
YALE LAW & POLICY REVIEW

Thoughts on the Unification of U.S. Labor and
Employment Law: Is the Whole Greater than
the Sum of the Parts?

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* General Counsel, AFL-CIO. The ideas articulated in this Article are mine alone and do not represent the positions of the AFL-CIO. I wrote the Article prior to the election of November 8, 2016. I publish it now with some trepidation, knowing that bits and pieces of what I say here will be taken out of context by those who do not support the animating ideals of either labor or employment law. I proceed with the hope that a time of more even-tempered and rational discourse will return and that this footnote will serve as something of a hedge against any suggestion that I support knocking down any of the parts of the current law of the workplace when what follows argues for an integration of the parts so that, as a whole, the law can better realize its underlying purposes. I thank Cindy Estlund, Janice Fine, Kelly Ross, Ben Sachs, and Andy Strom for their comments on earlier drafts of this Article and Matt Finkin for his always generous sharing of his knowledge of comparative labor law.

INTRODUCTION

As the need for fundamental reform of our nation's labor laws has grown more and more evident since the 1970s, major reform efforts have focused narrowly on adjusting the provisions of the National Labor Relations Act (NLRA), but have repeatedly foundered amidst intense polarization over tipping the existing "balance" between labor and management.¹ At the same time, at the federal, state, and, increasingly, municipal levels, U.S. labor laws governing worker organization and collective bargaining have been surrounded by a growing thicket of other laws governing the workplace. These employment laws have established various minimum standards, for example, to be free from specified forms of discrimination and to have access to family and medical leave. But the employment law on the books has not been matched by the law in action. Rather, violations are endemic, particularly at the bottom of the wage scale. A politically feasible (in the medium term), economically rational, and effective reform proposal would seek to unify our labor and employment laws.

Such a proposal could not be adopted today and will not be adopted during the next few presidential administrations.² The complications created simply by the number of governmental units currently regulating the workplace are enormous. Nonetheless, it is worth considering how widening our vision of reform might not only break the political deadlock over labor law reform, but also address fundamental flaws in both U.S. labor and employment law.

This Article sketches such a vision of reform in four parts. Part I briefly describes the bifurcated law of the workplace, which is split between the older labor law and the more recently enacted employment law. The former regulates organizing and collective bargaining, and the latter establishes minimum terms and conditions of employment by statute. Part I emphasizes both the different regulatory philosophies underlying the two regimes and also the gradual, historical accretion of workplace regulation, which has resulted in a voluminous and largely uncoordinated set of laws. Part II identifies the central failures of each regulatory regime—labor law's stubborn resistance to reform, increasing numbers of workers without representation, and the underenforcement of employment law, particularly for the most vulnerable workers. Part III describes the promise of unification of the two regimes. Collective bargaining could both reduce enforcement costs and allow flexibility in the application of minimum standards laws, possibly reducing employers' implacable opposition to labor law reform and permitting expanded union representation. The resulting expanded union representation could, in turn, ensure enforcement of employment law. Finally, Part IV discusses two current legal controversies: the first, over agreements to arbitrate employment law claims that include a waiver of

1. Of course, the absence of reform has itself dramatically tipped the "balance" toward management as explained below.
2. During that time, adoption of the Workplace Action for a Growing Economy (WAGE) Act, S. 2042, 114th Cong. (2016), would be a modest step in the right direction.

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unrepresented employees' right to engage in collective enforcement activity, and the second, over state and local minimum standards laws that permit waiver or modification of their terms via collective bargaining. Part IV uses these controversies as lenses through which to view how a more integrated regime of workplace regulation might function.

I. THE BIFURCATED LAW OF THE WORKPLACE

When the NLRA was signed into law in 1935, it was the central and almost the only federal regulation of the workplace.³ It would be three years before Congress established a minimum wage in the Fair Labor Standards Act (FLSA)⁴ and just shy of three decades before it prohibited employment discrimination in Title VII of the Civil Rights Act of 1964.⁵

The regulatory philosophy embodied in the NLRA, in contrast to today's employment laws, was tersely expressed by the Supreme Court in 1943:

[T]he National Labor Relations Act . . . does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions.⁶

However, three years after adopting the NLRA, Congress decided that some conditions were too bad to tolerate. The 1938 FLSA declares that "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" should be corrected and eliminated "as rapidly as possible" through the adoption of national minimum wage and maximum hours standards and the prohibition of child labor.⁷ Since the New Deal, Congress has continued to embrace both of these

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3. The Railway Labor Act (RLA), 45 U.S.C. §§ 151–188 (2012), and the Norris-LaGuardia Act, 29 U.S.C. §§ 101–115 (2012), preceded the NLRA and served as its foundation, but the RLA was limited to a single industry and Norris-LaGuardia restricted the jurisdiction of the federal courts, rather than directly regulating labor relations, because of limitations on federal power under the Commerce Clause imposed by the then-prevailing Supreme Court construction of the Clause.
 4. 29 U.S.C. §§ 201–219.
 5. 42 U.S.C. § 2000(e) (2012).
 6. *Terminal R.R. Ass'n of St. Louis v. Bhd. of R.R. Trainmen*, 318 U.S. 1, 6 (1943). The case actually concerned the RLA, but the Court spoke to the regulatory philosophy underlying both laws.
 7. Fair Labor Standards Act, 29 U.S.C. § 202(a)–(b).

regulatory philosophies with the legislated establishment of minimum employment standards accelerating after the passage of the 1964 Civil Rights Act.⁸ As the U.S. Commission on the Future of Worker-Management Relations (Dunlop Commission)⁹ observed in 1994:

The National Labor Relations Act (and the earlier Railway Labor Act) were the pioneering forms of federal legal regulation of labor management relations at the workplace. By the 1990s, though, a very different model of legal intervention, employment law, has come to play a much more prominent role both on the job and in the courts.¹⁰

These two distinct forms of workplace regulation are arguably in tension. Indeed, as the amount of minimum standards legislation expanded, employers argued that state employment laws were preempted by federal labor law as applied to represented employees. The employers' argument was based on the notion that the employment laws—by mandating terms or conditions of employment—interfered with the free collective bargaining encouraged by the NLRA. As the Supreme Court explained in 1985, employers argued that, “because Congress intended to leave the choice of terms in collective-bargaining agreements to the free play of economic forces, not subject either to state law or to the control of the National Labor Relations Board (NLRB), mandated-benefit laws should be pre-empted by the NLRA.”¹¹ The Court rejected this argument, however, finding “[n]o incompatibility exists . . . between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements.”¹²

But merely identifying this dichotomy between U.S. labor and employment law does not adequately describe our workplace policy's profuse, heterogeneous, and uncoordinated nature. Consider, for example, only those policies the

8. COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, U.S. DEP'TS OF LABOR & COMMERCE, FACT FINDING REPORT 24 (1994) [hereinafter FACT FINDING REPORT], http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1279&context=key_workplace [<http://perma.cc/3VJC-FTGH>] (citing the Occupation Safety and Health Act of 1970, the Employee Retirement Income Security Act of 1974, the Immigration Reform and Control Act of 1986, the Americans with Disabilities Act of 1990, and the Family and Medical Leave Act of 1993, as illustrations).

9. The Commission was appointed by the Secretaries of Labor and Commerce in an effort to identify reforms of both labor and employment laws that could obtain support from both labor and management as well as both political parties. It was chaired by former Secretary of Labor and then-Harvard Professor John Dunlop. The Commission conducted a lengthy investigation and produced several valuable reports, but failed to identify reforms that have been adopted.

10. FACT FINDING REPORT, *supra* note 8, at 105.

11. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748 (1985).

12. *Id.* at 754.

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enforcement of which is either wholly or partly lodged in the U.S. Department of Labor (DOL). The DOL administers approximately 180 separate statutes. Those statutes involve twenty distinct enforcement procedures with a considerable number of minor variations,¹³ and that does not take into account federal laws that lie outside the DOL's jurisdiction or state laws. State regulation, of course, preceded the New Deal. As early as 1916, the pioneering labor relations scholar John R. Commons, together with John B. Andrews, Secretary of the American Association for Labor Legislation, wrote:

At the beginning of 1914 the federal Department of Labor assembled and published the labor laws of the United States in two bulky volumes totaling more than twenty-four hundred pages. The legislatures of the following two years added to this list no fewer than five hundred new labor laws. The laws, moreover, are growing in complexity as well as in length and number, and to the maze of statutes is added a lengthening list of administrative orders and of judicial decisions.¹⁴

In short, we have a large and growing number of separate laws governing work.

