

# LABOR LAW REFORM AGAIN? REFRAMING LABOR LAW AS A REGULATORY PROJECT

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*The law of collective labor relations has been largely stagnant for many decades, to the detriment of both organized and unorganized labor, as well as labor law scholarship. This Essay argues for reframing labor law as one field of regulation among others, alongside regulation of the environment, product safety, and financial integrity. After briefly describing the general challenges of regulatory design, the Essay uses a recent reform proposal by Professor David Doorey to illustrate how good regulatory design can meet those challenges. The Essay concludes by reflecting on what is and is not gained by taking a regulatory approach to labor law reform.*

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## INTRODUCTION

For the past thirty years, American labor law—the law of collective labor activity and labor relations—has been in decline.<sup>1</sup> Moreover, after more than fifty years without any significant statutory change,<sup>2</sup> what we might call the “normal science” of labor law—the

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1. For an earlier lament about the corresponding decline in the status of labor law as a scholarly field, see Cynthia Estlund, *Reflections on the Declining Prestige of American Labor Law Scholarship*, 23 *COMP. LAB. L. & POL'Y J.* 789 (2002).

2. See Cynthia Estlund, *The Ossification of American Labor Law*, 102 *COLUM. L. REV.* 1527, 1535 (2002).

working out of doctrinal puzzles and interpretive disputes within the existing paradigm or statutory scheme<sup>3</sup>—has appeared increasingly pointless to labor law academics, and has nearly ground to a halt (at least judging from the leading law journals).<sup>4</sup> Puzzles and disputes within labor law continue to arise; some of them matter to employers and unions, and occupy practitioners of labor law.<sup>5</sup> But in the academy, labor law scholars—those who have not turned away from labor law and toward employment law or elsewhere—have understandably shifted their focus toward the next big thing, the next model for labor law reform, the next new paradigm. Since the early 1990s, much labor law scholarship has thus tended either to relocate the focal point of collective worker action outside the National Labor Relations Act (NLRA)<sup>6</sup>—in private voluntary recognition agreements, or worker centers, for example—or to propose more or less sweeping legislative fixes of the NLRA.<sup>7</sup>

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3. On the notions of “normal science” and paradigms, see THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 35–42 (2d ed. 1970).

4. One notable exception is Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655 (2010).

5. For example, the question of how Section 7 rights map onto employees’ use of social media has generated a flurry of caselaw and commentary. See, e.g., Roger Brice, et al., *Social Media in the Workplace: The NLRB Speaks*, INTELL. PROP. & TECH. L.J., Oct. 2012, at 13; Christine Neylon O’Brien, *The First Facebook Firing Case Under Section 7 of the National Labor Relations Act: Exploring the Limits of Labor Law Protection for Concerted Communication on Social Media*, 45 SUFFOLK U. L. REV. 29 (2011); Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. PA. J. BUS. L. 957 (2012). The flurry of attention is surprising insofar as technological innovations affecting the particular manner in which employees communicate with each other and outsiders about work would not seem to require any significant innovation in Section 7 principles.

6. 29 U.S.C. §§ 151–169 (2006).

7. See, e.g., CHARLES CRAVER, *CAN UNIONS SURVIVE?: THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT* 126–55 (1993) (advocating an overhaul of the NLRA’s substantive and remedial protections); KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* 217–39 (2004) (proposing that Congress amend the NLRA to allow for “inclusive craft unionism” and “citizen unionism”); James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005) (proposing to modify or supplant the “election paradigm” established by the NLRA); Jeffrey M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What Next for the NLRA?*, 34 FLA. ST. U. L. REV. 1133 (2007) (proposing a complete overhaul of the NLRA); Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149 (1993) (advocating a revision to the NLRA to supplant existing definitions of “labor organization” in order to encourage spontaneous worker organizing); Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385 (2006) (same).

The lack of statutory change, together with the virtual abandonment of scholarly exegesis within the existing statutory framework, has taken its toll on the field of labor law, not to mention on unions and workers. Legal change, large and small, replenishes the ground from which new ideas may take root. Thirty years of thinking big thoughts and devising reforms that never make it into the statute books have left the larder a bit bare of new ideas.<sup>8</sup> To one who has participated for thirty years both in the dwindling enterprise of “normal science” and in the search for the next new paradigm,<sup>9</sup> it seems that just about any new idea for reform that is thinkable in the U.S. context (as well as many that are not) has been elucidated if not exhausted. In the meantime, private sector union density continues its slide into the middle-single-digits<sup>10</sup>—simultaneously underscoring the urgent need for labor law reform and dimming the political prospects for that reform. So what is to be done?

I want to propose—not for the first time, I confess<sup>11</sup>—a two-step reframing of the project of labor law reform that might put the project on a firmer foundation and shake up existing conceptions of what labor law reform should look like. First, we need to see “labor law” as part of the larger societal project of regulating work and working conditions. That move may sound obvious and familiar, but it has implications that have not yet been absorbed by labor law scholars or by reform advocates. Second, we need to envision the regulation of work as one among many fields of regulation, alongside the regulation of consumer products, the environment, and financial integrity. Reconciving of labor law as a regulatory project brings into view an alternative set of analytical levers and tools of governance, as well as additional reservoirs of political support for the ultimate ends pursued by labor law.

