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Labour and Democracy

Abstract: *Democracy has always been a central project of labour law, but it is all the more important today, with authoritarianism on the rise and democracy under threat across the globe. This chapter examines the relationship between labour law and democracy. It explores the central tension between democracy and labour under capitalism; traces how ideas and arguments about workplace democracy have evolved over time; and explores the relationship between workplace democracy and political democracy, including how and when unions serve as a bulwark against authoritarianism. Ultimately, it argues that a critical task for labour law scholarship is to rethink the body of law to better serve the goals of workplace democracy, economic democracy, and political democracy.*

What is the purpose of labour law? How should we evaluate, justify, and defend it? Scholars have offered a range of answers to these questions.¹ Some ground labour law in the liberal values of autonomy, dignity, and human rights.² Others argue labour law should advance human capabilities,³ or should take as its goal non-domination, consistent with republican theory;⁴ still others offer a Marxist account of freedom and non-domination as the basis for labour law, or for its ultimate eradication, along with that of capitalism.⁵

Without minimizing the importance of those normative goals, this chapter argues that a crucial organizing principle for labour law must be democracy: not only workplace democracy, but also democracy at the level of the economy and the society.⁶ Democracy has always been a central project of labour law, but it is

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¹ Two excellent collections exploring this question are Hugh Collins, Gillian Lester, and Virginia Matouvalou (eds), *Philosophical Foundations of Labour Law* (OUP 2019); and Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011). On the importance of clarity of purpose in labour law, see Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016).

² John Gardner, ‘The Contractualisation of Labour Law’ in Collins, Lester, and Matouvalou (n 1); Hugh Collins, ‘Is the Contract of Employment Illiberal’ in Collins, Lester, and Matouvalou (n 1).

³ Brian Langille, ‘Human Development: A Way Out of Labour Law’s Fly Bottle’ in Collins, Lester, and Matouvalou (n 1).

⁴ David Cabrelli and Rebecca Zahn, ‘Civic Republican Political Theory and Labour Law’ in Collins, Lester, and Matouvalou (n 1).

⁵ Matthew Dimick, ‘Marx and Domination: Issues for Labour Law’ (draft on file with author); Zoe Adams, *Labour and the Wage: A Critical Perspective* (OUP 2020).

⁶ For examples of scholarship focused on democracy in the workplace specifically, see Davidov (n 1) 56-57 (describing two ways to understand workplace democracy: one focused on voice and participation at work and the other focused on the results of collective bargaining); Karl Klare, ‘Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform’ (1989) 38 *Catholic Univ. L Rev* 1, 3 (arguing that the goal for labour law must be democracy “at every level of the experience and organization of work”).

all the more important today, with authoritarianism on the rise and democracy under threat across the globe.⁷

This chapter examines the relationship between labour law and democracy. It traces how ideas and arguments about workplace democracy have evolved over time and surveys the growth and decline of unions and relatedly, economic democracy, during the twentieth century. It also examines how and when unions contribute to political democracy, serving as a bulwark against authoritarianism. Ultimately, it argues that a critical task for labour law scholarship is to rethink the body of law to better serve the goal of democracy. To that end, it rejects suggestions from some observers that enhancing workers' role in the political democracy can be cleaved from the project of economic democracy, or that either can be achieved without strong, democratic unions. While recognizing the profound challenge of achieving a labour law oriented around democracy in the context of financialized capitalism and frayed democratic institutions, it offers suggestions for future research and reform.

I. The Tension Between Democracy and Labour Under Capitalism

The basic idea of democracy is that people possess a right to govern themselves.⁸ Yet, this right of self-governance is in considerable tension with wage labour. Under the common law, the employment relationship provided the employer with the right to command the employee; to unilaterally set pay, conditions, and schedules; and to terminate the employment relationship at will, for any reason, including for no reason at all. Theoretically, the employee could bargain over terms, but individually most workers had no actual power to do so. The employee had the right to quit. Yet for many workers, dependent on their jobs for subsistence and survival, exit was not a viable option. Although contemporary law has limited the dictatorial power of the employer, the employment relationship remains one defined by the economically strong employer over the economically weak employee. Indeed, as Richard Hyman has written, 'the dynamic of capitalism requires the employer to extract a surplus from the worker's labour; and this entails a whole apparatus of coercion and control which transforms work itself into a sphere of inequality and unfreedom.'⁹

The late nineteenth century industrial revolution brought the contradiction between democracy and wage labour into sharp relief. The fall of indentured servitude and chattel slavery promised a new freedom and control over one's own future, but that promise was soon cruelly denied to former slaves under Jim Crow and colonialism.¹⁰ Meanwhile, working-class women increasingly laboured outside of the home under deeply undemocratic conditions, while still performing

⁷ A recent Cambridge volume was organized around this point, and this chapter draws from and builds on many of its essays. Angela B. Cornell and Mark Barenberg (eds), *The Cambridge Handbook of Labour and Democracy* (CUP 2022).

⁸ Robert Dahl, *A Preface to Economic Democracy* (Univ of Cal Press 1985) 56-57.

