An End of History for Union Democracy:
The Inevitability of Corporatism and the Unrealized Participatory Workplace

Jedidiah J. Kroncke
FGV Sao Paulo School of Law

Early in 2015, the Teamsters for a Democratic Union (TDU) celebrated one in a series of hard-won victories in its struggle within the International Brotherhood of Teamsters (IBT) to promote union democracy—in this case preserving the right for IBT members to directly elect their national representatives. As the largest union in the United States, the TDU’s struggles have often served to symbolize long-standing tensions within the U.S. labor movement between member participation and institutional bureaucracy. The fact that in 2015 such a fundamental issue of internal union democracy could be a point of continued and prolonged contention reflects the often-uneasy place of democratic norms within the U.S. workplace.

This tension between democratic and, what will be termed, corporatist norms has not only been a historical constant within the U.S. labor movement but also finds parallels in labor movements across the globe. Moreover, the few global bright spots in promoting democratic norms within the modern workplace find themselves submerged within a larger secular trend towards greater excision of democratic norms from the labor regulatory schemes. As such, the foundational norms of economic democracy that gave rise to labor unionism following 20th century industrializations have not been translated into the more participatory workplaces, an ideal that was once hopefully imagined by labor activists and scholars.

Instead, norms of economic democracy have been undercut by reinvigorated promotion of technocratic conceptions of managerial expertise from the enterprise to the transnational level—the same conceptions which have also placed more generalized pressure on participatory norms in

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practices of political democracies.\textsuperscript{2} While the modern citizen is often assumed in their life as a consumer to effectively filter and process complex data in a world of growing financialization, in their life as a producer they are assumed to have little capacity to contribute meaningfully to workplace decision-making. As a result, there has been little disturbance of the conceptualization of capital’s contribution to the workplace through the lens of ownership and labor’s contribution through the lens of commodity exchange.

The extensivity of this trend has induced what Guy Mundluk recently diagnosed as a near global state of anomie among labor scholars.\textsuperscript{3} This anomie reflects the continued rebuffing of hopes that the 20\textsuperscript{th} century rise of collective bargaining, alongside the growth of welfare state arrangements, would progressively assuage the dislocations of labor commodification that Polanyi identified at the heart of the industrial capitalism.\textsuperscript{4} For this paper, the modern vitality of the welfare state will be set aside to focus on exploring why, in comparative frame, the promise of economic democracy through the formation of labor unions has continued to leave labor movements either recurrently calling for revitalization through internal re-democratization or a retreat, from often quite radical ideologies, into corporatist forms of social bargaining that place little to no value on economic democracy.

This paper will argue that these two adaptations, 1) faltering revitalization or 2) growing corporatism, reflect the inescapable fact that union democracy, in its internal and external instantiations, relies on processes of social capital formation that are fundamentally at odds with the logics of capital formation which discipline the modern workplace. Following the global proliferation of what David Harvey called flexible accumulation,\textsuperscript{5} and accelerated by the denationalization of financial capital, no human-centric process of social capital formation can match the current logistical speed and scope of capital mobility.\textsuperscript{6} While in specific contexts over limited time horizons—most often involving intense mobilization around political democratization or in small homogenous nations—episodic labor movements can transcend this mismatch, but the

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levels of social capital they generate eventually dissipate or are ground away by the steady-state operation of the mobility mismatch with financial capital.

The process of social capital formation and reduction explains both the unrealized promise of systems of collective bargaining laying the groundwork for more participatory workplace regulation as well as the devolution of many union traditions into corporatism—identified over a century ago by Robert Michels as an example of his iron law of oligopoly. While labor union activists and supportive intellectuals often decry this devolution, the comparative scholarship on labor unions has revealed that, whatever successes are achieved by episodic upswings in union democracy, those collective bargaining systems that have been best able to serve the collective interests of their workers are often of the hyper-corporatist variety. This paper will explore this general principle by comparing the mid-to-late 20th century trajectories of unions with quite different institutional and legal arrangements, those of the United States, Brazil and China.

Herein, the durability of Brazilian union corporatism and the emergence of corporatist Chinese unions, even after a century of quite divergent political development, raises questions as to the extent to which the labor union model is still an ultimately progressive one today. It further questions the continued search to promote union democracy, especially of the decentralized and privately-ordered variety in the U.S., as a Sisyphean effort. Such questioning occurs in light of the fact that, especially for spatially large and socially diverse nations, the very success of these corporatist regimes depends on repressing internal democratic norms in order to strengthen their broader form of social bargaining. In contrast to past claims about ends of history, this apparent end of history for union democracy is far from celebratory, nevertheless it is hard at this point in labor history to ignore.

The irony of this end of history is that labor unions have been historically (as they were in Brazil and continue to be today in China), crucial vectors for political democratization. The solidarity generating potential of unions fed the social movements necessary to provoke systemic social change during multiple waves of 20th century democratizations, but post-democratization either turned to embrace corporatism or faded from social influence. Although the type of participatory workplace in which norms of economic democracy have a future might require

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7 Robert Michels, Political Parties (1911).
similar social mobilizations to institutionalize, such is at best tangential to the possibility of union democracy itself.

To develop this general argument, this paper progresses in four parts. Part I will provide background on debates about union democracy and their relationship with norms of economic democracy and labor union corporatism. Part II will present the tenuous place of union democracy in the United States, the largest exemplar of private, enterprise level collective bargaining that depends heavily on complementary social movements. Moreover, such dependence has left the U.S. labor movement following an unsuccessful pattern of recurrently failed calls for democratic revitalization after resorting to the use of electoral politics as a de facto form of corporatist bargaining. Part III discusses the modern Brazilian experience, possessing perhaps the most successful large-scale corporatist union regime. A central actor in Brazilian transition to democracy, the Brazilian labor party and its allied unions have since pursued ever-increasing marginalization of internal democracy and erected a hyper-corporatist arrangement with few, if any, links to democratic norms. Part IV relates the contentious role of the labor union form in contemporary China, where the communist presumption of alignment between Party and worker interests left the state union structure scrambling after its 1978 liberalization to experiment with union corporatism as both a solution to labor unrest and as a preemptive strike against labor mobilization fueling political democratization. Part V concludes by considering a harsh choice presented by the preceding analysis: is the entrenched and sclerotic nature of corporatist unions, even as they act to repress new ideas and more radical social movements, the best, if imperfect, shield against the growing global pressures of the authoritarian workplace? This presents anew the more traditional question of whether collective bargaining, regardless of institutional variation, itself, is a distraction in the effort to find alternative regulatory schemes that do not require constant infusions of social capital to achieve the aims of economic democracy.

I. BETWIXT ECONOMIC DEMOCRACY AND CORPORATISM: THE ELUSIVENESS OF UNION DEMOCRACY

Economic Democracy and 20th Century Unions

There exists a wide range of arguments traditionally advanced for why labor’s empowerment in the workplace is a desirable social goal, ranging from the purely moral to the
purely utilitarian.\(^9\) Within capitalist nations, most of these arguments are tied to advancing proposals for the two primary variants of economic democracy, direct ownership or greater participation.\(^{10}\) In the contemporary context, this desire to integrate democratic norms into economic production draws upon the failure of communist or socialist arrangements that presumed that ideological adherence to worker welfare in command and control economies was sufficient to achieve worker empowerment.\(^{11}\) While not mutually exclusive, proponents of economic democracy generally find proposals within the welfare state paradigm insufficient, such as providing greater economic opportunity within labor markets or reducing other social dynamics that promote economic inequality.\(^{12}\) Such disagreements often belie quite fundamental disjunctures on what constitutes the goal of economic development, from maximizing measurable indices of leisure or income\(^{13}\) to more aesthetic considerations of personal development or virtue.\(^{14}\) And, of course, there is an equally wide range of objections to arguments regarding worker empowerment as economic democracy, such as the classic neoclassical argument that such efforts are ultimately counterproductive for both general social and individual welfare.\(^{15}\)

Within this broader context, the 20\(^{th}\) century emergence of labor unions was tied to a particular participatory version of economic democracy expressed in forms of collective bargaining. Herein, the workplace was seen as a source of economic surplus that could then be allocated through a bargaining process, whose proper functioning could itself facilitate what Kenneth Dau-Schmidt calls the “cooperative surplus.”\(^{16}\) At the same time, this bargaining process would ideally facilitate a type of implicit psychological contract between owner and worker that would respect dignitary claims regarding workplace management.\(^{17}\)


\(\text{\textsuperscript{10}}\) ROBERT DAHL, PREFACE TO ECONOMIC DEMOCRACY (1956).


\(\text{\textsuperscript{13}}\) Take, for example, the anthropological critique of Keynes’ optimistic view of industrial progress to yield high levels of modern leisure in MARSHALL SAHLINS, THE ORIGINAL AFFLUENT SOCIETY (1972).

\(\text{\textsuperscript{14}}\) A popular meta-theory today is Amartya Sen’s concept of human capabilities, see KEVIN KOLBEN, *Labour Regulation, Human Capacities and Industrial Citizenship*, in PROMOTING DECENT WORK 35 (Shelley Marsh ed., 2010).


\(\text{\textsuperscript{17}}\) DENISE ROUSSEAU, *PSYCHOLOGICAL CONTRACTS IN ORGANIZATIONS* (1995).
The 20th century witnessed the development of a wide variety of institutional frameworks for how collectively bargaining could be structured legally and constitutionally, along with empirical experiences with how these frameworks worked in practice. A great deal of the resulting scholarship on the operation of collective bargaining engaged this diversity to demonstrate the relational embedding of collective bargaining processes within longitudinal processes of both enterprise and national development. Yet, as inspired as most movements to establish labor unions were by ideal philosophies of economic democracy, the role of democratic norms within the actual practice of collective bargaining became an early and recurrent subject of debate. Thus, a classic analytical dichotomy emerged between the requirements of institutional bureaucracy and membership participation in unions, as subset of the general tension between democratic movements and democratic organizations. Specified in this context as debates over “union democracy,” this tension was as pronounced in unions within socialist and capitalist countries alike. Such debates were further complicated by the characterization of different national systems of collective bargaining as possessing high or low levels of union democracy even among those generally considered to be relative successes.

In general, most labor scholars were sympathetic to critiques of insufficient participatory norms within unions regardless of their effectiveness as collective bargainers, often directly criticizing, ala Gerald Frug, the necessity of bureaucratic norms and processes on efficiency grounds. Thus, much labor critique highlighted the need for both internal reform within unions and direct government intervention to insure that collective bargaining fulfilled its democratic aspirations. Certainly, defenses of union de-democratization were mounted and captured specific

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22 Yoonkyung Lee, Labor’s Political Representation: Divergent Paths in Korea and Taiwan, in WORKING THROUGH THE PAST (Caraway et al. eds, 2015).
national discourses at times, but, more often then not, calls for re-democratization spilled over into to ever-greater calls for social unionism, or broadening union participation to include non-collective bargaining issues of social justice.

Yet, even with this focus on democratic norms within unions, most systems of collective bargaining stopped short of pushing participatory dynamics into core aspects of enterprise decision-making beyond the consultative. Perhaps the most aggressive design-level exception was that of German co-determination, where union representatives were given a place on corporate boards of directors. However, this system neither led to a more radical workplace politics as predicted by its opponents, nor to widespread imitations elsewhere as predicted by its supporters. While some impetus still exists for expanding worker participation in corporate governance through stakeholder theories, such theories have yet to be translated successfully into practice or reconcile the quite divergent participatory logics of union and shareholder democracy. The same holds true after the recurrent recognition of norms of economic democracy in international treaties, such as the European Union’s Lisbon Treaty.

