55, at 3.

67. The DLSE co-enforcement program is described in detail in Patel & Fisk, *supra* note 55, at 1, and in Fine & Lyon, *supra* note 52, at 442. See also *2017–2018 Fiscal Year Report on the Effectiveness of the Bureau of Field Enforcement*, CAL. LAB. COMM'R OFF. (2018), https://www.dir.ca.gov/dlse/BOFE_LegReport2018.pdf [<https://perma.cc/K4CN-5YWW>] (describing partnerships with community organizations).

community group does. In other words, the pursuit of numerically defined deliverables need not be the primary driver of strategy. Lawyer-activists at both OLSE and NELP explain that building worker power cannot easily be quantified (especially without a dues model driving the organization), so the foundation funding allows the number of cases referred or resolved, or the number of trainings or worker meetings, to arise organically from organizing rather than organizing happening as a result of the pursuit of deliverables.

Co-enforcement helps build sustainable worker organizations because it provides some funding, as well as legitimacy, and a direct connection to enforcement agencies that are important, if not always strictly necessary, for a worker group to have real power as an organization. This matters enormously to worker centers and other groups that lack what made organized labor strong in its mid-twentieth century heyday: the dues model of funding, the collective bargaining relationship that confers legitimacy, and the budget to hire lobbyists and lawyers who will ensure a direct connection to government power. Co-enforcement also embeds a worker-oriented commitment throughout a bureaucracy so that enforcement is less subject to the vicissitudes of electoral politics. Co-enforcement grants help to sustain the base-building organizations on which legal compliance depends. And the involvement of grassroots groups is the best insurance that the co-enforcement ecosystem keeps the workers themselves involved.

B. Hiring Halls

A second way in which law can facilitate the translation of mobilization into institutional power is to enable workers to form organizations that give them a greater role in job matching and labor market coordination. Law firms, hospitals, Uber, Care.com, and temp agencies are all institutions that match workers with those in need of services. What distinguishes law firms from all the rest is that law prohibits outside investors in law firms so that the lawyers themselves (or a subset of them) control the institution.⁶⁸ Why not use law to give other workers greater control over the institutions in which they work – in other words, why not use law to expand the use of hiring halls throughout the economy?

68. Model Rule of Disciplinary Conduct 5.4 provides, in part, that lawyers may not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law and may not practice with or in the form of a for-profit entity if a nonlawyer owns any interest in the practice or is a director or officer of the entity. See Gillian Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, INT'L REV. L. & ECON. (2013) (advocating abandoning the Rule 5.4 restriction on the finance and governance of law firms).

Labor market coordination involves enormous effort and enormous power for those who do it, especially in sectors in which people switch jobs frequently or provide services to many different clients. Workers at all levels of skill, education, and compensation face daunting challenges in seeking new jobs. It takes time and effort to find, apply for, and interview for open jobs. Employers and employees alike waste time and resources seeking a match. Many employers demand more skills or credentials than they're willing to pay for and focus on credentials rather than on competency, which creates disparate impacts on the basis of race, gender or gender identity, disability, and background, including criminal records.⁶⁹ Unscrupulous, low-road employment agencies have become the labor intermediaries in many industries. These agencies engage in wage theft, charge exorbitant fees, prevent workers from using unemployment insurance or workers' compensation, and do not provide health benefits, vacation or sick days, or retirement plans. The many tech-enabled job matching services (Monster, Indeed, Glassdoor, Craigslist, or Care.com) that are pathways to jobs have no accountability to workers, give workers no voice in governance, and are strongly motivated to keep wages low and work union-free. In the app-enabled gig economy, companies like Uber, Lyft, Taskrabbit and Postmates have coordinated casual labor but eroded hard-won employment protections by misclassifying workers as independent contractors while setting the price for their labor.