⁹ Richard Hyman, 'The Very Idea of Democracy at Work' (2016) 22 *Transfer: European Review of Labour and Research* 11, 12.

¹⁰ Eric Foner, *Reconstruction: America's Unfinished Revolution* (Harper Collins 2014); Aziz Rana, *The Two Faces of American Freedom* (Harvard UP 2010) 12.

extensive unpaid household labour. And for white males—especially former small producers and artisans—industrialization meant a loss of control over daily life.

Against this background, worker movements in both the United States and Europe came to describe wage labour as a form of bondage, even ‘the very essence of slavery.’¹¹ Corporations, they argued, were the functional equivalent of monarchs. As Terrence Powderly, the leader of the Knights of Labour, argued in a famous 1890 speech: ‘One hundred years ago we had one king of limited powers. . . . Now we have a hundred kings, uncrowned ones, it is true, but monarchs of unlimited power, for they rule through the wealth they possess.’¹²

The labour movement of the late nineteenth and early twentieth century struggled to displace this despotic power with democracy. Unions’ ideas about how to achieve their vision were heterogenous: some eschewed engagement with politics, others embraced it; some organized at the level of the craft, others industrially or even internationally; some engaged workers of all races and genders in their struggle, others sought democratic rights only for white men.¹³ Yet, they all sought to reduce authoritarian control over workers’ lives, and they understood labour organization to be central to that goal.

Scholars of the era, too, objected to the antidemocratic conditions that characterized most of people’s waking lives. They conceived of labour law as a corrective to private law; and they used the framework of democracy to urge an embrace of unions and a new system of industrial relations that would give working people real power over the political economy. In 1897, British scholars Sidney and Beatrice Webb published their classic work, *Industrial Democracy*, arguing that unions were a necessary element in a democratic state.¹⁴ In the Webbs’ view, the absence of democracy in industrial relations left the majority of the population unemancipated. Democratic industrial relations required worker organizations that were internally democratic and that could exercise collective

¹¹ Eric Foner, *The Story of American Freedom* (Norton 1998) 59. On nineteenth- and early twentieth-century worker movements’ ideas about free labour and democracy, see Alexander Gourevitch, *From Slavery to the Cooperative Commonwealth: Labour and the Republican Liberty in the Nineteenth Century* (CUP 2015) 98; William E. Forbath, ‘The Ambiguities of Free Labour: Labour and the Law in the Gilded Age’ [1985] *Wisconsin L Rev* 767, 808-809; Nikolas Bowie, ‘Antidemocracy’ (2021) 135 *Harvard L Rev* 160; David Montgomery, ‘Industrial Democracy or Democracy in Industry: The Theory and Practice of the Labour Movement, 1870–1930’ in Nelson Lichtenstein and Howell Harris (eds), *Industrial Democracy in America: The Ambiguous Promise* (1993).

¹² Jefferson Cowie, *The Great Exception: The New Deal & the Limits of American Politics* (2016), 41–42 (quoting Terence V. Powderly, Gen. Master Workman, Knights of Labour, *Address at Priceburg* (July 4, 1890)).

¹³ Landon R. Y. Storrs, *Civilizing Capitalism: The National Consumers’ League, Women’s Activism, and Labour Standards in the New Deal Era* (U of North Carolina Press 2000) 43 (describing anti-statism of the AFL); Victoria C. Hattam, *Labour Visions and State Power: The Origins of Business Unionism in the United States* (Princeton UP 1993) (same); David Montgomery, ‘Industrial Democracy or Democracy in Industry: The Theory and Practice of the Labour Movement, 1870–1930’ in Nelson Lichtenstein and Howell Harris (eds), *Industrial Democracy in America: The Ambiguous Promise* (1993) (describing political orientation of industrial unions); Eric Hobsbawm, *Workers: Worlds of Labour* (1985); Nelson Lichtenstein, *State of the Union: A Century of American Labor* (Princeton UP 2002) 30–35 (describing democratic commitments of industrial unions of the 1930s in the United States).

¹⁴ Sidney Webb and Beatrice Webb, *Industrial Democracy* (Longmans, Green & Co. 1897) 825, 841-42.

control over the workplace and industry.¹⁵ Writing a little over a decade later, the father of German labour law, Hugo Sinzheimer, pressed the idea of economic democracy as necessary to political democracy, arguing that the state must take affirmative steps to regulate the economy for the benefit of workers, while also empowering workers, and their trade unions, to exercise democratic control at work.¹⁶

II. The Rise and Fall of ‘Industrial’ Democracy

Ultimately, after years of labour strife, and with the threat of communism looming, industrialized democracies developed labour law systems to reduce the core conflict between the promise of self-governance and the autocratic nature of work. The shape of the regimes varied. In the United States, the Great Depression forced a settlement, when, under the leadership of President Roosevelt, Congress enacted the National Labor Relations Act (NLRA). It guaranteed the right of workers to organize, bargain collectively, and strike. Senator Wagner, who was the driving force behind the NLRA, hoped the law would guarantee democratic choice and real equality between the employer and employee.¹⁷ Once enacted, the statute helped facilitate a rapid rise in unionization, with over one third of Americans joining a union by the 1950s. Yet the statute also contained numerous weaknesses that undermined its democratic promise. For example, it excluded vast numbers of workers employed in agriculture and domestic work, the majority of whom were people of color and women,¹⁸ and it failed to require industrial or sectoral bargaining, or to establish an automatic system for worker voice at each workplace. Instead, the law embraced a ‘voluntaristic’, enterprise-based approach. Especially after the 1947 Taft-Hartley Amendments, U.S. labour law limited unions’ ability to exert economic pressure and protected employers’ ability to oppose workplace democracy and campaign aggressively against unionization.¹⁹

