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DIANA S. REDDY

After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions

ABSTRACT. It is a consequential moment for American labor unions. Over the past decade, public support for labor unions has skyrocketed. Yet even in this moment of renewed public interest, I argue that the American conversation about unions remains constrained by the legacy of past legal decisions. Within the post-New Deal constitutional framework, unions were categorized as engaging in commercial activity, rather than advancing inherently normative claims about justice at work. I refer to this jurisprudential paradigm and the sociolegal accommodations that followed as the “law of apolitical economy.” Synthesizing labor history, legal doctrine, sociological theory on social movements, and original empirical work, this Feature traces the trajectory of the law of apolitical economy in courts, identifies its broader cultural reverberations, and marshals new evidence to show that it still matters today.

When liberal lawyers made the political and constitutional case for labor unions in the 1930s, they operated within a socioeconomic context radically altered by the Great Depression. Instead of arguing, as labor movement leaders had in the 1800s and early 1900s, that democracy required people to have autonomy and self-determination in their working lives, and instead of advancing unions’ own emergent fundamental rights claims, they emphasized labor law as sound economic policy, boosting aggregate demand and promoting industrial peace. In the new constitutional equilibrium that emerged after the New Deal, labor-union advocacy within the workplace was treated as transactional rather than normative.

This choice had benefits, but it also had costs. Under the law of apolitical economy, labor unions increasingly found themselves denied First Amendment protection for the forms of broad, solidaristic protest that built the labor movement. And as new social movements began pressing rights claims in the public sphere, labor unions came to be seen as categorically distinct, as interest groups rather than social-movement organizations. When supply-side economics gained prominence in the late 1970s, it was devastating for union legitimacy. New economic theories and the on-the-ground realities they facilitated undermined the New Deal-era economic arguments that had justified labor law. At the same time, unions’ ability to counter with broadly resonant normative arguments was hampered by the detritus of their previous legal bargain. In a moment when rights had become, in sociological parlance, the “master frame” for articulating justice claims, it was well-established that bread-and-butter unionism had little to do with rights, or even right and wrong.

Returning to the present day, I argue that the legacy of the law of apolitical economy continues to shape contemporary discourse, even with public approval at a sixty-year high. Faced with a decimated membership and a legitimacy crisis, labor-movement organizations have sought over



the past decade to reassert the normative stakes of unionization. They have used what social scientists call “collective action frames” to show that unions further causes with defined normative stakes. These frames underscore the inherently intersectional role of labor unions in an unequal economy—as institutions that advance society-wide economic equity, racial and gender justice, and community well-being. Yet, they too often discount the value of unions’ primary statutory role: bringing workers together to improve their working conditions. In so doing, they fail to reclaim the inherently political vision of work and workers lost to the law of apolitical economy.

In conclusion, I reflect on the broader implications of this project. The dialogic relationship between law and social movements over the twentieth century—how labor unions were steered away from rights claims while other social movements were steered toward them—continues to shape American law and politics today. In turn, upending the law of apolitical economy can be about more than reclaiming the normative stakes of labor unions; it offers an opportunity to reclaim a transformative vision of rights.

AUTHOR. Law, Economics, and Politics Fellow, UC Berkeley School of Law. I am grateful for feedback from a veritable village of scholars: Catherine Albiston, Guy-Uriel Charles, Lauren Edelman, Cynthia Estlund, Yan Fang, Catherine Fisk, William Forbath, Charlotte Garden, Clayton Gillette, David Singh Grewal, Linda Hamilton Krieger, Sophia Lee, Taeku Lee, Lawrence Liu, Deborah Malamud, Joy Milligan, Yael Plitmann, James Pope, Benjamin Sachs, Laura Stoker, Christopher Tomlins, David Trubek, Ntina Tzouvala, Kim Voss, and Noah Zatz, as well as participants and attendees of the 2022 Culp/Emerging Scholars Conference, the 2021-22 Berkeley Empirical Legal Studies Fellows Seminar, the 2021 Yale Law and Political Economy Conference, the 2020 American Association of Law Schools New Voices in Workplace Law Conference, the 2020 American Sociological Association Conference, the 2019 Colloquium on Scholarship in Employment and Labor Law, and the 2019 Law and Society Association Conference, and last but not least, all of my job talk interlocutors. I am thankful for the excellent editorial assistance of A.D. Sean Lewis and the expert statistical assistance of Kim Love. Finally, I am deeply indebted to the *Yale Law Journal* editorial staff, particularly Caroline Parker, Fernando Rojas, and Malina Simard-Halm, who challenged me to clarify my writing and sharpen my ideas, and thereby exponentially improved this piece. Empirical work was supported by a Berkeley Institute for Research on Labor and Employment 2018-19 Research Award. IRB Approval for research discussed within (Project No. 2019-02-11796) was granted on April 18, 2019. Portions of Section III.B were featured on the Law and Political Economy blog on July 29, 2021: <https://lpeproject.org/blog/labor-bargaining-and-the-common-good> [<https://perma.cc/JEC7-UTCW>]. I dedicate this Feature to the memory of Professor Lauren Edelman, who twenty years ago challenged sociolegal scholars to “demonstrate the links at the societal level” between legality, morality, and the “social arena . . . [that] we conventionally label ‘the economy.’” Lauren B. Edelman, *Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality*, 38 LAW & SOC’Y REV. 181, 188 (2004).



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Given the fact that both labor and business are perceived as powerful, self-interested forces that do not have the public's interest at heart, why are labor organizations frequently held in greater disdain than business? The answer may lie in the belief that business does some good for everyone in society, even if only incidentally, while unions act primarily to benefit their members and leaders, and have only a negative impact on the rest of the public.

— Seymour Martin Lipset and William Schneider¹

INTRODUCTION

Americans are changing their minds about labor unions. Over the past decade, there has been a massive shift in public opinion on organized labor.² In 2009, during the depths of the Great Recession, only 48% of the American public said they approved of labor unions. This was unions' lowest approval rating *ever* and the first time that unions failed to command majoritarian public support.³ But from this nadir, the unexpected happened. Over the next decade, unions' approval rate climbed steadily more than twenty percentage points, up to 71% by 2022.⁴ This shift represents one of the most rapid changes in public attitudes toward unions in American history.

Yet in this Feature, I argue that even in this moment of renewed public interest, the American conversation about unions remains constrained in ways that could impede the political and legal transformations necessary to create a better future for workers. Current levels of support for labor unions remain conditional, tied to arguments about labor's broader societal benefits, but as yet ambivalent about greater freedom for working people as its own social good. In other words, how Americans talk about unions today still overlooks some of the most powerful normative arguments for what they do. This is unsurprising. As I will show, these arguments have been obscured, and purposefully so, for a long time.

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1. SEYMOUR MARTIN LIPSET & WILLIAM SCHNEIDER, *THE CONFIDENCE GAP: BUSINESS, LABOR, AND GOVERNMENT IN THE PUBLIC MIND* 215 (1983).
 2. *Labor Unions*, GALLUP, <https://news.gallup.com/poll/12751/labor-unions.aspx> [<https://perma.cc/MD9B-7FY2>]; Megan Brennan, *Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Sept. 2, 2021), <https://news.gallup.com/poll/354455/approval-labor-unions-highest-point-1965.aspx> [<https://perma.cc/9CJV-U2BP>].
 3. Brennan, *supra* note 2.
 4. Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), <https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx> [<https://perma.cc/BH82-4G5F>].

In making this claim, I use a law-and-political-economy framework to intervene in contemporary labor-law scholarship.⁵ During an era of union decline, legal scholarship on labor unions has tended to focus on structural issues: declining union density, changing economic conditions, and the technical insufficiencies of labor law.⁶ It has had much less to say about changes in what people think about unions and why – about the ideational and ideological currents that shape, and are shaped by, material realities. To the extent that this scholarship has discussed economic consciousness and political will, it has treated those phenomena as exogenous to the legal discussion, as politics or culture, but not law.

In contrast, fields such as history, sociology, and political science have paid greater attention to cultural understandings of unions. Paramount among these, labor historian Nelson Lichtenstein has argued that *ideas* are central to understanding American labor unions and their place within American political economy.⁷ Drawing from a cultural-history tradition, he argues that unions have always been engaged in what he calls “the contest of ideas,” among their other battles.⁸ In dialogue with corporations, politicians, and other institutional groups and social movements, Lichtenstein argues that unions help shape how people understand the economy and the role of workers and unions within it.⁹ And yet, this scholarship has sometimes left law, as both a source of ideas and a reflection of them, underexplored.

If legal scholarship has focused on law but not ideas, and other fields have focused on ideas but not law, this Feature insists on synthesis. It explores the relationship between law and the contest of ideas. Specifically, it argues that the American conversation about unions has been unduly constrained, in no small part, because of how the law has framed them. During the New Deal, unions

5. “Law and political economy” is the phrase increasingly used to refer to a field of diverse scholarship united by its commitment to studying the field of human action commonly referred to as “the economy” within its social, cultural, political, and legal context. Drawing from fields like economic sociology, behavioral economics, critical legal studies, critical race theory, legal realism, and the historical study of political economy, this intellectual project broadens the lens of twentieth-century economic analysis to focus on the political origins and consequences of economic activity. Law is central to this inquiry because of its role in structuring economic relationships and transactions. From a law-and-political-economy perspective, law is “the essential connective tissue between political judgment and economic order.” Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1792 (2020).

6. See *infra* notes 33-40 and accompanying text.

7. NELSON LICHTENSTEIN, A CONTEST OF IDEAS: CAPITAL, POLITICS, AND LABOR 2-3 (2013).

8. *Id.*

9. *Id.*

were constitutionally categorized as economic actors engaging in commercial activity, and consequently denied recognition as political actors engaging in normative advocacy.¹⁰ I refer to this legal move and all the accommodations that have followed from it as the “law of apolitical economy.” I use this term to describe a jurisprudential paradigm that actively minimized the normative stakes of labor unions’ statutory purposes in part through categorizing them as “economic” and therefore outside of the bounds of broader claims-making about societal values. I argue that this paradigm still shapes how Americans understand the stakes of labor unions today. The upshot is that even with support for unions currently at a sixty-year high, that support remains insufficiently tied to support for *workers as workers*.

It was not always this way. In the late 1800s and early 1900s, American unions raged against the inequalities of wage labor, insisting that there was a collective moral imperative to increase worker well-being and worker freedom. They championed ideals of labor republicanism and industrial democracy, and they spoke of fundamental rights under the First, Thirteenth, and Fourteenth Amendments. In so doing, they insisted that the labor question was an inherently political question.

But in the wake of the Great Depression, liberal lawyers and economists prioritized a different kind of justification for what unions do. They framed unions, and laws supporting them, as sound industrial policy, essential to economic recovery. According to then-dominant economic ideas (early pillars of what would later be referred to as Keynesianism), increased worker income meant increased purchasing power and economic growth. Similarly, liberal policymakers argued that a rationalized, legal process for collective bargaining would promote industrial peace, channeling the worker radicalism that had so recently halted production in factories across the country. The Supreme Court adopted these rationales, noting in 1940 that laws supporting worker bargaining power “have an importance which is *not less than the interests of those in the business or industry directly concerned*.”¹¹ Labor unions served the common good because of their benefits for business, for industry, for the economy writ large, and only by extension thereof, for workers. Labor law was an act of interest convergence, not just radicalism.

10. In this Feature, unless otherwise specified, I use the term “political” to refer to ideas and actions oriented toward shaping group decision-making through normative claims about what *should* be (as opposed to factual or empirical claims about what *is* or *will be*). As such, I mean something broader than electoral or party politics, but narrower than the exercise of power. See SHELDON S. WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT 316 (2016); SHELDON S. WOLIN, *Fugitive Democracy*, in FUGITIVE DEMOCRACY AND OTHER ESSAYS 100, 100–13 (Nicholas Xenos ed., 2016) (articulating a vision of the political existing outside of politics).

11. *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940) (emphasis added).

The justification of labor law based on a technocratic claim about the relationship between working conditions and the health of the American economy had long-term consequences. Armed with an economic rationale for unions, New Dealers did not merely abandon broader normative justifications, they actively undermined them. The Keynesian compromise which treated economics as science, rather than values, required a concurrent legal accommodation: economic regulation as rational public policy rather than fundamental rights.

The result, what I call the law of apolitical economy, is an ongoing and untenable line-drawing in constitutional law and broader culture that bifurcates economic issues from sociopolitical ones, treating the former as the domain of technocratic decision-making, while reserving the full scope of “normative” argumentation, whether about rights, fairness, democracy, or even just plain old political contestation, for the latter. While it is well-known that fear of *Lochner v. New York*¹² liberty-of-contract principles helped motivate the *Carolene Products* deconstitutionalization of “regulatory legislation affecting ordinary commercial transactions,”¹³ the impact of this choice on sociolegal understandings of unions remains largely unexplored. As I show herein, one of the primary impacts has been the carving out of unions’ statutorily defined role from the material and symbolic benefits of constitutional protection under the First Amendment, and then, over time, from legibility as a social movement.

While labor-law scholars have traced the brokering of the Keynesian compromise, this Feature tells the story of its longer-term consequences. Interrogating the law of apolitical economy is essential to understanding what happened to unions in the late twentieth century. Specifically, it helps explain why the resurgence of neoclassical economic principles in the 1970s was catastrophic for the legitimacy of labor unions. When supply-side economists flipped the Keynesian script, they claimed that corporate productivity, not worker purchasing power, grew the economy and furthered the general welfare. Unions doing what they were statutorily designed to do became rent-seeking at the public’s expense. At the same time, unions’ ability to respond with broadly resonant normative arguments was hampered by its previous concessions. Rights had become the “master frame” for articulating justice claims, and bread-and-butter unionism was no longer legible in this register. From the 1970s through the early

12. 198 U.S. 45 (1905).

13. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938); see also Jack Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 293-94 (1989) (“*Carolene Products* is the post-1937 Court’s first extended discussion and elaboration of [the New Deal] theory of judicial review. . . . [A few previous cases] announce[d] the end of the *Lochner* period in Supreme Court jurisprudence; . . . they constitute the boundary that separates modern from premodern constitutional law *Carolene Products* is the first way station in this hitherto uncharted territory.”).

2000s, union membership plummeted, particularly in the private sector.¹⁴ Public support for unions did too.

Faced with a decimated membership and a legitimacy crisis, labor-movement organizations have been forced to reassert the normative stakes of unionization. In the past decade, unions have used what social scientists refer to as “collective action frames” to show that unions further causes with defined normative stakes.¹⁵ Breaking with the underpinnings of the National Labor Relations Act (NLRA), these innovative frames tend to decenter unions’ benefits for worker majorities. Instead, they emphasize the benefits of organized labor for differently delineated groups: for a populist “people,” a 99% linked by a discursively powerful, yet materially tenuous, solidarity; for service recipients, such as students and patients who benefit from “bargaining for the common good”; and for subgroups of marginalized workers underserved by New Deal protections: workers of color, immigrant workers, women workers.¹⁶ These frames directly rebuke the neoliberal framing of unions as rent-usurpers. Each depicts labor as a social movement advancing a broader public interest, not just an interest group serving its members.

Perhaps because of this public-facing work, support for labor unions is currently as high as it has been in sixty years. Yet, I suggest that the legacy of the law of apolitical economy still shapes the contemporary conversation. Leading union collective-action frames too often discount the value of unions’ primary statutory imperative—allowing workers to come together to improve their working conditions. And drawing from my ongoing empirical work, I argue that notwithstanding currently high levels of public support, the public remains ambivalent about supporting unions’ core statutory functions. Rather, at least for some people, public support goes *down* when unions’ benefits to organized workers are emphasized. The normative vision once advanced by unions proclaimed that work was a site of political domination and that workers deserved more freedom, autonomy, and economic security. Lost to the law of apolitical economy, that normative vision may be the hardest one to recreate. But it may also be the most transformative.

14. See *infra* notes 200–203 and accompanying text for a discussion of why the trajectories of private- and public-sector unionism have diverged.

15. See, e.g., Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOCIO. 611, 611 (2000) (summarizing scholarship on “collective action frames and framing processes in relation to social movements”).

16. Similarly, much contemporary scholarship on the labor movement emphasizes the relationship between unionism, broader political economy, and other important social issues. See, e.g., JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 2 (2014) (“[O]rganized labor wasn’t simply a minor bit player in the ‘golden age’ of welfare capitalism It was *the* core equalizing institution.”).

This Feature proceeds as follows. Part I sets forth the historical, legal, and conceptual background. Here, I detail the creation of the jurisprudential paradigm I refer to as the law of apolitical economy. In Part II, I argue that there were long-term costs to the law of apolitical economy, for unions and for their vision of justice of work. Part III focuses on the past decade, which I theorize as a pivotal new chapter in the contest of ideas. As unions and their supporters seek to remake the case for unions, the legacy of the law of apolitical economy lives on. Current support for unions, in other words, belies ongoing ambivalence about worker freedom.

Finally, in Part IV, I call for renewed attention to unions' lost normative vision, one which included fundamental rights at work. With its legitimacy tied to the "alchemy of Keynesian economics,"¹⁷ the labor movement was counseled away from the "alchemy of rights."¹⁸ Law was mobilized in one social context to construct unions' demands as economic commonsense, just as it was later mobilized to construct other movements' demands as rights. As American progressivism struggles to theorize and implement a politically practicable intersectionality, it is important to continue to deconstruct this purposeful separation in American law between the material and the dignitary, economics, and rights.

I. JUSTIFYING NEW DEAL-ERA LABOR LAW

[Since] the readiness of individuals to spend and invest depends on their incomes, a relationship is set up between aggregate savings and aggregate investment Rightly regarded this is a banal conclusion. But it sets in motion a train of thought *from which more substantial matters follow*.

—John Maynard Keynes¹⁹

I begin by introducing the historical and legal conversations in which this Feature intervenes. In an era of increasing economic inequality, caused in significant part by union decline,²⁰ legal scholarship has tried to make sense of the failure of labor law to facilitate unionization. As Sharon Block has pointedly emphasized, workers were more likely to be unionized when doing so was legally

17. Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97, 104 (1993).

18. Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 406 (1987).

19. John Maynard Keynes, *Preface to the French Edition* of JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY*, at xvii (2018) (emphasis added).

20. Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 513-14 (2011).

unprotected, than they are today, after eighty years of federal legal protection.²¹ Has labor law somehow served as an impediment to unionization? If so, how and why? To answer these questions, contemporary legal scholarship on labor unions has tended to emphasize the technical insufficiencies of labor law, in the face of changing material conditions. It has had less to say about the normative insufficiencies of labor law, in the face of changing ideological conditions.²²

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21. Sharon Block, *Go Big or Go Home: The Case for Clean Slate Labor Law Reform*, 41 BERKELEY J. EMP. & LAB. L. 167, 170 (2020).
 22. There are many important exceptions to this statement. This Feature builds upon—and would not have been possible without—a host of revelatory pieces of legal scholarship that have: uncovered the broader normative vision and would-be constitutional claims of early American labor unions, see, e.g., James Gray Pope, *The Thirteenth Amendment versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1, 103 (2002) [hereinafter Pope, *The Thirteenth Amendment*]; James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997) [hereinafter Pope, *Labor's Constitution of Freedom*], named the context and costs of labor law's legal justifications and the insularity of its normative world, see, e.g., CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 52-59 (Louis Galambos & Robert Gallman eds., 1985); Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379 (1993); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1513 (1981), documented the neoliberal turn, its implications for law, and its specific case against unions, see, e.g., Deborah Dinner, *Beyond 'Best Practices': Employment-Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059 (2017); Brishen Rogers, *Three Concepts of Workplace Freedom of Association*, 37 BERKELEY J. EMP. & LAB. L. 177 (2016); David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1 (2014), traced the law and political economy of First Amendment doctrine over time and the incoherency of its application to unions, see, e.g., Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2063 (2018); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1996 (2016); LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE* (2016); Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617, 2626 (2011); Cynthia L. Estlund, Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938, 960 (1982), identified the historical specificity, path dependency, and unexpected compromises that underlie the constitutional claims advanced and won by social movements, see, e.g., SOPHIA LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (2014); SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* (2011); RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007), articulated new normative and constitutional arguments for labor unions, see, e.g., Jedediah Purdy, *"Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment,"* 118 COLUM. L. REV. 2161 (2018); Noah D. Zatz, *Does Work Law Have a Future if the Labor Market Does Not?*, 91 CHI.-KENT L. REV. 1081 (2016), and sounded the clarion call for a renewed vision of progressive constitutional political economy, see, e.g., JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* 442 (2022); Martha T. McCluskey, *Constitutional Economic Justice: Structural Power for "We the People,"* 35 YALE L. & POL'Y REV. 271 (2016); Kate Andrias, *Janus's Two Faces*,

To move the conversation forward, this Feature refocuses on the role that law has played over the past eighty years in framing the stakes of unionization, how it has shaped and narrowed the contest of ideas. Ideas about labor unions are particularly important because of the power granted unions by law. The legal structure of unions raises questions. Laws are supposed to serve the public interest, but labor law licenses groups of workers to raise hell and delay everyone's morning commute. What is the public interest in that? As I will show, law has equally helped provide answers to this question—albeit some more compelling than others.