Workplace policies are not simply voluminous, but are also largely uncoordinated. Current U.S. policy governing work was, of course, not created as a whole, but rather in fits and starts. As the Dunlop Commission reported: "Congress and its committees have considered the legislation piecemeal."¹⁵ Along the way, there has been little systematic review or effort to compare and harmonize standards, procedures, or remedies under the various statutes even within a single level of government. Again, the Dunlop Commission reported:

There has seldom, if ever, been a systematic overview of this statutory structure and the resulting detailed regulations and court interpretations that flow from employment law . . . Administrative agencies generally consider regulatory, interpretive and procedural issues separately, even in the case of similar issues that arise in different agencies of the same Department. Courts review individual cases.¹⁶

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13. COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, U.S. DEP'TS OF LABOR & COMMERCE, FINAL REPORT 74 (1994) [hereinafter FINAL REPORT], http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace [<http://perma.cc/15Z6-6ZPL>]. The Commission's Fact Finding Report contained an exhibit describing the major statutes and executive orders "[c]omprising the [f]ramework of [f]ederal [w]orkplace [r]egulation." FACT FINDING REPORT, *supra* note 8, at 129–31.
 14. JOHN R. COMMON & JOHN B. ANDREWS, PRINCIPLES OF LABOR LEGISLATION i (1st ed. 1916).
 15. FINAL REPORT, *supra* note 13, at 71.
 16. *Id.*; see also Craig Becker, *The Continuity of Collective Action and the Isolation of Collective Bargaining: Enforcing Federal Labor Law in the Obama Administration*, 33 BERKELEY J. EMP. & LAB. L. 401, 414–16 (2012) (describing the isolation of the Na-

The result is that enforcement of some policies is lodged in the DOL and enforcement of others—notably, administration of the NLRA—in independent agencies. Some policies are enforced largely by working people via litigation and others, including the NLRA (with a few exceptions),¹⁷ are enforced exclusively by government. Some policies are established at both the federal and state level, whereas others, like the NLRA, are established only at the federal level.¹⁸ One specific example of the failure to coordinate workplace policies can be found in the available remedies. Remedies, the Dunlop Commission found, have been “established at different times” and “have not been reviewed to determine whether they are equitable for comparable violations of different laws.”¹⁹ Consequently, some policies are enforced through the award of full compensatory and punitive damages and others only via the award of back pay and reinstatement.²⁰ In 1994, the General Accounting Office charitably reported: “Like many industrialized nations, the United States employs several different strategies for

tional Labor Relations Board (NLRB) in administering, enforcing, and construing the NLRA).

17. Importantly, the only private rights of action (permitting private parties to sue to enforce their rights) that exist under the Act are possessed by employers seeking to enforce the amended Act’s prohibition of certain forms of secondary pressure by unions and employees alleging a union breached its duty of fair representation.
18. Congress created one critical exception to federal preemption in 1947 for so-called “right-to-work” laws, which are state laws providing that unions and employers cannot agree that all employees must, as a condition of employment, bear their fair share of the cost of representation. *See* 29 U.S.C. § 164(b) (2012). According to the Supreme Court, these laws generate a “conflict between state and federal law; but it is a conflict sanctioned by Congress.” *Oil, Chem. & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407, 417 (1976) (quoting *Retail Clerks Int’l Ass’n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963)).
19. FINAL REPORT, *supra* note 13, at 83.
20. The Dunlop Commission described the diversity of procedures and remedies under U.S. labor and employment laws as follows:

Some cases the individual employee alone can bring (e.g., wrongful dismissal suits); others only the administrative agency can file (e.g., FLSA). Some cases go directly to court (wrongful dismissal); some remain within the agency (OSHA); some go to the agency for investigation and then to the courts for adjudication (ADA), while some conduct adjudication within the agency but leave enforcement (and review) up to the courts (NLRA). Some legal rights carry open-ended compensatory and punitive damages (wrongful dismissal); some provide for general damages under a ceiling, but attorney fees are also assessed against losing employers (Title VII; ADA); while . . . the NLRA is unique in restricting the damages assessed against guilty employers to the net back pay lost by the employee—along with the prospect of reinstating the employee if the latter is willing to return to the position from which he or she was fired.

FACT FINDING REPORT, *supra* note 8, at 111.

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protecting employees in the workplace.”²¹ Less charitably Professor Clyde Summers described U.S. employment laws as a “jumble of procedures and remedies.”²²

Because our labor and employment laws are voluminous and uncoordinated, their interrelationship is a source of considerable uncertainty, conflict, and litigation. When does federal law preempt state regulation?²³ When does state law preclude local action?²⁴ When is union assistance with enforcement of employment law a “grant of benefits” that requires overturning the results of a union representation election?²⁵ How should apparent conflict between statutes be reconciled?²⁶ In the United States, there is no single expert agency or specialized court to resolve these conflicts. Even when the conflict is between the NLRA and another federal statute, while courts defer to the NLRB’s construction of the NLRA, the agency is accorded no deference when it construes other statutes, even closely-related precursors like the Norris-LaGuardia Act.²⁷

21. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/HEHS-94-138, 1 WORKPLACE REGULATION: INFORMATION ON SELECTED EMPLOYER AND UNION EXPERIENCES 14 (1994), <http://www.gao.gov/assets/160/154468.pdf> [<http://perma.cc/7YM9-BYK8>].
22. Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 531 (1992); see also CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 75 (2010) (noting “the vast, hydra-headed body of employment law”).
23. The primary guideposts in this area are *San Diego Building Trades Council, Local 2020 v. Garmon*, 359 U.S. 236 (1959), and *Lodge 76, International Ass’n of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). But these cases have not drawn clear lines between what is preempted and what is permitted.
24. This has been an issue recently in litigation challenging municipal minimum wage ordinances. See, e.g., *Ky. Rest. Ass’n, Inc. v. Louisville/Jefferson Cty. Metro Gov’t*, No. 2015-SC-000371-TG, 2016 WL 6125883 (Ky. Oct. 20, 2016) (striking down Louisville minimum wage ordinance); *Coop. Home Care, Inc. v. City of St. Louis*, No. SC95401 (Mo. 2016) (challenging St. Louis’ authority); *City of Kansas City v. Kan. City Bd. of Election Comm’rs*, No. SC95368 (Mo. 2016) (challenging St. Louis’ authority).
25. See, e.g., *Stericycle, Inc.*, 357 N.L.R.B. 582, 583 (2011) (addressing the conflict between NLRB and several courts of appeals over this issue).
26. See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (addressing the conflict between fully remedying violations of the NLRA and enforcing the Immigration Reform and Control Act).
27. See, e.g., *Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F. Supp. 2d 831, 843 (N.D. Cal. 2012) (finding that the NLRB’s construction of the Norris-LaGuardia Act was not entitled to deference). This type of diffusion of authority over workplace regulation is not common to all countries. In France, for example, *l’Inspection du Travail* (the Labour Inspectorate) is not only responsible for enforcing the entire labour code, but also certain provisions of collective bargaining contracts. See Michael J. Piore & Andrew Schrank, *Toward Managed Flexibility: The Revival of Labour Inspection in the Latin World*, 147 INT’L LAB. REV. 1, 5 (2008); see also An-

II. THE FAILURES OF LABOR AND EMPLOYMENT LAW

As labor law has increasingly been surrounded by employment laws, it has become apparent that each form of regulation is plagued by what appear on the surface to be unconnected problems—growing obsolescence and thus ineffectiveness in the case of labor law and distorted and underenforcement in the case of employment law.

A. *The Frustration of Labor Law Reform*

Enacted in 1935, when General Motors was the nation's largest employer, U.S. labor law has not kept pace with changes in the economy and employment relationships. Rather, as Professor Cynthia Estlund pointed out in her aptly titled 2002 article, *The Ossification of American Labor Law*, "a longstanding political impasse at the national level has blocked any major congressional revision of the basic text since at least 1959."²⁸ "[N]o other major American legal regime—no other body of federal law that governs a whole domain of social life," Estlund observes, "has been so insulated from significant change for so long."²⁹

Again and again, reform efforts have foundered, often frustrated by Senate filibusters that could not be ended via cloture, or presidential vetoes that could not be overridden. In other words, a determined minority has repeatedly blocked reform. As Professor Estlund explains, "for many decades, both organized labor and especially employers have had enough support in Congress to block any significant amendment that either group strongly opposes."³⁰ Political scientist Dorian Warren similarly observes "that several long-term institu-

drew Schrank & Michael Piore, *Norms, Regulations, and Labour Standards in Central America*, ECON. COMM'N LATIN AM. & CARIBBEAN 14 (Feb. 2007), http://repositorio.cepal.org/bitstream/handle/11362/5002/1/S0700170_en.pdf [<http://perma.cc/5KPW-8PU2>] (contrasting the Anglo-American approach to labor law enforcement, in which "[e]nforcement agents are divided into different bureaucracies with narrow jurisdictions," with the Franco-Iberian approach).

28. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002). The Act was extended to cover non-profit hospitals in 1974.

29. *Id.* at 1531.