In this Essay I briefly trace some of the challenges of designing effective regulatory projects, in the workplace and in general. I illustrate the regulatory approach to labor law reform by analyzing one

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8. See Alan Hyde, *The Idea of the Idea of Labour Law: A Parable*, in *THE IDEA OF LABOUR LAW* 88 (Guy Davidov & Brian Langille, eds., 2011).

9. In the former category, see Cynthia Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 *TEX. L. REV.* 921 (1993). In the latter, see CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* (2010) [hereinafter ESTLUND, *REGOVERNING*].

10. Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%*, *N.Y. TIMES*, Jan. 24, 2013, at B1 (reporting that private sector union density fell to just 6.6% in 2012, down from a peak of approximately 35% in the 1950s).

11. See ESTLUND, *REGOVERNING*, *supra* note 9, at 9–24.

recent proposal advanced by Professor David Doorey. The Doorey proposal has several features that enhance both its political viability and its practical policy impact. I conclude by reflecting on what is to be lost and (mostly) what is to be gained by shifting to a regulatory approach to labor law reform.

## I.

### THE PROBLEM OF REGULATORY DESIGN IN MODERN SOCIETY

“Regulation” encompasses the many ways in which modern societies use law, broadly construed, to govern themselves. This Essay focuses on the body of regulation that governs the economic organizations that produce most of society’s goods and services and that threaten other societal interests in the process: corporations. Corporations compete for profits within product, labor, and capital markets. In their quest for higher profits, corporations may be tempted, even driven, to cut costs by consuming, destroying, or exploiting natural and human resources. In response, people agitate through political processes for constraints on corporate behavior; in modern democratic societies they have several avenues through which to do so. Obviously, corporations have their own very powerful levers in the political process, and they struggle with considerable success to resist or shape the regulatory agenda. But one way or another, a lot of law has emerged from democratic processes to regulate corporations and constrain their potentially harmful conduct.<sup>12</sup>

How can that law effectively accomplish its aims? That is one major focus of modern regulatory theory, and in particular of New Governance theory and some of its chief variants, such as “Responsive Regulation.”<sup>13</sup> At the risk of grossly oversimplifying a rich body of research and theory, we may observe that it rests on a more complex model of human and organizational behavior than the conventional rational actor model. Corporations and other economic actors are complex self-governing organizations with powerful internal logics, cul-

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12. For a classic account of the simultaneous development of private market-driven economic activity and of a body of law to enable and constrain that economic activity, see KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (Beacon Press 2d ed. 2001).

13. See generally LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinee de Búrca & Joanne Scott eds., 2006) (giving a broad overview of New Governance). On “Responsive Regulation,” see generally IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1995); JOHN BRAITHWAITE, *REGULATORY CAPITALISM: HOW IT WORKS, IDEAS FOR MAKING IT WORK BETTER* (2008).

tures, and incentive structures.<sup>14</sup> Given these complexities, unless regulators find ways to penetrate and bend internal corporate dynamics, their efforts may be ineffective or even counterproductive. Laying down external rules and sanctions is not enough.

According to New Governance scholars, regulatory design is especially difficult because organizations and individuals vary in both their capacity and their disposition to comply with societal constraints. Some actors, faced with rules and sanctions that are calculated to deter rational actors, may evade and conceal misconduct, while other actors will comply with the law even if it is backed by lesser rules and sanctions. Even within the same market sector, some organizations are more willing and able to abide by societal constraints than others. Some devote substantial resources to internal compliance structures and seek to cultivate a “culture of compliance,” while others promote sharp dealing and evasion (sometimes behind a veneer of “compliance”).<sup>15</sup> In overly simple terms, there are low-road and high-road actors, and there are many in between, whose choice of low-road or high-road tactics depends partly on the regulatory environment: on what is being rewarded and what is being punished.

Because of these dynamics, workers and citizens need multiple strategies and tools to regulate divergent organizations and to induce fence-sitters to choose the high road. They also need to engage a broad range of actors in the regulatory enterprise. Government officials will invariably be outnumbered and overmatched by the thousands of complex regulated entities under their jurisdiction. New Governance scholars argue that non-governmental actors can usefully supplement the resources of governmental regulators. In particular, active engagement of “stakeholders”—especially those who are the beneficiaries of the regulations in question—can help to prevent the regulatory enterprise from succumbing to recalcitrance or capture.

So far I have said nothing distinctive about labor law and the regulation of work. I will come to that soon. But the foregoing analysis does make an important point: Even if we conceive of labor and employment law as just one regulatory project among many, a central and complex question that it must confront is how to effectuate whatever norms of decent work society imposes on corporations. How can laws against discrimination and retaliation, laws establishing decent minimum wage and hour practices, and laws protecting employees’ health and safety, their privacy, or their ability to take care of

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14. See AYRES & BRAITHWAITE, *supra* note 13, at 101–32.