And so, here I revisit how, during one of the most unsettled moments in American economic and constitutional history, the National Labor Relations Act became (and remained) law. In this moment, ideas about unions were repackaged, reflecting the interests of labor's new crisis-era supporters, who then mobilized them for a skeptical Supreme Court. The stakes of labor unions were deemed economic, not political. Unions had once been theorized as a stepping stone to a more expansive vision of economic rights.²³ Instead, in the United States, just the opposite happened.²⁴

A. *What's Wrong with Labor Law?*

It has been a dismal several decades for American labor unions. Notwithstanding the recent resurgence in public support for unions and an even more recent resurgence in workers actively seeking union representation,²⁵ unions remain on the defensive. Labor-union density today is half of what it was in the

2018 SUP. CT. REV. 21; Kate Andrias, *Building Labor's Constitution*, 94 TEX. L. REV. 1591 (2016) [hereinafter Andrias, *Building Labor's Constitution*].

23. See T.H. Marshall, *Citizenship and Social Class*, in T.H. MARSHALL & TOM BOTTOMORE, *CITIZENSHIP AND SOCIAL CLASS 2* (Pluto Press 1992) (1950).

24. This story I tell here is accordingly also one of American exceptionalism. In many countries with robust labor unions, unions are rights bearers under governing constitutions. See ADAM CHILTON & MILA VERSTEEG, *HOW CONSTITUTIONAL RIGHTS MATTER* 265-92 (2020) (examining the constitutional "right to unionize" in different countries). Similarly, within the jurisprudence of international human rights, economics is not cordoned off from constitutional recognition; rather, there are a host of explicitly social and economic rights, including rights to unionize, strike, and collectively bargain. See *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, INT'L LABOUR ORG. (2022), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf [<https://perma.cc/DCN7-QLDG>]. See also *European Court of Human Rights Reaffirms Right to Strike in Key Decision*, INT'L TRADE UNION CONFEDERATION (Nov. 23, 2018), <https://www.ituc-csi.org/european-court-of-human-rights-re> [<https://perma.cc/FF7K-PPGZ>].

25. Press Release, Nat'l Lab. Rels. Bd., First Three Quarters' Union Election Petitions Up 58%, Exceeding All FY21 Petitions Filed (July 15, 2022) <https://www.nlr.gov/news-outreach>

early 1980s and less than a third of what it was during labor's 1950 heyday.²⁶ This aggregate data, buttressed by the growth of public-sector unionism in the 1960s and 1970s, obscures the much more significant decline in private-sector unionism.²⁷ The share of private-sector workers in a union has fallen from one in three in the 1950s, to one in seven in the early 1980s, to about one in sixteen today.²⁸ These decimated numbers are consequential for union power. Smaller unions tend to be weaker unions. Strikes are down even more than membership (albeit with a notable uptick in 2018 and 2019).²⁹ The union wage premium is down.³⁰ Union contracts provide less substantive worker protections than they once did.³¹ And while it seemed that pandemic-era organizing might augur an end to this trend, it has not yet managed to reverse the steady decline.³²

/news-story/correction-first-three-quarters-union-election-petitions-up-58-exceeding [https://perma.cc/89DZ-AAQ2].

26. Compare GERALD MAYER, CONG. RSCH. SERV., RL32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES, at CRS-23 (2004), with News Release, Bureau of Lab. Stat., Union Members—2020 (Jan. 20, 2022), <https://www.bls.gov/news.release/pdf/union2.pdf> [https://perma.cc/7QAU-NPWG].
27. In 2020, 6.3% of private-sector workers and 34.8% of public-sector workers were members of unions; labor-union membership today is accordingly almost equally divided between public-sector (7.2 million) and private-sector (7.1 million) workers. News Release, *supra* note 26. In contrast, at midcentury, union-membership rates were almost three times higher in the private sector than in the public sector, and the vast majority of union members were private-sector workers. See JULIA WOLFE & JOHN SCHMITT, A PROFILE OF UNION WORKERS IN STATE AND LOCAL GOVERNMENT 2 (2018).
28. Compare News Release, *supra* note 26, with Megan Dunn & James Walker, *Union Membership in the United States*, U.S. BUREAU OF LAB. STAT., (Sept. 2016), <https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/pdf/union-membership-in-the-united-states.pdf> [https://perma.cc/R7YS-TG4P].
29. See Diana S. Reddy, “There Is No Such Thing as an Illegal Strike”: Reconceptualizing the Strike in Law and Political Economy, 130 YALE L.J.F. 421, 423 (2021).
30. Thomas A. Kochan & William T. Kimball, *Unions, Worker Voice, and Management Practices: Implications for a High-Productivity, High-Wage Economy*, 5 RUSSELL SAGE FOUND. J. SOC. SCI. 88 (2019).
31. See, e.g., Alex Press, *How Two-Tier Unions Turn Workers Against One Another*, WASH. POST (Aug. 29, 2018, 5:40 PM EDT), <https://www.washingtonpost.com/outlook/2018/08/30/how-two-tier-unions-turn-workers-against-each-other> [https://perma.cc/KJ5F-BKDX] (noting the “lowering of union-contract standards”).
32. See Press Release, Nat’l Lab. Rels. Bd., Election Petitions Up 53%, Board Continues to Reduce Case Processing Time in FY22 (Oct. 6, 2022), <https://www.nlr.gov/news-outreach/news-story/election-petitions-up-53-board-continues-to-reduce-case-processing-time-in> [https://perma.cc/CN3U-2L26]; see also Bureau of Lab. Stat., *Union Membership Rate Fell by 0.2 Percentage Point to 10.1 Percent in 2022*, U.S. DEP’T LAB., (Jan. 24, 2023), <https://www.bls.gov/opub/ted/2023/union-membership-rate-fell-by-0-2-percentage-point-to-10-1-percent-in-2022.htm> [https://perma.cc/KGN4-3Z45].

For the past several decades, labor-law scholars have worked to theorize the role of law in this decline. For the most part, they have argued that labor law has failed to keep pace with structural economic change and that the legal rules that facilitate union organization and collective bargaining are no longer adequate to effectuate employee free choice in a postindustrial economy. In what became a leading metaphor, Cynthia L. Estlund argued in 2002 that labor law had been “ossified.”³³ Estlund showed that, for various reasons, labor law had been insulated from “democratic renewal” and rendered incompatible with a changed economy, a form of what political scientists call “policy drift.”³⁴ Labor-law scholars writing in this vein have rightly noted that the specifics of the statute presume midcentury economic organization and patterns of employment; due to changes in the structure of work since the late 1970s, the assumptions no longer fit economic realities.³⁵ Summing up this perspective, Joel Rogers emphasized problems of legal *technologies*:

The core ideas of [the New Deal] system – that workers should enjoy associational rights within and without the firm and that collective worker organizations can contribute to the vitality of the American economy – remain perfectly sound today. The problem is that the particular ways in which these ideas were institutionalized in the New Deal system are increasingly inapposite to present circumstances.³⁶

Technical problems merit technical solutions. Contemporary legal scholars have accordingly proposed a host of potential improvements, such as more flexible representation procedures, reversal of the doctrine on permanent replacements, and harsher penalties for employer unfair labor practices.³⁷ Others have

33. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1527 (2002).

34. *Id.* at 1530–31; see also Lawrence Mishel, Lynn Rhinehart & Lane Windham, *Explaining the Erosion of Private-Sector Unions: How Corporate Practices and Legal Changes Have Undercut the Ability of Workers to Organize and Bargain*, ECON. POL’Y INST. 5–6 (Nov. 8, 2020), <https://files.epi.org/pdf/215908.pdf> [<https://perma.cc/AEZ6-A4E8>] (describing the way in which labor law’s “support for workers’ ability to pursue union organizing and collective bargaining has declined over many decades” as an example of “policy drift”).

35. See, e.g., KATHERINE STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* 5 (2004); Janice R. Bellace, *The Future of Employee Representation in America: Enabling Freedom of Association in the Workplace in Changing Times Through Statutory Reform*, 5 U. PA. J. LAB. & EMP. L. 1 (2002).

36. Rogers, *supra* note 17, at 98.

37. For examples of these proposals, see Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655 (2010); Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827 (1996); Mark Barenberg, *Democracy and Domination in the Law of*

more hopefully emphasized the “hydraulic” effect of labor law’s demise, the ways in which workers, unions, and workers’ centers can and do leverage other laws for building power, redistributing wealth, and exercising a voice in the workplace.³⁸ Kate Andrias has documented unions’ turn to public policy — “the new labor law” — to improve working conditions through the political process when representation at the bargaining table has proven impossible.³⁹ Most recently, a cadre of leading legal scholars formulated a vision for “clean slate” reform, a comprehensive, multidomain plan for rebuilding labor law.⁴⁰ Noting that the technical specifics of the NLRA never fully effectuated the purposes set forth in its preamble, these scholars propose a substantial reworking.⁴¹ The upshot of this academic consensus has been summarized by one scholar as “save the preamble but not the rest.”⁴²

This scholarship is essential. There is no question that labor law is outdated and in drastic need of reform to make unionization meaningfully accessible to workers. And yet, drawing from a law-and-political-economy framework, I suggest that focusing on economic change independent of its political and social context provides an incomplete, and potentially misleading, picture.⁴³ As such,

Workplace Cooperation: From Bureaucratic to Flexible Production, 94 COLUM. L. REV. 753 (1994); Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 (1993); Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397 (1992); Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REGUL. 355 (1990); Clyde Summers, *Unions Without a Majority—A Black Hole?*, 66 CHI.-KENT L. REV. 531 (1990); and Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1 (1988).

38. See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2687 (2008); Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.U. L. REV. 385, 411 n.107 (2006); JANICE FINE, WORKERS CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 157–61 (2006); JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 149, 185–236 (2005).

39. See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 7–10 (2016); see also Michael Oswalt, *Alt-Bargaining*, 82 LAW & CONTEMP. PROBS. 89, 89–90 (2019) (describing the ways in which labor movements have advocated for change outside the traditional bargaining process).

40. Sharon Block & Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy*, HARV. L. SCH. LAB. & WORKLIFE PROGRAM 1–8 (2019), https://uploads-ssl.webflow.com/5fa42ded15984caa002a7ef2/5fa42ded15984e5a8f2a8064_CleanSlate_Report_FORWEB.pdf [<https://perma.cc/TN8V-H848>].

41. *Id.*

42. Dorothy Sue Cobble, *A Wagner Act for Today: Save the Preamble but Not the Rest?*, 14 LAB. 43 (2017).

43. I do not mean to suggest that ideas matter and material realities do not. Rather, my point is that ideas are how we make sense of material realities.

this Feature focuses on the *ideas* that have facilitated and followed from the economic changes noted above.⁴⁴ I will argue that the problem for American organized labor has never been just the “particular ways” in which labor law is institutionalized. The problem has equally been the insufficiency of its “core ideas” to justify what the statute asks of workers, employers, and the public. But other possibilities have always existed.

This revisiting of ideas could not be more timely. The past ten years have been a critical moment in the contest of ideas. Public opinion about labor unions has skyrocketed over the past decade, from a historical nadir to the highest level of support in sixty years.⁴⁵ But notwithstanding a recent surge in organizing successes, public support has not yet translated into a statistically meaningful increase in union membership rates. Nor has it effectuated labor-law reform. Meanwhile, recent debates about police unions’ role in enabling and protecting violent and racist officers and teachers’ unions role in resisting the opening of schools during the COVID-19 pandemic have highlighted the potential limits of current ideas.⁴⁶ As Benjamin Levin recently noted, “Worker power is often referred to romantically or idealistically as an unqualified good, but when worker power has been wielded, it hasn’t necessarily been met with resounding support, particularly from liberals or progressives.”⁴⁷

Why has American support for unions been so conditional? Which ideas have prevailed, and why? And what are the alternatives? These are the questions this Feature explores.

44. Studying ideas has always presented methodological challenges. For historical ideas from the New Deal era, I rely on the careful work of historians and other scholars, as well as some primary-source documents. For more contemporary ideas, I analyze existing public-opinion data, engage in discourse analysis, and present findings from an exploratory survey experiment, which I conducted in 2019.

45. See Brennan, *supra* note 2.

46. See, e.g., Steven Greenhouse, *How Police Unions Enable and Conceal Abuses of Power*, NEW YORKER (June 18, 2020), <https://www.newyorker.com/news/news-desk/how-police-union-power-helped-increase-abuses> [<https://perma.cc/6BPX-YRA6>] (“Critics of police unions stress that the unions have far too much power, and contend that robust protections give many police officers a sense of impunity.”); Madeline Will, *How Teachers’ Unions Are Influencing Decisions on School Reopenings*, EDUC. WK. (Dec. 2, 2020), <https://www.edweek.org/teaching-learning/how-teachers-unions-are-influencing-decisions-on-school-reopenings/2020/12> [<https://perma.cc/F3J4-G6VL>] (describing the “narrative that [teachers’ unions are] acting as obstructionists and pushing to keep schools closed”).

47. Benjamin Levin, *What’s Wrong With Police Unions?*, 120 COLUM. L. REV. 1333, 1391-92 (2020) (footnote omitted).

B. Private Organizations, Public Interest

In this Section, I briefly explain the fundamentals of American labor law, vis-à-vis the contest of ideas. My purpose is both to situate those less familiar with labor law, and to proffer a new take for the more familiar. Labor unions are a distinct legal technology, situated between the state and the labor market. In both organizational form and substantive rights and obligations, labor unions are a halfway measure, designed to balance competing values. Their peculiar structure reflects political choices born of the contest of ideas.

Before the enactment of federal labor law, unions were private associations. Rooted in feudal guilds and inspired by the successes of the modern corporation, workers joined together to consolidate worker power and exercise control over their lives.⁴⁸ In a producer-driven economy, they had a proactive role. They controlled entry and training into skilled roles and set the terms and conditions under which they worked—not just wages or days off, but what they would produce and for whom.⁴⁹ In the mid-1800s, the federal government had not yet taken a proactive role in protecting workers, and unions largely did not seek the assistance of state power. Rather, the organizational ethos of these unions emphasized autonomy, from both capital and the state.⁵⁰

With industrialization and the explosive growth of corporate power, labor unions evolved, inching closer to their modern form. Industrial unions adopted new strategies based on their members' positioning within the labor market.⁵¹ Craft unions for "skilled" workers had focused on controlling labor supply to ensure there were no more workers than the current market could reasonably support. In contrast, industrial unions sought power through mass organization.⁵² Through numbers alone, these unions would command power. If employers refused to negotiate, workers could collectively withdraw their labor power and force them back to the table.

The radical disjuncture of the Great Depression was a turning point for the relationship between unions and law. Up until that time, law had largely been a tool wielded *against* collective labor power.⁵³ By law, unions had been deemed

48. MELVYN DUBOFSKY & JOSEPH A. MCCARTIN, *LABOR IN AMERICA: A HISTORY* 47-54 (9th ed. 2017).

49. *Id.*

50. See Mark Walker, "Manliness is the Backbone of Our Nature": Masculinity and Class Identity Among Nineteenth-Century Railroad Workers in West Oakland, California, 25 *SOC'Y FOR CAL. ARCHAEOLOGY PROC.* 1, 2 (2011).

51. Richard Hyman, *The Future of Unions*, 1 *JUST LABOUR* 7, 8 (2002).

52. *Id.*

53. William E. Forbath, *The Shaping of the American Labor Movement*, 102 *HARV. L. REV.* 1109, 1115-16 (1989).

criminal conspiracies or restraints on trade. In the era of government by injunction, courts regularly enjoined union collective action, and the state police and federal national guard violently forced workers to abide.⁵⁴ Increased public support for unions in the early 1900s resulted in some legislative victories, but these were largely defensive, shielding unions from some forms of liability, but providing little affirmative support.⁵⁵

This changed during the New Deal. Economic devastation and popular unrest created an unexpected opportunity to enact a statute that affirmatively recognized the collective rights of workers and unions and that provided unions with some state support. This kind of legal protection had largely not been sought, nor even imagined, by most unions. But when Senator Robert Wagner took lead in crafting such a statute, unions signed on.⁵⁶

Originally enacted in 1935, the NLRA sets forth the leading statutory framework for collective labor organization in the United States.⁵⁷ It applies to most private-sector workers, and, in turn, has served as the model for most public-sector labor-relations laws.⁵⁸ Developed at a time when the role of the American state as regulator of the economy, as well as the constitutional framework for doing so, were in rapid flux, the NLRA stands out for its heterodox use of state power, relative to the midcentury movements that followed.⁵⁹ It does not specify outcomes; it changes bargaining endowments.

In this way, the NLRA can be seen as a political balancing act. It provides some government support for the purposes of unions, but only insofar as consistent with 1930s constitutional anxieties, as well as the labor movement's own brand of laissez-faire.⁶⁰ Federal labor law straddles the line between public and private, state and market, regulation and governance.⁶¹ And in so doing, it constructs a largely *sui generis* legal and organizational form. As Cynthia L. Estlund

54. *Id.* at 1148-49.

55. See, e.g., Clayton Antitrust Act of 1914, ch. 323, 38 Stat. 730 (codified at 15 U.S.C. § 17).

56. IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 27-28 (Da Capo Press 1975) (1950).

57. 29 U.S.C. § 151 (2018).

58. See Cynthia L. Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 194 (2015) ("The [National Labor Relations Act] NLRA serves as the primary point of reference here; it establishes a template of sorts for most private and public sector labor law in the United States.").

59. See *id.*; VICTORIA HATTMAN, *LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES* (1993).

60. See Reddy, *supra* note 29, at 434-35.

61. Cf. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 368-69 (2004) (explaining that the NLRA, unlike many New Deal-era statutes, was largely a governance regime, in that it created a process for

has explained, unions belong to a rare category of institutions: private organizations that serve public regulatory functions.⁶² They are, as she explains, largely a “constitutional anomaly.”⁶³

The NLRA does grant some affirmative rights. The law requires employers to bargain with labor organizations, to negotiate “in good faith” about terms and conditions of employment.⁶⁴ Further, it mandates that collective-bargaining processes adhere to basic minimum requirements.⁶⁵ Through its administrative authority, the National Labor Relations Board (NLRB) has continued to shape the best alternative to a negotiated agreement for workers, unions, and employers.⁶⁶ In requiring employers to engage in a particular bargaining process or face legal consequences,⁶⁷ labor law directly regulates what would otherwise be constructed as private, market relationships.⁶⁸

Yet, the statute does not mandate particular results; these are left to be worked out through bargaining between labor and management, each armed

interested parties to self-regulate). See also Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 576–77 (2021) (discussing both the promises and shortcomings of labor law as a model for political organizing).

62. Estlund, *supra* note 58, at 171.

63. *Id.* at 169. Historically, the anomalous legal role of unions was, in significant part, in deference to the mechanisms of the market economy. Unions were preferred to direct state intervention; they were a “free market” mechanism for addressing economic and social inequality. In contrast, the conservative position today is that unions are anomalous in labor’s favor. See, e.g., *Janus v. Am. Fed’n of State, Cnty. & Mun. Emps.*, 138 S. Ct. 2448, 2486 (2018) (noting the “considerable windfall that unions have received” under a construction of the First Amendment that tolerated laws requiring union nonmembers to pay “fair share” fees).

64. 29 U.S.C. § 158(d) (2018).

65. See, e.g., *id.* § 158(b) (listing unfair labor practices by unions); Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401–531 (2018).

66. See, e.g., *Guidance*, NAT’L LAB. RELS. BD., <https://www.nlrb.gov/guidance/key-reference-materials/manuals-and-guides> [<https://perma.cc/CBW2-TW7M>].

67. 29 U.S.C. § 160 (2018) (giving the National Labor Relations Board the power to “prevent any person from engaging in any unfair labor practice”). Many scholars argue that the inadequacy of those consequences, particularly in a period in which legal violations do not lead to social sanctions, reduces the efficacy of the NLRA as a regulatory regime. Many employers affirmatively choose to violate the terms of the NLRA as a putatively rational business decision. See, e.g., Robert M. Worster III, *If It’s Hardly Worth Doing, It’s Hardly Worth Doing Right: How the NLRA’s Goals Are Defeated Through Inadequate Remedies*, 38 U. RICH. L. REV. 1073, 1089–90 (2004).