30. *Id.* at 1540. Sweeping analyses of this history of frustration are found in Dorian T. Warren, *The Unsurprising Failure of Labor Law Reform and the Turn to Administrative Action*, in REACHING FOR A NEW DEAL: AMBITIOUS GOVERNANCE, ECONOMIC MELTDOWN, AND POLARIZED POLITICS IN OBAMA'S FIRST TWO YEARS 191–229 (Theda Skocpol & Lawrence R. Jacobs eds., 2011) [hereinafter Warren, *Unsurprising Failure*], and Dorian T. Warren, *The Politics of Labor Policy Reform*, in THE POLITICS OF MAJOR POLICY REFORM IN POSTWAR AMERICA 103–28 (Jeffery A. Jenkins & Sidney M. Mikis eds., 2014). For a compelling analysis of the role of Southern Democrats in blocking labor law reform after the NLRA, see Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 STUD. AM. POL. DEV. 1 (2005).

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tional and political obstacles . . . , including the geographical concentration of [organized] labor and conservative coalition in Congress, combined with anti-majoritarian features of the American state, have been and continue to be insurmountable” obstacles to labor law reform.³¹

In 1965, in the midst of a series of momentous legislative victories and only a little more than a year after breaking a filibuster to enact the Civil Rights Act of 1964, President Johnson failed in an effort to refederalize U.S. labor law by repealing Section 14(b) of the amended NLRA (which permits states to adopt so-called “right-to-work” laws). The repeal effort collapsed when the Senate failed to achieve cloture and end a filibuster.³² In 1976, President Ford vetoed a bill that would have permitted unions to picket and ask all employees working at a construction site to strike to protest the conduct of any one employer engaged on the project (so-called “common situs” picketing). The Senate, but not the House, voted to override the veto.³³ In 1978, President Carter’s comprehensive Labor Law Reform Act died in the Senate, despite majority support in both chambers, after a then-record, six failed cloture votes failed to end a filibuster.³⁴ In 1992, the House passed a bill supported by President Clinton that would have outlawed permanent replacement of strikes, but it fell three votes short of the number needed to end a filibuster in the Senate.³⁵ The bill met the same fate in 1994.³⁶ In his second term, Clinton vetoed the Teamwork for Employees and Managers (TEAM) Act that would have loosened restrictions on employer-

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31. Warren, *The Unsurprising Failure of Labor Law Reform*, *supra* note 30, at 134. Political scientist Taylor Dark writes, “For organized labor, perhaps more so than any other interest group, the American system of balanced bicameralism, combined with anti-majoritarian rules in the upper house, has proven catastrophic.” Taylor E. Dark III, Address at the Annual Meeting of the Western Political Science Association: Representing Labor in Congress: The Enduring Quest for Labor Law Reform 2 (Mar. 20–23, 2008), <http://www.taylordark.com/Representing%20Labor%20in%20Congress.pdf> [<http://perma.cc/F6QK-XXR2>].
32. S. 256, 89th Cong. (1965).
33. H.R. 5900, 94th Cong. (1975).
34. S. 2467, 95th Cong. (1978). A comprehensive study of the reform effort appears in BARBARA TOWNLEY, *LABOR LAW REFORM IN US INDUSTRIAL RELATIONS* (1986), and an account focused on employers’ successful effort to block the legislation in Thomas Ferguson & Joel Rogers, *Labor Law Reform and Its Enemies*, 228 *NATION* 1 (1979); see also Gary M. Fink, *Labor Law Revision and the End of the Postwar Labor Accord*, in *ORGANIZED LABOR AND AMERICAN POLITICS 1894–1994: THE LABOR LIBERAL ALLIANCE* 239–57 (Keven Boyle ed., 1998). For a more idiosyncratic view, see ORRIN HATCH, *SQUARE PEG: CONFESSIONS OF A CITIZEN-SENATOR 19–42* (2002) (describing his leadership of a successful filibuster).
35. S. 55, 102d Cong. (1992); H.R. 5, 102d Cong. (1991); see also Craig Becker, “Better than a Strike”: *Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 *U. CHI. L. REV.* 351, 371 (1994).
36. Estlund, *supra* note 28, at 1541.

sponsored employee representation and participation programs. The Act's supporters in Congress lacked the votes to override the veto.³⁷ Finally, in the first two years of the Obama administration, despite Democratic majorities in both chambers, the Employee Free Choice Act, another effort at comprehensive labor law reform that had twice passed the House during the prior administration, also died in the Senate in the face of a threatened filibuster.³⁸ Given the preceding half-century of experience, Professor Warren labeled this most recent stalemate an "unsurprising failure."³⁹

Without necessary changes in the law, the percentage of workers represented by unions has fallen from a high of 32.7% in 1953 to 12.3% in 2015.⁴⁰ Likewise, invocation of the statutory procedure to obtain representation via a petition for an election has fallen dramatically.⁴¹ The law's promise to U.S. workers that they have a right to "representatives of their own choosing"⁴² is no longer being fulfilled.

B. *The Failure of Employment Law Enforcement*

As labor law has aged, the number of statutes intended to establish minimum acceptable conditions of work has multiplied, yet it is almost universally conceded that those laws fail to protect the most vulnerable workers.⁴³ As Professors Janice Fine and Jennifer Gordon bluntly state: "Labor standards enforcement is not working."⁴⁴

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37. H.R. 743, 104th Cong. (1995); *see also* Estlund, *supra* note 28, at 1541. *See generally* John Logan, *The Clinton Administration and Labor Law: Was Comprehensive Reform Ever a Realistic Possibility?*, 28 J. LAB. RES. 609 (2007).
38. H.R. 1409, 114th Cong. (2009); S. 560, 114th Cong. (2009); *see also* Warren, *supra* note 30, at 208; Steven Mikulan, *Labor's Love Lost*, L.A. TIMES (Feb. 7, 2011), <http://articles.latimes.com/2011/feb/07/opinion/la-oe-mikulan-labor-20110207> [http://perma.cc/CB4J-ENLG].
39. Warren, *Unsurprising Failure*, *supra* note 30, at 193.
40. LEO TROY, TRADE UNION MEMBERSHIP, 1897–1962, at 2 (1965); Bureau of Labor Statistics, *Union Affiliation of Employed Wage and Salary Workers by Selected Characteristics*, U.S. DEP'T LABOR (Jan. 28, 2016), <http://www.bls.gov/news.release/union2.t01.htm> [http://perma.cc/537F-SLXQ].
41. Between fiscal years 1970 and 2015, the number of petitions fell steadily from 12,543 to 2,822. 35 NLRB ANN. REP. 14 (1970); NLRB, PERFORMANCE & ACCOUNTABILITY REPORT FY 2015, at 18 (2015).
42. 29 U.S.C. § 157 (2012).
43. *See, e.g.*, David Weil, *Regulating the Workplace: The Vexing Problem of Implementation*, in 7 ADVANCES IN INDUSTRIAL & LABOR RELATIONS 247–86 (David Lewin et al. eds., 1996).
44. Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 553, 553 (2010).

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Government enforcement is seriously constrained by inadequate resources and private enforcement is chilled by employees' fear of suing their employer. In 2005, two scholars (one of whom, David Weil, is the current Administrator of DOL's Wage and Hour Division) found that the annual probability of one of the seven million establishments covered by the FLSA and the Occupational Safety and Health Act (OSHA) being inspected was .001%.⁴⁵

Private enforcement cannot fully supplement government enforcement. As Weil observes, "There is reason to believe that workers will systematically underutilize their rights if decisions are made on an individual basis as a result of both the structure of benefits and costs related to exercise of rights."⁴⁶ The NLRB has recognized that "[i]ndividually, and even as a group, . . . employees often lack the information, resources, money, and security needed to pursue such litigation."⁴⁷ Indeed, the very year that Congress passed the Civil Rights Act of 1964, the Supreme Court recognized that employees who are "[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries."⁴⁸ Additionally, even when employees have the requisite knowledge, the Supreme Court has recognized that "it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."⁴⁹

Despite these unique dangers faced by employees who sue their employer, employees are nevertheless uniquely barred from access to ordinary class action procedures under Federal Rule of Civil Procedure 23 when they seek to enforce the FLSA. Instead, employees are each required to step forward individually to affirmatively join such an action.⁵⁰ The result is that, while the Supreme Court has declared in ringing tones that "FLSA [and other employment law] rights cannot be abridged by contract or otherwise waived,"⁵¹ in fact, waiver is endem-