As a result, while some labor scholars have continued to tie debates about union democracy to transformative visions of the workplace, hopes that unionization would lead to the growth of the stronger versions of economic democracy, such as direct ownership, have not materialized. Perhaps the most salient example of this failure was the beating back of Rudolf Meidner’s proposal

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25 For the turn of the “Oxford school” of industrial relations to electoral politics following a loss of faith in democratic bargaining, see Ben Jackson, Economic Democracy and the Labour Tradition, JUNCTURE (May 22nd, 2014).
for “wage-earner funds” in Sweden during the 1970s,\textsuperscript{34} where, as powerful and successful as Swede unions are often portrayed internationally, the idea that share levies could lead to high levels of corporate ownership by unions was fiercely resisted by Sweden’s highly concentrated family owners. In fairness, even among formally employee-owned corporation, such issues of democratic participation are still extant and unresolved.\textsuperscript{35}

**The Gravitation Pull of Union Corporatism**

Thus, instead of serving as a staging ground for the greater penetration of democratic norms into the workplace, the consistent objections of labor activists and intellectuals to bureaucratic norms within unions has failed to combat the general devolution of unions into corporatist arrangements. This gravitation pull of union corporatism in part reflects the very different democratic norms at play during the first 20\textsuperscript{th} century formulations of systems of collective bargaining. In contrast to democratic theories that rest upon individual conceptions of rights and participation, corporatist theories of society were predicated on facilitating the bargaining of particular group interests.\textsuperscript{36} Thus, in contrast to pluralist or republican versions of democratic participation,\textsuperscript{37} corporatist theories asserted that social harmony was achieved through designating collective intermediaries to both express and formulate the interests of particular social forces.\textsuperscript{38} The designation of corporatist theories as “democratic” was a popular transnational phenomenon in the early 20\textsuperscript{th} century, when such corporatist ideas were popular among liberal and non-liberal nations, including many fascist regimes.\textsuperscript{39}

While the inclusion of said regimes under contemporary democratic theory would be objectionable by liberal criteria, such corporatist notions of group intermediation were nevertheless popular exactly at the moment when many of the still extant systems of collective bargaining were institutionalized. As such, labor corporatism continues to be a key feature of many varieties of

\textsuperscript{34} Philip Whyman, *Post Keynesianism, Socialisation of Investment and Swedish Wage Earner Funds*, 30 CAMBRIDGE J. ECON. 49 (2006).
\textsuperscript{38} John Goldthorpe, *The End of Convergence: Corporatist and Dualist Tendencies in Modern Western Societies*, in *NEW APPROACHES TO ECONOMIC LIFE* 135 (Roberts et al. eds., 1985).
capitalism, even after nations have transitioned to formally non-corporatist political arrangements. Even today, the analytic frame of “neo-corporatism” that emerged in the 1980s remains popular, encompassing many studies on modern bureaucratic authoritarianism and financial corporatism in otherwise neoliberal economies. The persistence and re-emergence of corporatist agreements challenges the traditional view espoused by Philippe Schmitter, pioneering modern scholar of corporatism, that traditionally state-dominated forms of corporatism would give way to what he identified as societal corporatism. Schmitter’s key distinction being that under state corporatism the state designates and licenses the groups eligible to participate in political and economic bargaining and under societal corporatism where such groups arise spontaneously from civil society. The particular persistence of state corporatism has been most acute in the area of labor regulation, where government certification of unions has been an often unquestioned assumption undergirding the presumption that collective bargaining is an instrument for industrial peace and coordination.

Unregulated, privately organized labor movements were active in the 19th and early 20th centuries, resisting the global transition to industrial capitalism and wage labor. Such unions often advanced aggressive visions of economic democracy from those grounded in communism to those grounded in republicanism. Labor corporatism was thus attractive to very different political regimes interested in subverting these social movements. As a result, many fascist and authoritarian regimes, even those that came into power with the support of labor movements, moved to purge labor leaders and re-organize private labor unions under a single state-controlled union. For liberal democratic regimes, creating systems of non-unitary labor corporatism still served to quell and channel labor unrest emerging out of industrial transitions. This particular utility in part

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explains why such corporatist arrangements persisted in liberal regimes even after labor unions lost their effective place as political intermediaries.\textsuperscript{47}

The top-down process of regulated certification at the heart of labor corporatism thus shaped and further complicated the bottom-up tension of bureaucratic formation and internal democracy facing unions across the unitary/plural divide. It was this point that inspired Robert Michels’ use of labor unions as a paradigmatic example of his iron rule of oligopoly.\textsuperscript{48} Not only were the demands of centralization inescapable in any hierarchical organization, but the corporatist political ideas embedded in the foundations of modern collective bargaining were natural and desirable processes. A dreary diagnosis, and so it is not surprising that Michels himself grew disenchanted with German social democracy and later became an apologist for Italian fascism.

Obviously, Michels’ diagnosis did not bring on an end to the hope for union democracy, even though many 20\textsuperscript{th} century labor movements continued to resist their incorporation into new liberal and non-liberal labor regimes. As this paper will soon discuss, some of the strongest arguments for the possibility of union democracy came from the U.S., where Lipset, Trow and Coleman’s work on the decentralized and democratically vibrant International Typographical Union became a classic and hopeful counterpoint to Michel’s iron law.\textsuperscript{49} Throughout the 20\textsuperscript{th} century there was enough variation in regimes of labor corporatism episodically disintegrating and reformulating to leave open the question of whether union democracy could in fact thrive globally and foster ever greater developments in economic democracy.

\textit{The Global Rise of the Authoritarian Workplace}

The anomie of labor scholars cited at the outset of this paper is not primarily sourced in relative evaluation of the union democracy-corporatist tension, but instead springs from the impact of global economic and political trends on workplace rights more generally. In contrast to even the intermediary role of unions imagined under corporatist social theory, the idea that workers or their representatives should play a discrete role in state or enterprise decision-making has fallen

\textsuperscript{48} ROBERTO MICHELS, \textit{POLITICAL PARTIES, A SOCIOLOGICAL STUDY OF OLIGARCHIC TENDENCIES IN MODERN DEMOCRACIES} (1962).
increasingly hard to realize in an economic environment where the very desirability of labor protections has been called into question. A great deal of scholarship on labor markets in recent decades has promoted the ideal of "labor flexibilization," which asserts that individual, and associative, labor rights hamper GDP growth. Related but distinct from the traditional idea that formal labor protection simply induces labor informalism, the flexibilization discourse has found resonance in developed and developing countries alike, especially due to the influence of its popularity among international financial institutions.  


54 Ha-Joon Chang, Kicking Away the Ladder (2003).

contractualist labor norms\textsuperscript{56} and the proliferation of hyper-Taylorist management practices with limited concern for individual privacy, speech rights in and outside of the workplace, and other forms of automated workplace monitoring.\textsuperscript{57}

This growth of authoritarian norms within global workplaces and reforms focused on atomistic conceptions of labor/capital interactions have been resisted with varying degrees of success in different countries, but few evaluations of this resistance, perhaps outside of technological utopianism, are brightly optimistic. Thus, while much academic effort was committed to studying differences in union organization and labor regulation in democratic and non-democratic regimes, the categorical distinction has lost much of its salience in the face of these secular trends.\textsuperscript{58}

It is in this general context that this paper pursues the question of the modern salience of concerns about union democracy and corporatism. It does so by placing in comparative frame three nationally large and globally significant labor union systems, those of the United States, Brazil and China. Each system represents quite different, if at times interrelated, historical trajectories. The ultimate argument will be that each has retreated in different ways to forms of non-democratic labor corporatism. This common development is taken as significant precisely because these three countries represent distinctive political regimes and span the two primary axes of labor union formation: from public to private aegis and from sectoral to enterprise organization. The United States is an established liberal democracy whose decentralized system of private unionization ideally operates at the enterprise level. Brazil is a young social democracy with a centralized system of formally private but hyper-corporatist unionization. And China is governed by a modern bureaucratic authoritarian regime with a state union structure undergoing pressures for both democratization and de facto decentralization.

As in any area of law, the granularity of comparative legal analysis suffers when general global trends are at issue. As a given, for each point in this triadic analysis there are points of convergence and divergence that will be elided. However, given the state of economic

\textsuperscript{56} MARK FREEDLAND \& NICOLA KOUNTOURIS, THE LEGAL CONSTRUCTION OF PERSONAL WORK RELATIONS (2011) and RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT (Stone \& Arthurs eds. 2013).

\textsuperscript{57} An updated and concise summary of these trends can be found at: http://crookedtimber.org/2012/07/01/let-it-bleed-libertarianism-and-the-workplace/. Also see LEWIS MALTBY, CAN THEY DO THAT? (2009).

\textsuperscript{58} KRONCKE, supra note , at .
globalization, comparative legal analysis is both empirically necessary\textsuperscript{59} and is also the best disruptive intervention for spurring national labor intellectuals to escape the tendency to present tactical national solutions to what is a fundamental organizational shift in modern labor relations.\textsuperscript{60}

Fortunately, the methodological sophistication of labor studies has progressed significantly in recent decades, applying empirical techniques ethnographic,\textsuperscript{61} historical\textsuperscript{62} and statistical\textsuperscript{63} to move beyond the belabored laments of traditional comparative legal formalism or cultural over-determination. The relevance of comparative legal experience in labor law cannot be ignored on almost any facet of labor research which presumes to be honestly engaged in a search for new solutions. For those committed to notions of economic democracy, the comparative analysis presented herein is meant not as another biting wound, but to help face the harsher reality that some old battles, no matter the emotional or intellectual energy hereto committed, cannot be won.

Admittedly, this analysis will not address directly the thorny issues of the proper normative frame of evaluation with which comparative labor studies often struggle.\textsuperscript{64} At worst, for those convinced that there is little objectionable in the global trends in labor markets, or that the solutions for such rely on ideals of deregulation, the conclusions of the descriptive account given is likely to be tangential. Such limitations and caveats are openly accepted.

II. THE UNITED STATES: UNION DEMOCRACY AS CORE AND PERIPHERY

\textit{U.S. Labor from Republican Radicalism to Corporatist Peace}

The prominence of debates about union democracy with the U.S. labor movement reflects the nature of the social compromise that gave rise to its institutionalization through collective bargaining. In contrast to bargaining structures that emerged out of social democratic movements in Europe or post-authoritarian regimes elsewhere, the legal formalization of U.S. labor unions in

\textsuperscript{61} \textsc{The Anthropology of Labor Unions} (Durrenberger & Reichart eds., 2010)
\textsuperscript{63} Robert Karasek & Tores Theorell, \textit{Healthy Work} (1990).
1935 was the outgrowth of decades of struggle to reconcile U.S. ideals of republican government with the dislocations of industrialization. Finding a place for labor unions in U.S. law also faced the hurdle of the common law's traditional adherence to notions of contractual equality and preference for private ordering of economic affairs. Thus, much of the early resistance to labor organization in the industrial era was articulated through legal challenges to labor organization as a form of combinatory conspiracy. This form of judicial hostility, along with the traditional self-interested resistance of employers, only fueled quite radical republican critiques of wage-labor along with the notion that labor could serve as the basis for the type of broad social unionism often argued for today. Up until 1935, even when unions succeeded in discrete moments of bargaining with employers, there was little clarity of how and under what doctrinal categories collective agreements would even be enforced under existing U.S. law.

It was not until the Roosevelt administration sought to remake the U.S. economy in response to the Great Depression that unions were presented with a genuine opportunity to gain formal legal and political endorsement. In part to quell fears that social unrest could empower calls for more traditional socialism, Roosevelt advanced a corporatist vision of the New Deal as a solution to economic stagnation and industrial conflict. U.S. progressives where likewise drawn to ideas about labor corporatism then popular in Europe, especially given that corporatism was articulated, at the time, as a pathway to achieve both industrial peace and more effectively negotiate the allocation of labor. Yet, James Whitman has established that in contrast to the European experience which saw industrial peace as a resolution of class conflict, in the U.S. this corporatist view of group bargaining was instead re-cast as an expression of republican democracy.

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70 Woodrow Wilson, one of the leading Progressive thinkers of his generation, was also attracted to corporatist ideas and during World War I tried unsuccessfully to set up a Tri-Partite War Labor Board to manage growing labor tensions. JOSEPH MCCARTIN, LABOR'S GREAT WAR: THE STRUGGLE FOR INDUSTRIAL DEMOCRACY AND THE ORIGINS OF MODERN AMERICAN LABOR RELATIONS, 1912-1921 (1997).
As a result, the passage of the National Labor Relations Act in 1935, while bitterly contested by the Republican Party and most business interests, was explicitly infused with more pluralistic qualities than found elsewhere. The U.S. system was definitely corporatist given the government’s formalization and enforcement of the process of union formation as well as the scope of collective bargaining itself. Moreover, the regime was regulated through a then-still-novel grant of legal power to a federal administrative agency, the National Labor Relations Board. More exceptionally, the system was initially based on the enterprise level and with little regulation of internal union affairs, and with the aim of creating a private system of welfare as an alternative to the public welfare states emerging in Europe.  