The labour law systems in Europe got closer to workers’ aspirations for industrial democracy. After 1945, European countries instituted both workplace democracy and higher-level economic democracy, albeit through a range of

¹⁵ For scholarship analyzing the Webbs, see Walther Müller-Jentsch, ‘Industrial Democracy: Historical Development and Current Challenges’ (2008) 19 *Management Revue* 260; Royden Harrison, *The Life and Times of Sidney and Beatrice Webb* (St. Martin’s Press 2000) 237.

For contemporary theories of democracy, Carol Pateman, *Participation and Democratic Theory* (CUP 1970) 43; Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don’t Talk About It)* (Princeton UP 2017).

¹⁶ Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (2014) 13-32.

¹⁷ Mark Barenberg, ‘The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation’ (1993) 106 *Harvard L Rev* 1379, 1418-19; Mark Barenberg, ‘Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production’ (1994) 94 *Columbia L Rev* 753.

¹⁸ Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* (OUP 2001) 106 (noting that “African-American women, more than a third of whom still worked as domestic servants in 1935, and African-American men, who constituted 80 percent of agricultural workers, almost completely lacked [the FLSA’s] protections”); Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (Liverwright Publishing Corp 2013) (examining Roosevelt’s willingness to preserve racial discrimination in exchange for support for New Deal legislation from Southern Democrats).

¹⁹ Taft-Hartley Amendments, Pub L 80-101, 61 Stat 136 (1947).

approaches in different countries. Reforms included state intervention enabling establishing works councils, enterprise committees, or other consultative rights at the worksite;²⁰ limits on employers' authority to discipline workers; representation of workers on corporate boards; support for trade unions and systems of mandatory sectoral and industrial bargaining; and regimes that positioned unions as social partners to negotiate broad social benefits. The 1960s saw an expansion of those rights in some countries.²¹

Yet, even the countries that established the strongest systems of industrial democracy fell short of workers' aspirations. For example, most provided workers the right to negotiate about decisions at work only after key decisions on investment and product strategy had already taken place.²²

Still, despite their limitations, the post-war legal regimes helped facilitate unionization and made the experience of work less autocratic, at least for those workers who were in industries with significant union density. They also gave rise to a period of relative economic equality in industrialized countries, during which democracy functioned reasonably well, with governments broadly responsive to workers' interests. Trade unions provided a countervailing force in politics to organized business groups.²³ Unions not only raised wages through collective bargaining, but they fought for higher statutory minimums, safer workplaces, anti-discrimination laws, healthcare, and other social benefits. In short, through their unions, workers exercised more power in the economy and politics. Despite unions' limitations, no other organizations performed this role as effectively.²⁴

Over the course of the 1970s, '80s, and '90s, however, the picture transformed. Corporations, many already hostile to unions, faced increased domestic and international competition and pushed for higher profits, moving capital to lower-wage and non-union jurisdictions. They also 'fissured' by contracting out work to low-wage, nonunion subcontractors, shrinking the portion of their labour force that enjoyed full-time work, and vastly increasing their use of 'contingent' workers, including part-time and temporary workers and independent contractors.²⁵ Opposition to unionization became routine and overt, particularly in the United States, where the courts largely permitted employer de-unionization tactics and neither political party offered strong support of labour. In European countries, the attack on unions was less pervasive. Yet even in countries like Germany, workers' collective power eroded. Works councils, for example, declined in number, and no longer bolstered broad union strategies.²⁶ Instead,

²⁰ [cross reference chapter on workers' participation, this volume]

²¹ Hyman (n.) 4. Profits, and Innovation' (1996) 49 *Kyklos* 555, 557-560.

²² Hyman (n 9) 3; Ulrich Briefs, 'Codetermination in the Federal Republic of Germany: An Appraisal of a Secular Experience' in György Széll, Paul Blyton and Chris Cornforth (eds), *The State, Trade Unions and Self-Management* (de Gruyter 1989).

²³ John K. Galbraith, *American Capitalism: The Concept of Countervailing Power* (1st edn Routledge 1993) 111.

²⁴ Timothy J. Minchin, 'Holding On: The Decline of Organized Labour in the USA in Historical Perspective and Implications for Democracy' in Cornell and Barenberg (n 7) 127, 128; Jake Rosenfeld, *What Unions No Longer Do* (Harvard UP 2014) 1-2.

²⁵ David Weil, *The Fissured Workplace* (Harvard UP 2017) 94-95.