If workers had power in the job-matching process, they could establish floors for wages and benefits, improve other workplace standards, create cross-firm benefits programs, and, most broadly, create an occupational identity of the sort that professionals enjoy.⁷⁰ Union hiring halls have long played this role. A hiring hall—whether a physical space, such as a union hall, office, or dock, or a “virtual” hall,⁷¹ run through an online platform—benefits employers and employees by facilitating job-matching, enables job-training and skills certification, creates the infrastructure to administer

69. An overview of the challenges in contemporary job searches described in this paragraph and the role that unions and other worker formations could play in addressing them is David Rolf, *A Roadmap to Rebuilding Worker Power*, THE CENTURY FOUND. (Aug. 9, 2018), <https://tcf.org/content/report/roadmap-rebuilding-worker-power/?session=1&agreed=1> [perma.cc/KV3C-YYK6].

70. See, e.g., Dorothy Sue Cobble, *Organizing the Postindustrial Work Force: Lessons from the History of Waitress Unionism*, 44(3) ILR REV. 419, 433 (1991).

71. Unions have operated referral systems for which they have been permitted to charge fees to nonunion workers without an actual physical hall, as by screening workers, compiling and maintaining lists, contacting prospective workers, and reading names of eligible workers to employers over the phone or from a space in the employer's premises. See, e.g., Toledo World Terminals, 289 N.L.R.B. 670, 671-73 (1988); Plumbers Local Union No. 17, 224 N.L.R.B. 1262, *enf'd*, 575 F.2d 585, 586 (6th Cir. 1978); Detroit Mailers Union No. 40, 192 N.L.R.B. 951, 965 (1971).

sectoral benefits programs, and supports the development of an occupational identity. Referral and service-providing hiring halls could be central clearing houses where workers congregate and connect to resources and services, including child care and organized leisure activities, all while taking back from employment agencies control over work schedules.⁷²

Hiring halls can require both union members and nonmembers to adhere to reasonable, non-discriminatory rules that are designed to ensure the hall's effective operation.⁷³ Reasonable rules can include adherence to rules regarding timeliness or reliability in reporting to work and adherence to specific standards regarding pay and quality of work.⁷⁴

Historically, unions have sought hiring halls to be an exclusive arrangement in which an employer grants the union operating the hiring hall the exclusive right to refer employees, and the employer cannot hire from any other source.⁷⁵ Even Senator Taft, a principal author of the Taft-Hartley Act which restricted various union security devices, recognized that "the union frequently is the best employment agency," and union hiring halls benefit employers, employees, and the public by reducing wasted effort in job-seeking, reducing corruption and favoritism in job-matching,

72. The balance between leadership development, skills enhancement, and community organizing of the worker organization is a matter of lively discussion among worker center leaders. *See generally* Oswalt & Rosado-Marzán, *supra* note 8; Cesar F. Rosado Marzán, *Worker Centers and the Moral Economy: Disrupting Through Brokerage, Prestige, and Moral Framing*, 2017 U. CHI. LEGAL F. 409 (2018); Rebecca J. Livengood, *Organizing for Structural Change: The Potential and Promise of Worker Centers*, 48 HARV. C.R.-C.L. L. REV. 325 (2013); Dorothy Sue Cobble, *Lost Ways of Unionism: Historical Perspectives on Reinventing the Labor Movement*, in REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE TWENTY-FIRST CENTURY 82-96 (Lowell Turner, Harry C. Katz and Richard W. Hurd eds., 2001); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project and the Struggle for Social Change Symposium: Economic Justice in America's Cities: Visions and Revisions of a Movement*, 30 HARV. C.R.-C.L. L. REV. 407 (1995).

73. Courts have consistently treated hiring halls as distinct from union security agreements generally and have recognized that nondiscriminatory exclusive hiring halls are not synonymous with closed shops. They are not *per se* unlawful under the NLRA, and unions retain considerable discretion in structuring their operations so long as they are not operated in a discriminatory fashion. *Local 357 Int'l Bhd. of Teamsters v. N.L.R.B.*, 365 U.S. 667, 673-74 (1961). Hiring halls are legal as long as all workers are allowed to enroll in a hiring register regardless of union membership and are treated equally under the rules established by the hiring hall for job placement.

