

The Once and Future Countervailing Power of Labor

Catherine L. Fisk

ABSTRACT. This Essay looks to the history of the labor movement to engage with Kate Andrias’s and Benjamin I. Sachs’s argument that labor law provides a model of how law can support organizing. While embracing the solidarity of labor scholarship with the vibrant scholarly conversation about law and progressive social movements, I sound four cautionary notes drawn from past repression of labor and civil-rights activism. Labor’s experience is that law tends not only to thwart and suppress but also to channel movement activity in ways that weaken threats to the hegemony of the wealthy under capitalism. Sketching three specific ideas about how law can enable the exercise of countervailing power without also channeling activism away from radical challenges to elite power, I note how law has made it both essential and difficult for labor and racial justice activists to organize together against inequality. Although today’s inclusive activism gives hope for completing unfinished work of the New Deal, Civil Rights, and Great Society eras, we should be clear-eyed about the role law played in leaving that work undone and the difficulties of using law to build sustainable class-based social movements.

INTRODUCTION: USING LAW TO TRANSFORM TODAY’S MOBILIZATION INTO TOMORROW’S COUNTERVAILING POWER

“DON’T WASTE ANY TIME MOURNING — ORGANIZE!”
- JOE HILL¹

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1. The slogan “don’t mourn; organize” is often attributed to Joe Hill, a radical labor organizer of the International Workers of the World. On the eve of his execution for a dubious murder conviction, he wrote to Industrial Workers of the World leader Bill Haywood saying, “I die like a true rebel. Don’t waste any time mourning — Organize!” Joe Hill, *Don’t Mourn, Organize!*, JACOBIN (Nov. 19, 2015), <https://www.jacobinmag.com/2015/11/joe-hill-songs-utah-iww-union-labor-haywood> [<https://perma.cc/G8RW-RXJU>]; see WILLIAM M. ADLER, THE MAN WHO NEVER DIED: THE LIFE, TIMES, AND LEGACY OF JOE HILL, AMERICAN LABOR ICON 1-4 (2012).

By now it borders on cliché to note the similarities between 2020 and 1918, 1930, and 1968. Yet the comparisons are useful if they serve as a guide to legal reforms that will complete the unfinished business of the progressive movements of the past. This pandemic, like that of 1918, reveals that universal access to health care is necessary to protect the common good. This Gilded Age, like the one that crashed to an end in 1930, reveals the problems with unregulated capitalism and the gaping holes in the social safety net as people—especially people of color—face unprecedented levels of unemployment and a predicted tidal wave of evictions without access to adequate unemployment benefits, debt relief, or a right to housing.² The massive Black Lives Matter (BLM) protests—perhaps the largest protests in American history—like the uprisings of 1968, reveal that racist police killings are the tip of an iceberg of systemic racism.³

What will it take for these cataclysmic events to produce a new and more racially inclusive New Deal that will complete the unfinished work of the labor and civil-rights movement activism of 1930-1970? One need not squint too much to see the possibility of dramatic change in protests against the extreme inequalities exacerbated by the pandemic and police violence.⁴ The dawning awareness among elites that structural racism and inequality threaten our democracy might finally give political traction to working class organizing. Hope is manifest in the BLM protests, and in the upsurge of labor protest, including teachers' strikes in 2019, and the 2020 strikes, protests, and whistleblowing by Amazon warehouse

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2. Heather Long, *A 'Misclassification Error' Made the May Unemployment Rate Look Better than It Is. Here's What Happened.*, WASH. POST (June 6, 2020, 10:57 AM EDT), <https://www.washingtonpost.com/business/2020/06/05/may-2020-jobs-report-misclassification-error> [<https://perma.cc/LGH2-2N3T>] (reporting that the April and May 2020 Bureau of Labor Statistics (BLS) unemployment reports undercounted the unemployed, and that the BLS estimates the true unemployment rate in April was 19.7 percent and in May was 16.3 percent).
 3. Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/LW9L-HQQQ>].
 4. Amna K. Akbar, Opinion, *The Left Is Remaking the World*, N.Y. TIMES (July 11, 2020), <https://www.nytimes.com/2020/07/11/opinion/sunday/defund-police-cancel-rent.html> [<https://perma.cc/6N9S-25ZL>].

workers,⁵ Instacart shoppers,⁶ and even Facebook staffers angry at the company's refusal to address false and hatemongering posts by President Trump.⁷

Labor was one of the major successful social movements of the twentieth century. It was one of the few that aspired to build countervailing power against the hegemonic rule of capital. Building countervailing power of the working class, Kate Andrias and Benjamin I. Sachs remind us, was the way in which Americans built a new political economy in the New Deal, and it could build a new political economy now.⁸ Their timely article, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, argues that law can be a tool to enable the kind of sustainable organizations that exercise countervailing power. They urge reformers to consider the example of labor law, especially as it existed before major legislative change in 1947. Labor law was unusual in American law in promoting organizing and collective action of working people with the goal of enabling them to exert countervailing power against the concentrated economic, social, and political power of corporations and employers.

In this Essay, I embrace and build on Andrias and Sachs's law-and-organizing frame and their ideas about how laws can enable the formation of working people's movements. I also suggest some cautionary notes drawn from law's response to uprisings of the past, where labor and civil-rights activism were repressed by antiradical, anti-immigrant, and antilabor legislation.⁹ As labor

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5. Mihir Zaveri, *An Amazon Vice President Quit over Firings of Employees Who Protested*, N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/05/04/business/amazon-tim-bray-resigns.html> [<https://perma.cc/6CJT-UQ9A>] (describing a series of labor disputes at Amazon that ultimately led to the resignation of a prominent engineer in protest of the company's firings of workers who had questioned the company's handling of workplace safety during the pandemic).
 6. Noam Scheiber & Kate Conger, *Strikes at Instacart and Amazon over Coronavirus Health Concerns*, N.Y. TIMES (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/business/economy/coronavirus-instacart-amazon.html> [<https://perma.cc/XF2A-38BP>] (describing strikes by Amazon and Instacart workers).
 7. Sheera Frenkel, Mike Isaac, Cecilia Kang & Gabriel J.X. Dance, *Facebook Employees Stage Virtual Walkout to Protest Trump Posts*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/06/01/technology/facebook-employee-protest-trump.html> [<https://perma.cc/29SN-XHV3>] (reporting that hundreds of Facebook employees refused to work for a day to protest the company's refusal to do anything about President Trump's inflammatory posts).
 8. Kate Andrias & Benjamin Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 565 (2020).
 9. The Alien Registration (Smith) Act, Pub. L. No. 76-670, 54 Stat. 670 (1940) (codified as amended at 18 U.S.C. § 2385 (2018)), required all noncitizen adults in the United States to register with the government and made it a crime to "advocate, abet, advise, or teach" the overthrow of the United States government. It was enacted to enable the government to prosecute people suspected of subversion and to deport any who were not citizens. Targets included labor activists in cities across the country, and International Longshore and Warehouse Union President Harry Bridges. See *Bridges v. Wixon*, 326 U.S. 135, 138-39 (1945) (discussing

scholars and former labor organizers, Andrias and Sachs know as well as anyone the many ways law can both support and thwart the formation of sustainable and transformative class-based social movements. Law tends not only to thwart and suppress but also to *channel* movement activity in ways that weaken threats to the hegemony of the wealthy under capitalism.¹⁰ I seek, therefore, to elaborate on their ideas while bearing in mind lessons from history about how law enabled, channeled, and thwarted labor's quest to be a transformative social movement. In exploring specific ideas about how law can enable worker organizing without also channeling activism away from radical change and thwarting real challenges to elite power, I sketch ways in which law has made it both essential and difficult for labor and racial justice activists to organize together against inequality around the shared identity as have-nots.