68. The burgeoning law-and-political-economy literature emphasizes that the putatively “private” world of market exchange is also heavily structured by both common-law rules (e.g., property and contract) and statutes (e.g., corporate law). See, e.g., KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 6 (2019); Britton-Purdy et al., *supra* note 5, at 1813.

with their “economic weapons.”⁶⁹ While the NLRA proclaims a public policy in favor of unionization,⁷⁰ the law does not guarantee collective representation for employees. It allows workers to opt into collective representation.⁷¹ Neither does it guarantee any material benefits to employees. It requires that employers engage in “good faith” bargaining with union representatives, but that “good faith” requires neither actual agreement nor any minimum substantive standards.⁷²

This relatively nonstatist approach to workplace regulation was consistent with labor unions’ preexisting roles as private, voluntary associations. It was undergirded in part by the view that the state would always prioritize the interests of capital and that workers needed their own independent source of institutional power to effect change.⁷³ As such, much labor-law scholarship treats the enactment of the NLRA as a moment of unprecedented state support for labor, notwithstanding all that has gone wrong since.⁷⁴ And its delegation of public responsibilities to private actors has many advantages, including facilitating worker voice and building countervailing power.⁷⁵

Yet, because of this derogation of public responsibility to private actors, social theorist T.H. Marshall argued that the resolution proffered by state-supported collective bargaining would not last. Collective bargaining, he said, was

69. See Reddy, *supra* note 29, at 435-36 (discussing the concept of “economic weapons”).

70. There is a debate about whether following the Taft-Hartley Act amendments to the NLRA, the statute still sets forth a public policy in favor of collective bargaining or only a policy in favor of employee “free choice” regarding the matter. See, e.g., Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2034-36 (2009).

71. 29 U.S.C. § 157 (2018) (“Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or all of such activities”); see also Steven L. Willborn, *Industrial Democracy and the National Labor Relations Act: A Preliminary Inquiry*, 25 B.C. L. REV. 725, 734 (1984) (explaining the permissive nature of industrial democracy created by the NLRA). Recent criticisms of the Act have emphasized that the statute is therefore strangely ambivalent about “industrial democracy.” After all, in no other democratic system do citizens start with a default of autocracy and then have to affirmatively opt into democracy. See Benjamin I. Sachs, *Law, Organizing, and Status Quo Vulnerability*, 96 TEX. L. REV. 351 (2017).

72. 29 U.S.C. § 158(d) (2018).

73. CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 52-59 (Louis Galambos & Robert Gallman eds., 1985).

74. See Karl E. Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 2 (1988); Stone, *supra* note 22, at 1513. But see TOMLINS, *supra* note 73, at 317-18 (arguing that the NLRA was adopted with the goal of “labor peace” rather than support for organized labor).

75. See Andrias & Sachs, *supra* note 61, at 576-77.

a domain “for the assertion of [an evolving view of] basic rights.”⁷⁶ As rights consciousness evolved, societies would realize that “[r]ights are not a proper matter for bargaining.”⁷⁷ Having “to bargain for a living wage in a society which accepts the living wage as a social right,” he argued, “is as absurd as to have to haggle for a vote in a society which accepts the vote as a political right.”⁷⁸ Marshall concluded that collective-bargaining regimes would fall one day, with either a return to “free markets,” or alternatively, with the state taking on more substantive responsibility for protecting social and economic rights.⁷⁹

As long as this middle ground has held, though, the state’s delegation of power to labor unions has rendered ideas about unions—what values they advance or inhibit, whether they hold too much or too little power—a prime site of political contestation. And, as I will argue below, the ability of this middle ground to hold has often turned on one primary idea: a broadly resonant cultural claim that workers’ interests are the public interest.

C. *Framing Labor Law for Lochner-Era Courts*

The American labor movement of the mid-late 1800s and early 1900s advanced inherently normative claims about the value of unionism. Unions served fundamental American ideals. Early labor leaders spoke of “labor republicanism,” the idea that a democracy required autonomy and self-determination in the economic sphere too.⁸⁰ Progressives in the early twentieth century championed an ideal of “industrial democracy,” that workers should have a voice in an otherwise authoritarian workplace.⁸¹ The 1914 Clayton Antitrust Act—labor’s first federal legislative win—insisted that market logic should not trump human rights. It proclaimed: “[T]he labor of a human being is not a commodity or article of commerce.”⁸² According to Samuel Gompers, President of the American

76. Marshall, *supra* note 23, at 40.

77. *Id.* at 40.

78. *Id.*

79. From this view, the NLRA was an attempt to save “democratic capitalism,” by finding an acceptable balance between the equality required by democracy and the inequality required by (and produced by) capitalism. *See id.* at 20–21.

80. *See, e.g.,* Alex Gourevitch, *Labor and Republican Liberty*, 18 *CONSTELLATIONS* 431, 441–42 (2011); KIM VOSS, *THE MAKING OF AMERICAN EXCEPTIONALISM: THE KNIGHTS OF LABOR AND CLASS FORMATION IN THE NINETEENTH CENTURY* (1993).

81. JOSEPH A. MCCARTIN, *LABOR’S GREAT WAR: THE STRUGGLE FOR INDUSTRIAL DEMOCRACY AND THE ORIGINS OF MODERN AMERICAN LABOR RELATIONS, 1912–1921*, at 220, 225 (1997).

82. 15 U.S.C. § 17 (2018).

Federation of Labor, that proclamation was “epochal.”⁸³ It would, he said, “mark[] the end of the old period where workers were under the shadow of slavery and the beginning of a new period [in which neither] workers nor their labor power are to be regarded as things—the property of another.”⁸⁴ Consistent with this view, labor unionists also saw themselves as effectuating constitutional values under the First, Thirteenth, and Fourteenth Amendments to the U.S. Constitution.⁸⁵

But New Dealers hoping to revolutionize American political economy in 1935 were neither labor leaders nor workers. They were politicians, lawyers, and economists with their own agendas, and who knew they would face challenges in effectuating them. Senator Wagner was especially concerned about how the Supreme Court would react to his statute.⁸⁶ This was no remote fear. The NLRA was actively under consideration by Congress on May 27, 1935, when the Supreme Court issued three unanimous decisions ruling against the Roosevelt Administration.⁸⁷ The last of those, *Schechter Poultry Corp. v. United States*, invalidated the National Industrial Recovery Act, a law with clear analogues to the NLRA.⁸⁸ Wagner acted in the middle of a political revolution that had not yet become a judicial or constitutional revolution. Making legal arguments to courts, he decided, would demand code-switching.

The NLRA’s drafters accordingly devoted “scrupulous attention to constitutionality.”⁸⁹ There was debate about how best to justify Congress’s authority to enact the statute. At the outset, some labor stalwarts argued that the statute should be framed as emanating from congressional powers under the Thirteenth Amendment. Notwithstanding the racism endemic to some unions at the time, many unionists still understood their cause as part of an ongoing challenge to the legacy of slavery. Fighting against a political economy in which workers had no choice but to sell their labor power—to render themselves fully subordinate to the power of an employer for the majority of their waking hours—implicated Thirteenth Amendment values.

83. Letter from Samuel Gompers, President of the American Federation of Labor, to the Organizers of the American Federation of Labor (Feb. 24, 1915), <http://www.gompers.umd.edu/SG%20Clayton%20defense%201915.htm> [<https://perma.cc/K4EQ-EVE2>].

84. *Id.*

85. See Pope, *Labor’s Constitution of Freedom*, *supra* note 22, at 942.

86. Leon H. Keyserling, *Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 207 (1960).

87. MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937, at 422–23 (2002).

88. 295 U.S. 495 (1935).

89. BERNSTEIN, *supra* note 56, at 88.

The politicians, lawyers, and economists working on the statute, however, insisted that the statute be framed as a regulation of commerce. This was in some part strategy. But it also reflected an evolving elite consensus about the core value of labor unions. Many liberals who had recently come to support unions had done so because of broader economic concerns. A new cadre of highly educated economists and policymakers, whose opinions were solidified in the crucible of the Great Depression, had discovered macroeconomics. And consistent with the proto-Keynesianism of the time, they believed that government intervention to promote aggregate economic demand was good economic policy. Summing up this perspective two years before the enactment of the NLRA, Secretary of Labor Frances Perkins noted:

As a Nation, we are recognizing that programs long thought of *as merely labor welfare*, such as shorter hours, higher wages, and a voice in the terms and conditions of work, are really essential economic factors for recovery, and for the technique of industrial management in a mass production age.⁹⁰

The justification of labor law under the Commerce Clause relied on two main arguments. First, consistent with Secretary Perkins's vision, it was an "essential economic factor[] for recovery," rendered logical by the dominant economic views of the time.⁹¹ By increasing worker bargaining power, labor law would increase consumers' income, stimulating aggregate demand and economic growth. Second, it would promote industrial peace. At a time when workers across the nation were striking, some in increasingly radical ways, deterring strikes with a rationalized collective-bargaining process was also good economic policy.⁹²

The preamble to the NLRA reflects the constitutional strategy of its drafters, and it arguably suffers as a result. In the late 1800s and early 1900s, labor's normative arguments had been a clarion call. In contrast, the preamble to the NLRA reads as somewhat muddled. Its most powerful normative stances are asserted in subordinate clauses. On the way to its macroeconomic concerns, the preamble notes "the inequality of bargaining power" between employers and employees who lack "full freedom of association [and] actual liberty of contract."⁹³ But its

90. STEVEN FRASER, *LABOR WILL RULE: SIDNEY HILLMAN AND THE RISE OF AMERICAN LABOR* 330 (1991).

91. *Id.*

92. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937).

93. 29 U.S.C. § 151 (2018).

intervention is premised on the purported economic effect of these infringements, not their inherent injustice.⁹⁴ Workers should have equality, freedom, and liberty, because when they do not, it “substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions.”⁹⁵

To be sure, Senator Wagner and his aide Leon Keyserling, the two who together drafted most of the bill, were invested in the law’s broader normative aspirations. They believed there was a moral case for redistribution and were particularly interested in the idea of “worker freedom.” They *also* believed in the economic arguments. In their minds, the two were complementary. As Keyserling would later reflect: “[W]e were interested in the struggle to be free as well as in the bread and butter issue. I really don’t know whether we explicitly weighed one higher than the other. They were complementary and each fed the other.”⁹⁶ It was only in the years that followed that the inherent link between these two justifications would fracture.

D. *The Law of Apolitical Economy*

In 1937, the Supreme Court upheld the constitutionality of the NLRA in a decision that reflects all the possibilities and uncertainties of that moment. In *NLRB v. Jones & Laughlin Steel Corp.*, the Court ruled that the NLRA was a reasonable exercise of Congress’s Commerce Clause power.⁹⁷ Its reasoning mirrored the statutory preamble⁹⁸—commerce *and* rights, all at the same time. Consistent with the industrial-peace argument advanced by strategic lawyers, the Court found that strikes had a major impact on commerce, and so Congress could act to deter them.⁹⁹ At the same time, the Court opined—for the first and only time in the history of Supreme Court jurisprudence on labor unions—that labor collective action was a “fundamental right.”¹⁰⁰ In 1937, and perhaps only in 1937,

94. *Id.*

95. *Id.*

96. Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 320 (1987).

97. 301 U.S. 1, 43 (1937).

98. Pub. L. No. 74-198, § 1, 49 Stat. 449, 449 (1935) (codified at 29 U.S.C. § 151) (“Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment, of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.”).

99. 301 U.S. at 43.

100. *Id.* at 33.

unions' roles in shaping commerce and in advancing rights were allowed to overlap.

One year later, the Court would decide *United States v. Carolene Products Co.*¹⁰¹ In it, the Court set forth guiding principles for judicial review in a post-*Lochner* era. The federal judiciary would reserve searching constitutional scrutiny for those cases in which majoritarian democratic processes might prove insufficient, when legislation affected “discrete and insular minorities” or intruded upon enumerated fundamental rights. In contrast, purely “commercial” regulation would henceforth be presumed not to have constitutional stakes. With this line-drawing, the Court suggested that regulation of the economy should be guided by a particular logic, crafted on a “rational basis” by legislators acting “within their knowledge and experience.”¹⁰² The goal of the *Carolene Products* framework was to protect statutes like the NLRA from invalidation by hostile courts, through categorically restricting the scope of judicial review over economic legislation. But to do so also meant deconstitutionalizing the stakes of labor unions, walking away from the emergent vision of fundamental union rights set forth in *Jones & Laughlin*. And as applied, it would mean even more than that, effectively cabining the range of legible normative arguments for labor unions within legal discourse. Labor law would be judged based on its rationality, its consistency with existing knowledge and expertise.

A few years later, the Supreme Court was called upon to adjudicate unions' actual constitutional rights under the First Amendment, in a case involving peaceful labor picketing. The resulting decision in *Thornhill v. Alabama*¹⁰³ has been heralded as a high point in Constitutional political economy,¹⁰⁴ and it was. Yet the particularities of its reasoning also highlight a real-time shift toward applying the law of apolitical economy to unions, toward purposefully eliding their full normative stakes.

In *Thornhill*, the Court struck down an Alabama statute that prohibited labor picketing. It did so by equating labor's interests with business interests, and treating them both as matters of public concern deserving of First Amendment solace. “It is recognized *now*,” the Court said, that “satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance *which is not less than the interests of those in the business*

101. 304 U.S. 144 (1938).

102. *Id.* at 153.

103. 310 U.S. 88 (1940).

104. See, e.g., JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 442 (2022) (arguing that in *Thornhill* the Court recognized the inherent political importance of labor unions).

or industry directly concerned.”¹⁰⁵ This phrasing—“not less than”—was carefully considered.¹⁰⁶ An earlier draft of the opinion said that labor’s importance “transcends” business interests.¹⁰⁷ Three years prior, when labor advocacy was a “fundamental right” all on its own, that might have been the case. But with the Court’s commitment to a deconstitutionalized economy solidified, their language needed to be precise. Good jobs and the freedom and power to fight for them were economic issues; they did not transcend them. In the Court’s pointed “now,” this categorization still worked in labor’s favor. When workers’ interests were seen as integral to the national economy, labor advocacy was a matter of public concern, worthy of First Amendment protection. But it would not always be.

Legal scholar Martha T. McCluskey has described *Carolene Products* as a constitutional theory that “treats economic justice as discretionary, separate from and subordinate to fundamental constitutional protections for political and civil justice.”¹⁰⁸ And it does so in part through line-drawing. According to the law of apolitical economy, economic issues and sociopolitical ones are not inherently bound together; they are separate categories. The NLRA intimated that unions advanced constitutional values, “actual liberty of contract” and “full freedom of association” within the economic sphere. But *Thornhill* used the NLRA’s economic justifications to firmly classify labor law on one side of the line. Having drawn that line, the law of apolitical economy then cabined the kinds of justification available. Appropriate regulation of the economy is rational, not moral.

Perhaps unsurprisingly, the Court’s protection of labor speech for its industrial importance did not last long. Over time, the law of apolitical economy would soundly carve out unions’ statutorily defined role from the material and symbolic benefits of constitutional protection under the First Amendment and an evolving constitutional conception of values-based advocacy. In time, I suggest it would also play a role in denying labor’s legibility as a rights-based movement at a time when rights had become the leading normative discourse within American culture and law.

E. *The Capital-Labor Accord*

The enactment of federal labor law ushered in a period of relative strength for American labor unions. Within labor history, the 1940s-1970s are often periodized as a time of relative acquiescence by capital to the existence, if not the

¹⁰⁵. *Thornhill*, 310 U.S. at 103 (emphasis added).

¹⁰⁶. Pope, *The Thirteenth Amendment*, *supra* note 22, at 103.

¹⁰⁷. *Id.*

¹⁰⁸. McCluskey, *supra* note 22.

demands, of organized labor. For that reason, this era is sometimes called the “capital labor accord.”¹⁰⁹ During this time, the American economy continued to grow rapidly, and large, vertically integrated firms offered stable, long-term employment for many.¹¹⁰ Union density remained sufficiently high to have a meaningful impact on the wages, benefits, and norms of the labor market as a whole.¹¹¹

The claim of an accord is contested and understandably so.¹¹² After all, just twelve years after the NLRA was enacted, the Taft-Hartley Act was passed to amend it, driven by business conservatives and a public frustrated with the post-World War II strike wave.¹¹³ These changes to the statute curtailed labor power, shifting the *raison d'être* of labor law from encouraging collective bargaining to effectuating employee “free choice,” to form a union or not.¹¹⁴ Later, an anti-Communist fervor led to a purge of leftists from movement leadership, effectively silencing those whose vision of worker power included broader commitments to civil rights and a robust public-safety net.¹¹⁵ And union membership and public support began declining well before the end of the “accord.”¹¹⁶ There was never labor peace, and unions in the United States never gained the institutional power they had in most wealthy market democracies during the twentieth century.

Still, in hindsight, the state of America’s unions in the 1940s-1970s was qualitatively different from what came after. Employers and the public could be hostile to unions during the “accord,” and there were vicious battles over the scope of union power and specific demands. But these conflicts usually did not rise to

109. *E.g.*, Bruce Nissen, *A Post-World War II Social Accord?*, in *U.S. LABOR RELATIONS, 1945-1989: ACCOMMODATION AND CONFLICT* 173, 174-79 (Bruce Nissen ed., 1990); SAMUEL BOWLES, DAVID GORDON & THOMAS WEISSKOPF, *BEYOND THE WASTE LAND: A DEMOCRATIC ALTERNATIVE TO ECONOMIC DECLINE* 70-75 (1983).

110. *See* Nissen, *supra* note 109, at 173-84.

111. *See id.* at 179.

112. *See, e.g.*, NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 98 (2002); Richard McIntyre & Michael Hillard, *The “Limited Capital-Labor Accord”: May It Rest in Peace?*, 40 *REV. RADICAL POL. ECON.* 244, 244-49 (2008).

113. *See, e.g.*, Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law*, 47 *CATH. U. L. REV.* 763, 765, 769 (1998).

114. Fisk & Malamud, *supra* note 70, at 2041-42.

115. *See, e.g.*, Micah Uetrich & Barry Eidlin, *U.S. Union Revitalization and the Missing “Militant Minority,”* 44 *LAB. STUD. J.* 36, 51-52 (2019); Philip Murray, *American Labor and the Threat of Communism*, 274 *ANNALS AM. ACAD. POL. & SOC. SCI.* 125, 130 (1951).

116. LIPSET & SCHNEIDER, *supra* note 1, at 39. Of note, approval declined consistently from 71% in 1965 to 55% in 1981; from 1967-1980, union density and public approval went down together. Seymour Martin Lipset and William Schneider also found that attitudes toward organized labor only weakly correlate with economic conditions. *Id.* at 39, 64-65.

the level of imagining an American political economy *without* unions in it. As one leading account of popular opinion on business and labor put it, the “basic legitimacy” of labor unions remained sound through the late 1970s.¹¹⁷

At 71%, the level of public support for unions today is considered newsworthy. The American public is “in love with unions,” according to one recent headline.¹¹⁸ But these levels of support were standard midcentury. From the enactment of the NLRA through the mid-1960s, public approval of unions was almost always above 70%.¹¹⁹

The consistency of public support during the accord was partly due to high union density. Many more people were members of unions or shared households with union members, and union members and their affiliates are much more likely to support unions than nonmembers.¹²⁰ But public support was also relatively unsurprising within a culture shaped by the political-economic consensus that we all do better when workers do better. A proto-Keynesianism helped the NLRA become law and survive judicial review. In turn, Keynesianism helped bolster union legitimacy for the next forty years.¹²¹

Keynesianism, as a political-economy theory, resolved the contest of ideas in labor’s favor. It squarely answered the question of why workers’ interests were in the public interest. As political scientist Adam Przeworski argued in his classic *Capitalism and Social Democracy*, Keynesianism “granted universalistic status to the interests of workers.”¹²² Legal scholar Joel Rogers poetically describes the

117. *Id.* at 352–54.

118. Eric Rosenbaum, *The American Public Is Back in Love with Labor Unions, So Why Aren’t Workers?*, CNBC (Sept. 6, 2022, 6:21 PM EDT), <https://www.cnbc.com/2022/08/31/why-soaring-public-support-for-labor-doesnt-mean-unions-are-winning.html> [<https://perma.cc/ZV6B-U4SN>].

119. *Labor Unions*, *supra* note 2.

120. See ROSENFELD, *supra* note 16, at 18–19, 32–37.

121. As others have sagely written, it was not Keynes but Keynesianism “as a more general set of symbolic ideas” that made possible “the class coalitions and political compromises that structured the political economy of the postwar world.” Peter A. Hall, *Introduction*, in *THE POLITICAL POWER OF ECONOMIC IDEAS: KEYNESIANISM ACROSS NATIONS* 3, 7 (Peter A. Hall ed., 1989); see also LIZABETH COHEN, *A CONSUMER’S REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* 137, 150 (2003) (discussing the influence of Keynesianism in the postwar era).

122. ADAM PRZEWORSKI, *CAPITALISM AND SOCIAL DEMOCRACY* 37 (1985). To be clear, the argument here is not that the general public regularly contemplated Keynesian macroeconomic theory. But governing logics diffuse across domains, through media, art, and popular culture, and thereby become the “common sense” of a period. See, e.g., Robert Manduca, *Selling Keynesianism*, BOS. REV. (Dec. 9, 2019), <https://bostonreview.net/articles/robert-manduca-selling-keynesianism> [<https://perma.cc/DKJ5-L28B>]. In this way, everyday Keynesianism helped construct the worker (white and male) as the paradigmatic citizen.

