

PREDISTRIBUTION, LABOR STANDARDS, AND  
IDEOLOGICAL DRIFT:  
WHY SOME CONSERVATIVES ARE EMBRACING LABOR  
UNIONS (AND WHY THEY SHOULDN'T)\*

ALEXANDER MACDONALD\*\*

Common ground isn't always a good thing. For example, consider the growing popularity of "predistribution." Predistribution is an alternative to redistribution: rather than taxing people's incomes and spending the revenue on social programs, predistribution structures markets so they allocate income more evenly at the front end.<sup>1</sup> Though originally a progressive concept, predistribution has recently gained currency on the right.<sup>2</sup> Right-of-center thinkers have held it up as a way to shift power from an increasingly progressive corporate elite to an increasingly conservative blue-collar workforce.<sup>3</sup> These conservative thinkers have especially praised predistribution's approach to labor unions, which they say can help replace government regulation by

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\* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at [info@fedsoc.org](mailto:info@fedsoc.org).

\*\* Alexander MacDonald is a shareholder with Littler Mendelson, PC, in its Washington, DC, office. He is a core member of the firm's Workplace Policy Institute. His practice focuses on the intersection of workplace law and public law, including administrative, regulatory, and constitutional law.

<sup>1</sup> See Tyler Smith, *Predistribution vs. Redistribution*, AM. ECON. ASS'N (Oct. 27, 2022), <https://www.aeaweb.org/research/charts/equality-predistribution-europe-us>; see also John O. McGinnis, *Predistribution: The New Road to Serfdom*, LAW & LIBERTY (June 27, 2024), <https://lawliberty.org/predistribution-the-new-road-to-serfdom>.

<sup>2</sup> See generally, e.g., SOHRAB AHMARI, TYRANNY INC.: HOW PRIVATE POWER CRUSHED AMERICAN LIBERTY—AND WHAT TO DO ABOUT IT (2023); Rob Atkinson, *Growth vs. Redistribution: The New Fault Line in U.S. Politics of Economic Policy*, AM. COMPASS (Feb. 18, 2020), <https://americancompass.org/growth-vs-redistribution-the-new-fault-line-in-u-s-politics-of-economic-policy>.

<sup>3</sup> See Sohrab Ahmari, *Josh Hawley's Labor Revolution*, COMPACT MAG. (Apr. 17, 2024), <https://www.compactmag.com/article/josh-hawleys-labor-revolution>.

negotiating workplace standards in private.<sup>4</sup> And that sort of bottom-up standard-setting, they argue, promotes “industrial democracy.”<sup>5</sup>

There’s only one problem: predistribution doesn’t work. It is not just an academic idea ensconced in an ivory tower; it is a real-world policy prescription, and it is already being put into practice. In a dozen states and cities, local governments are establishing labor-standards boards, sectoral-bargaining schemes, and other predistributional labor models.<sup>6</sup> These models are constructed to circumvent federal labor and antitrust laws, which have become increasingly unpopular on the left.<sup>7</sup> And in practice, these models achieve few of their supposed benefits. They both increase government regulation and suppress worker voice.<sup>8</sup> They are, in short, everything their supporters on the right supposedly want to avoid.

Modern policy debates could stand to be a little less partisan. Ideas shouldn’t be dismissed solely because they originated in opposing intellectual camps. But policies also should not be embraced solely for the sake of consensus. They should be embraced when they work—and predistributional labor policies decidedly do not. These policies do none of the things they’re

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<sup>4</sup> See Wells King, *Give Workers Power to Boost Productivity, Reduce Inequality*, AM. COMPASS (Sept. 29, 2020), <https://americancompass.org/give-workers-power-to-boost-productivity-reduce-inequality>.

<sup>5</sup> See Oren Cass & Brad Littlejohn, *Conservatives Should Embrace Labor Unions*, PUB. DISCOURSE (Sept. 26, 2020), <https://www.thepublicdiscourse.com/2020/09/71843> (interviewing Oren Cass).

<sup>6</sup> See, e.g., SEATTLE, WASH., MUN. CODE ch. 14.23 (promulgating standards for domestic workers in Seattle); N.Y. DEP’T OF LAB., ORDER OF COMMISSIONER OF LABOR ROBERTA REARDON ON THE REPORT AND RECOMMENDATIONS OF THE 2022 FARM LABORERS WAGE BOARD (Sept. 22, 2022), [https://dol.ny.gov/system/files/documents/2022/09/fwrb\\_signed\\_order\\_093022.pdf](https://dol.ny.gov/system/files/documents/2022/09/fwrb_signed_order_093022.pdf) (outlining recommended standards for New York farm laborers); N.Y. LAB. L. § 674-a (standards board for agricultural workers); COLO. REV. STAT. § 8-13.5-205 (same); COLO. REV. STAT. § 8-7.5-104 (standards board for direct care workers); NEV. REV. STAT. 608.640 (standards board for home care workers); Detroit, Mich. Ordinance No. 2021-42 (Nov. 3, 2021) (standards board for multiple industries); CAL. LAB. CODE § 1475 (standards board for fast-food workers); see also David Madland, *Sectoral Bargaining Can Support High Union Membership*, CTR. FOR AM. PROGRESS (May 30, 2024), <https://www.americanprogress.org/article/sectoral-bargaining-can-support-high-union-membership> (describing recent burst of standard-board laws at state and local levels).

<sup>7</sup> See Cynthia Estlund, *The Case for Sectoral Co-Regulation*, 98 CHI.-KENT L. REV. 539, 540–41 (2024) (describing search of labor-left for new schemes to supplant federal labor law); ERIC POSNER, HOW ANTITRUST FAILED WORKERS 6 (2022) (pointing to the “historical neglect” antitrust law has shown for labor markets).