Part I of this Essay explores four lessons for today's class-based social movements from the history of law's successful channeling of labor. Part II sketches three ways that labor organizations can navigate the law to become the countervailing power that Andrias and Sachs promote. Part III concludes with some reminders that, while law can enable today's activism to complete some of the work that was left undone in the New Deal, Civil Rights, and Great Society eras, we should be clear-eyed about the role law played in leaving that work undone and the difficulties of using law to build sustainable class-based social movements.

the government's efforts to deport Bridges); MICHAL R. BELKNAP, *COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES* (1977) (discussing Smith Act prosecution of radical activists in New York); DONNA T. HAVERTY-STACKE, *TROTSKYISTS ON TRIAL: FREE SPEECH AND POLITICAL PERSECUTION SINCE THE AGE OF FDR* 1-2, 30-41 (2015) (discussing the origins of the Smith Act and its use to prosecute Minneapolis union leaders in 1941); SANFORD ZALBURG, *A SPARK IS STRUCK!: JACK HALL AND THE ILWU IN HAWAII* (1979) (describing Smith Act prosecutions of labor and progressive activists in Hawaii who worked for interracial unionism and Native Hawaiian rights). The Supreme Court upheld the Smith Act against constitutional challenge in *Dennis v. United States*, 341 U.S. 494 (1951), following a trial in which both the defendants and their lawyers were sentenced to federal prison for using the trial as a platform for criticism of censorship. BELKNAP, *supra*, at 77-116. The Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-197 (2018)), further repressed labor activism and radicalism. The Taft-Hartley Act is discussed *infra* text accompanying notes 30-31, 35-45.

10. Catherine L. Fisk & Diana Reddy, *Protection by Law, Repression by Law: Bringing Labor Back into Law and Social Movement Studies*, 70 EMORY L.J. 63, 122-26 (2020).

I. CONSTRUCTING COUNTERVAILING POWER: LESSONS FROM THE MID-TWENTIETH CENTURY

Andrias and Sachs argue that mass-membership organizations were instrumental in winning changes in law and policy that benefitted ordinary people rather than elites.¹¹ In a political economy dominated by huge and concentrated power on the one side, organization on the other side is necessary for law to be responsive to the non-elite. The dearth of countervailing power, as John Kenneth Galbraith called it,¹² or what Andrias and Sachs call “the paucity of collective organization among non-elites,” is not “a natural occurrence” stemming from inexorable economic principles (e.g., collective action problems). Rather, it is a product of legal rules that make it hard to organize.¹³

The elements of a legal regime that will nurture class-based organizing essential to economic and political democracy, Andrias and Sachs argue, are found in the National Labor Relations Act (NLRA).¹⁴ The NLRA was the single most significant government effort to remove legal obstacles to collective action. Andrias and Sachs make the case that effective organizing requires legal rights to access spaces in which to organize, to reliably collect funds from members, to be free from retaliation, and to bargain with relevant actors over conditions – to do all the things that the National Labor Relation Board (NLRB) under the Trump Administration and the Supreme Court are busy using law to block.¹⁵ Both the conservatives who are rolling back protections for labor and liberals like Andrias

11. Andrias & Sachs, *supra* note 8 at 579.

12. JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* 142-49 (1952) (arguing that the way to respond to concentrated economic power of capital is not to break it up but to create countervailing power in labor unions and consumer groups).

13. Andrias & Sachs, *supra* note 8 at 580.

14. 29 U.S.C. §§ 151-69 (2018).

15. *See, e.g.*, *Caesars Entm’t*, 368 N.L.R.B. 143, slip op. at 2 (Dec. 16, 2019) (upholding against an National Labor Relations Act (NLRA) section 7 challenge to an employer’s rule prohibiting use of its “computer resources,” including email, to send “non-business information” or to solicit “advancement of personal views”); *Kroger Ltd. P’ship I Mid-Atl.*, 368 N.L.R.B. 64 (Sept. 6, 2019) (holding that an employer may deny union organizers access to its premises but grant access to Girl Scouts, the Salvation Army, or the United Way); *UMPC Presbyterian Hosp.*, 368 N.L.R.B. 2 (June 14, 2019) (holding that employer may deny nonemployee organizers access to cafeterias, restaurants, and other spaces open to the public); *Walmart Stores, Inc.*, 368 N.L.R.B. 24 (July 25, 2019) (holding that a group of employees who took a few days off of work in order to attend their employer’s shareholders’ meeting could be fired because it was an unprotected intermittent strike); *Stern Produce Co.*, 368 N.L.R.B. 31, slip op. at 3 (July 31, 2019) (holding that an employer did not impermissibly threaten employees when it said that if they unionized it would lock them out in order to “slap some sense into the union”).

and Sachs share a belief that law matters; law is a cause and power is an effect. It is well known that after Congress enacted legal rights to unionize in 1935, union membership exploded.¹⁶ It is less well known that after Hawaii enacted legal rights to organize agricultural workers, union membership in that state skyrocketed, forever transforming a red-state plantation economy into a blue state.¹⁷ Thus, the case for a law to help the development of countervailing power is compelling.

But if the history of the labor movement offers inspiration for those who believe law can promote organizing, it also offers cautionary tales. Here I sketch four.

A. Promotion of Organizing Entails Regulation of Organizations

Government protection of labor organizing came with government regulation of labor organizations. The labor organizations to which the NLRA gave a special role in the self-regulation of industry were no longer just private-membership organizations but were now imbued with the public interest.¹⁸ Law therefore created a tangle of incentives towards less radical, less political, more self-interested behavior.¹⁹ The Norris-LaGuardia Act²⁰ and the NLRA reduced outright repression of labor as a social movement, but they channeled union activism towards a state-preferred goal—collective bargaining—and away from

16. CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 252 (1985) (noting that in the decade following the Supreme Court's 1937 decision upholding the NLRA, labor unions more than doubled their membership, which grew from 5.8 million (1937) to 14.6 million (1947), and from 11.8 percent of nonfarm employment in 1933, to 17.9 percent in 1937, to 31.8 percent in 1947).

17. See MOON-KIE JUNG, *REWORKING RACE: THE MAKING OF HAWAII'S INTERRACIAL LABOR MOVEMENT 2* (2006) (attributing the transformation of Hawaii from conservative to progressive to the successful unionization of "the vast majority" of Hawaii's workforce in a leftist, interracial, politically active union).

18. Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 220 (2015).

19. This point is developed at greater length in Fisk & Reddy, *supra* note 10. See also INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE (Nelson Lichtenstein & Howell John Harris eds., 1993); WILLIAM E. FORBATH, *LAW AND THE SHAPING OF AMERICAN LABOR* (1991); Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1.

