

A New Approach to Labor Law in States & Cities

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Date : June 8, 2017

Kate Andrias, [The New Labor Law](#), 126 *Yale L.J.* 2 (2016).

Perhaps the greatest success story for unions and workers over the last five years is the wave of state and local ordinances that have raised minimum wages, guaranteed sick and safe time, and improved corporate scheduling practices, among other worker-friendly innovations. At the same time, though, union density has remained flat, as unions' successes in campaigns for better working conditions have not translated into large numbers of successful union elections. Moreover, with the election of Donald Trump, further erosion of union density is likely: unions will face a hostile NLRB possibly compounded by federal labor law reform in the form of a national "right to work" law or evisceration of collective bargaining rights for federal employees. In other words, unions' campaigns to improve working conditions have been wildly successful so far – they just haven't led to more enterprise-based bargaining, as contemplated by the Wagner model of labor law.

Where does this leave unions? The pessimistic story is that private employers – aided by an anticipated spate of favorable NLRB decisions – will continue to rebuff union drives, Republicans will continue to weaken public sector unions in states they control and in the federal government, and the Supreme Court will eliminate mandatory dues or fees in public sector unions nationwide. And it goes nearly without saying that prospects for creating conditions in which unions could thrive – for example, by passing legislation to facilitate sectoral-level bargaining – went from "very unlikely" to "completely DOA" with the 2016 election. But Kate Andrias develops a more optimistic story in her pathbreaking article, *The New Labor Law*. She focuses with precision on exactly how unions have managed to achieve their recent successes, revealing that, in a sense, sectoral and regional bargaining are actually *already here*, and they can be nurtured and propelled at the state level.

How could a new model of union representation arrive without anyone noticing? The answer seems to lie in our tendency to place labor law and employment law in separate silos. Consider the process by which New York State raised wages for fast food workers or Seattle raised its minimum wage. In the New York example, public protests underwritten by the Service Employees International Union led Governor Andrew Cuomo to convene a wage board, comprised of representatives of management, labor, and the public. The wage board then heard testimony, weighed the evidence, and announced a decision phasing in a fifteen-dollar minimum wage. Similarly, the process by which Seattle raised its minimum wage entailed creating a task force on which both labor and business were represented. The task force hammered out a compromise proposal, which was ultimately enacted by the City Council. In both instances (and many others, which Andrias documents), union representatives literally bargained with management representatives over conditions for large numbers of workers – though the final result then had to be ratified by government. Andrias calls this tripartite process "social bargaining," and she argues that it could be replicated: "Under the emerging model, employment law is no longer just a collection of individual rights to be bestowed by the state. Instead, it is a collective project to be jointly determined and enforced by workers, in conjunction with employers and the public." (P. 68.)

In addition to identifying the practice of social bargaining in the United States, Andrias argues that it could lead to two results: first, improving union prospects for traditional collective bargaining for working conditions above the minimum guaranteed by law, and second, creating new forms of labor organizations and funding mechanisms. The most concrete manifestation of the first can be seen in minimum employment standards that contain a carve-out for unionized employers – as Andrias notes, a practice that can generate controversy. But beyond that, Andrias argues that growing political support for better pay and benefits can soften employer resistance to offering higher wages at the

bargaining table. As to union funding mechanisms, Andrias's possibilities are less concrete, but they include possible fee-for-service models (which the NLRB could facilitate), as well as government funding of union programs that benefit non-union workers.

As Andrias acknowledges, finding a way for unions to pay for social bargaining is perhaps the greatest challenge to the model's success. Unions' loss of density and political power have gone hand-in-hand – they are a vicious cycle. Movements like Fight for \$15 have shown that labor can still deliver the goods for low-wage workers, but they are expensive, and dues-paying members may not be willing to fund them indefinitely. Whether labor can solve the funding problem while fighting off new threats from the federal government will likely be the single largest determinant of whether social bargaining proliferates. At the same time, the lack of a long-term funding mechanism is not the only challenge to social bargaining – Andrias also points to legal threats, including federal or state preemption of local laws.

Over the course of the next four years, we are likely to see manifested two diametrically opposed visions for improving the lives of low-wage workers – a deregulatory one in red states and cities, and a social-bargaining-based one in their blue counterparts. Andrias's article offers scholars and other commentators a framework for thinking about the latter, and in doing so, performs a great service.

Cite as: Charlotte Garden, *A New Approach to Labor Law in States & Cities*, JOTWELL (June 8, 2017) (reviewing Kate Andrias, *The New Labor Law*, 126 *Yale L.J.* 2 (2016)), <http://worklaw.jotwell.com/a-new-approach-to-labor-law-in-states-cities/>.