<sup>8</sup> See generally U.S. CHAMBER OF COM., STANDARDS BOARDS, BALLOT INITIATIVES, AND “INDUSTRIAL DEMOCRACY”: HOW UNIONS ARE USING GOVERNMENT TO CIRCUMVENT THE NLRA AND END LABOR-MARKET COMPETITION (forthcoming 2024) (on file with author) (describing new models and their function).

supposed to do; and, in fact, they amplify the problems they're supposed to solve. So if conservatives want to find more common ground, they should look elsewhere.<sup>9</sup>

### I. OLD WINE IN NEW WINESKINS

Predistribution is a new label for an old idea. Ostensibly, it is a strategy to reduce income inequality.<sup>10</sup> The United States mostly has addressed inequality through social spending: it collects taxes and uses the revenue to fund programs like Social Security and Medicare.<sup>11</sup> These programs are “redistributive” in the sense that they capture income after it is earned and reallocate it. Predistribution strategies, by contrast, address inequality from the opposite direction. They attempt to structure the market so that more income goes to lower-income people from the start.<sup>12</sup> A common example is the minimum wage.<sup>13</sup> Minimum-wage laws require employers to pay more to employees at the lowest end of the earnings ladder.<sup>14</sup> So in theory, these laws “predistribute” wealth to those with the smallest incomes.<sup>15</sup>

Another common strategy for reducing income inequality is unionization.<sup>16</sup> Unions theoretically can do that in two ways.<sup>17</sup> *First*, they can increase workers’ bargaining power vis-à-vis their employers.<sup>18</sup> Enhanced bargaining power allows workers to demand higher wages, thus raising their relative

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<sup>9</sup> See McGinnis, *supra* note 1 (arguing that predistribution is a “terrible prescription for addressing economic inequality” because it exacerbates misallocation of income and distorts political power).

<sup>10</sup> See Smith, *supra* note 1.

<sup>11</sup> See Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620; Medicare and Medicaid Act of 1965, Pub. L. No. 89-97, 79 Stat. 286.

<sup>12</sup> See Ben Jackson & Martin O’Neill, *The Politics of Predistribution*, 21 RENEWAL 54, 54 (2013), <https://journals.lwbooks.co.uk/renewal/vol-21-issue-2/abstract-8824> (interviewing Jacob Hacker); see also McGinnis, *supra* note 1.

<sup>13</sup> Alan S. Blinder, *Shore Up the Social Safety Net with “Predistribution,”* WALL ST. J. (June 6, 2024), <https://www.wsj.com/articles/shore-up-the-social-safety-net-with-predistribution-14ac0f8d> (citing minimum wage as an example of predistribution).

<sup>14</sup> See, e.g., 29 U.S.C. § 206 (federal minimum wage); SEATTLE, WASH., MUN. CODE ch. 14.19 (city minimum wage).

<sup>15</sup> See Blinder, *supra* note 13.

<sup>16</sup> See King, *Give Workers Power*, *supra* note 4; Jackson & O’Neill, *supra* note 122, at 58.

<sup>17</sup> See Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOCIO. REV. 513, 513 (2011) (arguing that decline in union density has led to greater wage inequality).

<sup>18</sup> See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

economic standing.<sup>19</sup> *Second*, unions can flatten wages across a single employer by negotiating fixed pay structures.<sup>20</sup> These fixed structures ensure that employees in similar jobs earn roughly the same thing; they leave less room for wage inequality within a bargaining unit.<sup>21</sup>

These general ideas have long been favored by progressive thinkers. Since at least the mid-19th century, leftist activists have tried to reduce inequality through regulation and collective bargaining.<sup>22</sup> More recently, Yale economist Jacob Hacker has relabeled the strategies and championed them as “predistribution.”<sup>23</sup> Likewise, Alan Blinder, former vice chair of the Federal Reserve, has written in support of predistributional policies.<sup>24</sup> And even the Biden administration has weighed in, directing federal agencies to consider the distributional effects of their regulations.<sup>25</sup>

But more surprisingly, the idea has also gained traction on the right. Leading the charge has been Oren Cass, chief economist of American Compass. Cass and his American Compass colleagues have spoken openly and often in

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<sup>19</sup> See *id.* (“National labor policy has been built on the premise that by pooling their strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions.”).

<sup>20</sup> See David Card, Thomas Lemieux, & W. Craig Riddell, *Unionization and Wage Inequality: A Comparative Study of The U.S., The U.K., and Canada* 2–3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 9473, 2003).

<sup>21</sup> See *id.*; see also Maureen Soyars Hicks, *Can Unions Significantly Reduce Wage Inequality? Depends on Whether You’re in the Public or Private Sector*, U.S. BUREAU OF LAB. STATS. (Jan. 2019), <https://www.bls.gov/opub/mlr/2019/beyond-bls/can-unions-significantly-reduce-wage-inequality-depends-on-whether-youre-in-the-public-or-private-sector.htm> (reporting on greater effects on inequality in private sector); Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 637–38 (2019) (arguing that decline of unions has accounted for up to one third of increase in income inequality in United States in recent decades).

<sup>22</sup> See, e.g., NORMAN WARE, *THE INDUSTRIAL WORKER: 1840–1860*, at 143–44 (Hart, Schaffer & Marx ed. 1990) (discussing labor-union support for “ten hour” laws limiting amount of daily work in factories); Frank T. de Vyver, *Regulation of Wages and Hours Prior to 1938*, 6 LAW & CONTEMP. PROBS. 323, 327 (1939) (describing tripartite boards convened to set minimum wages in Massachusetts, Wisconsin, Minnesota, Oregon, California, Utah, Colorado, Nebraska, and the District of Columbia).

<sup>23</sup> See Jackson & O’Neill, *supra* note 12, at 54–55. In fact, Hacker is sometimes credited with coining the term. See *Jacob Hacker on Predistribution*, YALE INST. SOC. & POL’Y STUDS., <https://isps.yale.edu/news/blog/2012/11/jacob-hacker-on-predistribution-bbc> (last visited Sept. 3, 2024) (calling Hacker “the man who came up with the idea”).

<sup>24</sup> Blinder, *supra* note 13.