20. 47 Stat. 70 (1932) (codified at 29 U.S.C. § 101 (2018)).

more radical movement objectives.²¹ The NLRA's promotion of union organizing on a certain model changed the structure under which unions organized.²² As Andrias and others have argued, it did this by requiring unions to adhere to the NLRB's determination of what constituted an appropriate bargaining unit (typically based in a single location of a single enterprise), rather than what the union considered best for its organizational objectives and worker interests (which could have been industry-wide or sectoral).²³ The protection of worker power through mandated union security based on exclusive representation enabled racist unions to exclude people of color²⁴ while empowering conservative and quiescent unions to push out more radical unions.²⁵ And, as we now see with police, legal protections for majority unions have enabled union leaders to thwart challenges from reform-oriented or minority groups.²⁶ Antilabor interpretations of the NLRA increased the costs of movement activism, including sit-down strikes (which had been crucial to organizing Detroit in 1937), slow-downs (useful for workers who fear being fired for striking), and secondary picketing or boycotts (which are necessary to exert effective power in supply chains and in the service economy).²⁷ Courts and, to a lesser extent, the NLRB,

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21. TOMLINS, *supra* note 16, at 318 (observing that “[e]ven before the Taft-Hartley debates, it had become clear that such institutional legitimacy as unions could expect to enjoy in the post-war industrial relations system would be limited to activities which seemed to contribute to the well-being of the corporate political economy”).
 22. Christopher L. Tomlins, *AFL Unions in the 1930s: Their Performance in Historical Perspective*, 65 J. AM. HIST. 1021, 1041 (1979).
 23. Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 84-88 (2016); Tomlins, *supra* note 22, at 1040-41.
 24. See HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEMS: RACE, WORK, AND THE LAW 185-372* (1985) (detailing a series of case studies in which management and unions used collective bargaining to the detriment of workers of color).
 25. Noam Scheiber, Farah Stockman & J. David Goodman, *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES (June 6, 2020), <https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html> [<https://perma.cc/94U3-5JQC>].
 26. See Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 736-37, 780 (2017).
 27. See, e.g., *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 255 (1939) (overturning the National Labor Relation Board's order that peaceful sit-down strikers were entitled to reinstatement at the conclusion of a strike). See generally AHMED WHITE, *THE LAST GREAT STRIKE: LITTLE STEEL, THE CIO, AND THE STRUGGLE FOR LABOR RIGHTS IN NEW DEAL AMERICA* (2016) (describing the brutal struggle to organize four steel companies in 1937 and the enduring effects on labor law of the strike's failure); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 268-69 (1978) (arguing that early Supreme Court interpretations of the Wagner Act which narrowed the range of legitimate labor activity “did . . . much to guide the long-run development of the labor movement into domesticated channels and, indeed, to impede workers' interests”); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L.

imported pre-NLRA notions from master-servant law into the new labor law in ways that constrained the rights of workers to act collectively.²⁸ Regulation of the internal affairs of unions increased financial transparency but did not invariably make unions more democratic and in fact increased the power of government and union opponents to channel union activity.²⁹

The vast literature on twentieth-century labor and civil rights shows how business skillfully deployed the menaces of radicalism, socialism, and communism to tar ambitious labor and civil-rights organizing. The Taft-Hartley Act's anticommunist oath requirement removed all NLRA protections from unions whose leadership refused to sign oaths repudiating communism, and refused access to the NLRB for such unions.³⁰ The statute thus leveraged the protections of law and administrative processes to force unions to push radicals out of leadership positions.³¹ The National Association for the Advancement of Colored People and some other civil-rights groups sought to preserve their legitimacy and influence by taking a strong stance against communists in their ranks.³² Although there is plenty of blame to go around – indeed, some American communists did the cause of labor and civil rights no favors³³ – the purge of

REV. 518, 520-34 (2004) (exploring the origins of the judicial interpretations of the Wagner Act as neither protecting the right to engage in sit-down strikes nor the right to strike without being permanently replaced).

28. JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 19-34* (1983); STUART CHINN, *RECALIBRATING REFORM: THE LIMITS OF POLITICAL CHANGE*, 109-51 (2014).
29. See Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified at 29 U.S.C. § 401) (requiring unions to file financial and other information with Department of Labor and regulating the internal governance of unions, including elections for leadership, rights of union members to speak at union meetings, and standards and processes for the restructuring of affiliated local unions).
30. Section 9(h), added in 61 Stat. 146 (1947), was upheld against First Amendment challenge in *American Communications Association v. Douds*, 339 U.S. 382, 407-08 (1950). It was repealed and replaced by section 504 of the Landrum-Griffin Act, 73 Stat. 525 (1959), which made it a crime for a member of the Communist Party to serve as a labor union officer or employee. The Supreme Court struck down section 504 as a bill of attainder in *United States v. Brown*, 381 U.S. 437, 440 (1965).
31. See RONALD L. FILIPPELLI & MARK D. MCCOLLOCH, *COLD WAR IN THE WORKING CLASS: THE RISE AND DECLINE OF THE UNITED ELECTRICAL WORKERS 105-40* (1995); NELSON LICHTENSTEIN, *THE MOST DANGEROUS MAN IN DETROIT: WALTER REUTHER AND THE FATE OF AMERICAN LABOR 252-53, 265-69* (1995).
32. See RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS 219-220* (2007) (describing the efforts of National Association for the Advancement of Colored People leaders to avoid associating with organizations thought to be subversive, including the 1950 convention adoption of a resolution condemning communism and calling for the expulsion of branches under Communist control).
33. See Eric Arnesen, *No "Graver Danger": Black Anticommunism, the Communist Party, and the Race Question*, in 3 *LABOR: STUD. IN WORKING-CLASS HIST. AMS.* 13 (2006); Eric Arnesen, *The Final*

progressives and radicals reduced the vigor of organizing and derailed certain efforts to end race and sex discrimination on the part of employers and unions.³⁴

History invites us to think about what happens after unions or other social-movement organizations gain power. At the end of World War II, just as unions were poised to win (through a massive strike wave) the wage increases that had been long delayed by wartime wage and price controls, business used the labor upsurge as a wedge issue to win Congress for the first time since 1932. Congress scaled back labor protections over President Truman's half-hearted veto, insisting that labor had become too powerful. The Taft-Hartley Act of 1947 adopted a multipronged approach to reducing union power. It granted legal protections to workers who resisted unionization (thus enabling employers to undermine solidarity).³⁵ It denied unionization rights to independent contractors and low-level supervisors, even though they historically had belonged to unions and needed the protections of collective representation.³⁶ It prohibited certain forms of labor protest.³⁷ It forced leftists out of leadership positions.³⁸ It made unions subject to suit as entities.³⁹ It made collective-bargaining agreements enforceable by judges⁴⁰ who used that power to enjoin strikes in violation of collectively bargained no-strike clauses and to award damages against unions that were insufficiently vigorous or competent in enforcing contracts against employer breach.⁴¹ The Landrum-Griffin Act continued the work of the Taft-Hartley Act

Conflict? On the Scholarship of Civil Rights, the Left and the Cold War, 11 AM. COMMUNIST HIST. 63, 63-64 (2012).

