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ALT-BARGAINING

MICHAEL M. OSWALT*

I

INTRODUCTION

Reflections on the modern labor movement tend to take a bad-news/good-news approach to the future: yes, unions are down, but a new trend suggests they are far from out.¹ The framing is optimistic, but also right. What’s “new” has often involved innovations in unionizing, and over the past three decades organized labor has gotten creative, taken risks, and every once in a while—for the first time in a while—started winning. The new wave campaigns were variously “comprehensive,” legally canny, sometimes global, and usually movement-esque in their approach to traditionally underrepresented constituencies and sectors.

Less discussed is that the trends developed counterparts: hot takes in unionization became new normals in negotiation. If exposing dirty directors weakened corporate resolve in union drives, C-suite exposés became a regular feature in contract drives. If union organizers learned that an employer’s fiercest anti-union weapons could be traded away during a campaign, contract organizers realized that a collective bargaining agreement could do the same for future campaigns. And if fighting for a union became less about money and more about morality, so did fighting for a contract.

The current trend is “alt,” short for “alternative-labor,” and invoked where unions or non-profits mobilize workers for better working conditions but not necessarily collective bargaining. As its name implies, the efforts have varied origins, tactics, and aims, making the category hard to define with specificity.² But

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1. See, e.g., Lowell Turner, et al., *Revival of the American Labor Movement*, in REKINDLING THE MOVEMENT: LABOR’S QUEST FOR RELEVANCE IN THE 21ST CENTURY 1, 5 (Lowell Turner et al., eds. 2001) (describing “the richness of innovation now under way within the American labor movement”); RICK FANTASIA & KIM VOSS, *HARD WORK: REMAKING THE AMERICAN LABOR MOVEMENT* 175 (2004) (“[H]owever weak its relational position may be, ‘labor’ has begun to conjure up an entirely different vision, as a constellation of groups, institutions, and movements [that might] overcome the formidable obstacles to achieving significant social power in American society.”); Ruth Milkman, *Toward a New Labor Movement?* in NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT 1, 22 (Ruth Milkman & Ed Ott eds., 2014) (describing recent union and non-union advocacy efforts that could “incubat[e] a generation of new labor activists and new labor movement organizational forms”).

2. For some recent attempts to classify alt-labor organizations based on legal status, size, and function, see Heather M. Whitney, *Rethinking the Ban on Employer-Labor Organization Cooperation*, 37 CARDOZO L. REV. 1455, 1480–94 (2016); Dayne Lee, *Bundling ‘Alt-Labor,’* Note, 51 HARV. C.R.-

if the alt-labor innovations of today signal how more mature entities—alt-, traditional, or otherwise—will push for workplace benefits tomorrow, clarifying what the present advance *is*, exactly, is useful foreshadowing.

That definitional project is one goal of this article. Alt-labor is incredibly diverse, but through-lines exist. Its constituent groups are repeatedly marked by three non-standard relationships to law that generate exceptional conceptions of group membership, challenge organizing’s presumptive outer-bounds, and prove how even bad organizing doctrine can be harnessed for good.

The major goal, though, is to argue that alt-labor isn’t foreshadowing anything because alt-*bargaining* is here. Over and over, the unconventional legal orientations that facilitate alt-labor’s inclusive approaches to membership, fluid conceptions of which workers or what entities are organizable, and optimistic spins on employment rights can be spotted in recent campaigns where the activists are already assembled and scrutiny instead surrounds how the group is negotiating. The innovative legal perspectives that make up alternative organizing practices, in other words, can now be found in situations where labor and management are actually passing proposals.

I make this case through a series of narratives. The Chicago Teachers Union has a storied history, but in 2012 it demanded things it had no right to demand and shattered the definition of union “membership” in the process. Teachers in West Virginia, Oklahoma, Arizona, North Carolina, and Kentucky had unions but no right to bargain and no right to strike. Last spring, they crashed those legal gaps by walking out, yelling out, and winning out anyway. Unions in Colorado and Minnesota took laws passed to limit bargaining power, embraced them, and landed more leverage than ever. Together, the stories may seem to suggest the beginnings of a new brand of bargaining. My claim is that set against alt-labor, the methods are not really new. They’re just “alternative.”

To an extent, alt-bargaining resonates with other recent advancements in benefit negotiations. Like last year’s southern-state teacher strikes, campaigns to set wages, leave, or other standards through tri-partite administrative boards also shift discussions to atypical, uniquely political—and especially public—settings.³ Attempts to use joint-employment and other theories to establish working conditions by sector⁴ showcase a sense that gloomy legal assumptions can be brightened, the same ethic that fuels the Denver and St. Paul union stories reviewed later.

The more obvious overlap is with the so-called “bargaining for the common good” (BCG) approach to negotiations, which prioritizes community-centric demands. The model is central to how the Chicago Teachers Union conceives of its membership—each and every city resident—and, accordingly, how it develops proposals to cover that membership. In fact, to varying degrees, a commitment

C.L. L. REV. 509, 516–20 (2016).

3. Kate Andrias, *The New Labor Law*, 126 YALE L. J. 2, 64–66 (2016).

4. *Id.* at 29–32.

to extend benefits beyond whatever would be considered the usual bargaining “unit” runs through every campaign detailed here.

What gives alt-bargaining promise is the insight that the sustainability of its three legal orientations rest on how members and non-members come to understand that commitment. Putting far-reaching but haphazardly developed demands on the table could be understood by the public as a cheap ploy. The proposals might get mocked and dismissed by employers, spark internal member resentments, or be easily traded off for something like vacation time, alienating or angering outside supporters. An illegal strike in support of demands that fail to energize unionists or the community could be disastrous.

The takeaway from the case studies is that none of this is happening. A contract proposal has always been a collection of interests, and alt-bargaining has revealed that when interests are viewed more as relational opportunities than coalitional glue, the interests—and the number of seats on the union side of the table—expand. With time, intention, and practice, even a multiplicity of cabined, individualistic, “self”-interested goals can become common. From there, bargaining’s nature changes along the lines suggested by a saying that’s been making the rounds in movement circles: “Community is the new density.”⁵ That is, the conventional power equation asks, “Who’s got a contract?”⁶ Alt-bargaining asks, “Who’s in your contract?”

The article proceeds as follows. Part II canvasses evolutions in organizing since the 1970s to show how innovations that start at the unionization phase don’t stay there. Corporate, comprehensive, and social movement advances all became mainstay bargaining strategies. While the present breakthrough, alt-labor, defies easy characterization, Part II tries based on its three exceptional relationships to law. Part III addresses the next question: when and how might alt-labor’s legal insights begin to reverberate in later stages of organizing. After identifying the existing echoes, I argue that time is now.

Part IV explores mechanics. Embedded in alt-bargaining’s three new legal orientations is a sophisticated understanding of interest formation that allows the campaigns to press for broad, “common good”-type community benefits with minimal outside conflict, minimal internal dissension, and—most critically—draw big crowds. In doing so, leaders use practices steeped in community-based activism that incorporate months of transformational political and relational education. As Gabe Winant has described, unions’ modern challenge is to get the

5. See, e.g., Harold Meyerson, *Labor Goes Community* AM. PROSPECT (Sept. 9, 2013) (“‘Community is the new density,’ AFL-CIO Secretary-Treasurer Elizabeth Shuler said yesterday, just moments before the labor federation’s quadrennial convention was gavelled to order in Los Angeles.”); VANESSA TAIT, *POOR WORKER’S UNIONS: REBUILDING LABOR FROM BELOW* 214 (2016) (“[T]he change in thinking was epitomized by the slogan of AFT president Randi Weingarten, ‘Community is the new density!’”).

6. Union “density” refers to the percentage of unionized workers in a geographical location. Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 N.C. L. REV. 319, 326 (2012). As “a key measure of labor union power and influence,” it has traditionally been “the main concern of the American labor movement . . . to reverse its decades-long decline.” *Id.* at 326–27.

nurse, custodian, fast-food worker—and, increasingly, Uber driver—to “understand their fates as intertwined.”⁷ The realities of “race, economic position, and social status,” can make the task feel intractable.⁸ Alt-bargaining’s approach suggests it’s not impossible.

Finally, Part V offers a vision of alt-bargaining’s ambitions, plus a slate of legal and structural reforms—especially the introduction of community “pool voting”—that might support them. Part VI briefly concludes.

II

LABOR ORGANIZING IN TWO PHASES

When workers unionize, it is frequently a headline-grabbing event. It doesn’t happen very often, and the law’s failure to check employer hostilities during the process make for a good underdog story.⁹ Less covered, and generally less studied,¹⁰ is what comes next. The infant union must campaign anew, this time for a contract.

The tactics and strategies involved in this second phase of organizing are as important as the first. The law does not require that employers agree to anything, and about 50% of the time they don’t, leaving workers more frustrated and disillusioned than before.¹¹ From there, the union frequently dissolves.¹²

Though the goals are technically different—employee acceptance of a group representative, first, then employer acceptance of the representative’s demands—from an organizing perspective the phases are intimately connected and even reflect on each other. Studies show that the best practices for union-building are the best practices for contract-building,¹³ that employee activism in the union phase correlates with employee activism in the negotiation phase,¹⁴ and that workers’ perceptions of the union’s bargaining prowess affects their willingness to fight for it in the first place.¹⁵

7. Gabriel Winant, *Who Works for the Workers*, 26 N+1 (Fall 2016), <https://nplusonemag.com/issue-26/essays/who-works-for-the-workers/> [<https://perma.cc/683L-4NDN>].

8. *Id.*

9. Paul Weiler’s seminal critique of the NLRB election process has stood the test of time. Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769, 1774–1816 (1983).

10. Kate Bronfenbrenner & Tom Juravich, *The Evolution of Strategic and Coordinated Bargaining Campaigns in the 1990s*, in REKINDLING THE MOVEMENT: LABOR’S QUEST FOR RELEVANCE IN THE 21ST CENTURY 211, 211 (Lowell Turner et al., eds. 2001); LINDA MARKOWITZ, WORKER ACTIVISM AFTER SUCCESSFUL UNION ORGANIZING 6 (2000).

11. Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and EFCA*, 70 LA. L. REV. 47, 47, 54–55 (2009).

12. *Id.*

13. Kate Bronfenbrenner, *Lasting Victories: Successful Union Strategies for Winning First Contracts*, PROCEEDINGS 48TH ANNUAL MEETING INDUS. REL. RESEARCH ASSOC. 161, 161–62, 166 (1996).

14. MARKOWITZ, *supra* note 10, at 160–62, 176.

15. Steven H. Lopez, *Overcoming Legacies of Business Unionism*, in REBUILDING LABOR: ORGANIZING AND ORGANIZERS IN THE NEW UNION MOVEMENT 114, 117, 124–25 (Ruth Milkman & Kim Voss eds., 2004).

An interplay can also be spotted in practice, over time. Labor's early history was marked by broad-based organizing for broadly-applicable goals, like the Knights of Labor's vision for a "worker's republic"¹⁶ with every race, sex, and skill subsumed in struggles for employment and community justice.¹⁷ By the late-nineteenth century, that ambition had been eclipsed by the rise of the American Federation of Labor (AFL) and a reverse commitment to craft-based, racially-exclusionary organizing and narrowly job-based, non-political demands.¹⁸

Treatments of this turn to what is often called "volunteerism" or "business unionism" could fill a small library and point to its enduring legacy.¹⁹ By the 1960s, labor was insular, out-of-step with movement politics, and content to coast on its then-historic size.²⁰ New organizing had effectively stopped and bargaining had become comparatively passive, with demands often "patterned"²¹ or granted perfunctorily.²² When the UAW's Walter Reuther, a key dissenter, pleaded with AFL president George Meany to help bring millions of marginalized workers into the union fold, Meany responded: "Well, good luck with that one."²³

Luck, though, was in short supply. In the 1970s and '80s, deindustrialization, deregulation, recessions, and filibuster-protected employer aggressions helped chop unionization rates in half.²⁴ Collective bargaining, likewise, became "concession" bargaining, with wages and benefits routinely crashing through previously agreed-to floors, sometimes with dubious financial justification.²⁵

The period was, as labor historian Nelson Lichtenstein has described it, a "disaster."²⁶ But it also sparked a basic re-appraisal of organizing's substance—the essentials of union campaigns and the fundamentals of contract fights. In retrospect, the results can be roughly arranged as trends emerging over the last few decades: from an initial change in campaign tactics; to a shift in rhetorical

16. LEON FINK, *WORKINGMEN'S DEMOCRACY: THE KNIGHTS OF LABOR AND AMERICAN POLITICS* 228 (1983).

17. ELIZABETH FAUE, *COMMUNITY OF SUFFERING AND STRUGGLE* 6–7 (1991).

18. Marion Crane, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1774–78 (2001). The AFL's orientation stands in contrast to its early competitor and later partner, the Congress of Industrial Organizations (CIO). See Cynthia Estlund, *Are Unions a Constitutional Anomaly?* 114 MICH. L. REV. 169, 180 n. 52 (2015).

19. See Catherine Fisk, *Still "Learning Something of Legislation": The Judiciary in the History of Labor Law*, 19 L. & SOC. INQUIRY 151, 159, 184 (1994) (canvassing the literature and analyzing volunteerism's persistence and modern consequences).

20. NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 185–91 (2002). See also Katherine V.W. Stone, *The Steelworkers' Trilogy: The Evolution of Labor Arbitration*, in *LABOR LAW STORIES* 149, 187 (Laura J. Cooper & Catherine L. Fisk, eds., 2005) ("By 1970, the labor movement found itself isolated from the rest of American society.").

21. LICHTENSTEIN, *supra* note 20, at 127–28.

22. JULIUS GETMAN, *THE BETRAYAL OF LOCAL 14: PAPERWORKERS, POLITICS, AND PERMANENT REPLACEMENTS* 10–11 (1999).

23. Robert Zieger, *George Meany*, in *LABOR LEADERS IN AMERICA* 324, 342 (Melvyn Dubofsky & Warren Van Tine eds., 1987).

24. JAKE ROSENFELD, *WHAT UNIONS NO LONGER DO* 1, 10–30 (2014).

25. Charles Craver, *The Impact of Financial Crises Upon Collective Bargaining Relationships*, 56 GEO. WASH. L. REV. 465, 475–78 (1988).

26. LICHTENSTEIN, *supra* note 20, at 213.

frames and legal strategies; to, most recently, a restructuring of the movement's relationship to the law.

A. Tactics: Corporate and Comprehensive Campaigns

Labor's first advance was to expand the universe of pressures brought to bear on employer intransigence. Through so-called "corporate campaigns," unions sought to transform a contained fight between an employer and a union into a messier—and personalized—affair risking executives' relationships and reputations. The strategy is commonly linked to "maverick campaigner" Ray Rogers, hired by the Amalgamated Clothing Textile Workers Union (ACTWU) in 1976 to boost a decade-long effort to unionize southern textile giant J.P. Stevens.²⁷ In an unconventional move, Rogers launched a "campaign of exposure" on Stevens' Board of Directors, using letter-writing, street protests, shareholder resolutions, and faith-based denunciations to shame directors' various corporate entanglements.²⁸ Publicizing the board's unsavory alliances with alleged anti-worker, anti-women companies like New York Life, Seamen's Bank, and Avon cosmetics led to a stunning five resignations and neutralized Stevens' presumed business allies.²⁹

With Stevens settled in 1980 (and later memorialized in the Oscar-winning film *Norma Rae*),³⁰ the approach seeped into the bargaining arena. Rogers-style reveals of incestuous business ties got tacked onto contract fights at Phelps-Dodge and Browne & Sharpe and then took centerstage during protracted strike and lockout negotiations at Hormel,³¹ International Paper,³² and Staley.³³

While most of the corporate campaign-infused fights ended unfavorably, if not terribly,³⁴ expanding the universe of pressure points showed enough promise that labor opted to build on the strategy instead of abandoning it. The new buzzwords were "coordinated" or "comprehensive," and organizing would now be multi-directional: on and off the clock, in the community, between executive suites, and, if necessary, across the globe.³⁵ The Union of Needletrades, Industrial

27. TIMOTHY MINCHIN, "DON'T SLEEP WITH STEVENS!": THE J.P. STEVENS CAMPAIGN AND THE STRUGGLE TO ORGANIZE THE SOUTH, 1963-1980, 122-23 (2005).

28. *Id.* at 123-26.

29. *Id.*

30. Megan Rosenfeld, *Through the Mill with Crystal Lee and 'Norma Rae,'* WASH. POST (Jun. 11, 1980).

31. TOM JURAVICH & KATE BRONFENBRENNER, RAVENSWOOD: THE STEELWORKERS' VICTORY AND THE REVIVAL OF AMERICAN LABOR 70 (1999).

32. Julius G. Getman & F. Ray Marshall, *Industrial Relations in Transition: The Paper Industry Example*, 102 YALE L. J. 1803, 1831-33 (1993).

33. STEVEN ASHBY & C.J. HAWKING, STALEY: THE FIGHT FOR A NEW AMERICAN LABOR MOVEMENT 37-39 (2009).

34. At International Paper and Hormel, workers lost the strike, many lost their jobs, and all lost the union. Getman & Marshall, *supra* note 32, at 1835-36; PETER RACHLEFF, *HARD-PRESSED IN THE HEARTLAND: THE HORMEL STRIKE AND THE FUTURE OF THE LABOR MOVEMENT* 3-4 (1999).

35. JURAVICH & BRONFENBRENNER, *supra* note 31, at 71-72; Rob Hickey, *Strategic Contract Campaigns at Multinational Corporations*, 27 LAB. STUDIES J. 71, 72-73 (2002).

and Textile Employees' (UNITE) 1994 plan to organize Guess—then the “colossus” of L.A.’s apparel manufacturing scene—is representative, mixing sophisticated corporate research with a “ground war” (unfair labor practice strikes and community alliances), an “air war” (a media- and celebrity-fueled boycott), and rhetoric culled from the ascendant international anti-sweatshop movement.³⁶ Contract organizing became a mirror image. Scholars identified a “true evolution” in bargaining weapons across the decade, shifting from the corporate campaign’s reputational approach to a varied arsenal of external alliances, safety and environmental charges, striker mortgage cooperatives, and overseas lobbying.³⁷

B. Frames and Legal Ingenuities: Social Movement Unionism

A second trend surfaces from some of these later-stage comprehensive campaigns, which couched union and contract struggles not in terms of money or power but “as a moral issue demanding a response.”³⁸ Such values-based framing sought to stretch the circle of solidarity and reanimate the “movement” side of labor’s historic arc.³⁹ Through marches and street theatrics, with clergy and politicians ratifying the message, union campaigns like the Service Employees International Union’s (SEIU) “Justice for Janitors,” and contract campaigns like the Hotel Employees and Restaurant Employees Union’s (HERE) “Hotel Workers Rising,” emphasized “the community’s stake in [their] organizing success.”⁴⁰

That these and similar efforts also unionized and won gains for thousands is a testament to a simultaneous commitment to legal innovation. Where the National Labor Relations Act (NLRA or Act) “certifies” unions only through secret-ballot elections,⁴¹ “social movement unionism” relied on voluntary recognition and a petition system the Supreme Court blessed as an alternative in the 1960s.⁴² Where the NLRA bans “coercive” pressure on parties peripherally involved in union fights, Justice for Janitors thrived on *creative* pressure courts usually deemed within the law’s theoretical limits.⁴³ And where the law

36. RUTH MILKMAN, *L.A. STORY: IMMIGRANT WORKERS AND THE FUTURE OF U.S. LABOR* 162–69 (2006).

37. BRONFENBRENNER & JURAVICH, *supra* note 10, at 234, 220–22, 228–29.

38. STEVEN HENRY LOPEZ, *REORGANIZING THE RUST BELT: AN INSIDE STUDY OF THE AMERICAN LABOR MOVEMENT* 114, 153 (2004).

39. RICK FANTASIA & KIM VOSS, *HARD WORK: REMAKING THE AMERICAN LABOR MOVEMENT* 130–31 (2004).

40. *Id.* at 142–43; JULIUS GETMAN, *RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT* 132–33 (2010) [hereinafter *RESTORING THE POWER*].