<sup>25</sup> Exec. Order No. 14,094 § 3(a), 88 Fed. Reg. 21,879 (Apr. 6, 2023) (“Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law.”).

favor redistribution, especially the idea's approach to labor unions.<sup>26</sup> Cass himself has argued that unions are an ideal way to distribute the economic pie more fairly.<sup>27</sup> Unions require no government intervention in labor markets: they can raise wages through purely private bargaining.<sup>28</sup> Even better, they are democratically chosen by workers themselves.<sup>29</sup> They therefore promote free markets, industrial democracy, and economic justice. They are nearly a panacea to modern America's woes.<sup>30</sup>

But to promote unions, Cass says, we first need to remake U.S. labor law.<sup>31</sup> By his telling, labor law has two big problems. First, it makes union organizing too hard. Labor organizing is governed mainly by the National Labor Relations Act (NLRA).<sup>32</sup> The NLRA uses an "enterprise" bargaining system, where workers in each separate enterprise choose whether to join a union for themselves.<sup>33</sup> So to organize them, unions have to go shop by shop.<sup>34</sup> And that makes organizing slow and expensive.<sup>35</sup> It results in fewer unionized workers than we might see in a different system.<sup>36</sup>

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<sup>26</sup> Cass & Littlejohn, *supra* note 5.

<sup>27</sup> *See id.*

<sup>28</sup> *See id.*; *see also* King, *Give Workers Power*, *supra* note 4 (arguing that unions offer a form of redistribution with "minimal state interference and greater worker input").

<sup>29</sup> *See* Cass & Littlejohn, *supra* note 5; King, *Give Workers Power*, *supra* note 4.

<sup>30</sup> *See* Cass & Littlejohn, *supra* note 5 ("Ensuring that workers have power and can bargain on equal footing should be a core principle for setting up a well-functioning market economy.").

<sup>31</sup> *See id.* (calling current labor law "worse than useless").

<sup>32</sup> National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69).

<sup>33</sup> *See* Cass & Littlejohn, *supra* note 5 (calling enterprise bargaining a "serious" problem). *See also* 29 U.S.C. § 159(b) (describing appropriate bargaining units as a single "employer unit, craft unit, plant unit, or subdivision thereof"); Estlund, *supra* note 7, at 545 ("The near-collapse of enterprise-based collective bargaining in the United States has led U.S. labor scholars to explore alternatives strategies for workers.").

<sup>34</sup> *See* NLRB v. Phoenix Programs of N.Y., Inc., 2 F. App'x 166, 168 (2d Cir. 2001) (observing that when selecting an appropriate bargaining unit, the NLRB applies a "single-facility" presumption"); *Bry-Fern Care Ctr., Inc. v. NLRB*, 21 F.3d 706, 711 (6th Cir. 1994) (same); *cf.* Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 412 (1982) (recognizing that the NLRA allows multi-employer bargaining, but only when the parties agree to it; they cannot be required to participate in a multi-employer unit (though withdrawal can be limited)).

<sup>35</sup> *See* Cass & Littlejohn, *supra* note 5; *see also* Suresh Naidu, *Is There Any Future for a US Labor Movement?*, 36 J. ECON. PERSPS. 3, 18 (2022) (identifying NLRA's enterprise-level election system as main hurdle to organizing); Andrias, *supra* note 21, at 636 ("[W]orkers must organize unions worksite by worksite, facing significant resistance from both their direct employers and other employers in their supply chains, with little hope of building power throughout an industry.").

<sup>36</sup> *See* Cass & Littlejohn, *supra* note 5 (blaming enterprise structure for decline of labor unions) ("Private sector unions have been in such terminal decline because the legal framework we have set up for them is a very bad one."); *see also* Aneurin Canham-Clyne, *How the Biggest Private Sector*

Second, U.S. labor law balkanizes the labor market. Because unions have to organize shop by shop, only some employers get organized. And those employers are at a competitive disadvantage.<sup>37</sup> After all, the whole point of a union is to raise wages; and higher wages for workers translate into higher labor costs for employers.<sup>38</sup> An employer saddled with higher costs is unlikely to thrive, or even survive, in a competitive market.<sup>39</sup> So employers naturally resist organization tooth and claw.<sup>40</sup> Organizing campaigns are hard fought, sometimes vicious.<sup>41</sup> And even when a union wins, bitterness from the campaign is likely to linger. According to Cass, the whole system is inherently and irredeemably adversarial.<sup>42</sup>

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*Union Wants to Transform the Restaurant Workforce*, RESTAURANT DIVE (May 1, 2023), <https://www.restaurantdive.com/news/how-labor-union-seiu-wants-to-transform-the-restaurant-workforce/648986> (interviewing SEIU President Mary Kay Henry) (stating that workers could “never” organize a restaurant chain going store to store under the NLRA); SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 37–38 (2020), [https://assets.website-files.com/5ddc262b91f2a95f326520bd/5e28fba29270594b053fe537\\_CleanSlate\\_Report\\_FOR\\_WEB.pdf](https://assets.website-files.com/5ddc262b91f2a95f326520bd/5e28fba29270594b053fe537_CleanSlate_Report_FOR_WEB.pdf) (arguing that enterprise bargaining and workplace-by-workplace organizing “has left millions of workers without the protection of a collective-bargaining agreement”).

<sup>37</sup> Cass & Littlejohn, *supra* note 5.

<sup>38</sup> *Id.*; see also Alex Bryson, *Union Wage Effects*, IZA WORLD OF LAB. (2014), <https://wol.iza.org/articles/union-wage-effects/long> (reporting average union wage premium of 17% in the United States).

<sup>39</sup> Cass & Littlejohn, *supra* note 5 (arguing that union victory is sometimes “pyrrhic” because it cripples employer with uncompetitive costs); see also Richard Posner, *Some Economic Effects of Labor Law*, 51 U. CHI. L. REV. 998, 1001 (1984) (“[T]he intended and actual effect of unionization is to raise the price of labor above the competitive level . . . .”); David S. Lee & Alexandre Mas, *Long-Run Effects of Unions on Firms* 35–37 (Nat’l Bureau of Econ. Rsch., Working Paper No. 14709, 2009), <https://www.nber.org/digest/may09/long-run-effects-unions-firms> (reporting that unionization reduces firm value by \$40,500 in 1998 dollars per worker eligible to vote); Wells King, *Workers of the World*, AM. COMPASS (Sept. 18, 2020), <https://americancompass.org/workers-of-the-world> (noting that employment in unionized manufacturing declined more than 80% from 1979 to 2019, while employment in nonunionized manufacturing firms grew over the same period).