34. See, e.g., BRUCE NELSON, *DIVIDED WE STAND: AMERICAN WORKERS AND THE STRUGGLE FOR BLACK EQUALITY* 201-50 (2001); ROBERT H. ZIEGER, *THE CIO, 1935-1955*, at 153-54, 280-85, 345-50 (1995); Robert Korstad & Nelson Lichtenstein, *Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement*, 75 J. AM. HIST. 786 (1988); Staughton Lynd, *The Possibility of Radicalism in the Early 1930s: The Case of Steel*, 6 RADICAL AM. 37 (1972).
35. 29 U.S.C. § 158(b)(1)(A) (2018).
36. *Id.* § 152(3); see Marley S. Weiss, *Kentucky River at the Intersection of Professional and Supervisory Status: Fertile Delta or Bermuda Triangle?* 355-61, in *LABOR LAW STORIES* (Laura Cooper & Catherine Fisk eds., 2005) (explaining the history of supervisors in unions and the reasons the Taft-Hartley Act excluded them).
37. 29 U.S.C. § 158(b)(4) (2018).
38. See *supra* note 30.
39. 29 U.S.C. § 185(b) (2018).
40. *Id.* § 185(a).
41. *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 251-52, 253-55 (1970) (enjoining the strike and holding that the Taft-Hartley Act provision allowing judicial enforcement of collective bargaining agreements is a partial repeal of the Norris-LaGuardia Act's ban on injunctions in labor disputes); *Bowen v. U.S. Postal Serv.*, 459 U.S. 212, 230 (1983) (holding the union liable for damages for lost wages due to a breach of duty of fair representation); *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 52 (1979) (holding the union not liable for punitive damages for breach of duty of fair representation).

by eliminating legal protection for secondary protests and by regulating internal union affairs.⁴²

The ostensible purpose of this legislation was to curb union abuses of power and corruption, and make unions more responsible to their members and to their contracts with employers.⁴³ But an important purpose and effect was also to weaken unions and reduce labor protest. As I have documented elsewhere, the legislation used unions' institutional power as leverage to reduce their activism by punishing union picketing with crushing damages liability and injunctions.⁴⁴ This, in turn, required union lawyers to protect the union by counseling against certain forms of protest, reviewing the content, timing, and location of union picket signs and other protest tactics, and even censoring union newspapers.⁴⁵

B. Political Compromises that Exclude Some from Protection

If the original sin of America was slavery, the original sin of the New Deal was building on the legacy of slavery in the political compromise that got the New Deal passed. To get the votes of legislators from agricultural states, Congress excluded farmworkers and domestic workers from the NLRA right to unionize, which meant that Black and Latinx workers and women disproportionately were excluded.⁴⁶ The Social Security Act of 1935 likewise disproportionately omitted the jobs dominated by people of color and women from the unemployment and old age insurance systems it created.⁴⁷ These political choices were possible only because the political parties and the interest group organizations

42. Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), Pub. L. No. 86-257, § 704, 73 Stat. 519, 542-543 (codified at 29 U.S.C. § 158 (2018)).

43. 29 U.S.C. § 401(b) (2018) (finding that legislation is necessary to address “breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct . . . as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives”).

44. Fisk & Reddy, *supra* note 10 at 104-21, 122-33.

45. *See id.* at 118-19 (describing union lawyer review of union newspapers); *see also* Sailors' Union of the Pac., 92 N.L.R.B. 547, 550 (1950) (illustrating how unions regulated the message of their own picket signs).

46. 29 U.S.C. § 152(3) (2018); IRVING BERNSTEIN, *TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933-1941*, at 326 (1971) (saying that Senator Wagner defended the exclusion “simply because of the power of the farm bloc in Congress; it was better to get protection for industrial workers than no law at all”).

47. *See* Gareth Davies & Martha Derthick, *Race and Social Welfare Policy: The Social Security Act of 1935*, 112 POL. SCI. Q. 217, 219 (1997) (summarizing the literature on the exclusion of agricultural and domestic work from the unemployment and old age insurance aspects of the Social Security Act); Alice Kessler-Harris, *In the Nation's Image: The Gendered Limits of Social Citizenship in the Depression Era*, 86 J. AM. HIST. 1251, 1261-62 (1999) (describing the exclusion of women's work from the Social Security Act's vision of covered employment).

that drafted and lobbied for the legislation did not represent women and people of color. A legal regime like the NLRA that grants power to organizations risks entrenching inequality if the organizations that gain power under the law are not representative, as many unions during the New Deal were not.

A challenge in implementing the Andrias-Sachs proposal is to ensure that the organizations that law supports remain responsive to the diversity of working-class interests. In today's polarized and highly segmented political culture, no one should underestimate the difficulty of forming broadly inclusive unions. For instance, Whites without a college degree (a common definition of working class) are much more likely to describe themselves as Republicans or conservative than are working class Blacks or Latinx.⁴⁸ Building a political agenda across the divides of race and ideology is tremendously difficult because race has been used for so long and still is used so effectively to divide the working class.⁴⁹ Claims of racial justice or racial resentment are powerful appeals in organizing. As long as racial and class oppression exist, racial and class resentment can be stoked, and opponents of change will stoke them.

Unions with diverse membership and leadership are well-suited to organize inclusively along lines of occupational, class, racial, and other identities. As membership organizations committed to principles of solidarity, they are communities in which injustice can be confronted and reconciliation can be cultivated. To ensure that inevitable political compromises in legislation do not unfairly sacrifice the interests of some group, it is essential that the organizations involved in crafting the legislation be diverse and representative of the full swath of America. But the times in which this has been successful are regrettably few.

48. Tamara Draut, *Understanding the Working Class*, DEMOS (Apr. 16, 2018) (reporting that among Whites without a college degree, 36% say they are Republican and 47% say they are conservative; for Blacks the percentages are 6% and 26%, and for Latinx 15% and 33%), <https://www.demos.org/research/understanding-working-class> [<https://perma.cc/J46H-RALQ>].

49. Critical Race Theory scholars have long been doing brilliant work to document and theorize the racial subordination and erasure that have constructed the notion of working class as being white and to propose ways to organize for legal equality around and across identities. See, e.g., LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 54 (2002) (exploring racial wealth inequalities, arguing that similar factors keep poor Blacks and poor Whites poor, and noting that "race has been deployed to polarize, marginalize, or distract a multiracial coalition from pursuing a social justice agenda"); Amna Akbar, Sameer Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. (forthcoming 2021) (discussing movement organizing). Recent examples could include painful conversations over how to discuss or frame police killings of victims who are not Black, or white privilege and fragility, or reparations, or unionization rights of police officers. As to these and many other issues, it is difficult to overstate the importance and the challenge of building a campaign to end racial marginalization without splintering a progressive coalition and sparking a backlash.

C. *Regulating Countervailing Power*

A third lesson from history is that when organizing succeeds and unions build political power for their members, opponents will argue that concentrated political power disserves the public interest. As noted above, the Taft-Hartley Act is one of many examples when working people's organizations were weakened or destroyed when business organizations and elites regrouped and deployed law to suppress the threat to what they argued was the public interest in "labor peace" or "free movement of commerce" or "property rights." But one need not go back to the 1940s to find examples of law empowering skeptics of unions, and the fear of union power has crossed political lines.