This vision of the NLRA was held out to unions to indicate that it rejected the distinction between economic and political democracy, at least the corporatist conception of such. This institutionalization was resisted by a range of existing labor organizations, especially its narrow designation of unions as only for non-supervisory workers, but the weakening of the labor movement in the early 1930s paved the way for acquiescence in relatively short order.

However, from the outset of the NRLA regime, norms of economic democracy were still not widely embraced across U.S. legal and political culture. There were still continued arguments advanced that the collective notion of labor unions violated norms of U.S. liberty and individualism. Defenders of unionization disagreed but they did so in consonant ideological terms or else made recourse to more inchoate invocations of “economic nationalism” popular during times of war. The particular historical aperture that allowed Roosevelt to pass the NRLA and avoid annulment by the Supreme Court was, in retrospect, exceptional. While the U.S. government would for decades promote abroad—especially in its post-World War II reconstruction projects—this regime of collective bargaining as an expression of republican democracy in the workplace, broad social and legal hostility to unions would persist and grow in the following

75 Christopher Tomlins, AFL Unions in the 1930s, 65 J. AMER. HIST. 1021 (1979).
78 William Hard, National Policy Toward Labor, 224 ANNALS AM. ACAD. POL. & SOC. SCI. 152 (1943).
80 ANTHONY CAREW, LABOUR UNDER THE MARSHALL PLAN (1987) and AMERICAN LABOR AND THE COLD WAR
decades.\textsuperscript{81} As a result, the neat theoretical operation of labor corporatism used to justify the NRLA would rarely come to fruition in practice.\textsuperscript{82} The institutionalization of labor unions did serve to help eventually sideline more radical visions within the labor movement, as symbolized by the merger of the AFL and CIO in 1955.\textsuperscript{83}

Even though enterprises-level union affiliation with larger union organization such as the AFL-CIO was purely voluntary in the NLRA scheme, in practice, the strength of the labor movement was recognized to lie in its potential for collective solidarity. As a result, while the decentralized system ideally represented a victory for democratic norms, the issue of union democracy was recurrent. Following the dynamics outlined by Michel’s iron law, unions de facto embraced a more collective form of corporatism, spurred on by the continued national political and legal assault they faced at the legislative and judicial level.\textsuperscript{84} Union democracy became a rallying cry for activists within the labor movement, but it also became a weapon wielded by critics of unionizations.

These dynamics resulted in the passage of the Labor Management Relations Act in 1947, popularly known as the Taft-Hartley Act, which placed greater procedural restrictions on union bargaining, as did the Labor Management Reporting and Disclosure Act of 1959. The LMRD, popularly known as the Landrum-Griffin Act, was explicitly justified on the basis of promoting union democracy in the wake of a variety of union corruption scandals.\textsuperscript{85} It was certainly true that many unions had grown in influence by centralizing their operations. It was further true that in union workplaces dissenting workers were often left with little recourse,\textsuperscript{86} though exceptions like the ICT did persist at the local level.\textsuperscript{87} Nevertheless, the relative success of the AFL-CIO merger

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\textsuperscript{84} Joel Seidman, Democracy in Labor Unions, 61 J. POL. ECON. 221, 231 (1953).
\textsuperscript{86} Clyde Summers, Legal Limitation on Union Discipline, 64 HARV. L. REV. 1049 (1950) and Paul Tobias, A Plea for the Wrongfully Discharged Employee Abandoned by His Union, 41 U. CIN. L. REV. 55 (1972).
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also gave better mooring to arguments that labor unions were powerful enough to submerge other legitimate social interests.\textsuperscript{88}

These developments placed pro-union democracy activists in the awkward position of finding their loyalty to the large union movement questioned.\textsuperscript{89} The scholarship of Clyde Summers, key contributor the Landrum-Griffin act, would for decades try to reconcile this commitment to union democracy with the progressive weakening of the labor movement.\textsuperscript{90} Others were explicit that the search for union democracy was a distraction to the core issue of bargaining power that the turn to more corporatist operations at the national level had quickly revealed.\textsuperscript{91}

\textbf{Legal Deradicalization Amid Failed Corporatism}

The passage of the Taft-Hartley and Landrum-Griffin Acts revealed that, for whatever initial opening the NRLA had provided for the recognition and expansion of U.S. labor unions, the corporatist conception of industrial peace imagined during the New Deal was not in sync with the general organization of the U.S. economic or political arenas. The social movements that sustained labor organization up until this point fed into a system that demanded greater centralization to achieve any economic results through collective bargaining, but where the same centralization recursively lessened the participatory capacity for renewed social capital formation. This distinct structural weakness left unions relatively powerless to resist repeated losses at the judicial and legislative levels. Retelling and reinterpreting what Karl Klare has called the “deradicalization” of the NLRA has become a staple among contemporary labor law scholars,\textsuperscript{92} culminating in perhaps the most restrictive and regulated collective bargaining regime among industrial democracies.\textsuperscript{93}

Foundationally, while the Wagner Act itself was deemed constitutional, it was so as a regulation of interstate commerce rather than through a positive articulation of constitutionalized

labor rights. Some hope had initially existed that the success of civil rights legislation in penetrating the traditional insulation of economic organization from rights-based claims could empower the National Labor Relations Board to articulate a more substantive vision of associative labor rights, but, as Sophia Lee has recently demonstrated, the use of racial discrimination as a constitution bridge to the workplace failed to materialize. Some unions themselves openly resisted this development by attempting to shield their international operations from critiques of racial discrimination, and such a choice still stands today in a legacy of lost union opportunities to expand on the positive precedents of black political engagement.

The lack of a constitutional basis that did not simply enable legislative discretion, but led to a litany of decisions by the courts and the NRLB that hearkened back to the common law treatment of unions at the 19th-century. Progressively, the scope of union organization was narrowed to focus on procedural formalities, the evaluation of which was judged based on implicitly constitutionalized versions of common law property rights of owners, and with an overt hostility to forms of collective action such as secondary strikes, sit-ins and even the right to strike itself. None of which has been successfully turned back at the legislative level, even after various economic and financial crises, and has helped leave private unionization in the U.S. at an all-time low today.

104 Compare Samuel Estreicher, “Come the Revolution”: Employee Involvement in the Workers’ State, 1 U. PAJ. LAB. & EMP. L. 87, 87 (1998) with ()
105 Harry Hutchinson, Liberty, Liberalism, and Neutrality: Labor Preemption and First Amendment Values, 39 SETON HALL L. REV. 779 (2009) and Lonnie Stevans, The Effect of Endogenous Right-to-Work Laws on Business and
The response of labor intellectuals to this decline has been to articulate alternative constitutional frames that would better support collective labor actions, largely grounded in antisubordination readings of the 13th Amendment or more expansive readings of the associative content of the First Amendment. Other responses embrace the basic proceduralism of labor union certification and advance modifications either to union formation or to further decentralize labor regulation to the state level. Some of these directly critique union reactions to changing labor market conditions or to make the first move towards more conciliatory engagement with employers. Some take up more abstract arguments about the framing of workplace justice arguments, but all with an often open assumption that better union responsiveness to current and potential members will lead to significant progress. This need to anchor proposals to the ideal that unions properly express the U.S. democratic tradition remains enabled by the corollary faith that


removing such roadblocks would allow U.S. workers to achieve the greater level of union representation they desire.\textsuperscript{114}

Following this continued embrace of union democracy, most all of these legal proposals are accompanied by a critique of current union operations—in particular those that reflect and encourage greater corporatist behavior.\textsuperscript{115} Many scholars trace the decline of union democracy with the progressive shift of expenditures from organizing to legislative lobbying\textsuperscript{116} and a debilitating focus on short-term electoral politics.\textsuperscript{117} Such observations are again the basis of arguments that union democracy and the effectiveness of the U.S. labor movement are linked,\textsuperscript{118} even when such claims call for otherwise more radical reforms, such as abandoning striking.\textsuperscript{119}

More sweeping arguments about union democracy involve an embrace of the social unionism of earlier eras or abroad.\textsuperscript{120} It is in calls for social unionism that more fundamental critiques do emerge regarding the Wagner Act regulatory framework,\textsuperscript{121} but again on the level that it inhibits not only internal union democracy but the capacities of unions to engage in broader forms of social activism;\textsuperscript{122} especially so as to remediate its historical errors of racial or gender exclusion\textsuperscript{123} or hostility to immigrant labor.\textsuperscript{124} Social unionism is seen as providing the link

\begin{itemize}
\item[114] Richard Freeman & Joel Rogers, What Workers Want (2006).
between unions and the participation of those workers outside of the traditional industrial conception.\textsuperscript{125} At its peak, calls for social unionism expand to the transnational level.\textsuperscript{126} Of great current popularity, labor scholars have attempted to adapt to labor contractualism by imagining organizing around individual employment rights so that unions can use aggregate litigation as a new source of worker solidarity.\textsuperscript{127} At the local level, there has certainly been a range of internal union innovations on these grounds, some achieving for a short time the hoped for renewed democratic energy hoped.\textsuperscript{128}

\textit{Disengaging from Corporatism: From the Fire Into the Flame?}

In the end, the focus on union democracy has often left labor activists rediscovering the next new precedent for union revitalization among what essentially amounts to tactical victories.\textsuperscript{129} The broadest action taken under the renewed union democracy rubric was the split of several unions from the AFL-CIO to form the Change to Win Federation in 2005. However, in just a few years several, of the unions reaffiliated with the AFL-CIO, and what studies have been done have shown little success by the remaining Change to Win affiliates in new member organizing.\textsuperscript{130} This only replays the general and consistent trend towards union mergers that has characterized the U.S. labor movement even prior to the Wagner Act.\textsuperscript{131} Recent case studies of some of the most hopeful,

\begin{flushleft}
\textsuperscript{129} Melvin Rivers, A Union Representative’s Perspective of Declining Union Membership, 3 INT’L J. MANAG. ECON. & SOC. SCI. 125 (2014).
\end{flushleft}
committed and sophisticated local union organizing drives have ended stymied by but one unfavorable aspect of the current regulator regime.\textsuperscript{132}

Such developments have seeded new calls to sidestep union democracy and facilitate, rather than fight, the centralization of labor power, either within the current system\textsuperscript{133} or through the formation of a labor party.\textsuperscript{134} These minority arguments recall some of earlier generations of labor scholars such as Archibald Cox who saw union growth prior to the Landrum-Griffin Act as already fragile, and thus often disagreed with Clyde Summers’ consistent endorsement of union democracy.\textsuperscript{135} Their argument tracks both the empirical record of union decline following the Landrum-Griffin Act and the fact that the one consistent stronghold of unionization in the public sector operates on a de facto sectoral basis and has, hereto, been largely insulated from the contemporary logic of capitalist productions.\textsuperscript{136} Furthermore, attempts under the current paradigm to expand union membership to unorganized workers faces the popular perception that unions are themselves weak,\textsuperscript{137} if not socially inefficient, and fostered the realization that in many cases the costs of organizing new populations are less cost-effective than defensive legislative expenditures.\textsuperscript{138} The original post-Wagner Act turn to corporatism and its consistent pull since, can thus be read not as a failure of democracy but as an inevitable defensive measure in a system with irresolvable internal logistical conflicts and Michels’ institutional necessities of hierarchy.\textsuperscript{139}

There is of course little doubt that many of wholesale pro-union reforms popularly argued for would improve the state of union membership, but it remains unclear if such would ultimately foster union democracy or simply provide new sustenance to defensive corporatism. Union