²⁶ Wolfgang Streeck, *Re-Forming Capitalism: Institutional Change in the German Political Economy* (OUP 2009) 86.

multinational companies forced them into concessionary bargaining or bypassed them altogether.²⁷

Collective bargaining rates plummeted, particularly in countries that lacked systems of sectoral bargaining, like the United States and the United Kingdom.²⁸ Workers lost their primary mechanism for self-rule at work, leaving workplaces increasingly autocratic.²⁹ Society also lost a critical equalizing institution. As unions declined, economic inequality soared, reaching its highest point in many countries since the early 20th century.³⁰

III. Labour and Political Democracy: Participation, Outcomes, Social Ties, and an Organized Force Against Authoritarianism

Today, the reality of labour once again sharply contrasts with democratic ideals, particularly for low-wage workers. Workplaces are characterized by autocratic power; workers have little influence over their wages, their schedules, their benefits, their patterns of work; they are often under surveillance or electronic monitoring, sometimes unable to take bathroom breaks, and have little ability to exit for a better alternative. For anyone fundamentally committed to democracy, the conclusion is inescapable: Labour law must be reimagined to bring the contemporary workplace, and economic life more generally, closer into line with democratic commitments.

But even for those committed only to political democracy, and ambivalent about the intrinsic value of workplace democracy, concern is warranted: The decline of workplace democracy has been devastating for political democracy. A significant and growing body of scholarship demonstrates that strong democratic unions are essential to democracy. Unions strengthen political democracy through several mechanisms: They increase rates of political participation among workers; they aggregate workers' political voice in ways that produce more representative government and more redistributive policy; they strengthen social ties, serving as a bulwark against racial divisions on which authoritarianism and ethno-nationalism prey; and, historically, they have tended to lend support to democratic institutions and anti-authoritarian movements. In addition, by decreasing economic inequality, they limit one of the conditions that enables right-wing populists to thrive. Undoubtedly, as discussed below, unions do not always serve these democratic functions—but the evidence is overwhelming that they have particular capacity to do so.

First, consider the effect of unions on individual workers' political participation. Substantial research has found a consistent, positive relationship

²⁷ Ibid.

²⁸ For a discussion of the causes of the decline in the United States, see Rosenfeld (n 24) 10-30; Kate Andrias, 'The New Labor Law' (2016) 126 Yale LJ 1, 6-7. For a comparison of regimes, see David Madland, *Re-Union* (Cornell UP 2020); Kathleen Thelen, *Varieties of Liberalization* (CUP 2014).

²⁹ Anderson (n 15) 69-70.

³⁰ Rosenfeld (n 24) 68-84; Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* (2010) 221-223.

between union membership and increased political participation.³¹ Union members are more likely to vote, protest, sign petitions, lobby, and join associations.³² These effects are strongest for individuals with low levels of education.³³ High union rates in a community correlate with greater political participation among all working people. For example, the U.S. states with the highest unionization rates also have the highest rates of voter turnout, particularly among working-class voters.³⁴ The same is true for European countries with higher levels of unionization rates.³⁵ Notably, unions' engagement in politics affects not only their own members, but non-union working-class citizens as well. For example, one study found that self-described working-class citizens and citizens of color—whether unionized or not—were far more likely to vote when unions ran dedicated political campaigns in their congressional districts.³⁶

Second, and related to their effects on political participation, unions produce more representative government and more redistributive policy outcomes. They serve as a countervailing force against the disproportionate power that wealthy corporations and elites exercise in politics, affecting the kinds of candidates that succeed and the public policies that prevail. As Martin Gilens and others have demonstrated, when the interests of the poor and the wealthy diverge, federal legislators show no responsiveness to the poor—*except* when working-people are organized.³⁷ A recent U.S. study examined the causal effects of union strength on politics and policy by comparing Democratic vote share and voter turnout between counties in states that have enacted 'right-to-work' (RTW) laws, which weaken unions and decrease their funding, and neighboring counties in states that have no such laws.³⁸ The authors found 'consistent negative and significant relationships between the passage of RTW laws and Democratic electoral outcomes and Presidential election turnout across all specifications.'³⁹ Other studies have found that U.S. states with high unionization rates tend to produce policy outcomes that are more consistent with the preferences of working-class people and less consistent with the preferences of the wealthy. In particular, they have more progressive systems of taxation and more generous social welfare

³¹ Jasmine Kerrissey and Evan Schofer, 'Union Membership and Political Participation in the United States' (2013) 91 *Social Forces* 895, 895-96; Rosenfeld (n 24) 170, 173; Richard B. Freeman, 'What, Me Vote?' in Kathryn Neckerman (ed), *Social Inequality* (Russel Sage Foundation 2004) 714-15.

³² John Karl Scholz and Kara Levine, 'U.S. Black-White Wealth Inequality' in Neckerman (n 31) 919-20.

³³ *Ibid*, 920.

³⁴ Benjamin Radcliff and Patricia Davis, 'Labour Organization and Electoral Participation in Industrial Democracies' (2000) 44 *American J of Political Science* 132, 137.

³⁵ Alex Bryson and others, 'What Accounts for the Union Member Advantage in Voter Turnout? Evidence from the European Union, 2002-2008' (2014) 69 *Industrial Relations* 732, 738-42.