<sup>40</sup> See Posner, *supra* note 39, at 1000–02 (explaining that employer resistance to unionization is a rational economic reaction to higher labor costs); see also Estlund, *supra* note 7, at 551 (attributing difficulty in organizing in part to “vehement” employer resistance).

<sup>41</sup> See MARTY JAY LEVITT, CONFESSIONS OF A UNION BUSTER 164–225 (1993) (describing hard-fought campaign at Copeland Oaks nursing home in which employer went to extraordinary lengths to block union drive among nurses); U.S. CHAMBER OF COM., *HARDBALL: THE TACTICS OF UNION CORPORATE CAMPAIGNS* 4–6 (2018) (describing similarly extreme tactics by union in campaign to organize employees at Sodexo, Inc.).

<sup>42</sup> Cass & Littlejohn, *supra* note 5 (“[T]hat system obviously creates an incredible amount of adversarialism right off the bat.”).

Cass's proposed solution is "sectoral bargaining." Sectoral bargaining is a model borrowed from Europe and Latin America.<sup>43</sup> It involves simultaneously organizing many employers—maybe even an entire industry.<sup>44</sup> These employers negotiate a single collective-bargaining agreement with a union, and that agreement imposes uniform labor costs across the whole sector.<sup>45</sup> And because every covered employer faces the same costs, none is left at a disadvantage.<sup>46</sup> Employers can essentially call a truce over labor competition.<sup>47</sup>

Cass's colleagues at American Compass have also spoken warmly of wage boards.<sup>48</sup> Wage boards are essentially industry-specific labor councils.<sup>49</sup> They bring together representatives from business and labor, who figure out standards for the whole sector.<sup>50</sup> They work a bit like sectoral bargaining, except that the government bargains alongside private parties.<sup>51</sup> These kinds of boards were historically used to set minimum wages in the Progressive Era,<sup>52</sup> and they were even included in the original Fair Labor Standards Act.<sup>53</sup> But they were eventually disbanded, in part because mid-century conservatives saw them as Trojan horses for unions.<sup>54</sup> Now, pro-predistribution conservatives are lauding these boards as a targeted, responsive way to set working conditions.<sup>55</sup> Yes, the boards may involve the government to some degree; but

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<sup>43</sup> See King, *Workers of the World*, *supra* note 39 (describing European models); BLOCK & SACHS, *supra* note 36, at 38 (describing European and South American systems).

<sup>44</sup> Cass & Littlejohn, *supra* note 5; see also BLOCK & SACHS, *supra* note 36, at 38 (explaining that under sectoral bargaining, "collective bargaining takes place between many unions and all of the employers in the industry").

<sup>45</sup> Cass & Littlejohn, *supra* note 5 ("The agreements they reach then govern the sector as a whole, regardless of whether individual firms are unionized or not.").

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*; cf. Estlund, *supra* note 7, at 559 (arguing that "[s]ectoral labor standards can partially avoid the Achilles' heel of enterprise-based collective bargaining by constraining labor-cost-based competition from non-union firms").

<sup>48</sup> See King, *Workers of the World*, *supra* note 39 (arguing that sectoral bargaining, wage boards, and similar systems "point the way toward a new labor law").

<sup>49</sup> See Estlund, *supra* note 7, at 543 (describing boards).

<sup>50</sup> See Madland, *supra* note 6 (surveying modern standards boards).

<sup>51</sup> See *id.*

<sup>52</sup> Andrias, *supra* note 21, at 650–54 (describing Progressive-Era wage boards used to set minimum wages in some states).

<sup>53</sup> See Fair Labor Standards Act of 1938 §§ 5, 8, Pub. L. No. 75-718, 52 Stat. 1060, 1064.

<sup>54</sup> See Andrias, *supra* note 21, at 665, 687 (describing political opposition leading to the FLSA boards' repeal).

<sup>55</sup> See King, *Workers of the World*, *supra* note 39 (favorably citing state efforts to establish wage boards).

they draw their standards mainly from the knowledge and desires of local people. That makes them a more flexible, allegedly democratic way to regulate the workplace.<sup>56</sup>

These ideas might once have been dismissed as think-tank musings. But they have recently gained traction in powerful circles. Some GOP lawmakers have signaled their support for predistributional ideas, including ways to make labor law less adversarial.<sup>57</sup> Others, including the current Republican nominee for vice president, have endorsed sectoral bargaining as a conservative solution.<sup>58</sup> The problem with unions, these conservatives say, isn't that unions raise labor costs or make American companies less competitive.<sup>59</sup> Rather, the problem is that unions embrace progressive social causes.<sup>60</sup> If unions were only less political and more (small-d) democratic, they could support conservative goals such as strengthening the American family and reviving American manufacturing.<sup>61</sup>

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<sup>56</sup> See King, *Give Workers Power*, *supra* note 4 (arguing that predistributional wage strategies are better than regulatory solutions because they involve “minimal state interference and greater worker input”).

<sup>57</sup> See, e.g., Teamwork for Employees and Managers Act of 2024, S. 3600, 118th Cong. (2024) (proposing to establish “employee involvement organizations” which, among other things, could place nonvoting members on corporate boards); see also Press Release, Off. of Sen. Marco Rubio, Rubio, Vance Reintroduce Bill to Empower Worker Voice (Jan. 17, 2024), <https://www.rubio.senate.gov/rubio-vance-reintroduce-bill-to-empower-worker-voice>.