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45. David Weil & Amanda Pyles, *Why Complain: Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 62 (2005).
 46. Weil, *supra* note 43, at 252.
 47. Stericycle, Inc., 357 N.L.R.B. 582, 583 (2011).
 48. Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar, 377 U.S. 1, 7 (1964); *see also* United Mine Workers, District 12 v. Ill. State Bar Ass'n, 389 U.S. 217 (1967).
 49. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960).
 50. The limitation stems from 29 U.S.C. § 216(b) (2012). *See generally* Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 U. MINN. L. REV. 1317 (2008). Notably, in light of the argument made in this Article, the 1947 amendments to the FLSA that introduced Section 216(b) and now prevent Rule 23 class actions to enforce the Act were largely intended to curb union-aided enforcement. *See* Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 172 (1991).
 51. *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981).

ic. As Professor Paul Weiler bluntly stated in his seminal book, *Governing the Workplace*: “Unfortunately, the initial promise of legal regulation—that it would insulate the fundamental and equal rights of workers from disparities in their resources (which clearly influence the outcomes of the market and of collective bargaining) turns out in great part to be mythical.”⁵²

Unsurprisingly, given the reasons for underenforcement of minimum standards legislation, the underenforcement is not uniform across the labor force, but instead exists primarily among the most vulnerable workers. The Dunlop Commission questioned whether litigation “protects all kinds of employees equally well,” noting that most discrimination plaintiffs “come from the ranks of managers and professionals rather than from lower-level workers.”⁵³ Litigation, according to Professors Samuel Estreicher and Zev Eigen, is “an attractive source of leverage for well-paid litigants who can afford competent counsel,” but “[f]or the overwhelming number of U.S. workers . . . the U.S. court system is, for all practical purposes, *terra incognita*.”⁵⁴ “The fundamental problem of the current system,” Estreicher and Eigen state, “is that the overwhelming majority of U.S. workers lack access to a fair, efficient forum for adjudicating their disputes with their employers.”⁵⁵ “[T]he current system sets different de facto standards of legal compliance for employers of low-wage earners versus high-wage earners.”⁵⁶ The result is that many working people at the bottom of the wage scale labor under conditions that are below the minimum deemed socially acceptable.⁵⁷

Employment law also largely fails, at least directly, to reorder existing relationships to comport with minimum standards. “A striking fact that emerges from” judicial statistics, Professors John Donohue and Peter Siegelman report-

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52. PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 28 (1990).
53. FINAL REPORT, *supra* note 13, at 49–50.
54. Samuel Estreicher & Zev J. Eigen, *The Forum for Adjudication of Employment Disputes*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 410, 409 (Cynthia L. Estlund & Michael L. Wachter eds., 2013).
55. *Id.*
56. *Id.* at 414.
57. See, e.g., Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities 2* (2009), <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf> [<http://perma.cc/VTU8-B4BS>] (reporting findings from survey of over 4,000 workers in low-wage industries in Chicago, Los Angeles, and New York City, including that 26% were paid below the minimum wage and 76% of those who worked overtime were not paid at required rates); News Release, U.S. Dep’t of Labor, Significant Violations in the Austin Restaurant Industry Raise Concerns to US Labor Department Officials (Oct. 4, 2016), <http://www.dol.gov/newsroom/releases/whd/whd20161004> [<http://perma.cc/E3VY-F7HC>] (announcing that the DOL found violations in 98% of investigations of restaurants in Austin, Texas in 2015 and 95% in 2016).

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ed in 1991, “is that plaintiffs in employment discrimination litigation rarely sue their current employers.”⁵⁸ Relying on that research, the Dunlop Commission found that most discrimination actions are brought by former employees.⁵⁹ In fact, Donohue and Siegelman found that only one in ten civil rights actions against private employers is filed by an employee still on the job.⁶⁰ This suggests that the laws are not working to ensure ongoing compliance except via an indirect deterrent effect. These facts led Donohue and Siegelman to conclude that “to protect workers from on-the-job discrimination, alternatives to the current form of private litigation must be found.”⁶¹ The identity of plaintiffs may also suggest that some litigation results from former employees pouring what may be legitimate grievances over their termination into a limited number of available juridical molds, despite a less than perfect fit between their grievance and the legal relief available.⁶² It most clearly suggests that many current employees will not risk their jobs, or retaliation short of termination, by suing their employers in order to ensure that the law on the shop floor comports with the law on the books, no matter how well-founded their grievances are in the law.

Historically separated, our labor and employment laws have both failed many American workers.

III. THE PROMISE OF UNIFICATION

Knitting together the bifurcated pieces of our system of workplace regulation might serve as the foundation for solutions to each of the seemingly separate problems described in Part II.

The frustration of labor law reform might be addressed by widening the legislative focus to encompass both labor and employment law. Although employers may be content to permit labor law to become obsolete through inaction, they are concerned about the high cost of judicial enforcement of employment standards, particularly through class actions and their rigidity.⁶³ Expanded union representation, facilitated by labor law reform, could address both of employers’ grievances about employment law.

58. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1031 (1991).

59. FINAL REPORT, *supra* note 13, at 49–50, 56.

60. Donohue & Siegelman, *supra* note 58, at 1031.

61. *Id.* at 1032.

62. Donohue and Siegelman posit that one of the reasons why there was substantial growth in discharge cases compared to hiring cases under Title VII between 1966 and 1985, was the decline in union representation that left an increasing number of workers unable to challenge their discharge under contractual just-cause provisions. *Id.* at 1019.

63. FINAL REPORT, *supra* note 13, at 49.

Employers contend that the cost of defending claims under various employment laws in court is excessive and that “[a]rbitration is faster, easier, and less expensive.”⁶⁴ Expanded union representation could facilitate arbitration of statutory disputes. Such arbitration is commonplace under collective bargaining agreements, as it is central to fulfilling the purpose of federal labor law. In 1960, in one of its *Steelworkers Trilogy*, which placed arbitration firmly at the center of federal labor-relations policy, the Supreme Court stated, “The present federal policy is to promote industrial stabilization through the collective bargaining agreement” and “[a] major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.”⁶⁵ Parties to collective bargaining agreements have almost universally adopted arbitration as a means of resolving contractual disputes. In 2009, the Supreme Court held in *14 Penn Plaza LLC v. Pyett*,⁶⁶ that employers and unions can agree to incorporate legislated minimum standards in collective-bargaining agreements, and to enforce represented employees’ statutory claims through arbitration rather than litigation.

Of course, to expand the use of collectively-bargained arbitration procedures to enforce statutory rights, unions would have to agree to do so and agree clearly and unmistakably.⁶⁷ Unions are currently, and understandably, reluctant to do so without new resources given the additional legal expertise needed to present statutory claims and the factual complexity of many such claims. This is particularly true in “right-to-work” states, where, under current law, a union could be obligated to present a complex statutory claim on behalf of a non-member who could not, in turn, be required to pay even his or her fair share of

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64. Brief of the Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioner at 27, *Rose Group v. NLRB*, Nos. 15-4092, 16-1212 (3d Cir. Apr. 26, 2016).
65. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).
66. 556 U.S. 247 (2009). An article by counsel for both the union and the employer association that were party to the collective bargaining agreement at issue in *Pyett* describes both the legal questions that have arisen post-*Pyett* and the two parties’ handling of their disagreement about the application of the decision to their own agreement. See Terry Meginniss & Paul Salvatore, *Response to an Unresolved Issue from Pyett: The NYC Real Estate Industry Protocol*, in PROCEEDINGS OF THE NEW YORK UNIVERSITY 69TH ANNUAL CONFERENCE ON LABOR (forthcoming 2016). Three important legal questions that remain unanswered are: can such an agreement require that grievances on behalf of each individual employee be pursued separately in arbitration; can an employee file in court, regardless of such an agreement, if the union decides not to take his or her case to arbitration in a manner consistent with its duty of fair representation; and does the same duty of fair representation apply to the union’s enforcement of the agreement when the claim is that an employee’s statutory rights were violated as when the claim is a simple breach of contract?
67. See *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 82 (1998).

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the overall cost of union representation.⁶⁸ Further, the question of whether the union has the same duty of fair representation toward a represented employee when his or her claim is based on a statute as when it is based solely on contract will have to be answered before large numbers of unions will agree to assume this responsibility, given that unions' duty runs to the entire unit of represented employees as a whole.⁶⁹ Thus, unions' ability to agree to arbitral enforcement of statutory rights under *Pyett* is not itself a solution to the complex of regulatory problems, but only one piece of a necessarily larger, possible reform.

Employers also contend that employment laws impose "one-size-fits-all" standards that do not, in fact, fit some workplaces. As Professor Weiler observes, U.S. business leaders lament "the often procrustean fit of a single legal requirement imposed by a remote government agency on the varying needs of millions of workplaces."⁷⁰ Notably, this rigidity is the direct result of the shift from promoting bargaining to establishing minimum standards. Weiler continues, "Because we have shifted the power of decision-making to distant lawmakers in order to overcome the problem of disparity in local bargaining power, we thereby sacrifice the necessary appreciation of what precautions would actually be most sensible in a particular setting."⁷¹ As Professors Estreicher and Eigen point out, a regulatory system founded on employment laws "lacks the intimate knowledge of industries' peculiarities, and flexible specialization of the 'law of the shop'"⁷² characteristic of parties to collective bargaining and the arbitrators who enforce their agreements.