³⁶ Roland Zullo, 'Union Cities and Voter Turnouts' in *Labour and Employment Relations Association Series: Proceedings of the 58th Annual Meeting, Boston, Massachusetts* (2006) 200-202.

³⁷ Martin Gilens and Benjamin I. Page, 'Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens' (2014) 12 *Perspectives on Politics* 564, 575-76; Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (Princeton UP 2012); Kay Lehman Schlozman, Sidney Verba and Henry E. Brady, *The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy* (Princeton UP 2012) 360-61.

³⁸ James Feigenbaum, Alexander Hertel-Fernandez and Vanessa Williamson, 'From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws' (2018) National Bureau of Economic Research Working Paper 24259 <<http://www.nber.org/papers/w24259>> accessed 9 December 2022, 2.

³⁹ *Ibid*, 11.

programs.⁴⁰ Similar findings exist at the national level: Countries with stronger labour movements tend to have more generous social benefits.⁴¹ In short, unions counter a democratic market failure created by the disproportionate power of the wealthy, which leads, in the absence of strong unions, to redistributive measures being weaker than what majorities would favor.

It should not be surprising therefore that the precipitous decline of unions has contributed to the declining influence of workers—and the growing influence of the wealthy—in politics. To be sure, other factors contribute as well, including campaign finance laws, restrictions on voting, and the changing shape of the media. But unions' decline is a critical factor given the many mechanisms by which they engage in politics—educating workers about political issues, mobilizing them to participate in politics, contributing financially to political campaigns that support labour, and advocating for pro-worker policies.⁴²

Third, unions play a critical role in preventing and challenging authoritarian regimes. One way they do so is by serving as a bulwark against social division on which authoritarianism and ethno-nationalism prey.⁴³ Recent empirical research suggests that union membership can reduce racial and ethnic resentment.⁴⁴ Unions provide opportunities for people of different racial and ethnic identities to interact on a daily basis, undermining prejudice through exposure. Members work toward a common goal across racial and ethnic lines, promoting cooperation, enhancing respect and mutuality, and shifting ideas about intergroup competition.⁴⁵ In addition, unions build social solidarity when they urge, and help bring about, broad social welfare reforms.⁴⁶

Unions also tend to give workers more faith in the possibility and promise of democracy. By involving workers in democratic practices both at work and in the political sphere and producing governmental outcomes more aligned with workers' interests, they counteract citizens' perception that government serves elites and is not responsive to ordinary people.⁴⁷ Relatedly, strong trade unions, and in particular high collective bargaining rates, are one of the most effective ways to reduce economic inequality, which researchers have identified as a key threat to democracy.⁴⁸

⁴⁰ Benjamin Radcliff and Martin Saiz, 'Labour Organization and Public Policy in the American States' (1998) 60 J of Politics 113, 121.

⁴¹ Evelyne Huber and John D. Stephens, *Development and Crisis of the Welfare State* (U of Chicago Press 2001).

⁴² Jacob S. Hacker and Paul Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer—And Turned Its Back on the Middle Class* (1st edn, Simon & Schuster 2010) 57; Rosenfeld (n 24) 4-8.

⁴³ Cynthia Estlund, 'Coming Apart: How Union Decline and Workplace Disintegration Imperil Democracy' in Cornell and Barenberg (n 7) 163.

⁴⁴ Paul Frymer, Jacob M. Grumbach, and Thomas Ogorzalek, 'Unions Can Help White Workers Become More Racially Tolerant' in Cornell and Barenberg (n 7) 180.

⁴⁵ *Ibid* 183.

⁴⁶ Gillian Lester, 'Beyond Collective Bargaining: Modern Unions and Social Solidarity,' in Langille and Davidov (n 1) 329.

⁴⁷ Mark Anner, 'Labour, Workers' Rights, and Democracy in Latin America' in Cornell and Barenberg (n 7) 238.

⁴⁸ On the role of unions in reducing inequality, see Richard B. Freeman and James L. Medoff, *What Do Unions Do?* (1984); Rosenfeld (n 24); David Card, 'The Effect of Unions on Wage Inequality in

Finally, numerous examples from around the world demonstrate that labour movements often play a critical role in preventing, destabilizing, and dismantling authoritarian regimes.⁴⁹ In particular, labour movements have been central to the politics of democratization in recent South American, African, and southern European transitions.⁵⁰ Their ability to mobilize collective action, their normative commitment to democratic government, and their ability to propagate that message make them a potent force against authoritarianism. They have also helped to construct democratic regimes in the aftermath of authoritarianism, by increasing the legitimacy of new governments and investing in institution-building.⁵¹

Not all unions, however, are equally supportive of democracy.⁵² Under some authoritarian regimes, trade unions have been allied with neo-populist parties or even have functioned as arms of the authoritarian state.⁵³ Meanwhile, in many democracies, law enforcement unions have tended to support authoritarian and ethno-nationalist candidates and policies.⁵⁴