41. 29 U.S.C. § 159(c)(1)(B) (empowering the National Labor Relations Board to “direct an election by secret ballot and . . . certify the results thereof”).

42. FANTASIA & VOSS, *supra* note 39, at 129. *See also* *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 575–76 (1969).

43. Catherine L. Fisk, et al., *Union Representation of Immigrant Janitors in Southern California, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA* 199, 214–24 (Ruth Milkman ed., 2000).

greenlights anti-union speech, unions negotiated private employer agreements that limited its substance and intensity.⁴⁴

Bargaining, too, remodeled analogously. HERE and SEIU shrewdly reduced or escalated tensions by strategically “triggering” bargaining obligations (and the associated risk of cost spikes or strikes) at times convenient—or extremely inconvenient—for employers.⁴⁵ Many unions began “bargaining to organize,” using contract negotiations to facilitate unionization at different or future employer locations.⁴⁶ Others used politics to conjure bargaining partners for publicly-funded childcare and homecare workers out of state law.⁴⁷

These and other advances were real, important, and captivated legal commentators.⁴⁸ But density still dropped.⁴⁹ With statutory reform off the table, many advocates came to believe that legal resourcefulness was not enough and that labor needed to revolutionize its relationship with the law entirely.⁵⁰ That surrogate vision became known as “alt-labor,” and it marks organizing’s current era.

C. Law: Alt-Labor

The term alt-labor tends to refer to organizing efforts aimed at improving working conditions primarily through avenues other than collective bargaining.⁵¹ Because unions support and even fund many alt-groups and alt-campaigns, marking where “traditional” labor ends and alt-labor begins can be debatable. But in terms of organizing, definitions are less important than the descriptive fact that the very rise of “alternative” campaigns signals a shift in labor’s orientation with the law. The change reverberates in the movement’s current approach to membership, jurisdiction, and legal doctrine itself.

1. Law and Membership

Running parallel to social movement unionism’s heyday was a near-obsessive internal focus on reversing the ever-dwindling number of U.S. union members. In 1995, the concern prompted what was viewed as a radical shake-up at the top of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).⁵² A decade later it led six unions to split-off and form a new

44. Benjamin Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1169–72 (2011).

45. RESTORING THE POWER, *supra* note 40, at 131–32; Benjamin Sachs, *Labor Law Renewal*, 1 HARV. L. & POL’Y REV. 375, 379 (2007).

46. Dorothee Benz, *Organizing to Survive, Bargaining to Organize*, 6 WORKINGUSA 95, 95 (2002).

47. Peggy Smith, *The Publicization of Home-Based Care in State Law*, 92 MINN. L. REV. 1390, 1403–05 (2008).

48. Sachs, *supra* note 44, at 394 (predicting potentially “enormous returns”).

49. Rosenfeld, *supra* note 30, at 2–3.

50. See, e.g., David Rolf, *Alternative Futures for Labor*, AM. PROSPECT (Dec. 12, 2012) ([W]e’ll be remembered—or won’t be—for whether we had the vision to reallocate our resources and our talent on a massive scale to create a new model for worker advocacy.”).

51. Josh Eidelson, *Alt-Labor*, AM. PROSPECT (Jan. 29, 2013).

52. Peter Kilborn, *Militant Elected Head of A.F.L.-C.I.O.*, N.Y. TIMES (Oct. 26, 1995).

federation.⁵³ When it came to “how-tos,” theoretical camps arose and internecine feuds proceeded.⁵⁴

“Membership” in this context meant workers paying dues to unions certified or recognized under the NLRA, holding democratic rights under the Labor-Management Reporting and Disclosure Act, and reported to the Department of Labor.⁵⁵ That has changed. Alt-labor membership is affective, not bureaucratic. Law remains a key feature, but as a tool that sows solidarity, not an encumbrance that triggers procedures. So, when in early 2013 the AFL-CIO’s President implored leaders to “stop letting the law define who our members should be,”⁵⁶ he likely had things like the Organization United for Respect (OUR) Walmart, a United Food and Commercial Workers (UFCW)-funded project, in mind. Sharing only the same massive anti-union employer and the courage to invoke NLRA Section 7, which protects most workplace protests,⁵⁷ OUR Walmart backers were “members” in activism only.⁵⁸ Collective rights assertion, like demonstrations over pregnancy accommodations, doubled as membership orientation.⁵⁹

SEIU’s still-active Fight for \$15 (FF15) is even more ambitious. Like OUR Walmart, FF15 membership is a function of action, usually short strikes that would be classic insubordination but for basic labor law.⁶⁰ But unlike OUR Walmart, FF15’s first target was an industry (fast food), and it has since expanded its sights to any job paying less than \$15 an hour.⁶¹ The universe of potential members is therefore massive, but it’s based on a theory that has paid dividends:

53. Rachel Aleks, *Estimating the Effect of “Change-To-Win” on Organizing*, 68 *INDUST. & LAB. RELATIONS REV.* 584, 585 (2015).

54. See, e.g., Max Fraser, *Labor’s Conundrum: Growth vs. Standards*, 18 *NEW LAB. FORUM* 48 (2009).

55. See Thomas Edsall, *Two Top Unions Split From AFL-CIO*, *WASH. POST* (Jul 26, 2005) (citing “distress over . . . the AFL-CIO’s ineffectiveness in stopping the long-term decline in union membership and . . . density.”). See also *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963) (interpreting union “membership” in the National Labor Relations Act); U.S. Dept. of Labor, Office of Labor-Management Standards, 73 Stat. 519-546 (1959) (describing the Labor-Management Reporting and Disclosure Act of 1959, which “grants certain rights to union members and protects their interests by promoting democratic procedures”); UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, *ECONOMIC NEWS RELEASE, UNION MEMBERS SUMMARY* (Jan. 18, 2019) (reporting the “union membership rate”).

56. Michael Bologna, *Trumka Calls on Labor To Adapt New Models of Representation*, *DAILY LAB. REP.* (Mar. 7, 2013).

57. *NLRB v. Washington Alum.*, 370 U.S. 9, 14-17 (1962).

58. Josh Eidelson, *Walmart Workers Plan Widespread, Massive Strikes*, *NATION* (Sep. 6, 2013).

59. Amien Essif, *Walmart’s Inhumane Policies for Pregnant Workers*, *WORKING IN THESE TIMES* (Nov. 6, 2014) (describing the origins of the UFCW-funded, OUR Walmart-organized, “Respect the Bump” campaign, which “established a list of demands to present to Walmart, including to comply immediately with the 1978 Pregnancy Discrimination Act and to craft a store policy in line with the Pregnant Workers Fairness Act, a more progressive bill pending in Congress”).

60. See, e.g., Paul Davidson, *Fast-food workers strike, seeking \$15 wage, political muscle*, *USA TODAY* (Nov. 10, 2015), <https://www.usatoday.com/story/money/2015/11/10/fast-food-strikes-begin/75482782/> [<https://perma.cc/3DBT-PQX6>].

61. Steven Greenhouse & Jana Kasperkevic, *Fight for \$15 Swells into Largest Protest by Low-Wage Workers in US History*, *GUARDIAN* (Apr. 15, 2015).

workers strike because they see others strike and return to work tell about it.⁶² The law's protective cloak is, in practice, also the recruitment program.

Other recent union-backed efforts are not even linked to employers, like UnitedNY's 330,000 door-to-door canvass in low-income neighborhoods. Leadership defines the group's membership simply as "folks that are willing to take action,"⁶³ a box that gets checked the first time someone shows up to any of the many rallies UnitedNY organizes in support of progressive law reforms, like more millionaire taxes or less train troubles.⁶⁴ That UnitedNY ultimately fused its work with Occupy Wall Street's 2011 come-one-come-all park insurgency highlights this capacious conception of membership. It also points to the second common element of alt-efforts: organizing beyond borders.⁶⁵

2. Law and Jurisdiction

Of labor law's many organizing restrictions, its coverage exclusions may have done the most to stunt the movement's long-term character.⁶⁶ The NLRA has always limited unions' geographic, demographic, and equitable reach by disqualifying agricultural and in-home workers.⁶⁷ Later revisions walling off "supervisors" diced the organizing universe considerably while redefining the very nature of the "working class" and labor's relationship to it.⁶⁸ Today, as the gig economy expands in numbers and consciousness,⁶⁹ the law's potential neglect of the developments through the independent contractor exception⁷⁰ reads like a bad sociological joke.

But alt-labor thrives in breaches, and now questions of jurisdiction—which workers are organizable—feel much less constrained by law. In Florida's tomato fields, stark statutory voids have been filled by the unincorporated, effectively leaderless Coalition of Immokalee Workers' campaign of shame and boycotts to pressure 90% of the industry to adhere voluntarily to a wide-ranging Code of Conduct and complaint, audit, and sanction system.⁷¹ In New York, the fledgling Domestic Workers United convened a "Having Your Say" assembly of nannies,

62. *Id.* at 644.

63. Lynne Turner, *United New York*, in *NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT* 88, 96-97 (Ruth Milkman ed., 2014).

64. *Id.* at 98, 100.

65. *Id.* at 104-05.

66. See LICHTENSTEIN, *supra* note 20, at 118.

67. Juan Perea, *Echos of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion in the National Labor Relations Act*, 72 OHIO ST. L. J. 95 (2011).

68. LICHTENSTEIN, *supra* note 20, at 119.

69. A recent government study concluded that the percentage of "alternative-work-arrangements" has remained steady, surprising many and focusing new attention on a broader survey from 2015 that found a significant rise. Ben Casselman, *Maybe the Gig Economy Isn't Reshaping Work After All*, N.Y. TIMES (Jun. 7, 2018).

70. 29 U.S.C. § 152(3). Whether gig workers are, in fact, "independent contractors" is of course hotly contested. See Noam Scheiber, *Uber Drivers Are Contractors, Not Employees, Labor Board Says*, N.Y. TIMES (May 14, 2019) (citing critics of the Board's conception of independent contractor status).

71. Manoj Dias-Abey, *Justice in Our Fields: Can 'Alt-Labor' Organizations Improve Migrant Farm Workers' Conditions?*, 53 HARV. C.R.-C.L. REV. 167, 197-205 (2018).

cleaners, and personal assistants to document the financial and family havoc caused by the legal vacuum at the heart of the homecare industry.⁷² Seven years of stories, advocacy, and lobbying later, a domestic worker “Bill of Rights” statute filled it with state wage, rest, and harassment protections.⁷³ Today organizers target independent contractors whether their status is largely accepted (cab drivers)⁷⁴ or hotly contested (Uber drivers).⁷⁵ Both even strike.⁷⁶

Perhaps the most telling exemplars of alt-labor’s willingness to organize in the absence of clear—or any—law come from worker centers, clinic-like organizations that use direct action and legal and policy advocacy to enforce and enhance workplace rights.⁷⁷ All of it rests on a foundational interest in organizing workers outside of labor law.⁷⁸ The law’s picketing, servicing, and administrative strictures generally apply where entities repeatedly push for “bilateral” talks, and worker centers, reliant on creative protests, fluid pressure points, and shoestring budgets, know to make demands discrete and discussion one-sided.⁷⁹ Here—and only here—expanding the Act’s coverage is a recurrent corporate priority.⁸⁰

Yet, like the rest of alt-labor, in many other instances worker centers see law as a potent organizing—and dignifying—resource. This quality is the third and final signifier of alt-labor’s reorienting influence.

3. Law and Legal Empowerment

Behind much of the legal innovation associated with the social movement unionism period was a sense that labor law, as traditionally conceived, had failed. The statute’s remedial scheme made even adjudicated illegalities a cost of doing business, and the Board’s representation procedures created substantial gaps between employee preferences and bureaucratic outcomes.⁸¹ Expressed sentiments swung between cynicism and despair.⁸²

72. Harmony Goldberg, “Prepare to Win,” in Milkman & Ott, *supra* note 1, at 274.

73. *Id.* at 274–79.

74. Lizzie Widdicombe, *Thin Yellow Line*, NEW YORKER (Apr. 18, 2011).

75. Alan Feuer, *Uber Drivers Against the App*, N.Y. TIMES (Feb. 19, 2016).

76. Widdicombe, *supra* note 74; Janet Burns, *Uber and Lyft Drivers Strike in LA After Yet Another Uber Pay Cut*, FORBES (Mar. 25, 2019), <https://www.forbes.com/sites/janetwburns/2019/03/25/uber-and-lyft-drivers-strike-in-la-after-yet-another-pay-cut/#76eb04326e41> [<https://perma.cc/AK8D-L8FS>].

77. Eli Naduris-Weissman, *The Worker Center Movement and Labor Law*, 30 BERKELEY J. EMP. & LAB. L. 232, 241–42 (2009).

78. Alan Hyde, *What Is Labour Law*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW 37, 44–45 (Guy Davidov, ed. 2006). *See also* Sameer Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879, 1893 (2007) (“Worker centers have been innovative at the margins of the field, outside of the bureaucratic strictures and biases of unions and the regulatory regime established by business and government to contain labor organizing.”).

79. NLRB ADVICE MEMORANDUM, ROC-NY, 2-CP-1067 ET AL., 1–9, Nov. 30, 2006.

80. Ben Penn & Jacquie Lee, *‘Worker Center or Union’ Probe Sign of Things to Come*, BLOOMBERG B.N.A. (Mar. 15, 2018).

81. *See, e.g.*, PAUL WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 44 (1990) (describing a “yawning representation gap”).

82. *See, e.g.*, James Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N. C. L. REV. 939, 942 (1996) (noting commentators deeming the Act “largely irrelevant to the contemporary workforce”); Michael Gottesman, *In Despair, Starting Over: Imagining a*

By nature, alt-labor seeks non-standard forms of empowerment, and with that has come a more auspicious take on the law. While a vast socio-legal literature has developed around questions of how legal consciousness affects activism,⁸³ worker centers have taken a position: the correlation is positive, and in most situations law—limits, flaws, and all—is couched as a dignifying force.⁸⁴

In Chicago, worker centers pushed for a panoply of domestic worker rights—like minimum bedroom sizes and dedicated refrigerator space—that state officials warned would be practically unenforceable.⁸⁵ Leaders and activists forged ahead with a sense that much of law’s value is existential.⁸⁶ Even paper rights devolve workplace control.⁸⁷ Even weak rights “acknowledge[] the claimant’s membership in the larger group.”⁸⁸ And even rights-talk “encourages a group to understand its vision of justice in a particular way.”⁸⁹ For worker centers, law’s elixir of agency, inclusion, and righteousness make it a leveraging, motivating force.⁹⁰

Beyond worker centers, FF15 would not exist without a baseline faith in Section 7’s integrity that can be conveyed to vulnerable employees. Organizers push its protection of “concerted activities” to workers in strike kits and to employers in strike notices.⁹¹ “We know striking works,” the campaign’s website reads, before pulling inspiration straight from the Act: “[W]e don’t win because politicians or companies decide out of the goodness of their hearts to give us raises. We win because workers stand together to make them give us what we deserve.”⁹²

FF15 takes this position fully cognizant of the law’s remedial holes. No striker returns to work absent a scrum of local leaders reminding employers that the community is watching.⁹³ Likewise, rampant, unchecked wage theft⁹⁴ does not diminish the campaign’s faith in wage and hour laws. For Fight for \$15, the eponymous benchmark is ennobling as much for its impact on rent as for its

Labor Law for Unorganized Workers, 69 CHI-KENT L. REV. 59 (1993).

83. Dias-Abey, *supra* note 71, at 176.

84. JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 150, 179–80 (2005). César Rosado Marzán’s field research emphasizes this point. César F. Rosado Marzán, *Dignity Takings and Wage Theft*, 92 CHI-KENT L. REV. 1203, 1218–19 (2017).

85. Michael M. Oswald & César Rosado Marzán, *Organizing the State: The ‘New Labor Law’ Seen from the Bottom-Up*, 39 BERKELEY J. EMP. & LAB. L. 415, 454–55 (2018); Interview with ARISE Chi. Staffer, in Chi., Ill (March 3, 2017).

86. Oswald & Rosado Marzán, *supra* note 85, at 455.

87. *Id.*

88. Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L. J. 1860, 1874 (1987).

89. GORDON, *supra* note 84, at 179.

90. Oswald & Rosado Marzán, *supra* note 85, at 455.

91. 29 U.S.C. § 157; Fight For \$15, *For Workers, How to go on strike*, <https://fightfor15.org/for-workers/> [<https://perma.cc/8ANE-DW2M>].

92. Fightfor\$15, *Why We Strike*, <https://fightfor15.org/why-we-strike/> [<https://perma.cc/Y6GK-4CQT>].

93. FightFor\$15, *For Workers, Walkbacks*, <https://fightfor15.org/for-workers/> (“When workers in the FF15 strike, we always make sure we don’t return to work alone.”).

94. Marianne Levine, *Behind the minimum wage fight, failure to enforce*, POLITICO (Feb. 18, 2018).

shared, righteous vision for marginalized people.⁹⁵ The definitive long-form account of the campaign is simply titled, “Dignity.”⁹⁶

III

ALT-BARGAINING

Alt-labor groups, campaigns, and strategies are likely to proliferate and comprise the bulk of labor movement commentary and scholarly analysis for the foreseeable future.⁹⁷ Unexplored, however, is how the current evolution may reverberate in other, later stages of the organizing timeline. The course of U.S. labor relations suggests that fashionable styles of organizing collectives become fashionable styles of organizing to extract benefits for those collectives. Unless alt-labor is a historical aberration, the other shoe, it would seem, is likely to drop.

Or perhaps it has already hit the floor. In just the past few years, alt-labor’s core characteristics have seeped into settings where the workers are largely assembled and the real suspense surrounds the demand. Some of the innovations arising at this stage have started to receive attention under the heading “bargaining for the common good,” a reference to unions that coordinate “demands with those of their community allies.”⁹⁸ It is an apt term. But from a broader vantage, these and other recent campaigns reveal more than a uniquely intimate labor-community alliance. They outline a new alignment with existing law, one that touches on the familiar categories of membership, jurisdiction, and doctrine. The era of “alt-bargaining,” it seems, has begun.

Before surveying some key exemplars, it should be noted that to this point alt-bargaining appears largely confined to the public sector. This might be expected. As private sector unions scrambled to reverse declines throughout the 1990s and 2000s, government unions, numerically stable and seemingly protected by state law, “made no substantive strategic adjustments” on the membership front.⁹⁹ By 2010, shocking ruptures in state political economies put an unprecedented bulls-eye on public sector benefits, forcing unions to reassess bargaining as profoundly as private sector unions had long reassessed

95. See *Why We Strike*, *supra* note 92 (“It’s time to pay people enough to survive. It’s time to pay people what they deserve. It’s time for \$15/hr and union rights.”); see also GORDON, *supra* note 84, at 165 (describing how rights-talk provided “a new sense of standing to challenge the suffering [workers] had previously felt intensely as individuals”).

96. William Finnegan, *Dignity*, NEW YORKER (Sep. 15, 2014).

97. Recent takes on the state-of-play include that “the twentieth century model of American labor relations is gone,” DAVID ROLF, *THE FIGHT FOR FIFTEEN: THE RIGHT WAGE FOR A WORKING AMERICA* 21 (2016), and that traditional labor “is grounded and will not fly again.” JONATHAN ROSENBLUM, *BEYOND FIFTEEN: IMMIGRANT WORKERS, FAITH ACTIVISTS, AND THE REVIVAL OF THE LABOR MOVEMENT* 176 (2017).