\textsuperscript{132} The exhaustive case study carried out by Scott Cummings of the dynamic Clean Truck Program campaign in L.A. ends with its derailment by federal pre-emption after a variety of local strategic and tactical innovations. Scott Cummings, \textit{Preemptive Strike: Law in the Campaign for Clean Trucks}, 4 U.C. IRVINE L. REV. 939 (2014). Also see \textit{VIRGINIA DOELLGAST, DISINTEGRATING DEMOCRACY AT WORK: LABOR UNIONS AND THE FUTURE OF GOOD JOBS IN THE SERVICE ECONOMY} (2012).
\textsuperscript{138} A further example is the total failure of more anarchical versions of economic democracy to translate into any effective form of social organization following the Occupy Movement. \textit{TOM MALLESON, AFTER OCCUPY: ECONOMIC DEMOCRACY FOR THE 21ST CENTURY} (2014).
democratization as currently envisioned requires intensive and constant processes of social organization and social capital formation within the constraints of an economic system whose steady-state operations agitates against solidarity and participation. The retreat to corporatism and the failure of democratic revitalization returns to the failure of the original compromise of the Wagner Act—not to corporatize unions per se—but to accept a system whose social vision never reflected a longitudinal social compact.\(^{140}\) Such is the inevitable consequence of James Atlenson’s classic *Values and Assumptions in American Labor Law* and Catherine Fisk’s critique of Karen Orren’s *Belated Feudalism*—that the Wagner Act did not ward off socialism as much as it failed to deracinate the feudal presumptions of the common law regarding the basic property/commodity divide in employee-employer relations.\(^{141}\) Certainly, current corporatist practices discourage and inhibit innovation at the margins of current labor law, but it is an open question whether their collapse would simply accelerate the very outcomes for workers which such innovations seek to prevent.\(^{142}\)

As much as the current weakness of U.S. labor unions is often linked to structural changes in the economy, the impossibility of union democracy as a persistent feature of U.S. labor organization explains the failure to realize participatory visions of the workplace ascendant in the 1980s as the logical outgrowth of the same dynamics of globalization\(^ {143}\) and new technologies.\(^ {144}\) Encouraged at the time by popular interpretations of the Japanese workplace as both more participatory and successful than those in the U.S.,\(^ {145}\) hopes were expressed that the next wave of corporate governance reforms would move teleologically toward greater employee voice if not outright ownership.\(^ {146}\) Such optimism located a new flaw in the Wagner Act regime, the ban on in-house unions and other forms of non-union employee representations.\(^ {147}\)

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aggressively resisted these claims, historically suspicious of in-house programs—a suspicion partially validated by the adoption of such rhetoric by anti-union activists in the form of the TEAM Act of 1995.¹⁴⁸

In response, the next iteration of scholarship on workplace participation largely presumed a tangential relationship between unions to the promotion of a participatory workplace and tried to embrace the possibility of enlightened employer acquiescence to participatory norms through voluntary self-regulation, popularly known as “new governance” approaches.¹⁴⁹ These approaches can see unions as obstacles as often as allies,¹⁵⁰ and such approaches replaced in U.S. labor reform rhetoric the self-evident good of union democracy with the more individualized self-evident good of employee voice.¹⁵¹ Many new governance approaches dropped dignitary arguments altogether to focus on the efficiency-enhancing possibility of employee participation.¹⁵² Whatever doubts were expressed about new regulation approaches in theory, they have yet to yield any discernable impact on the global trend toward the authoritarian workplace. In the U.S., as elsewhere, employee voice has not won over employers but who have instead increased monitoring and demands for demonstrations of workplace loyalty in workers’ private and public lives.¹⁵³ This trend has produced episodic bouts of social protest and even organization in the U.S., but as reliant as these processes are on intensive social capital accumulation they continue to be subject to daily contest and often avoid being drawn into the NRLA system.¹⁵⁴

It is ever easy to point out the foibles of any corporatist institution, but the retreat of U.S. union leadership to lobbying and other forms of corporatist bargaining is nevertheless far more

understandable than is commonly recognized. If an existing or imagined future union leadership is expected to walk away from the Wagner Act and its hollow corporatism, it cannot be simply for some as-of-yet unrealized model of union democracy.

III. Union Hyper-Corporatism in Brazil: Bulwark or Reform Trap?

Among contemporary labor intellectuals, the international reputation of Brazilian unions is often quite high. While aspects of Brazil’s legal system have traditionally been subject to critique by legal scholars on efficiency grounds, the relative success of Brazilian unions in playing a central role in Brazilian politics has not gone unnoticed by labor scholars looking for comparative successes. In contrast to the decline of unions in the U.S., Brazil presents to the initial observer what many consider to be purely aspirational elsewhere—a labor party in power for over a decade, broad and mandatory sectoral unionization, and little to no constitutional restrictions on the bargaining process. Economically liberal observers lament the influence of unions in Brazil much as leftists decry the powers of corporations in the United States.

Yet, as recently as 2014, street-sweepers in Rio de Janeiro were sanctioned by a Brazilian labor court (Justiça do Trabalho) for carrying out an illegal strike during the peak tourist season of Carnival and were dispersed by police using tear gas. Moreover, the strike was neither initiated nor endorsed by the street-sweepers union. Six months later, another strike was held by subway workers in Sao Paulo prior to the World Cup, and was again declared illegal and dispersed by the police under orders from the administration of President Dilma Rousseff—a former communist rebel and putative head of the Workers Party (Partido dos Trabalhadores, or PT). In an era when Brazil had witnessed some of its most active and robust instances of public protest, this civil society unrest did not proclaim the PT as the conduit through which to voice their discontent, but was rather, in many cases, the object of it—leaving unions in a politically ambivalent position.

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156 KEITH ROSEN, TRENDS IN BRAZILIAN REGULATION OF BUSINESS (1981).
159 Transport Chaos in Sao Paulo Following Second Day Running of Metro Strike, MERCOPRESS (June 7th, 2014).
160 Luciana Tatagiba and Karin Blikstad, The Left and the June Protests in Brazil, MOBILIZING IDEAS (Sept. 4th, 2013).
This ambivalence belies a more complicated relationship between unions, workers and political power than the reputation the Brazilian unionism has built up over the past two decades—diagnoses of which have begun to emerge in more critical scholarship on Brazilian unions.¹⁶¹ Within this scholarship can been seen arguments not far afield from that of the Teamsters Democratic Union described at the beginning of this paper. The central importance of union democracy, expressed as the tension between local participation and bureaucratic bargaining, has been at the heart of Brazilian unionism for as long as it has been in the United States. The very success of the PT and its role in Brazilian democratization did shape and present a new narrative of Brazilian labor history for internal and international consumption. Yet, the PT transitioned from its origins in radical social unionism into the motor forced behind a hyper-corporatist labor union regime, with little to no remaining practice of union democracy. This transition has both opened the PT to critique, but, given its very success, also provides another vantage point to consider the question of whether corporatism is in fact the best tactic for modern union movements.

**A New Unionism for A New Labor History**

During the rise of the PT in the 1980s, the labor history of Brazil was often presented as tightly linked to failures of union democracy, wherein corporatist labor unions ignored their rank-in-file members and neglected truly agitating for their interests.¹⁶² Thus, while there were moments in the 19ᵗʰ and 20ᵗʰ centuries where Brazilian workers had organized politically, such movements were either directly repressed by the state or their energy siphoned away by corrupt union leaders. Much of the early 20ᵗʰ century of labor is told through the plight of the Confederação Operária Brasileira (COB), a radical labor union which first attempted to form a Brazilian labor party and was central to the historic 1917 general strike in Sao Paulo.¹⁶³ Yet, in the following decades the variety of socialist, communist and anarchist-inspired labor organizations were not able to coalesce into a political force sufficient to challenge the rural landowners who had taken power after the end of the post-colonial monarchy.¹⁶⁴

¹⁶¹ *See infra* ()
¹⁶² A critical overview is presented in the *MAURICIO RANDS BARROS, LABOUR RELATIONS AND THE NEW UNIONISM IN CONTEMPORARY BRAZIL* (1999).
¹⁶⁴ Wolfe describes the active, if unsettled, labor politics of this early era. *JOEL WOLFE, WORKING WOMEN, WORKING MEN: SÃO PAULO AND THE RISE OF BRAZIL’S INDUSTRIAL WORKING CLASS* (1900-1955). For a interesting comparative
The major early 20th century turning point in Brazilian history was the military coup that brought the dictatorship of Getulio Vargas to power in 1930. Vargas’s consolidation of power over the next decade culminated in his overt adoption of corporatism as a general political model for Brazil, known as the New State (Estado Novo). In contrast to the selective experiment with corporatism in the U.S. under the New Deal, Vargas’s corporatist model for labor functioned in the context of his reshaping of the entire Brazilian state under corporatism.\textsuperscript{165} The labor code that Vargas’s regime adopted in 1943 (the Consolidação das Leis do Trabalho, or CLT) would serve as the foundational labor law of Brazil throughout the 20th century and, many would say, today. In the context of a dictatorship, the brand of nationalism that Vargas promoted in Brazil was far removed from the republican ideologies of the U.S., and the CLT system was far more centralized. Overseen by a Ministry of Labor, only one union was recognized by the government in each industry, for which membership was mandatory and to which all workers were required to pay mandatory dues (imposto sindical). Following the general corporatist logic of the New State, unions did not need to organize workers through elections or bargaining with individual enterprise owners. Furthermore, unions were a conduit for state benefits rather than a bargaining instrument for private welfare. Although not technically members of the government, union leaders (pelegos) were deeply embedded in the state as a result and gained a notorious reputation for corruption. The success of the New State in dampening labor unrest was significant, and allowed the military regime in 1946 to relax the CLT’s initial ban on striking.

Brazilian political history over the following decades was far more systemically contested than that of the U.S. post-New Deal, but the integration of the corporatist labor system within the general logic of the corporatist Brazilian state and economy gave it a durability far greater than the progressive disintegration of the NRLA in the United States.\textsuperscript{166} Many local Brazilian labor movements still organized and resisted inclusion in the corporatist system, but more often than not they ended up settling for trying to reform unions from within. As in the U.S., the rallying cry of

\textsuperscript{165} Italy is often cited as the main transnational influence on the CLT regime, but new scholarship has revealed wider influences, including from the United States. Fernando Silva, \textit{The Brazilian and Italian Labor Courts: Comparative Notes}, 55 Int’l Rev. Soc. Hist. 381 (2010) and Melissa Teixeira, Law, Race, and Development in the Writings of Oliveira Vianna: Recovering the Global Arguments That Shaped Brazil’s Corporatist Experiment in the 1930s (2013) (paper for Commerce, Corporations and the Law at Princeton University).

\textsuperscript{166} French emphasizes less a narrative of oppression than one of opportunism in the success of the corporatist model. Concurrently, he makes much less of the issue of union democracy than many other contemporary scholars. \textit{John French, The Brazilian Workers’ ABC: Class Conflict and Alliances in Modern Sao Paulo} (1992).
such reform was union democracy, as unions’ corporatist bargaining not only failed to provide wage increases commensurate with productivity gains, but also failed to transcend the urban/rural and racial divides that cleft the working classes in Brazil.

In contrast to narratives popular later in the 20th century, Brazilian labor activists were never quiescent during this time and often their efforts were quashed not only by the seductive corruption of the corporatist system, but also by direct military repression. At the same time, even these more militant challenges from outside of the system were as susceptible to ignoring union democracy in practice, especially when broader working class sympathies were given over to the variety of nationalist populism Vargas promoted rather than imported European theories. One of the more telling transnational moments from these mid-century decades was the failed attempt of quasi-government sponsored attempts by the AFL-CIO to move Brazilian labor regulation towards the U.S. model, often marketed during the Cold War as “business unionism,” in order to democratize Brazilian labor unions. Such efforts fared as poorly as most such attempts to reshape foreign legal systems based on stylization of U.S. law, but specifically suffered from misunderstanding the current unions’ function within the corporatist state.