74. In *IATSE, Local 838 (Freeman Decorating)*, 364 N.L.R.B. No. 81 (2016), the Board ruled that a union does not violate Section 8(b)(1)(A) by maintaining a hiring hall that required users to pay fines to the union if they failed to report for work and permanently removed workers from the referral list after a fourth attendance offense. The Board majority found that a rebuttable presumption of a violation of Section 8(b)(1)(A) arises when a union takes action that affects a referent's employment status for reasons other than the failure to pay dues or other fees uniformly required. However, the union rebutted the presumption because its rule was reasonably designed to ensure effective operation of its hiring hall by protecting its relationship with employers to which it supplied labor. This case shows that hiring halls have discretion to establish and enforce norms and standards throughout an industry.

75. *See generally* Pittsburgh Press Co. v. N.L.R.B., 977 F.2d 652 (D.C. Cir. 1992) (discussing the history of legal regulation of hiring halls).

and protecting workers who might otherwise be “at the mercy of petty racketeers who demanded kick-backs” for job referrals.”⁷⁶ The NLRB has long endorsed hiring halls because they “eliminate wasteful, time-consuming and repetitive scouting for jobs by individual workers and haphazard uneconomical searches by employers.”⁷⁷

Exclusive hiring halls are almost always established by collective bargaining agreements and are prohibited by the NLRA’s ban on closed shops only if the hiring hall refuses to refer non-union workers even if they are willing to pay a reasonable fee tied to the pro rata cost of the operation of the hiring hall.⁷⁸ In nonexclusive arrangements, the union’s hiring hall is only one of many possible sources of employees. In either case, under federal labor law, a union-run hiring hall cannot deny employees access on the basis of union membership but can charge nonmembers a reasonable fee tied to the pro rata cost of operating the hall.⁷⁹ Workers who want to join the union would pay union dues, part of which would cover the hiring hall referral fee.

Enabling unions and other labor organizations to operate non-discriminatory exclusive hiring halls, even in states that bar union security agreements, generates power for workers over their employment. Achieving this level of worker solidarity and control over labor supply affords the hiring hall operator the bargaining leverage needed to improve significantly the referred workers’ terms and conditions of employment. Non-exclusive hiring hall arrangements, where a union or other entity is not the only supplier of labor to an employer, are also an option and would allow for a members-only model. Such an arrangement, however, would not succeed

76. SUBCOMM. ON LAB.-MGMT. REL. OF THE S. COMM. ON LAB. AND PUB. WELFARE, MARITIME HIRING HALLS, S. REP. NO. 1827, at 6–7, 13 (81st Cong., 2d Sess. 1950) (additional views of Sen. Taft).

77. *Mountain Pac. Chapter of Assoc. Gen. Contractors v. N.L.R.B.*, 119 N.L.R.B. 883, 896 n.8 (1958), *enf. denied in part*, 306 F.2d 34 (9th Cir. 1962), *overruled in part by*, *Int’l Bhd. Teamsters, Local 357 v. N.L.R.B.*, 365 U.S. 667 (1961).

78. *See Local 357, Int’l Bd. of Teamsters v. N.L.R.B.*, 365 U.S. 667, 673-74 (1961); *Radio Officers’ Union v. N.L.R.B.*, 347 U.S. 17, 40-42 (1954).