98. Joseph McCartin, *Bargaining for the Common Good*, DISSENT (Spring 2016); see also *Bargaining for the Common Good*, <http://www.bargainingforthecommongood.org> [https://perma.cc/FBE7-CQ69].

99. Richard Hurd & Tamara Lee, *Public Sector Unions Under Siege*, 39 LAB. STUDIES. J. 9, 12 (2014).

unionization as their own first priority.¹⁰⁰ Yet, as discussed later, in this context the line between “public” and “private” is somewhat illusory, and bargaining for non-state benefits will almost assuredly take on “alt”-characteristics.

Below, the case for alt-bargaining is depicted in three stylized accounts of recent bargaining campaigns that seem to draw on legal orientations now coursing through alt-labor. In Chicago, unionized teachers have revolutionized notions of membership by refusing to allow strict limits on the propriety of demands define the negotiating team. In five southern states, unionized educators have scattered into ad hoc offshoots, blown past bargaining bans, and won unprecedented benefits. And in Colorado and Minnesota, anti-union forces that pressed to pass laws meant to weaken workers’ hands learned that “be careful what you wish for” isn’t just an adage.

A. Law and Membership: The Chicago Teachers Union

Like union organizing, contract organizing is shaped by law. Under NLRA Sections 8(a)(5) and 8(b)(3), employers and employee representatives must bargain, and under Section 8(d) they must do so “in good faith,”¹⁰¹ but only, as the Supreme Court has said, over the “mandatory” topics of “wages, hours, and other terms and conditions of employment.”¹⁰² Other, “nonmandatory” subjects can be considered voluntarily, but neither party can “insist” on discussion as a precondition to agreement or to the point of a strike, lockout, or legal charge.¹⁰³ These so-called “permissive” topics expand over time through decisional law, but the biggest categories encompass product, sales, and financing decisions on one hand, and “core” operational or “entrepreneurial” choices on the other.¹⁰⁴

Criticisms of this regime are legion and pop-up when a surprised public learns that the permissive category includes the choice to kill the company—or a conspicuous part of it—as soon as a union shows up.¹⁰⁵ The earliest critiques, though, warned that walling issues off from workers’ input promoted industrial insularity, endangering collective bargaining’s historic role in the joint tailoring of standards, norms, and practices to the needs of particular communities.¹⁰⁶ By

100. Joseph E. Slater, *Public-Sector Labor in the Age of Obama*, 87 IND. L. J. 189, 192–93 (2012).

101. 29 U.S.C. §§ 158(a)(5), (b)(3), (8)(d).

102. NLRB v. Borg-Warner Corp., 356 U.S. 342, 349 (1958).

103. *Id.*; Michael Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447, 1447–1449 (1982).

104. Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 220, 223 (1964).

105. Billionaire Joe Ricketts’ decision to shutter news-sites DNAinfo and Gothamist days after unionizing was publicly condemned but legal under Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 269–72 (1965). Andy Newman, *DNAinfo and Gothamist are Shut Down After Vote to Unionize*, N.Y. TIMES (Nov. 2, 2017). So, too, Walmart’s near-instantaneous shift to pre-packaged meats once butchers voted for representation in 2000. Ann Zimmerman, *Pro-Union Butchers at Walmart Win a Battle—but Lose the War*, WALL ST. J. (Apr. 11, 2000). See also United Food & Commercial Workers, Local 540 v. NLRB, 519 F.3d 490, 495–96 (D.C. Cir. 2008) (requiring Walmart to bargain only over the “effects” of the shut-down, citing First Nat’l Maintenance Corp. v. NLRB, 452 U.S. at 681–82).

106. Archibald Cox & John Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 405–06 (1950); Archibald Cox, *1957 Supreme Court Labor*

the 1980s the prediction proved prophetic, as executives shuttered factory after factory, reducing neighborhoods to shells and neighbors to legal bystanders.¹⁰⁷

Alt-bargaining is ending the insularity. By vastly expanding the universe of parties with concrete interests at the negotiating table, the campaigns force employers to take community into account. While doing so has required a legal deftness well known to veteran negotiators, here the maneuvers are in service to a truly alternative conception of participation in contract bargaining. The Chicago Teachers Union's (CTU) 2012 negotiation with the Chicago Public Schools (CPS) tells this story well.

1. CORE

The CTU represents around 25,000 teachers¹⁰⁸ in the nation's third-largest school district.¹⁰⁹ Much of its history is activist, first with anti-Communist union purges in the 1940s and 1950s and then through strikes for African-American inclusion in full-time teaching during the 1960s.¹¹⁰

The union's most recent narrative, however, arises from complacency in the face of a school revitalization plan announced to great fanfare in the mid-2000s, "Renaissance 2010."¹¹¹ The name was ironic. To the extent Renaissance 2010 "revived" anything in Chicago, it was the non-union sector by shutting down 100 public schools and reopening them as private charters.¹¹² But years of acquiescence to creeping mayoral control and rights restrictions in exchange for steady, and relatively hefty, raises¹¹³ had seemingly left the union flat-footed. Though an existential threat to a third of the membership, leadership's response to the proposal was, as the Chicago Tribune described, a "curiously muted" no comment.¹¹⁴ Following the first 36 shutdowns and amid a base frustrated by stuffed classrooms, increasingly testing-centric curriculums, and perceived scapegoating,¹¹⁵ CTU actually dissolved its school closing committee in 2007.¹¹⁶

Decisions, 44 VA. L. REV. 1057, 1083 (1958). See also P.R. Louiseaux & Arthur S. Miller, *Collective Bargaining: Some Fundamental Assumptions in Law and Practice*, 35 TEX. L. REV. 188, 188–89 (1956) (likening collective bargaining agreements to private governments that "legislate for the network of factory communities and the millions of members of those communities").

107. See, e.g., *Local 1330 v. U.S. Steel*, 631 F.2d 1264, 1279–82 (6th Cir. 1980) (describing, "with great sympathy," corporations' only theoretical relationship to the "public interest" absent profitability).

108. Chicago Teachers Union, *About Us*, <https://www.ctunet.com/about> [<https://perma.cc/8DLP-83SH>] (2019).

109. Matt Masterson, *CPS Enrollment Drops to 360,000 Students*, WTTW News (Oct. 26, 2018).

110. JANE MCALEVEY, *NO SHORTCUTS: ORGANIZING FOR POWER IN THE NEW GILDED AGE* 103 (2016).

111. Tom Alter, *"It Felt Like Community": Social Movement Unionism and the Chicago Teachers Union Strike of 2012*, 10 LABOR 11, 14–15 (2013).

112. *Id.*

113. STEVEN ASHBY & ROBERT BRUNO, *A FIGHT FOR THE SOUL OF PUBLIC EDUCATION: THE STORY OF THE CHICAGO TEACHERS STRIKE* 31 (2016).

114. Tracy Dell'Angela, *Daley set to remake troubled schools*, CHI. TRIB. (June 25, 2004).

115. ASHBY & BRUNO, *supra* note 113, at 46–47.

116. MCALEVEY, *supra* note 110, at 110, 112.

Internal resistance grew subtly and slowly. The committee gone, a handful of teachers spent the year recording colleagues, parents, and students talking about the impact of school closings and meeting as a reading circle.¹¹⁷ Naomi Klein's *Shock Doctrine* had a powerful impact, convincing the group that the closures had little to do about the exigencies of austerity or test scores and much to do with the corporate exigency to do away with public goods under the guise of crisis-management.¹¹⁸

Next came a bit of growth, a name—the Caucus of Rank-and-File Educators (CORE)—and a coming-out in the form of questions at school board hearings, social events, and meetings with pre-existing groups with names to match their neighborhoods.¹¹⁹ Throughout, the headline was school closings, but the lede was member and public education. The study groups multiplied and were joined at a two-day retreat in mid-2008.¹²⁰ “I was fascinated by the idea that I needed to study this, [that] I needed to understand . . . why is it that we’re doing this,” said an early supporter.¹²¹ When 500 teachers, parents, and local activists packed a college auditorium for a teach-in during a January 2009 blizzard,¹²² CORE had the city’s attention. The closure list shrank the following month.¹²³

The caucus also had CTU’s attention. That October, CORE ran test candidates for two seats on the union’s pension board and won both.¹²⁴ In January 2011, CORE nominated Karen Lewis, a 23-year veteran chemistry teacher and only African-American woman in her Dartmouth graduating class, for CTU’s presidency.¹²⁵ Though by May’s election day the caucus had only 400 official members, many more informal supporters fanned-out across 600 schools to secure enough votes to force a run-off with the incumbents.¹²⁶ CORE’s true reach was revealed in a “Save Our Schools” rally in downtown Chicago that featured the biggest teacher turnout in over twenty years.¹²⁷ Easily consolidating votes from the departed candidates, Lewis won the presidency in a walk.¹²⁸ Her victory speech read like the last class in the CORE curriculum: “Corporate America sees K-12 public education as 380 billion dollars that, up until the last ten or fifteen years, they didn’t have a sizable piece of. This so-called school reform is not an

117. *Id.* at 110–11.

118. ASHBY & BRUNO, *supra* note 113, at 62.

119. *Id.* at 62–65.

120. *Id.* at 64.

121. *Id.* at 65.

122. *Id.* at 66.

123. MCALEVEY, *supra* note 110, at 113.

124. *Id.* at 114.

125. Ben Goldberger, *Karen Lewis, Street Fighter*, CHICAGO MAG (Oct. 2, 2012).

126. ASHBY & BRUNO, *supra* note 113, at 68.

127. *Id.*

128. *Id.*

education plan. It's a business plan."¹²⁹ If so, the final exam was clear but amazingly ambitious: Getting "business . . . out of our schools."¹³⁰

2. Rules, Interests, and Seats

Unlike many reform caucuses, CORE's rise had been premised not on wages, give-backs, or corruption but a challenge to an emerging national consensus that public learning needed private investment and expertise to succeed.¹³¹ The vision flourished in Chicago, where Renaissance 2010's mass privatization plans seamlessly transitioned to Mayor Rahm Emanuel in 2011, who appointed a charter booster as CPS CEO and stacked the school board with finance stars, including the director of Bank One as president.¹³²

With contract negotiations just months away,¹³³ the central question was whether CORE's long-term, even aspirational, organizing principle could translate into a credible negotiating posture for the refurbished union.¹³⁴ That Emanuel had staked much of his campaign on openly anti-CTU sentiment¹³⁵—instantly instantiated by the new school board's inaugural vote rescinding a previously agreed-to raise¹³⁶—made the issue acute. That it had been decades since teachers had seriously battled for a contract made it urgent.¹³⁷

The legal answer was "no." The state's Chicago-specific teacher bargaining statute made permissive subjects explicit, and layoffs, force reductions, places of instruction were on the list.¹³⁸ If the city was willing to discuss one of these so-called "Section 4.5 subjects," it was free to start implementing its position in the interim.¹³⁹ If negotiations got stuck, the sole recourse was toothless mediation "in lieu of a strike."¹⁴⁰ The regime did not take walkouts completely off the table, but the rallying cry would have to be wages, healthcare, or some other "direct[]" teacher benefit, not banks.¹⁴¹

129. MCALEVEY, *supra* note 110, at 119.

130. MICAH UETRICH, *STRIKE FOR AMERICA: CHICAGO TEACHERS AGAINST AUSTERITY* 37 (2014).

131. Stephanie Simon, *Privatizing Public Schools: Big Firms Eyeing Profits From K-12 Market*, REUTERS (Aug. 1, 2012) (describing a "golden moment" for private equity and special education as a "growth market").

132. ASHBY & BRUNO, *supra* note 113, at 71.

133. *Id.* at 151.

134. See Amisha Patel, *The Long Road to Victory*, JACOBIN (Oct. 13, 2016) (calling this the "key question" of the CTU negotiations).

135. MCALEVEY, *supra* note 110, at 126.

136. Noreen Ahmed-Ullah, *Chicago Public Schools board rescinds teacher raises*, CHI. TRIB. (Jun. 15, 2011).

137. MCALEVEY, *supra* note 110, at 129.

138. 115 ILCS 5/4.5(a). The city also had unilateral power "over matters of inherent managerial policy," including the "overall budget." 115 ILCS 5/4.

139. *Id.* at 5/4.5(b).

140. *Id.*; Bd. of Educ. v. IELRB, 2011 WL 10088350, 2011 IL App. (1st) 111696, para. 8 (IL.App. 2011) (providing for "mediation of [Section 4.5] disputes by a rotating mediation panel" that "may include the issuance of . . . recommendations").

141. 115 ILCS 5/4. See also 115 ILCS 13 (permitting strikes after a series of procedural prerequisites).

Yet the statute also assumed bilateral talks and, from CORE's perspective, privatization was not a bilateral issue. Closings were a kids' issue. A University of Chicago analysis found that they provoked deep student grief akin to "a period of mourning."¹⁴² Social marginalization at the new school followed, as did "a long-term negative impact on" math skills and shorter-term declines in reading.¹⁴³ Students with disabilities were especially worse off.¹⁴⁴ Closings also affected parents, who knew that jumbling students also meant jumbling gangs, which meant fresh tensions and violence.¹⁴⁵ The city hired monitors to keep watch as students navigated new routes through new neighborhoods to new schools.¹⁴⁶ There was an undeniable racial component to the city's plans as well, with ninety percent of the slated closings impacting majority black student populations.¹⁴⁷ Finally, taxpayers had an interest, since all the promised cost-savings never seemed to pan out.¹⁴⁸

The new leadership's insight was that acceding to the statute meant ceding all of these interests, reserving, in effect, a single seat on the union side of the table. So they didn't accede and secured a bigger reservation—and a different menu—in the process.

3. City Checkers, Union Chess

As the contract campaign began, it did not take long to see that CPS and CTU had different conceptions of the ground rules. As city leaders pushed narratives of children on the hook for union raises, Lewis spoke of a "fight for the soul of public education."¹⁴⁹ Calls for "reform" were met by cartoon "fat cats" stripping classrooms bare.¹⁵⁰

It wasn't rhetoric or a play for viral videos. The union made steep salary cuts to hire six organizers to oversee a new school-based delegate program to internally push the theme: the next contract was about "billionaires, banks, and racism," not paychecks.¹⁵¹ The outward-facing side of the campaign was led by

The "effects" of Section 4.5 subjects are hybrid matters: mandatory bargaining topics but not subject to strikes. 115 ILCS 5/4.5(a).

142. Molly F. Gordon et. al., *School Closings in Chicago*, UCHICAGO CONSORTIUM ON SCHOOL RESEARCH 4 (May 2018).

143. *Id.* at 5.

144. Adeshina Emmanuel, *What happened to Sylvia Galvines?* CHALKBEAT (Jun. 11, 2018), <https://chalkbeat.org/posts/chicago/2018/06/11/school-closings-special-education/> [<https://perma.cc/4Q3Z-7CT2>].

145. SARAH JAFFE, NECESSARY TROUBLE: AMERICANS IN REVOLT 119 (2016).

146. Gordon, *supra* note 142, at 4.

147. Carol Caref et al., *Twelve Months Later*, CTU RESEARCH DEPT. 3 (2013), <https://www.ctunet.com/quest-center/TwelveMonthsLaterReport.pdf> [<https://perma.cc/VR3D-ST7W>].

148. Stephanie Famer, et al., *Research Brief on School Closures*, CReATE 2 (March 2013).

149. ASHBY & BRUNO, *supra* note 113, at 125, 234.

150. UETRICH, *supra* note 130, at 98–99.

151. ASHBY & BRUNO, *supra* note 113, at 108, 110; MCALEVEY, *supra* note 110, at 122. The conversations paid immediate dividends when the union scrambled to mobilize against a surprise (and ultimately illegal) offer by the Mayor to pay bonuses if teachers preemptively agreed to a longer school day, a permissive subject he could have eventually implemented on his own. ASHBY & BRUNO, *supra*

“The Schools Chicago’s Students Deserve,” a forty-six-page potpourri of demands the union had no legal right to demand.¹⁵² Art, world languages, free transit, and healthy food made compelling on-ramps for discussing the upcoming contract talks with parents during teacher conferences,¹⁵³ on calls and canvasses,¹⁵⁴ and in leaflets distributed with report cards.¹⁵⁵ Closures were depicted as a financial maneuver funneling millions to private entities and a key driver of a “two-tier education . . . apartheid” in Chicago.¹⁵⁶ They were also called “racist.”¹⁵⁷

The goal was to personalize the bargaining process by seeding the closing and financialization issues as the community’s own. Early signs suggested it was working. The report’s spotlight on the use of Tax-Increment-Financing (TIF), a supposed anti-blight lever, to renovate Chicago Mercantile Exchange bathrooms and a Cadillac showroom instead of schools became cause for trespass and arrests, not just talking points.¹⁵⁸ Anti-closure protests were repeated, aggressive, and increasingly borrowed tactics popularized by the ascendant anti-bank movement Occupy Wall Street. In late-2011, 300 parents and teachers welcomed the start of negotiations by shutting down a school board meeting after monopolizing the floor through “mic-checks” or comments repeated en-masse.¹⁵⁹ The next month, 200 teachers, parents, and activists had a three-night sleep-over in City Hall.¹⁶⁰ In February, Occupy Chicago joined to turn the soon-to-be privatized Piccolo Elementary into a campground.¹⁶¹ Overflowing, disruptive school board meetings became the norm.¹⁶²

By May 2012, the border between union and community activism had seemingly dissolved. When 500 African-American and Latino parents staged a weeknight vigil in front of Mayor Emanuel’s house, CTU joined but later admitted community sentiment had forced its hand, having long avoided protests in front of the Mayor’s children.¹⁶³ The union’s plans for a climatic, hundred-bus contract rally called not only for the city’s largest auditorium, but overflow into Occupy Chicago’s old home-base and a simultaneous corporate tax protest

note 113, at 111. Wide-spread participation in red-shirt Fridays and the results of internal straw polls showed that the message was sinking in. *Id.*

152. CTU, *The Schools Chicago’s Students Deserve* (Feb. 2012) (on file with author) [hereinafter, *Schools*].

153. ASHBY & BRUNO, *supra* note 113, at 125.

154. MCALEVEY, *supra* note 110, at 120.

155. *Id.* at 114.

156. *Schools*, *supra* note 152, at 27–28, 13.

157. *Id.* at 13.

158. *Schools*, *supra* note 152, at 33; Abdon Pallasch, *TIF marchers demand \$4M from N. Side auto dealers*, CHI. TRIB. (Mar. 20, 2011) (protesting funds “diverted from public schools and given to developers”).

159. ASHBY & BRUNO, *supra* note 113, at 126, 151.

160. *Id.* at 126.