<sup>58</sup> See Sohrab Ahmari, *The New Face of the Republican Party*, NEW STATESMAN (July 15, 2024), <https://www.newstatesman.com/international-content/2024/07/jd-vance-vice-president-donald-trump-republican-ticket> (“Vance noted that he supports a regime of sectoral bargaining like the ones that prevail in continental Europe, rather than shop-by-shop organising bequeathed by the New Deal.”).

<sup>59</sup> See Marco Rubio, *Amazon Should Face Unionization Drive Without Republican Support*, USA TODAY (Mar. 12, 2021), <https://www.usatoday.com/story/opinion/2021/03/12/amazon-union-not-helping-working-class-economy-column/6947823002> (“Adversarial relations between labor and management are wrong. They are wrong for both workers and our nation’s economic competitiveness.”).

<sup>60</sup> See Press Release, Off. of Sen. Marco Rubio,, *supra* note 57 (“Employees who consider unionization are often dissuaded by the failures of Big Labor, which too often puts its political stances over workers’ best interests.”); Editorial, *Pro-Worker Republicans Will Never Support Big Labor’s PRO Act*, WASH. EXAMINER (Sept. 27, 2023), <https://www.washingtonexaminer.com/opinion/editorials/2571797/pro-worker-republicans-will-never-support-big-labors-pro-act> (“Asked to identify why they don’t want to join a union, 75% of nonunion workers identify ‘union political involvement’ as the top reason they don’t want to join.”).

<sup>61</sup> See Cass & Littlejohn, *supra* note 5 (arguing that Republicans reject labor unions only because unions support Democrats and progressive causes) (“[L]abor has become a partisan, political issue.”); see also Jonathan Berry, *Department of Labor and Related Agencies*, in HERITAGE FOUND., *MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE* 581, 581 (2024) (“The role that labor policy plays in that promise is twofold: Give workers the support they need for rewarding, well-paying,



## II. THE HARSH LIGHT OF BAD LAW

Nice as that idea might sound, it ignores how predistributional policies have played out on the ground. In cities and states across the country, these policies are already being implemented. And none of them has reduced regulation or enhanced workplace democracy. Instead, they have offered only more government entanglement and less worker voice.

First, consider the new wave of “labor standards boards.” Like the old wage boards, these new standards boards are tripartite, quasi-regulatory bodies.<sup>62</sup> They include representatives from workers, business, and government, who come up with workplace standards for an entire industry.<sup>63</sup> In theory, some of these boards only “recommend” new standards to government officials—sometimes a department head, sometimes a city council.<sup>64</sup> But in practice, their “recommendations” are usually rubber-stamped; there is no daylight between their proposals and the ultimate regulations.<sup>65</sup>

What’s more, some of these boards go even further. For example, in 2023, California delegated regulatory power to a “Fast Food Council.”<sup>66</sup> This Council can effectively raise wages for the entire fast-food industry in the state.<sup>67</sup> It technically has to clear its regulations with the state labor commissioner.<sup>68</sup> But the commissioner’s review is meager. She can check the Council’s regulations only to ensure that they are “consistent with” its statutory powers.<sup>69</sup> If they are, she publishes them.<sup>70</sup> And once published, they bind all covered restaurants and workers in the state.<sup>71</sup>

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and self-driven careers, and restore the family-supporting job as the centerpiece of the American economy.”).

<sup>62</sup> See, e.g., COLO. REV. STAT. § 8-13.5-205 (tripartite agricultural work standards board); NEV. REV. STAT. § 608.610 (tripartite home-care standards board); CAL. LAB. CODE § 1475 (tripartite fast-food workers board).

<sup>63</sup> See, e.g., N.Y. LAB. L. § 674-a (directing board to develop overtime standards for farmworkers); CAL. LAB. CODE § 1475(b) (directing board to develop standards for wages, hours, and other working conditions for fast-food workers).

<sup>64</sup> See, e.g., CAL. LAB. CODE § 1475(d)(1)(C)(ii) (submission to state labor commissioner); 3.5 § 14.23.020(I) (submission to city council).

<sup>65</sup> See N.Y. DEP’T OF LAB., *supra* note 6 (approving board’s “recommendations” without change).

<sup>66</sup> See A.B. 1228, Reg. Sess. (Cal. 2023) (as codified at CAL. LAB. CODE § 1475).

<sup>67</sup> CAL. LAB. CODE § 1475(d)(2)(D).

<sup>68</sup> *Id.* § 1475(d)(1)(C)(iii).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See *id.* § 1475(j)(1) (stating that standards developed by council are the legal minimum standards for fast-food workers). The statute appears to require closer review for antidiscrimination and workplace-safety standards. If the Council wants to regulate on those subjects, it must petition the

The Council may be the board with the highest profile,<sup>72</sup> but it is hardly the only one. Since 2018, at least ten cities and states have adopted similar boards.<sup>73</sup> These boards usually cover only a single industry—for example, agriculture, home care, or domestic service.<sup>74</sup> But some sweep more broadly. For example, one proposed board in Minneapolis would have the power to convene sub-boards to regulate any industry in the city.<sup>75</sup> And another proposed board in New York would regulate not only working conditions, but also consumer prices.<sup>76</sup>

Beyond labor boards, a few states have experimented with Cass's favored strategy—sectoral bargaining. Most of these new sectoral schemes have covered homecare and domestic workers.<sup>77</sup> In one sense, the schemes are only a half-step toward real sectoral bargaining: they designate the workers as

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responsible agencies. See CAL. LAB. CODE § 1475(e), (f). It is not clear, however, how responsive those agencies will be to the Council's petitions or how closely they will review the Council's proposals. The Council first met in March 2024, and it has not yet petitioned either agency.

<sup>72</sup> See, e.g., Noam Schieber, *California Passes Bill to Regulate Fast-Food Industry*, N.Y. TIMES (Aug. 29, 2022), <https://www.nytimes.com/2022/08/29/business/economy/california-fast-food-ab-257.html>; Heather Haddon, *California Restaurants Cut Jobs and Fast-Food Wages Set to Rise*, WALL ST. J. (Mar. 25, 2024), <https://www.wsj.com/business/hospitality/california-restaurants-cut-jobs-as-fast-food-wages-set-to-rise-eb5ddaaa>; Erica Werner, *A California Law That Takes Wage-Setting Power from Fast-Food Bosses Sparks Fight*, WASH. POST (Nov. 16, 2022), <https://www.washingtonpost.com/us-policy/2022/11/16/fast-food-wages-california>.