79. *Pittsburgh Press Co.*, 977 F.2d at 655. For example, *Simms v. Local 1752, Int’l Longshoreman Ass’n*, 838 F.3d 613 (5th Cir. 2016), rejected a legal challenge to an exclusive union hiring hall in a suit brought by a nonmember in a right to work state. The nonmember who was denied referral for employment because of his failure to pay the union a reasonable fee for use of the hiring hall alleged that Mississippi’s right to work law prohibited the union’s assessment of mandatory fees for a nonunion member for use of the hiring hall. The plaintiff’s theory was that hiring hall fees amount to compulsory union membership, which states can prohibit under Section 14(b) of the NLRA. The court held that the NLRA allows states to prohibit unions and employers to agree to conditions that come into effect after an individual is hired, not to the hiring process itself. *See Oil, Chem & Atomic Workers Int’l Union, AFL-CIO v. Mobil Oil Corp.*, 426 US 407, 417 (1976) (holding that hiring hall fees do not compel union membership); *Pittsburgh Press Co.* 977 F.2d at 657 (observing that “Congress, the Supreme Court, and the NLRB . . . agreed on the basic principles of a legitimate hiring hall for which non-union workers could be charged a fee by the union”).

in improving labor standards unless the union represents a substantial majority in the sector and its members have uniquely valuable skills. Without that, the hiring hall cannot effectively raise standards in the sector because low-wage competition will remain a constant threat.

Hiring hall operators could offer, in addition to job placement, any number of members-only services and benefits: training, health benefits, retirement benefits, death benefits, funds for funeral expenses, financial assistance during illness, loans from treasury after exhaustion of sick benefits, child care, free or low cost attorney services, free or low cost medical care, unemployment insurance, workers' compensation, no cost travel to and from work, home loans, and help establishing bank accounts. The Culinary Union in Las Vegas is a good example of a union that provides excellent benefits to its hiring hall users.⁸⁰ In fact, unions in Las Vegas, operating in a state that bans union security agreements, have been able to build substantial power, in part through the use of hiring halls. But the Culinary Union, and other successful instances of unions operating hiring halls, all exist in a context where the union is also the exclusive bargaining representative once the workers are hired. It is an open question as to how effective a hiring hall would be if the employer does not also recognize the union as the employees' representative after they are hired.

The goals of labor unions, worker centers, and community-based worker advocacy groups are sufficiently aligned such that they can be a complement to one another, as opposed to being in competition with one another, in the operation of a hiring hall. For example, worker centers' deep connections to the communities they serve and awareness of the particular needs of their constituencies, and unions' experiences in collective bargaining and building political power, can reinforce each other and make collaboration between them mutually beneficial. As noted above, the National Domestic Workers Alliance has already developed online platforms to facilitate hiring in home care and cleaning workers and to provide portable benefits for workers.⁸¹ Taking control of a labor supply in a local or regional occupational market requires members, allied organizations, and others to support or engage in collective actions to overcome employer and establishment opposition.

Hiring halls of today must not be limited to serving only those who qualify as statutory employees. Rather, those not covered under the NLRB

80. *See For Members / Benefits*, CULINARY WORKERS UNION LOCAL 226, <https://www.culinaryunion226.org/members/benefits> [<https://perma.cc/KH9S-M9F9>] (last visited Jan. 7, 2020).

81. *See MY ALIA*, *supra* note 17.

(independent contractors, low-level supervisors, agricultural workers, and domestic workers) can and should be included.⁸² Focusing on the best practices from the traditions of community and labor organizing can help to build effective hiring halls, including a unionism with fluid, porous membership boundaries that shift as the nature of work shifts, and structural capacity to organize occupationally and geographically as well as industrially. In addition, hiring halls that are run by worker organizations can provide a structure in which all levels—national, local, state, and regional—are activated and empowered economically as well as politically.⁸³

A hiring hall could be created by statute in the contemporary app-based gig economy by incentivizing co-op based employment as a source of labor supply for platform companies such as Uber. It could gain political traction if agreeing to source labor through a worker-controlled co-op were a condition of an exemption from certain minimum labor standards laws like California's AB 5. That is, a worker co-operative system could give workers control over job-matching regardless of whether the workers are employees or independent contractors. But if the workers were independent contractors, the platform company would be relieved of responsibility for compliance with minimum labor standards laws, and the co-operatives would negotiate the price of labor with the company and would administer benefits systems. The idea would be that workers hired through a licensed