161. John Byrne, *Overnight school sit-in ends*, CHI. TRIB. (Feb. 19, 2012).

162. ASHBY & BRUNO, *supra* note 113, at 127.

163. Steven Ashby, *Ashby Response to Rosenblum and Juravich*, 42 LAB. STUD. J. 398, 403 (2017).

around the corner, courtesy of Stand Up! Chicago, a labor-neighborhood coalition.¹⁶⁴

Newspapers painted the auditorium’s atmosphere variously as “thunderous,” “revival-style,”¹⁶⁵ and “angry,” but the key takeaway was the crowd’s reaction to Lewis’s seemingly rhetorical question: “So why are we here?”¹⁶⁶ The response—“Strike! Strike! Strike!”—was both prescient and precarious.¹⁶⁷

4. Strikes, Strictures, and Support

On paper, a walkout seemed unlikely. It hadn’t happened in twenty-five years, and the state had recently passed Senate Bill 7 (SB 7), legislation requiring strike authorization from an unprecedented 75% of the union’s total membership (not just among those voting).¹⁶⁸ The point, as education reformer Jonah Edelman explained in audio leaked from the Aspen Institute’s gathering of corporate elite, was that the union “wouldn’t have the right to strike even though the right was maintained.”¹⁶⁹ That SB 7’s pre-strike factfinder dangled a whopping 35.74% raise added to a sense that getting that type of unity would be difficult.¹⁷⁰

It was not difficult. Ninety-two percent of the union came out for the authorization vote, 98% voted “yes,” and CTU told the factfinder, “no deal.”¹⁷¹ The reality was that over time the specter of a strike had transformed into a union obligation, essentially foregone.¹⁷² A teacher contract had become the epicenter of a social fight joined by parents, students, and various groups combatting poverty, violence, and racism.¹⁷³ To settle now would be to deny that community agency and ownership over at least a piece—the corporate piece—of the corrective.¹⁷⁴ As Steven Ashby and Robert Bruno put it, “[l]ots of people were involved in the dispute, and now they needed a place to act.”¹⁷⁵ A conference room wouldn’t cut it.¹⁷⁶

Yet, there was also the legal context. The demands that convened the community—things that in most negotiations might serve as narrative devices—had been sent across the bargaining table. Proposals related to air conditioning, music, playgrounds, libraries, and the holy grail, closings, were fine to offer but

164. ASHBY & BRUNO, *supra* note 113, at 117-18.

165. Editorial, *City teachers: ‘We need a voice,’* CHI. SUN-TIMES (May 25, 2012).

166. Noreen Ahmed-Ullah, *Teachers Ready for Battle*, CHI. TRIB. (May 24, 2012).

167. ASHBY & BRUNO, *supra* note 113, at 118.

168. Alter, *supra* note 111, at 21-22.

169. UETRICH, *supra* note 130, at 10, 60-62; MCALEVEY, *supra* note 110, at 101.

170. ASHBY & BRUNO, *supra* note 113, at 164-66; Alter, *supra* note 111, at 22.

171. “No” votes amounted to a minute 482. Alter, *supra* note 111, at 22.

172. This, in fact, was the conclusion reached by the city’s chief negotiator. ASHBY & BRUNO, *supra* note 113, at 183.

173. *See id.* (describing the bargaining process as “a social compact”).

174. *Id.*

175. *See id.*

176. *Id.*

illegal if pushed too seriously or, as now seemed inevitable, inspired a strike.¹⁷⁷ Injunctions and crippling fines meant the union needed to press its case with care. But since bargaining is a messy process, it could also do so shrewdly. Negotiators were tacitly relieved, for example, by the city's self-evidently low wage offer, since prolonged hand-wringing on a low-priority mandatory topic opened the door for copious counters packed with permissive subjects.¹⁷⁸ At times, the union seemed to use Section 4.5's strictures to its advantage, amplifying its permissible pitch for more staffing in slyly noting to the Sun-Times that, "[c]ertainly CPS is not obligated to bargain the fact that out of the 10 largest cities, we have the third-highest student-to-nurse and student-to-counselor ratio."¹⁷⁹ And while the city refused to discuss nearly every non-mandatory issue,¹⁸⁰ CTU exposed the factfinder as a promiscuous listener, freeing its heavily rank-and-file bargaining team to bring harsh teaching realities to life through story after story.¹⁸¹ When the factfinder's final recommendations stretched beyond his narrow statutory mandate and endorsed the union's perspective on the Mayor's highly-touted plan to lengthen the school day, frustrated city officials were forced to parry alternatives CTU had no legal right to debate.¹⁸²

In a deeper respect, CTU just plowed through the law.¹⁸³ Shutdowns were the sticking point. The city's refusal to reckon with its omnipotence or budge on the secondary issue of transfer rights for laid-off teachers provoked the stoppage in the literal sense that, once CPS's position was fully exposed, CTU's negotiator announced: "I think we're on strike."¹⁸⁴ Much of the union's public rhetoric was equally brazen. Statements surrounding its statutorily-required ten-day strike notice led with wages but emphasized the city's "draconian policies" as the "larger picture," grouping the "Board's plan to close over 100 schools" alongside "shut down[s]" of "public housing, public health clinics, [and] public libraries."¹⁸⁵ Permissive issues dotted every flyer and strike bulletin, shielded only by a discordant disclaimer reminding the public that none of it mattered enough to strike over.¹⁸⁶

177. *Id.* at 146–47, 167, 202.

178. *Id.* at 153.

179. Letter to Editor, Karen Lewis, *CPS refusing to bargain, not CTU*, CHI. SUN-TIMES (Jun.14, 2012).

180. ASHBY & BRUNO, *supra* note 113, at 202.

181. *Id.* at 169–70.

182. *Id.* at 170–71, 164–65.

183. In a "backhanded affirmation" of the union's approach, the city's chief negotiator said that CTU "ran roughshod over the law." *Id.* at 228.

184. *Id.* at 182 (calling this "the Gordian knot of the . . . struggle"). In an effort to defuse pressure on the Mayor's priority of a longer school day, the city did initially agree to discuss recall rights, but an interim agreement received backlash from principals and was scuttled by Emanuel. *Id.* at 172–73.

185. CTU Press Release, *CTU files notice of intent to strike* (Aug. 29, 2012), <https://www.ctunet.com/media/press-releases/breaking-news-ctu-files-notice-of-intent-to-strike> [<https://perma.cc/BGQ5-CJME>].

186. ASHBY & BRUNO, *supra* note 113, at 234.

The union had placed a bet on issue magnetism, that massive support for the demands framing CTU's rise would, in the strike's opening salvos, ruin the city's appetite for legal theories. The wager paid. City leaders would later admit they were "stunned" by union's control of the narrative.¹⁸⁷ Over nine days, 95% of the membership picketed schools by breakfast (with pancakes cooked by parents), roved neighborhoods by lunch (in step with student marching bands), and coalesced downtown by dinner (conjuring a sea of CTU-red).¹⁸⁸ Fifty-thousand people showed up the first afternoon.¹⁸⁹ Throughout, allies lacking obvious connections to the labor movement, who the Sun-Times labeled "shadow strikers," seeped into the throngs.¹⁹⁰ "Community organizations are so supportive because teachers have the same vision we have," explained a leader.¹⁹¹ The vision included a march on Hyatt to protest a \$5.2 million TIF gift as seven surrounding schools juggled \$3.4 million in budget cuts.¹⁹²

Throughout, the teacher and union drumbeat was pro-kids and pro-public jobs. After the CPS CEO warned that strikes harm students, a post by a teacher blogging under the moniker "Teacher-X" got 20,000 hits in twenty-four hours with lines like, "When you close and turnaround schools disrupting thousands . . . often plunging them into violence [with] no data to support your practice, that hurts our kids."¹⁹³ CTU's Vice-President took to ABC News to report agreement on wages with the glaring caveat that only "the big education issues" would get "to a settlement on this deal."¹⁹⁴

The lawyers could question the messaging, but CPS leadership had to live with the results. A clear majority of Chicagoans following the strike both supported it and blamed the Mayor. Sixty-six percent of public school parents sided with the union.¹⁹⁵ CTU had come to be viewed as one of the strongest advocates for racial justice in the city.¹⁹⁶

5. Agreement

CPS did, in fact, eventually file for a TRO, but only after a deal had been reached and the Mayor reacted in fury to the union's vote to continue striking

187. *Id.* at 234.

188. *Id.* at 194, 192, 195.

189. Alter, *supra* note 113, at 23.

190. Laura Washington, 'Shadow Strikers,' CHI. SUN-TIMES (Sep. 17, 2012).

191. *Id.*

192. *Id.*; ASHBY & BRUNO, *supra* note 113, at 206.

193. Xian Barrett, Blog, *Why I'm Striking, JCB, Teacher-X* (Sep. 9, 2012), <http://chiteacherx.blogspot.com/2012/09/why-im-striking-jcb.html> [<https://perma.cc/PZ3P-V66H>]; Xian Barrett, *My view: From the picket lines*, CNN.COM (Sep. 13, 2012), <http://schoolsofthought.blogs.cnn.com/2012/09/13/my-view-from-the-picket-lines/> [<https://perma.cc/PFP9-3T7C>].

194. Bd. Educ. v. CTU, Complaint and Request for TRO, para. 28 (Sep. 17, 2012), <http://www.chicagotribune.com/news/nationworld/chi-full-text-of-request-for-injunction-to-end-teachers-strike-20120917.htmlstory.html> [<https://perma.cc/UAZ9-8GLW>]

195. ASHBY & BRUNO, *supra* note 113, at 205.

196. *Id.* at 237.

while members reviewed the proposal (plus an added day for Rosh Hashanah).¹⁹⁷ Scrutiny was needed, said one organizer, for fear that “we would disappoint the community by not winning things like air-conditioning.”¹⁹⁸ Ultimately, the court sealed Section 4.5’s irrelevance by scheduling a hearing for the day after the contract was approved.¹⁹⁹ The move, according to the Tribune, could be attributed to the judge’s reluctance “to offend” the roiling labor community.²⁰⁰

The finalized agreement did not stop school “reform.”²⁰¹ Though teachers would for the first time have rights to “follow students”²⁰² displaced by closings—which had the secondary effect of making shutdowns less attractive to privatizers—Lewis soon faced an internal challenger of her own for failing to secure “a guarantee not to close schools.”²⁰³

It did, however, cement a new take on bargaining that, unmoored from legal protocol, links “membership” to demands and counts on that community to show up and fight. Reflecting on the change, CTU’s lawyer remarked that he’d never before “participated in a work stoppage that the public supported.”²⁰⁴

B. Law and Jurisdiction: Teachers in Revolt

Unlike the federalized private sector, labor rights for public workers vary by state. CTU can strike legally because Illinois law allows it, while its New York affiliate, under the so-called “Taylor Law,” may not.²⁰⁵ Some states go straight to the source and ban collective bargaining itself, while others prohibit it for certain employees, leave it up to cities and towns, or limit it to something more informal, like open-ended discussion.²⁰⁶ Unsurprisingly, limiting bargaining rights limits unions. States without comprehensive regimes typically have far fewer public sector union members²⁰⁷ and, partly in turn, pay less.²⁰⁸ Much-discussed forthcoming research also finds that law-based bargaining gaps dampen union political activism substantially and even “demobilize[e]” the membership.²⁰⁹

197. *Id.* at 220–21.

198. *Id.* at 224.

199. Jason Meisner, *Court hearing set for Wednesday, after union vote*, CHI. TRIB. (Sept. 18, 2012).

200. *Id.*

201. Indeed, “mass closings” continued throughout 2013. Lauren FitzPatrick, *CPS to list 40 vacant schools, mostly from 2013 mass closings*, CHI. SUN-TIMES (Jan. 12, 2017).

202. *New Agreement, Highlights*, 75 CHI. UNION TEACHER 1, 17 (Sept./Oct. 2012), [hereinafter *New Agreement*], https://www.ctunet.com/media/downloadable-pdf/CUT_Vol_75_Iss_1_FINAL.pdf (on file with the author).

203. Noreen Ahmed-Ullah, *CTU Members to Run Against Lewis’ Leadership Team*, CHI. TRIB. (Feb. 24, 2013). Teachers also won on a variety of other non-mandatory issues, including hundreds of new hires in art and music. *New Agreement*, *supra* note 202, at 17.

204. ASHBY & BRUNO, *supra* note 113, at 225.

205. NYS Civ. Serv. L. § 201(1) (1967).

206. For an overview of this complexity, see Joseph E. Slater, *The Strangely Unsettled State of Public-Sector Labor Law*, 30 HOFSTRA J. EMP. & LAB. L. 511, 512–13 (2013).

207. Rosenfeld, *supra* note 30, at 35–36.

208. *Id.* at 49; Jeffrey Keefe, *Eliminating Fair Share Fees Would Increase the Pay Penalty*, ECON. POLICY INST. 4 (Oct. 13, 2015), <https://www.epi.org/files/pdf/93216.pdf> [<https://perma.cc/BJG5-SA59>].

209. James Feigenbaum et al., *From the Bargaining Table to the Ballot Box*, Unpublished Manuscript

The 2018 history is different. Five times in five states, “no bargaining right” was no reason not to bargain. In West Virginia, Oklahoma, Kentucky, Arizona, and North Carolina ad hoc groups of union and non-union teachers struck for between one and nine school days, forcing impromptu benefit negotiations at makeshift tables stuffed into legal gaps.²¹⁰ None had the right to strike,²¹¹ none had an affirmative right to bargain.²¹² While a different story can be told for each state, the big picture reveals four shared elements.

1. Social Media Infrastructure

Emerging from the absence of law-based bargaining blueprints is a new, social media-driven infrastructure for navigating negotiations. Facebook, in particular, has played an out-sized role in funneling teachers’ interests into discrete forums amid sprawling, disconnected workplaces. In West Virginia, what could have been a throw-away thought on a Facebook group for educators’ concerns—“any talks of striking?”—provoked “an explosion” of replies, the first derisive, the rest a counter-avalanche of acclamation: *There will not be an end to the cuts until a line is drawn; As long as you take it . . . they will keep giving it to you; Teachers went on strike in 1990.*²¹³ The group grew to over 20,000 members before dividing into school districts as talk turned to the question: How do we organize this?²¹⁴ Disappointed to find that his union had not set up something similar, social-studies teacher Alberto Morejon created the “Oklahoma Walkout—The Time is Now!” group late one night and awoke to find it populated with 20,000

5, n.14, 12, 18, 20, 23 (Jan. 20, 2018), https://jamesfeigenbaum.github.io/research/pdf/fhw_rtw_jan2018.pdf [<https://perma.cc/ED4W-66CS>].

210. *Pedagogic protests: Behind the teacher strikes that have roiled five states*, ECONOMIST (May 5, 2018). While Colorado is often included in this list, there teachers have long collectively bargained with local districts and leaders themselves described the protest—approved by schools in advance—as “a rally, not a strike.” Danika Worthington, *What you need to know about why Colorado teachers are walking out of classes and onto the Capitol*, DEN. POST (Apr. 24, 2018); Independence Institute, Colorado School District CBAs, <https://i2i.org/k-12-issues/labor-and-employment/unions-and-bargaining/colorado-school-district-collective-bargaining-agreements/> [<https://perma.cc/9ZYT-HRYM>]. In North Carolina, where collective bargaining is outlawed, teachers technically engaged in a “slowdown” or “sickout” by coordinating personal days state-wide to “overwhelm the system with absences” and force shutdowns. T. Keung Hui, *Thousands of NC teachers will march*, RALEIGH NEWS & OBSERVER (May 16, 2018).

211. Milla Sanes & John Schmitt, *Regulation of Public Sector Collective Bargaining*, CEPR 8 (Mar. 2014), <http://cepr.net/documents/state-public-cb-2014-03.pdf> [<https://perma.cc/62PD-G964>].

212. See *infra* notes 219–21. In Kentucky and Arizona, bargaining is allowed but, with no statutory structure to do so, never required. Sanes & Schmitt, *supra* note 211, at 15, 24.

213. Rick Hampson, ‘Any talks of striking?’: How a West Virginia teacher’s Facebook post started a national movement, USA TODAY (Feb. 20, 2019).

214. *Id.*; Kate Doyle Griffiths, *Crossroads and Country Roads*, VIEWPOINT MAG. (Mar. 13, 2018), <https://www.viewpointmag.com/2018/03/13/crossroads-and-country-roads-wildcat-west-virginia-and-the-possibilities-of-a-working-class-offensive/> [<https://perma.cc/BX85-Z38C>].

members.²¹⁵ By week-end, 72,000 had signed up.²¹⁶ Kentucky’s strike vehicle, KY120 United, was and is a Facebook group.²¹⁷

Tasks benefitting from synchronicity, like time-sensitive decision-making, responding to legislative testimony, or coordinating picket lines, often used the video-streaming service “FacebookLive.”²¹⁸ In West Virginia, teachers joined a feed to vote on whether to return to work, with the results and discussion forwarded to the superintendent.²¹⁹ The Arizona walkout officially ended with a Facebook video.²²⁰ Twitter served a similar function, facilitating en-masse critique of legislative counter-proposals in nearly real-time.²²¹ The setting was serious enough that retweeting the “wrong” stance post-consensus could be viewed as “tantamount to crossing a picket line.”²²²

And, of course, social media has played its now customary movement role in building and expressing solidarity. The #RedForEd hashtag, for example, was coined in Arizona²²³ but quickly became the short-hand for supporting education protests in general.²²⁴ North Carolina teachers, the last to walk, drew particular inspiration from the early online activism in ways commentators likened to the surging #MeToo anti-harassment movement.²²⁵ And while thousands of in-person actions brought indispensable local momentum to every campaign, on-line amplification took the energy national. Arizona teachers’ “how-to” guides to small-scale protests like “walk-ins”—short, in-school demonstrations “30 minutes before the first bell”—invariably ended with all-caps reminders to “report the results” to Facebook and Twitter.²²⁶ Prompt celebrity validation, like supportive tweets from Reese Witherspoon, Bette Midler, and James Marsden

215. Rivka Galchen, *The Teachers’ Strike and Democratic Revival in Oklahoma*, NEW YORKER (Jun. 4, 2018), <https://www.newyorker.com/magazine/2018/06/04/the-teachers-strike-and-the-democratic-revival-in-oklahoma> [https://perma.cc/XD87-TZ5V].

216. *Id.*

217. Melissa Daniels, *How social media helped teachers organize in Arizona, across nation*, AP (Apr. 19, 2018), <https://www.azcentral.com/story/news/local/arizona-education/2018/04/19/social-media-helped-teachers-organize-arizona-across-nation/532318002/> [https://perma.cc/2Q8V-CYN8].

218. Caroline O’Donovan, *Facebook Played a Pivotal Role in the West Virginia Teacher Strike*, BUZZFEED (Mar. 7, 2018), https://www.buzzfeed.com/carolineodonovan/facebook-group-west-virginia-teachers-strike?utm_term=.jr7y8yv0K#.wkAo2or5l [https://perma.cc/3B36-AWXH]; Griffiths, *supra* note 214.

219. Griffiths, *supra* note 214.

220. Ross Franklin, ‘We will return to our schools,’ AP (May 3, 2018), <https://www.cbsnews.com/news/arizona-teachers-walkout-ends-red-for-ed-today-2018-05-03/> [https://perma.cc/N5VX-3J8L].

221. Griffiths, *supra* note, at 214.

222. *Id.*

223. Joseph Flaherty, *The Teachers Won*, PHOENIX NEW TIMES (May 8, 2018).

224. Daarel Burnette, *What Is #RedforED?* ED. WEEK (May 3, 2018), http://blogs.edweek.org/edweek/teacherbeat/2018/05/what_exactly_is_redford.html [https://perma.cc/6CZF-QY64].

225. Hui, *supra* note 210.

226. *How to Organize #RedforEd Walk-in*, <https://storage.snappages.site/6exeklw9g2/assets/files/AEU-Walk-In-Instructions.docx-1.pdf> [https://perma.cc/6SWQ-GUF7].

to their millions of followers²²⁷ suggested that all the social media messaging was indeed getting out.

It also helped shake, and scatter, the nature of labor advocacy.