While scholarly revision of this era continues, it is undisputed that the corporatist model of unionization remained dominant in Brazil up until the 1980s. However, during the 1980s the Brazilian labor movement began to take on the role alluded to earlier in this paper, that as key actor in mobilizing for the political democratization. The notion of a “new unionism” emerged, with union leaders in southern urban Brazil arguing that they would bring about a new era of union democracy. Centerpiece to this movement was the interrelated formation of the PT and CUT (Central Única dos Trabalhadores) in the early 1980s, bringing together leftist intellectuals and

170 This is main intervention carried out by Wolfe, supra note .
172 Jedidiah Kroncke, Law and Development as Anti-Comparative Law, 45 VAND. J. TRANSNAT’L L. 477 (2012);
173 Kenneth Erickson, The Brazilian Corporative State and Working Class Politics (1977) and John Humphrey, Capitalist Control and Workers’ Struggle in the Brazilian Auto Industry (1982).
disaffected members of the labor movement. Luiz Inácio Lula da Silva, popularly known as Lula, had been the leader of several successful strikes in the 1970s by the powerful ABCD Steelworkers Union in Sao Paulo, and he became figurehead of both the PT and CUT.\textsuperscript{175}

CUT specifically championed the idea that it represented an alternative to the corporatist regime and criticized the corporatist attributes of the CLT that left unions more dependent on the state than on workers for their legitimacy. Much of CUT’s contribution to the democratization movement was its broadening of the inclusiveness of the labor movement, incorporating both middle class professionals as well as rural and ethnically diverse constituents symbolized by its alliance with the Landless Workers’ Movement (Movimento dos Trabalhadores Sem Terra). The victories of CUT in the political arena were significant,\textsuperscript{176} and it initially succeeded in gaining concession for workers well beyond those of the traditional corporatist unions.\textsuperscript{177} The effusive praise for CUT from international observers was encouraged by the close alliance of labor intellectuals with the PT, many of whom contributed to writing the narrative of union democracy’s ascendance with the “new unionism.”\textsuperscript{178}

\textit{The Iron Rule and Neo-Corporatism}

The success of CUT and the PT in pressuring the military regime to hold elections for a national Constituent Assembly and paving the way for democratic transition is undeniable. However, the crucial point in evaluating modern Brazilian labor unionism is interpreting the process of forming the 1988 Constitution and the PT’s subsequent rise to power. In the course of broadening its social appeal during democratization, CUT had already jettisoned much of its more radical ideological elements and embraced the type of social unionism of other successful labor parties in Europe and Latin America.\textsuperscript{179} Its emphasis on union democracy, rather than more extensive forms of social revolution or economic redistribution, provided exactly the type of less

\textsuperscript{175} Jose Moises, \textit{Current Issues in the Labor Movement in Brazil}, 6 Latin Am. Persp. 51 (1979).
\textsuperscript{176} Margaret Keck, \textit{The Workers’ Party and Democratization in Brazil} (1992).
\textsuperscript{177} John French, \textit{The Brazilian Workers’ ABC: Class Conflict and Alliances in Modern Sao Paulo} (1992).
contentious political basis for building a democratic movement, and it retreated from the land
distribution called for by the Landless Workers Movement.\footnote{180}

The main success of CUT in shaping the 1988 Constitution was the removal of the
discretionary powers of union recognition from the Ministry of Labor and thus towards greater
union self-regulation—formal privatization.\footnote{181} Yet, the basic corporatist structure created under the
New State was not undone. With some semantic alterations, the main components of the CLT
remained unchanged: only a single union could be formed within any economic sector,
membership and dues were mandatory, and there was no new requirement for the direct election of
representatives.\footnote{182} As a result, while the larger corporatist logic of the Brazilian political system
was weakened, in the context of labor this privatization simply allowed for the proliferation of
unions who could make a conceptual claim to a new category of economic activity and then reap
the guaranteed rewards of such “representation.”\footnote{183} Unions still were not charged with bargaining
to create a system of private welfare, but served as conduits again for growing social welfare
benefits granted by the states.\footnote{184} The lack of reform within the labor system reflected the highly
negotiated nature of the transition to democracy that gave rise to the 1988 Constitution, as was seen
in the election of more economically liberal presidents until 2002.\footnote{185}

When the PT finally won the national presidency after Lula’s third campaign, this victory
provided a new opportunity to revisit these previous calls for union democracy. By this point, the
power of the PT relied heavily on existing unions, and CUT itself benefited from cementing its
place within the new corporatist structure. One of Lula’s first moves as President was to form a
corporatist consultative body drawn from representatives across society, the Council for Economic
and Social Development (Conselho de Desenvolvimento Econômico e Social, or CDES), and
establish a related commission on labor reform, the National Labor Forum (Forum Nacional do
Trabalho, or FNT). However, the union reforms that emerged from this once again did not advance

\footnote{180} Rebecca Tarlau, \textit{Thirty Years of Landless Workers Demanding State Power}, 58 BERK. J. SOC. ART. 1 (2014).
\footnote{181} Ana Gomes & Mariana Prado, \textit{Flawed Freedom of Association in Brazil: How Unions Can Become an Obstacle to
214 (1988); Armando Boito & Bill Steiger, \textit{The State and Trade Unionism in Brazil}, 21 LATIN AM. PERSP. 7 (1994)
and Marieke Riethof, \textit{Changing Strategies of the Brazilian Labor Movement: From Opposition to Participation}, 31
\footnote{183} Helio Zylberstajn, \textit{President Lula’s Union Reform, in SOCIAL DIMENSIONS OF GLOBALISATION} (International
Industrial Relations Association ed., 2005).
\footnote{184} Álvaro Dias et al., \textit{Pension Funds and Brazilian Unions}, 2 REV. BRASIL. PREVIDENCIA ART. 2 (2013).
\footnote{185} Margaret Keck, \textit{Update on the Brazilian Labor Movement}, 11 LATIN AM. PERSP. 27 (1984) and Leigh Payne,
union democracy, outside of allowing older unions to stay in power as long as they met the threshold of 20% direct worker representation. Later in 2008, Lula moved to guaranteeing the existing central trade unions 10% of the trade union dues. These developments did not sit comfortably with all the members of CUT and defections have occurred at different moments since 1988, most notably in the formation of Coordenação Nacional de Lutas (Conlutas) in 2004 and the later splintering of other formally communist and socialist unions.

The lack of reform and CUT’s close ties to the PT have inspired calls for recognizing the operation of “neo-corporatism” and open claims that the PT has succumbed to Michels’ iron rule. This critique has found adherents from the both the left and right, and has benefited from the growth of critical empirical studies of labor unions in the past twenty years. Although much of the critique from the right focuses on more traditional arguments about the negative impact of labor unions in growth and efficiency terms, among labor scholars the focus has been on the unfulfilled promise of union democracy and the effective continued reliance of unions on the state rather than worker legitimacy.

In sum, as of yet, very few new unions have embraced union democracy or have developed internal systems for remaining in communication with the workers they represent. The bargaining that does go on between unions and employers, even when technically at the enterprise level, need not involve any of the actual employees affected. Representatively, Brazil under the PT has continued to refuse signing major ILO conventions guaranteeing freedom of association. When two preeminent contemporary Brazilian labor law scholars were asked by a U.S.-based

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187 Gomes & Prado, *supra note* (), at 878.
journal to describe restrictions on union speech in the workplace, their initial reaction was puzzlement—there are no restrictions, for why would a Brazilian union need to speak to the workers it is meant to represent?\(^\text{196}\)

It would elide too much to claim that these structural critiques are simply tied to union democracy as a good in itself, but do concretely link it to the social conservatism of unions regarding other issues of social reform, such as environmental degradation.\(^\text{197}\) Furthermore, the primarily industrial membership (and thus fee) base of unions left employment conditions in many rural areas, especially outside of the South, much neglected even in the post-1988 era.\(^\text{198}\) Brazil’s informal sector also has little trade union representation,\(^\text{199}\) as well as many generally low-wage sectors of employment.\(^\text{200}\) There are still exceptions to these general rules, but exceptions they remain.\(^\text{201}\)

The tangential relationship of many unions to their workers also helps explains why so many workers have turned to Brazil’s specialized labor courts to resolve their problems. In practice, routine labor disputes have been effectively judicialized\(^\text{202}\) and exposed the gap between the aspirational and real conditions of many workers.\(^\text{203}\) And while Brazilian labor courts are often seen as favoring employees over employers,\(^\text{204}\) they have not only grown less protective of union strikes but acted consistently to reinforce incumbent union organization.\(^\text{205}\)

\textit{The Risk of Union Democracy with Oncoming Internationalization}


\(^{197}\) Bruno Dobrusin, \textit{Sustainability in Brazil and Argentina: The Trade Unions Within the Commodity Consensus} (2014) (paper for Ninth Global Labour University Conference) and Carolina Mercante, \textit{As Centrais Sindicais e o Neocorporativismo à Brasileira}, 5 REV. ESTUD. POLIT. 301 (2014).


\(^{199}\) (FGV 2011)


\(^{201}\) \textsc{R}enato \textsc{C}olistete, \textit{Trade Unions and the ICFTU in the Age of Developmentalism in Brazil, 1953-1962} (2010). (recent auto-industry election and strikes)


\(^{203}\) \textsc{J}ohn \textsc{F}rench, \textit{Drowning in Laws Labor Law and Brazilian Political Culture} (2004).

\(^{204}\) Carolina Mercante, \textit{As Raizes Autoritarias da Atual Lei Greve Brasileira}, 7 REV. DIR. MACKENZIE 42 (2014).

A number of reasonable and often technically measured reform proposals have emerged from the new critiques of labor neo-corporatism in contemporary Brazil. Some of this moderation reflects a kind of resignation that the existing political power of corporatist unions would be difficult to overcome. At the same time, it is important to recognize that not only have some areas of Brazilian labor regulation improved dramatically in recent years, such as labor inspection, but the power of Brazilian unions have also allowed them to provide some of the better examples of transnational labor action to date, with CUT alone participating in fifty transnational partnerships as part of its CUTMulti project. Moreover, in the past ten years union strikes and bargaining have garnered significant wage increases for workers, while the PT has used its political clout to successfully expand welfare state protections. In other areas of Brazilian governance, the rhetoric of participatory citizenship has yielded experiments that are now studied worldwide, such as participatory budgeting.

In the wake of these gains, the drive for union democracy must again be weighed against the current relative success of Brazilian unions in material terms. What Pedro Ribeiro has called the “amphibian” nature of the PT would not be an inherently negative attribute if the alternative was, for example, less labor participation in the democratization process. Again, one of the common outcomes of labor union stimulation of democratization processed is how little they gain afterwards and how often they are then politically marginalized. The very process of the CUT’s deradicalization and depluralization followed exactly the track of Michels’ iron law, not because of raw opportunism but the necessity of effective coalition politics. Here again, we confront the

207 ROBERTO PIRES, FLEXIBILITY, CONSISTENCY AND RESULTS IN THE MANAGEMENT OF BUREAUCRATIC PERFORMANCE (2010).
213 María Cook, Labor Reform and Dual Transitions in Brazil and the Southern Cone, 44 LATIN AM. POL. & SOC’Y 1 (2002).
214 JEFFREY SLUYTER-BELTRAO, RISE AND DECLINE OF BRAZIL’S NEW UNIONISM (2010).
issue that generating social capital to inspire democratization is far different from putting in place a steady-state system of union organization that requires constant social capital formation.

It is also important to note that the Brazilian economy has to-date been relatively insulated from the forces of globalization and capital mobility that have made labor organizing difficult elsewhere. It is notable that beyond critics who claim that unions depress Brazilian productivity more generally, it some have already claimed that Brazilian unions will suffer the same fate once the economy more extensively internationalizes. Moreover, the demographics of Brazil’s workforce are only growing more diverse, making the traditional recourse to social unionism more challenging.

As a preliminary test of this more difficult future, Brazilian unions have been active in bringing lawsuits against foreign employers attempting to enforce stricter forms of Taylorist discipline into the Brazilian workplace, serving as a noticeable deterrent to the operations of private equity takeovers. However, in those areas of the Brazilian economy that have already witnessed trade liberalization, unions’ power to bargain effectively has been seriously circumscribed.