Moreover, as unions have become weaker, some have become less internally democratic.⁵⁵ In order to maintain their efficacy in a hostile environment, they have pursued mergers of heterogeneous unions, increased centralization, and focused on leverage strategies and corporate campaigning, rather than worker collective action.⁵⁶ While such tactics may be necessary for unions' survival while under siege, they tend to reduce member engagement,⁵⁷ as well as the cross-

the U.S. Labour Market' (2001) 54 *Industrial and Labor Relations Rev* 296; Bruce Western and Jake Rosenfeld, 'Unions, Norms, and the Rise In U.S. Wage Inequality' (2011) 76 *American Sociological Rev* 513; Henry S. Farber and others, 'Unions and Inequality Over the Twentieth Century: New Evidence From Survey Data' (2018) National Bureau of Economic Research Working Paper 24587 <<https://www.nber.org/papers/w24587.pdf>> accessed 29 January 2023. On economic inequality as a threat to democracy, see Suzanne Mettler & Robert C. Lieberman, *Four Threats* (MacMillan 2020).

⁴⁹ Ruth Berins Collier and James Mahoney, 'Adding Collective Actors to Collective Outcomes: Labour and Recent Democratization in South America and Southern Europe' in Lisa Anderson (ed), *Transitions to Democracy* (Columbia UP 1999) 100.

⁵⁰ Ibid; Gay W. Seidman, *Manufacturing Militance: Workers' Movements in Brazil and South Africa, 1970–1985* (U of Cal Press 1994); Evance Kalula and Chanda Chungu, 'African Perspectives on Labour Rights as Enhancers of Democratic Governance' in Cornell and Barenberg (n 7) 250.

⁵¹ Collier and Mahoney (n 49) 98-99, 109; Seidman (n 50) 258; Anner (n 47) 237; Kalula and Chungu (n 50) 250.

⁵² Lucio Baccaro, Chiara Benassi and Guglielmo Meardi, 'Theoretical and Empirical Links Between Trade Unions and Democracy' (2019) 40 *Econ. & Indust. Democracy* 3, 4-5.

⁵³ Ibid 5.

⁵⁴ Reuters, 'U.S. Police Union Endorses Trump in November Election,' (Sept. 4, 2020). For critiques of police unions, see Benjamin Levin, 'What's Wrong With Police Unions' (2020) 120 *Columbia L Rev* 1333; Mark P. Thomas and Steven Tufts, 'Blue Solidarity: Police Unions, Race, and Authoritarian Populism in North America' (2020) 34 *Work, Employment and Society* 126.

⁵⁵ Adrien Thomas, 'Towards the Managerialization of Trade Unions? Recent Trends in France and Germany' (2013) 19 *Eur. J. of Indust. Relations* 21, 33. For an exploration of the relationship between on-the-ground organizing and higher-level union activity, see Mundlak, *Organizing Matters: Two Logics of Trade Union Representation* (Edward Elgar Publishing 2020) 10-15 (contrasting two distinct logics of labour's collective action).

⁵⁶ Adrien Thomas, 'Conglomerate Unions and Transformations of Union Democracy' (2017) 55 *British J. of Indust.* 648, 664; Thomas, 'Managerialization' (n 55) 33; Rebecca Gumbrell-McCormick and Richard Hyman, 'Democracy in Trade Unions, Democracy Through Trade Unions?' (2019) 40 *Econ. & Indust. Democracy* 91, 105.

⁵⁷ Gumbrell-McCormick and Hyman (n 60) 103.

identity collaboration that makes unions so valuable in resisting authoritarianism.⁵⁸ They also reduce the unions' credibility in advocating for democracy externally.⁵⁹ Ultimately, the research suggests that unions better support political democracy when they embody democratic values internally.⁶⁰

Even among unions fully committed to democracy, not all are equally effective at playing a democratizing role. Indeed, for many, the ability to do so has waned over time. Neoliberalism has brought about changes in the structure of work that have weakened ties among workers and allowed employers to exercise more control and surveillance over employees. It has also resulted in weaker and smaller unions, which necessarily have less ability to provide workers the experience of democracy at work; engage workers in politics; serve as a counterweight to organized business and elite interests' influence over government; create social solidarity; or reduce economic inequality.

Thus, in countries where neoliberalism has had the most destructive effect on unions and on the organization of work, right-wing movements have found fertile ground. They are increasingly taking the place of unions as the vehicle for workers' opposition to the challenges they face, with white working-class voters, in particular, turning in some number to ethno-nationalist candidates.⁶¹ In contrast, in countries where unions have been able to maintain a stronger presence, right-wing populist movements have remained more minor actors.⁶²

IV. A Labour Law for a Democratic Future

In short, the connection between unions and democracy is well established. Yet, critical, indeed urgent, questions remain: How can we reconstruct the democratic role of unions in the contemporary fissured, globalized, and increasingly automated economy, and against the rising tide of ethno-nationalism and authoritarianism? Under these circumstances, how can labour law regimes facilitate both economic and political democracy, and, more specifically, strengthen unions' ability to serve as a bulwark against authoritarianism?