<sup>73</sup> See U.S. CHAMBER OF COM., *supra* note 8 (surveying boards); Madland, *supra* note 6 (same).

<sup>74</sup> See, e.g., SEATTLE, WASH. MUN. CODE ch. 14.23 (standards board for domestic workers); N.Y. LAB. L. § 674-a (standards board for agricultural workers); NEV. REV. STAT. § 608.640 (standards board for home care workers).

<sup>75</sup> See MINNEAPOLIS PUB. HEALTH & SAFETY CMTE., REPORT TO THE CITY COUNCIL FROM THE PUB. HEALTH & SAFETY COMMITTEE (Feb. 14, 2024), <https://lims.minneapolis.gov/Download/CommitteeReport/3596/PHS-02142024-CommitteeReport.pdf> (stating that ordinance would create “a new Article VIII creating a process to establish a Labor Standards Board study and report on working conditions in specific industries”); see also Susan Du & Katelyn Vue, *Minneapolis Mayor, City Council Members Propose New Labor Board to Address Worker Dissatisfaction*, MINNEAPOLIS STAR TRIB. (June 15, 2022), <https://www.startribune.com/minneapolis-mayor-city-council-members-to-create-a-new-labor-board-to-address-worker-dissatisfaction/600182460> (describing proposal).

<sup>76</sup> S.B. S1800, Reg. Sess. (N.Y. 2023); See also Press Release, Off. of N.Y. State Sen. Jessica Ramos, Ramos, Bronson Introduce New Legislation to Establish Minimum Standards Council for Nail Salon Industry (Jan. 26, 2022), <https://www.nysenate.gov/newsroom/press-releases/2022/jessica-ramos/immediate-release-ramos-bronson-introduce-new> (describing prior version of the same legislation).

<sup>77</sup> See, e.g., WASH. REV. CODE § 7439A.270 (sectoral bargaining for home care workers); 5 ILL. COMP. STAT. 315/7 (same); CAL. GOV'T CODE § 7926.300 (same).

“limited” public employees, and the union bargains with the state.<sup>78</sup> But more aggressive versions are on the way. For example, a ballot initiative in Massachusetts would create the nation’s first sectoral-bargaining system for app-based rideshare drivers.<sup>79</sup> These drivers would be collected into a single bargaining unit, where they would be represented by a single union.<sup>80</sup> That union would then negotiate with every rideshare company.<sup>81</sup> And the resulting agreement would bind every driver and company in the state.<sup>82</sup>

Like the new labor-standards boards, this sectoral-bargaining law would require review by a state official: the state secretary of labor would have to approve any agreement before it went into effect.<sup>83</sup> But this approval mechanism would be less a check against private mischief than a way to circumvent federal law. Rideshare drivers are usually classified as independent contractors.<sup>84</sup> And under the Sherman Antitrust Act,<sup>85</sup> independent contractors cannot collectively bargain.<sup>86</sup> Collective bargaining by independent contractors is effectively price-fixing, and price-fixing violates antitrust law per se.<sup>87</sup>

<sup>78</sup> See *supra* note 6 (citing authorities); see also *Harris v. Quinn*, 573 U.S. 616, 624 (2014) (describing system under Illinois law).

<sup>79</sup> See Initiative Petition for Law No. 23-35: An Act Giving Transportation Network Drivers the Option to Form a Union (Mass. 2023), <https://www.mass.gov/doc/initiative-petition-for-an-act-giving-transportation-network-drivers-the-option-to-form-a-union-and-bargain-collectively/download> [hereinafter Initiative Pet. No. 23-35].

<sup>80</sup> *Id.* § 5(B).

<sup>81</sup> *Id.* § 6.

<sup>82</sup> *Id.* § 6(A) (requiring bargaining by all transportation network companies with the designated union for a single agreement).

<sup>83</sup> *Id.* § 6(F).

<sup>84</sup> See, e.g., Uber Techs., Inc., Uber Platform Access Agreement (P2P) ¶ 1.1 (Jan. 1, 2022), <https://tb-static.uber.com/prod/reddog/country/UnitedStates/licensed/f5f1f4a9-4e6d-4810-8aa3-21b663290294.pdf> (“The relationship between the parties is solely as independent business enterprises, each of whom operates a separate and distinct business enterprise that provides a service outside the usual course of business of the other.”); Lyft, Inc., Lyft Terms of Service ¶ 19 (Jan. 22, 2024), <https://www.lyft.com/terms> (“[T]he relationship between the parties under this Agreement is solely that of independent contracting parties.”); see also *Razak v. Uber Techs., Inc.*, 2024 WL 3584324, at \*11 (E.D. Pa. July 30, 2024) (concluding that “no reasonable jury” could conclude that plaintiffs, UberBlack drivers, were improperly classified as independent contractors under the Fair Labor Standards Act).

<sup>85</sup> Pub. L. No. 51-647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–38).

<sup>86</sup> See *Colum. River Packers Ass’n v. Hinton*, 315 U.S. 143, 146–47 (1942) (holding that independent fishermen did not qualify for antitrust labor exemption); *Taylor v. Local No. 7, Int’l Union of Journeymen Horseshoers*, 353 F.2d 593, 606 (4th Cir. 1965) (same for independent horse farriers).

<sup>87</sup> See *Hinton*, 315 U.S. at 146–47; see also *Chamber of Com. of the U.S. of Am. v. City of Seattle*, 890 F.3d 769, 780–81 (9th Cir. 2018) (assuming without deciding that collective bargaining by independent rideshare drivers would be price-fixing under the Sherman Act).