Yet, with appropriate legislative authorization, employers and unions can adjust legislated labor standards through collective bargaining to fit their par-

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68. See, e.g., *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014). This construction of the NLRA's Section 14(b), 29 U.S.C. § 164(b) (2012), is currently being challenged in two pieces of litigation. See *Int'l Union of Operating Eng'rs Local 139 v. Schimel*, No. 16-CV-590-JPS, 2016 U.S. Dist. LEXIS 131458 (E.D. Wis. Sept. 26, 2016); *Int'l Union of Operating Eng'rs Local 370 v. Wasden*, No. 4:15-CV-00500-EJL-CWD, 2016 U.S. Dist. LEXIS 146966 (D. Idaho Oct. 24, 2016). Appeals are currently pending from both of these decisions.
69. The Supreme Court explained the tensions inherent in combining such individual representation with an obligation to the whole in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974), but largely ignored them in *Pyett*, 556 U.S. at 269–72.
70. WEILER, *supra* note 52, at 27.
71. *Id.* Professor Estlund similarly observes, "Two of the inherent weaknesses of uniform minimum standards are their rigidity in the face of changing conditions and their uniformity in the face of firms' widely varying capabilities and workers' varying needs and interests." ESTLUND, *supra* note 22, at 20; see also *id.* at 76.
72. Estreicher & Eigen, *supra* note 54, at 413. The "law of the shop" quote is from the *Steelworkers Trilogy*, specifically, *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

ticular circumstances, accounting for employee desires, geographic and industry variation, and other local factors.⁷³

In its 1994 decision in *Livadas v. Brandshaw*,⁷⁴ the Supreme Court held that a state policy of not enforcing a requirement of timely payment of wages due upon termination on behalf of represented employees was preempted by the NLRA. The Court reasoned, “It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.”⁷⁵ In so holding, however, the Court made clear that its decision “cast no shadow” on the validity of “narrowly drawn opt-out provisions.”⁷⁶ The Court referred to a number of state and federal laws that provide “union-represented employees . . . the full protection of the minimum standard, *absent any agreement for something different*.”⁷⁷ Indeed, in an earlier decision involving a state law requiring severance pay after a plant closing, but exempting employers that are party to a collective bargaining agreement requiring severance pay (even if the contractual requirement did not match the statutory mandate), the Court reasoned that opt-out provisions bolster the case against preemption of minimum standards legislation: “The fact that the parties are free to devise their own severance pay arrangements . . . strengthens the case that the statute works no intrusion on collective bargaining.”⁷⁸ In other words, minimum conditions legislation can permit unions to waive the law’s protections on behalf of represented employees and opt for something different.

73. Professors Michael Piore and Andrew Schrank argue that the discretion vested in the labor inspectorate in France and Latin America play a similar role. Piore & Schrank, *supra* note 27.

74. 512 U.S. 107, 129 (1994).

75. *Id.* at 129 (citing *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)).

76. *Id.* at 132.

77. *Id.* at 131 (emphasis added). Lower federal courts have understood *Livadas* to hold that state employment laws are preempted if they simply exempt employers that are a party to collective bargaining agreements, but not preempted if they permit parties to bargain an express opt-out provision, or if they exempt employers who are parties to collective bargaining agreements containing provisions addressing the problem the legislature sought to resolve even if the bargained solution differs from the legislated solution. *See, e.g., Firestone v. S. Cal. Gas Co.*, 219 F.3d 1063, 1067 (9th Cir. 2000) (holding that a provision exempting employees from the California overtime law, when the employees are covered by a collective bargaining agreement that provides “premium wage rates” for overtime work, is not preempted on the ground that the law exempts only “those [employees] who have sought and received alternative wage protections through the collective bargaining process”).

78. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22 (1987).

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As the Supreme Court pointed out in *Livadas*, many federal and state laws already allow minimum standards to be altered through collective bargaining, including the foundational FLSA. Since 1938, the FLSA has provided that “in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board,” a union and an employer can alter the 40 hour a week threshold for overtime compensation so long as their agreement requires that the 40 hour standard is met when employees’ weekly hours are averaged over a six-month period, thereby providing for considerably more flexibility in scheduling.⁷⁹ Pursuant to this authorization, the NLRB has a special procedure for certifying representatives as “bona fide” that extends beyond its ordinary jurisdiction to encompass representatives of federal, state, and local employees.⁸⁰ A similar exemption provision exists in the requirement that pension plans have specified minimum coverage in order to qualify for tax advantages under the Employee Retirement Income Security Act.⁸¹ The *Livadas* Court also pointed with approval to a considerable number of state minimum standards laws containing such collectively bargained opt-out provisions.⁸² Since the Supreme Court’s decision in *Livadas*, a number of lower federal and state courts have rejected challenges to such provisions.⁸³

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79. 29 U.S.C. § 207(b)(1) (2012). Additional examples from the FLSA are Sections 207(b)(2), (f) and (o)(2)(A)(i) and 203(o) (the last cited by the Court in *Livadas*).
80. See *County of Alameda*, 322 N.L.R.B. 614 (1996); NLRB, CASE HANDLING MANUAL, PART TWO: REPRESENTATION PROCEEDINGS (2014), <http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/CHM2-Sept2014.pdf> [<http://perma.cc/Z38M-WPVG>].
81. 26 U.S.C. § 410(b)(3)(A).
82. *Livadas v. Bradshaw*, 512 U.S. 107, 132 n.26 (1994). The Court cited an addendum to the Brief of Amicus Employers Group listing examples of opt-out statutes from eighteen states and the District of Columbia. Brief for the Employers Group et al. as Amici Curiae Supporting Respondent at Appendix B, *Livadas*, 512 U.S. 107 (1994) (No. 92-1920), 1994 U.S. S. Ct. Briefs LEXIS 149; see also David I. Levine et al., ‘Carve-Outs’ from the Workers’ Compensation System, 21 J. POL’Y ANALYSIS & MGMT. 467 (2002).
83. Litigation concerning opt-out provisions has largely been conducted in the Ninth Circuit. See *Am. Hotel & Lodging Ass’n v. City of Los Angeles*, 834 F.3d 958 (9th Cir. 2016) (upholding opt-out provision of City Hotel Worker Minimum Wage Ordinance); *Firestone v. S. Cal. Gas Co.*, 219 F.3d 1063, 1067 (9th Cir. 2000) (holding that a California law exempting employees from the state overtime law where they were covered by a collective bargaining agreement that provides “premium wage rates” for overtime work, was not preempted by the NLRA); *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 486–90 (9th Cir. 1996) (upholding a California law limiting the hours mine employees could work in a day that was amended to exclude employees covered by collective bargaining agreements “where the agreement expressly provides for the wages, hours of work, and working conditions of the employees”); *NBC Inc. v. Bradshaw*, 70 F.3d 69, 71–72 (9th Cir. 1995) (upholding exemption from state law requiring double pay for hours worked over twelve

Opt-out provisions also exist in Western European labor law. In the Nordic countries, where the rate of union representation is relatively high, many employment laws allow their terms to be altered by collective agreement. This kind of legislation is described as “semi-mandatory.” In Sweden, for example, the Working Time Act, the Annual Holidays Act, and large parts of the Employment Protections Act are semi-mandatory. These provisions generally allow for waiver through collective agreements only at the sectoral level, however, and not at the individual firm level.⁸⁴ In Germany, collective agreements can “derogate” from the Hours of Work Act in a number of specified respects as well as from legislation requiring equal pay for and treatment of temporary agency employees. In addition, the recently enacted general minimum wage can be deviated from by collective agreement during a two-year implementation period.⁸⁵

These forms of integration of labor and employment law can yield less expensive enforcement and flexibility where it benefits both employees and employers. Consequently, they might convince employers to soften their implacable resistance to labor law reform aimed at making representation more accessible to U.S. employees.

in a day for workers “covered by the terms of a collective bargaining agreement providing specified minimum overtime benefits”); *Rawson v. Tosco Refining Corp.*, 67 Cal. Rptr. 2d 790, 790 (Cal. Ct. App. 1997) (upholding law granting employees double pay for certain overtime hours, while exempting employees covered by a collective bargaining agreement that provides a premium overtime rate and base wages of at least one dollar above the minimum wage); *see also* *St. Thomas-St. John Hotel & Tourism Ass’n v. Virgin Islands*, 218 F.3d 232, 235, 245 (3d Cir. 2000) (upholding an opt-out provision of Virgin Island’s unjust discharge law that limited termination of employees to specified causes “[u]nless modified by union contract”).