“alchemy of Keynesian economics” in harmonizing unions’ dual roles. He argues¹²³:

Labor [unions] did something for its members or potential members of obvious usefulness—increased compensation. [At the same time,] it solved a problem for capital that capital could not solve for itself. It created effective mass demand, which assured the existence of mass markets for goods, which increased firm productivity via the increased investment and production scale that followed. And by doing both things—by solving a problem for workers that also enhanced the productivity of capital in ways beyond those that capital itself could achieve—*labor appeared as an agent of the general interest*.¹²⁴

In this way, Keynesianism was a technically expert way of resolving the tensions between democratic ideals and market logic. But, in conjunction with the law of apolitical economy, it had costs.

Harmonized into the existing social order as an economic good and increasingly deterred by a lack of robust First Amendment protections, unions turned inward during this period. Critics of midcentury unionism refer to their ethos as “business unionism.”¹²⁵ But, of course, they would be business unions. Constitutionally, their interests *were* the interests of business.

Still, what the critique of business unionism gets wrong is that unions *did* continue to espouse a rich and compelling normative order, internally. It was simply not pressed in the public sphere. With high union density, unions had institutional power. They got what they wanted through mobilizing workers and demanding it. They did not need to ask nicely. Accordingly, over time, many unions, workers, and their liberal supporters came to understand union advocacy as it had been described, as economic and, therefore, apolitical. As Steve Fraser has so brilliantly phrased it, “Somehow the political chemistry of the New Deal worked a double transformation: the ascendancy of labor and the eclipse of the ‘labor question.’”¹²⁶ New Dealers had given unions power, in part by treating what unions did with that power as less consequential.

123. Rogers, *supra* note 17, at 104.

124. *Id.*; see also Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1544 (2006) (“Keynesian economics . . . understood labor unions and collective bargaining to be promoting economic growth, and thus, the goals of efficiency and legitimacy in market relations could both be attained.”).

125. Philip Taft, *On the Origins of Business Unionism*, 17 INDUS. & LAB. REV. 20, 20 (1963).

126. Steve Fraser, *The ‘Labor Question,’* in *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980*, at 55, 56 (Steve Fraser & Gary Gerstle eds., 1989). The “labor question” of the Progressive era focused on the political implications of waged labor, on how its inequalities of control, voice,

Consistent with the liberal origins of the law of apolitical economy, it would be Justice Brennan who pushed the paradigm further still. In his 1961 opinion in *International Ass'n of Machinists v. Street*, Brennan construed the Railway Labor Act to prohibit unions from charging nonmembers for their “political” expenditures.¹²⁷ Unions could charge nonmembers only for their “economic” expenditures, given the strictures of the First Amendment. In dissent, Justice Frankfurter ridiculed this attempt to distinguish “political” from “economic” issues in the context of labor relations.¹²⁸ It would be “sheer mutilation” to do so, he said, as unions had always pressed both at the same time, using their rights to speech and association to further political commitments in the economic realm and economic commitments in the political realm. Labor law furthered this freedom of expression and association; it did not restrict it.

Justice Brennan handed down this decision during another moment of rapid social change. At that time, the civil-rights movement was in the middle of forever changing the national conversation. Pressing their case in the public sphere—in marches, in the media, and in the Supreme Court—civil-rights activists, women’s rights activists, and LGBT activists spoke in moral and juridical terms.¹²⁹ Those movements advanced normative commitments. In contrast, unions negotiated contracts. Those contracts might advance the rights of people of color, women, and other marginalized groups, or they might inhibit them. But they were not rooted in their own resonant rights claims. Support for unions began to decline in the mid-1960s, even before the supply-side revolution. Social movements now spoke in the “master frame” of rights, and labor unions no longer knew the words.

The conditions were ripe for pushback.

II. UPENDING THE NEW DEAL-ERA CASE FOR UNIONS

It is scarcely an exaggeration to say that, while we still owe our current living standards chiefly to the operation of an increasingly mutilated market system, economic policy is guided almost entirely by a combination of the two views whose object is to destroy the market: the planning ambitions of doctrinaire socialist intellectuals and the restrictionism of [labor] unions

and material resources were inconsistent with American democratic ideals. See *id.*; see also Reddy, *supra* note 29, at 426–29.

127. 367 U.S. 740, 767 (1961).

128. *Id.* at 814 (Frankfurter, J., dissenting).

129. David A. Snow & Robert D. Benford, *Master Frames and Cycles of Protest*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY* 145 (Aldon D. Morris & Carol McClung Mueller eds., 1992).

— F.A. Hayek¹³⁰

The technocratic economic consensus in favor of unions would not last. During the 1970s and 1980s, Keynesianism was repudiated, first in university economics departments and then in global politics. This paradigm shift was devastating for union legitimacy. According to ascendent supply-side logic, unions were economically irrational and socially harmful, and industrial peace should be assured through industrial autocracy, rather than industrial democracy. As for unions' normative stakes, they were lost to the law of apolitical economy.

A. *An Era of Union Decline, but Why?*

Gary Chaison and Barbara Bigelow's short book, *Unions and Legitimacy*, begins with this pointed reflection:

There was no precise moment when the tide began to turn against labor unions in America. There was no single catastrophic event—no landmark strike that was broken, no massive organizing campaign that was turned back, no key negotiation that went poorly for labor. But beyond any doubt, since the early 1980s, unions have lost many of their resources and much of their influence¹³¹

It is no secret that American unions did not fare well in the 1980s. In the 1970s and 1980s, union membership declined more rapidly than ever before, or since.¹³² Between 1970 and 1990, overall union membership decreased by 40%,¹³³ and private-sector union membership by 60%.¹³⁴

In trying to make sense of this decline, pundits initially emphasized material changes in the economy. According to the standard story, globalization and technology—seemingly autonomous forces—had upended midcentury international and domestic economic realities and, in turn, altered the constraints upon market actors. Union-dense industries like manufacturing now faced international

130. F.A. HAYEK, 1980s UNEMPLOYMENT AND THE UNIONS: ESSAYS ON THE IMPOTENT PRICE STRUCTURE OF BRITAIN AND MONOPOLY IN THE LABOUR MARKET 40 (1980).

131. GARY CHAISON & BARBARA BIGELOW, *UNIONS AND LEGITIMACY* 1 (2002).

132. Mishel et al., *supra* note 34, at 2.

133. Will Kimball & Lawrence Mishel, *Unions' Decline and the Rise of the Top 10 Percent's Share of Income*, ECON. POL'Y INST. (Feb. 3, 2015), <https://www.epi.org/publication/unions-decline-and-the-rise-of-the-top-10-percents-share-of-income> [<https://perma.cc/EPF4-7HMX>].

134. See Mishel et al., *supra* note 34, at 9–10 (from approximately 25% union density in the private sector in 1970 to approximately 10% by 1990, a decline of 60%).

competition. As a result, companies in those industries moved production offshore or closed.¹³⁵ In their place, sectors of the economy without a history of union representation – service, finance, and technology – grew rapidly.¹³⁶ In this faster-paced, more competitive environment, businesses needed greater flexibility, and they needed to cut costs.¹³⁷

Legal scholarship during this period similarly emphasized how economic shifts – again, seemingly autonomous forces – necessitated changes in production and employment. As legal scholar Katherine Stone described it, the transition from “industrial production” to “digital production” required “flexibility in . . . labor relations.”¹³⁸ Companies became smaller and leaner; internal labor markets were replaced by external ones.¹³⁹ Subcontracting, franchising, and the use of independent contractors – all characteristics of a fissured workplace – increased.¹⁴⁰

The result of all these changes, legal scholars showed, was to make existing laws less effective. As Stone put it, “The labor and employment laws of the 1930s were a response to both the advent of scientific management job structures and the rise of industrial unions. . . . [A]s new forms of production . . . emerg[ed], the existing labor laws and forms of collective action [became] out of date.”¹⁴¹ Labor law presumed stable, long-term employment that created an ongoing community of interests. Labor law also presumed that employers would not unduly resist unionization. By the 1980s, however, employers had begun doing so with a repertoire of fierce tactics that would have previously been considered beyond the pale: using permanent replacements to break strikes, hiring “union avoidance” consultants to conduct anti-union campaigns, and engaging in an increasing number of unfair labor practices.¹⁴² The limited remedial authority of

135. See Rogers, *supra* note 17, at 98–99; see also STEVEN PETER VALLAS, *WORK: A CRITIQUE* 140 (2012) (explaining that “the advent of neo-liberal policies governing trade and financial intervention acted to encourage a shift of US manufacturing operations to foreign platforms”).

136. See BRUCE WESTERN, *BETWEEN CLASS AND MARKET: POSTWAR UNIONIZATION IN THE CAPITALIST DEMOCRACIES* 150–51 (1999).

137. See, e.g., VALLAS, *supra* note 135, at 60–85.

138. STONE, *supra* note 35 at 5.

139. *Id.*

140. See *id.* at 6; DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 93–98 (2014).

141. STONE, *supra* note 35, at 7; see also Bellace, *supra* note 35, at 27 (“The model of representation appropriate for 1930s America, focusing on an industrial economy, a domestic market, industrial workers, and a model embraced by the Wagner Act, is no longer appropriate [for the information age].”).

142. See Reddy, *supra* note 29, at 444–46 (documenting the increasing use of the permanent replacement doctrine during the 1970s and 1980s); Mishel et al., *supra* note 34, at 2.

the NLRB was insufficient to rein in these excesses.¹⁴³ But employers had little choice but to exploit weaknesses in labor law. According to the standard story, their competitiveness required it.

B. Unions as Antithetical to the Common Good

The standard story is not wrong, but it is incomplete. It is certainly true that the NLRA model for unionization and collective bargaining assumes workplace characteristics that are often no longer standard today, and that these material changes have rendered certain elements of the law burdensome, if not impossible, for workers and employers alike. Yet the failure to theorize these structural changes as enabled by, and in turn enabling of, ideational changes has long been limiting. To be clear, the questions of why union density has declined, why public support for unions has wavered, and how law matters are incredibly complex. My goal here is not to reject existing accounts, but to situate them within a longer-term history of changing economic consciousness.

Today, the changes detailed above can more easily be seen as about more than autonomous economic forces. They were also about a changed politics—a changed politics which, in turn, facilitated changed institutional and regulatory responses to always-changing material conditions. In other words, the supply-side resurgence constituted a new epoch in the contest of ideas.

Although the historical importance of Keynesianism has itself been elided in recent decades, in the mid-twentieth century, its centrality to the political-economic order of western democracies was evident, and particularly so to its detractors. As an economic paradigm, Keynesianism legitimated a particular political order, premised on substantial regulation of the economy in the public interest. The creation of a new political order demanded a new economic paradigm.

The Mont Pelerin Society was founded for exactly this purpose. In 1947, Friedrich von Hayek gathered a group of economists, historians, and philosophers to contemplate the future of economics, and with it, Western liberalism. Together, they formed the Mont Pelerin Society, and explicitly committed themselves to reestablishing the supremacy of neoclassical economics over Keynesianism. They believed that “[t]he central values of civilization [were] in danger” because of “a decline of belief in private property and the competitive market.”¹⁴⁴

^{143.} See Mishel et al., *supra* note 34, at 33–34.

^{144.} *Statement of Aims*, MONT PELERIN SOCIETY, <https://www.montpelerin.org/event/429dba23-fc64-4838-aea3-b847011022a4/websitePage:6950c74b-5d9b-41cc-8da1-3e1991c14ac5> [https://perma.cc/4LJL-C9XN].

Accordingly, they sought to reestablish these economic views as the dominant logic of governance in the Western world.¹⁴⁵

In a case study of the institutionalized spread of ideas and practices, this nascent movement rapidly gained prominence. In the 1950s, anti-Communist sentiment helped grow their cache within academic and policy enclaves. Through association with the Chicago School of Economics, their views became institutionalized in universities. Soon, theirs would be the only paradigm taught within American economics departments.¹⁴⁶ One by one, similar transformations took place in other institutional power centers. In 1982, all Keynesian economists were abruptly fired from the World Bank and the International Monetary Fund, then replaced by those with supply-side views.¹⁴⁷ In the late 1970s, economic and social conservatives—frustrated with decades of liberal rule—brought neoliberal economic claims-making into the political sphere.¹⁴⁸ In 1980, Ronald Reagan ran for the U.S. presidency on a platform of supply-side economic policies (“trickle-down” economics, as Democrats would call it¹⁴⁹). He won in a landslide.

This sea change in political-economic paradigms was devastating for labor-union legitimacy. New Dealers had relied on two primary economic arguments to justify labor law: that a legal process encouraging collective bargaining would reduce strikes and create industrial peace and that increased worker wages would increase aggregate demand, which under Keynesian macroeconomic theory, would stabilize and grow the economy for all. The political economic changes of the early 1980s undermined both.

As to industrial peace, more authoritarian employment practices replaced industrial democracy as the leading vehicle for achieving it. In 1981, President Reagan—six months into his first term in office—ushered in a new era of labor relations. During a showdown with the Professional Air Traffic Controllers Organization (PATCO), he legitimized the use of hard-line tactics against union

¹⁴⁵ Wendy Brown, *Neo-liberalism and the End of Liberal Democracy*, 7 THEORY & EVENT (2003) (defining and describing the “political rationality” of neoliberalism).

¹⁴⁶ See, e.g., Nick Romeo, *Is It Time for a New Economics Curriculum?*, NEW YORKER (Oct. 8, 2021), <https://www.newyorker.com/culture/annals-of-inquiry/is-it-time-for-a-new-economics-curriculum> [https://perma.cc/58K6-U9VR].

¹⁴⁷ See Bjarke Skærlund Risager, *Neoliberalism Is a Political Project: An Interview with David Harvey*, JACOBIN (July 23, 2016), <https://www.jacobinmag.com/2016/07/david-harvey-neoliberalism-capitalism-labor-crisis-resistance> [https://perma.cc/D3VY-E54J].

¹⁴⁸ *Id.*

¹⁴⁹ See H.W. Arndt, *The “Trickle-Down” Myth*, 32 ECON. DEV. & CULTURAL CHANGE 1, 1 (1983) (disputing that any economists ever believed in the “myth” of trickle down).

workers.¹⁵⁰ When PATCO workers went on strike, despite a federal prohibition, President Reagan fired 11,345 of them. Their union was decertified, and striking workers were banned from federal service for life.¹⁵¹ Emboldened by President Reagan's actions, private employers began using a long-standing but rarely used labor-law loophole to deter strikes.¹⁵²

The symbolic and material effects that this pivotal event had on worker protest cannot be overstated. In the years between 1980 and 1985 alone, the annual number of major work stoppages went from 187 to 54, a decline of 70%.¹⁵³ The downward trend in strikes continued unabated. In 2009, it reached a nadir. In that year, there were only *five* major work stoppages. This was a radical transformation, given that in 1974—just six years before Reagan was elected—there had been 424.¹⁵⁴ There were eight times more major strikes in 1974 than in 1985. There were *eighty-five times more* major strikes in 1974 than in 2009.

In this new world, the argument that labor law was necessary to facilitate industrial peace lost credibility. There was no industrial unrest in the first place. Commentators noted the declining number of strikes, along with the declining number of workers in labor unions, and concluded that whatever the value of unions had once been there was no need for them anymore.¹⁵⁵

As to the Keynesian linkage of workers and the common good, supply-side economics reversed it.¹⁵⁶ It was no longer the mass purchasing power of well-paid workers that assured economic growth and stability; supply-side factors did that. Business ingenuity and innovation produced wealth and distributed it through job creation. Before, it was believed that whatever benefitted workers benefitted the polity as a whole. But under the new logic, whatever benefitted

150. JOSEPH A. MCCARTIN, *COLLISION COURSE: RONALD REAGAN, THE AIR TRAFFIC CONTROLLERS, AND THE STRIKE THAT CHANGED AMERICA* 14 (2011).

151. *Id.*

152. Reddy, *supra* note 29, at 437.

153. Bureau of Lab. Stat., *16 Major Work Stoppages in 2021*, U.S. DEPT. LAB. (Mar. 2, 2022), <https://www.bls.gov/opub/ted/2022/16-major-work-stoppages-in-2021.htm> [<https://perma.cc/Y3DD-65XH>].

154. Bureau of Lab. Stat., *Work Stoppages*, U.S. DEPT. LAB. (Feb. 23, 2022), <https://www.bls.gov/web/wkstp/annual-listing.htm> [<https://perma.cc/TUW2-XSAT>].

155. Michael L. Wachter, *The Striking Success of the National Labor Relations Act*, in *RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW* 427, 456 (Cynthia L. Estlund & Michael L. Wachter eds., 2012).

156. For detailed accounts of this sea change in economic ideas and political power, see generally ANGUS BURGIN, *THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION* (2012); KIM PHILLIPS-FEIN, *INVISIBLE HAND: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN* (2009); NANCY MACLEAN, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA* (2017); and LAURA KALMAN, *RIGHT STAR RISING: A NEW POLITICS, 1974-1980* (2010).

business benefitted the polity as a whole. Meanwhile, labor unions extracted unearned rents from less privileged workers or from the public purse.

This undermining of unions' claims to be in the public interest was not a coincidence. The reconceptualization of labor unions was central to the project of the Mont Pelerin Society, and central to the ideas they had so successfully spread and institutionalized.¹⁵⁷ The Society was flatly opposed to unions, which its leaders saw as the largest remaining distortion of the free market.¹⁵⁸ Hayek argued that unions had the economy "by the throat" and were "killing the goose which lays the golden eggs."¹⁵⁹ Milton Friedman took this argument directly to its endpoint. By hurting the economy, unions hurt everyone. Friedman argued, "When unions get higher wages for their members by restricting entry into an occupation, those higher wages are at the expense of other workers who find their opportunities reduced."¹⁶⁰ In other words, for Hayek and Friedman, unions were antithetical to the common good.

For these committed critics, the opposition to unions was never just economic. It was always inherently normative, and avowedly political—about how freedom is defined, and which freedoms are prioritized.¹⁶¹ Hayek wrote in 1960 that

[i]t cannot be stressed enough that the coercion which unions have been permitted to exercise contrary to all principles of freedom under the law is primarily the coercion of fellow workers. Whatever true coercive power unions may be able to wield over employers is a consequence of this primary power of coercing other workers.¹⁶²

The market facilitated individual choice, and that was the hallmark of freedom. Unions' legally granted monopoly status made people less free.

Just as Keynesianism permeated everyday culture, "everyday neoliberalism" would shift popular understandings of the economy, too.¹⁶³ Under the Keynes-

157. See Risager, *supra* note 147 ("I've always treated neoliberalism as a political project carried out by the corporate capitalist class as they felt intensely threatened both politically and economically towards the end of the 1960s into the 1970s. They desperately wanted to launch a political project that would curb the power of labor.").

158. For critiques of the term "free market," see PISTOR, *supra* note 68; and David Singh Grewal & Jedediah Purdy, *Inequality Rediscovered*, 18 THEORETICAL INQUIRIES L. 61 (2017).

159. HAYEK, *supra* note 130, at 64.

160. MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 247 (1980).

161. See Rogers, *supra* note 22 (noting the recent ascension of a neoliberal vision of workplace freedom of association).

162. F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 269 (1960).

163. See Nicholas J. Kiersey, *Everyday Neoliberalism and the Subjectivity of Crisis: Post-Political Control in an Era of Financial Turmoil*, 4 J. CRITICAL GLOBALISATION STUD. 23 (2011).

ian view, workers were consumers, and companies relied on a well-paid consumer base to buy their products. Companies could not survive without them. From the supply-side view, employers were “job creators,” and workers could not survive without them. This was a massive reframing, suggesting that employment was a public service, rather than a site of political and economic subjugation. Apocryphally attributed to Ayn Rand’s philosophizing in *Atlas Shrugged*,¹⁶⁴ Vice President Richard Nixon brought the term “job creators” into national politics in a 1958 speech. There, he advocated for the right kind of tax cut, one that would put money into the hands of the “investors and job-creators.”¹⁶⁵ Unions fought this reframing with their own economic theories.¹⁶⁶ But from the 1970s through the 2000s, regulations that benefitted workers over employers were increasingly derogated as job killers.

Within law schools, this same time period saw the rise of a new “law and economics” movement. In the United States, the field was particularly shaped by its association with the Chicago School of Economics during the 1960s and 1970s.¹⁶⁷ As such, the “economics” of the law-and-economics field was, until recently, almost entirely neoclassical in orientation.¹⁶⁸ This movement brought Hayek’s and Friedman’s criticisms of labor unions to law schools.¹⁶⁹ Based on the belief that the market, rather than political or legal processes, was the best way of aggregating preferences and adjudicating conflicts, the field focused on how legal rules could support market-based efficiency.¹⁷⁰ From the supply-side perspective, unions did *not* do that. Richard A. Epstein voiced the extreme version

164. John Paul Rollert, *The Hardy Myth of “Job Creators,”* SALON (Sept. 28, 2011, 6:30 PM EDT) https://www.salon.com/2011/09/28/job_creator_myth [<https://perma.cc/6VJ2-KHVW>].

165. See Editorial, *Guys and Taxes*, LIFE, May 5, 1958, at 39.

166. In 1962, for instance, UAW President Walter Reuther spoke out against the term, arguing that it was workers not employers who created wealth through their work. See Report of Walter Reuther, President, UAW 16 (May 1962).