Thus, as appealing as union democracy may be in theory, and as imperfect as Brazilian labor unions are, would deconstructing their current corporatist privileges solve these problems or simply leave workers as helpless as those in the United States today? The fact that CUT so openly embraced the logistical advantages of Michels’ iron rule may have avoided a much worse fate for Brazilian labor after 1988, and one it still may suffer in the future. Perhaps most telling, in contrast to the more reactionary positions of union movements elsewhere, Brazilian unions have been much more supportive of the development of fourth-way modes of cooperative management and capital

218 The Brazilian lawsuits against McDonalds also provide an interest moment of transnational regulatory interaction, as the NRLB has recently ruled McDonald a “co-employer” for workers at its franchises. Neil Munshi, McDonald's Franchisee Sued by Brazilian Unions, FINANCIAL TIMES (Feb. 24th, 2015).
219 José Gonçalves & Maria Caporale, Private Equity Investment and Labour: Faceless Capital and the Challenges to Trade Unions in Brazil, in TRADE UNIONS AND THE GLOBAL CRISIS: LABOUR’S VISIONS, STRATEGIES AND RESPONSES (Serrano et al. eds., 2011). Ironically, many of the limited union pension funds invest in private equity.
spreading.\textsuperscript{221} This is less a rebuttal of the critiques made of the system as is, but asks whether greater union democracy is where Brazilian labor should be directing its energies.

IV. UNION CORPORATISM IN CHINA: MONUMENT TO OR FOIL OF AUTHORITARIANISM?

Like many post-socialist countries, China in the past three decades has witnessed dramatic shifts in the nature of work during its rapid pace of economic reform. The lingering ideological commitment to worker welfare that adorned its communist-era practices of complete state ownership of industry and full-employment were transformed by a range of hybridized economic actors who most often embraced wage labor to structure employment relations.\textsuperscript{222} The final shape of labor relations in China following the 1978 reforms was unclear as the Chinese Communist Party (CCP) sought to promote market logics while maintaining its tight grip on a legitimacy provided by quite a different economic ideology. The CCP more cautiously loosened its traditional opposition to private property in land and industry,\textsuperscript{223} but fully embraced the commodification of labor.\textsuperscript{224}

In fact, while many contemporary observers in and outside of China are rightly critical of the CCP’s current treatment of labor, in the 1980s there was a great deal more excitement about the possible outcomes of the reforms for labor. One object of this interest was Township Village Enterprises (TVEs), where privatization resulted in communal ownership and regulation of industry.\textsuperscript{225} As Teemu Ruskola has shown, the productivity of TVEs often eclipsed the much large State Owned Enterprises (SOEs) that the CCP came to favor,\textsuperscript{226} making the current pattern of

\begin{thebibliography}{99}
\bibitem{221} Paul Singer, \textit{The Recent Rebirth of the Solidarity Economy in Brazil}, in \textit{Another Production is Possible} 1 (Boaventure de Sousa Santos ed., 2006).
\bibitem{222} Daniel Ding et al., \textit{The Impact of Economic Reform on the Role of Trade Unions in Chinese Enterprises}, 13 INT. J. HUM. RESOURCE MGMT. 431 (2002).
\bibitem{223} CHIH-JOU CHEN, \textit{Transforming Rural China} 74 (2004); \textit{PROPERTY RIGHTS AND ECONOMIC REFORM IN CHINA} 10 (Oi and Walder eds., 1999) and Yingyi Qian, \textit{How Reform Worked in China}, in \textit{IN SEARCH OF PROSPERITY} 297 (Dani Rodrik ed., 2003).
\bibitem{225} Xiao-Yuan Dong et al., \textit{Share Ownership and Employee Attitudes: Some Evidence from China’s Postprivatization Rural Industry}, 30 J. COMP. ECON. 812 (2002).
\bibitem{226} Philip Huang, \textit{Chongqing: Equitable Development Driven by a “Third Hand?”}, 37 MOD. CHINA 569 (2011). (“Chongqing experiment” or SOEs as welfare state stand ins, deep militancy)
\end{thebibliography}
employment and ownership more obviously a choice by the CCP than a necessity of development.\textsuperscript{227}

Nonetheless, creating a labor law regime to manage its mixed state-private enterprise ecology became one of the many facets of the CCP’s legalization strategy.\textsuperscript{228} The CCP’s massive buildup of legal infrastructure and personnel since 1980s sought to use law as an intermediary logic for strengthening its regulatory capacity while shoring up the regime’s domestic and international legitimacy.\textsuperscript{229} Within this process, the different varieties of workplaces proliferated,\textsuperscript{230} and the designing of legal rules to govern this complexity presented one of the great challenges of the CCP’s project of legal reconstitution.

At the outset of these reforms, the CCP had a pre-existing state union, known as the All-China Federation of Trade Unions (ACFTU) (Zhonghua Quanguo Zonggong Hui). Formally, the ACFTU predates the CCP itself, having its historical roots in labor organizations of the 1920s during China’s Republican-era rule of Chiang Kai-shek’s authoritarian regime.\textsuperscript{231} When the CCP rose to power in 1949, it folded the ACFTU into its new regime—promising worker empowerment after decades of repression by Chiang’s administration. However, many labor leaders objected to the institutional vision of a single state union advanced by the CCP, wherein the independence of unions was unnecessary following the traditional communist presumption that state and worker interests were perfectly aligned. As a result, many original ACFTU leaders were purged and suffered various forms of retaliation.\textsuperscript{232} In contrast to the corporatist social theories that influenced the U.S. and Brazilian labor regimes of the early 20\textsuperscript{th} century, the ACFTU was clearly seen as a pure instrument for transmitting labor policy, and neither needed to bargain on behalf of workers nor represent their distinct interests.

After 1978, the role of the ACFTU—which had been temporarily disbanded during the Cultural Revolution—was less clear as the CCP shifted away from complete state ownership and its membership levels fell. The TVE experiment and the widespread persistence of SOEs showed

\textsuperscript{227} Teemu Ruskola, A Tale of Two Chinas: The Law and Politics of Economic Development (unpublished paper on file with author).
\textsuperscript{228} KEVIN O’BRIEN, REFORM WITHOUT LIBERALIZATION (1990).
\textsuperscript{230} WORKING IN CHINA: ETHNOGRAPHIES OF LABOR AND WORKPLACE TRANSFORMATION (Ching Kwan Lee ed., 2007).
\textsuperscript{231} JACKIE SHEEHAN, CHINESE WORKERS: A NEW HISTORY (1998).
\textsuperscript{232} Ching Kwan Lee, Pathways of Labor Insurgency, in CHINESE SOCIETY 48 (Perry & Selden eds., 2000).
that the CCP lacked a coherent vision of how it wanted labor markets to operate, and it was not until the early 1990s that there was any significant legislation passed signaling the future of the ACTFU. In 1992, the Trade Union Law established that the CCP wanted the ACTFU to play an expanded role in labor markets, but still as a unitary actor from within the state. As such, the ACTFU operated like many state agencies, with a vertical legal relationship to a relevant Ministry, here the Ministry of Labor, and a horizontal political relationship with parallel party organs. Critically, ACTFU personnel are CCP members and its leadership held positions in these same parallel party organs.

The CCP’s legal institutionalization of the ACTFU, reinforced again in amendments to the Trade Union Law in 2001, reflected in parts its response to growing labor unrest following economic liberalization. The dislocation of new employment patterns and the fallout from intense industrialization and urbanization left many workers facing harsh working conditions with little to no legal or political recourse. Labor unrest only grew alongside the speed of Chinese economic growth, stimulating labor protest that eliciting sharply divided responses in Chinese intellectual and policy debates regarding labor law and the ACFTU. The scope of this unrest only intensified over time, and is today considered one of the major systemic challenges to CCP rule.

Recently this unrest has come to greater global attention with illegal strikes and other forms of collective protest highlighting abuses at Foxconn, one of the largest private manufacturers in the world and supplier to well-known U.S. consumer electronics firms such as Apple and Microsoft. In such cases, the priorities and aims of the ACFTU demonstrated what Feng Chen has called its

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234 Bill Taylor & Qi Li, Is the ACFTU a Union and Does it Matter?, 49 J. INDUS. REL. 701 (2007).
235 Miao Qingqing, An Urge to Protect is Not Enough: China’s Labor Contract Law, 2 Tsinghua China L. Rev. 159, 179 (2010).
237 Chang Kai (常凯), Laoquan Baozhang Yu Laozi Shuangying (劳权保障与劳资双赢) [Protecting Labor Rights and Workplace Cooperation], (2009) and Dong Baohua (程延园), Laodong Hetong Fa de Zhengming Yu Sikao (劳动合同法教程) [Debate and Deliberation on the Labor Contract Law], (2011).
“double institutional identity”: both disciplinary agent of the state and putative representative of workers’ interests.\textsuperscript{240}

\textit{Corporatism as Authoritarian Innovation}

Defining the type of economic or political regime that the CCP created since 1978 has claimed the energy of many scholars, all of whom try to reconcile the CCP’s simultaneous monopoly on political power with the dizzying complexity of Chinese social and economic development.\textsuperscript{241} Corporatism has had its share of proponents in this effort, as well as its critics. Anita Chan and Jonathan Unger influentially argued during the mid-1990s that China was corporatist because the CCP designated group representatives for collective interests who were allowed to bargain with or become included in the state.\textsuperscript{242} They also claimed that China was undergoing a transition from state to societal corporatism, as defined earlier by Schmitter, a claim they have recently retracted.\textsuperscript{243}

Criticisms of the corporatist label do not deny the aspiration of the CCP to use corporatist policies to manage its close relation with private businesses and new social actors. They do argue that such policies do not capture the diversity of relations that escape direct corporatist inclusion,\textsuperscript{244} especially following the often highly decentralized nature of legal and political administration.\textsuperscript{245} In the economic realm, Holbig has called this “fragmented corporatism”\textsuperscript{246} and Bruce Dickson has

\begin{footnotes}
\item FENG CHEN, BETWEEN THE STATE AND LABOUR, 176 CHINA Q. 1006 (2003).
\item The corporatist term has a longer history in Chinese studies, especially in describing guild and family based businesses of the pre-CCP era and in the Chinese diaspora. DANIEL FITZPATRICK, CHINESE FAMILY FIRMS IN INDONESIA AND THE QUESTION OF "CONFUCIAN CORPORATISM," in LAW AND THE CHINESE IN SOUTHEAST ASIA 150 (HOOKER ED., 2002).
\item JONATHAN UNGER & ANITA CHAN, STATE CORPORATISM AND BUSINESS ASSOCIATIONS IN CHINA: A COMPARISON WITH EARLIER EMERGING ECONOMIES OF EAST ASIA, 10 INT’L J. EMERGING MKTS. 12 (2015).
\item RAY YEP, THE LIMITATIONS OF CORPORATISM FOR UNDERSTANDING REFORMING CHINA: AN Empirical Analysis of a Rural County, 9 J. CONT. CHINA (2000).
\end{footnotes}
described the relationship of private sector elites as “conditional co-optation.” The corporatist frame continues to be popular as way of describing local state-business relationship as well.

What remains evident is that whatever complexities exist within Chinese society, the CCP aspires to corporatism as it constructs what many consider the most durable instance of modern bureaucratic authoritarianism. The recent CCP slogan of promoting a “harmonious society” directly echoes the corporatist sentiments of Vargas and other early 20th century authoritarians.

Herein, the CCP had envisioned the ACFTU as an important element in its neo-corporatist vision, both as an instrument of state policy but also as a manager of labor unrest. It is often forgotten today that the formation of a private labor organization in the late 1980s, the Workers Autonomous Federation, was the primary motivation for the CCP violently repressing the Tiananmen Protests in 1989. This fear of labor protest reflected the CCP leadership’s recognition of labor solidarity’s role in other democratization movements, and in similar fashion it has moved to undermine the independent labor unions of Hong Kong after the British turnover.

Following this renewed support for the ACFTU, the CCP has promoted new organizing drives by the ACFTU and made total workplace representation an open goal, including foreign owner enterprises. In these drives, the CCP has remained relatively agnostic as to the specific

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249 Baogang He, China’s Responses to the Arab Uprisings, in DEMOCRACY AND REFORM IN THE MIDDLE EAST AND ASIA: SOCIAL PROTEST AND AUTHORITARIAN RULE AFTER THE ARAB SPRING 161 (Saikal & Amitav eds., 2014). (an “ingenious neo-Foucauldian approach to policing, monitoring and controlling society”)


253 Masaharu Hishida, Introduction to CHINA’S TRADE UNIONS: HOW AUTONOMOUS ARE THEY, xvi (Masaharu Hishida et al. eds., 2010).