15. See *id.* at 130–31; BRAITHWAITE, *supra* note 13, at 90–94.

family and medical needs, for example, accomplish their aims, given the complexities of organizational and individual behavior and the social and market forces that operate on them?

Rather than go on about the regulatory approach to labor law in general, I will elaborate by borrowing one good recent labor law idea from a Canadian colleague, Professor David Doorey, and explain what I think is good about it, and how it illustrates the virtues of the regulatory perspective on labor law. I will conclude with some reflections on what the regulatory perspective does and does not promise for labor and labor law scholarship.

## II.

### THE DOOREY PROPOSAL AND SOME OF ITS VIRTUES AS A REGULATORY STRATEGY

Doorey proposes a new strategy of labor law reform.<sup>16</sup> He begins by recognizing that employers regard unionization as a reflection of management's failure.<sup>17</sup> (Indeed, it appears many U.S. employers view unionization as an existential threat.) Employers' fear and loathing of unions has long frustrated both union organizing efforts and efforts to reform the law of union organizing.<sup>18</sup> But Doorey proposes to use that fear and loathing in a way that both facilitates union organizing and improves compliance with labor standards. He proposes to recast the standard package of labor law reform proposals—for example, union organizers' access to the workplace, mandatory recognition based on "card check,"<sup>19</sup> a ban on employers' "captive audience meetings,"<sup>20</sup> mandatory interest arbitration of first contracts—as a kind of penalty regime that is triggered by a firm's violation of basic labor standards.<sup>21</sup> (Of course, among the important details of imple-

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16. David Doorey, *A Model of Responsive Workplace Law*, 50 OSGOODE HALL L.J. 47 (2012).

17. *Id.* at 70.

18. *Id.* at 68–72.

19. In contrast to the standard union representation contest, in which employers typically wage an aggressive anti-union campaign leading up to a secret ballot election, "card check" recognition allows unions to demonstrate majority support through union authorization cards gathered over a period of time, often without an active employer campaign. For a description of both ordinary representation and "card check" organizing, see Sachs, *supra* note 4, at 668–72.

20. Among the aggressive employer tactics that are permitted in the standard representation campaign, "captive audience meetings" allow employers to compel employee attendance at meetings—often one-on-one with employees' own supervisors—at which the employer's representative holds forth on reasons to vote against the union. See Sachs, *supra* note 4, at 683.

21. Doorey, *supra* note 16, at 76–85.

mentation is deciding which labor standards count for these purposes, and what kind of violations would trigger the union-friendly organizing regime.)

Under the Doorey proposal, high-road employers that respect basic employee rights and comply with labor standards laws could continue to claim the privileges that current law affords employers in resisting union organizing. They could continue to exclude union organizers from the workplace, give captive audience meetings, and demand a secret ballot election preceded by a formal campaign period. But low-road employers—those that are found to have violated basic labor standards (repeatedly or seriously or both)—would lose those privileges and become subject to new rules that make them more vulnerable to unionization.<sup>22</sup>

Of course, many labor law scholars, including Doorey, have argued vehemently against the privileges that labor law now accords to all employers in resisting unionization.<sup>23</sup> But those arguments have failed utterly in the United States (and largely in Canada as well). Hence this attempt to target labor law reform more narrowly. The idea of Doorey's proposal is to sharpen the familiar union threat effect that has long been seen as a significant factor in improving wages and workplace practices in non-union firms<sup>24</sup> and to focus that threat on low-road employers. The serious threat of unionization under these union-friendly organizing rules would thereby become simultaneously a *remedy* for employer violations of basic labor standards, as well as a *penalty* against proven violations and a *deterrent* against future violations of those labor standards. Apparently, it is bad form in Canada to characterize unionization as a penalty for bad behavior rather than as a fundamental human right, so Professor Doorey frames his proposal in somewhat different terms than I do here. But given our more desperate straits south of the border, we may be more blunt here.

#### A. *Some Political Virtues of the Proposal*

I want to highlight several features of the Doorey proposal that make it a good labor law idea—and one that illustrates general archi-

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22. *Id.* at 82–83.

23. Doorey, *supra* note 16, at 76; David Doorey, *Union Access to Workers During Organizing Campaigns: A New Look Through the Lens of Health Services*, 15 *CAN. LAB. & EMP. L.J.* 1, 1–5 (2009).

24. *See, e.g.*, David Neumark & Michael L. Wachter, *Union Effects on Nonunion Wages: Evidence from Panel Data on Industries and Cities*, 49 *INDUS. & LAB. REL. REV.* 20 (1995) (providing empirical support for the “union threat” theory that increased unionization raises wages at the city level, while undermining the theory that increased unionization raises wages across an industry).

tectural principles of regulatory design within the labor law field. But I want to begin with the politics of the regulatory approach to labor law. Given the seemingly insurmountable wall of resistance that meets traditional pro-union labor law reform efforts in the United States, it is worth pointing out several related virtues of the Doorey proposal that are responsive to that particular political challenge.