167. See BURGIN, *supra* note 156, at 32–45.

168. According to James B. Zimarowski, Michael J. Radzicki, and William A. Wines, “Generally, when examining a particular conflict situation, Chicago-style law and economics mandates a decision which maximizes the economic efficiency of the party having the most market power, and, because the discipline of the market is accepted as unassailable truth, it is taken on faith that society will inevitably benefit.” James B. Zimarowski, Michael J. Radzicki & William A. Wines, *An Institutional Perspective on Law and Economics (Chicago Style) in the Context of United States Labor Law*, 35 ARIZ. L. REV. 397, 430 (1993) (footnotes omitted).

169. See, e.g., STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 91–95 (2008) (discussing the incorporation of Chicago-style law and economics in the conservative legal movement through the Federalist Society); AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* 66 (2014) (describing Milton Friedman’s speech on “Free Markets and Free Speech” to the Federalist Society’s 1986 national meeting).

170. See A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 157–58 (3d ed. 2003).

of this position: “[F]rom the perspective of social welfare, labor unions have proved not a savior but a scourge. . . . [N]othing in the history of labor law justifies the extraordinary set of legal privileges that they have received over the past 100 years.”¹⁷¹ As unions lost members and the practice of labor law lost prestige, many law schools stopped hiring in the field, or teaching labor-law classes at all.¹⁷² Legal academia has long been an important source of ideas, and there were now fewer ideas being circulated that had anything to do with labor unions.

Ultimately, the result of this discursive work was to erase the arguments that had once justified labor law from collective memory. In a 2001 law-review article, labor lawyer Peter Levine opined, “Labor unions do not have a well-understood rationale, as do capitalist enterprises, strictly voluntary associations, and democratic states.”¹⁷³ Unions might still benefit their members through narrow interest-group advocacy. But as to why a legal regime still existed to facilitate that rent-seeking, there was little that was discursively comprehensible left to say.¹⁷⁴

C. Constructing “Political” Protest

When Leon Keyserling, legislative aide to Senator Robert Wagner and drafter of much of the NLRA, reflected on the motivations for the statute, he framed the economic and the political as equally important, and largely inseparable: “We were interested in the struggle to be free as well as in the [economic] issue. I really don’t know whether we explicitly weighed one higher than the other. They were complementary and each fed the other.”¹⁷⁵

But when the neoliberal turn undermined the economic arguments for unionization in the 1980s, unions could not simply fall back on “the struggle to be free.” After decades of living under the law of apolitical economy, unions no longer spoke, nor could they be broadly understood, in that vernacular. The rights-based social movements were associated with a resonant freedom struggle. Unions were not.¹⁷⁶

171. Richard A. Epstein, *Labor Unions: Saviors or Scourges?*, 41 CAP. U. L. REV. 1, 7-8 (2013).

172. See Cynthia L. Estlund, *Reflections on the Declining Prestige of American Labor Law Scholarship*, 23 COMP. LAB. L. & POL’Y J. 789, 789 (2002).

173. Peter Levine, *The Legitimacy of Labor Unions*, 18 HOFSTRA LAB. & EMP. L.J. 529, 529 (2001).

174. See LANE WINDHAM, *KNOCKING ON LABOR’S DOOR: UNION ORGANIZING IN THE 1970S AND THE ROOTS OF A NEW ECONOMIC DIVIDE* 5-8, 120-27 (2017) for further reflections on how the ascendance of supply-side economics, and its increasing political and legal centrality, would affect unions.

175. Casebeer, *supra* note 96, at 320.

176. This Feature accordingly proposes a partial explanation for Nelson Lichtenstein’s reflection that “rights consciousness, which has revolutionized race and gender relations, has had little organizational payoff for American labor unions. Indeed, if one just looks at the timing and

As before, the conversations in courts of law and courts of public opinion dovetailed. During the 1980s and 1990s, the Supreme Court issued two decisions making clear that labor-union advocacy was jurisprudentially *not* the same as social-movement advocacy. In both cases, the Court explicitly differentiated collective-worker action from social-movement protest, treating the former as economic and self-interested and the latter as political and righteous.

In *NAACP v. Claiborne Hardware Co.*, decided in 1982, the Supreme Court was asked to consider whether an NAACP-led consumer boycott merited First Amendment protection.¹⁷⁷ NAACP members and supporters in Claiborne County, Mississippi had engaged in a multiyear boycott of local white-owned businesses that had, among other things, refused to comply with demands that they hire Black clerks and cashiers. White merchants later sued for damages incurred during the boycott, and the Mississippi Supreme Court found protesters liable under common-law tort.¹⁷⁸

The U.S. Supreme Court reversed. It held that the NAACP's boycott was protected by the First Amendment, even though similar actions by labor unions had long been deemed unprotected. To explain this difference, the Court reaffirmed its commitment to the law of apolitical economy:

While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful *political* activity such as that found in the boycott in this case. . . . [The Court emphasized that] the picketing, speeches, and other communication associated with the boycott were directed to the elimination of racial discrimination in the town.¹⁷⁹

The protesters' emphasis on racial discrimination, the Court went on, differentiated the case "from a boycott organized for *economic* ends, for speech to protest racial discrimination is essential political speech lying at the core of the First Amendment."¹⁸⁰

What is remarkable about the reasoning of this case is that the NAACP was not just engaged in speech to protest racial discrimination; it was engaged in an

the numbers, an inverse relationship may well link the decline of unionism and rise of 1960s-1970s rights consciousness." LICHTENSTEIN, *supra* note 7, at 151.

177. 458 U.S. 886, 912-13 (1982).

178. *Id.*

179. *Id.* at 913-15 (emphasis added).

180. *Id.* at 915 (quoting *Henry v. First Nat'l Bank of Clarksville*, 595 F.2d 291, 303 (5th Cir. 1979) (footnote omitted) (emphasis added)). As I have noted elsewhere, the Court's definition of "political" lacks consistency. While the petitioning exception to antitrust liability is rooted in a relatively concrete definition of the "political"—petitioning the political branches of government—in this case and others, the Court has blurred the lines, equating the "political" with normative commitments. See Reddy, *supra* note 29, at 450.

economic boycott. And protestors sought more than formal equality; they wanted *jobs*. It is certainly true that civil-rights-movement protest and labor protest have often taken different forms in service of different ends. In this case, however, the conduct and goals of the NAACP were comparable to those of labor unions. Still, the Court understood one as inherently political, while dismissing the other as just economic.

Eight years later, the Court expanded on this line of reasoning, further differentiating collective-worker advocacy from the political speech of social movements. In *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*, the Court held that a concerted refusal to work by a group of trial lawyers was not entitled to First Amendment protection.¹⁸¹ These lawyers, who regularly served as court-appointed counsel for indigent defendants in the District of Columbia, had refused to take further cases until the District increased compensation.¹⁸² Their boycott was effective; the District raised rates. The Federal Trade Commission then sued, alleging that the boycott was an illegal restraint of trade. In defense, the lawyers argued that their case was analogous to *Claiborne Hardware*. But the Supreme Court disagreed. These workers, they noted, sought “an *economic* advantage for those who agreed to participate.”¹⁸³ In contrast, “[t]hose who joined the *Claiborne Hardware* boycott sought no special advantage for themselves.”¹⁸⁴

Here, the Court’s reasoning was more than a derogation of the economic as political. Rather, it can be seen as drawing a distinction between what sociologists have called “interest adherents” and “conscience adherents.” Social movements tend to be composed of two distinct types of members: those who combine together to advance their own cause, and those whose own freedom is not implicated, but who support the cause nonetheless.¹⁸⁵ Conscience adherents, and the movements they support, tend to have higher incomes and be middle class.¹⁸⁶ Interest adherents, and their movements, are more likely to be working class and poor.¹⁸⁷

¹⁸¹. 493 U.S. 411, 426–27 (1990).

¹⁸². In a nod to the law of apolitical economy, the trial lawyers argued before the Supreme Court that their boycott was political rather than economic, because their underlying concern about low rates was not their own financial well-being or fair treatment, but about the quality of representation available to indigent criminal defendants. The Court was unconvinced.

¹⁸³. *Id.* at 426 (emphasis added).

¹⁸⁴. *Id.*

¹⁸⁵. John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 AM. J. SOCIO. 1212, 1221–22 (1977).

¹⁸⁶. *Id.* at 1222 (citing MICHAEL HARRINGTON, *TOWARD A DEMOCRATIC LEFT: A RADICAL PROGRAM FOR A NEW MAJORITY* 291 (1968)).

¹⁸⁷. *Id.* at 1223.

Taken together, what the principles of *Claiborne Hardware* and *Superior Court Trial Lawyers* do is remove the bread-and-butter advocacy of unions from legibility as political under the First Amendment. For labor's speech to be protected under labor law, it is supposed to be self-interested and economic.¹⁸⁸ But for it to be protected by the First Amendment, it cannot be. This seemingly irreconcilable tension sums up the catch-22 unions faced at the end of the twentieth century. The alchemy of Keynesianism was in *equating* workers' self-interest and the public interest. In a changed political-economic era, unions had to choose one or the other. They could not advance both.

D. The End of the Law of Apolitical Economy (Except for Unions)

In recent years, scholars have detailed the ways in which conservative claims of political economy on behalf of corporations and other moneyed interests were never fully silenced by the law of apolitical economy. Corporations began reconstitutionalizing their claims under the First Amendment the moment it became clear that "liberty of contract" would not last.¹⁸⁹ The result has been increased constitutional protection, largely under the First Amendment, for conservative economic interests.¹⁹⁰

In the 1970s, when the Supreme Court first became more active in renewing constitutional protections for commercial speech¹⁹¹ — while still holding the New Deal-era line for unions — Cynthia L. Estlund argued that it had begun making economic value judgments and prioritizing certain kinds of economic speech over others. The Court no longer adhered to the law of apolitical economy; rather, it followed a law of political economy. And this jurisprudential paradigm equated business interests with the public interest, while treating workers' interests as narrow and self-serving. More than forty years ago, Estlund argued that the Court was recreating the values of the *Lochner* era under the First Amendment.¹⁹² Labor-law scholars have always been scholars of law and political economy.

188. See Reddy, *supra* note 29, at 450.

189. See Kessler, *supra* note 22, at 1996.

190. See, e.g., Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 133.

191. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (calling commercial speech doctrine into question as applied to commercial advertisements, because "[s]o long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable").

192. See Estlund, *supra* note 22, at 960.

Since then, many have come to agree with Estlund's account.¹⁹³ Today, notwithstanding increasing First Amendment protection for corporate speech, the law of apolitical economy as applied to unions' interests lives on.¹⁹⁴ In perhaps the ultimate irony, in 2016, a conservative Supreme Court acknowledged that Justice Brennan's 1960s-era line-drawing between labor unions' economic and political advocacy was untenable.¹⁹⁵ There *were* political implications inherent to bread-and-butter bargaining in the public sector, at minimum, due to the impact on the public budget. Still, the result has not been to hold that public employees have a constitutional right to organize at work, or even a constitutional right to discuss working conditions.¹⁹⁶ Rather, the result in *Janus* was to hold that public employees had a constitutional right *not* to pay dues to the union statutorily required to represent them.¹⁹⁷

The lines drawn in service of preserving the law of apolitical economy, as applied to unions and no one else, seem logically irreconcilable. As Catherine L. Fisk has argued, "it cannot be that all speech by and about unions is political except when union supporters gather in a public forum to urge workers and consumers to boycott."¹⁹⁸

The point of this story, though, is more about strategy than doctrine. The law of apolitical economy was largely a liberal invention, and it lasted just long enough to restrict the advancement of any meaningful vision of progressive constitutional political economy. As soon as conservatives had the political power and normative sway to claim and win back their fundamental economic rights, they did. In retrospect, it seems naïve to have expected anything else.

III. REFRAMING UNIONS TODAY

The terms "union" and "labor movement" capture a contradiction. The "union" is an institution, a legally constituted collective bargaining agent that represents workers in complex economic and juridical relations with

193. See, e.g., Shanor, *supra* note 190.

194. See, e.g., Fisk, *supra* note 22, at 2075.

195. See *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps.*, 138 S. Ct. 2448, 2484 (2018).

196. *Cf.*, e.g., *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 398 (2011) (suggesting that a union grievance about working conditions may not be "a matter of public concern" and thus that it could be constitutionally permissible under the First Amendment for an employer to retaliate against an employee for that grievance).

197. See *Janus*, 138 S. Ct. at 2460.

198. Fisk, *supra* note 22, at 2063; see also 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, 268-69 (2018); Catherine L. Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277, 308-09 (2015).

employers and government. The “labor movement” is a more fluid formation whose very existence depends on high-risk activism, mass solidarity, and collective experiences with transformational possibilities But, as the last two decades have demonstrated, the sustained opposition of employers means that the presumed legitimacy of the union, its taken-for-granted character, ultimately depends on the existence of a labor movement, an ability by unions to constitute and reconstitute themselves as social movements.

—Dan & Mary Ann Clawson¹⁹⁹

In this Part, I move from past to present, to show how the legacy of the law of apolitical economy still matters for unions. Here, I focus on the past ten years, another pivotal epoch in the contest of ideas—because so much is uncertain and up for grabs. With their economic justifications undermined, unions have had no choice but to reassert publicly their normative stakes. Through reframing what unions are and what they do, they have been “reconstituting themselves as social movements.” And public support for unions has grown.

This is good news for unions and the people who support them. But I suggest that, even now, the law of apolitical economy continues to shape the contemporary conversation and the quality of public support. I make this point using two different sources of original empirical data. Through discourse analysis of contemporary union “collective action frames,” I show that unions and their supporters have become increasingly adept at emphasizing their intersectional benefits, how they advance a host of causes with well-defined normative stakes. But unions have difficulty in asserting, and the public has difficulty in understanding, the normative stakes of unions’ main statutory purposes, allowing workers to come together and improve their working conditions. In turn, I discuss one of the findings of my own survey research on attitudes toward labor unions, which suggests that public support for unions today is not necessarily tied to support for workers as workers. Rather, in a survey experiment I conducted in 2019, approval rates went *down* when unions’ benefits to organized workers were emphasized.

This all, I suggest, is the ongoing legacy of the law of apolitical economy. It was the bread-and-butter work of unions—the daily tasks of redistributing power, wealth, and dignity within the workplace—that was sheared of its normative importance and left vulnerable to recharacterization as rent-seeking by conservative economists. Of course, unions do much more than these bread-

199. Dan Clawson & Mary Ann Clawson, *What Has Happened to the U.S. Labor Movement? Union Decline and Renewal*, 25 ANN. REV. SOCIO. 95, 109 (1999).

and-butter tasks. But it is hard to imagine a path forward for unions, or for American economic progressivism, without reclaiming the redistribution of power, wealth, and dignity within the workplace as its own normative good.

A. *A Turn Toward the Public*

2009 was a tough year for labor unions. In the wake of the Great Recession, conservatives invested heavily in the contest of ideas. They focused their attention on public-sector unions,²⁰⁰ the last bastion of union density in a deunionized United States.²⁰¹ Private-sector union membership had been decimated by the economic policy changes and the anti-union tactics of the 1980s and 1990s.²⁰² Public-sector unions, by contrast, had remained relatively insulated. Government jobs could not be outsourced, there was no international competition, employers had fewer incentives to wage aggressive anti-union campaigns, and civil-service law protected union activists from retaliation.²⁰³ Given public-sector unions' outsized importance in the modern labor movement, a challenge to them was inevitable.

In a moment of economic crisis, conservatives took their anti-union campaign to the people. They attributed municipal and state budget deficits to worker pensions.²⁰⁴ They argued that teachers' unions were associated with structural educational inequities.²⁰⁵ The contest of ideas had previously been

200. Conservatives at the time were quite clear-minded about this strategy. See, e.g., Nick Gillespie, *Why Private-Sector Union Membership Declined. And Why Public-Sector Unions Might Follow*, REASON (Mar. 1, 2011, 10:26 AM), <https://reason.com/2011/03/01/why-private-sector-union-membe> [<https://perma.cc/CS8Y-TQFP>].

201. See Mishel et al., *supra* note 34.

202. See *id.*

203. See ROSENFELD, *supra* note 16, at 18-19, 23-37.

204. See, e.g., Chris Edwards, *Public Sector Unions and the Rising Costs of Employee Compensation*, 30 CATO J. 87, 92 (2010), <https://www.cato.org/sites/cato.org/files/serials/files/cato-journal/2010/1/cj30n1-5.pdf> [<https://perma.cc/DK8M-QC3K>]; Daniel DiSalvo, *The Trouble with Public Sector Unions*, NAT'L AFFS. (2010), <https://www.nationalaffairs.com/publications/detail/the-trouble-with-public-sector-unions> [<https://perma.cc/3YMX-LKUV>]. But see *Report Finds No Link Between State Budget Deficits and Public Sector Unions*, ECON. POL'Y INST. (Oct. 13, 2011), <https://www.epi.org/publication/report-finds-link-state-budget-deficits> [<https://perma.cc/29ZG-F4VB>].

205. See, for example, Haley Sweetland Edwards, *The War on Teacher Tenure*, TIME (Oct. 30, 2014, 5:58 AM EDT), <https://time.com/3533556/the-war-on-teacher-tenure> [<https://perma.cc/P55D-75DR>], discussing the case of *Vergara v. State*, No. BC484642, 2014 WL 6478415 (Cal. Super. Ct. Aug. 27, 2014), *rev'd*, 209 Cal. Rptr. 3d. 532 (Ct. App. 2016), in which plaintiffs argued that K-12 teacher tenure and dismissal laws violated the California state constitution because they prevented the firing of "grossly ineffective teachers" and thereby deprived California's school children of their right to an education, and in turn, resulted in particular harms

waged less publicly and with more subtlety; this was different. In 2014, the corporate-funded Center for Union Facts took out a giant billboard in the middle of Times Square, excoriating the president of the American Federation of Teachers: “Randi Weingarten’s Union Protects Bad Teachers.”²⁰⁶

According to Philip Mirowski, it was through this barrage of public messaging that a recession, which by all accounts resulted from corporate excesses and the deregulation of financial products,²⁰⁷ came to be laid at the foot of labor.²⁰⁸ In 2009, public approval of unions bottomed out at an all-time low of 48%.²⁰⁹ As traditionally union-dense states began revoking public-sector bargaining rights, a future without unions seemed possible.²¹⁰

Instead, something very different happened. Over a chaotic decade of social-movement agitation, people changed their minds about unions. Today 71% of Americans say they approve of labor unions, up 23 *percentage points* since 2009.²¹¹ This is a level of support unseen since labor’s midcentury heyday.²¹²

to Black, Brown, and low-income students. I was part of the legal team for the California Teachers Association, which intervened in the lawsuit to defend the statutes. Importantly, it was not just conservatives who argued that teachers’ unions did not serve the public good during this time. In what had become a zero-sum framing contest between children’s education and good jobs for teachers, many liberal commentators chose the former. During the early 2010s, the liberal-leaning Brookings Institution published several books highly critical of teachers’ unions, including by avowedly conservative authors. See, e.g., Terry M. Moe, *Special Interest: Teachers Unions and America’s Public Schools*, BROOKINGS INST. (Dec. 1, 2011), <https://www.brookings.edu/book/special-interest> [<https://perma.cc/5BPU-U6UT>] (describing the author’s Brookings Institution Press book of the same name, which argues that “teachers unions . . . are by far the most powerful forces in American education and use their power to promote their own special interests at the expense of what is best for kids”).

206. *New Billboard in Times Square Calls Out AFT*, LAB. PAINS (Jan. 9, 2014), <https://laborpains.org/2014/01/09/new-billboard-in-times-square-calls-out-aft> [<https://perma.cc/X4T3-C6DB>].

207. See Thomas Palley, *America’s Flawed Paradigm: Macroeconomic Causes of the Financial Crisis and Great Recession*, 38 EMPIRICA 3, 4 (2010) (“[T]he wholesale ideological approach to deregulation of financial markets ultimately contributed to the build-up of massive financial excess and financial fragility that triggered the financial crisis.”).

208. See PHILIP MIROWSKI, *NEVER LET A SERIOUS CRISIS GO TO WASTE: HOW NEOLIBERALISM SURVIVED THE FINANCIAL MELTDOWN* (2013). Later, commentators would attribute the decline in popular support for unions simply to the recession, based on the argument that support for unions tends to go down when money is tight. See, e.g., Arne L. Kalleberg & Till M. von Wachter, *The U.S. Labor Market During and After the Great Recession: Continuities and Transformations*, RSF, Apr. 2017, at 1, 12–13. I think this account misses the importance of the contest of ideas.

209. See Brennan, *supra* note 2.

210. See, e.g., *Wis. Governor Officially Cuts Collective Bargaining*, NBC NEWS (Mar. 9, 2011, 6:58 PM EST), <https://www.nbcnews.com/id/wbna41996994> [<https://perma.cc/J6UE-MT58>].