Courts have, however, carved out an exemption for otherwise-anticompetitive activity authorized and supervised by a state.<sup>88</sup> The idea is that regulation is often anticompetitive, and antitrust law was never meant to stop states from regulating markets.<sup>89</sup> So if a state adopts an explicit policy promoting sectoral bargaining, and the state actively supervises the bargaining process, the Sherman Act won't apply.<sup>90</sup> The state will be able to establish a sectoral scheme free from the limits of antitrust.<sup>91</sup>

The state-approval structure also helps avoid another federal law—the NLRA. Again, the NLRA is built on “enterprise” bargaining.<sup>92</sup> And that enterprise model is generally exclusive: courts have interpreted the NLRA to preempt any conflicting or alternative state laws.<sup>93</sup> That means states cannot simply opt out of the enterprise model and create alternative organizing schemes.<sup>94</sup> If workers are covered by the NLRA, the enterprise process is their only option.<sup>95</sup>

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<sup>88</sup> See *Parker v. Brown*, 317 U.S. 341, 360 (1943); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980); see also Thomas B. Nachbar, *Antitrust and the Politics of State Action*, 60 WM. & MARY L. REV. 1395, 1399–1407 (2019) (surveying development of “state action” immunity from antitrust).

<sup>89</sup> See *Parker*, 317 U.S. at 360; see also HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 20.2a (3d ed. 2005) (describing the historical basis and rationale of the state-action exemption).

<sup>90</sup> See *Midcal Aluminum*, 445 U.S. at 106; *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 503–04 (2015).

<sup>91</sup> See *City of Seattle*, 890 F.3d at 780–81 (applying *Midcal* framework to proposed law to authorize bargaining by independent rideshare drivers); see also Josh Jacob, *Avenues for Gig Worker Collective Action After Jinetes*, 123 COLUM. L. REV. F. 208, 224 (2023) (“Because city or state collective bargaining frameworks for gig workers generally involve private parties organizing themselves, usually through another private party like a union, restraints on trade resulting from such arrangements do not flow directly from sovereign state action and thus must be able to pass the *Midcal* test in order to survive antitrust suits.”).

<sup>92</sup> See 29 U.S.C. § 159(c).

<sup>93</sup> See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242 (1959); *Machinists v. Wis. Emp. Rels. Comm'n*, 427 U.S. 132, 144 (1976); See also Estlund, *supra* note 7, at 555–57 (proposing “co-regulation” schemes as a way to overcome the preemption “problem”)

<sup>94</sup> See *Chamber of Com. of the U.S. v. Brown*, 554 U.S. 60, 65, 76 (2008) (holding that state law conditioning state funds on business's waiver of its speech rights under the NLRA was preempted).

<sup>95</sup> See *id.*; see also Estlund, *supra* note 7, at 555–56 (recognizing preemption as a barrier to state- and local-level pro-union legal reforms).

But there is a potential workaround. While the NLRA regulates the bargaining process, states can still establish minimum labor standards.<sup>96</sup> Those standards can include minimum wages, mandatory benefits, and job protections.<sup>97</sup> These minimum standards do affect bargaining indirectly; they take certain proposals off the table (e.g., pay rates below the minimum wage).<sup>98</sup> But they don't disrupt the bargaining process. They simply set a new floor, and the parties bargain up from there.<sup>99</sup>

Both sectoral schemes and labor boards try to fit into that gap. They create new workplace standards through quasi-private negotiations.<sup>100</sup> And while those negotiations mirror collective bargaining, a public official decides whether the negotiated standards take effect.<sup>101</sup> So local governments can present them as essentially regulatory processes. Functionally, they replace private bargaining. But formally, they set minimum work standards by law.<sup>102</sup>

That approach might solve predistribution's preemption problems.<sup>103</sup> But it effectively wipes out the idea's supposed benefits from the conservative point of view. Remember, predistribution policies are supposed to *reduce* the

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<sup>96</sup> See *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987) (explaining that the NLRA accommodates state minimum-labor standards, which serve as a floor for bargaining); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (same).

<sup>97</sup> See, e.g., *Fort Halifax Packing*, 482 U.S. at 21 (mandatory severance payments under state law); *Metro. Life Ins.*, 471 U.S. at 756 (mandatory minimum health benefits); *Am. Hotel & Lodging Ass'n v. City of Los Angeles*, 834 F.3d 958, 963 (9th Cir. 2016) (local minimum-wage ordinance); *Nw. Grocery Ass'n v. City of Seattle*, 526 F. Supp. 3d 884, 890–91 (W.D. Wash. 2021) (premium-pay ordinance for grocery workers).

<sup>98</sup> See *Nat'l Broad. Co. v. Bradshaw*, 70 F.3d 69, 71 (9th Cir. 1995) (explaining that “the enforcement of state minimum standards creates a ‘backdrop’ that must be taken into account in the collective bargaining negotiations”).

<sup>99</sup> See *Am. Hotel*, 834 F.3d at 963 (“By providing a basic minimum wage and time-off compensation, the Wage Ordinance alters the backdrop of negotiations, not the mechanics of collective bargaining.”). *But see* *Chamber of Com. of U.S. v. Bragdon*, 64 F.3d 497, 502 (9th Cir. 1995) (finding prevailing-wage law inconsistent with NLRA's bargaining scheme when law dictated the entire package of wages and benefits, allowing no upward bargaining).

<sup>100</sup> See, e.g., Initiative Pet. No. 23-35 § 6(A), *supra* note 79 (requiring companies to “bargain with the exclusive bargaining representative concerning wages, benefits, and terms and conditions of work”); CAL. LAB. CODE § 1475(d)(1)(A) (empowering council to convene and jointly determine minimum standards of employment); see also Estlund, *supra* note 7, at 542 (describing sectoral “co-regulation” as a “mid-point” between private collective bargaining and state regulation).

<sup>101</sup> See, e.g., Initiative Pet. No. 23-35 § 6(F), *supra* note 79 (requiring approval by state secretary of labor); CAL. LAB. CODE § 1475(d)(1)(C)(iii) (requiring review by state labor commissioner).