84. Jonas Malmberg, *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, 43 SCANDINAVIAN STUD. L. 189, 195–96 (2002). When derogation is allowed at the firm level it is typically hedged by restrictions, for example, allowing it only on a temporary basis. *See Semi-Discretionary Law*, EUR. FOUND. FOR IMPROVEMENT LIVING & WORKING CONDITIONS, <http://www.eurofound.europa.edu/emire/sweden/anchor-semidispositivelag-se.htm> [<http://perma.cc/WPR4-3J68>]. Moreover, caselaw has developed the concept of “undue undermining,” invalidating the collectively-bargained rule when it seriously undermines the statutory standard. *Id.*
85. *Arbeitszeitgesetz* [ArbZG] [Hours of Work Act], June 19, 1994, BGBL I at 1170, § 7 (Ger.); *Arbeitnehmerüberlassungsgesetz* [AÜG] [Act Regulating the Commercial Lease of Employees], Feb. 3, 1995, BGBL I at 158, § 9 no. 2, s.2 (Ger.); *Mindestlohngesetz* [MiLoG] [Minimum Wage Act], Aug. 11, 2014, BGBL I at 1348, § 24 (Ger.). Outside of Western Europe, in Australia, while the parties to collective bargaining cannot alter the terms of minimum standards legislation, agreements can supplant standards set by awards at the industry or occupation level. Such agreements are subject to a “better off overall test” to ensure that workers suffer no disadvantage. *See* ANDREW STEWART ET AL., *CREIGHTON & STEWART’S LABOUR LAW* 392–97 (6th ed. 2016). I thank Professors Jonas Malmberg, Rüdiger Krause, and Andrew Stewart for these insights into comparative opt-out provisions.

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Giving unions a role in the shaping, enforcement, and administration of legislated minimum standards might also encourage more employees to seek representation, particularly low-wage and other vulnerable workers who have never been represented in significant numbers and among whom union density has declined most dramatically.⁸⁶ In contrast to some other countries, the United States affords unions no formal role in enforcing or administering legislated workplace standards and benefits. For example, in the United States, unemployment insurance is mandated by federal and state statute and administered by state agencies. In contrast, in Sweden, Denmark, Finland, and Belgium, under the Ghent system, unions administer unemployment insurance plans subsidized by the government.⁸⁷ Three of the four Ghent-system nations have the highest union density in the world and the fourth, Belgium, is number six. On average, Ghent-system countries have union density seventeen percent higher than non-Ghent countries.⁸⁸ Swedish Professor Bo Rothstein concludes, “we can say that it is possible to have a fairly strong union movement without a Ghent system, but in order to have really strong unions, such a system seems necessary.”⁸⁹ Although the Ghent system may not be suited to the U.S. context, developing a comparable role for unions in the administration of U.S. employment laws is surely possible.

Expanded union representation would, in turn, ensure higher rates of enforcement of employment laws, particularly by current employees. Empirical evidence clearly demonstrates that unions significantly increase the enforcement of a broad range of employment laws on behalf of the employees they represent. Under OSHA, for example, across similar workplaces, unions increase the likelihood and intensity of inspection and the size of penalties for violations.⁹⁰ Professor Weil summarizes the literature concerning the union effect on enforcement of employment laws: “This consistent body of empirical evidence confirms that unions improve the de facto implementation” of those laws.⁹¹ This is the case because unions have each of the characteristics Weil identifies for a “workplace agent” that can potentially solve the problem of enforcement: interests allied with individual workers, a means of efficiently gath-

86. David Card, *The Effect of Unions on Wage Inequality in the U.S. Labor Market*, 54 *INDUS. & LAB. REL. REV.* 296, 297, 305–06 (2001).

87. See Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 *N.C. L. REV.* 319, 378 (2012).

88. *Id.* at 333–35. This is true despite the facts that participation in the union-administered unemployment insurance plans is not conditioned on membership in the union (except to some extent in Belgium) and that union membership is typically wholly voluntary in Sweden and Denmark. *Id.* at 356, 354–55.

89. Bo Rothstein, *Labor-Market Institutions and Working-Class Strength*, in *STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS* 42 (Sven Steinmo et al. eds., 1992).

90. David Weil, *Enforcing OSHA: The Role of Labor Unions*, 30 *INDUS. REL.* 20 (1991).

91. Weil, *supra* note 43, at 265.

ering and disseminating information about rights, and a method of protecting workers against retaliation for exercising their rights.⁹² To that list I would add an efficient means of enforcement through arbitration as discussed above. Indeed, as early as 1992, Professor Summers, in his article, *Effective Remedies for Employment Rights*, identified a:

need for certain institutional and structural changes which will make protection of these rights more effective . . . The need is to create devices beyond the class action which will enable employees to act together to protect their individual legal rights. The most obvious device is a union.⁹³

Weil draws the same conclusion suggested here: “future consideration of labor law reform . . . should consider the connection—and growing lack of connection—between unionization and implementation of labor policies as currently structured.”⁹⁴ Paradoxically, although the Dunlop Commission suggested that employment law “has come to play a much more prominent role” than labor law, “both on the job and in the courts,”⁹⁵ in actual operation, i.e., “on the job,” the failures of employment law have highlighted the continued need for employee representation. As Professor Weiler put it, “the representation gap considerably reduces the potential of external legal regulation for providing effective protection to the intended employee beneficiaries.”⁹⁶

Integration of the historically bifurcated systems of labor and employment law—collective bargaining and minimum standards—might solve seemingly unconnected and intractable defects in each system. But what would such an integrated system look like and how do we begin to move in that direction?

92. *Id.* at 253.

93. Summers, *supra* note 22, at 538; *see also* ESTLUND, *supra* note 22, at 144 (“Unions fit the . . . bill particularly well, for they are designed to capture the advantages of employees’ inside position while meeting the challenges posed by both the ‘public goods’ nature of workplace conditions and the problem of worker dependency and fear.”).

94. Weil, *supra* note 43, at 265–66. Other scholars, notably Janice Fine and Jennifer Gordon have identified the importance of workplace representation to the effective enforcement of employment laws. *See* Fine & Gordon, *supra* note 44. Fine has developed the idea of “co-enforcement,” meaning active cooperation between government enforcement agencies and worker organizations in enforcement. *See* Janice Fine, *Enforcing Labor Standards in Partnership with Civil Society: Can Co-enforcement Succeed Where the State Alone Has Failed?*, POL. & SOC’Y (forthcoming). Professor Estlund uses the term “co-regulation.” ESTLUND, *supra* note 22, at 22.

95. FACT FINDING REPORT, *supra* note 8, at 105.

96. WEILER, *supra* note 52, at 29. As Professor Estlund states, “The representation gap that faces American workers thus threatens not only workers’ voice within workplace governance and their ability to bargain above the legal floor established by law; it threatens the floor itself.” ESTLUND, *supra* note 22, at 239.

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IV. POSSIBLE PRECURSORS OF ENFORCEMENT AND TAILORING OF MINIMUM STANDARDS THROUGH COLLECTIVE BARGAINING

Consideration of two legal questions currently generating considerable controversy sheds some light on how the bifurcated legal regimes governing the workplace might be integrated.

Employers are increasingly seeking to suppress effective, private, judicial enforcement of employment laws, specifically, any form of class or collective litigation. In a series of cases, employers have urged the Supreme Court to narrow the circumstances under which employees can proceed collectively in the enforcement of their workplace rights.⁹⁷ The U.S. Chamber of Commerce has pleaded to the Court that “[i]t is hard to overstate the toll that frivolous class actions take on U.S. businesses,”⁹⁸ and the Court has tightened the requirements for certifying a class of aggrieved employees.⁹⁹

In addition, encouraged by the pro-arbitration trend in recent Supreme Court jurisprudence,¹⁰⁰ more and more employers are requiring that employees agree to arbitrate all disputes and to do so solely as individuals, i.e., to waive their right to file and participate in class and collective actions or even to join their claims.¹⁰¹ As Justice Ginsburg pointed out in 2015, “[i]t has become rou-