211. See McCarthy, *supra* note 4.

212. See Mishel et al., *supra* note 34.

In the rest of this Section, I theorize these changes in public opinion in real time. Contemporaneous study of cultural change – any study of cultural change, for that matter – is empirically challenging. There are many variables, and none can be fully isolated from the others. It is particularly hard to make sense of transitional moments, before shifts have crystallized into something more concrete and the stakes rendered clear.

Nevertheless, drawing from the longer-term history recounted above, sociological theory, and original empirical work, I account for the past decade as follows. In a moment of social unrest, labor unions and their liberal supporters have effectively emphasized the intersectional benefits of unions: how they ameliorate society-wide inequality, redress racial and gender inequalities, and benefit their communities. In other words, they have convincingly shown that unions matter for causes that a substantial part of the public already cares about. This is important and necessary work. But it is insufficient. What unions and their supporters have struggled to do is sufficiently reclaim the normative stakes of their bread-and-butter advocacy: increasing wages, benefits, job security, and voice for working people. Again, unions have struggled to reclaim the importance of what was most depoliticized by the law of apolitical economy.

I begin with a brief overview of the theoretical framework in which I situate my empirical research. Social-movement theorists have long studied the ways in which social movements create cultural change, how they participate in the contest of ideas. “Framing” refers to the process by which movements situate their claims in existing belief systems. Movements compress their grievances, identities, and goals into “collection action frames.” Then they use those frames to effect change by mobilizing supporters, convincing the undecided, or neutralizing opponents.

Because collective-action frames are oriented toward what people already know and believe, frames act much like the minor premise of a syllogism. Building on the audience’s preexisting beliefs (the major premise), the frame connects movement claims to those existing beliefs and values (the minor premise), leading to the desired conclusion. When frames produce the desired effect in the world, social-movement theorists refer to this as “resonance,” or a “fit between a message and an audience’s worldviews.”²¹³

Precisely because of this syllogistic quality, some scholars have argued that seeking resonance skews movements toward irradicalism. Sociologist Myra Marx Ferree has argued that collective-action frames engage too superficially; they are tethered to preexisting commitments that may themselves be implicated

213. Terence E. McDonnell, Christopher A. Bail & Iddo Tavory, *A Theory of Resonance*, 35 SOCIO. THEORY 1, 1 (2017).

in the problem.²¹⁴ Frames seek to situate a minor premise within a preexisting major premise. Structural change may demand going further, challenging the major premise itself. Framing is no substitute for organizing or broader ideological change.²¹⁵

There is relatively little research on how these theoretical issues play out in collective-action framing by and about labor unions.²¹⁶ But consistent with this Feature's foundational premise, I contend that the core challenge for unions has always been to conceptually link workers' interests and the public interest, to convince workers in individual workplaces to take on the costs and risks of unionizing, while convincing a broader public that what benefits workers benefits them too.

B. Reconstituting Themselves as Social Movements

In the early 2010s, unions were on the defensive. The economic arguments which had once helped sustain them had been effectively lost to collective memory. Meanwhile, unions faced an onslaught of normative critiques in the metaphorical public square (and the literal Times Square). Facing a legitimacy crisis and an ever-shrinking membership base, labor unions and their supporters pivoted and began making their political case directly to the public in ways that they had not for decades.²¹⁷ Labor unions sought to convince the public that they were, and always had been, social movements.

214. Myra Marx Ferree, *Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany*, 109 AM. J. SOCIO. 304, 305 (2003).

215. See *id.* at 306.

216. With increasing public and scholarly attention to labor unions, this has begun to change. See, e.g., Alexander Hertel-Fernandez, William Kimball & Thomas Kochan, *What Forms of Representation Do American Workers Want? Implications for Theory, Policy, and Practice*, 75 ILR REV. 267 (2022); Alexander Hertel-Fernandez & Ethan Porter, *Why Public Sector Union Members Support Their Unions: Survey and Experimental Evidence*, 100 SOC. FORCES 375 (2021); Alexander Hertel-Fernandez, Suresh Naidu & Adam Reich, *Schooled by Strikes? The Effects of Large-Scale Labor Unrest on Mass Attitudes Toward the Labor Movement*, 19 PERSPS. ON POL. 73 (2021); Benjamin J. Newman & John V. Kane, *Economic Inequality and Public Support for Organized Labor*, 70 POL. RSCH. Q. 918 (2017); John V. Kane & Benjamin J. Newman, *Organized Labor as the New Undeserving Rich?: Mass Media, Class-Based Anti-Union Rhetoric and Public Support for Unions in the United States*, 49 BRIT. J. POL. SCI. 997 (2017) [hereinafter Kane & Newman, *The New Underserving Rich?*]; Cedric E. Dawkins, *A Test of Labor Union Social Responsibility: Effects on Union Member Attachment*, 55 BUS. & SOC'Y 214 (2016).

217. Charlotte Garden brilliantly details the beginning of this turn toward the public in her path-breaking piece on union corporate campaigns. There, she also argues for union speech being protected as social-movement speech and shows the costs of its lack of protection. As unions have sought to engage more with the broader public during organizing campaigns, employers have in turn brought civil RICO lawsuits against them. The First Amendment would clearly

In this Section, I engage in discursive analysis of three collective-action frames frequently used by labor unions and those who support them over the past decade. I gained familiarity with union framing strategies in part through my professional role as a union attorney from 2009 to 2014, and in part through inductive and iterative engagement with labor-movement communications and media coverage from 2009 to the present. This involved visiting labor-union websites, joining labor-union email listservs, and reading newspaper and magazine articles about organized labor. I also conducted semistructured interviews with five media professionals who work full-time in labor communication roles.

I focus on three frames here: the 99%, the service recipient, and the marginalized worker. Breaking with the Keynesian logic underlying the NLRA, these frames each decenter workers as a categorical whole. Instead, they focus on the intersectional benefits of unionism, how improving workers' lives benefits other causes and other groups too. I describe and analyze each of these frames below, offering tentative reflections of when and how they resonate, and when and how they may concede something more "radical."

1. *The 99% ("Economic Populism"*²¹⁸)

The Occupy Wall Street protests of the early 2010s put the long-dormant issue of economic inequality back on the public's agenda. In so doing, they forced labor to engage more publicly as well.

If the neoliberal era can generally be characterized by a lack of emphasis on economic inequality as a sociopolitical issue, Occupy stands out as the exception, and potentially the beginning of its repudiation.²¹⁹ In the wake of the Great Recession – and the seeming failure of electoral politics or elite discourse to address its causes²²⁰ – Occupy reinserted political economy into contentious politics. Oc-

protect other social-movement organizations from this kind of prosecution. See Garden, *supra* note 22, at 2626.

218. As this frame draws upon the long-standing tradition of labor claiming to represent the interests of the "people" or the "masses," I refer to it as "economic populism." See generally PRZE-
WORSKI, *supra* note 122 (discussing organized labor's role in political organizing).

219. See, e.g., Joseph Stiglitz, *After Neoliberalism*, PROJECT SYNDICATE (May 30, 2019) <https://www.project-syndicate.org/commentary/after-neoliberalism-progressive-capitalism-by-joseph-e-stiglitz-2019-05> [<https://perma.cc/GUK5-F9XG>].

220. See generally MIROWSKI, *supra* note 208 (discussing the economic crises in the 2010s and noting that they did not spur on their own economic or political change).

cupy's discursive success has largely been attributed to the breadth of its populist, anti-elite framing. This was a movement for 99% of Americans.²²¹ And unlike unions, it did not require a complicated and contentious election process within the workplace to participate.

Labor-union communications in the early 2010s regularly invoked the 99%. Unions were not organizers of the early Occupy Wall Street protests, but union members increasingly took part.²²² As the protests captured the public imagination, union leaders began speaking in the Occupy vernacular. First, they expressed their support for "the 99%."²²³ Soon, however, unions realized that this failed to reflect labor's positioning in the new discourse, and they corrected. In 2011, the Communication Workers of America put out a series of member videos entitled "We are the 99%."²²⁴

Over a decade later, this frame is still a part of many unions' discursive repertoires. The AFL-CIO's public-facing website proclaims that unions "are re-writing the rules of the economy, so they benefit the 99% instead of the wealthy few."²²⁵ This section concludes: "Join with us as we build an economy that works for the 99%."²²⁶ A flyer produced by the North Carolina State affiliate of the AFL-CIO articulates the upshot of this harmonization of movement agendas. Unions, the flyer proclaims, provide "a voice for the 99%."²²⁷

Unions largely used this economic-populism framing to emphasize their institutional role within broader American political economy. For decades, the decimation of unions had *not* been seen as a matter of general societal or economic importance. Declining union density had been presumed relevant primarily to union members. But in the wake of Occupy, academics, policymakers, and other thought leaders outside of the labor movement began reconsidering the public role of labor unions. Importantly, these academics were able to show that labor

221. See generally MICHAEL A. GOULD-WARTOFSKY, *THE OCCUPIERS: THE MAKING OF THE 99 PERCENT MOVEMENT* (2015) (profiling the Occupy movement and its participants).

222. For one account of how Occupy protesters viewed labor unions, see Suzanne Collado, *Occupy's Alliance with Labor*, in *IS THIS WHAT DEMOCRACY LOOKS LIKE?*, <https://what-democracy-looks-like.org/occupys-alliance-with-labor-2> [<https://perma.cc/ZP3X-UVTQ>].

223. E.g., AFL-CIO (@AFLCIO), TWITTER (Oct. 7, 2011, 1:48 PM), <https://twitter.com/AFLCIO/status/122367630215626752> [<https://perma.cc/G82T-7748>].

224. *We Are the 99%*, COMM'NS WORKERS AM. (Mar. 22, 2012), https://cwa-union.org/video/entry/we_are_the_99 [<https://perma.cc/U93P-R3CC>].

225. *Advocate for Social and Economic Justice*, AFL-CIO, <https://aflcio.org/what-unions-do/social-economic-justice> [<https://perma.cc/48A8-TGJ2>].

226. *Id.*

227. *Unions: A Voice for the 99%*, N.C. STATE AFL-CIO (2011), <http://aflcionc.org/wp-content/uploads/2011/12/Unions-are-a-voice-of-the-99-percent.pdf> [<https://perma.cc/C3ZT-CXJU>].

unions had affected society-wide distribution of income.²²⁸ Whether through a “moral economy” or through forcing nonunion employers to compete with union wages, unions had improved wages for everyone, not just union workers.²²⁹ As an institution, unions were economically populist.

Some intellectuals within the labor movement, however, were less sanguine about the linkage between populism and unionism. According to Nelson Lichtenstein, unions were not populist. Unionism, he said, “is not defined by income, consumption, or even education, but by the power and autonomy—or the lack thereof—which people who sell their labor for their wages experience in daily life.”²³⁰ Moreover, he argued, unions have a programmatic approach to power, “an organized leadership, a concrete program, and the capacity to exist once the fever of the election season has passed.”²³¹ For Lichtenstein, this meant that unions had the capacity to create change, while the amorphous populist agenda did not. “To champion the 99% is to seek agency where none can be found. This is not a social category that can be mobilized. It is a statistical construct,” he concluded.²³² Similarly, political sociologist Cihan Tuğal argued that Occupy was an overly fragile coalition, fractured by too many distinct interests to lend itself to concrete political mobilization.²³³

While Lichtenstein condemned the populist framing as overly broad, others argued that it was too exclusionary. Alan L. Bogg and Mark R. Freedland resisted the linkage between unions and populism on these grounds.²³⁴ Drawing from

228. Western & Rosenfeld, *supra* note 20, at 517–18.

229. *Id.*

230. Nelson Lichtenstein, *Twenty-First Century “Populism:” Not for the Unions and a Good Thing Too*, 14 F. 235, 242 (2016).

231. *Id.* at 235.

232. *Id.* at 242.

233. Cihan Tuğal, *Elusive Revolt: The Contradictory Rise of Middle-Class Politics*, 130 THESIS ELEVEN 74, 76 (2015). Cihan Tuğal also notes that American Occupy, in particular, was largely characterized by its middle-class, or “petit bourgeois,” orientation, and palpable lack of working-class leadership. He cites both how protesters engaged in activism (through encampment-style street activism, largely economically inaccessible to the working class) and their vision for reform (antistate and antibureaucracy voluntarism) as examples. *Id.*; see also Cihan Tuğal, *Neoliberal Populism as a Contradictory Articulation*, 57 EUR. J. SOCIO. 466, 469 (2016).

234. Alan L. Bogg & Mark R. Freedland, *Labour Law in the Age of Populism: Towards Sustainable Democratic Engagement* 3 (Max Planck Inst. for Compar. Pub. L. & Int’l L. Rsch. Paper, Paper No. 2018-15, 2018).

the work of political theorist Jan-Werner Müller,²³⁵ they construed “antipluralism” as the defining characteristic of populism. And they insisted that labor must find a different frame more compatible with liberal values.²³⁶

Synthesizing these concerns, the greatest limitation of this framing may be in its complicated legacy, both generally and for unions specifically. The economic-populist message recentered economic inequality within American political discourse. But it did not specify a causal mechanism, nor did it offer a solution. As such, it did not provide a method for adjudicating competing claims within the 99%. This framing could not reconcile competing claims between workers and consumers, for instance, or workers and taxpayers.

To resolve these limitations, unions sought to frame themselves as a *voice* for the 99%. But at historically low levels of union density, this invited a counterframing, what political scientists John V. Kane and Benjamin J. Newman have termed class-based anti-union rhetoric.²³⁷ This counterframe suggests that unionized workers are the elite 1% of workers, rather than the true working class. The unwieldiness and internal incoherencies of economic populism arguably ushered in the American political crises of the late 2010s, when Donald Trump became the “populist” choice for President of the United States.

2. *The Service Recipient (“Bargaining for the Common Good”)*

Following Great Recession-era attacks on public-sector unions, public- and service-sector unions in the mid-2010s began explaining their advocacy in a new way—as advocacy not for themselves, but for the community, the public, for students, for patients. In recent years, this turn of phrase has coalesced into a broader tactical repertoire now institutionalized as “bargaining for the common good” (BFCG).²³⁸ As defined by Kimberly M. Sánchez Ocasio and Leo Gertner, “common-good unionism” should be seen as “push[ing] the boundaries of what it means to be in a union and spurs worker movements to have significant impact on housing, education funding, health care, the environment, and other areas.”²³⁹

235. See generally JAN-WERNER MÜLLER, *What Is POPULISM?* 8 (2016) (arguing that the “99%” rhetoric of Occupy was a form of exclusionary “identity politics”).

236. Bogg & Freedland, *supra* note 234, at 2.

237. Kane & Newman, *The New Underserving Rich?*, *supra* note 216, at 997.

238. See Joseph A. McCartin, *Bargaining for the Common Good*, DISSENT (2016), <https://www.dissentmagazine.org/article/bargaining-common-good-community-union-alignment> [<https://perma.cc/L8B4-FPWB>]; see also Andrias & Sachs, *supra* note 61, at 586 (arguing that the law should protect bargaining for the common good).

239. 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, 522 (2017).

BFCG is a broad tent and has many permutations, based on the multiple ways that workers connect to their communities. It can mean recognizing that workers are community members with a range of needs beyond those of the presumed white, male, citizen “worker” – needs for child care or for immigration reform. It can mean building upon the shared material interests between workers and the people they serve – interests in smaller class sizes or increased funding for services. It can also mean an explicitly political unionism, in which workers bargain to effectuate their broader normative commitments, in addition to their immediate material interests.

Uniting these diverse threads is the belief that in a fissured economy with low union density and weak labor laws, existing bargaining frameworks are insufficient to create social change. In order to build power and effectuate change, workers must craft broader demands in partnership with their communities. Doing so, BFCG proponents recognize, requires “transcend[ing] the traditional bargaining frameworks that are written in law.”²⁴⁰ The NLRA and its counterparts focus on terms and conditions of employment in a specific workplace. The common good requires more.

As a frame, “bargaining for the common good” resonates in part because it emphasizes the benefits of unionism for groups *other* than workers. It emphasizes benefits to the “community,” the locus of social-movement activism during decades of union decline.²⁴¹ And in the industries where it is most championed, the framing often equates that amorphous community with service recipients. In so doing, it foregrounds this twenty-first-century “consumer” as the bearer of the common good.

Consumer identity has long had primacy in American political economy, given the neoclassical emphasis on exchange over production (not to mention the Keynesian framing of workers as consumers). In the industrial-based economy of midcentury, unions claimed that “union made” meant quality workmanship. Today, in a service-based economy with union density greatest in the public sector, unions claim that they benefit the consumer qua service recipient: the student, the patient. This frame has proven particularly resonant in feminized industries in which selflessness is celebrated – teaching, first and foremost. Here, it also aligns with the neoliberal reformulation of the student as the holder of investment value, with increased human capital as the primary “common good” furthered by education.

Bargaining for the common good does precisely what many commentators argued must be done to win back public support for unions, in the wake of Great

240. McCartin, *supra* note 238.

241. See Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 1-2 (1999).

Recession-era attacks. Anti-union forces were adept during that time at constructing a dichotomy “in which victimized children [were] pitted against greedy teachers.”²⁴² Scholars called for “child-first rhetoric” in teacher-union advocacy.²⁴³

The limitation of this strategy, though, is that by accepting the existing connotations of these categories as a given, it arguably cedes too much. It cedes a vision of workers and working conditions as *themselves* a common good. As organizer Marianne Garneau has argued:

Anti-worker propaganda from both liberals and conservatives has succeeded in framing every union fight as chauvinistic, narrow self-interest . . . [Unions’] response to that cannot just be to implicitly concede the point and reach out to “the public” to tack on issues of interest to them. Instead, we have to reclaim the working class’s interest as the general interest.²⁴⁴

Unsurprisingly, then, this frame can only bear so much weight. While there is significant overlap between the interests of teachers and their students, not every interest is equally overlapping. As such, teachers’ legitimacy as *agents* of student welfare will likely be subject to contestation, as it has been over school closures during the COVID-19 pandemic.²⁴⁵ When teachers’ interests and students’ interests collectively diverge, as they necessarily do and will sometimes, how should those divergences be reconciled?

Consistent with theorists’ concerns that the more “resonant” a frame is, the less “radical,”²⁴⁶ it is also worth questioning whether a consumer-first frame is consistent with labor’s long-term interests. By tying union legitimacy to consumer welfare, rather than worker welfare, it cedes significant discursive ground.

²⁴². William C. Smith, *Framing the Debate over Teacher Unions*, MID-ATL. EDUC. REV. 1, 17-26 (2013).

²⁴³. *Id.* at 22.

²⁴⁴. Marianne Garneau, *Bargaining for the Common Good in the Coronavirus Era*, ORG. WORK (Aug. 17, 2020), <https://organizing.work/2020/08/bargaining-for-the-common-good-in-the-coronavirus-era> [<https://perma.cc/NL32-DNU7>].

²⁴⁵. See McCartin, *supra* note 238. This is all the more true given recent legal changes in state collective-bargaining laws, which prevent teachers from bargaining about issues other than wages and benefits. See Reddy, *supra* note 29; Bradley D. Marianno, *Teachers’ Unions: Scapegoats or Bad-Faith Actors in COVID-19 School Reopening Decisions?*, BROOKINGS INST. (Mar. 25, 2021), <https://www.brookings.edu/blog/brown-center-chalkboard/2021/03/25/teachers-unions-scapegoats-or-bad-faith-actors-in-covid-19-school-reopening-decisions> [<https://perma.cc/8W8D-MU24>] (“[T]he empirical research suggests that teachers’ unions slowed fall school reopening decisions during a worldwide pandemic, and media accounts suggest their efforts continued as schools returned from winter break. Naturally, some will view union actions as an affront to America’s students and others as a public service.”).

²⁴⁶. See Ferree, *supra* note 214, at 304.

Until this point, corporate legitimacy under neoliberalism has been tied to claims of being the “job creators,” the ultimate agent of worker interests.²⁴⁷ As corporations today increasingly seek to frame automated service provision as in consumers’ best interests,²⁴⁸ labor unions may need to preserve the viability of claims that business and governments should, separately and independently, be accountable to workers.

3. *The Marginalized Worker (“Antidiscrimination”)*

The racialized and gendered exclusions built into New Deal-era labor law – as well as the racist and sexist policies and practices historically adopted by many unions – meant that for decades, unions failed to represent large sections of the working class. Yet, given the realities of who the American working class is and who has most fought for representation, unions today are increasingly composed of, and led by, Black and Brown workers. Consistent with this reality, one final way in which unions today reframe themselves is *as* civil-rights organizations, advancing the cause of workers long marginalized because of their race, gender, or immigration status.²⁴⁹

In union communications today, this framing is sometimes explicit. For instance, in mid-2020, the Service Employees International Union’s website featured an article with the headline: “Unions step up to protect Blacks and other vulnerable workers from COVID-19.”²⁵⁰ Similarly, President Biden’s much-heralded tweet in support of labor unions drew upon this frame by proclaiming: “Unions lift up workers, both union and non-union, and especially Black and brown workers.”²⁵¹ Other times, the framing is more subtle, as unions highlight their diverse memberships.²⁵²

247. Rollert, *supra* note 164.

248. For instance, Uber and Lyft claim that their services have led to a decrease in drunk-driving injuries and arrests. See, e.g., Jacey Fortin, *Does Uber Really Prevent Drunken Driving? It Depends on the Study*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/business/uber-drunk-driving-prevention.html> [<https://perma.cc/CHS6-9VZZ>].