*First*, the Doorey proposal would reframe labor law as part of the regulatory enterprise associated with “employment law,” thus building on a foundation that is much less eroded and “ossified,” and that has shown far greater potential for growth, than traditional labor law.<sup>25</sup> As Professor Harry Arthurs and others have forecast, in a post-collective bargaining world, workers will increasingly rely on legislated rights and minimum labor standards to cushion them from harsh market forces.<sup>26</sup> But the rights and labor standards that make up employment law are still under-enforced, especially below the top tiers of the labor market, and especially where workers lack collective representation inside their organization.<sup>27</sup> That makes employment law a logical platform on which to build the infrastructure for new forms of employee representation.

*Second*, in tying labor law reform to the project of enforcing decent labor standards and punishing scofflaws, the Doorey proposal taps into a broader and deeper reservoir of popular support than exists for traditional labor law reform. The politics of raising and enforcing labor standards in the United States is obviously challenging, but compared to the politics of labor law reform, it’s a cakewalk. As of 2012, a bare majority of the American public approved of labor unions in general, while forty-two percent reported their disapproval of unions.<sup>28</sup> By contrast, the public generally expresses broad support for workplace safety regulation, living wage laws, antidiscrimination laws, and such.<sup>29</sup>

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25. See Estlund, *supra* note 2, at 1530–31 (arguing that labor law has “ossified”).

26. See Harry Arthurs, *Landscape and Memory: Labour Law, Legal Pluralism, and Globalization*, in *ADVANCING THEORY IN LABOUR LAW AND INDUSTRIAL RELATIONS IN A GLOBAL CONTEXT* 21, 23–25 (Tom Wilthagen ed. 1998); Samuel Estreicher, *Trade Unionism Under Globalization: The Demise of Volunteerism?*, 54 *ST. LOUIS U. L.J.* 415, 416–18 (2010).

27. See ESTLUND, *REGOVERNING*, *supra* note 9, at 60–68.

28. See Jeffrey M. Jones, *In U.S., Labor Union Approval Steady at 52%*, *GALLUP POLITICS* (Aug. 31, 2011), <http://www.gallup.com/poll/157025/labor-union-approval-steady.aspx>.

29. For example, Gallup found eighty-three percent support for an increase in the U.S. minimum wage. See Jeffrey M. Jones, *Public Solidly Supports Increase in Minimum Wage*, *GALLUP* (Jan. 4, 2006), <http://www.gallup.com/poll/20710/public-solidly-supports-increase-minimum-wage.aspx>. A 2011 survey found that seventy-seven per-

The first two points are related: It is partly because of broader public support for the employment law enterprise that, during the last half century, Congress has enacted scores of federal laws establishing employee rights or raising minimum labor standards while it has allowed labor law to stagnate. Congress has thus failed to restore, refurbish, or replace the only formal mechanism for workers' involvement in the enforcement of these standards within the workplace—unionization. A subsidiary benefit of the Doorey proposal is that it would underscore and reinforce the important link between unionization and raising and enforcing labor standards.

The project of enforcing *existing* labor standards—of exposing and punishing law breakers—draws on additional vectors of public support. There is some evidence of this in the vitality and proliferation of anti-retaliation and whistleblower protections, which prohibit employer discrimination against employees who report or expose illegality.<sup>30</sup> In recent decades, Congress has enacted dozens of anti-retaliation provisions in employment and other laws, some with quite robust procedures and remedies.<sup>31</sup> These statutory protections, together with a rare string of employee victories in the Supreme Court in disputes over the interpretation of those provisions,<sup>32</sup> have generated a fairly robust “antiretaliation principle.”<sup>33</sup> Individual whistleblowing rights and remedies are obviously not enough to enable workers to enforce their rights; in some ways they have been a big disappoint-

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cent of respondents supported a ban on discrimination based on sexual orientation. See *Memorandum from The Human Rights Campaign & Greenberg Quinlan Rosner Research to Interested Parties* (Dec. 9, 2011), [http://www.hrc.org/files/assets/resources/ENDA\\_Polling\\_Memo\\_Dec\\_2011.pdf](http://www.hrc.org/files/assets/resources/ENDA_Polling_Memo_Dec_2011.pdf). A 2010 survey found that eighty-four percent of respondents supported federal legislation to improve workplace health and safety. TOM W. SMITH, PUBLIC ATTITUDES TOWARDS AND EXPERIENCES WITH WORKPLACE SAFETY 7 (2010), available at <http://publicwelfare.org/resources/DocFiles/NORCworksafety.pdf>.

30. See generally Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375 (2011) (discussing statutory and judicial support for whistleblowers).

31. *Id.* at 399.