2. Institutional Decentering

As noted, the standard consequence of harsh state labor regimes is not the absence of unions, but their smallness or weakness. In North Carolina, where labor contracts are expressly forbidden, the “union” is essentially a voluntary association that, like any other interest group, is limited to lobbying politicians for beneficial treatment of its members.²²⁸ Oklahoma repealed the right to bargain in 2011, and while the Oklahoma Education Association remains, teacher pay is forty-ninth in the nation.²²⁹ West Virginia unions can bargain if they can persuade local officials to sit down voluntarily, but no one volunteers.²³⁰

Amid this vulnerability, the quick and unexpected activist upswells have had the effect of decentering these institutional avenues for public worker advocacy. That union listservs and elected officials took a backseat to social media applications in facilitating strikes and mediating demands is some proof of this.

Deeper evidence comes from examining how the destabilization progressed in different states. Probably the best-case scenario played out in Arizona, where the Facebook group Arizona Educators United (AEU) ballooned to 40,000-strong days after twenty-three-year-old teacher Noah Karvelis created it.²³¹ Joe Thomas, the incumbent Arizona Education Association’s president, heartily embraced the faction, calling it a “breath of fresh air” and appearing at AEU rallies and on its FacebookLive feed.²³² Both signed a letter requesting to meet with the Governor, listing only AEU’s five demands.²³³

But even a less complete meld of institution and upstart can generate new activism access points and, in turn, new activists. Politically unaffiliated and without the cultural baggage unionism can carry in red-states, West Virginia’s Facebook group was home to Hillary voters, Trump acolytes, union members and

227. K. Querry, *Olivia Munn, James Marsden announce support for Oklahoma teachers*, Oklahoma’s News4 (Apr. 3, 2018), <https://kfor.com/2018/04/03/olivia-munn-james-marsden-announce-support-for-oklahoma-teachers/> [<https://perma.cc/U374-MYMV>]; @ReeseWitherspoon, Twitter, (Feb. 26, 2018 12:34 PM).

228. Ann Hodges, *Southern Solutions for Wisconsin Woes*, 43 U. TOL. L. REV. 633, 634–41 (2012).

229. Martin Malin, *Legislative Upheaval in Public-Sector Labor Law*, 27 ABA J. LAB. & EMP. L. 149, 154 (2012); *Rankings and Estimates*, NEA Research, C-5 (May 2017), <http://www.nea.org/assets/docs/2017RankingsandEstimatesReport-FINAL-SECURED.pdf> (on file with author).

230. Chris Brooks, *What Should Unions Do After the Strike Wave Recedes*, NEW LAB. FORUM (Apr. 27, 2018), <https://newlaborforum.cuny.edu/2018/04/27/unions-strike-wave-recedes/> [<https://perma.cc/G4WF-C3RJ>].

231. Daniels, *supra* note 217.

232. *Id.*

233. Letter from AEA and AEU to Governor Ducey, Apr. 17, 2018, https://actionnetwork.org/user_files/user_files/000/022/623/original/2nd_Gov_demand_letter.pdf [<https://perma.cc/4E6A-TKKU>].

objectors alike.²³⁴ While moderators did their best to keep the focus on local, unifying issues, the group’s non-institutional pedigree made the biggest solidarity-enhancing contribution by cultivating homemade—and frequently off-color—memes and song lyrics promoting demands.²³⁵ Photos mocking intransigent Senate President Carmichael’s “resting Mitch face” was a viral favorite.²³⁶ The rag-tag vibe translated to a kind of authenticity at rallies, where boilerplate union shirts and signs were traded for bespoke tees and placards with witticisms like, “[i]n a world full of Carmichaels be an Ojeda,” referencing a favored politician that teachers joked was their Obi-Wan Kenobi.²³⁷

In other ways, decentralization created coordination challenges. In late-February, West Virginia Education Association leaders strode to the capitol steps and announced to a crowd of Facebook-organized protesters that the union had reached a deal with the Governor for five percent raises and a healthcare task force.²³⁸ A voice rose up—“[w]e’re not going back in for that!”—followed by chants of “[w]e are the union bosses . . . [b]ack to the table!”²³⁹ A wildcat strike was on.

The Oklahoma rank-and-file were less successful, the strike ending at the behest of the longstanding teachers’ association, a bit player at best in the lead-up to the walkout.²⁴⁰ A journalist who shadowed the “Oklahoma-Teacher-Walkout” Facebook group throughout the strike described members as “devastated.”²⁴¹

Grassroots leaders faced complications too. Arizona’s deep “ideological aversion to taxes” perched its walk-out on a high-wire: higher rates on one side, parent backlash on the other.²⁴² Attentive to sustained conservative attacks and an intensifying #PurpleforParents counter-hashtag campaign, AEU called the strike after a week, “provok[ing] shock and anger” not from the union, but their own #RedforEd faithful.²⁴³

3. Broad Demands

Compounding these organizational challenges were dizzying lists of bottom-up demands. While stagnant pay, rising insurance premiums, and pension changes underpinned the core appeals,²⁴⁴ the course of negotiations exposed the

234. O’Donovan, *supra* note 218; Griffiths, *supra* note 214.

235. O’Donovan, *supra* note 218.

236. *Id.*

237. *Id.*

238. Eric Blanc, *The Strike is On*, JACOBIN (Mar. 1, 2018), <https://jacobinmag.com/2018/03/west-virginia-teachers-strike-activist-interview> [<https://perma.cc/KSD6-NEMW>].

239. *Id.*

240. Galchen, *supra* note 215.

241. *Id.*

242. Alvin Chang, *Arizona teacher walkout: how 3 decades of tax cuts suffocated public schools*, VOX (Apr. 26, 2018), <https://www.vox.com/2018/4/25/17276284/arizona-teacher-strike-tax-cut-funding-data> [<https://perma.cc/Q7VQ-22BR>].

243. Flaherty, *supra* note 223.

244. See, e.g., Donna St. George, *Kentucky teachers shut down multiple school systems, in uproar over*

bread-and-butter issues as kindling for much broader concerns. In many districts teachers had become, in figurative and sometimes literal senses, “social workers” ensconced in workplaces that reproduced the surrounding community’s deficits on a daily basis.²⁴⁵ The strikes showed that teachers not only internalized those deficits but would fight for fixes by translating them into claims touching on everything from textbooks to Wall Street.

In some cases, the transition resulted in something very concrete. Arizona teachers had five brief bulleted demands, like returning “school funding to 2008 levels” and no tax cuts until “per-pupil spending reaches [the] national average.”²⁴⁶ Oklahoma educators, on the other hand, just wanted to escape budgets so radically thin that parents confronted three-day weekends and ESL students were paired with instructors assigned to meet with 270 students a day.²⁴⁷ The asks in North Carolina were somewhere in between and ranged from the specific (new teaching materials), to the general (Medicaid expansion), to the aspirational (“prioritize[d] classrooms . . . not corporate board rooms”).²⁴⁸

None of it was lip service. West Virginia teachers secured a five percent bump but stayed on strike until it was extended to all classes of public employees.²⁴⁹ Oklahoma teachers won a historic \$6,000 raise *before* hundreds marched from Tulsa to Oklahoma City and thousands struck for over a week for more school funding.²⁵⁰ When the legislature rejected a string of new revenue bills, educators ran for office in numbers that overwhelmed the filing office.²⁵¹ And while a twenty percent raise ended Arizona’s nine-day walkout, the state’s refusal to boost school revenue or pull back on privatization²⁵² prompted teachers to keep pushing by putting pro-tax and anti-voucher measures on the fall ballot.²⁵³

pension bill, WASH. POST (Mar. 30, 2018).

245. Griffiths, *supra* note 214. In McDowell County, West Virginia, an innovative pilot project has made teachers’ social welfare role explicit. See Kalena Thomhave, *West Virginia Teachers Won Their Strike. Now, They’re Rebuilding the Economy*, AM. PROSPECT (Jun. 19, 2018).

246. Arizona Educators United, *Demands*, <http://www.arizonaeducatorsunited.com/demands> [<https://perma.cc/3ZMU-XL6G>].

247. Galchen, *supra* note 215.

248. North Carolina Association of Educators, *March for Students*, <http://www.ncrsp.org/wp-content/uploads/2018/05/2018-NCAE-NCRSP-March-Rally-.pdf> [<https://perma.cc/D3AX-FAU7>]. See also Hui, *supra* note 210 (reporting that “[t]here’s no single clear demand for this legislative session”).

249. Statement from the Three Education Organizations Regarding Action on HB 4145 (Mar. 3, 2018), <https://www.facebook.com/dedicatedteachers/photos/a.194611687236933.45477.138703196161116/1794911210540298/?type=3&theater> [<https://perma.cc/6KC2-MTZD>].

250. Galchen, *supra* note 215.

251. *Id.* The teacher-turned-candidate phenomenon features across the five states. Ian Kullgren, ‘Educator spring’ spawns wave of teacher candidates, POLITICO (Jul. 4, 2018), <https://www.politico.com/story/2018/07/04/teacher-candidates-democrats-midterms-664358> [<https://perma.cc/EP8X-RPYN>].

252. *Striking Arizona teachers win 19% raise, end walkout*, L.A. TIMES (May 3, 2018).

253. Melissa Daniels, *Arizona ballot initiatives focus on energy, school funding*, AP (Jul. 5, 2018), <https://www.apnews.com/9187089cc1304078bf58d0bea9ca1260> [<https://perma.cc/474J-BY8E>]; Yavonne Wingett Sanchez, *Will Arizona Republicans ‘repeal and replace’ voucher expansion to thwart referendum?* AZ REPUBLIC (Apr. 10, 2018), <https://www.azcentral.com/story/news/politics/arizona-education/2018/04/10/arizona-republicans-repeal-and-replace-voucher-expansion-thwart->

4. Legislative Precarity

There is no doubt the teachers “won.” Every state enhanced benefits, reversed cut-backs,²⁵⁴ or, in the case of North Carolina’s one-day electoral-focused strike, pulled off “the largest act of organized teacher political action in state history.”²⁵⁵ Throughout the winter and spring, public opinion was firmly on their side.²⁵⁶

Yet these were street negotiations. No one signed a contract. What states gave they could also take away, and some did. Days after passing a hotel tax to pay for raises and revenue, Oklahoma repealed it.²⁵⁷ The promise of twenty percent raises that ended the Arizona strike did not, once enacted, fully pan out for many teachers.²⁵⁸ West Virginia’s universal public worker raise was paid for, yet not, as expected, with a gas tax, but by especially regressive cuts to tuition subsidies and possibly Medicaid.²⁵⁹ Lawmakers have tried to make future raises contingent on charter schools.²⁶⁰

The lesson, in the end, seemed to be that bargaining in legal gaps can work, but negotiation requires a two-fold power: the power to assemble a massive bargaining team, yes, but later, the power to bring everybody back.

C. Law and Empowerment: Embracing *Collective* Bargaining

In *Janus v. AFSCME*,²⁶¹ the Supreme Court barred public sector unions from charging non-members fees for representing them in bargaining. This was, depending on the source, a “devastating,”²⁶² “decisive,”²⁶³ or even “eviscerating”²⁶⁴ blow. Organized labor was more sanguine. Steeling for the

referendum/493786002/ [https://perma.cc/88KJ-A5MA].

254. Holly Yan, *Here’s what teachers accomplished with their protests this year*, CNN.COM (May 29, 2018) (describing “What teachers wanted” and “What they got” in each state), <https://www.cnn.com/2018/05/29/us/what-teachers-won-and-lost/index.html> [https://perma.cc/S7P7-LJ6A].

255. Hui, *supra* note 210.

256. Anya Kamenetz, *NPR/Ipsos Poll: Most Americans Support Teachers’ Right to Strike*, NPR.ORG (Apr. 26, 2018), <https://www.npr.org/sections/ed/2018/04/26/604117045/npr-ipsos-poll-most-americans-support-teachers-right-to-strike> [https://perma.cc/2QMW-W8D6].

257. AFT Press Release, *AFT in Oklahoma Decries Fallin Repeal*, (Apr. 10, 2018), <https://www.aft.org/press-release/aft-oklahoma-decries-fallin-repeal> [https://perma.cc/85H6-K6ZJ].

258. Richard Ruelas, *‘20%’ promise persists, but plan can’t fund raises for all teachers*, AZ REP. (May 5, 2018), <https://www.azcentral.com/story/news/politics/arizona-education/2018/05/05/ducey-promise-20-percent-raise-persists-lack-funding-teacher-walkout/582878002/> [https://perma.cc/3X7L-HJ4T].

259. Sarah Jones, *Requiem for a Strike*, NEW REPUBLIC (Mar. 7, 2012), <https://newrepublic.com/article/147307/cost-west-virginia-teachers-strike> [https://perma.cc/V69R-5QTJ].

260. Doug Stanglin, *West Virginia teachers’ strike ends: Teachers to return for class Thursday, unions say*, USA TODAY (Feb. 20, 2019).

261. 138 S. Ct. 2448 (2018).

262. Joe Dziemianowicz, *Supreme Court ruling seen as devastating blow to unions*, N.Y. DAILY NEWS (Jun. 27, 2018).

263. Joseph Hower, *With Janus, the Supreme Court guts the modern labor movement*, WASH. POST (Jun. 27, 2018).

264. DemocracyNow!, Transcript, *In Janus Case, Court Issues Major Anti-Labor Ruling, Eviscerating Power of Public-Sector Unions*, (Jun. 28, 2018), <https://www.democracynow.org/2018/6/28/>

outcome had “made the union stronger,” said a Midwest spokesperson.²⁶⁵ “They woke us up,” described a leader on the west coast.²⁶⁶ “No one wanted this case,” explained a union president, “but the gestalt around the country has been to turn an existential threat into an opportunity.”²⁶⁷

It would be fair to chalk these responses up to making the best of changed circumstances. But optimistic takes and canny reactions to challenging law are becoming a mini-trend when unions prepare to bargain. In fact, when *Janus*’s logic was previously applied just in the home-care industry, in some states new strategies helped unions actually increase membership and pile-up raises.²⁶⁸

A more direct example comes from the rise of so-called “bargaining transparency” bills, which aim to make contract negotiations a communal affair by amending open meeting laws to include state and local discussions with public sector unions.²⁶⁹ Twelve states have already adopted the language, sometimes taken from template legislation²⁷⁰ shopped by conservative groups arguing that “a third-party’s money” in bargaining necessitates taxpayer “scrutiny during debate, not just after” agreement.²⁷¹ “Secret” negotiations, the Goldwater Institute contends, grease “backroom deals elected officials too often rubberstamp.”²⁷²

Traditionally, unions and their allies have branded the bills gimmicks less about good government than delay and grandstanding.²⁷³ The public, for its part, hardly ever shows up when it has the chance.²⁷⁴

in_janus_case_court_issues_major [https://perma.cc/FR3H-ECJU].

265. Alexia Elejalde-Ruiz, *Supreme Court’s Janus ruling could undercut private sector unions too*, CHI. TRIB. (Jul. 11, 2018).

266. John Myers, *California’s politically powerful labor unions have been preparing*, L.A. TIMES (Jun. 27, 2018).

267. Noam Scheiber, *Labor Unions Will Be Smaller but Maybe not Weaker*, N.Y. TIMES (Jun. 27, 2018).

268. *Id.*; Alana Semuels, *Is This the End of Public-Sector Unions in America?*, ATLANTIC (Jun. 27, 2018).

269. American Legislative Exchange Council, *Public Employee Bargaining Transparency Act*, <https://www.alec.org/model-policy/public-employee-bargaining-transparency-act/> [https://perma.cc/85S7-L6MS].

270. *Id.*

271. Priya M. Abraham, *Opening the Curtain on Government Unions*, COMMONWEALTH FOUND. 4, 10 (June, 2015), https://www.commonwealthfoundation.org/docLib/20150609_CBTransparency.pdf [https://perma.cc/5HVR-Q5RT].

272. Nick Dranias, et al., *Airing Out the Smoke-filled Rooms*, GOLDWATER INST. 2 (Jan. 17, 2013), https://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2015/4/22/PR255%20Collective%20Bargaining_0.pdf [https://perma.cc/58VJ-HPEJ]. Of course, as Clyde Summers argued long ago, the “ultimate public employer is the electorate, the taxpayer and the users of public service.” Clyde Summers, *Bargaining in the Government’s Business: Principles and Politics*, 18 U. TOL. L. REV. 265, 268 (1987). These parties may desire open access to negotiations for other, non-ideological reasons ranging from lines at the Department of Motor Vehicles to a distrust of local or union officials.

273. Ethan DeWitt, *N.H. Senate approves opening collective bargaining to public*, CONCORD MONITOR (Mar. 22, 2018); *Collective Bargaining Under Attack*, PA AFL-CIO, (June 23, 2015), <http://www.paaffcio.org/?p=6038> [https://perma.cc/R639-DYNW]; Abraham, *supra* note 271, at 10.

274. Benjamin DeGrow, *Colorado Education and Open Negotiation*, Independence Institute 2-3 (Apr. 2010), <https://i2i.org/wp-content/uploads/2011/04/IB-2010B-Web.pdf>. [https://perma.cc/CA3Q-

Both dynamics, though, are changing.

1. Colorado

When Colorado’s Proposition 104 opened up teacher bargaining in 2015, the “goal,” according to the libertarian Independence Institute, was for “the public to watch.”²⁷⁵ The Colorado Education Association had opposed the change,²⁷⁶ and when contract negotiations came up for its biggest affiliate in 2017, staying under-the-radar would have been a logical strategy. Instead, the Denver Classroom Teachers Association (DCTA) called supporters’ bluff—and raised them.

While the proposition and existing meetings law provided for public “notice” and public “access,” the issue of public participation remained open,²⁷⁷ prompting the district to try to set some rules regarding how and when audience members might chip in. DCTA didn’t agree to any.²⁷⁸ Initially, this resulted only in the addition of a microphone at the back of a grade-school cafeteria, flipped-on at prearranged times for scripted testimonials before the six union and five district negotiators up front.²⁷⁹ But then came homemade signs, a smartphone balanced on a tripod, and—ironically, from the “no-peanut” gallery—some spontaneity.²⁸⁰ “Can I give some examples?” rose a voice from the folding chairs, before questioning a district negotiator’s assumption to nodding heads.²⁸¹ “It’s supposed to be about the kids,” said another taking the microphone, “trembling with emotion.”²⁸²

Confronting 100-person crowds and discussion so rollicking that, as the anti-union Freedom Foundation complained, most states would “not tolerate[]” it, the district turned outwardly practical, telling reporters that “[k]nowing what teachers feel strong about helps . . . identify the most critical areas of the

KT3J]; Eric Gorski, *Proposition 104 opens school-union negotiations to the public*, DEV. POST (Nov. 8, 2014) (“Often, no one from the public shows up.”).

275. Melanie Asmar, *Denver teachers union’s strategy for negotiations: Go big*, CHALKBEAT (Jun. 29, 2017), <https://www.chalkbeat.org/posts/co/2017/06/29/denver-teachers-unions-strategy-for-this-years-contract-negotiations-go-big/> [<https://perma.cc/T75Q-54EC>].

276. Todd Engdahl, *Open meetings initiative could have unintended side benefit*, CHALKBEAT (Oct. 7, 2014), <https://www.chalkbeat.org/posts/co/2014/10/07/could-open-meetings-initiative-have-unintended-side-effect/> [<https://perma.cc/M3WV-69S9>].

277. CO School Bd. Open Meetings, Prop. 104 (2014), [https://ballotpedia.org/Colorado_School_Board_Open_Meetings_Proposition_104_\(2014\)](https://ballotpedia.org/Colorado_School_Board_Open_Meetings_Proposition_104_(2014)) [<https://perma.cc/J9J5-A6XD>]; CO Rev.Stat. § 24-6-402(2)(a)-(c). *See also* Intermountain Rural v. Pub. Util., 298 P.3d 1027, 1029 (CO App. 2012) (requiring “meaningful[] participat[i]on . . . by becoming fully informed on issues of public importance”); Office of Legislative Legal Services, Legal Memorandum, Open Meetings Law—FAQ (Jan. 2, 2015) (“[B]eing open does not guarantee a right . . . to participate in the meeting.”), <https://leg.colorado.gov/sites/default/files/open-meetings-law-state-public-body-faq.pdf> [<https://perma.cc/52MH-L3L9>].