82. Gonos and Martino provide a comprehensive strategy for such temp workers that transcends production. It includes: (1) forming regional temp workers' associations and creating work councils which serve as organizing committees that build broader community coalitions; (2) building coalitions to engage communities in statewide actions in order to generate widespread condemnation of abusive temp agency practices and to disrupt supply of labor to and from them; (3) launching a hiring hall operation inside a targeted high road employment agency and dividing up responsibilities; (4) creating responsible employer pacts signed with these partner agencies/employers; (5) forming partnerships where unions organize those workers falling under the NLRA and worker centers/community based organizations work with the rest; (6) coordinating efforts at targeted facilities so that certain employers are persuaded to use the hiring hall to meet their flexible labor needs and to voluntarily recognize the union; (7) ensuring that CBAs negotiated by unions would spell out temp workers' terms and conditions and would regulate temp usage (8) creating multi-employer associations between unions/worker centers and temp agencies/employers that sets a minimum living wage and guarantee of minimum number of paid daily hours for a dispatched worker. See George Gonos & Carmen Martino, *Temp Agency Workers in New Jersey's Logistics Hub: The Case for a Union Hiring Hall*, 14 WORKINGUSA: J. LAB. & SOC'Y 499 (2011).

83. Occupational unionism is characterized by four overlapping categories: occupational identity, control over the labor supply in the occupation, rights and benefits as a function of occupational membership rather than worksite affiliation, and peer control over performance standards and workplace discipline. It was similar to craft unionism with emphasis on craft specialization, restrictive membership rules and union monitoring of performance standards, but also had characteristics common with organizations formed by non-factory (skilled and unskilled) workers (longshoremen, agricultural, building tradesmen, musicians, teamsters) in that it stressed employment security rather than job rights at a particular facility (work sharing principles in downswings) and offered portable benefits (health and welfare funds bound members emotionally as well as financially to the locals and its members). See Cobble, *supra* note 70, at 419.

labor cooperative with democratic worker control (where the licensing requirement would ensure that workers actually control the co-op) would be exempt from specified statutory minimum standards, thus giving platform companies an incentive to hire them and relieving them of responsibility for compliance with complex labor laws. Legislation could ensure that co-ops were worker controlled by creating a nonprofit mutual benefit corporation to be the federation of labor co-ops (and which could negotiate on a sectoral basis over minimum terms) and would partner with the state department of labor to ensure that the co-ops were democratically governed by the workers. The basic principles of such a system would be the following:

1. open and voluntary membership, which would include uniform hiring criteria for applicant workers and uniform membership criteria for co-op worker owners;
2. worker ownership of the co-op, including a right of distribution of net income to the worker owners; and
3. worker control of the co-op and the federation on a one-person, one-vote basis.

Hiring halls or worker co-ops could be a partnership of unions and worker centers. For example, a collaboration between the National Day Laborer Organizing Network, LIUNA, and the AFL-CIO shows that day labor worker centers can be strong union allies and key players in the current labor movement. Worker centers are effective mechanisms for organizing workers, monitoring industry conditions, and strengthening worker protections. On the demand side, they increase transparency of the hiring hall process and provide a means by which to hold employers accountable for maintaining labor standards, while on the supply side they provide the day laborers, monitor work quality, and provide opportunities for worker incorporation into the mainstream economy through job search and assistance.⁸⁴

Hiring halls could be the base from which sectoral representation could grow. Individuals from an ethnic neighborhood or an occupational community could become members of a union or a worker organization. The members would elect a group from among their ranks that would help the organization to develop the hiring hall rules and administer the operations. The organization would train interested members in negotiation and

84. See Theodore, *supra* note 23, at 59.

public speaking, trade skills, and operational administration, and would educate them about wages, benefits, and labor standards in relevant sectors, regionally and more broadly, as well as in federal, state, and local labor and employment statutes.