32. See *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 278–79 (2009); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 456 (2008); *Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 56–57 (2006); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005). Strikingly, in several of those decisions the majority invoked congressional purpose as a basis for a broader statutory interpretation than the text might have compelled.

33. Moberly, *supra* note 30, at 377–78.

ment.<sup>34</sup> Still, their popularity, both in legislatures and in the courts, attests to strong popular support for the mission of law enforcement and a widespread, if largely implicit, recognition of workers' role as crucial agents of enforcement. This is a rare outcropping of employee-friendly law and policy on which it is wise for reformers to build.

Framing labor law reform as a way of better enforcing existing minimum labor standards should give it political appeal that labor law reform does not generally enjoy. I do not wish to overstate this point, especially in the current polarized political environment. The campaign against the confirmation of Patricia Smith for Solicitor of Labor shows how much fury employers and their allies can muster against effective and creative strategies for enforcing labor standards.<sup>35</sup> Still, the political environment for measures that improve enforcement of labor standards and employee rights is far more favorable than for labor law reform as such. That is partly because of the next point:

*Third*, the Doorey proposal has a small chance of splitting the business community, whose vehement and unanimous opposition to labor reform has proven insuperable. High-road employers that comply with employment mandates have less reason to resist labor law reform that renders only low-road employers more vulnerable to unionization.

One reason it has been easier to legislate individual employee rights and labor standards than to reform the labor laws is that the business community has often been divided over the former. "Responsible employers" have even supported some laws expanding employment rights, especially those regarding discrimination.<sup>36</sup> They see these laws as compatible with, or at least no threat to, their corporate identity and interests. Of course these self-proclaimed good corporate citizens do not always do as they say, but they also do not pull out all the stops in opposing employment rights legislation, as they do when legislation threatens to strengthen unions. Similarly, many large firms already maintain higher internal standards for occupational safety and health and work-life balance than any imaginable legislation would require.<sup>37</sup> Employers that are committed to the high road (or maybe even to the middle road) have relatively little to lose from legislation

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34. See, e.g., Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 23–35 (2012) (arguing that the whistleblower protections of Sarbanes-Oxley have failed to protect whistleblowers from retaliation).

35. See Steven Greenhouse, *New York State Labor Chief is Confirmed to Federal Post*, N.Y. TIMES, Feb. 5, 2010, at A16.

36. See FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 1–5 (2009).

37. See *id.* at 188–89 (describing firms' initiative in developing work-life balance).

that raises the floor a bit higher, or tries to plug holes in the existing floor.<sup>38</sup>

The Doorey proposal narrows and sharpens the focus of labor law reform to tap into those same dynamics: Employers that, for reasons of corporate branding or the “race for talent,” maintain terms and conditions of employment well above the existing floor would maintain their existing legal privileges in opposing unions. Again, both Doorey and I share the predominant view among labor law academics that those existing privileges are unjustified, but the labor movement has been unable to make that case stick within the current political system against a solid wall of business opposition. Labor law reform that targets the bottom feeders in the labor market might shake up those political dynamics and loosen the political logjam that has doomed labor law reform for so many years.

### *B. Some Practical and Policy Virtues of the Proposal*

Now let us turn away from legislative politics toward policy. Supposing that the Doorey proposal, and the regulatory approach to labor law in general, might have some political traction that traditional labor law reform has lacked, would it be good policy and why? My affirmative answer has five parts.

*First*, the Doorey proposal explicitly recognizes that there are good and bad (or at least better and worse) employers, and that they call for different regulatory treatment. Given the wide variety in organizations’ disposition and ability to comply with societal standards of conduct, and in their response to regulatory interventions, we need multiple regulatory tracks. Doorey cleverly lodges those multiple regulatory tracks within the law of union organizing. Employers are put (or put themselves) on one track or another based on their record of violating or respecting minimum labor standards.

*Second*, the Doorey proposal points a “big gun”—a potent sanction—at low-road employers. Those employers sensibly see unionization as an existential threat to their low-wage business model. A significantly increased threat of unionization thus serves as a potent

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38. See Cynthia L. Estlund, *Why Workers Still Need a Collective Voice in the Era of Norms and Mandates*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 463, 480–89 (Cynthia L. Estlund & Michael L. Wachter, eds. 2012). To be sure, even “high-road” employers might oppose laws that directly raise labor costs at the bottom of the labor market—e.g., a higher minimum wage—if that affects their suppliers’ costs. Many large and reputable firms have joined in the trend toward outsourcing of low-skill, labor-intensive tasks to less visible, less capitalized, less reputation-conscious contractors. See Margaret M. Blair, et al., *Outsourcing, Modularity, and the Theory of the Firm*, 2011 B.Y.U. L. REV. 263.

penalty and a strong deterrent to labor standards violations. The threat of unionization is not a substitute for fines or criminal penalties, but it is an additional fearsome sanction in a labor standards regime that has too few of those.