In Wisconsin in 2010, the Republican legislature eliminated collective-bargaining rights for workers whose unions opposed the candidacy of Scott Walker and preserved bargaining rights for workers – police, prison guards, firefighters – whose unions support Republicans.⁵⁰ This was political payback, but it was also defended as serving the public interest in reducing labor costs and taxes and making the government more responsive to the people.⁵¹ Sometimes the critique of union power is bipartisan. The campaign to reduce collective-bargaining rights of teachers had bipartisan support, for the ostensible reason that teachers' unions make it too hard to reform education in ways that would serve Black and Brown children.⁵² Even the Left attacks the concentrated power that a union provides, as seen in current proposals to eliminate or curtail police and prison-guard

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50. Martin H. Malin, *Life After Act 10?: Is There a Future for Collective Representation of Wisconsin Public Employees?*, 96 MARQ. L. REV. 623, 626-30 (2012) (describing the political fight over the legislation and its principal provisions).
51. See *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 654 (7th Cir. 2013) (rejecting a First Amendment and Equal Protection constitutional challenge to Act 10, remarking that "political favoritism is a frequent aspect of legislative action" and election "winners get to write the laws," but also noting Wisconsin argued the law would "promote flexibility in state and local government budgets by providing public employers more leverage in negotiations" (second quoting *Hearne v. Bd. of Educ.*, 185 F.3d 770, 775 (7th Cir. 1999))); C.J. Szafr, Will Flanders & Alexandra Hudson, *Untold Stories of Act 10: How Superintendents Have Used Act 10 to Reform Public Schools*, WIS. INST. FOR L. & LIBERTY 1 (Apr. 2016), <https://www.will-law.org/wp-content/uploads/2016/03/Untold-Act-10-apple-cover-FINAL.pdf> [<https://perma.cc/D5DU-M8V7>] (describing the "fiscal successes" of Act 10 in reducing labor costs and the freedom it gave school superintendents to "adopt the best practices of teacher pay and classroom management" without the "rigid" teachers' union contracts as a hindrance).
52. See Daniel Buck, *7 Reasons to Say Goodbye to Teachers Unions*, FOUND. FOR ECON. EDUC. (Jan. 2, 2019), <https://fee.org/articles/7-reasons-to-say-goodbye-to-teachers-unions> [<https://perma.cc/4DJ7-MREK>]; Seema Mehta, *How Antonio Villaraigosa Went from a Union Organizer to a Union Target*, L.A. TIMES (Sept. 25, 2017), <https://www.latimes.com/politics/la-pol-ca-villaraigosa-labor-20170925-story.html> [<https://perma.cc/X4JR-L3ZJ>]. One of the first cases to strike down job protections for teachers explicitly made the racial-justice point by beginning the opinion with a lengthy quote from *Brown v. Board of Education*, and grounding the

union rights as obstacles to police reform,⁵³ or because police unionization is said to be associated with an increase in police violence.⁵⁴

Organizations that have power to influence the regulatory processes designed to ensure they serve the public interest are rarely ones that represent the dispossessed. And when they do, elites label them a threat to capitalism. If unionization and collective bargaining are a privilege only for good workers, rather than a fundamental right, every group of workers who gain power is at risk of being found unworthy because its collective action will be portrayed as inimical to the public welfare.⁵⁵

D. Transforming a Social Movement into a Sustainable Institution

A fourth cautionary note from history draws from the experiences of the United Farm Workers (UFW) in the 1970s. Enacting even a good law to enable organizing is not enough to build power if a union fails to do the work of balancing its social movement side with its role as an institution that exerts power in the workplace and in the economy. The UFW had secured the enactment of one of the most progressive labor laws in the country; California's Agricultural Labor Relations Act contains most (but certainly not all) of the five elements of an Andrias-Sachs law.⁵⁶ Only a few years after the law was enacted, however, the UFW began a downward slide, from which it has yet to recover (at least as measured by membership and collective bargaining agreements).⁵⁷ In part, that was

unconstitutionality of job security on the impact it allegedly has on "poor and minority students." *Vergara v. State of California*, 2014 WL 6478415, *1, *4 (Cal. Super. Ct. 2014), *rev'd*, 202 Cal. Rptr. 3d 262 (Cal. App. 2016). The nationwide trend in litigation on school equity, and the strand of that litigation which deploys the disadvantage of poor and Black and Brown children to argue for limiting teacher job protections, is discussed in William S. Koski, *Beyond Dollars? The Promise and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897 (2017).

53. Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1340-46 (2020); Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1240-43 (2017); Shawn Gude, *The Bad Kind of Unionism*, JACOBIN (Jan. 12, 2014), <https://jacobinmag.com/2014/01/the-bad-kind-of-unionism> [<https://perma.cc/Q7BZ-UA7A>].
54. Dhammika Dharmapala, Richard H. McAdams & John Rappaport, *Collective Bargaining Rights and Police Misconduct: Evidence from Florida* 30 (Univ. of Chi. Coase-Sandor Inst. for Law & Econ., Research Paper No. 831, 2019), <https://ssrn.com/abstract=3095217> [<https://perma.cc/2VUN-4JWD>].
55. I owe this insight to Diana Reddy.
56. CAL. LAB. CODE § 1140 (West 1937). See generally PHILIP L. MARTIN, PROMISES TO KEEP: COLLECTIVE BARGAINING IN CALIFORNIA AGRICULTURE (1996) (providing an overview of ALRA's operation).
57. See MIRIAM PAWEL, THE UNION OF THEIR DREAMS: POWER, HOPE, AND STRUGGLE IN CESAR CHAVEZ'S FARM WORKER MOVEMENT 213-54 (2009) (narrating the struggle within the union

caused by employer and political opposition—employers managed to get the state to defund the agency and to bog it down with delays.⁵⁸ And partly it is because of sectarian struggles among labor. The Teamsters, who had never had the slightest interest in organizing farmworkers, swooped in to replace the UFW at many farms. Growers were only too happy to replace the militant UFW with the more accommodating Teamsters.⁵⁹ But partly it was because the UFW leadership did not aggressively pursue the traditional union sources of power, such as organizing dues-paying members and negotiating and enforcing collective-bargaining agreements. The institutional power the union could exercise through the negotiation and administration of collective agreements required a commitment of resources that some activists and leaders preferred to spend on more organizing, on political action, and on building and maintaining a regional and national movement of Latinx people.

Winning civil-rights or labor legislation does not transform workplaces or neighborhoods or politics if there is no mechanism to make the legal change stick on the ground. Unions as institutions have done this. But when a social movement becomes an institution, as unions did, the challenge is to continue the work of progressive transformation that is an unending project in capitalism.

II. LAW CHANNELS: THOUGHTS ON BUILDING A NEW POLITICAL ECONOMY

In this Part, I will expand on the Andrias-Sachs proposal by sketching three examples of how law can promote worker organizing in a way that responds to the needs of the current moment. Bearing in mind the lessons of the past, close attention should be paid to institutional design to minimize the risks of relying

between being a union and being a movement); Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PENN. J. LAB. & EMP. L. 1, 40-44 (2005) (describing the “[u]ntraveling” of the United Farm Workers (UFW)); Jerry Cohen, *Gringo Justice: The United Farm Workers Union, 1967-1981* (unpublished manuscript), https://libraries.ucsd.edu/farmworker_movement/essays/essays/Gringojustice.pdf [<https://perma.cc/U7KG-BM9M>] (providing a first-person narrative of the General Counsel of the UFW).