254 Robert Berring, Farewell to All That, 19 LOY. L.A. INT’L & COMP. L. REV. 431, 446 (1997) and Andy Chan, Trade Unions in Hong Kong: Worker Representation or Political Agent?, in TRADE UNIONS IN ASIA 81, (Benson & Zhu eds., 2008).

organizational forms and tactics of unions, allowing both industrial and enterprise, or grassroots, unions to be formed, as well as other unions based on a variety of demographic and geographic frames. These flexible organizing tactics also reflect the incentives provided by the mandatory fees paid by organized workplaces to these often overlapping unions.\textsuperscript{256}

While not mandatory, the CCP has encouraged broad ACFTU-sanctioned collective bargaining at the sectoral level as a process of de facto administrative negotiation in order to secure workplace concessions and depress widespread private labor mobilization.\textsuperscript{257} The new collective agreements are contracts in name only, as they are more accurately understood as political settlements containing broad employment contract minimums of the industrial or geographic area implicated.\textsuperscript{258} At the highest level, the Ministry of Human Resource and Social Security represents national government interests and the Chinese Enterprise Directors’ Association those of employers.\textsuperscript{259} These negotiations rarely contain robust private welfare provisions, but can provide supplements to the basic levels of welfare state benefits available from national and local government.\textsuperscript{260} Yet, these bargains have yet to be robustly enforced, and it is important to remember that the CCP primarily views them as administrative labor coordination devices.\textsuperscript{261} Notably, during the Global Financial Crisis such agreements were no bar to renegotiating wage freezes and rollbacks.\textsuperscript{262}

Moreover, new ACFTU expansion has not changed the basic fact that Chinese workers enjoy no right to strike or anti-retaliation protections. Local government often allies with the ACTFU to actively suppress privately organized strikes.\textsuperscript{263} Like Brazil, the CCP has never signed

\textsuperscript{256} Wu Qingjun, Corporate Governance and Trade Unions in Foreign Companies in China (2014) (paper for Proceedings of the 7th International Conference on Innovation & Management).


\textsuperscript{258} For example, in 2014 a joint agreement among a variety of unions and business associations formed a “Food and Beverage” collective wage agreement that formally covered 22 million workers and detailed wage minimums, benefits and job training programs. Eli Friedman, Experimentation and Decentralization in China Labor Relations, 68 HUMAN REL. 181 (2015).

\textsuperscript{259} CEDA describes itself as a “bridge and link” to government: http://www.cec-ceda.org.cn/.


\textsuperscript{261} TIM PRINGLE, TRADE UNIONS IN CHINA (2011). Also see Xin He, Administrative Law as a Mechanism for Political Control in Contemporary China, in BUILDING CONSTITUTIONALISM IN CHINA 143 (Balme & Dowdle eds., 2010).


\textsuperscript{263} Yang Su & Xin He, Street as Courtroom: State Accommodation of Labor Protest in South China, 44 L. & SOC’Y REV. 157, 162 (2010) and Chen Feng, Trade Unions and the Quadripartite Interactions in Strike Settlement in China,
ILO treaties acknowledging a private right of labor association. While the CCP fear of labor solidarity works to attract national attention to collective labor actions, even when administrative bargaining results in employer concessions, this is fundamentally a self-interested longitudinal calculation by the government actors involved. This in part explains why the once lauded symbol of the ACFTU’s organizing at Wal-Marts was ultimately met with little resistance by perhaps the most well known anti-union corporation in the United States. Similarly, the facilitative function of the ACFTU was also demonstrated in the Foxconn agreement to allow union representatives to help guide its self-monitoring proposals.

Union Democracy as Engine of Solidarity?

As one might expect, labor scholars in and outside of China have made the now familiar argument that the corporatist character of the ACFTU should be infused with representative mechanisms or replaced with a regime of independent democratic organizing. Some observers were and still are optimistic that the expansion of the ACFTU can pave the way for its re-orientation as a more representative institution, while others remain doubtful that it can ever unmoor itself from its corporatist origins. It is certainly an open question as to whether the CCP’s corporatist strategy will be sufficient to quell labor unrest and ward off destabilizing its regime. Thus, while the CCP clearly has a corporatist future in mind for the ACTFU, the basic fact

remains that its ability to manage local social and political actors remains one of its core governance dilemmas.

Hope in part emerges from the fact that local chapters of the ACFTU have been empowered by recent organizing campaigns, from increased dues alone. As such, new spaces for experimentation and innovation have opened up at the local level. Grassroots unions in provincial industrial hubs such as Zhejiang and Guangdong have been the sites of experimentation with direct cadre elections, including in foreign companies. Such elections would constitute a significant intervention in local unions, as generally enterprise union leaders are members of the local business community who are either appointed or who run unopposed. More controversially, provincial-level unions have introduced potential reforms to allow limited strikes. The reinvigoration of the worker congress system as a form of in-house consultation popular in the earlier state-owner enterprise system has also garnered attention as a potential new focal point for more representative dynamics in Chinese companies.

Yet, as much as the CCP has frequently allowed experimentation in local governance, even plainly illegal innovations, it has from the outset closely monitored local unions for signs of horizontal worker solidarity. So while it is likely that discrete experiments in intra-union democracy may be allowed to the extent that it increases internal ACFTU effectiveness and external legitimacy, it is unlikely to foster logics of representation related to collective action. So as experiments with internal elections continue, the proposals for the right to strike in Guangdong were recently withdrawn, even with labor unrest relatively unabated.

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275 Guangdong Regulations on the Democratic Management of Enterprises [Guandong Sheng Qie Minzhu Guanli Tiaoli Cao’an Xiugai]; Shenzhen Jingji Tequ Hexie Laodong Guanxi Cujin Tiaoli [Regulations to Shenzhen Special Economic Zone on the Promotion of Harmonious Labor Relations].
280 Aaron Halegua, Strike a Balance, SOUTH CHINA MORNING POST (Feb. 26th, 2015).
It is important to remember that one of the CCP’s core political strategies has been to portray its intentions in populist terms and leave the administration of unpopular practices to local governments. In the context of labor, this had led to what Eli Friedman has called the “insurgency trap,” whereby national political and legal organs like the Ministry of Labor can draw on labor unrest to produce national legislation and intervene when labor protests grow intense, but then leave day-to-day administration to local governments where corporatist relations among unions and local business is most intense and the enforcement of legal rights costly.\footnote{\textit{Eli Friedman, The Insurgency Trap} (2014).} Friedman’s thesis is supported by the continued exertion of authority over the ACFTU by the Ministry of Labor,\footnote{David Metcalf & Jianwei Li, Chinese Unions: Nugatory or Transforming? (CEP Discussion Paper Series, Paper No. 708, 2005).} and the structural fact that the career trajectories of ACFTU members are still determined by promotion policies dictated by the Ministry.\footnote{Chelsea Chia-chen Chou, The Expansion of Social Rights in Authoritarian Regimes: The Politics of Labor Policy Reform in China, 1978–2009 (2009) (unpublished Ph.D. dissertation, Cornell University).} Thus, even reforms that appear analogous to union democracy dynamics in other systems are in practice more akin to the type of internal party discipline with which many modern authoritarians use to improve their administrative capacity. Over time, for all the ACFTU’s recent organizing activity, few studies have shown an actual wage premium associated with new union representation.\footnote{Chang Lee & Mingwei Liu, \textit{Collective Bargaining in Transition: Measuring the Effect of Collective Voice in China, in The Role of Collective Bargaining in the Global Economy} 205 (Susan Hayter ed., 2011). One moderate exception is Yi Lua, Zhigang Taoa, & Yijiang Wang, \textit{Union Effects on Performance and Employment Relations: Evidence from China}, 21 CHINA ECON. REV. 202 (2010).}

In similar fashion, the CCP has been mixing its new top-down administrative bargaining strategy through the ACFTU with legislation aimed at remediating labor unrest through re-emphasizing employment rights based in individual labor contracts.\footnote{Mary Gallagher et al., China’s 2008 Labor Contract Law: Implementation and Implications for China’s Workers (World Bank Policy Research Working Paper Series, Paper No. 6542, 2013) and HILARY JOSEPHS, LABOR LAW IN CHINA (2003).} This dual-strategy reflects the larger CCP pattern of governance through simultaneous individuation and state-dependence.\footnote{Eli Friedman, \textit{Alienated Politics: Labour Insurgency and the Paternalistic State in China}. 45 DEV. & CHANGE 1001 (2014).} Chinese workers have been undoubtedly eager to litigate based on their new rights,\footnote{Timothy Webster, \textit{Ambivalence and Activism: Employment Discrimination in China}, 44 VAND. J. TRANSNAT’L L. 643 (2011) and Jenny Chan, \textit{Meaningful Progress or Illusory Reform?: Analyzing China’s Labor Contract Law}, 18 NEW LAB. F. 42, 51 (2009).} and while enforcement of employment rights has been traditionally very uneven,\footnote{Ronald Brown, \textit{China’s Employment Discrimination Laws During Economic Transition}, 19 COLUM. J. ASIAN L. 361 (2006) and Virginia Harper Ho, \textit{From Contracts to Compliance?: An Early Look at Implementation Under China’s Labor Contract Law}, 88 MINN. L. REV. 907 (2003).} at least one recent study
argues for an empirical link below employment law reforms and workplace outcomes.\textsuperscript{289} Moreover, the CCP has allowed foreign labor NGOs to operate in the employment law realm, signaling that it sees it as a more open site for experimentation that labor organizing,\textsuperscript{290} much like its embrace of the corporate social responsibility campaigns.\textsuperscript{291} As such, when employment law innovations do occur at the local level, the CCP has been eager to embed such developments in its formal administrative structure.\textsuperscript{292}

Before hopeful parallels are drawn to the same argument made by U.S. labor scholars regarding the social union potential of employment rights based organizing, it should be noted that the CCP has universally prohibited class action procedures,\textsuperscript{293} and that such rights are often not available to China’s substantial migrant and informal labor sectors.\textsuperscript{294} Employers have also been quick to innovate to avoid new employment law protections, such as using labor sub-contracting and other forms of non-standard workers,\textsuperscript{295} with SOEs and unionized workplaces often exhibiting higher than average use of contingent workers.\textsuperscript{296} The has led to a further breakdown in regular work patterns for many Chinese workers, alongside the same genre of authoritarian monitoring regimes increasingly found in U.S. workplaces.\textsuperscript{297} These practical delimitations help again explain why even foreign companies have provided little pushback against new employment rights legislation.\textsuperscript{298}

\textsuperscript{298} William Hurst et al., \textit{Implementing China’s Labor Law Reforms: Interests and Obligations at the Firm Level, in
In sum, the CCP has to date prevented any legal processes of interest aggregation to occur from within the workplace.\textsuperscript{299} Again, whether it will continue to do so successfully is unresolved. The CCP itself has in recent years begun to exhibit a loss of faith in its capacity to use legal regulation as an effective force to combat social unrest, and the costly surge of labor cases into the court system has been one significant factor in its redeployment of more traditional authoritarian repression.\textsuperscript{300} Workers have remained uncowed by a lack of ACFTU reform, and have even begun to engage in offensive strikes against employers.\textsuperscript{301} All of which recalls again the democratizing precedent the CCP fears.

Yet, here again the focal concerns of the as of yet inchoate Chinese labor movement seems tangential to outside calls for union democracy. Procedural formalism within unions seems to be an experiment that only the CCP seems consistently concerned with, and not to promote economic democracy. Chinese workers seem far more taken with organizing collective action on a popular basis, and with gaining substantive concessions, than with ACFTU reform itself.\textsuperscript{302} Centralization and hierarchy, the products of Michels’ iron rule, is exactly what the CCP fears and what the labor movement is denied. While social unionization akin to that displayed by the PT in its early agitation for democracy in Brazil might become necessary, if a Chinese labor movement does rise to challenge the CCP it would need to engage in likely an ever-stronger process of internal discipline not democratic process. Union democracy seems as easy a self-evident ideal to suggest as it has in the U.S. and Brazil, but appears far less practically attractive, if not destructive, to the political bargaining power of even a more genuinely representative Chinese labor movement.