This virtue of the proposal underscores an important point about New Governance theories of regulation: Those theories do not tend toward deregulation or rely on bare “self-regulation” or voluntary compliance; proponents recognize the necessity, though not the sufficiency, of coercive sanctions to back up regulatory norms.<sup>39</sup> If the most opportunistic employers—those who respond only to regulatory threats and sanctions—get away with their scofflaw ways, then decent employers will be undercut in the market; and those who might go either way, depending on how the regulatory winds blow, may be tempted to cheat. So potent sanctions are important. The Doorey proposal recognizes that the imposition of a union-friendly organizing regime may be perceived as a bigger sanction than fines or backpay remedies.

*Third*, the Doorey proposal works by consciously injecting regulatory concerns into firms’ internal compliance calculus and altering their orientation toward labor standards. This is crucial given the powerful internal dynamics that both reflect and affect firms’ dispositions and capacity to comply with external legal norms. The Doorey proposal penetrates firms’ internal compliance calculus in two distinct ways: For low-road employers, it gives employees a decent chance of securing union representation, which can dramatically bend organizational dynamics toward compliance. And for employers seeking to avoid unionization, the proposal creates a powerful new incentive to get in line with legal standards and reject the low-road business model. Doorey calls this “injecting risk” into organizations, and proposes it as a general regulatory strategy.<sup>40</sup> In the case of this particular proposal, injecting the heightened risk of unionization into firms’ calculus should induce rational firms to channel some of the prodigious resources that they now put into union-avoidance into better legal compliance. Better legal compliance would not work as dramatic a change as unionization and collective bargaining would do, but it would be a significant improvement that would affect many more employers and workers.

We are now beginning to see what the regulatory approach has to do with labor law as it is traditionally conceived—that is, the law gov-

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39. See, e.g., AYRES & BRAITHWAITE, *supra* note 13, at 40–53 (on the importance of “big guns,” or highly coercive and disabling sanctions for serious offenders).

40. See Doorey, *supra* note 16, at 61–62.

erning collective labor activity and collective employee voice in terms and conditions of work. The last two virtues of the Doorey proposal illustrate how the regulatory approach to labor law can potentially reinvigorate the law's approach to collective voice and participation at work.

*Fourth*, the Doorey proposal is designed to empower workers themselves to play a role in the enforcement and improvement of labor standards. This is crucial both to labor law and to good regulatory design in general. Theories of Responsive Regulation in particular insist on the importance of giving regulatory beneficiaries significant institutionalized roles in the regulatory process and even in corporations' self-regulatory processes.<sup>41</sup> But how this plays out in the workplace warrants a short digression here.

One distinctive feature of workplace regulation is that its chief beneficiaries are competent adults inside the regulated organization (or supply chain). Unlike consumers, shareholders, or air-breathers, for example, workers are part of the organization's day-to-day operations. That insider status entails advantages and disadvantages from a regulatory perspective. On the downside, workers' dependence on the organization for their livelihoods makes them more vulnerable to the organization's control and manipulation than consumers, shareholders, and air-breathers. Workers can be silenced in ways those other groups cannot be. That is a big problem insofar as we rely largely on workers to enforce their own rights.<sup>42</sup>

On the plus side, as insiders, workers often have much better information about non-compliance than outsiders. Workers also have potential power within the regulated organizations as they supply indispensable input to production. (Of course, the more replaceable the workers are, the less power this role in production entails.) Workers' collective role and shared experience in production should also make them easier to organize than consumers, shareholders, and air-breathers (though that has been far more difficult lately than in the mid-twentieth century, for complicated reasons that we will not explore here). Under the right conditions, workers can overcome collective action problems that are endemic to the enforcement of collective rights, and can play a major role in enforcing employee rights and labor standards, not instead of the state but in conjunction with it.

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41. See, e.g., AYRES & BRAITHWAITE, *supra* note 13, at 57–60.

42. Even laws that are enforced by government agencies rely heavily on individual complaints to trigger enforcement actions. On the general problem of enforcement of labor standards, see ESTLUND, *REGOVERNING*, *supra* note 9, at 60–68.

So one way to think about the distinctive regulatory project of labor law is by asking the following question: What are the conditions under which workers, with their particular vulnerabilities and strengths as regulatory actors, can effectively contribute to the enforcement of their legally recognized rights and labor standards? That brings us to the final virtue of the Doorey proposal.

*Fifth*, the proposal harnesses the regulatory resources of non-governmental organizations, especially unions. Activating the regulatory capacity of non-governmental actors, especially those that represent regulatory beneficiaries, is one major architectural principle for smart regulatory theory.<sup>43</sup> Unions fit the bill, but so do worker centers and some law clinics and civil rights organizations.

The Doorey proposal activates the regulatory capacities of unions in particular in two ways: First, where a union does not represent workers but hopes to do so, it gives the union an incentive to uncover labor standards violations, so as to trigger the union-friendly organizing rules. Unions would thus augment a corps of labor inspectors that is chronically overmatched. Second, for some workers, the proposal makes it easier for unions to organize and represent them, and then to help enforce their rights through collective bargaining.<sup>44</sup> It is precisely because labor standards are better enforced in unionized settings that union-friendly organizing rules make sense as a remedy for labor standards violations.