58. See William B. Gould IV, *Some Reflections on Contemporary Issues in California Farm Labor*, 50 U.C. DAVIS L. REV. 1243, 1247-54 (2017) (discussing delays and other issues with the ALRA, including a dearth of representation petitions, from 2014-17); Cohen, *supra* note 57 (on bogging down the Agricultural Labor Relations Board at the start).
59. See generally Cohen, *supra* note 57 at 26 (describing how farmworkers needed a law that gave them the right to choose the union they preferred).

on law to support organizing, especially when the organizing is oriented around challenging the existing distribution of wealth and power.⁶⁰

First, law could promote worker power and voice immediately by ordering every workplace to recognize a worker-elected workplace safety and health committee.⁶¹ Workers often know better than the public or supervisors where the risks of illness and injury are, and they could form common cause with one another and with consumers, workers at other firms, and the public over the need to prevent the spread of infectious disease or other hazards. The public interest in allowing workers to organize around coronavirus infections is obvious because of the abject failure of the Occupational Safety and Health Administration (OSHA). With nearly twenty-five million confirmed COVID-19 cases and more than 400,000 deaths in the United States by mid-January 2021,⁶² OSHA had proposed only \$3.5 million in total penalties by mid-December, mainly against relatively small businesses, such as nursing homes.⁶³ Workers walked out of an Amazon warehouse—and later filed a public nuisance suit—when they contracted the coronavirus from coworkers who were encouraged to come to work sick and who lacked adequate paid sick leave. Amazon defended its conduct by saying it complied with OSHA guidelines, which was a plausible position because OSHA has failed to enforce existing law or to issue new regulations.⁶⁴ State

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60. To be clear, none of these proposals is new—all have been suggested by Andrias, Sachs, me, or others. I raise them here because they are responsive to three current crises: the dearth of working-class voices and power that Andrias and Sachs identify, the pandemic, and the upsurge of protest against systemic racism and police killings of Black and Brown people.
61. The details of such a proposal have been laid out by a number of people involved in the Clean Slate Project, including Sachs, Andrias, Sharon Block, me, and several others. See Sharon Block & Benjamin Sachs, *Worker Power and Voice in the Pandemic Response*, CLEAN SLATE FOR WORKER POWER 7-9 (2020), https://assets.website-files.com/5dddc262b91f2a95f326520bd/5ef2396d689c3880ec008db2_Clean%20Slate_Worker%20Power%20and%20Voice%20in%20the%20Pandemic%20Response.pdf [<https://perma.cc/4JBD-XAF3>]; Sharon Block, Suzanne Kahn, Brishen Rogers & Benjamin I. Sachs, *How and Why to Empower Workers in the COVID-19 Response*, ROOSEVELT INST. 5-8 (Apr. 2020), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_COVID19SectoralBargaining_IssueBrief_202004.pdf [<https://perma.cc/E3RA-AREV>]. This short sketch draws on that work.
62. Coronavirus Res. Ctr., *Cumulative Cases*, JOHNS HOPKINS U. & MED. (Jan. 19, 2021), <https://coronavirus.jhu.edu/data/cumulative-cases> [<https://perma.cc/W2UQ-93UV>].
63. *U.S. Department of Labor's OSHA Announces \$3,504,345 in Coronavirus Violations*, U.S. DEP'T LAB. (Dec. 11, 2020) <https://www.osha.gov/news/newsreleases/national/12112020> [<https://perma.cc/38SW-2W8C>].
64. Josh Eidelson & Spencer Soper, *Amazon Workers Sue over Virus Brought Home from Warehouse*, BLOOMBERG L.: DAILY LAB. REP. (June 3, 2020, 8:31 PM), https://www.bloomberglaw.com/product/labor/document/XCAEP9RO000000?criteria_id=dd9d55fba826cf63543fb54a3a71e846&searchGuid=97392201-e741-4bfb-ac55-332boe9a9b22&bna_news_filter=daily-labor-report [<https://perma.cc/2R69-87U9>]. Workers also filed a public nuisance suit against McDonald's for failing to protect them. Patricio Chile, *McDonald's Case Tests Nuisance*

attorneys general pressured Walmart to bring its policies into compliance with law protecting workers from coronavirus because OSHA had done nothing.⁶⁵ In the face of the failure of OSHA to protect workers, state and local governments could use their power to protect public safety by ordering every workplace to recognize an employee workplace health committee.⁶⁶ This would build worker power on a broadly inclusive basis and demonstrate the public interest in empowering worker collective action.

A second proposal draws on what teachers unions pioneered beginning in 2012: bargaining for the common good.⁶⁷ Bargaining for the common good (BCG) is a practice and a philosophy under which unions work with the community to identify collective needs and then negotiate with the employer to achieve those goals.⁶⁸ BCG has at least three obvious advantages for building worker power. It makes collective action appealing to a wide swath of workers (beyond those concerned with the usual paycheck issues). It makes the union responsive to the needs and wishes of a diverse workforce and a diverse community. And it builds power for workers and for the community together by preventing antilabor groups from portraying the workers' interests as being in conflict with the public interest. BCG also has some promise for making unions more accountable to the public by institutionalizing a role for the community in

Theory for Work Virus Safety, BLOOMBERG L.: DAILY LAB. REP. (June 4, 2020, 6:56 AM), https://www.bloomberglaw.com/product/labor/document/X7DSJ71C00000?criteria_id=dd9d55fba826cf63543fb54a3a71e846&searchGuid=97392201-e741-4bfb-ac55-332boe9a9b22&bna_news_filter=daily-labor-report [<https://perma.cc/4QWZ-A8NM>].

65. Adam Lidgett, *AGs Say Walmart Employees Need More Virus Protections*, LAW360 (June 2, 2020, 8:27 PM EDT), <https://www.law360.com/articles/1279225> [<https://perma.cc/NM5J-PM3B>].
66. For an analysis of how and why this should be done in Los Angeles County, see Tia Koonse, Ken Jacobs & Jennifer Ray, *Workers as Health Monitors: An Assessment of Los Angeles County's Workplace Public Health Council Proposal*, U.C. BERKELEY LAB. CTR. (July 21, 2020), <https://laborcenter.berkeley.edu/workers-as-health-monitors-an-assessment-of-la-countys-workplace-public-health-council-proposal> [<https://perma.cc/2AK3-42U4>].
67. See Michael M. Oswalt, *Alt-Bargaining*, 82 LAW & CONTEMP. PROBS. 89, 107-08 (2019) (describing the origin and use of bargaining-for-the-common-good strategies by teachers unions).
68. *Id.* at 90-91; see also Kimberly M. Sánchez Ocasio & Leo Gertner, *Fighting for the Common Good: How Low-Wage Workers' Identities Are Shaping Labor Law*, 126 YALE L.J.F. 503, 505-06 (2017) (“[W]e see emerging what commentators have coined as ‘common-good unionism’—that is, a form of union organizing that addresses social conditions whether or not they are directly related to traditional terms and conditions of employment.”); *About Us*, BARGAINING FOR COMMON GOOD, <https://www.bargainingforthecommongood.org/about> [<https://perma.cc/GF66-DV6H>] (“In these campaigns, . . . [u]nions that have the right to bargain use contract fights as an opportunity to organize with community partners around a set of demands that benefit not just the bargaining unit, but also the wider community as a whole.”).

helping workers and the union identify problems and form priorities for negotiation. These are crucial if unions are to avoid some of the attacks sketched above in Part I.

At a minimum, state and local public-sector labor law should redefine the subjects of bargaining to allow BCG. More ambitiously, law could consider ways to incentivize unions to choose BCG by allowing workers whose unions practice it greater protections for resolving negotiating disputes. Public involvement in police-union negotiations, for example, might force departments and unions to rethink use-of-force policies or disciplinary processes that result in police violence.⁶⁹ It might incentivize and enable radical restructuring of policing so that traffic, social service, and other functions are assigned to unarmed officers or civilian agencies; perhaps officers could be trained for these jobs rather than instinctively oppose the reorganization out of fear of job loss.⁷⁰ Rather than prohibiting unions from negotiating over disciplinary procedures, law might mandate some kind of regular collective scrutiny of police contracts when they are up for renegotiation. Law might facilitate peer review and public scrutiny of police uses of force so that the union, rank-and-file officers, management, the public, and others could consider reforms, including early warning systems to identify problem officers and better ways to train rookies.⁷¹

A third possible way to use law to enable organizing to build power is members-only unionism. In the private sector and in most states, workers have a right to unionize only in a union chosen by the majority, and only the union chosen by the majority has any bargaining rights.⁷² This is majority unionism and exclusive representation. A union chosen by a minority of workers (what is known

69. Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1243-47 (2017).