V. CONCLUSION: UNION DEMOCRACY AND (NOT) THE FUTURE OF ECONOMIC DEMOCRACY

The Least Worst Appeal of Labor Corporatism

\textsuperscript{299} Eli Friedman, Experimentation and Decentralization in China’s Labor Relations, 68 HUM. REL. 181 (2015).
\textsuperscript{300} Carl Minzer, China’s Turn Against Law, 19 AM. J. COMP. L. 935 (2011); Pierre Landry, The Institutional Diffusion of Courts in China: Evidence from Survey Data, in RULE BY LAW 207 (Ginsburg & Moustafa eds., 2008) and Benjamin Liebman, Legal Reform: China’s Law-Stability Paradox, 143 DAEDULUS 96 (2014).
\textsuperscript{302} Dorothy Solinger has claimed that even without traditional unions Chinese workers were able to agitate for better concessions than established corporatist unions in Mexico and France. DOROTHY SOLINGER, STATES’ GAINS, LABOR’S LOSSES: CHINA, FRANCE, AND MEXICO CHOOSE GLOBAL LIAISONS, 1980-2000 (2009).
With any comparative legal exercise the foundational challenge is to find that which is in fact comparable among the myriad of ways in which legal institutions and practices are embedded in particular nations. Moreover, national labor law traditions of the 20th century variety are almost universally beset by the need to symbolize the outcome of acute political struggles that leave them with substantial gaps between their ideal and real functions. The idea of collective bargaining inherent in most systems of union representation is essentially reactive and system ingraining to other social and economic pre-conditions—it requires constant energetic inputs and is subject to intense feedback from labor market dynamics and political contests.

Thus, the aspiration for economic democracy that gives rise to calls for union democracy will recurrently confront the core problem that, in the context of labor commodification, there will consistently be strong mismatch between the present and the desired future. The strong commitment to union democracy under the decentralized and privately ordered form of U.S. unionization may at first blush serve as an ideal platform for better facilitating the emergence of more participatory workplaces, but in practice only exacerbates this underlying mismatch. The relative success of the Brazilian system and the force of labor activism in China posit the hard-to-swallow possibility that embracing, rather than fleeing from, Michels’ iron law of oligopoly may be the better strategy. This is in essence a claim about institutional ecology—democratically organized workplaces struggle to operate in an economic system that otherwise operates on non-democratic norms, or will only form naturally to the limited extent they can find specific occupational niches.

This dynamic renders quite understandable links between argument about union democracy and social unionism, as the historical successes of various systems of collective bargaining—again here most notably in the United States—were tied to moments when labor unions could draw on the high-levels of social capital broadly available to overwhelm the operational mismatch of their underlying legal logics. As Herbert Hoovencamp noted in his study of labor conspiracies, once

the assumption that combinations of labor and capital are functionally equivalent is accepted in legal doctrine or social analysis, labor organizations will always be faced with only devising compensatory and defensive strategies therein.\textsuperscript{307}

However, social capital formation is a fragile process and even in formally democratic political systems it has been a constant challenge to create conditions conducive to its consistent production.\textsuperscript{308} Part of this challenge is that while humans may thrive in high social capital settings, they are, on the whole, highly adverse cognitively to conditions of uncertainty and social unpredictability.\textsuperscript{309} Therefore, processes of social capital formation that are not built-in systemically to labor organization will never be able to keep pace with forms of financial capital formation that are far more agnostic to their fungible translation from one institutional setting to another.\textsuperscript{310} Such an analysis hold true, for example, in studies of recent union revitalization in Canada,\textsuperscript{311} where even after pro-union democracy reforms, workers fall back into relative passivity when they do not perceive moments of acute crisis.\textsuperscript{312} The normal dissipation of social capital derived from exceptional moments of crisis flows directly into John Godard’s claim that systems with more decentralized forms of organizing, such as in the U.S., are doomed to perpetual cycles of conflict and contention.\textsuperscript{313} In contrast, the corporatist logic of current Brazilian hyper-corporatism has displayed such unusual comparative stability exactly because it requires no such episodic infusions of social capital. And the CCP attempts to use collective bargaining to preemptively undermine social capital formation, but is not adverse to it forming within the workplace.

The 20\textsuperscript{th} century labor histories of the U.S., Brazil and China, further, serve as evidence that the ideal of union democracy faces even greater challenges in large economies. Perhaps Robert Putnam’s most controversial claim regarding social capital formation is that it is more difficult under conditions of social diversity.\textsuperscript{314} The dynamics in small, relatively homogenous countries where social capital formation is easier to consistently generate provides deceptively hopeful

\begin{itemize}
\item \textit{Waning of Union Strength}, 20 BERKELEY J. EMP. \& LAB. L. 1 (1999).
\item ROBERT PUTNAM, \textit{MAKING DEMOCRACY WORK} (1993).
\item Carol Graham, \textit{Happiness and Uncertainty}, THE ECONOMIST (Feb 1\textsuperscript{st}, 2010)
\item John Godard, \textit{The Exceptional Decline of the American Labor Movement}, 63 INDUS. \& LAB. REL. REV. 1 (2009).
\end{itemize}
comparison for geographically and demographic diverse countries. Even large but homogenous countries have to rely, at best, on intense cultural pressures to maintain labor representation over time. The rise and fall of Australia’s movement for industrial bargaining reflects this general dynamic, but also the further difficulties present in strong federalist systems. Still, small size or social homogeneity is not necessarily a panacea, as it also provides advantages to authoritarian states such as Singapore, perhaps the most successful example of unionism as labor coordination institution, and Vietnam, which has felt freer to allow union strike experimentation than has the CCP.

The issue of scale and social capital formation also helps explain the disappointing track record of transnational labor organizing. Even when labor rights have been conceptualized as human rights, the recurrent challenge of varying national and cultural interpretation is replicated in transnational labor organizing. While no doubt inhibited by the marginalization of class as an organization frame by the international NGO community, it is nonetheless true that few national unions have taken large risks for international partners. Labor organizations, therefore, can never find abroad what they cannot find in their own states. Even in the European Union, what progress has been made in constructing a transnational labor regime has worked not through democratic but corporatist processes. Ironically popular exactly because of its dreamy

322 Joseph Roman, The Trade Union Solution or the NGO Problem? The Fight for Global Labour Rights, 14 DEV. IN PRAC. 100 (2004).
324 PAUL BUCHANAN, STATE, LABOR, CAPITAL (1987).
idealization of meta-union democracy, transnational labor organizing to date is empirically just another example of yawning democratic deficits in international institutions.

The experience of the PT in Brazil and the ongoing social unrest in China make clear that this says nothing about labor unions’ ability to help compel political democratization and consolidation. The point remains that supporting labor organization is the most well-established investment possible in democratization movements, even if many still practice the unfortunate fetishization of property rights. And in such contribution, unions, such as CUT in Brazil, best do so when they resist corporatization until after democratization. Even after democratization, the course of labor flexibilization reforms has hit those developing countries the hardest who lack corporatist regimes.

This generally dismal diagnosis is best illustrated by comparison of the Brazilian and Mexican experiences with de-corporatization. While some Mexican labor scholars have made the same criticisms of Brazilian unions as oligopolic, Brazilian workers over the recent decades have fared much better than those in Mexico, as the de-corporatization process in Mexico did not lead to renewed shopfloor democracy, but simply greater subjection to workplace authoritarianism.

Though distinct in many ways from CCP authoritarianism, the surprising relevance of Russian unions as more than mere instruments of Russian state corporatism reflects their use of internal corporatism mixed with rhetorical populism to shield themselves from state co-option.

326 TRANSNATIONAL COOPERATION AMONG LABOR UNIONS (Gordon & Turner eds., 2000) and JAMIE MCCALLUM, GLOBAL UNIONS, LOCAL POWER: THE NEW SPIRIT OF TRANSNATIONAL LABOR ORGANIZING (2013).
330 Eva Bellin, Contingent Democrats: Industrialists, Labor, and Democratization in Late-Developing Countries, 52 WORLD POL. 175, 180–81 (2000).
331 Kevin Kolben, Transnational Labor Regulation and the Limits of Governance, 12 THEOR. INQ. LAW 78 (2011).
Sclerotic, unresponsive, internally undemocratic, but extensive—this may be the best version of labor unionism possible under conditions of flexible accumulation.

**The Other Inevitability: Facing the Ownership Divide**

There is no shortage of reforms possible to improve the lives of workers that do not involve unions. In common law countries, targeting at-will employment has long been an aspirational goal and calls for a minimum income have been gaining traction. Various corporate governance reforms try to reconcile worker empowerment with owner self-interest, from modes of direct representation to other procedural, new governance reforms aimed at maximizing Dau-Schmidt’s cooperative surplus. Just as with collective bargaining, these are compensatory measures whose ambition starts from the assumption that labor commodification is an inevitability. Whatever their individual capacity to improve the lives of workers, it is notable that most of these reforms no longer argue presuming language of economic democracy as a self-justifying norm, but do so increasingly in a non-conflictual language of productive efficiency.

The diagnosis of the futility and often counterproductive aspiration of union democracy presented in this paper casts overlapping doubts on the power of these reforms. Such doubts do not return us to the socialist or communist visions of labor that degenerated on their own terms, but to the radical republican visions advanced commonly under the rubric of cooperative or employee ownership. The ideal of either expanding the extensivity and intensivity of capital ownership to allow for widespread employee ownership or promoting various forms of mandatory profit-sharing have emerged in countries as different as the U.S., China and Brazil, and garnered formal, if superficial, endorsement by often antagonistic political interests. But whatever episodic support has been given to such efforts, attempts to systemically promote such alternative configurations has remained quite weak.

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337 Margaret Blair and Mark Roe, *Employees and Corporate Governance* (1999).
Some of this weakness reflects a variation of the ecological problem—developing truly different forms of economic organization from within logically antagonistic systems leads to unpredictable mutations and often incredibly high interface costs with existing legal and economic institutions. The non-replication of even successfully run employee-owned business and the less-than-stellar global track-record of employee stock ownership plans (ESOPs) speaks to this difficulty. Furthermore, existing owner resistance to these forms has heightened when they have threatened to take on a more dominant role in an economy, exemplified by the swift and hostile reaction in Sweden to the possibility that Meidner’s union wage-funds could eventually buy controlling shares in major industries. Conceptions of labor are at their core about the basic distribution of power in any society, and systemic changes cannot be expected to be met without enduring resistance.

Many of these proposals in the past have further struggled as they presumed that their goal of economic democracy also mandated extensive forms of procedural democracy or were anathema to managerial expertise. As such, unions globally have not devoted effort to expanding ownership as a long-term solution, and notable ownership advocate Robert Hockett does not even mention unions in his review of possible “ownership spreading” mechanisms. Even pro-union advocates across the globe who seek to constitutionalize more radical antisubordination principles stop short of the historical radical republican arguments about wage-labor, what James Pope has called “constitutional insurgency.”

In many ways, this is an old argument about the goals of labor movements and the possibilities of radical reform. Naturally, to proponents of end of history arguments about the rise of modern corporate capitalism, claims about union democracy as a distraction from economic

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340 Abby Scher, This Rust Belt Town’s Survival Strategy Is All About Giving Workers Control, YES! (Jan. 13\textsuperscript{th}, 2015).
342 A direct comparison can be made to Michele Robert’s comment that players’ unions in modern sport leagues could do exactly the same thing—render owners unnecessary. Pablo Torro, NBPA Director: Let's Stop Pretending, ESPN Online (Nov. 13th, 2014).
347 DEMOCRATIC WEALTH (White & Smith eds., 2014).
democracy may seem obtuse. Nonetheless, for those caught up in Munlak’s anomic the diagnosis in this paper is offered up as an empirical point about whether modern labor unions under regimes of collective bargaining can serve as a pathway to greater conditions of economic democracy. Perhaps any proposal that conceptualizes the workplace as an instance of shared property, or argues that labor can gain property rights in the workplace by accretion are considered unworkable as much as they maybe intone with populist sentiments. Even if more radical reforms regarding the property/commodity divide are deemed unrealistic or unattainable, union democracy is not a productive long-term solution.

If unions are to transition away from corporatism, or even away from electoral politics, it should not be to perform experiments in procedural democracy but to build and aggregate social capital for reforms that can be self-sustaining and ultimately render themselves unnecessary. Wracked by the struggles of the 20th century, no union movement has yet been able to do so, and much less energy has been devoted to what such reform would look like. Yet, doing so is the only realistic alternative left to embracing corporatism.

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