Ironically, the modern regulatory perspective on labor law casts a new and favorable light on collective bargaining itself. Consistent with New Governance theories, both the structure and the ends of collective bargaining can be tailored to different organizations, workers, sectors, and market conditions. Collective bargaining addresses both the problem of organizational heterogeneity that all regulatory projects face, and the unique opportunities and vulnerabilities that workers face in enforcing their rights. Collective bargaining in practice has not

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43. See AYRES & BRAITHWAITE, *supra* note 13, at 54–100.

44. See, e.g., John W. Budd, *The Effect of Unions on Employee Benefits and Non-Wage Compensation: Monopoly Power, Collective Voice, and Facilitation*, in WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE 161, 184–87 (James T. Bennett & Bruce E. Kaufman eds., 2007); Alison D. Morantz, *Coal Mine Safety: Do Unions Make a Difference?*, 66 INDUS. & LAB. REL. REV. 88 (2013); Alison D. Morantz, *Does Unionization Strengthen Regulatory Enforcement? An Empirical Study of the Mine Safety and Health Administration*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 697 (2011); David Weil, *Regulating Noncompliance to Labor Standards: New Tools for an Old Problem*, CHALLENGE Jan.–Feb. 2002, at 47, 67; David Weil, *Individual Rights and Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets?* 13–15 (Nat'l Bureau of Econ. Research, Working Paper No. 9565, 2003).

always lived up to this potential, and is often cited as a source of rigidity.<sup>45</sup> But the potential for flexibility, and for variation over time and across employers, is one of the inherent virtues of collective bargaining as compared to uniform labor standards. The Doorey proposal's tendency to revive collective bargaining and the role of unions in the labor market is one of its signal virtues.

### III.

#### WHAT IS GAINED (AND WHAT IS NOT) BY REFRAMING LABOR LAW AS A REGULATORY PROJECT

The Doorey proposal is not, of course, the only workplace law reform proposal that fits the architectural principles of smart regulatory design. Two other types of reform proposals suggest some of the additional directions in which the regulatory approach might point: First, proposals for non-union forms of worker participation in workplace governance, either in general or in particular domains such as workplace safety, also fit many of those architectural principles.<sup>46</sup> This suggests that the regulatory approach to labor law may challenge some traditional principles of U.S. labor law, such as the broad ban on non-union forms of employee participation. Second, proposals to disseminate and to mandate disclosure of information about terms and conditions of employment also comport with the regulatory approach to labor law.<sup>47</sup> A well-designed regime of "workplace transparency" would empower both workers themselves and various intermediary organizations, including but not limited to unions, to monitor regulatory compliance and put reputational pressure on employers to improve conditions of employment.<sup>48</sup>

Let us return to the general virtues of thinking of labor law as one field of regulation among many. One thing that this switch of frames does *not* do is to avoid the central problem of power: workers need more power, whether it is to press for their own collectively-deter-

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45. On employers' perception that unions bring rigidities, see Katherine V.W. Stone, *A New Labor Law for a New World of Work: The Case for a Comparative-Transnational Approach*, 28 COMP. LAB. L. & POL'Y J. 565, 574–78 (2007).

46. See, e.g., ESTLUND, *REGOVERNING*, *supra* note 9, at 162–88 (urging an expanded role for non-union workplace committees); PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 218–24 (1990) (calling for expansion of non-union forms of worker participation); Hirsch & Hirsch, *supra* note 7, at 1152–67 (suggesting that the NLRB relax its restrictions against "company unions" in order to accommodate non-union employee work groups).

47. See, e.g., Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351 (2010) (proposing a regime of mandatory disclosure of work-related information).

48. See *id.* at 369–79.

mined goals or for enforcement of public norms of decent work. So how do workers gain power to improve their working lives in a world in which corporations (or at least investors and financial markets) have obviously gained power relative to workers? And how might the regulatory perspective on labor law recast that question? It is useful first to ask why the power balance has shifted against workers.

Mobility—the practical ability to exit, and therefore the credible threat of exit, from one geographic setting in favor of another with more lucrative opportunities—is a source of power. Globalization is all about the increased mobility of products, services, and capital. But labor cannot realize those same gains from mobility. Although labor migration flows have indeed increased over recent decades, due to expanded access to transportation and information, mobility is destined to be more limited and more costly for labor than for capital. First, labor faces continuing legal impediments to mobility in the form of immigration laws, which have changed much more slowly than trade and capital restrictions.<sup>49</sup> More importantly, labor mobility also has large built-in human costs, including the loss of community and family ties that sustain solidarity and individual well-being.<sup>50</sup> So the question of how to rebuild countervailing power on behalf of workers relative to capital in a globalized economy remains at the center of the labor law enterprise.