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97. See *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).
98. Brief of the Chamber of Commerce et al. of the United States as Amici Curiae Supporting Petitioner at 20, *Tyson Foods*, 136 S. Ct. 1036 (No. 14-1146).
99. See *Wal-Mart*, 564 U.S. 338 (tightening requirements for demonstrating the existence of common questions in Title VII class action).
100. The key cases are *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (holding that contract of adhesion containing arbitration clause that precluded class actions was enforceable under the FAA despite state court finding that it was unconscionable); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (holding that the Federal Arbitration Act (FAA) applies to all employment contracts except those of “transportation workers”); and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that employees’ agreement to arbitrate statutory claims are enforceable).
101. See Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 2 (2011) (finding that “[e]mployment arbitration grew dramatically in the wake of . . . *Gilmer*” and estimating that “for perhaps a third or more of nonunion employees” arbitration is the sole means of vindicating workplace rights); Nicole Wredberg, *Subverting Workers’ Rights: Class Action Waivers and the Arbitral Threat to the NLRA*, 67 HASTINGS L.J. 881, 893 (2016) (“In 2008, it was estimated that about fifteen percent to twenty-five percent of employers nationally had adopted mandatory arbitration procedures.”); *The 2014 Carlton Fields Jordan Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, CARLTON FIELDS JORDEN BURT 1, 30 (2014), <http://classactionsurvey.com/pdf/2014-class-action-survey.pdf> [<http://perma.cc/YUN5-PQQJ>] (law firm survey of “326 companies of

tine, in a large part due to this Court's decisions, for powerful economic enterprises to write into their form contracts with consumers and employees no-class-action arbitration clauses."¹⁰² The result, according to Justice Ginsburg, is to "insulat[e] already powerful economic entities from liability for unlawful acts."¹⁰³

Importantly, none of the recent Supreme Court decisions that have encouraged employers to impose arbitration agreements encompassing employment law claims and containing collective action waivers have considered federal labor law. Rather, considering only the federal employment law at issue—the Age Discrimination in Employment Act—the Court in 1991 held in *Gilmer v. Interstate/Johnson Lane* that the fact that Congress expressly provided for judicial enforcement of the law does not prevent employers from imposing on employees, as a condition of employment, an arbitration agreement encompassing statutory claims.¹⁰⁴ In 2013, outside the employment context entirely, in *American Express v. Italian Colors Restaurant*, the Court suggested that the existence of an arbitration clause in a contract of adhesion containing a class-action waiver cuts off an "affordable procedural path" to protection of federal statutory rights (under the antitrust laws) and may prevent "effective vindication" of the legislative purpose, does not render the agreement unenforceable.¹⁰⁵

Paradoxically, the very labor law that many thought was gradually being rendered obsolete by the set of employment laws whose effective enforcement is now imperiled by employers' strategy of atomizing enforcement—the NLRA—may yet save those employment laws from becoming largely a dead letter. The NLRB has held that employment "agreements" that include a waiver of employees' right to proceed collectively in both court and arbitration unlawfully interfere with employees' NLRA right to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection."¹⁰⁶ The Board's holding received a mixed reception in the courts of appeals, producing a split in the circuits that may soon be resolved by the Supreme Court.¹⁰⁷

all sizes and business types" in 2013 found that seventy-two percent included arbitration clauses in their contracts, up from fifty-five percent in 2012, and that forty percent of those clauses precluded class actions, double the percentage from 2012).

102. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (Ginsburg, J., dissenting).
103. *Id.* at 478.
104. *Gilmer*, 500 U.S. 20. The agreement at issue in *Gilmer* actually permitted collective actions in arbitration. *See id.* at 32.
105. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309, 2312 (2013).
106. *Murphy Oil USA, Inc.*, 361 N.L.R.B. 72 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015); *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013). I was a member of the NLRB when it decided *D.R. Horton*. The quote is from Section 7 of the NLRA, 29 U.S.C. § 157 (2012).
107. The Fifth Circuit disagreed with the Board in *D.R. Horton* and *Murphy Oil*, as have the Second and Eighth Circuits. *See Sutherland v. Ernst & Young LLP*, 726 F.3d

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If the Supreme Court upholds the NLRB's conclusion that individual employees cannot be required or even induced¹⁰⁸ to prospectively waive their right to take collective enforcement action, employers might be able to negotiate agreements with unions to arbitrate employees' statutory disputes on an individual basis, but not with unrepresented, individual employees.¹⁰⁹ That is because in 2009 the Supreme Court held in *Pyett*¹¹⁰ that a union representing a unit of employees can agree to arbitrate their statutory claims as explained above.¹¹¹ The divergence would not be aberrational as unions can agree to waive other labor law rights, most notably the right to strike, even though individual employees cannot be held to such a waiver.¹¹² It would also be appropriate because unions, unlike individual employees who typically sign contracts of adhesion, negotiate the mechanics of arbitration, including whether the arbitrator can hear class-wide grievances. Furthermore, unions, unlike individual employees, are repeat players whose confidence arbitrators must retain if they want to stay in business.¹¹³ The legal regime that will result if the Supreme Court affirms

290, 297 n.8 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–54 (8th Cir. 2013). The Seventh and Ninth Circuits have agreed with the Board. See *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young LLP*, 843 F.3d 975 (9th Cir. 2016). Petitions for a writ of certiorari are pending in *Lewis, Morris, Murphy Oil*, and a successor case to *Sutherland, Patterson v. Raymours Furniture Co.*, No. 15-2820-cv, 2016 WL 4598542 (2d Cir. Sept. 2, 2016).

108. The NLRB has held that it is unlawful for employers to impose an agreement to arbitrate all claims in individual proceedings on employees even if the employees are permitted to opt out of the agreement during a window period. On *Assignment Staffing Servs., Inc.*, 362 N.L.R.B. 189 (2015). *But see* *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072 (9th Cir. 2014) (concluding that opt-out provision renders the agreement lawful).
109. Unless the individual employees have purely individual claims, i.e., they cannot assert class or collective claims. See *D.R. Horton*, 357 N.L.R.B. at 2287.
110. 556 U.S. 247 (2009).
111. See *supra* Part III.
112. See *D.R. Horton*, 357 N.L.R.B. at 2286 (“It is well settled, however, that a properly certified or recognized union may waive certain Section 7 rights of the employees it represents—for example, the right to strike—in exchange for concessions from the employer. The negotiation of such a waiver stems from an exercise of Section 7 rights: the collective-bargaining process. Thus, for purposes of examining whether a waiver of Section 7 rights is unlawful, an arbitration clause freely and collectively bargained between a union and an employer does not stand on the same footing as an employment policy . . . imposed on individual employees by the employer as a condition of employment.” (citation and emphasis omitted)); see also *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956).
113. For a vivid description of how unilaterally-imposed arbitration systems involving organizations that are repeat players on one side and individuals on the other, see Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), <http://www.nytimes.com/2015/11/03/>

the Board¹¹⁴ might make more employers recognize the benefits of collective bargaining and thus might permit more current employees, particularly at the bottom of the wage scale, to enforce their statutory workplace rights.

The second legal question currently in dispute is under what circumstances legislatures should authorize unions and employers to waive or alter statutorily-established minimum conditions through collective bargaining. A specific example illustrates how an opt-out provision properly functions in an industry where non-compliance with minimum standards laws is endemic and unions have been historically absent: car washing. Car washes are operated by unskilled workers who, in many areas of the country, are largely undocumented and thus vulnerable to exploitation. In 2008, the *Los Angeles Times* reported that many car washes in southern California paid less than half the required minimum wage, and that two-thirds of those inspected by the State's labor department were out of compliance with one or more employment laws. Although some violations were minor, others were fundamental: underpaying workers, hiring minors, operating without workers' compensation insurance and denying workers meal and rest breaks.¹¹⁵ Workers faced not only all the typical barriers to seeking legal relief against their employers, but also often found that when they did so, they could not collect on judgments because the employers lacked sufficient assets to pay or could no longer be located.

The California legislature began to respond to this enforcement problem in 2003 by adopting a bond requirement for operating a car wash. The bond proceeds were made available "for the benefit of any employee damaged by his or her employer's failure to pay wages, interest on wages, or fringe benefits" or turn over tips.¹¹⁶ In 2014, recognizing that workers are better off receiving the minimum wage when it is due rather than collecting on a judgment years later,

business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html [http://perma.cc/L6W2-V4BY]; Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [http://perma.cc/XNL5-F22M]; and Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a "Privatization of the Justice System,"* N.Y. TIMES (Nov. 1, 2015), <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [http://perma.cc/4DNU-YV3H].

114. Of course, even if the Court does not affirm the Board, Congress could achieve the same result by amending the Federal Arbitration Act, the NLRA, or the Norris LaGuardia Act. The latter already prevents federal courts from barring any person, whether "singly or in concert," from "aiding any person participating or interested in any labor dispute who is . . . prosecuting, any action or suit in any court of the United States or of any State." 29 U.S.C. § 104(d) (2012).
115. Sonia Nazario & Doug Smith, *Workers Getting Soaked at Southland Carwashes*, L.A. TIMES (Mar. 28, 2008), <http://articles.latimes.com/2008/mar/23/local/me-carwash23> [http://perma.cc/FV28-7MEH].
116. CAL. LAB. CODE § 2055(b)(1) (2015).