These workers would be primed to act effectively on works councils at their specific workplace. They would also be trained to participate in wage or standards board discussions with local government officials, union and employer representatives and others in their community in a co-enforcement or sectoral bargaining scenario. This would also pave the way for union representation at the worksite, whether exclusive representation or minority graduated representation, as the hiring hall organization would have built a productive and supportive relationship with the referred workers.

Community-based organizations that operate high-road hiring halls can develop strong ties of trust and loyalty to a community, which strengthens their role in sector-specific, multi-community organizing. Whether or not the organization is a labor union, it could partner with unions or national organizations with significant experience and infrastructure around workplace and political action. This includes political action outside of the workplace as well as direct economic intervention within the workplace, and both are mutually reinforcing as the group cohesion needed to enforce direct action can also translate into a united voice at the polls. Direct action in which unions are well-versed, such as civil disobedience, boycotts, picketing, flash mobs, and strikes, is necessary if a community-based hiring hall is to compete with low road employment agencies in order to disrupt the supply of labor from these agencies. Further, in partnering with a union, they gain experience in building worker power in the industry, turning control of the labor market into bargaining strength, and establishing formal relationships with employers.

A number of legal and policy reforms are necessary to create hiring halls on a widespread basis. The nature of the legal reforms may depend on the entity that operates the hiring hall and the structure of the sector in which it operates.

For sectors that are structured like construction, in which many small business employers hire workers on a short-term basis, unions have long operated hiring halls to aid the rapid matching of skilled labor to the episodic needs of construction contractors. The construction trades unions negotiate collective bargaining agreements with contractors before the labor force is hired for any particular job so that the contractor can gain access to the union hiring hall. Section 8(f) of the NLRA allows these pre-

hire agreements. Expanding lawfulness of pre-hire agreements to non-construction industries with similar high-velocity labor markets would allow hiring halls to expand beyond construction. This could be important in agriculture and other seasonal work.

In other industries in which the demand for labor fluctuates slightly but the employer base is stable, as in longshore work, the hiring hall operated like a day labor market. On the west coast, the International Longshore and Warehouse Union ended the abuses of the day labor market by negotiating with all the west coast stevedoring companies to hire longshoremen only from the ILWU hiring hall. Although the advent of containerized shipping eliminated the day labor aspect of longshore work (and dramatically reduced employment), the hiring hall still operates as a way to place skill union labor in available positions. The ILWU originally had closed-shop agreements with the stevedoring companies that required them to hire only from the ILWU hiring hall and required workers to participate in a hiring hall in order to gain employment. So long as access to union or worker organization membership is open to all (as it was with the ILWU), there would be no legal obstacle to a closed-shop agreement.⁸⁵

Law should rationalize the circumstances in which group action setting the minimum terms of labor is lawful and when it is an antitrust violation. Unionized hiring hall relationships allow employers and workers, acting collectively through their union, to agree on the price and terms of labor. This raises no antitrust issue because of the labor exemption to antitrust.⁸⁶ Today, Uber, Lyft, Door Dash and other app-based service providers unilaterally set the price and terms of labor. This, the companies argue, raises no antitrust issue because the price coordination happens within the boundary of the firm.⁸⁷ Critics disagree.⁸⁸ And when a labor contractor agrees to supply labor at a set price and then refuses to negotiate with the workers over a wage, that, too, should be seen to raise antitrust issues, though it has not to date. Under current law, however, a worker-operated hiring hall that is not the product of a collective bargaining agreement would probably, at least by business, be thought to raise an antitrust problem to the extent it involves workers as a group agreeing to set a minimum

85. See *supra* text accompanying notes 74-80.

86. See *Brown v. Prof'l Football, Inc.*, 518 U.S. 231 (1996); *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

87. See Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 L. & CONTEMP. PROBS. 45 (2019).

88. See Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 L. & CONTEMP. PROBS. 65 (2019).

price for their labor.⁸⁹ There is no reason why only firms or collective bargaining agreements, and not worker groups, can set the price of services or otherwise coordinate the labor market.⁹⁰ But if courts were to conclude it does, then a change in antitrust law would be necessary to expand the hiring hall framework.