249. See Sánchez Ocasio & Gertner, *supra* note 239, at 509–10.

250. SERV. EMPs. INT’L UNION, <https://www.seiu.org> [<https://perma.cc/V3YU-KZW6>]; Jay Mwamba, *Unions Step up to Protect Blacks and Other Vulnerable Workers from COVID-19*, N.Y. DAILY NEWS (Feb. 3, 2021, 4:30 PM), <https://www.nydailynews.com/new-york/black-history-month/ny-black-history-2021-unions-fight-covid-attack-on-blacks-20210203-jdf4krktjzfwpdhxxsens7ote-story.html> [<https://perma.cc/EW6N-WPLS>].

251. President Biden (@POTUS), TWITTER, at 00:22 (Feb. 28, 2021, 8:01 PM), <https://twitter.com/POTUS/status/1366191901196644354> [<https://perma.cc/LVH3-KKTW>] (embedded video).

252. SERV. EMPs. INT’L UNION, *supra* note 250 (“We are the Service Employees International Union (SEIU), a union of about 2 million diverse members . . .”); see also *About*, INT’L BHD. OF

Given organized labor's mixed history when it comes to race and gender justice, this frame does essential discursive work to rehabilitate unions.²⁵³ First, it helps counter outdated stereotypes about the actual demographics of unions. For much of the public, the stereotypical union member is still a white man, working a blue-collar job. Yet, for decades, Black workers have been more likely to be in unions than any other racial group,²⁵⁴ and men and women are almost equally likely to have union representation.²⁵⁵

Second, in an economy structured by race, gender, and immigration status, this frame emphasizes that work, economy, and class are co-constructed with race, gender, and citizenship.²⁵⁶ In so doing, it harkens back to a more material understanding of civil rights.²⁵⁷ As Risa L. Goluboff has shown, formal, dignitary equality before the law was *not* always the predominant understanding of civil rights.²⁵⁷ For many in the civil-rights movement, the rights they wanted were economic—full employment, good jobs, fair pay, and benefits. Unionism, for all of its civil-rights failures, has often served racial and gender justice, simply by virtue of the technologies it uses to ensure that bosses, too, follow the rules. Through limiting managerial discretion, union contracts have long decreased wage gaps for workers of color and women.²⁵⁸ And a recent study showed that unionism is associated with decreased racial resentment among white workers,²⁵⁹ not through trainings or mandates, but because of the experience of working together toward a common goal.

TEAMSTERS, <https://teamster.org/about> [<https://perma.cc/UER3-9T6Y>] (“The Teamsters are America’s largest, most diverse union.”).

253. See, e.g., Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 122–26 (2011); THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* 53–54 (2008); BRUCE NELSON, *DIVIDED WE STAND: AMERICAN WORKERS AND THE STRUGGLE FOR BLACK EQUALITY* 46–48 (2001).

254. See News Release, *supra* note 26, at 1 (“Black workers remained more likely to be union members than White, Asian, or Hispanic workers.”); see also ROSENFELD, *supra* note 16, at 102–03 (noting that since the 1970s, Black workers have been more likely to be unionized than white workers).

255. See News Release, *supra* note 26, at 1 (“Men continued to have a higher union membership rate (10.6 percent) than women (9.9 percent).”).

256. See, e.g., Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2172–96 (2013).

257. GOLUBOFF, *supra* note 22, at 4–6.

258. *Unions Help Reduce Disparities and Strengthen Our Democracy*, ECON. POL’Y INST. (Apr. 23, 2021), <https://www.epi.org/publication/unions-help-reduce-disparities-and-strengthen-our-democracy> [<https://perma.cc/4Y65-TYC9>].

259. Paul Frymer & Jacob M. Grumbach, *Labor Unions and White Racial Politics*, 65 AM. J. POL. SCI. 225, 228–36 (2021).

Legal scholar César F. Rosado Marzán has argued that workers' centers, who often represent the most marginalized workers, have greater moral authority as a result. The demographics of their membership help legitimize them as social-movement organizations. Relative to traditional unions, he contends that one of the advantages of workers' centers is their greater "symbolic capital," which he says, "lends prestige . . . and helps to draw significant public attention."²⁶⁰ Marzán suggests that workers' centers may be able to bolster the legitimacy of the labor movement more broadly, through this symbolic capital.²⁶¹

Marzán's analysis does not fully delve into why representation of marginalized workers gives workers' centers greater symbolic capital than traditional unions, nor does he make explicit why labor unions might have less legitimacy as social-movement organizations. Still, in making this comparison, he highlights a tension within contemporary liberal-left political discourse about race, class, and work. Unions' framing of themselves as champions of the most marginalized workers embodies that same tension. On the one hand, it rehabilitates unions from their past, signals which unions have made a commitment to deeper anti-oppression work, and names the inherently intersectional nature of unionism within a system of racial capitalism. On the other, the frame sometimes hints at a neoliberal multicultural complacency. If it is *only* the most marginalized workers who are a concern, if it is only the Black and Brown workers who need support, then formal equality should be the solution, not a reconstituted political economy. Neoliberal economists have always asserted their own vision of racial justice. In their view, a free market is the best way to ameliorate irrational "status" inequalities.²⁶²

For this reason, a frame which ties deservingness to marginalization, rather than fundamental right, may have limitations, *even for those it seeks to champion*.²⁶³ A low-wage domestic worker who seeks overtime pay may garner support under this frame today.²⁶⁴ But, without broader ideological change, it is worth questioning how much room there is before her claim loses credibility. In other

²⁶⁰. César F. Rosado Marzán, *Worker Centers and the Moral Economy: Disrupting Through Brokerage, Prestige, and Moral Framing*, 2017 U. CHI. LEGAL F. 409, 411. Interestingly, many workers' centers and other alt-labor groups engage in clear and unequivocal rights framing. See, e.g., Hina Shah & Marci Seville, *Domestic Worker Organizing: Building a Contemporary Movement for the Dignity and Power*, 75 ALB. L. REV. 413 (2011) (detailing the domestic-worker movement's campaign for a "Domestic Worker Bill of Rights").

²⁶¹. Marzán, *supra* note 260, at 418.

²⁶². See, e.g., Dinner, *supra* note 22, at 1085–90; MILTON FRIEDMAN, CAPITALISM AND FREEDOM 108–118 (1962).

²⁶³. For a competing view, see Noah Zatz, *Poverty Unmodified?: Critical Reflections on the Deserving/Undeserving Distinction*, 59 UCLA L. REV. 550 (2012).

²⁶⁴. See Helen Schwenken, *The Challenges of Framing Women Migrants' Rights in the European Union*, 21 REVUE EUROPÉENNE DES MIGRATIONS INTERNATIONALES 1, 7–8, 16 (2005).

words, there may be limited discursive space between the domestic worker and the “greedy teacher.”

C. *Dignity, Voice, and Redistribution at Work as a Common Good?*

Each of the above frames resists the account of labor unions as rent-seeking interest groups by framing the work that unions do as social-movement work, connected to a broader, more resonant social-justice agenda. This public-facing advocacy has seemingly been impactful; labor’s public support is currently higher than it has been in decades.²⁶⁵ This has, in turn, been heralded by many of labor’s supporters as a fundamentally changed politics, a rebuke to the conservative economic policies of decades prior. But the question remains: to what end? Will increased support do anything to shift stubborn material realities? Can it do anything to stop the decades-long decrease in union membership and power?²⁶⁶

It is worth noting that thus far, rapidly increasing support for unions has *not* been accompanied by a meaningful increase in union membership rates. It is possible that this will change; there were notable upticks in organizing interest and activity in 2022.²⁶⁷ Thus far, however, union density has continued its steady march downward. In 2009, with a 48% public approval, 12.3% of workers were unionized.²⁶⁸ In 2021, with a 68% approval rate, 10.3% of workers were unionized.²⁶⁹ A decade characterized by a 40% increase in public approval of unions was also characterized by a 20% decrease in union membership.

Of course, power is not only about numbers; it is also about law. Power relations between labor, capital, and the state are constructed by legal rules, by how they allocate burdens and benefits. Given that labor law’s rules are a structural mismatch for the realities of work and that labor law’s remedies are insufficient to discipline recalcitrant employers, virtually all scholars agree that labor-law reform is required – to change the power relationships between labor and capital,

265. McCarthy, *supra* note 4.

266. There have been some immediate material benefits. As Kate Andrias has shown, the increased legitimacy of labor unions has materially and symbolically benefitted unions and other worker collectivities. The Fight for \$15, a frame which I discuss in the next Part, has built worker confidence and resulted in transfers of wealth to working people through the political process. See Andrias, *supra* note 39, at 47–51.

267. See McCarthy, *supra* note 4.

268. Bureau of Lab. Stat., *A Look at Union Membership Rates Across Industries in 2020*, U.S. DEPT. LAB. (Feb. 25, 2021), <https://www.bls.gov/opub/ted/2021/a-look-at-union-membership-rates-across-industries-in-2020.htm> [<https://perma.cc/8GLY-PX54>].

269. Press Release, Bureau of Lab. Stat., U.S. Dep’t Lab., Union Members – 2021 (Jan. 20, 2022), <https://www.bls.gov/news.release/union2.nro.htm> [<https://perma.cc/SD3J-KX8T>].

to increase membership. There is little question that more workers would be in unions if the process were less cumbersome and risky.

From this perspective, labor's reframing may offer a different route to membership growth and power: legal change. Social-movement scholars have long emphasized that organizations with little power must seek legitimacy in order to achieve goals through the political process.²⁷⁰ With weak union membership and limited strike capacity, labor's best hope for increased membership may be labor-law reform. And that requires changed public opinion.

That said, it remains to be seen whether public support for unions will be sufficiently powerful, durable, and salient to voters' political choices to accomplish such change. There are already some signs that this rapidly built support may be tenuous. Concerns about the role of teachers' unions in prolonging school closures during the pandemic, about some unions' resistance to vaccine mandates, and about police unions' role in enabling police violence have troubled many of labor's new supporters.²⁷¹ And in so doing, they have highlighted cracks in the fidelity between each of these frames and the way that unions are structured to operate.

While unions challenge the power and wealth of the 1%, their bargaining prioritizes workers in workplaces. While teachers' unions advocate for their students' learning conditions, the COVID-19 crisis has shown that there are material and ideological reasons why teachers, parents, and students may have differing visions of the common good.²⁷² While unions significantly reduce racial pay disparities and have helped families of color build wealth,²⁷³ unionism has long relied on legal and organizational technologies, like majority rule, that will sometimes imperfectly serve minority interests.²⁷⁴

One of the reasons the current moment is so remarkable is that public support for unions is high even though union density is low. When public approval of unions was previously this high, almost half of those who approved were union members themselves, and approval rates among union members have always

270. See, e.g., DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970*, at 132 (1982); THEDA SKOCPOL, *DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE* 60 (2003).

271. See, e.g., Greenhouse, *supra* note 46 ("Critics of police unions stress that the unions have far too much power, and contend that robust protections give many police officers a sense of impunity."); Will, *supra* note 46 (describing "narrative that [teachers' unions are] acting as obstructionists and pushing to keep schools closed").

272. See McCartin, *supra* note 238.

273. See Jake Rosenfeld & Meredith Kleykamp, *Organized Labor and Racial Wage Inequality in the United States*, 117 AM. J. SOCIO. 1460, 1486 (2012); Frymer & Grumbach, *supra* note 259, at 236.

274. See Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 738 (2017).

been significantly higher than among nonmembers.²⁷⁵ Today, the public loves unions, even though only a small percentage of them are in one.

There are two ways to think about this inverse relationship. It might mean that national beliefs have finally changed, and a massive increase in union density and power is on the horizon. Or—consistent with Benjamin Levin’s admonition that Americans (and particularly liberals) often romanticize worker power, but are troubled when it is wielded—it might mean that support is high *because* unions are weak. In their inchoate form, it is possible to project onto them all sorts of ideas about what they would do with their countervailing power, if only they had it.

From this perspective, it is worth noting that notwithstanding currently high levels of public support, the two unions that seemingly remain the most controversial, that continue to threaten this wave of pro-worker sentiment are teachers’ unions and police unions. Education and policing are, *by far*, the most union-dense sectors of the economy today. With close to a third of all teachers and police officers in unions, these are the sole sectors in which union density approximates labor’s midcentury heyday.²⁷⁶ No other sectors come close. By many measures, these are some of the most powerful unions in the country. And they are the most reviled.

Given this tension between idealized unions and actual unions, it is also worth asking whether these frames are doing the equally necessary work of increasing *workers’* interest in unionization, and if so, which workers. Workers are as diverse as any group, and their motives are multifaceted. But in the aggregate, research suggests that most workers’ commitment to unionism begins in the material and dignitary concerns of their own immediate working lives.²⁷⁷ This local activism can, of course, serve as a bridge to broader political commitments. As former organizer-turned-academic Jane McAlevey has argued, this is one of the hallmarks of labor unions as a social movement, and what makes them so important for building power.²⁷⁸ Unions organize interest adherents, rather than conscience adherents.²⁷⁹ They attempt to engage in the work of building broader solidarities, but do not necessarily require that agreement *a priori*.

275. See LIPSET & SCHNEIDER, *supra* note 1, at 202.

276. Bureau of Lab. Stat., *supra* note 268.

277. See Andrias, *supra* note 39, at 80–81.

278. JANE MCALEVEY, NO SHORTCUTS: ORGANIZING FOR POWER IN THE NEW GILDED AGE 13–14 (2016).

279. See *supra* text accompanying notes 185–187.

In contrast, much new organizing today is among the precommitted. For a host of reasons, unionization is increasingly common in white-collar, professional jobs in urban areas.²⁸⁰ This is partly because the investment of time and energy that unionizing currently entails is most practicable and worthwhile for longer-term, more stable employees. But in a partisan political climate, there is also a concern that unions will increasingly be a phenomenon of liberal-leaning, professional and/or urban workplaces, leaving behind many other working people.²⁸¹

The “contest of ideas” between capital and labor is, of course, ongoing and involves ebbs and flows of public support.²⁸² But one of the lessons of labor’s New Deal bargain is that instrumental and conditional justifications for unions *will* fail. To be clear, labor unions should and must establish that they have the capacity to advance community interests, further racial and gender equality, and challenge the power of the 1%. But without a claim that *what unions do to improve the working lives of their own members is itself a common good*, organized labor—and all who benefit from it—have already lost the contest of ideas.²⁸³

D. Measuring the Limits of Public Support

And so, as scholars interrogate the nuances of public attitudes toward unions, there is increasing evidence that “the fundamental political commitments of the nation” may not, in fact, have shifted, at least not as far as labor needs them to.²⁸⁴

280. See, e.g., Alana Semuels, *Organized Labor’s Growing Class Divide*, ATLANTIC (Jan. 26, 2018) <https://www.theatlantic.com/business/archive/2018/01/union-organizing-media-white-collar/551453> [<https://perma.cc/33GF-HJWE>].

281. Support for unions today is highly partisan, with 90% of Democrats indicating approval but only 47% of Republicans. See Brenan, *supra* note 2. From 2011 to 2018, the increase in support for unions was consistent across political parties, an eleven-percentage-point increase for both Democrats and Republicans. Since 2019, however, liberal support for unions has increased even further, while conservative support has declined. John Gramlich, *Majorities of Americans Say Unions Have A Positive Effect on U.S. and that Decline in Union Membership is Bad*, PEW RSCH. CTR. (Sept. 3, 2021), <https://www.pewresearch.org/fact-tank/2021/09/03/majorities-of-americans-say-unions-have-a-positive-effect-on-u-s-and-that-decline-in-union-membership-is-bad> [<https://perma.cc/X8YC-KB3E>].

282. See LICHTENSTEIN, *supra* note 7.

283. Cf. JULIE GREENE, *PURE AND SIMPLE POLITICS: THE AMERICAN FEDERATION OF LABOR AND POLITICAL ACTIVISM, 1881-1917* (1998) (examining the political importance of the American Federation of Labor’s “pure and simple” unionism).

284. Andrias, *Building Labor’s Constitution*, *supra* note 22, at 1595 (arguing that for labor’s constitutional claims to have purchase both the judiciary and the “fundamental political commitments of the nation would have to shift.”).

To start, existing public-survey data hint at the limits of labor's reframing. Seventy-one percent of the American public currently approves of unions.²⁸⁵ A majority of that public works,²⁸⁶ and only about 10% of workers are actually union members.²⁸⁷ Yet when nonunion workers today are asked whether they want to be in a union, 58% indicate that they are "*not at all* interested."²⁸⁸ Notwithstanding high levels of public support, only 20% of nonunion workers indicate any affirmative interest in forming a union.²⁸⁹

Similarly, social-science research suggests that public support is malleable. Researchers have shown that even those who most support unions can be convinced otherwise simply through strategic counter-framing.²⁹⁰ For those with strong working-class identities, framing unions as an undeserving class of elite of workers can rapidly switch their attitudes toward unions, from strong approval to strong disapproval.²⁹¹

In my ongoing empirical research, I have found additional evidence that the legacy of the law of apolitical economy lives on. In 2019, I ran an exploratory survey experiment to study how people's attitudes toward unions were affected by exposure to different collective-action frames.²⁹² While a full presentation of that research is beyond the scope of this Feature, I emphasize one key finding: it

285. See Brennan, *supra* note 2.

286. News Release, Bureau of Lab. Stat., U.S. Dep't of Lab., The Employment Situation—January 2023 (Feb. 3, 2023), <https://www.bls.gov/news.release/pdf/empstat.pdf> [<https://perma.cc/W8CJ-4YUT>].

287. News Release, Bureau of Lab. Stat., U.S. Dep't of Lab., Union Members—2022 (Jan. 19, 2023), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/8Y8M-4HGF>].

288. Brennan, *supra* note 2. *But see* RICHARD BARRY FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 15-16 (1999) (arguing that standard survey methodologies fail to reflect workers' true preferences).

289. Brennan, *supra* note 2.

290. Kane & Newman, *The New Underserving Rich?*, *supra* note 216, at 997.

291. *Id.*

292. Through the guise of asking respondents to read various draft letters to the editor for the purpose of studying media usage, the survey randomly exposed respondents to one of several different frames about labor unions, and then measured their support. There was also a control condition in which respondents were not asked to read anything and were immediately asked about their levels of support. These frames included the three frames discussed above (economic populism, bargaining for the common good, and marginalized workers), a frame that emphasized the role of unions in creating good jobs for organized workers, a frame that incorporated language from the preamble to the NLRA, and a placebo. Details about survey design, sampling, descriptive statistics, and results are available in my working paper. See Di-ana S. Reddy, Legal Framing Against Ideology: The Limits of Contemporary Public Support for Unions (unpublished manuscript) (on file with author).

is not just negative counter-framing that can decrease support for unions. Rather, simply presenting unions as doing *exactly what they are statutorily designed to do* may also be associated with decreased support.

In my study, respondents were asked to read editorial materials describing the benefits of unionization from a variety of perspectives. One of the materials was a draft letter to the editor written by a union member celebrating how the union made their job better. When respondents were exposed to this frame, two notable results followed. First, those respondents had significant trouble remembering the gist of what they had been told relative to respondents who received other frames; it was the least memorable frame of all those presented, and significantly so. Second, those respondents who received the frame and were able to remember it then went on to express a *lower* level of support for unions than respondents in the control condition, that is, those who received no frame at all.²⁹³ This means that, on average, respondents felt more positively toward unions when reporting their preexisting beliefs than they felt when they read, internalized, and remembered a narrative that positively described unions helping workers to improve their jobs.

The letter in question emphasized two important attributes of unions in the United States: that workers are required to affirmatively opt into unionization, and that unions improve workers' jobs. While this frame focused on the benefits to unionized workers, it was not exclusionary. Among other things, the letter stated:

Labor unions fight to make sure that every unionized job is justly compensated and secure. They are the best way we have of making sure that our bosses treat us fairly when we show up to work each day. If you want to have a good job, unions are the way forward.²⁹⁴

This is the message, if internalized, that was associated with lower support for unions. While further research is necessary to confirm and explain this outcome, it should, at minimum, raise troubling questions for labor advocates.

²⁹³ *Id.* For those who remembered it, the frame was associated with 0.4 points lower support on a 7-point scale, even after controlling for potentially confounding demographic variables. This decrease was not large, but it was not overly small, either, especially given that most responses fell within a relatively narrow range. This finding was statistically significant at the 0.05 level of significance.

²⁹⁴ The full text of this letter was as follows:

Dear Editor: I am glad to see that labor unions are in the news again. Too many people today don't know how essential labor unions are for creating good jobs. Labor unions fight to make sure that every unionized job is justly compensated and secure. They are the best way someone like me has of making sure that my boss treats me fairly when I show up to work each day. If you want a good job too, unions are the way forward. Thank you for your excellent reporting. Signed, R.S.