70. To be sure, scholars have raised grave and compelling questions whether antiracist police reform is possible in a society that is defined so profoundly by racial inequality. See Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 759 (2020) (exploring the ways in which policing exists to perpetuate racial segregation and questioning whether reforms aimed at transparency, accountability, and reducing racism in police departments can succeed without fundamental challenges to racial segregation in society).

71. Some evidence suggests that peer review of officer uses of force have been associated with a reduction in officer uses of force. See HANS TOCH & J. DOUGLAS GRANT, *POLICE AS PROBLEM SOLVERS* 77-85 (1991) (discussing Oakland Police Department's use of peer review in 1970s and its success in reducing violent confrontations between police and the public). Increasing police labor relations law to increase transparency and accountability has also been proposed as a way to address police abuse. Catherine L. Fisk, Joseph Grodin, Thelton Henderson, John True, Barry Winograd & Ronald Yank., *Reforming Law Enforcement Labor Relations*, CALIF. L. REV. ONLINE (Aug. 2020), <http://www.californialawreview.org/reforming-law-enforcement-labor-relations> [https://perma.cc/MT35-RGTJ].

72. 29 U.S.C. § 159(a) (2018). See generally Catherine Fisk & Xenia Tashlitsky, *Imagine a World Where Employers Are Required to Bargain with Minority Unions*, 27 A.B.A. J. LAB. & EMP. L. 1 (2011) (proposing a way to create members-only unionism).

as a members-only or minority union) has no right to bargain.⁷³ Much has been written about how members-only unionism could enable workers in nonunion workplaces to experience the power of collective action without waiting for a majority of workers to join the union and vote for exclusive representation.⁷⁴ Andrias and Sachs's concern that law makes it too difficult for workers to act collectively would be addressed by a law requiring management to meet and confer with a representative of a smaller group than a majority.

Members-only unionism could also be adopted to force unions to be more responsive to minority interests. This would address the concentrated power of police unions. Some assert, based on systematic and anecdotal evidence, that involving the rank-and-file is not only possible but essential to reducing or eliminating police violence⁷⁵ or other abuses of the collective power of workers.

Consider what empowering minority unionism and greater public involvement in police-union negotiations might do in a situation like that of the Minneapolis Police Department in the months preceding the killing of George Floyd on May 25, 2020. Derek Chauvin, the officer who killed Floyd, had drawn twenty-two complaints or internal investigations in his nineteen years on the force,⁷⁶ and two of the three officers who stood by and watched Derek Chauvin

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73. See *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961) (holding that an employer violated NLRA by entering into a collective-bargaining agreement with a union that had not yet attained majority status at the time of contracting). The contours of, and uncertainty about, the rights of employees and nonmajority unions are explored in Fisk & Tashlitsky, *supra* note 72.
74. In addition to Fisk & Tashlitsky, *supra* note 72, other classic and recent works advocating a new look at members-only unionism include Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195, 197-99, (1993), which draws on the history of nonmajority bargaining prior to 1935 and the practical fact that many unions do not have as members a majority of those whom they represent, and arguing that nonmajority unionism should be considered, perhaps through statutory amendment; and Marion C. Crain & Ken Matheny, *Labor Unions, Solidarity, and Money*, 22 EMPLOYEE RTS. & EMP. POL'Y J. 259, 283-87 (2018), which argues that nonmajority unionism would advance employees, unions, and the cause of solidarity and building worker power.
75. Fisk & Richardson, *supra* note 26, at 759-66, 792-97 (describing evidence of police unions being agents of police reform, and exploring literature showing that rank-and-file involvement is necessary for meaningful police reform); Elliot Ackerman, Opinion, *The Police Will Be Part of the Solution, Too*, N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/2020/06/04/opinion/police-violence-reform-protests.html> [<https://perma.cc/ULS9-K9HC>] (recounting anecdotal evidence about the importance of rank-and-file whistleblowers in preventing misconduct).
76. Kim Barker & Serge Kovaleski, *Officer Who Pressed His Knee on George Floyd's Neck Drew Scrutiny Long Before*, N.Y. TIMES (July 18, 2020), <https://www.nytimes.com/2020/07/18/us/derek-chauvin-george-floyd.html> [<https://perma.cc/E5NM-EWQD>].

kill George Floyd were rookies in their first weeks on the job.⁷⁷ One rookie was African American, and had joined the police because he wanted to help the community.⁷⁸ Their prompt prosecution – and the fact that two chose to cooperate rather than adhere to the customary police code of silence – show the power of the global protests sparked by the killing. These facts also demonstrate the possibility that creating institutional supports for some officers to challenge the hegemony of a police culture might help identify problematic officers and training situations before they result in death or injury.

Law could help promote community organizations to partner with progressive or reform-minded public employees to transform public safety unions and criminal-law enforcement. With civil-rights laws granting broad immunity to municipalities and to individual officers for liability for misconduct, police departments and unions have no reason not to trade expansive protections against discipline for smaller increases in pay and benefits.⁷⁹ After all, limits on discipline appear to cost the city little, because municipal and qualified immunity for the city and the officers mean the city faces reduced risk of liability for employing a bad cop.⁸⁰ But empowering the public and rank-and-file officers to oversee contract negotiations, or to participate in them as a minority union, would ensure

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77. Ashley Collman, *2 of the Police Officers Charged over George Floyd's Deadly Arrest Had Been Less than 4 Days into the Job, Their Lawyers Say*, INSIDER (June 5, 2020, 5:52 AM), <https://www.insider.com/george-floyd-alexander-kueng-thomas-lane-rookies-defense-lawyers-2020-6> [https://perma.cc/R6XL-Y8LE]
78. Kim Barker, John Eligon, Richard A. Oppel Jr. & Matt Furber, *Officers Charged in George Floyd's Death Not Likely to Present United Front*, N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/2020/06/04/us/george-floyd-police-records-chauvin.html> [https://perma.cc/SWJ2-VNH6].
79. See, e.g., *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam) (granting qualified immunity to an officer who arrived late at the scene and immediately started shooting, firing through the window of the plaintiff's decedent's home and killing unarmed occupant of the home); *Scott v. Harris*, 550 U.S. 372 (2007) (granting summary judgment on qualified immunity to a police officer who deliberately rammed the plaintiff's car, causing an accident that rendered plaintiff quadriplegic); *Bryan Cty. v. Brown*, 520 U.S. 397 (1997) (rejecting municipal liability for a sheriff's department that the jury found to have been deliberately indifferent to the risk that a police officer with a history of violence would commit violence in a traffic stop); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) (holding that although local governments cannot be held vicariously liable under section 1983, they can be held liable when the constitutional violation stems from government policy or custom); Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62 (2016) (explaining the contours and expansion of qualified immunity for officers under section 1983).
80. Critics note, however, that some cities pay substantial amounts in defense and settlement of civil-rights suits arising from police violence. Chicago, it is asserted, has paid more than half a billion dollars on suits arising from policing, that the payment is financed by debt, and that interest on the debt has more than doubled the amount of money taxpayers pay to defend police against civil-rights claims. *Settling for Misconduct*, CHI. REPORTER, <https://www.chicagoreporter.com/series/settling-for-misconduct> [https://perma.cc/KB5G-AYAT].