278. Asmar, *supra* note 275.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

contract.”²⁸³ Inwardly, frustration seemed to have set in. In an unprecedented move, the district unilaterally declared an impasse, triggering closed-door mediation²⁸⁴ and ending both audience participation and a FacebookLive feed that had attracted as many as 2,200 viewers.²⁸⁵

Declaring itself “blindsided,” the union accused the district of trying to hide negotiations to “silence” the community.²⁸⁶ It was a striking role reversal. “We want this process to continue,” DCTA’s deputy director explained. “We want the public comment.”²⁸⁷

Hidden or not, the ultimate agreement produced “the most generous compensation package for teachers” around.²⁸⁸ The union, at least, certified Proposition 104 a success: “Some people always say we have something to hide, and that’s not true. I think this process proves that.”²⁸⁹

2. Minnesota

Minnesota’s law is decades older²⁹⁰ and its unions, as a result, have had more practice. The St. Paul Federation of Teachers (SPFT) began inviting parents of special education students to negotiations in 2009, and two years later the union successfully moved all sessions to Thursdays at five p.m.—catching community supporters right after work.²⁹¹ Since then, the very notion of discussing contract issues in private has become not just alien but a leverage point for protest, mobilization, and innovative benefits.

The 2013 contract was a tipping point. To prepare, SPFT first took a page from CTU by breaking into book groups.²⁹² Early on, teachers decided to bring neighborhood and non-profit leaders into the circles, and the union’s bargaining priorities flowed from those 8-months of discussions.²⁹³ On the one hand, drawing demands directly from community stakeholders created a compelling incentive for broad audience participation in contract negotiations. It also, however, created a platform flush with permissive topics.²⁹⁴ Unimpressed, the district

283. Asmar, *supra* note 275.

284. Melanie Asmar, *Impasse declared, prompting criticism from union*, CHALKBEAT (Jun. 27, 2017) [hereinafter *Impasse*], <https://www.chalkbeat.org/posts/co/2017/06/27/impasse-declared-in-denver-teacher-contract-negotiations-prompting-criticism-from-union/> [https://perma.cc/JA2Z-YXWA].

285. Asmar, *supra* note 275.

286. *Impasse*, *supra* note 284.

287. Asmar, *supra* note 275.

288. Monte Whaley, *Denver teachers, administrators reach new agreement*, DEN. POST (Sep. 1, 2017).

289. *Id.*

290. Up until 1981, unions and employers could not even hold strategy sessions in private. *What Constitutes a ‘Meeting’ Under the Minnesota Open Meeting Law?* Note, 11 WM. MITCHELL L. REV. 251, 252 (1985).

291. Mary Cathryn Ricker, *Teacher-Community Unionism: A Lesson from St. Paul*, DISSENT (Summer 2015), <https://www.dissentmagazine.org/article/teacher-community-unionism-lesson-st-paul> [https://perma.cc/6Y7S-R548].

292. *Id.*

293. *Id.*

294. Eric S. Fought, *All Hands on Deck*, AM. EDUCATOR (Fall 2015), at 22, https://www.aft.org/sites/default/files/ae_fall2015fought.pdf [https://perma.cc/4LEA-QMY2].

rejected twenty of the union’s twenty-nine proposals out-of-hand and replaced its chief negotiator with a lawyer.²⁹⁵ When parents and community members stood-up and pressed the issues nonetheless, the district moved for mediation, kicking everyone out of the room.²⁹⁶

But what the district conceived as de-escalation, the union saw as a hook for escalation. As school officials prepped to meet the mediator, SPFT rallied its network, and the press, to show up at the first session and present a letter reiterating the twenty blocked demands.²⁹⁷ Amid blinking iPhones and a smattering of “gasps,” district leaders walked in—then immediately walked out—leaving the assembled teachers, students, and activists to repurpose their prepared testimony for reporters.²⁹⁸

The group was also, as SPFT’s president described, left to “brainstorm . . . ways to continue the public dialogue . . . now that open negotiations were no longer possible.”²⁹⁹ School board meetings, for example, remained public and perfectly situated for petition deliveries.³⁰⁰ So were porches (for sharing stories),³⁰¹ the internet (for videos dramatizing a demand a week),³⁰² and snowbanks (for make-your-own-signs, like “St. Paul kids deserve ___”).³⁰³ By early-2014, allies who “didn’t appreciate having their ideas cast aside” found them back at the center, only chanted, sung, and tweeted by 2,500 teachers, parents, students, and activists in crowded school lobbies during a blizzard.³⁰⁴

Numbers-wise, the union ultimately won a good contract. The district agreed to \$22 million in new compensation, up from \$13.9 million the previous round.³⁰⁵ The non-compensation provisions were more telling. The district had tried, and failed, to ignore non-mandatory demands on class size, parental involvement in discipline,³⁰⁶ and teacher-led home visits,³⁰⁷ reducing to writing what the Twin Cities press described as, “a wider array of issues than perhaps any other teacher

295. Ricker, *supra* note 291.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. Fought, *supra* note 294, at 22.

301. Ricker, *supra* note 291.

302. Fought, *supra* note 294, at 22.

303. Ricker, *supra* note 291.

304. *Id.*

305. Mila Koumpilova, *St. Paul teachers contract*, TWIN CITIES PIONEER PRESS (Feb. 23, 2014), <https://www.twincities.com/2014/02/23/st-paul-teachers-contract-smaller-class-sizes-8-6-compensation-increase/> [https://perma.cc/VK6X-35TE].

306. *Id.* See also Mila Koumpilova, *St. Paul parents hope to keep momentum after teachers contract*, TWIN CITIES PIONEER PRESS (Mar. 2, 2014), <https://www.twincities.com/2014/03/02/st-paul-parents-hope-to-keep-momentum-after-teachers-contract-deal/> [https://perma.cc/DDK3-YJBU].

307. Sarah Jaffe, *Teachers’ Strikes, Catching Fire*, WORKING IN THESE TIMES (Mar. 26, 2014), http://inthesetimes.com/article/16402/teachers_strikes_catching_fire [https://perma.cc/NX8A-5GUV].

labor agreement in the state.”³⁰⁸ Or, as SPFT and many of its allies recognized it, book club come to life.³⁰⁹

IV

“ALT” AND INTEREST DYNAMICS

So far, I have suggested that alt-labor represents three new relationships to law in organizing. This has led to alternative conceptions of membership, alternative assumptions about where collective progress is possible, and alternative beliefs about how law might empower workers. These core alt-labor characteristics can now be spotted in settings of group demands. With the historically mirrored nature of mobilization and negotiation strategies in the background, the developments may mark the rise of “alt-bargaining.”

Each campaign highlighted in Part III contained a narrative thread useful to draw out one quality or another of alt-bargaining. But the three new legal orientations also share a unifying theme. CTU, #RedForEd, SPFT and DCTA pressed for community, not just workplace benefits. Others have trumpeted this phenomenon and, as noted, it even has a name: common good bargaining.³¹⁰ As those commentators acknowledge,³¹¹ there is not much new about labor’s incorporation of interests other than its own. For decades unions have lobbied for Medicare, food stamps, and higher minimum wages though the policies impact few, if any, members directly.³¹² Boycott rhetoric has long been suffused with a target’s impact on women, minorities, the environment, or international affairs.³¹³ In 1999, four unions set up shop in the same small office in Stamford and spent a year organizing to save two public housing complexes and shift millions of state dollars into affordable developments.³¹⁴

But now that community agenda is on the table, breaking the employer-union bargaining dyad wide open on one side. What results is partly a traditional coalition of shared values, but even more an unconventional collection of self-interests, newly aligned in a surprising setting. Others have contended that the inclusion of concrete, outside interests in bargaining is not simply an important development but a difference-maker for the labor movement going forward.³¹⁵ I

308. *Id.*

309. See Ricker, *supra* note 291 (citing “progress in every priority area advanced by the study groups”).

310. McCartin, *supra* note 98. See also Kimberly Sanchez-Ocasio & Leo Gertner, *Fighting for the Common Good*, 126 YALE L. J. FORUM 503, 504–06 (2017) (describing, more broadly, the rise of union campaigns that “address[] social conditions whether or not they are directly related to traditional terms and conditions of employment”).

311. See, e.g., McCartin, *supra* note 98 (noting that the “spirit . . . recall[s] a venerable tradition”).

312. ROSENFELD, *supra* note 24, at 50, 160.

313. James Gray Pope, *Labor-Community Coalitions and Boycotts*, 69 TEX. L. REV. 889, 892–93, 902–06 (1991).

314. Janice Fine, *Contemporary Community Unionism: Some Lessons from Baltimore and Stamford*, PARTNERING FOR CHANGE: UNIONS AND COMMUNITY GROUPS BUILD COALITIONS FOR ECONOMIC JUSTICE 165, 178–80 (David B. Reynolds, ed. 2004).

315. See, e.g., Stephen Lerner, *Injury to All: Going Beyond Collective Bargaining As We Know It*, 19

agree, but this essential, embedded feature of alt-bargaining could benefit from unpacking. Because self-interest can be more than an instrument useful in gathering a coalition. Interests can also be transformed, aligned, and leveraged to empower it. It is ultimately this practice of making individual concerns common that drives the sustainability of alt-bargaining's three legal orientations going forward.

A. Self-Interest in Organizing

For social theorists, the significance of self-interest—as opposed to, say, ideology—in activism is foundational and implicated in the development of many movement-building accounts.³¹⁶ Labor coalition theories exhibit a similar tension, often distinguishing between campaigns based on the degree to which allied groups can expect material gains from eventual union success.³¹⁷ Social movement unionism alliances, for example, are sometimes labeled “vanguard” coalitions,³¹⁸ a nod to labor in the lead and allies “add[ed]-on to the pursuit of union goals,” exclusively.³¹⁹

When West Virginia workers win pay demands but stay on strike until others do too, or when teachers propose twenty provisions for the community and nine for themselves, it's clear alt-bargaining is expanding the circle of coalitional interests. As a bargaining innovation, the move could be viewed cynically—an enticement to swarm an open mic, a sweetener to show-up at a rally, or an incentive write a representative. But the evidence suggests that's not how tying demands to outsiders' self-interest is playing out.

Instead, alt-bargaining leaders seem to have recognized what community organizers have long known: self-interest can be used strategically and without exploitation in organizing.³²⁰ There, interests are about relationships, not individualism. Desires develop experientially, through interactions with others. True “self”-interest requires both a recognition and a degree of differentiation from what others want.³²¹ Self-interest, as Dennis Jacobson puts it, is not

NEW LAB. FORUM 45, 46 (2010) (“Communities and allies must become invested . . . as a way to achieve their own self-interests.”).

316. See Edward Rubin, *Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 12–17, 25–33 (2001) (tracing the role of self-interest and ideology in the development of resource-mobilization, framing, and critical theories of movement-building); Sheryll Cashin, *Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253, 278 (2005) (“The most significant debate in the political science literature about multiracial coalitions is whether interest or ideology is the more effective motivating force. . .”).

317. Carola Frege, et al., *Comparative Coalition Building and the Revitalization of the Labor Movement*, IRRRA 55th Annual Proceedings 122, 124–25 (2003), <http://lerachapters.org/OJS/ojs-2.4.4-1/index.php/PFL/article/view/542/538> [<https://perma.cc/E9HP-RBG6>].

318. Bruce Nissen, *Labor-Community Coalition Strengths and Weaknesses in Reynolds*, *supra* note 314, at 55.

319. AMANDA TATTERSALL, *POWER IN COALITION: STRATEGIES FOR STRONG UNIONS AND SOCIAL CHANGE* 9–11 (2011).

320. PAUL OSTERMAN, *GATHERING POWER: THE FUTURE OF PROGRESSIVE POLITICS IN AMERICA* 49–51 (2002).

321. MARK R. WARREN, *DRY BONES RATTLING: COMMUNITY BUILDING TO REVITALIZE*

selfishness, which “denies the ‘other,’” nor *selflessness*, which “denies the ‘self,’” but something in-between.³²²

At meetings, this principle plays out in real time, as members sit in twos sharing personal histories before linking the stories to interests in cheaper rent, easier commutes, or safer streets.³²³ The organizing key is for activists to see that all the stories, and all the interests, connect. Visitors to a training are likely to see easels filled with furiously crisscrossing stick diagrams of interests flowing upwards to converge on a handful of actors or entities reliant on regressive policy commitments to maintain the status quo.³²⁴ This sort of “power analysis” is meant to seed notions of self-interest that are longer-term, broader, and necessarily more mutual than participants may have first identified.³²⁵

The revelation can also happen organically. Storytelling does not stop when the group reassembles. There are just more listeners, more vulnerabilities, and, most critically, more echoes.³²⁶ As theologian Jeffrey Stout recounts,

Initially there might seem to be a series of disconnected individuals, relating stories about particular events they have experienced. But, with any luck, two sorts of connections will begin to take shape: emotional connections among the individuals who are mirroring one another’s concerns, but also thematic connections among the stories, a number of which now appear to be about something more than the particulars referred to explicitly in them.³²⁷

Religious institutions are home-base for much community organizing,³²⁸ and for many that “something more” may translate into a faith-value, like a “theology of housing” as one activist has put it.³²⁹ But secular frames, like equality in housing, or, as some scholars have suggested, a “common good” right to be free from economic domination, work as well.³³⁰

The challenge is to concentrate these values “into a zone that is neither completely abstract, and thus inattentive to the particularity of the stories being told, nor so focused on the distinctness of each story that no connections among stories can be made explicit.”³³¹ Stories about bad schools may energize the pursuit of justice, but a talented organizer must translate that passion into a drive to reverse “what the school system is doing,” specifically, to disadvantaged

AMERICAN DEMOCRACY 224 (2001) (“[T]rainers stress that the Latin root of the word interest is *interesse*, which means ‘to be among or between.’”).

322. DENNIS A. JACOBSEN, *DOING JUSTICE* 51 (2001).

323. WARREN, *supra* note 321, at 224.

324. *Id.*

325. JEFFREY STOUT, *BLESSED ARE THE ORGANIZED: GRASSROOTS DEMOCRACY IN AMERICA* 41 (2010). *See also* JACOBSEN, *supra* note 322, at 54.

326. STOUT, *supra* note 325, at 155.

327. *Id.*

328. Two of the largest national networks, the Industrial Areas Foundation and Gamaliel, ground their work, at least initially, in religious institutions. Warren, *supra* note 321, at 47-71; Cashin, *supra* note 316, at 286-87.

329. WARREN, *supra* note 321, at 58.

330. *See, e.g.*, STOUT, *supra* note 325, at 41; CHRIS SHANNAHAN, *A THEOLOGY OF COMMUNITY ORGANIZING: POWER TO THE PEOPLE* 69 (2013).

331. STOUT, *supra* note 325, at 157.

students right now.³³² When it works, self-interests that were once individual, and then philosophical, become grounded and common.

B. Self- to Common-Interests in Labor Coalitions

The progression from self to shared interests is not limited to community organizing. That it can be applied in the context of labor coalitions, specifically, is suggested by some recent case studies, which identify the depth of a campaign's "common concern"—defined as the degree to which a coalition's goals reflect the "mutual self-interest" of participants and the public—as a major factor in its likely success.³³³

A good example comes from the four-year, multi-union crash course on coalition strength and shared self-interest spurred by Walmart's low-wage incursion into the Chicago market in 2003. UFCW, the retail and grocery union, faced the most immediate threat, and its first move was to gather-up groups to challenge the company's plans under city zoning laws.³³⁴ While so-called "site fights" had been somewhat successful in Southern California,³³⁵ here organizers faced immediate ambivalence. For one, Walmart's proposals zeroed-in on the city's depressed, mostly African-American south and west sides, where residents saw the stores as a consumer oasis, and a cheap one at that.³³⁶ ACORN, the most effective community organization at the time, was deeply divided over participation and joined only grudgingly, unable to activate its members after an intensive education effort.³³⁷ The powerful clergy community was even less energized, desperate for jobs—any jobs—for its congregants and accepting of financial "donations" direct from Bentonville.³³⁸ The lack of unity made the negative, "No-Walmart" messaging vulnerable to charges of racism, which Walmart lobbed freely against the largely white union officials.³³⁹ While one south-side project was scrapped, about a dozen more eventually went through.³⁴⁰

Though organizers reflected on the zoning strategy with regret,³⁴¹ its failure fueled a more cohesive formula. If the unions couldn't stop Walmart, perhaps they could lessen its impact. In 2004, labor changed course to push legislation mandating a ten dollar minimum wage, plus three dollars in benefits, for "big-

332. *Id.*

333. Tattersall, *supra* note 319, at 26, 21–22 (identifying "scale" and "organizational relationships and structure" as the other key attributes).

334. *Id.* at 74–75.

335. Scott Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CAL. L. REV. 1927, 1929–30 (2007).

336. Tattersall, *supra* note 319, at 76, 77.

337. *Id.* at 75, 77.

338. *Id.* at 79–80.

339. *Id.* at 78, 80.

340. *Id.* at 81; Walmart.com, Storefinder, Chicago, <https://www.walmart.com/store/finder?location=60606&distance=50> (on file with author).

341. TATTERSALL, *supra* note 319, at 77–78.

box” stores like Walmart.³⁴² The shift paid immediate coalitional dividends. ACORN, having “built its name” on living wage work, mobilized its membership easily, as did a major immigrant alliance fresh off organizing the city-wide “Day Without Immigrants” workplace strike.³⁴³

Union members required a more personalized pitch. At Local 880, a “general rap” about inadequate city minimums drove zero participants to a rally.³⁴⁴ But when better pay at Walmart was linked to “mak[ing] it easier to push wages up in our industry,” dozens of home- and child-care workers started showing up to events.³⁴⁵

For these actors, an evident or educated self-interest in higher wages motivated involvement. Living wages also smoothly converted into a moral value that, this time, garnered clergy support, tied on-the-fence politicians into knots, and made canvassing the public a relative breeze (ACORN organizers carried extra cell-phones for on-the-spot lobby calls).³⁴⁶ Yet, as sociologist Amanda Tattersall reported, the actual “*issue* of living wages did not overlap with the issues that many of the [other coalition] partners were focused on.”³⁴⁷ Instead, a “remarkably strong set of organizational relationships” allowed campaigners to translate particular living wage self-interests, and general living wage values, into a “shared organizational interest in building social and political power” long-term in Chicago.³⁴⁸ So, while the Chicago Federation of Labor, a union umbrella-group, did not have worker-members to protect or mobilize, it did confront a weakened grip on the council that a campaign role could help revitalize.³⁴⁹ At major rallies, speakers touched on topics spanning the military to trains, but everyone was up for signing postcards that distilled the common political-economy denominator: no Alderman will survive a “no” vote.³⁵⁰

From a living wage perspective, the campaign’s victory was moral. The mayor was forced to veto legislation for the first time in seventeen years, and an override failed by one vote.³⁵¹ But from a coalition perspective, the “broadest labor participation and the broadest community participation” in memory suggested that the real winner was the transformation of self- to shared-concern.³⁵²

342. See Erik Eckholm, *Chicago Orders “Big-Box” Stores to Raise Wages*, N.Y. TIMES (Jul. 27, 2006).

343. TATTERSALL, *supra* note 319, at 82, 87; Michael Martinez, *Rallies draw over 1 million*, CHI. TRIB. (May 2, 2006).

344. TATTERSALL, *supra* note 319, at 87.

345. *Id.* at 87-88.