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the legislature amended the car wash law to both increase the required amount of the bond and provide an exemption for “an employer covered by a valid collective bargaining agreement, if the agreement expressly” sets wages and hours and provides for an “expeditious process to resolve disputes concerning non-payment of wages.”¹¹⁷ In other words, the legislature gave car wash employers a choice of means to ensure workers are paid in accordance with law—employers could post a bond or enter into an agreement providing for extrajudicial enforcement of the law of the workplace, typically through arbitration, with a properly-chosen representative of their employees. The latter type of insurance is effective because employees have a representative with knowledge of the law, the right to obtain payroll information, a more continuous presence in the workplace than government investigators, and the ability to enforce contractual commitments and legal requirements on a unit-wide basis. Represented employees can also seek enforcement without fear of retaliation and through a fair, economical, and relatively speedy system of labor arbitration.¹¹⁸

In addition to ensuring that workers are either paid in accordance with law, or at least can eventually collect on a judgment, the Car Wash Law resulted in employees gaining some representation in the Los Angeles car wash market. Although employee representation expanded largely among the smallest and most economically vulnerable employers, making the foothold tenuous and improving employees’ wages and benefits through bargaining difficult, the increased representation furthered the purpose of the Car Wash Law by securing workplace-level enforcement among those employers most likely to disappear, leaving unpaid wage obligations behind.

Yet opt-out provisions remain controversial. A New York City ordinance modeled on the California Car Wash Law has been challenged on federal labor

117. *Id.* § 2055(b)(4) (2015).

118. These provisions of the car wash law can be characterized as what Professors Estlund and David Levine have labeled “conditional deregulation”—offering “firms the opportunity to opt out of certain aspects of the default regime for enforcement of labor standards and employee rights . . . if they maintain employee representation committees, chosen by employees and insulated in certain respects from managerial control, to oversee the firms’ pursuit of regulatory goals.” ESTLUND, *supra* note 22, at 23 (citing DAVID I. LEVINE, *WORKING IN THE TWENTY-FIRST CENTURY: POLICIES FOR ECONOMIC GROWTH THROUGH TRAINING, OPPORTUNITY, AND EDUCATION* 150–53 (1998)); *see also id.* at 218–19 (describing the “ideal sanctions regime” suggested by Professors Jennifer Arlen and Reinier Kraakman, involving a “composite between strict corporate liability for misconduct without regard to precautions taken and a duty-based regime that deals out sanctions based on precautions taken” under which “self-regulators would escape the higher ‘default sanction,’ which must be high enough to induce firms to undertake self-policing and to discover and disclose wrongdoing when it occurs”) (citing Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997)).

law preemption and other grounds.¹¹⁹ In addition, when news broke in the spring of 2016 that the Los Angeles City Council was considering adding an opt-out provision to a newly-enacted minimum wage law stepping the minimum up to \$15 per hour by 2020, the *Los Angeles Times* called it a “minimum wage loophole.”¹²⁰ Another headline pejoratively proclaimed: *Outrage After Big Labor Crafts Law Paying Their Members Less than Non-Union Workers*.¹²¹ The same year, the U.S. Chamber of Commerce produced a report on collectively-bargained opt-out provisions entitled, *Labor’s Minimum Wage Exemption: Unions as the ‘Low-Cost’ Option*.¹²² “This ‘escape clause,’” the Chamber suggested, “is often designed to encourage unionization by making a labor union the potential ‘low-cost’ alternative to new wage mandates, and it raises serious questions about whom these minimum wage laws are actually intended to benefit.”¹²³

But the overwhelming empirical evidence on union enforcement of minimum labor standards described above, together with the evidence of a continued union wage premium,¹²⁴ suggests that opt-out provisions will not make represented workers the “low-cost option” even if representation can provide employers greater flexibility under such provisions. Rather, so long as vigorous union representation ensures that employees’ consent is not coerced, employers and employees will agree to waive or alter statutory standards in collective bargaining only if doing so makes both better off. For example, an employer and its employees may both gain via the scheduling flexibility achieved by adopting a permitted alternative to the FLSA’s 40 hour per week overtime standard. Thus, the Chamber’s rhetoric aside, narrowly-drawn and carefully-selected opt-out provisions can advance both employers’ and workers’ interests.

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119. See Complaint, *Ass’n of Car Wash Owners, Inc. v. City of New York*, No. 15-cv-8157 (S.D.N.Y. Oct. 16, 2015).
120. Peter Jamison, *Why Union Leaders Want L.A. To Give Them a Minimum Wage Loophole*, L.A. TIMES (July 27, 2015), <http://www.latimes.com/local/cityhall/la-me-union-exemption-20150726-story.html> [<http://perma.cc/BE6F-HCA3>].
121. Peter Jamison, *Outrage After Big Labor Crafts Law Paying Their Members Less than Non-Union Workers*, L.A. TIMES (Apr. 9, 2016), <http://www.latimes.com/local/cityhall/la-me-union-minimum-wage-20160410-story.html> [<http://perma.cc/DXA2-SLRK>].
122. U.S. CHAMBER OF COMMERCE, LABOR’S MINIMUM WAGE EXEMPTION: UNIONS AS THE “LOW-COST” OPTION, 2016 UPDATE, http://www.uschamber.com/sites/default/files/documents/files/_final_report_labors_minimum_wage_exemption.pdf [<http://perma.cc/XM6Q-5U6W>].
123. *Id.* at 3.
124. See, e.g., Lawrence Mishel, *Unions, Inequality, and Faltering Middle-Class Wages*, ECON. POL’Y INST. (Aug. 29, 2010), <http://www.epi.org/publication/ib342-unions-inequality-faltering-middle-class/> [<http://perma.cc/Q2CJ-VUWQ>] (noting that the overall union wage premium is 13.6%).

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However, like bargained arbitral enforcement of employment laws, opt-out provisions cannot stand alone. Rather, they need to be combined with widespread, robust, independent, and democratic union representation—i.e., with broader labor law reform.¹²⁵ In addition, rather than loosening the prohibition on company unions, as Congress attempted to do in mid-1990s,¹²⁶ the prohibition should be maintained, if not strengthened. The NLRB's current, little-known role in certifying unions as "bona fide" under the long-standing opt-out provision in the FLSA's overtime requirement¹²⁷ could also be made more probing and expanded to apply in other contexts.

Furthermore, some minimum standards should remain just that. In some cases, we may believe that no working person should labor under less favorable conditions, no matter what the corresponding compensation. Other standards might remain universal because we do not believe they are properly subject to elimination or adjustment at the will of the majority, at least not at the level of the bargaining unit. Anti-discrimination laws likely fall in the latter category.

I am not suggesting, therefore, that at the present moment unions should universally assume responsibility for enforcing represented employees' statutory rights through collectively bargained systems of arbitration. Nor am I suggesting that legislatures should amend all minimum standards legislation to permit parties to collectively bargain to alter their terms. My suggestions are more modest and tentative. I suggest that arbitral enforcement of legislated labor standards by employees' collectively chosen representative could be both more effective and more economical than individual employees' judicial enforcement. I also suggest that permitting bargained adjustment of some minimum standards could make all parties better off. In other words, I suggest that the present legal controversies might be windows into the type of merger of labor and employment law that could benefit both employers and employees. Coupled with labor law reform leading to expanded union representation, this merger has the potential to represent both a politically possible and socially and economically rational reform.

125. In some Western European countries, the concern that weak or company-dominated unions will undermine legislated standards through bargained opt-out provisions is addressed by permitting such alteration of minimum standards only at the sectoral level. See Dimick, *supra* note 87. In the United States, however, there is little sectoral bargaining in part because the NLRA does not permit the NLRB to require multi-employer bargaining absent employers' consent. See, e.g., *Pac. Metals Co.*, 91 N.L.R.B. 696, 699 (1950).

126. See *supra* Section II.A.

127. See *supra* Part III.

CONCLUSION

In 1994, the Dunlop Commission called for “integrated employment regulation.”¹²⁸ The Commission explained, “This country needs to develop institutional arrangements that will do a better job of integrating the host of legally distinct programs all trying to influence and reshape different parts of the same employment body.”¹²⁹ In the succeeding two decades, no such integration has occurred. This Article has hardly described a fully integrated system of regulation. It has merely sought to open a discussion of what one might look like and how it might not only eliminate confusion, conflict, inconsistency, and redundancy, but also begin to address the most serious deficiencies in our current, bifurcated system of workplace regulation.

In 1985, the Supreme Court rejected the argument that federal labor law preempted state minimum standards legislation, reasoning, “[n]o incompatibility exists . . . between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements” on the employment relationship.¹³⁰ Since that time, it has become more and more evident that our labor and employment laws are not only not incompatible, but depend crucially on one another in order to make real their respective promises to working people in the United States: “to representatives of their own choosing” and to “labor conditions” conducive to “the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being.”¹³¹ Beginning to knit together the two parts of our bifurcated law of the workplace might put us on a path toward fulfilling both of those promises.

128. FACT FINDING REPORT, *supra* note 8, at 123.

129. *Id.* at 124.

130. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 754 (1985).

131. 29 U.S.C. §§ 157, 202(a) (2012).