Law should also facilitate negotiation between employers and labor organizations to address the fissurization of work and the need to allow unions and companies flexibility to have their contract follow the work. The duty to bargain under section 8(a)(5) should allow unions to insist that collective bargaining agreements address subcontracting, thus allowing hiring halls to follow the work.⁹¹

A more ambitious set of legal reforms would give to worker-owned employment agencies (which is what hiring halls are) the same legal advantages enjoyed by for-profit employment agencies. Under current law, unions that operate hiring halls have extensive reporting requirements to government and disclosure requirements to members. Law should require non-union, for-profit employment agencies to engage in the same reporting and disclosure as the law requires of unions. Alternatively, and much more ambitiously, the law would empower workers through a hiring hall structure that would require that any organization engaged in employment referrals and in interstate commerce either be operated by, or in equal partnership with, a union or other bona-fide non-profit worker organization or be operated. Functionally, this would require firms ranging from Kelly Service and Manpower to Uber and TaskRabbit to enter into labor partnership agreements in order to continue operating their existing lines of business. A slightly less forceful approach would be the labor co-op system described above: for-profit companies could gain an exemption from certain minimum standards legislation (such as laws designating workers as employees) if the source their workers from a worker-controlled co-op.⁹²

89. See *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 411; *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 696 (1978) (holding professional organization's ethics rule prohibiting members from bidding against each other as to minimum fee violates antitrust law); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 793 (1975) (holding minimum fee schedule adopted by lawyers violated antitrust law).

90. Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 *UCLA L. REV.* (forthcoming 2020); Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 *L. & CONTEMP. PROBS.* 45 (2019).

91. *First Nat'l Maint. Corp. v. N.L.R.B.*, 452 U.S. 666 (1981) (holding that janitorial services contractor had no duty to bargain with union representing its employees over the contractor's decision to terminate service at a location which would result in layoff of janitors working at that location).

92. See *supra* text accompanying notes 86-87.

It would also be possible to expand the role of hiring halls to assume broader functions of unions or Taft-Hartley benefit plans themselves—benefit administration, training, codetermination, co-enforcement—on a portable basis. This would require legal changes in the regulation of unions and in the regulation of benefit plans.

States or municipalities could serve as laboratories for experimentation with hiring halls by provide government funding to hiring halls. Or they could require any public-sector employer or employer receiving substantial government funds to use the community hiring hall for some or all of its workforce needs. Alternatively, government could subsidize the training or education of workers on a pro rata share based on the number of those that are referred.

Any hiring hall would require some source of funding to support the cost of its operations. The more training it does, or the more benefits or services it provides, the greater its costs. As with other employment agencies, hiring halls would charge fees to employers, and perhaps dues to its employee members. Group discounts for these benefits and services would make membership more attractive. For example, a coalition of different unions could collaborate to provide substantial services to members at a very low cost.

Hiring halls could also be the basis of a Ghent system.⁹³ That is, they could replace or augment employers or governments as providers of paid benefits, such as for unemployment, work-related injury, medical, retirement, parental leave, death, or disability. They would receive the funding from these sources for sustainability, such as through federal and state grants. Organizing around benefits allows unions to regularly connect with workers as whole people—who need health care, have children, hope to retire.