<sup>102</sup> See Estlund, *supra* note 7, at 555–56 (arguing that state “co-regulation” schemes solve the “preemption problem” by setting new terms through regulatory processes).

<sup>103</sup> See *id.* (arguing that “federal labor law does not preempt higher substantive labor standards at the state or city level”).

need for government intervention.<sup>104</sup> But in practice, these schemes only embed the government even further into the workplace. Labor-standards boards can dictate everything from wages and hours to training and hiring policies.<sup>105</sup> And they impose those terms through binding regulations, enforced by state officials.<sup>106</sup> This is not the soft touch of the market, but the iron fist of the law.<sup>107</sup>

Second, predistribution are supposed to make workplace regulation more democratic.<sup>108</sup> But these new models effectively squash workplace choice. Under some sectoral laws, unions can be certified with support from only a fraction of the workforce. For example, the proposed Massachusetts law would allow a union to trigger an election with the support of only 5% of “active drivers.”<sup>109</sup> And it would define “active drivers” to include only drivers who have completed more than the median number of rides in the last year.<sup>110</sup> In other words, the law would immediately exclude half of the driver population from the selection process.<sup>111</sup> A tiny fraction of drivers could trigger an election.<sup>112</sup> And if the union won more than half of the votes actually cast, it would represent all drivers, whether they wanted a union or not.<sup>113</sup>

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<sup>104</sup> See King, *Give Workers Power*, *supra* note 4.

<sup>105</sup> See CAL. LAB. CODE § 1475(d)(1)(A) (“The council is charged with developing minimum fast food restaurant employment standards, including, as appropriate, standards on wages, working conditions, and training, as are reasonably necessary or appropriate to protect and ensure the welfare, including the physical well-being and security, of fast food workers or to otherwise meet the purposes of this section . . .”).

<sup>106</sup> *Id.* § 1475(d)(2)(D) (stating that standards developed by the council are “enforceable by the Labor Commissioner” under procedures applicable to other parts of the state labor code). *Cf.* Estlund, *supra* note 7, at 567 (arguing that the “payoff” for co-regulation comes in the enforcement process); César F. Rosado Marzán, *Can Wage Boards Work in America?*, LPE PROJECT (April 3, 2023), <https://lpeproject.org/blog/wage-boards-labor-america> (arguing that labor-standards boards such as Seattle’s domestic-worker board offer “more lawmaking and enforcement potential”).

<sup>107</sup> See McGinnis, *supra* note 1 (“Even worse than predistribution’s economic effects are its political ones. It allows the state to intervene in the market while making it harder for citizens to evaluate the costs of these policies.”).

<sup>108</sup> See King, *Give Workers Power*, *supra* note 4. See also Estlund, *supra* note 7, at 558 (arguing that “co-regulation” could make “the law of work more democratic”).

<sup>109</sup> See Initiative Pet. No. 23-35 § 5(D)(1)–(2), *supra* note 79.

<sup>110</sup> *Id.* § 2(A).

<sup>111</sup> See *id.* §§ 5(D), 2(A).

<sup>112</sup> See *id.*

<sup>113</sup> See *id.* § 6(A) (authorizing the union to bargain with all transportation-network companies on behalf of all drivers in the state). See also Veena Dubal, *Sectoral Bargaining Reforms: Proceed with Caution*, 31 NEW LAB. F. 11 (2022), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4006698](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4006698) (criticizing sectoral-bargaining proposals for offering “limited democratic worker participation and voice in the conditions created through bargaining”); Estlund, *supra* note

The new standards boards are even less democratic. Workers are ostensibly represented on the boards by designated board members. But workers have no say on who these members are. Instead, the members are appointed by a government official.<sup>114</sup> And they cannot be recalled—nor can they even be required to listen to the workers they represent. Instead, they stay in their seats until their terms expire, and they make their own decisions about what is best for workers.<sup>115</sup> This is not worker voice, but the absence of it.<sup>116</sup>

### III. THE PERILS OF CONSENSUS

None of this promotes conservative ideals. Conservatives say they want to reduce regulation and enhance workers' voice in the workplace. But predistribution promotes neither goal. It is neither voluntary nor light touch, nor does it make unionism any more consistent with conservative goals than it ever was. Consensus is not always bad, but nor is it always good. Ideas should not be judged on their ubiquity, but on their merits. And on the merits, predistribution has nothing to offer workers. Conservatives who want to support workers should look for consensus elsewhere.

#### Other Views:

- Oren Cass, *America Needs a Conservative Labor Movement*, WALL ST. J. (Sept. 17, 2020), <https://www.wsj.com/articles/america-needs-a-conservative-labor-movement-11600379608>.
- Eric Levitz, *The Conservative Case for Organized Labor*, INTELLIGENCER (Sept. 8, 2020), <https://nymag.com/intelligencer/2020/09/conservative-case-for-organized-labor.html>.

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7, at 543 (arguing that the proponents of sectoral bargaining “tend[] to overstate the role that workers’ own bargaining power and organizations, diminished as they are, can play within the new hybrid strategies”).

<sup>114</sup> See, e.g., CAL. LAB. CODE § 1475(a)(3)–(4); COLO. REV. STAT. § 8-7.5-103(2)(I); SEATTLE MUN. CODE § 14.23.030(B); N.Y. LAB. L. § 674-a.

<sup>115</sup> See, e.g., CAL. LAB. CODE § 1475(a)(4) (term of four years); SEATTLE MUN. CODE § 14.23.030(C) (terms of two to three years). *But see* NEV. REV. STAT. § 608.610 (no explicit limit on terms).

<sup>116</sup> See Estlund, *supra* note 7, at 566 (noting that the appointments process raises questions about why and how workers can participate in the boards and whether there “should be a more rigorous process” for designating worker representatives).

- Jonathan Rauch, *The Conservative Case for Unions*, THE ATLANTIC (July/Aug. 2017), <https://www.theatlantic.com/magazine/archive/2017/07/the-conservative-case-for-unions/528708/>.