Once we shift to thinking of the workplace as one field of regulation among many, however, we might wonder how distinctive this question of power is to the law of the workplace. Questions about power arise within a large cluster of fields involving economic subordination and resistance.<sup>51</sup> For example, consumers and tenants face similar asymmetries of power, wealth, and information. But there are common concerns across fields of regulation even beyond those linked domains. Could we not also ask: How should society constrain corporations' exploitation of natural resources and environment? And how can citizens enact and implement constraints on powerful, complex organizations operating in increasingly competitive and boundariless product and capital markets? In both cases (labor and environment), the law both reflects and shapes citizens' ability to build and exercise power and to effectively constrain corporate behavior (through legisla-

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49. See generally Jennifer Gordon, *People Are Not Bananas: How Immigration Differs from Trade*, 104 NW. U. L. REV. 1109 (2010).

50. See *id.* at 1143; Ronald Krumm, *Regional Labor Markets and the Household Migration Decision*, 23 J. REGIONAL SCI. 361, 366–72 (1983).

51. See Arthurs, *supra* note 26; Alan Hyde, *What is Labour Law?*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 37 (Guy Davidov & Brian Langille eds., 2006).

tion and otherwise). In both cases, legal rights and remedies can sometimes be sources of power—but may only come about through the exercise of political power; “it takes a movement” to enact and implement significant environmental legislation, much as it does to achieve decent reforms in the law of work.<sup>52</sup>

In the labor field, the law has sometimes helped to enable collective action in ways that could be instructive to other regulatory projects. Ayres and Braithwaite, for example, use union health and safety committees as a model for how and why to bring regulatory beneficiaries into an organization’s self-regulatory processes.<sup>53</sup> That model might be instructive on how other regulatory beneficiaries—tenants or even nursing home patients—could play a role in governance.

Of course, the law has often been used to disable or restrain collective action by workers; that, too, may be instructive, at least as a cautionary tale, to other regulatory projects where citizens do manage to organize themselves and put economic pressure on organizations. A benefit of seeing labor law as one regulatory regime among others is that it suggests that labor law scholars may have something to teach in other fields, for example, about how law can both enable and disable citizens from organizing and exercising countervailing collective power.

#### CONCLUSION

Like many labor law scholars, I was drawn to labor law largely by the unique human drama of work—of collective production and collective protest and struggle. But I now think that we have much to gain from recognizing what is important but *not* special about labor law. Any effort to advance public values and social interests against powerful market forces and organizations must take explicit account of the powerful, complex, and varied dynamics, cultures, and incentive structures that operate inside regulated organizations and that af-

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52. See JULIUS G. GETMAN, *RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT* 9–32 (2010) (arguing that labor movements are necessary to counteract the power of corporations and executives); Cynthia Estlund, “*It Takes A Movement*”—*But What Does It Take to Mobilize the Workers (In the U.S. and China)?*, 15 *EMP. RTS. & EMPL. POL’Y J.* 507, 513 (2011) (“[H]istory would seem to suggest that, for workers to get labor law reform that favors unions, they are going to have to make some trouble.”).

53. See AYRES & BRAITHWAITE, *supra* note 13, at 59–60, 103–05. They also recount successful examples of organized participation by nursing home patients, consumers, and others. *Id.* at 27–33, 99. But workplace participation is their chief case in point on how and why organized participation by regulatory beneficiaries can work.

fect their ability and willingness to comply with societal standards of conduct. Further, any such effort must activate the potential of pro-regulatory constituencies inside and outside of regulated organizations and put them to work in support of societal goals.

On one view, this way of thinking about labor law may require us to put aside the political and moral commitments that drew many of us to the field and to start viewing labor law “as a technical branch of regulation, like securities or banking regulation.”<sup>54</sup> I think that is wrong, but not because the analogy to other branches of regulation is misplaced. What is wrong is the premise that the regulatory enterprise is merely technical. Good regulatory design aims to deepen and extend democracy. It aims to effectuate democratic decisions about the governance of powerful private organizations. It does that, in part, by extending democracy beyond the polling booth, and giving citizens more levers of power, both within those private organizations and in public regulatory process.<sup>55</sup> Moreover, expanding public participation within non-governmental institutions might even help rejuvenate public participation in political processes.<sup>56</sup>

Labor law was a pioneer in that project. New Deal proponents of the NLRA argued that extending democracy to the workplace would provide both a mechanism to improve and enforce labor standards and a training ground for citizens in political participation.<sup>57</sup> But labor law has since fallen on hard times. Now labor law and labor law scholars may have to expand their field of vision to reach across fields of regulation, and to recognize that they have much to learn and much to teach about how to make the law effective and how to empower citizens vis-à-vis the powerful organizations that shape their lives.

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54. Hyde, *supra* note 8, at 96.

55. See CHRISTINE PARKER, *THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY* 205–16 (2002) (providing numerous examples of such “levers”).

56. See CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 50–51 (1970); SIDNEY VERBA & NORMAN H. NIE, *PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY* 208 (1987).

57. CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 113 (2003).