And yet, in light of the legal and economic history recounted above, perhaps this seemingly paradoxical result is actually unsurprising. *Claiborne Hardware* and *Superior Court Trial Lawyers* constructed this exact activity – this seeking of economic benefits for those who agree to participate – as apolitical and inconsistent with values-laden social-movement activity. Given that context, the fact that framing unions as helping workers improve their jobs decreases support for them makes much more sense.

At its core, American labor law empowers workers to join together to secure better pay, benefits, voice, and dignity. And these are the primary reasons that workers continue to join unions.²⁹⁵ Today, people proclaim support for unions generally. But when they are reminded that unions do what labor law asks them to do, what workers want them to do – people like them less. Whatever the status of the law of apolitical economy in courts of law, I suggest it still lives on in courts of public opinion.

IV. LAW AND THE NORMATIVE STAKES OF LABOR UNIONS

Unions are pillars of the moral economy in modern labor markets. Across countries and over time, unions widely promoted norms of equity that claimed the fairness of a standard rate for low-pay workers and the injustice of unchecked earnings for managers and owners.

– Bruce Western & Jake Rosenfeld²⁹⁶

Union Guy: The thing is, you always go on in your speeches about the workers in Indonesia, Cambodia, Timbuktu –

Senator: Because I think we have . . . a moral, uh –

Union Guy: My union members are hurting. They don't care about moral this or moral that.

– House, Season One, Episode Seventeen²⁹⁷

In this concluding Part, I reflect on the ramifications of legal paths taken, and not taken. When New Dealers relied on the alchemy of Keynesianism to transmute workers' interests into a common good, they turned away from a more expressly normative framework for their actions and their goals. For unions and

²⁹⁵ McCarthy, *supra* note 4. In contrast, union members report being least likely to join unions based on the diffuse belief that unions can have a “positive effect on the country.” *Id.*

²⁹⁶ Western & Rosenfeld, *supra* note 20, at 513–14.

²⁹⁷ *House: Role Model* (Fox television broadcast Apr. 12, 2005).

those who support them today, one enduring legacy of the law of apolitical economy is its stubborn grasp on how we understand the stakes of unionization. But other movements took alternative paths, and different paths remain available to unions.

A. *Alchemical Paths, Revisited*

Today, the public supports unions, but that support is limited and conditional. And in the complexity of the real world, cases continue to pop up in the margins of the Venn diagram, outside of the large (but never total) overlap between unions members' interests and the public's current demands. In those cases, the union does not appear to benefit the broader public; rather, it seems to fight only for what a majority of its members decided was important to them. In a world of conditional support, each of these moments threatens a full-blown legitimacy crisis for American labor unions.

In those moments, even labor's most stalwart defenders shy away from a wholesale defense of unionism. As one example, in recent debates about the role of police unions in propagating violence, labor-law scholar Benjamin Sachs conceded a great deal to the law of apolitical economy. In response to the justified moral outrage of the moment, Sachs said, "Collective action is . . . just a source of power."²⁹⁸ As such, "When unions use the power of collective bargaining for ends that we, as a democratic society, deem unacceptable," he argued, "it becomes our responsibility . . . to deny unions the ability to use collective bargaining for these purposes."²⁹⁹ In 1937, a Supreme Court just a few years removed from the *Lochner* era stated that union collective action was "a fundamental right."³⁰⁰ Today, even labor's champions concede that it is "just a source of

²⁹⁸ Benjamin Sachs, *Police Unions: It's Time to Change the Law and End the Abuse*, ON LAB. (June 4, 2020), <https://onlabor.org/police-unions-its-time-to-change-the-law> [<https://perma.cc/FXD6-B56Q>]. To be clear, in that same post, Benjamin Sachs also spoke of the great importance of collective bargaining. *Id.* And given his life's work, there is no doubting his commitment to the rights of workers. Moreover, as discussed, the problem of police unions is and should be difficult for all progressives. That said, my concern here is not so much about deep-seated beliefs or complex arguments; it is about discourse, the language we have all have fallen into, eighty years into the law of apolitical economy.

²⁹⁹ *Id.*

³⁰⁰ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) ("Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer. That is a fundamental right.").

power,” created by democratic majorities and capable of being taken away by democratic majorities.³⁰¹

Catherine L. Fisk would later point out the danger of Sachs’ concession. It ceded too much to the vagaries of public opinion, too easily shaped by monetary advantage in the contest of ideas. “The problem,” Fisk noted, “is that working class people are rarely the ones to determine when the collective bargaining or labor protest is used for unacceptable purposes.”³⁰² She is right. Just ten years ago, public-sector employees in Wisconsin lost their collective-bargaining rights to the will of a putative democratic majority. Whether taking away those rights was actually the will of a Wisconsin democratic majority is contested.³⁰³ But what is uncontested is that in 2009, less than 50% of the public approved of labor unions. In the midst of a recession caused by the mistakes of financial companies, much of the American public became convinced that the real problem in the United States was that teachers’ pensions were too generous.

The danger inherent in subjecting unions to constant judgment about whether their ends are acceptable is exactly why legal historian Christopher L. Tomlins has argued that trying to justify unions to the general public is an unwinnable battle. In his classic account of the relationship between labor unions and state power, he argued that the problem of the public interest was a problem created by labor law. Only when the state asserted a role in the collective-bargaining process did unions’ actions come to be judged by the vague and manipulative standard of the public interest. The “legitimacy of collective activity putatively guaranteed by labor relations law,” he said, was “conditional almost from the outset.”³⁰⁴ Unions have only been acceptable to the state as “means to an end.”³⁰⁵ Those ends have included industrial peace, Keynesian economic growth, and perhaps today, economic populism or bargaining for the common good. But thus far, they have not included support for workers as workers. From this view,

301. Sachs, *supra* note 298; see also *Janus v. Am. Fed’n of State, Cnty. & Mun. Emps.*, 138 S. Ct. 2448 (2018) (stating in the syllabus that Illinois law *permits* employees to unionize). Constructing unionism as something which democratic majorities can either grant or deny, rather than a fundamental right, makes the vagaries of public opinion all the more important. Arguably, the contest of ideas has been so heightened in recent years because through mobilizing public opinion, it remains possible to grant or deny workers the ability to legally unionize.

302. Catherine L. Fisk, *The Once and Future Countervailing Power of Labor*, 130 YALE L.J. F. 685, 704 (2021).

303. Shawn Johnson, *A Decade After Act 10, It’s a Different World for Wisconsin Unions: With Their Numbers on the Decline, Public Sector Unions Have Had to Reimagine What It Means to Organize*, WIS. PUB. RADIO (Feb. 11, 2021, 5:40 AM), <https://www.wpr.org/decade-after-act-10-its-different-world-wisconsin-unions> [<https://perma.cc/B7G3-8RYD>].

304. TOMLINS, *supra* note 73, at 318.

305. *Id.*

law renders labor's legitimacy contingent, and in that precarious situation, unions will lose.

According to Tomlins, it was the legalization of unions that rendered their legitimacy conditional. But here, I want to suggest that just the opposite may be true. The problem was never too much law, but too little – an insufficient legal foundation, the failure to fully assert the stakes. Under the law of apolitical economy, twentieth-century labor law afforded unions a highly conditional legitimacy. But there were and are legal alternatives.

If the “alchemy of Keynesian economics,” as Joel Rogers described it,³⁰⁶ was in transmuting labor's self-interested advocacy into a legible common good through economic reasoning, critical race theory reminds us that there are other alchemical paths through juridical reasoning. In her classic entrée into the rights debate, Patricia Williams brilliantly theorized what she called the *alchemical role* of rights claims for social movements.³⁰⁷ She focused on the ways in which rights talk can turn into actual rights. But in much the same way, rights render what might otherwise be seen as self-interest into a cognizable public interest. In *Claiborne Hardware*, the Supreme Court's distinction between the self-interested advocacy of workers and the “political” protest of civil-rights advocates was facilitated by rights claims.³⁰⁸ Interest adherents in social movements seek their own liberation, and that does not make it any less liberatory. Many of the Black activists who boycotted hardware stores in Claiborne County in the 1960s wanted jobs, and that did not make their demands any less right.³⁰⁹ Through clear and unequivocal moral framing, through the alchemy of rights, we proclaim a public interest in our self-interest and recognize the same in others.

For labor unions, the law of apolitical economy has inhibited development of a fundamental rights claim for unions, equivalent in normative valence to the rights claims advanced by later movements. This was not preordained. The preamble to the NLRA set forth such a constitutional vision for labor unions, even if only in its subordinate clauses. Unions effectuated “actual liberty of contract” and “full freedom of association.”³¹⁰ Liberals deconstitutionalized these concepts

306. See Rogers, *supra* note 17, at 104.

307. See generally Williams, *supra* note 18 (describing the alchemical role of rights claims for social movements).

308. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982).

309. See, e.g., Art Harris, *We've Got a Long Way to Go*, WASH. POST. (July 3, 1982), http://www.washingtonpost.com/archive/politics/1982/07/03/weve-got-a-long-way-to-go/e8f72066-9665-4283-a9a2-1ea215a8c8a1/?tid=ss_mail [<https://perma.cc/PD9Q-A7YH>].

310. 29 U.S.C. § 151 (2018).

in order to save them. What might have happened if they had chosen differently?³¹¹

But it is not just rights talk that has been lost. By the late twentieth century, unions' construction as apolitical meant the erasure, at least within public law, of *any* powerful normative defense of unions' statutory purposes, of those activities which the law of apolitical economy constructed as transactional and self-interested.

After the law of apolitical economy, there are a host of normative worlds to be revisited, or constructed anew.³¹² And ultimately, I am less concerned about the vehicle for the message than the message itself. Today, scholars are increasingly propounding new expert theories based on rediscovered facts that would again render labor unions and laws that protect them sound economic policy. But the history I have recounted suggests that labor unions and their supporters should be wary of overreliance on any new technocratic consensus independent of a clear articulation of new values. Economic rationality itself has always been based on its own underlying normative judgments, prioritizing efficiency and maximization. As such, whether or not dignity, voice, and redistribution at work are about rights, they need to be framed, to some meaningful extent, as about right and wrong.

311. Cf. CHARLES EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998). In Charles Epp's classic book, Epp proposed a new theory of rights generation. He argued that the phasic development of constitutional rights should be attributed less to judges, constitutional amendments, or other top-down mechanisms than commonly thought, and more to the growth of "support structures." By this, he meant organizations mobilizing for rights. Courts, he said, are reactive; they can only adjudicate what is brought to them. And as such, for rights to be created, there must be organized groups pressing for them, bringing the cases. For a book focused on the relationship between the state, organizations, and rights, Epp has remarkably little to say about labor unions. But perhaps, that is the point. Even in their weakened form today, labor unions are the largest economic-justice organizations in the United States. Yet, for a host of reasons, they have played a relatively limited role in asserting fundamental economic rights. This Feature suggests that unions might have been better able to assert such claims, were it not for the law of apolitical economy.

312. For some complementary and/or competing views of the juridical and normative stakes of unions, see, for example, K. Sabeel Rahman, *From Economic Inequality to Economic Freedom: Constitutional Political Economy in the New Gilded Age*, 35 YALE L. & POL'Y REV. 321 (2016); Purdy, *supra* note 22; and Alex Gourevitch, *Labor Republicanism and the Transformation of Work*, 41 POL. THEORY, 591 (2013). See ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT)* (2017).

B. On Becoming a Matter of Public Concern

This Feature has explained how under the law of apolitical economy, unions lost legibility as a rights-based movement. What it has not yet said is that there is an extent to which unions wanted it that way. Before concluding, I accordingly reflect briefly on a foundational issue to which almost any theoretical account of unions must return: unions' historically ambivalent relationship with state power.

Among the many standards that the Court has used to evaluate union and worker speech under the First Amendment (and found it lacking) is the "matter of public concern" test. Under it, the Court asks whether public-employee speech addresses a matter of public, or just private, concern. Consistent with its construction of union and worker speech as apolitical in other First Amendment contexts, the Court has consistently found that mistreatment at work is a purely private concern,³¹³ notwithstanding unions' ongoing attempts to convince the Court otherwise.³¹⁴

In a linguistic irony, labor scholar Katherine Stone used this exact phrasing decades ago to refer to unions' own preference for looking inward, rather than outward. As she put it, organized labor had long sought *to be a matter of private concern*. She urged unions to reconsider. "Industrial pluralism mandates legal arrangements that force workers to fight the daily workplace struggles in an invisible, privatized forum, where each dispute is framed in an individuated, minute, economic form," she argued.³¹⁵ The better alternative, she said, was to "define labor issues as a matter of public concern."³¹⁶ In response, other labor scholars voiced extreme skepticism. Jack Getman summarized the opposing view:

The real question is whether, if we made labor relations *a matter of public concern*, the workers would somehow be better off . . . I am suspicious

313. See Meredith McCaffrey, *Public or Private? The Split Over First Amendment Protection of Union Speech by Public Employees*, 60 B.C. L. REV. 274, 282 & n.49 (2019). For essential background on the regulation of union speech, see generally Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1 (1990); and Estlund, *supra* note 22.

314. See, e.g., Fisk, *supra* note 22, at 2075 ("If anti-union government employees have a First Amendment right to resist paying money to the union to negotiate over working conditions, formal equality would suggest that pro-union government employees have a First Amendment right to discuss their working conditions collectively. Having reintroduced the First Amendment into the labor field, there is no intellectually respectable way that the Court can insist that the only First Amendment right workers enjoy is the right not to join a union or to pay dues.").

315. Stone, *supra* note 22, at 1580.

316. *Id.*

of attempts to develop a theoretical overview which is going to define the agenda for the American working class which they have not chosen to define for themselves.³¹⁷

When Stone and Getman were debating whether unions should be a “matter of public concern,” they were not debating the emergent First Amendment standard.³¹⁸ Rather, they were debating what has always been a foundational question for unions, that is, the nature of their relationship with the state. Labor unions began as a way to address pressing social and economic inequalities privately. And in that way, there is some congruence between how unions have been treated under the First Amendment, and what they have sought to be.

In her pathbreaking article, *The New Labor Law*, Kate Andrias tells the story of the Fight for \$15.³¹⁹ She treats this union-funded movement to win raises for fast-food workers through protest and legislation, rather than collective bargaining, as an example of what she calls the “new” labor law.³²⁰ The new labor law will not rely solely on private bargains; it will make public policy.

The Fight for \$15 is also a collective-action frame. And it stands out for how starkly it differs from the frames I analyze above. The Fight for \$15 is unequivocal in its proclamation of economic rights. It does not rely on resonance with preexisting normative commitments; it establishes new ones.

But in proclaiming economic rights, the Fight for \$15 also reveals a tension in union-led economic-rights claims. The Fight for \$15 was originally conceptualized as the Fight for \$15 *and a union*.³²¹ But the latter part of the framing quickly fell away in public discourse. The movement has thus far won \$68 billion in raises for 22 million low-wage workers, but it has not directly grown union membership, at least not yet.³²² Andrias suggests this is less of a concern than most unionists think it is, as she envisions a more public role for unions.³²³ But as long as unions operate on member dues, they will play a limited role in the political arena if they are not also increasing membership.

317. Katherine Stone, *The Structure of Post-War Labor Relations*, 11 N.Y.U. REV. L. & SOC. CHANGE 125, 149 (1982) (transcribed exchange between Katherine Stone, Julius Getman, David Feller, and Howard Lesnick).

318. See email correspondence between Katherine Stone, Julius Getman, and Diana S. Reddy (on file with author).

319. See Andrias, *supra* note 39, at 47–51.

320. *Id.*

321. *Id.*

322. Yannet Lathrop, *Impact of the Fight for \$15: \$68 Billion in Raises, 22 Million Workers*, NAT’L EMP. L. PROJECT (Nov. 29, 2018), [www.nelp.org/publication/impact-fight-for-15-2018](https://perma.cc/2MFE-3UFG) [https://perma.cc/2MFE-3UFG].

323. See Andrias, *supra* note 39, at 47.

The incredible success of the Fight for \$15 in increasing real wages for working people through the political process, coupled with its failure thus far to grow unions, suggests a potential tension for labor unions and rights claims. Here, I return again to T.H. Marshall's canonical vision of labor unions as a crucible for a broader economic-rights consciousness, which he thought would ultimately be internalized into law.³²⁴ As he put it, "To have to bargain for a living wage in a society which accepts the living wage as a social right is . . . absurd."³²⁵ From this view, the Fight for \$15 did not build unions, because its own framing rendered unions superfluous. It identified state action rather than private action as the alternative solution to the problem of inequality.

When labor unions have made constitutional claims, they have usually been procedural, a right to protest, strike, or bargain.³²⁶ They have been less likely to constitutionalize the substance of their demands—a right to a living wage or to health care, for instance. To constitutionalize those demands risks a different challenge to union legitimacy. Because if there are fundamental economic rights, why has their realization been delegated to labor unions, rather than public law? If there are fundamental economic rights, what is the role of a union?

In the late 1800s and early 1900s, unions followed corporations' path to power, through organization and autonomy. The social movements that ushered in the rights revolutions of the 1950s and 1960s carved a distinct path, arguing that the state itself should bear this responsibility. And the siren calls of public rights—of a day in which workers might not have to independently build the conditions of their own empowerment—beckons, notwithstanding all we know about its limitations. From this perspective, the tensions between unions' duties to their members and to the public are the result of the state's delegation of these very public responsibilities to private actors in the first place.

These questions may one day prove essential. For now, though, the contemporary United States is plainly not "a society which accepts the living wage as a social right."³²⁷ As in the 1930s, then, perhaps the best justification for unions is that they straddle the middle ground. For those who oppose greater social and economic rights, unions remain the best of bad options. For those who would welcome a more redistributive state, unions remain the best we can currently hope for.

324. See Marshall, *supra* note 23, at 40.

325. *Id.*

326. Laura Weinrib has expertly shown that early twentieth-century progressives saw the two as connected. See WEINRIB, *supra* note 22.

327. Marshall, *supra* note 23, at 40.

CONCLUSION

Americans are changing their minds about labor unions — well, at least, they are for now. Today superficially appears to be a very different moment for workers and their unions than it was a decade ago. But this Feature suggests that the American conversation about labor unions, even at its sixty-year best, still fails to fully correct course. Under the law of apolitical economy, unions' core statutory functions — allowing workers to come together to improve their working conditions, full freedom of association and actual liberty of contract — were shorn of their normative importance. They were legally framed as transactional and self-interested. The goal was to give unions more power, to insulate them from potentially hostile courts. But the problem is that if you say something enough times, people start to believe it. Unions and their supporters today still struggle to overcome that construction, to reclaim good jobs and the power to achieve them as a normative good, in and of itself.

This is not just a story about unions though. It has broader theoretical and political implications. As a story of historical constitutional political economy, this Feature centers Keynesianism as an understudied progenitor of the *Carolene Products* framework for judicial review. In the New Deal moment, liberals had great faith that legislators, acting rationally based on their knowledge and experience, would enact and sustain protections for workers and consumers. Beyond simple faith in democratic majorities, policymakers were also influenced by the sudden technocratic consensus: they were all Keynesians then. And in that way, this story also deepens theoretical conceptualization of the relationship between law, politics, and the economy. It is not just that law and economy are mutually constitutive, it is that our constitutional fabric is woven with the thread of time-bounded political and economic judgments, and to tug on one is to potentially unravel them all.

As a story of social movement claims-making channeled by law, this Feature adds to existing theorization of the uniquely American divide between class politics and the politics of race and gender. New Deal-era labor law was constructed as economics (not rights). Ongoing racism and sexism within American society as a whole, as well as within labor-union ranks, pushed activists concerned about racial and gender oppression to advance new legal paradigms, rights (not economics). Both of these frameworks have been subject to epistemological and legal challenges. Today, this historically contingent bifurcation of issues and legal technologies continues to inhibit meaningful intersectional analysis and advocacy. I do not think it is an exaggeration to say that the future of American progressivism may turn on reckoning with this legacy, and forging a new path forward.

Ultimately, as a story about reclaiming the normative stakes of labor unions, this Feature raises as many questions as it provides answers. Still, a few things are certain. For labor unions to have the power to bring about the changes their newfound supporters want, legal reform is necessary. For labor unions to advance society-wide economic equality, challenge racial and gendered capitalism, and further community interests, they need to organize workers, and current law makes that unconscionably difficult. But it is unclear if the kind of support labor unions have today is sufficient to make labor-law reform a political priority.

As labor unions and their supporters figure out how to reclaim these stakes, how to name work as a site of political and economic inequality, how to frame good jobs as a matter of what is right rather than what is efficient, should law matter? Should rights matter? Today, progressive legal scholars and popular social movements are increasingly aware of all that the rights revolutions did not accomplish. Understandably, many are reconsidering the value of “rights” themselves. This Feature suggests it may be worth asking whether the problem with rights was never rights in and of themselves, but instead what they were constructed over the twentieth century to exclude.