Some have concluded that rebuilding strong, democratic trade unions is an impossibility given political opposition and the changed nature of work, at least in the near term. On this account, the more responsible or pragmatic approach is to pursue other forms of workplace voice and other forms of political voice for workers. Cynthia Estlund, for example explores 'the question of what workplace democracy could mean in the twenty-first century, including for the great majority of private sector workers who are destined to remain without union representation,' and she considers whether corporations might be 'brought on board to supply part

⁵⁸ Thomas, 'Conglomerate Unions' (n 56) 664; Cynthia Estlund, 'Coming Apart' (n 43) 164.

⁵⁹ Collier and Mahoney (n 49) 91.

⁶⁰ Gumbrell-McCormick and Hyman (n 60) 101.

⁶¹ Ruth Dukes and Wolfgang Streeck 'Labour Law After Neoliberalism?' (2022) 11, 18 (draft on file with author); Estlund, 'Coming Apart' (n 43) 163, 175.

⁶² Dukes and Streeck (n 59) 18.

of what workers want and need as citizens of the workplace.’⁶³ She urges corporations to develop new, collaborative forms of worker representation—much as many corporations have developed a norm of making workforce diversity a priority.⁶⁴

In a different vein, Benjamin Sachs has suggested that unions’ political role could be unbundled from their economic role, with potentially less resistance from business as a result.⁶⁵ He suggests the possibility that law could facilitate ‘political unions’ of workers, which would engage in political activity but would be barred from collective bargaining.⁶⁶ Meanwhile, several of us have urged new forms of worker voice in politics, including the possibility of tri-partite industry committees or worker boards, which could serve some of the functions of sectoral bargaining by engaging workers and employers in setting standards in particular industries through administrative processes.⁶⁷

That legal scholars have turned toward these relatively modest reforms is understandable: The current political economy makes real workplace or economic democracy seem not only unachievable but almost inconceivable. Virtually no leading politicians or elected officials suggest that all workers should have a right of collective self-determination in their firms or that worker organizations should have significant power in setting the direction of the political economy. Indeed, pro-worker labour law reforms are largely stalled in national legislatures. Against that background, many have concluded that lesser forms of representation and voice are the best that can be hoped for.

Yet the preceding analysis of the connection between labour and democracy suggests that economic and political democracy cannot be unbundled—and that the goal of achieving either form of democracy cannot be abandoned without risking the other.

Consider the idea of corporate-supported forms of worker participation. Such approaches might give workers ‘voice,’ (and, proponents argue, may also exert some modest pressure toward greater equity on wages)—but voice without collective organization and without decisional power is unlikely to play any of the key democratic roles discussed above: to reduce economic inequality; to create social bonds through collective pursuit of a shared goal; to create independent,

⁶³ Cynthia Estlund, ‘Workplace Democracy for the Twenty-First Century? Rethinking a Norm of Worker Voice in the Wake of the Corporate Diversity Juggernaut’ (2013) 14 Nevada LJ 309, 310; Leo E Strine Jr, Ancil Kovvali and Oluwatomi O. Williams, ‘Lifting Labor’s Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance’ (2022) 106 Minn L Rev 1325, 1380 (discussing possibilities for integrating worker-employer collaboration with general principles of corporate governance).

⁶⁴ Estlund, ‘Workplace Democracy’ (n 63) 319-21.

⁶⁵ Benjamin I. Sachs, ‘The Unbundled Union: Politics Without Collective Bargaining’ (2013) 123 Yale LJ 1, 154-55.

⁶⁶ Sachs (n 65) 155.

⁶⁷ Kate Andrias, ‘An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act’ (2019) 128 Yale LJ 616, 702-05; Nelson Lichtenstein, ‘Sectoral Bargaining in the United States’ in Cornell and Barenberg (n 7) 88; Sara Slinn, ‘Workers’ Boards: Sectoral Bargaining and Standard Setting Mechanisms for the New Gilded Age’ (April 25, 2023) Employee Rights and Employment Policy Journal, Forthcoming, available at SSRN: <https://ssrn.com/abstract=4429598>; Cynthia Estlund, ‘The Case for Sectoral Co-Regulation of Work in a Post-Collective Bargaining World,’ (draft paper on co-regulation on file with author).

democratic organizations that engage workers in politics and bolsters democratic institutions; and so on. Rather, the existence of corporate-enabled ‘voice’ without an organization that can exercise real power over economic and political life could potentially contribute to further decline in confidence in democracy and increase the turn toward authoritarian ideologies. False hope about workers’ influence on the political economy could engender feelings of betrayal and resentment when voices are ignored and policies do not reflect workers’ needs.

Similarly, a system of political organizing that bars workers from collective bargaining is likely to be only minimally effective at advancing democratic aims. Such a system is posited on an unstable divide between the economic and political realms; it also has less chance of fostering social ties in service of a shared goal through daily workplace interactions or broader collective victories, and, relatedly, far less ability to reduce economic inequality.