representation of the interests of the public in changing police-citizen encounters. Even if the city negotiators and the majority union agreed to exchange generous protections against discipline for smaller wage increases, public representatives or minority union representatives could disagree. Adding such voices might change the discipline system more effectively than statutory prohibitions on police unions negotiating over discipline.⁸¹

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These three proposals are based on the common theme that those seeking legal protection for organizing must be attentive to the historical fact that law has been used more often to squelch unions that get too powerful than to empower those that are weak. The contemporary debate over whether law should curb the power of police or prison guards' unions is a reminder that the public often gets antsy about the collective power of workers. As Sachs has recently argued, “[w]hen unions use the power of collective bargaining for ends that we, as a democratic society, deem unacceptable it becomes our responsibility—including the responsibility of the labor movement itself—to deny unions the ability to use collective bargaining for these purposes.”⁸² The problem is that working class people are rarely the ones to determine when the collective bargaining or labor protest is used for unacceptable purposes.⁸³ When the business community decided that secondary boycotts gave labor too much power, they excoriated

81. See Fisk et al., *supra* note 71; *Don't Let Labor Agreements Thwart Police Accountability*, BOS. GLOBE (June 4, 2020) <https://www.bostonglobe.com/2020/06/04/opinion/dont-let-labor-agreements-thwart-police-accountability> [<https://perma.cc/RHE4-968L>] (arguing that police unions should be prohibited from negotiating with management over discipline).

82. Benjamin Sachs, *Police Unions: It's Time to Change the Law and End the Abuse*, ONLABOR (June 4, 2020), <https://www.onlabor.org/police-unions-its-time-to-change-the-law> [<https://perma.cc/H57Q-P6E8>] (arguing that unionization gives police power, which “like all sources of power . . . can be abused”).

83. To be clear, I am not defending police abuses of power, and I favor radical defunding and restructuring of police departments. The minority unionism proposal I make here builds on legal reform I advocated years ago to strengthen the voice and power of minority police officers to reduce police violence. See Fisk & Richardson, *supra* note 26, at 776-97.

the Teamsters Union's so-called "top down" organizing,⁸⁴ but Congress outlawed the secondary boycott for everybody.⁸⁵ The result is that janitors now get punished when they picket outside office buildings pleading for tenants to support their effort to get an abusive supervisor fired and get a pay raise.⁸⁶ The International Longshore and Warehouse Union is facing an enormous damages judgment because a number of workers engaged in secondary activity to protest two job assignments at the Port of Portland.⁸⁷ The farmworker and longshore worker unions both paid substantial damages when the dock workers supported the famous 1966 grape boycott by refusing to load struck grapes onto a ship.⁸⁸

All three of these proposals develop the Andrias-Sachs suggestion that progressives use law to facilitate organizing, while seeking to ensure that the power the organizing creates remains accountable to the diverse workers in whose name it is exercised. Constraints on that power should come from transparency, diversity, and accountability rather than from judges who rarely in American history have had the interests of the have-nots foremost in their mind. Under capitalism, labor is rarely in a position to control how capital uses law.

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84. JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994*, at 138-41 (1995) (noting that labor's "enemies were more astute, more clever, and better organized" than labor and describing the politicking leading to the adoption of the Landrum-Griffin Act, including a two-plus year campaign to attack union corruption and excessive power, especially the Teamsters union, the "massive letter-writing campaign" organized by business, and a television program supported by the Chamber of Commerce).
85. 29 U.S.C. § 158(b)(4)(B) (2018) prohibits any "labor organization" or "its agents" from striking or inducing anyone to strike, or from "threaten[ing], coerc[ing], or restrain[ing] any person," with the object in either case of "forcing or requiring" that person to cease doing business with any other person, but exempts from its prohibition "any primary strike or primary picketing" that is not otherwise unlawful.
86. Preferred Bldg. Servs., Inc., 366 N.L.R.B. No. 159, 2018-19 NLRB Dec. P 16466 (Aug. 28, 2018).
87. The jury awarded \$93.6 million. Mike Baker, *\$93.6 Million Verdict Threatens to Bankrupt One of America's Most Powerful Unions*, N.Y. TIMES (Nov. 21, 2019), <https://www.nytimes.com/2019/11/21/us/ILWU-Portland-Verdict-Bankruptcy.html> [<https://perma.cc/9GNF-7XGR>]. The district judge determined that the evidence supported an award of \$19 million and granted a new trial on damages. *ICTSI Or., Inc. v. Int'l Longshore & Warehouse Union*, 442 F. Supp. 3d 1329 (D. Or. 2020). At the union's request, the Ninth Circuit granted interlocutory review on liability.
88. MARSHALL GANZ, *WHY DAVID SOMETIMES WINS: LEADERSHIP, ORGANIZATION, AND STRATEGY IN THE CALIFORNIA FARM WORKER MOVEMENT* 141 (2009); see Catherine L. Fisk, *Is It Time for a New Free Speech Fight? Thoughts on Whether the First Amendment Is a Friend or Foe of Labor*, 39 BERKELEY J. EMP. & LAB. L. 253, 268 (2018).

CONCLUSION: PEOPLE MAKE THEIR OWN HISTORY, BUT NOT JUST AS THEY PLEASE

The 2020 upsurge prompts those who have waited for decades for a labor civil-rights resurgence to wonder if the moment has finally come for law to help ordinary people challenge systemic racism and the most unequal distribution of wealth the United States has ever seen. It is the moment for the Andrias-Sachs prescription for law to help build countervailing power by reviving and improving upon one of the great regulatory visions of the New Deal. They make wise use of history to argue that class-based organizing can address the concentrated power of capital and promote self-government in the economy and in politics. To that end, they advance the idea that law should facilitate the formation of self-governing civil-society organizations and empower them to meet as equals with the institutions of capitalism.

But, as Marx famously observed, people “make their own history, but they do not make it just as they please.”⁸⁹ The law that promoted organizing in the past also channeled labor organizations away from radical challenges to the concentrated economic and political power of business. Andrias and Sachs are cognizant of the reasons why the New Deal legal structure and civil-society institutions perpetuated racial and gender subordination and eventually allowed a return of Gilded Age levels of economic inequality. Their proposal challenges all interested in using law to construct countervailing power to do so in a way that is more inclusive than the institutions that gained power in the New Deal.

To that end, I have explored three ways law could do more to promote some of the forms of organizing that are happening in this moment. Law could empower workers through workplace safety committees, it could support efforts to build worker-community coalitions through bargaining for the common good, and it could help enable collective action for the unrepresented or reform oligarchic unions through members-only unions. Relatively modest statutory change at the state or federal level could enable the proliferation of these three forms of worker collective action beyond the places they have already been proposed or tried. They could build worker power while encouraging diversity, racial, ethnic, and gender equity, accountability, and transparency.

Barbara Nachtrieb Armstrong Professor of Law, University of California, Berkeley. I am grateful to my colleagues Erwin Chemerinsky and Diana Reddy for their comments

89. KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* (1851), as reprinted in *MARX'S EIGHTEENTH BRUMAIRE: (POST)MODERN INTERPRETATIONS* 19 (Mark Cowling & James Martin eds., Terrell Carver trans., Pluto Press 2002).

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