346. *Id.* at 89, 87, 82-83.

347. *Id.* at 82.

348. TATTERSALL, *supra* note 319, at 64, 82.

349. *Id.* at 84.

350. *Id.* at 63-64.

351. *Id.* at 93.

352. TATTERSALL, *supra* note 319, at 99. Tattersall agrees: “I argue that success cannot be measured by policy victories alone but is evident in the sustainability of the [coalition’s] relationships and its ability to dramatically change the political climate.” *Id.* at 98.

C. Self- to Common-Interests in Alt-Bargaining

Alt-bargaining seems to be drawing from a similar playbook. In various ways, and surely in fits and starts, the campaigns can be seen as experimenting with shifts from self- to common-interests in coalition. Like any workplace, where alt-bargaining emerges there are stories, frustrations, and anecdotes passed in hallways, breakrooms, and on-line. Like any workplace, many interests—pay, insurance, favoritism—are obvious. There may not be easels to connect the dots, but in St. Paul, Phoenix, and elsewhere, book clubs, moderated Facebook groups, and even viral memes get behind those grievances to reveal a bank, funder, or legislator. Chicago teachers of course didn't want their schools to close, but *Shock Doctrine* and retreats exposed reform as a business boon and led them to reject a thirty-five percent raise, potentially break the law, and embrace community because of it. Minnesota teachers cut out the middleman by inviting community into the book club in the first instance and melding demands from there. West Virginia teachers hadn't had a raise in years, but a "Resting Mitch Face" helped unify the fight—and the solution.

To the extent these and other approaches can be labeled "power analyses," they range from the informal to the ad hoc. But, as the "common good" moniker itself suggests,³⁵³ the book clubs, Facebook groups, and other methods seem to be working. Outside observers writing about the campaigns identify not "parent" or "teacher" demands but "negotiations for broader, shared gains."³⁵⁴ After a 50,000-person march in Phoenix, Slate.com asked a cross-section of high-school and elementary teachers to state their main demand. The uniform answer—from three, presumably practiced, leaders but also many merely inspired participants—would have provoked applause at all but the most conservative community gatherings: a sustainable school funding source.³⁵⁵ The real tells, though, are the results. The extra-workplace demands could easily be foils traded off for more pay or fewer standardized tests. But they are deal-breakers, often pushed at the expense of considerable legal risk. SPFT might have thanked moms and dads for putting up yard-signs, dropped their desire to participate in school discipline, and stretched new compensation an extra half-million. But SPFT's members didn't do that. They'd spent an hour discussing Chapter 7 of Alfie

353. Bargaining for the Common Good, <http://www.bargainingforthecommongood.org> [<https://perma.cc/JP7M-DBZL>]

354. Marilyn Sneiderman, *Going on Offense in Challenging Times*, NEW LAB. FORUM (Jan. 2018), <http://newlaborforum.cuny.edu/2018/01/18/going-on-offense-during-challenging-times/> [<https://perma.cc/PZY3-XL94>].

355. Molly Olmstead, *Why Teachers Keep Walking Out*, SLATE.COM, (May 2, 2018), <https://slate.com/news-and-politics/2018/05/arizona-teachers-explain-why-they-went-on-strike-to-preserve-public-education.html> [<https://perma.cc/D7XJ-PH9V>].

Kohn's *The Schools Our Children Deserve*³⁵⁶ and realized that this seemingly outside interest was also their own.³⁵⁷

V

THE FUTURE

It is the capacity to turn individual interests communal and, in turn, gather more than a few crowds, that undergirds alt-bargaining's sustainability, particularly in the face of legal risks. The power to strike over permissible demands or to strike without the right to strike at all relies, in practice, on mass support as a counter-force. How far that principle can be pushed is not clear, but it is worth considering where alt-bargaining might go in the medium and long term.

One stop is surely the private sector. Opportunities in the public sector are ultimately tied to budgets, and budgets are increasingly shaped by private institutions. Already campaigns make large companies and banks secondary or even joint-targets, spotlighting the role of tax avoidance and exorbitant fees in immiserating public services.³⁵⁸ The parent unions of CTU, SPFT, AEU, and the others represent thousands of non-public workers in hospitals, universities, and charters right now.³⁵⁹ Most importantly, nothing about alt-bargaining is limited to particular employers. A website broadcasts victories, a training curriculum teaches best practices, and regional leaders gather regularly to spread lessons and challenges.³⁶⁰

More questions surround the organizational structures of future campaigns. Were permissive demands, jurisdictional innovation, and doctrinal optimism to become standard bargaining table practice, heavy community participation would need to be become equally regular. A pressing issue is how that might be sustained and, relatedly, where everyone might sit.

Central to alt-bargaining's achievements is the ennobling, yet strategic, use of self-interest. CTU, #RedForEd, and the Denver teachers had success not just because they made broad demands, but because some of those demands were of direct concern to outsiders. However, because much of alt-bargaining's momentum has developed on the fly, initial links between specific demands and

356. ALFIE KOHN, *THE SCHOOLS OUR CHILDREN DESERVE: MOVING BEYOND TRADITIONAL CLASSROOMS AND 'TOUGHER STANDARDS'* 122–23 (2000) (discussing parental values and school discipline).

357. Ricker, *supra* note 291.

358. Sneiderman, *supra* note 354.

359. The American Federation of Teachers, for example, represents around 55,000 private-sector workers in healthcare alone. AFT, *About AFT Nurses and Healthcare Professionals*, <https://www.aft.org/healthcare/about> [<https://perma.cc/RP9X-PS4F>]. A sizable portion of the National Education Association's 200,000 higher education members are also in the private sector. NEA, *Collective Bargaining in Higher Education*, <http://www.nea.org/home/62147.htm> [<https://perma.cc/Z3K7-TSY8>].

360. Sneiderman, *supra* note 354. *See also* Bargaining for the Common Good, bargainingforthecommongood.org [<https://perma.cc/JP7M-DBZL>].

specific community segments are blurry and potentially underdeveloped. When West Virginia's teachers won their raise and kept striking until it was extended to others, perhaps state workers would have preferred a dental plan. Maybe an additional demand would have added contracted employees to the fight. There was no natural mechanism to find out.

One solution would be to make space for community groups at the table, and some have suggested expanding collective bargaining to include non-profits, neighborhood associations, and even other local businesses.³⁶¹ Amid the rapid deindustrialization of the 1980s, then-United Mine Workers President Trumka supported federal legislation mandating community negotiations prior to a shut-down.³⁶²

There may be a way, however, to sustain deep community involvement through targeted interests and local voice without fundamentally upending the existing architecture of U.S. labor relations: pool voting.

A. Pool Voting

Pool voting expands the universe of people eligible to ratify collective bargaining agreements from members of the relevant bargaining unit to some other, usually much larger, group. In the most famous example, striking locals representing different plants at International Paper agreed to merge into a single voting unit so that no one local could accept an offer unless a majority of all members, across all locals, agreed.³⁶³ Echoing the structure of recent campaigns, the alt-bargaining variant would probably have the union at the negotiating table, alone, pressing demands to be voted on by both members and outside groups.

But what groups, and what demands? That should depend on who speaks up and what, exactly, they say they want. Ideally, unions already have a sense of local needs through members' existing external relationships³⁶⁴ or, failing that, the newspaper. But a more outside-in approach to priorities would foster "community demands" in the most actualized sense. A possible model comes from the remarkable story of Teamsters Local 688 in 1950s St. Louis, which sought to cultivate members' dual-nature as "worker-citizens" by bringing "shop-

361. See, e.g., CHARLES C. HECKSCHER, *THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION* 10–11 (1988) (proposing "mechanisms of multilateral negotiation" of workplace and "general policy issues" among "varied employee" and community groups); Samuel Estreicher, *Deregulating Union Democracy*, 2000 COLUM. BUS. L. REV. 501, 502, 516 (2000) (proposing that "existing laws be amended to allow any individual or organization . . . to vie for exclusive bargaining status").

362. Nicolaus Mills, *Coping with the '80s: A New Kind of War for the U.M.W.*, NATION (Nov. 8, 1986).

363. Getman & Marshall, *supra* note 32, at 1830–31. As the NLRB later explained: "[E]mployees in the participating units first vote for-or-against ratification of their own separately negotiated contracts . . . [T]he votes pro-and-con from all the units are pooled and tabulated together. If a majority of the pool's total votes is against ratification of these separate contracts, there is no ratification of any contract." Int'l Paper, 309 N.L.R.B. 44, 44 (1992).

364. Jane McAlevey and others have argued that workers' external, indigenous relationships are the key to strong union organizing coalitions. See, e.g., Jane McAlevey, *Everything Old Is New Again*, JACOBIN (Aug. 1, 2016) (describing "whole-worker" organizing).

floor expertise” to bear on neighborhood issues in astonishingly literal senses.³⁶⁵ Residents could fill-out a “community grievance form” and deliver it to a “community steward” who would “then take the grievance to the union and then the appropriate city agency for redress.”³⁶⁶ An inadequate response moved the complaint to higher rungs of authority, from supervisors, to elected officials, to judges, and ultimately voters.³⁶⁷ Early on the union resolved around 250 issues ranging from unsafe sidewalks to uncollected trash, but as the program matured the grievances expanded. And so did the grievants.³⁶⁸ The near-death of an infant from rat bites turned a generalized public housing anxiety into a concrete complaint backed by the vocal support of the NAACP, the UAW, the Metropolitan Church Federation, and the press.³⁶⁹ Subsequent efforts to get the city to enforce its existing rodent regulations burnished Local 688’s reputation as a “staunch defender of the community’s safety and well-being” and served as proof of concept for Local 688’s vision of a “community bargaining table”: unionists and citizens allied “to define and negotiate the terms of a social contract” with public officials.³⁷⁰

As historian Robert Bussel tells it, the union’s creative turn to community arose in part from leaders’ presumptions about the continued stability (and even strengthening) of workplace collective bargaining relative to weakening state support for urban communities.³⁷¹ The modern balance is different. Corporate power has crushed private sector collective bargaining and often exerts difference-making authority over the levers of local governments. Uber,³⁷² Amazon,³⁷³ and trade associations³⁷⁴ have bewildered activists by winning reversals of regulatory, legislative, and referendum victories with shocking speed. Today’s corporations are both “mega”³⁷⁵ and exert “octopus-like” control over

365. ROBERT BUSSEL, *FIGHTING FOR TOTAL PERSON UNIONISM: HAROLD GIBBONS, ERNEST CALLOWAY, AND WORKING-CLASS CITIZENSHIP* 88 (2015). Joseph McCartin’s foundational depiction of “bargaining for the common good” cites Bussel’s retelling of Local 688’s community steward program as one strand in a long tradition of “[e]fforts to fuse the interests of union and community.” McCartin, *supra* note 98.

366. BUSSEL, *supra* note 365, at 88.

367. *Id.* at 88–89.

368. *Id.* at 90–92.

369. *Id.* at 93–94.

370. *Id.* at 93–95.

371. BUSSEL, *supra* note 365, at 88.

372. Olivia Solon, *How Uber conquers a city in seven steps*, *GUARDIAN* (Apr. 12, 2017), <https://www.theguardian.com/technology/2017/apr/12/why-everyone-hates-uber-seven-step-playbook> [<https://perma.cc/KL32-RZ6M>].

373. David Streitfeld, *Seattle Officials Repeal Tax That Upset Amazon*, *N.Y. TIMES* (June, 12, 2018).

374. Fenit Nirappil, *D.C. Council overturns wage hike for bartenders, servers—four months after voters approved it*, *WASH. POST* (Oct. 2, 2018).

375. Matt Phillips, *Apple’s \$1 Trillion Milestone Reflects the Rise of Powerful megacompanies*, *N.Y. TIMES* (Aug. 2, 2018) (“Today, a smaller cluster of American companies commands a larger share of total corporate profits than since at least the 1970s.”).

smaller entities, “increasingly impacting not just employment conditions, but housing affordability, credit availability, infrastructure, and the environment.”³⁷⁶

But that, as long-time community and union activist Stephen Lerner has said, also makes for especially juicy targets impacting especially varied constituencies—and interests.³⁷⁷ Lerner’s focus is the shadowy world of private equity, but take a more rooted company like Whole Foods, where fledging unionization efforts have emerged.³⁷⁸ Certifying merely a single unit at the aggressively non-union grocery would be a historic organizing development. Under standard bargaining theory, it would also be precarious.³⁷⁹ But alt-bargaining augurs something different. Even the smallest, most isolated, organized unit forces the company to sit down and negotiate.³⁸⁰ For alt-bargaining, that duty is like a green light to declare the neighborhood Whole Foods open for community business and the union open to suggestions. A local food bank may have some ideas for the table, but so might a homeless organization that has been asking the grocer’s parent, Amazon, to support a county housing initiative. Maybe employees at a nearby Zappos facility—another Amazon offspring—want parental leave. The universe of potential requests and requestors is seemingly great, and it corresponds with the potential universe of those with tangible incentives to pressure Whole Foods for a good contract. That could be a lot of pressure.

Importantly, because each outside ask comes with new entrants to the voting pool, incentives flow in the opposite direction too. The union will surely be cognizant that failing to make good on, say, the food bank’s proposal could lose votes. But few negotiations result in complete victories. As the pool diversifies so does the danger that those with the narrowest interests will view the tentative agreement as a personal loss. That, though, just converts the union’s transactional incentive to pack the agreement with as much as it can into a *relational* incentive to transform initially differentiated desires into common, shared stakes. While the transactional incentive is likely to leave resentments in its wake, the relational incentive, as taught in Part IV, can unite.

B. The Long-Term

Community-based pool voting can, rightly, be seen as an innovative, community-enhancing contract strategy. But it also gestures towards a much more ambitious era of union-centered progressivism. The post-1960s “proliferation of movements, causes, and political identities”³⁸¹ makes it easy to

376. Teke Wiggin, *The Silver Lining of the New Gilded Age*, AM. PROSPECT (Oct. 22, 2018).

377. *Id.*

378. Matt Day, *Group of Whole Foods workers aims to unionize*, SEATTLE TIMES (Sept. 6, 2018); Mugambi Mutegi, *‘Fight for \$15’ begins 2nd round in Chicago*, CHI. TRIB. (Jul. 31, 2013).

379. Matthew Dimick, *Productive Unionism*, 4 U.C. IRVINE L. REV. 679, 700–01 (2014) (describing how wage gains isolated to a single unit in a non-union market is predicted to lead to job losses, negative wage pressures, and dwindling employee support).

380. 29 U.S.C. § 158(a)(5).

381. L.A. KAUFMAN, DIRECT ACTION: PROTEST AND THE REINVENTION OF AMERICAN

depict the modern Left as fractured³⁸² or directionless.³⁸³ Yet, as L.A. Kaufman has recently argued, multiplicity—even multiplicity at cross-purposes—can be a feature of protest, a “source of political validation and strength,” not a bug.³⁸⁴ The anti-globalization movement at the millennium’s turn is emblematic, particularly the so-called “Battle for Seattle,”³⁸⁵ where some 40,000 anti-nuke, anarchist, Central American, peace, feminist, and, famously, “Teamster and turtle” activists forced the November 30, 1999 World Trade Organization meeting to disband.³⁸⁶ Lost in the apparent “hodgepodge of groups” and chaos of the streets—the protests have been dubbed “the Occupy Wall Street of their time”³⁸⁷—was how activists “smoothly and brilliantly” divided city blocks “like pieces of pie,” assigning “clusters of affinity groups” to take “responsibility” for blocking delegates’ path to the summit in “each wedge.”³⁸⁸

For Kaufman, the experience teaches that a differentiated unity, even among thousands of participants, is possible, so long as organizers trade the need for issue and even tactical convergence for general agreement on one “very concrete objective”—at the WTO, disruption—plus an overarching “vision of systemic change.”³⁸⁹ That is a tall order. In Seattle it took months of inter-group planning sessions and a week-long, in-person training in an east-side warehouse.³⁹⁰ But where the right object and the right vision take root, the lived experience is empowerment through diversity. As one activist reflected, it was “very instructive for a lot of people that it can be done, that we don’t all have to be on one program, we don’t all have to have one message, we don’t all have to have one tactic.”³⁹¹

RADICALISM ix (2017).

382. Political scientist Sara Watson calls “a divided left, in which parties and unions are seeking to mobilize different constituencies in which left parties are themselves divided between moderate and far-left groups with conflicting interests . . . common in welfare states outside of Northern Europe.” SARA E. WATSON, *THE LEFT DIVIDED: THE DEVELOPMENT AND TRANSFORMATION OF ADVANCED WELFARE STATES* xviii (2015). Others have identified leftist divisions in the political economy, Pete Davis, *The liberal-left divide reshaping American politics*, *GUARDIAN* (Oct. 26, 2017), and among radicals. MILTON CANTOR, *THE DIVIDED LEFT: AMERICAN RADICALISM, 1900-1975*, 6 (1978) (depicting the “recurring” and ultimately fatal American radicalist “dilemma—the relation between ultimate goals and immediate methods, orthodoxy and opportunism”).

383. KAUFMAN, *supra* note 381, at ix–x (“At times, it can seem like the number of recent radicalisms stands in inverse proportion to their overall influence.”).

384. *Id.* at 136.

385. ADAM REICH & PETER BEARMAN, *WORKING FOR RESPECT: COMMUNITY AND CONFLICT AT WALMART* 9 (2018).

386. KAUFMAN, *supra* note 381, at 144.

387. Noah Smith, *The Dark Side of Globalization: Why Seattle’s 1999 Protesters Were Right*, *ATLANTIC* (Jan. 6, 2014).

388. KAUFMAN, *supra* note 381, at 144–45, 149.

389. *Id.* at 147. Kaufman is clear that not all relationships went smoothly. Labor leaders were upset that street blockades interfered with a major march, and some groups ignored official commands to protect private property, providing a convenient excuse for police to unleash tear gas and rubber bullets. *Id.* at 146, 149–50.

390. *Id.* at 143–44.

391. *Id.* at 147.

Alt-bargaining might eventually cultivate these insights on a mass scale. Right now, lots of organizations might want to demand things from a large company like Exxon. But, again, federal law does not require Exxon to negotiate with the Sierra Club. It requires Exxon to negotiate with unions. The labor movement therefore has an opportunity to position itself as something like an all-purpose progressive agent, a go-between cloaked by law to traverse the divide between public and corporate interests. Mega-corps might come to be seen not simply as job or service providers but as resource extraction points, with demands reviewed, renewed, or changed every three years.

What gets contributed would ultimately be a function of the bargaining “team’s” power. But since the negotiation obligation repeats, the team can expand or contract its size and tactics over time, as opportunity and experience dictate. A climate change organization might try apocalypse-themed ads or street theater to demand Exxon’s support for a federal carbon tax, realize the public is better engaged by exposed hypocrisy, and switch to teach-ins. Imagine the anti-sex discrimination organization TIMES UP capitalizing on data leaks by demanding the gold standard in pay transparency and marching with Black Lives Matter. Alt-bargaining allows many demands and much activism to be handed-off, while the careful work of CTU, #RedforEd, and many more unions across the country show how an underlying, dual-focused unity can nevertheless remain: a standard focus on a collective bargaining agreement, and an audacious focus on a massive conglomerate’s relationship to the public. The labor movement could sit at the center of all of it.

C. Challenges

This future sketch is, admittedly, aspirational. To this point, overwhelming public support has probably papered over a number of basic legal challenges that would become more acute in the unelected private sector. Primarily, the demands that would originally animate outside groups are the very demands the company could freely ignore.