Political processes that engage workers in government as co-regulators are more promising—but only if they are joined with efforts to build strong, democratic trade unions. The right to participate is valuable, but evidence suggests that workers are unlikely to use it without organization that facilitates their engagement. Moreover, participation rights that exist without a mechanism for the exercise of decisional power are unlikely to effectuate significant distributional change. Thus, tripartite administrative systems are helpful at advancing democratic goals when they are paired with active efforts at union organizing and a long-term strategy for achieving worker power and sectoral bargaining rights.⁶⁸

In short, any system of labour law must keep as central goals both economic and political democracy. And, in fact, the research on when unions further such democracy tells us quite a bit about what that labour law should entail, at least at a high level of generality: It must facilitate strong trade unions that are independent from both government and business, that are themselves democratic, and that can exercise real power in the workplace, the economy, and the political sphere.

How can law advance internal union democracy? Some legal systems regulate the internal affairs of unions in great detail to ensure robust participation rights, majoritarian governance, and transparency. Yet critics worry this approach burdens associational autonomy and results in excessive state supervision. Arguably, the extent to which such regulation is defensible depends on the extent of privileges and powers granted to unions in a given legal system.⁶⁹ Nevertheless, at a minimum, the law should prohibit corruption and discrimination and impose a duty of fair representation. The goal is to ensure that union members are not subject to an arbitrary authority but rather have the ability to participate in the governance of their organizations.⁷⁰

In any event, internal union democracy is only one piece of the puzzle. To advance political and economic democracy, the law must also facilitate workers’

⁶⁸ Andrias (n 65).

⁶⁹ Cynthia Estlund, ‘Are Unions a Constitutional Anomaly?’ (2015) 114 Mich LR 203.

⁷⁰ Edo Eshet, ‘Coercion and Freedom in Labour Law: American, Canadian, and Israeli Perspectives’ (2017) 33 Intl J Comparative Labour L 489, 513, citing Philip Pettit, *Republicanism, a Theory of Freedom and Government* 36 (OUP 1997).

ability to exercise collective power versus capital and to participate collectively in the political democracy. Here too, the precise shape of democracy-enhancing law reform will necessarily vary depending on the broader societal context. Moreover, additional research and experimentation are needed to better understand the relationship between specific legal reforms and the capacity and tendency of unions to advance democracy—as well as how to balance democratic goals with other goals of labour law.

Yet, it is clear, first, that the law must guarantee structures of democratic decisionmaking at the level of the workplace and the firm, for example through workplace collective bargaining, works councils, and democratization of corporate boards and ownership structures. Second, the law must enable sectoral bargaining that empowers unions to reduce economic inequality and exercise power over the economy. Third, it must facilitate broad, inclusive unions that cut across racial and ethnic divides and that include workers who have too often been excluded from labour law's protections, like gig workers, domestic workers, and agricultural workers. Fourth, it must encourage and enable unions' engagement in politics, creating mechanisms for workers and unions to engage in and legitimize democratic governance and to bargain for social welfare goods at the regional and national levels. Finally, the commitment to democracy cannot be a limited to formal procedures or mechanisms for 'voice.' Rather, the regime must protect workers' ability to engage in collective action by striking and protesting not only against individual employers, but also on a sector-wide or multi-sector scale. The question arises whether the law should also protect political strikes—those in which workers seek to make a political point or to change governmental policies rather than to win a better labor contract. Many legal regimes prohibit or provide less protection for such strikes on the ground that they are not core to collective bargaining or they risk giving unions outsized power. Yet, the arguments for protection are strong: workers' political aims and their economic aims are often inexorably connected, and in any event, such strikes an important form of democratic engagement and can be a critical tool for resisting authoritarianism.⁷¹

Several recent law reform proposals emanating from both academics and labour movement actors urge fundamental reform of labour law along some of these lines.⁷² Others expand the lens, proposing new legal regimes to facilitate collective organization among working-class people in other aspects of their lives as well, including as tenants, debtors, and benefit-recipients,⁷³ or urging the reconsideration of such other fields of law as international finance, national security, and communications law under the ambit of democracy-enhancing labour law.⁷⁴ Of course, no such fundamental reform is achievable in the short term. And law can only produce some measure of change; unions themselves must orient their

⁷¹ Seth Kupferberg, 'Political Strikes, Labor Law, and Democratic Rights,' (1985), 71 Va LR 685.

⁷² Kate Andrias & Brishen Rogers, 'Rebuilding Worker Voice in Today's Economy,' (2018) Roosevelt Institute; Sharon Block & Benjamin I. Sachs, 'Clean Slate for Worker Power: Building a Just Economy and Democracy' (2020) Labor and Worklife Program, Harvard Law School; Ruth Dukes & Wolfgang Streeck, *Democracy at Work: Contract Status, and Post-Industrial Justice* (Polity 2023).

⁷³ Kate Andrias & Benjamin I. Sachs, 'Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality' (2019) 130 Yale LJ 546; Harry Arthurs, 'Labour Law as the Law of Economic Subordination' (2012) Comparative Research in Law & Political Economy, Research Paper No 10.

⁷⁴ Mark Barenberg, 'A New Labor Law for Deep Democracy' in Cornell and Barenberg (n 7).

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work to building democracy at the level of the workplace, the economy, and the society. But real democracy—economic and political—must remain a lodestar for labour law.