In order for hiring halls to not replicate the grim history of racial, gender, and other forms of exclusion, it is important that hiring hall organizations have operations in low-income, disadvantaged communities. They should have the elected members monitor compliance with rules so that they are not discriminatorily applied. The government could also have a certification requirement to ensure that a certain percentage of the organization's hiring hall operations are in particular zip codes. In the past, some hiring halls have been guilty of illegal discrimination, typically in order to facilitate greater employment and earning opportunities for members of a dominant racial, ethnic, national, or gender group allied with union leader-

93. Dimick, *supra* note 48, at 376.

ship. Diversity in union and worker center leadership, and making hiring halls open to all, will prevent a recurrence of the old discrimination. Regardless of union affiliation, hiring halls, bilateral labor marketplaces, and employment placement and referral agencies should be covered by anti-discrimination laws; government agencies should be adequately resourced to enforce those laws; and government funding and contracts should be contingent on demonstrating compliance with applicable anti-discrimination laws.

* * *

There is a significant and deeper theoretical debate underlying the question of whether gaining institutional power will necessarily weaken labor as a movement. Saul Alinsky, the great theorist of social movement organizing, apparently thought so, on the ground that stable union contracts and the periodic rounds of collective bargaining enabled unions to improve wages and benefits without involving their members.⁹⁴ Some observers of the UFW believed that it was the goal of the leadership to keep the movement vibrant by focusing more on Latinx political power and grassroots community organizing than on negotiating and administering farmworker labor contracts. Others believe that it was the failure to keep the UFW as a democratically accountable, member-governed organization that led to its collapse, not that it gained institutional power through collective bargaining agreements.⁹⁵

The relationship between law, institutional power, and movement vibrance is a huge topic beyond the scope of this essay. There is tension between the tendency toward hierarchy and bureaucratic control inherent in an institution and the goal of a movement to be democratic, bottom-up, and voluntaristic. Labor history is a story of struggle to gain and keep power over wages and working conditions against the constant threat that some workers will work for less money in order to get a competitive advantage. Unions have adopted a variety of coercive measures under the name of solidarity, and courts or legislatures have outlawed most of them.⁹⁶ History

94. See SAUL ALINSKY, *REVELLE FOR RADICALS* (repr. ed/ 1969) (1946).

95. See FRANK BARDACKE, *TRAMPLING OUT THE VINTAGE: CESAR CHAVEZ AND THE TWO SOULS OF THE UNITED FARM WORKERS* 72 (2011) (noting that Alinsky believed that unions were “languishing precisely because they have institutional power” that enables them “[t]hrough ritualized contract negotiations . . . [to] win higher wages without the active participation of their members” but suggesting that Alinsky erred in ignoring the “obvious alternative – for workers to fight within their unions for democratic unionism”).

96. For example, the Taft-Hartley Act prohibited closed shops (agreements between unions and employers that the employer would hire only union members). 29 U.S.C. § 158(a)(3). See, e.g., Pattern

has few examples of stable labor unions (or any other institutions) that are inclusive on the basis of race, class, gender, immigration status, and skill level, are truly and always voluntary, and are powerful. And in the highly partisan and rancorous time in which we live, any diverse organization will encounter difficulty in bridging the things that divide the members and to find common ground and to promote solidarity strong enough to enable the workers to get results from oppositional employers.

CONCLUSION

To build enduring worker power from the activism and organizations of Alt-Labor requires thinking about how law could create institutional leverage for worker groups. If today's organizing produces a new wave of labor power in blue states or nationally, they will be vulnerable to a pro-business counter-revolution. Co-enforcement and legal support for expanded and robust hiring halls are state level legal changes that can make Alt-Labor movement activism sustainable and are building blocks to sectoral bargaining.

Makers' League v. NLRB, 473 U.S. 95 (1985) (invalidating union rules restricting members from resigning from the union during a strike, even though resignations were done to enable workers to cross the picket line without repercussions); *NLRB v. Allis-Chalmers*, 388 U.S. 175 (1967) (upholding the power of a union to fine members for crossing a picket line; the power to fine is what creates the incentive for members to resign from the union before crossing the picket line).