Precedent is precedent, but it’s worth noting that time has tarnished the problem case, *NLRB v. Borg-Warner*, more than most. Divvying demands between “mandatory,” strike-enabling things that affect “terms and conditions of employment” and “non-mandatory” things that don’t was always textually suspect³⁹² and practically strange.³⁹³ Before the decision Archibald Cox warned

392. As Archibald Cox and others have said, Congress likely listed subjects in Section 8(d) as minimums for good faith negotiations and, at the very least, did not intend to prohibit unions from resorting to economic pressure over other subjects. See Cox & Dunlop, *supra* note 106, at 1078, 1081–83; Note, *Major Operational Decisions and Free Collective Bargaining*, 102 HARV. L. REV. 1971, 1973–76 (1989) [hereinafter Major Operational].

393. For one, a right to insist only on “mandatory” topics obviously invites rhetorical mischief, like oblique mentions of key permissive demands under cover of more explicitly conveyed—but, as everyone understands, less important—mandatory topics. See, e.g., Major Operational, *supra* note 392, at 1984; Note, *Application of the Mandatory-Permissive Dichotomy to the Duty to Bargain*, 15 WM. & MARY L. REV. 918, 937–45 (1974) (describing many other “deficiencies”). As Justice Harlan noted in dissent,

the Board against meddling with bargaining scope,³⁹⁴ and after he just lamented: “[c]ollective bargaining is too dynamic for us to decide today what should be required or permissible . . . tomorrow.”³⁹⁵ Later cases compounded the damage by ignoring congressional calls to consider work “conditions” broadly, “left in the first instance to employers and trade-unions” with a view to “the social and political climate at any given time.”³⁹⁶

The decision remains, but we could at least start acknowledging that increasingly the social and political climate is that community conditions *are* work conditions. Trade-unions certainly think so. That’s why a Teamsters local declared itself a “sanctuary union,” began challenging Immigration and Customs Enforcement agents at worksites, and started picketing detention centers.³⁹⁷ It’s why SEIU spends millions raising wages for non-members³⁹⁸ and winning laws letting non-union workers support community organizations through payroll deductions.³⁹⁹ It’s why alt-labor—non-union through and through—would probably collapse without traditional labor’s money. And it’s why the largest union federation nearly granted internal voting rights to the NAACP and Sierra Club.⁴⁰⁰ Today, notions embedded in decisional law that unions don’t know enough,⁴⁰¹ or lack interests enough,⁴⁰² to deserve a say in how companies benefit or don’t benefit third-parties is pure anachronism. The irony is that when big companies want something, they bargain with communities—and dangle things like parks and rec centers—all the time. They even call the contracts “CBAs.”⁴⁰³

The cleanest escape would be for the NLRB to accept that something like funding a child care center is not “indirect or incidental” to “conditions of

“‘bargaining’ which enables one to ‘propose’ a particular point but not ‘insist’ on it” is not, actually, “bargaining.” *Borg-Warner*, 356 U.S. at 724.

394. Cox & Dunlop, *supra* note 106, at 406 (“If capital and labor are able to adjust questions concerning the allocation of responsibilities to their mutual satisfaction, society will gain nothing by imposing different answers.”).

395. Cox, *supra* note 106, at 1084.

396. *First Nat’l Maintenance Corp. v. NLRB*, 452 U.S. 666, 675 n. 14 (1981).

397. Ginger Adams Otis, *Teamsters form ‘sanctuary union’ to fight ICE agents*, N.Y. DAILY NEWS (Feb. 10, 2018).

398. NELP, DataBrief, *Impact of the Fight for \$15*, (Nov. 2018), <https://s27147.pcdn.co/wp-content/uploads/Data-Brief-Impact-Fight-for-15-2018.pdf> [<https://perma.cc/9QUB-LL9F>].

399. Steven Greenhouse, *Fast-Food Workers Claim Victory*, N.Y. TIMES (Jan. 9, 2018).

400. Susan Page, *AFL-CIO leader seeks to expand membership beyond unions*, USA TODAY (Aug. 7, 2013).

401. See, e.g., *UAW v. NLRB*, 470 F.2d 422, 427 (D.C. Cir. 1972) (describing “subject areas as to which determinative financial and operational considerations are likely to be unfamiliar to the employees and their representatives”).

402. See *First Nat’l Maintenance Corp.*, 452 U.S. at 689 (Brennan, J. dissenting) (“I cannot agree with this [balancing] test, because it takes into account only the interests of *management*; it fails to consider the legitimate interests of the workers and their union.”)

403. CBAs or “community benefit agreements” are private contracts negotiated between businesses and community groups to smooth approval of development projects. RICHARD SCHRAGGER, *CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE* 156 (2016). Neighborhoods frequently use the process to negotiate specific “neighborhood services.” *Id.*

employment.”⁴⁰⁴ The case could be made with hard facts—childcare options really do control the jobs, hours, and wages members can accept—or the soft reality argued in this article: in alt-bargaining, community concerns, and work concerns, really do merge. If that seems like a stretch, consider that interests so indirect as to not tangibly affect a particular workplace *at all* can be protected when employees act collectively.⁴⁰⁵ It also accords with the theory underlying scholars’ calls for the Board to label any contested subject mandatory as a matter of course: if the union wants to talk about it, it’s related to working conditions.⁴⁰⁶

Moreover, although alt-bargaining’s greatest room for growth is in the private sector, in the interim an analogous state law progression should also be on the table. While public employee collective bargaining statutes are diverse, most parrot the NLRA’s language on bargaining scope,⁴⁰⁷ and all are influenced by the NLRB’s analyses.⁴⁰⁸ Thus, piggybacking is a possibility,⁴⁰⁹ but if so states would have to wrestle with the classic argument against expanding mandatory topics where taxpayer dollars are in play: “certain public decisions belong to the public and . . . these decisions cannot be submitted to a collective bargaining process which restricts the public’s participation.”⁴¹⁰ Others have already made good arguments against this position,⁴¹¹ but it is particularly unpersuasive in situations

404. United Tech., 274 N.L.R.B. 1069, 1070 (1985).

405. All labor law students read *Eastex Inc. v. NLRB*, 437 U.S. 556, 567–70 (1978), where anti-right-to-work activism (in a state that was right-to-work already) and pro-minimum wage advocacy (in jobs that paid much more already) had a protected nexus with employees’ workplace interests.

406. See, e.g., Cox, *supra* note 106, at 1086 (“[T]he best course to follow in the future would be to reject all new attempts to limit the phrase ‘terms or conditions of employment,’ thus reading it to embrace very stipulation which management or labor might advance . . . [F]or if either side feels strongly enough about a proposal to press it . . . it is better to have the full discussion . . . than to attempt to conceal the issue by legal repression.”); Theodore St. Antoine, *Legal Barriers to Worker Participation in Management Decision Making*, 58 TULANE L. REV. 1301, 1305–07 (1984) (calling this the “wiser course”); Ellen Dannin, *Collective Bargaining, Impasse, and Implementation of Final Offers: Have We Created a Right Unaccompanied by Fulfillment*, 19 TOLEDO L. REV. 41, 70–71 (1987) (“Leaders. . . do not remain in office to seek to bargain about matters which the rank-and-file perceives to be irrelevant to their desires.”).

407. SETH D. HARRIS ET AL., MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS: CASES AND MATERIALS 703 (2013) (“[A] clear majority of the states that permit public employees to bargain collectively use [the NLRA’s] model.”).

408. MARTIN H. MALIN, ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 458 (2011) (“The private sector’s history and terminology has directly affected the development of private sector law, even in jurisdictions rejecting private sector scope of bargaining doctrine.”). See also *San Jose Peace Officer’s Ass’n v. San Jose*, 78 Cal. App. 3d 935, 942–43 (Cal. 1978) (“[B]ecause of the similarities in language between the MMBA and the National Labor Relations Act federal precedents provide useful analogies in determining the parameters of the phrase ‘wages, hours and other terms and conditions of employment.’”).

409. Other approaches include providing an exclusive list of mandatory topics or borrowing the NLRA’s language while also adding or subtracting specific subjects. See, e.g., Iowa Code. Ann. § 20.9 (providing a 16 point list); Mich. Comp. Laws Ann. § 423.215 (removing subjects while requiring bargaining “with respect to wages, hours, and other terms and conditions of employment”); 43 Pa. Stat. § 1101.702 (adding subjects while requiring bargaining “on policy matters affecting wages, hours and terms and conditions of employment”).

410. Clyde Summers, *Bargaining in the Government’s Business: Principles and Politics*, 18 U. TOL. L. REV. 265, 274 (1987).

411. See, e.g., Joseph E. Slater, *The Rise and Fall of SB-5: The Rejection of an Anti-Union Law in*

where the electorate has actually formulated many of the demands. That's pool voting.⁴¹²

The second major challenge is that pool arrangements have faced mixed legal receptions. International Paper's pool violated good faith because ratification was contingent on voting results at other units, which the Board labeled "an extraneous," meaning permissive, consideration.⁴¹³ The Sixth Circuit agreed but was more concerned with the pool's potential to inject "undue delay" into negotiations.⁴¹⁴ The envisioned pool is contingent on nothing but the standard single tally of unit members—plus others invited to join. The rise of remote electronic balloting in internal union elections suggests it could be over in a day.⁴¹⁵ When pools have been approved, it has been because the Board identifies a compelling "community of interest" among the constituents,⁴¹⁶ and that is alt-bargaining's very nature.

Since those decisions involved only cross-sections of union voters, a community pool might also raise novel questions about third-party participation in bargaining. In general, a union's negotiating team can include "outsiders" for "technical advice" or limited inter-union coordination, but not where they are "so tainted with conflict or so patently obnoxious"⁴¹⁷ as to be more about "mischief"⁴¹⁸ than good faith deliberations. Bringing a supervisor or corporate competitor to the table meets that bar,⁴¹⁹ as does inviting "observers" represented by another union to convince them to decertify and join-up with the bargaining union.⁴²⁰ Here, the motivation all around is a completed agreement, not disruption or chicanery. The third-parties are not even in the room and their interest in the proceedings is transparent and genuine. They are, after all, voters.

Further, there are good arguments—overlooked in International Paper and elsewhere—that pools should never be policed. The usual principle, for example, is that unions can approve agreements any way they want.⁴²¹ Ratification votes need not be held at all, and if they are the rules are limited primarily by provisions

Historical and Political Context, 43 U. TOL. L. REV. 473, 499-501 (2012).

412. If *Borg-Warner* and many of its state equivalents do not fall, it is worth noting that "permissive" means what it says: there's always a chance. Indeed, for some scholars there is "little practical difference between a mandatory and a permissive demand because bargaining outcomes depend upon bargaining power and pressures and not upon technical legal distinctions." June Miller Weisberger, *The Appropriate Scope of Bargaining in the Public Sector: The Continuing Controversy and the Wisconsin Experience*, 1977 WIS. L. REV. 685, 692-93 (1977). That, it seems, is one of the lessons of the Chicago Teachers Union's experience.

413. 309 N.L.R.B. at 44-45.

414. *Kobell v. United Paperworkers Int'l Union*, 965 F.2d 1401, 1408-09 (6th Cir.1992).

415. U.S. DOL, Office of Labor-Management Standards, OLMS Compliance Tip, *Electing Union Officers Using Remote Electronic Voting Systems* (Oct. 2016).

416. *Lynchberg Foundry Co.*, 192 N.L.R.B. 773, 777, 779 (1971).

417. *Gen. Elec. Co.*, 173 N.L.R.B. 253, 254-56 (1968).

418. *BHC NW Psychiatric Hosp.*, 356 N.L.R.B. No. 79 (2017).

419. *Gen. Elec. Co.*, 173 N.L.R.B. at 254-55.

420. *BHC NW Psychiatric Hosp.*, 356 N.L.R.B. No. 79 (2017).

421. *Lynchberg Foundry Co.*, 192 N.L.R.B. at 776-77 (suggesting that ratification issues are "not 'cognizable' under the Act").

in the union's own constitution.⁴²² And as Julius Getman and Ray Marshall have said, pools are pressure tactics.⁴²³ Expanding the franchise may happen to delay or diversify the topics under discussion,⁴²⁴ but the point is to hold the line on minimum terms, organize outsiders, or attract new allies to the fight. That puts pools beyond the scope of good faith remedies and into the rough-and-tumble of economic weaponry that, under *NLRB v. Insurance Agents*, the government must ignore.⁴²⁵

Other legal issues reflect problems endemic to the law itself. One could argue there is no pool without a proposed contract, there is no proposed contract without a union, and without better organizing and bargaining remedies it is fanciful to imagine unions, contracts, or pools on any meaningful scale. All true. Changes are needed at pretty much every step of the unionization timeline.⁴²⁶ Alt-bargaining's immediate moral, though, seems to be that opportunities lurk in the shadows of bad law and even no law, and crowds are the flashlights. As law reform awaits, the more light, the better.

Finally, a host of practical questions exist. In advocacy organizations, membership can be slippery. Who should be allowed to vote? Balancing participation levels with rights to organizational governance is a recurring challenge for many groups,⁴²⁷ but that also means that most already have internal policies that could be the basis for self-administered "voter registration" rules. Thus, inclusion on a mailing list, proof of attendance at the holiday party, or employment at a foundation that helps fund the organization are unlikely to trigger ballot access. On the other hand, dues payers, graduates of a formal onboarding process, or regular involvement in events, meetings, or actions—all

422. *Ackley v. W. Conf.*, 958 F.2d 1463, 1466, 1476 (9th Cir. 1992). For this reason, even unconventional restrictions like turn-out minimums and pre-election information limits are generally valid. *Id.* See also Mike Schneider, *After UPS contract vote, Teamsters feel betrayed*, SEATTLE TIMES (Oct. 17, 2018) ("54% of the ballots were 'no' votes, but under a Teamster rule, a rejection requires 2/3 of the voters to vote down the contract when less than 1/2 of the eligible members participate [thus ratifying the contract].").

423. Getman & Marshall, *supra* note 363, at 1890 n. 325, n. 327.

424. As Getman and Marshall note, so might strikes or lockouts. *Id.*

425. *Id.* The same argument has been made with respect to third-party participation in bargaining. Stephen B. Goldberg, *Coordinated Bargaining Tactics of Unions*, 54 CORNELL L. REV. 898, 900–02 (1969).

426. Thankfully, serious efforts are underway. See, e.g., Clean Slate Project, *Rebalancing Economic and Political Power: A Clean Slate for the Future of Labor Law, Labor and Worklife Program*, Harvard Law School, <https://lwp.law.harvard.edu/clean-slate-project> [<https://perma.cc/BX3A-QTQY>] ("The Clean Slate Project. . . is building a policy agenda to reconstruct labor law in order to rebalance our economy and politics."). Brishen Rogers & Kate Andrias, *Rebuilding Worker Voice in Today's Economy*, ROOSEVELT INST. (Aug. 2018), <http://rooseveltinstitute.org/rebuilding-worker-voice-todays-economy/> [<https://perma.cc/76A6-5T8R>].

427. Sameer M. Ashar's and Catherine L. Fisk's contribution to this symposium provides an especially thoughtful long-form consideration of the struggles advocacy organizations face in balancing activism with organizational voice. *Worker Center Governance, Voice, and Autonomy*, 82 LAW & CONTEMP. PROBS. No. 3, at 141 (2019). See also GORDON, *supra* note 84, at 112–47 (2005) (discussing the same issue in the context of an early worker center).

things that contribute to “membership” at many community organizations today—might make the cut.⁴²⁸

A more difficult issue concerns demands. Unions make the proposals, but should they feel obligated to offer every idea suggested by a community group? Very recent experiments with members-only bargaining highlight a real risk that the union could be presented with bad faith, regressive, or even anti-worker demands.⁴²⁹ For that reason, unions should have the discretion to pick and choose between various community-based proposals. While this raises the specter of top-down, unilateral, or authoritarian decision-making, union leadership has reasons both to be maximally inclusive and to avoid instigating grassroots opposition from outsiders with sound interests in the negotiation. Knowing that the union is most likely to present demands it believes will generate substantial external pressure on the company would also motivate groups to carefully vet and promote broad enthusiasm for potential proposals.

Ultimately, this Part’s goal is to offer an optimistic sketch of how an emerging approach to bargaining might evolve, not an accounting of hypothetical procedure. But like anything ambitious, surely the answers to these sorts of questions are likely to come through time and experience, trial and error. That, of course, is what welcomed alt-labor—and now alt-bargaining—to the workplace in the first place.

VI

CONCLUSION

On January 22, 2019, an “overwhelming supermajority” of the thirty-thousand members of the United Teachers Los Angeles voted to end a week-long strike.⁴³⁰ Asked if they “won,” sixth-grade teacher Ingrid Villeda replied, “We got almost everything.”⁴³¹ The walkout didn’t impact the district’s pay proposal a penny,⁴³² but Villeda wasn’t referring to wages anyway. Members’

428. See, e.g., Ashar & Fisk, *supra* note 427, at 165–67 (describing a variety of “different membership models” in worker centers); GORDON, *supra* note 84, at 71 (“Only graduates of the course were eligible to become members.”); Jobs with Justice, Our History (describing the “Jobs with Justice Pledge” that “commits each participant to be there at least five times a year for someone else’s fight, as well as their own”), <http://www.jwj.org/about-us/our-history> [<https://perma.cc/Y7S5-KV3R>]; Steven Greenhouse, *Fast-Food Workers Claim Victory in a New York Labor Effort*, N.Y. TIMES (Jan. 9, 2018) (detailing 1,200 New York City fast food workers who immediately took advantage of new law allowing them to “insist on having the restaurant they work for deduct money from their pay and forward that money to” a “nonunion workers’ group”).

429. See, e.g., Chris Brooks, *The Cure Worse than the Disease: Expelling Freeloaders in an Open-Shop State*, NEW LAB. FORUM (Aug. 2017) (describing a right-wing front group with a bargaining stance designed to “len[d] credibility to management’s position and create . . . the appearance that teachers in the district were divided”), <https://newlaborforum.cuny.edu/2017/08/24/the-cure-worse-than-the-disease/> [<https://perma.cc/9H5Z-7GYA>].

430. Jennifer Medina & Dana Goldstein, *Los Angeles Teachers’ Strike to End as Deal is Reached*, N.Y. TIMES (Jan. 22, 2019).

431. Ruben Vives, *L.A. teachers celebrate their victories as union and district reach a deal*, L.A. TIMES (Jan. 22, 2019).

432. Medina & Goldstein, *supra* note 430.

demands included an immigrant defense fund, transforming vacant district-owned land into affordable housing, and support for a cap on charter schools.⁴³³ Three months before, 24,000 University of California truckers, landscapers, and food service workers revived a tactic long left for dead, the mass sympathy strike in support of someone else's contract.⁴³⁴ West Virginia's labor laws haven't changed but neither have the teachers, who in February 2019 struck—and won—once again.⁴³⁵

Whether these and other like-campaigns will continue to multiply is an open question. Given the returns so far, they just might, raising the possibility that the next transition in bargaining trends could be the simplest: alt-bargaining might just lose the “alt” part.

433. Sarah Jaffe, *The Radical Organizing that Paved the Way for LA's Teachers' Strike*, NATION (Jan. 19, 2019), <https://www.thenation.com/article/los-angeles-teachers-strike-utla-organizing-solidarity/> [<https://perma.cc/HD77-L5X2>].

434. Cathie Anderson, *39,000 health workers announce when they will picket UC medical centers statewide*, SACRAMENTO BEE (Oct. 13, 2018); Steven Greenhouse, *The Return of the Strike*, AM. PROSPECT (Jan. 3, 2019).

435. Stanglin, *supra* note 260.