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## Alt-Labor and Employment Law: Symposium Introduction

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## ALT-LABOR LAW: SYMPOSIUM INTRODUCTION

MICHAEL M. OSWALT & CÉSAR F. ROSADO MARZÁN

Unionization and collective bargaining were once the bedrock of workplace governance and activism in the United States. Much of that foundation has fractured, but the gaps are increasingly being filled by a variety of new organizational forms and strategies. Legal clinics that organize—but not for unions—are a standard feature of assistance in low wage, immigrant communities. Groups like the Restaurant Opportunities Center, Coalition of Immokalee Workers, National Day Labor Organizing Network, Rideshare Drivers United, #Red For Ed, National Domestic Workers Alliance, National Taxi Workers Alliance, Google Walkout for Real Change, and National Guestworker Alliance are collective, but they do not “bargain” in a National Labor Relations Act (“NLRA”) sense. These and other efforts are innovative, courageous, experimental, and, for those interested in new forms of employee voice, inspiring. They are also, from a historical vantage, genuinely “alternative.”

While the causes, effects, and course of the so-called “alt-labor” movement are of growing interest to journalists, social scientists, historians, employers, politicians, activists, and unions, as legal scholars our interest focused on the law’s role in facilitating—or inhibiting—the visions of workers organizing under this emerging banner. Specifically, if others increasingly accept that a category of workplace advocacy called “alt-labor” exists, does that mean a category of “alt-labor *law*” also exists? The papers presented at the symposium suggest that this is a worthwhile project.

Panels were organized thematically. The first considered law’s place in sustaining models of alt-labor advocacy. As Professor Catherine L. Fisk notes, institutionalizing the power of alt-labor activism is a central and enduring challenge. Drawing on the experience of the United Farm Workers under the California Agricultural Labor Relations Act, she proposes co-enforcement (offering groups a role in regulatory enforcement) and hiring halls (offering groups job-matching and training opportunities) as options with established track records. Crucially, both also contribute to “proto-sectoral bargaining” frameworks that have attracted the interest of a wide-range of current scholars and policymakers.

Professor Hiba Hafiz's paper steps into the vibrant debate surrounding antitrust law's role in reversing the alarming effects of labor market concentration on workers' wages, options, and power. While many envision more aggressive merger reviews by the Department of Justice and Federal Trade Commission, Professor Hafiz notes that the agencies' consumer welfare focus will inevitably prioritize purchasers over workers, and neither have labor market expertise in any event. Her novel solution is to vest *labor* agencies with concurrent jurisdiction to approve questionable mergers under a new "public interest" standard. And she provides detailed recommendations for how it might be done.

Professor Michael Oswalt turns to what has seemingly become alt-labor's go-to tactic: the short strike. Why limited-duration stoppages have expanded has some relatively obvious legal and practical answers, but Professor Oswalt suggests there is more to the story. For example, while the strikes are surely designed to maximize labor law protections, the inadequate protections of traditional employment law may say more about the tactic's perseverance, perhaps signaling a new era of "labor law as employment law." Similarly, all strikes are tailored for attention, but when workers walk-out for just an hour or a day, tweets, livestreams, memes—and Millennials—are sure to follow. An emerging literature on digital protest, and an existing literature on the sociology of political generations, suggests the combination is a powerful cultural multiplier.

The papers were reinforced by a lunchtime presentation by former chief of the Illinois Attorney General's Workplace Rights Bureau and Visiting Scholar at IIT Chicago-Kent College of Law, Jane Flanagan. Her work emphasizes how state attorney generals have emerged as a new type of public labor enforcer, highlighted by the creation of six new units dedicated to workplace rights since just 2015. Through an incredible diversity of statutes, including antitrust, civil rights, and consumer laws, and a diverse array of litigation, regulatory, policy, and outreach tools, the bureaus are uniquely equipped to take on the multi-faceted nature of workplace violations in the fissured economy. Together they represent a new "cohort of progressive state attorney generals" changing the face of workplace law enforcement.

Panel two focused on the law of alternative workplace bargaining. Professor César F. Rosado Marzán explores how wage boards can provide for sectoral bargaining in the United States, a centralized structure of collective bargaining that could help to represent workers in a wholesale fashion, rather through the plant-by-plant model offered by the NLRA. He describes the case of Puerto Rico of the 1950s-1970s, when unions, employers, and the government of Puerto Rico set minimum wages through a minimum wage

board. He concludes that while the wage board did centralize wage setting, and did help unions represent and organize workers wholesale, and quickly, there were political, social, and legal peculiarities which made the model work in Puerto Rico, but may not in contemporary United States.

Professors Matthew Dimick and Martin H. Malin then returned to some crucial baselines. Professor Dimick, discussing a forthcoming review of the *Philosophical Foundations of Labour Law*,<sup>1</sup> noted that beneath any labor movement discussion rests an implicit normative evaluation of labor law itself. In fact, the assessment is essential to considering the law's deficiencies and avenues for reform. While various philosophical schools might help shape the normative appraisal, Professor Dimick identifies a broad theme of domination throughout the book's many chapters and argues that focusing on its structural dimensions, in particular, can help foreground "alternative forms" of employment protections that may best protect against exploitation at work.

Professor Malin's article serves as an important rejoinder to all considerations of alt-labor: conventional business unionism produces worker and societal benefits that other forms of activism and representation cannot. Unions may be historically weak, but their democratizing, efficiency, health, and wage effects remain. In fact, the most broadly effective alt-labor groups function much like unions. Advocacy in support of strengthening public and private sector collective bargaining therefore remains critical, and Professor Malin ultimately suggests a range of important legal and institutional reforms impacting how unions function in organizing, bargaining, politics, and in future partnerships with alt-labor.

The final panel centered on the law of alternative workplace protections. Professor Roberto L. Corrada's contribution considers elite college athletes, whose classification as amateurs and students frees universities from a litany of legal obligations under basic labor, employment, and anti-trust laws. But as an array of recent litigation, scholarship, and legislation exposes, that reality is doomed. Professor Corrada's focus is on the challenge of next steps. How, for example, will employee athletes be paid, and what will the relationship with their "employers" look like? Professor Corrada's insight is that well-established systems of undergraduate "work study" programs can serve as a template, with many other issues determined through collective bargaining. He concludes with crucial specifics about how the new

1. Matthew Dimick, Review of *Philosophical Foundations of Labour Law*, COMP. LAB. L. & POL'Y J. (forthcoming 2020).

system—limited to employee athletes in revenue generating sports—might work.

Professor Paul Secunda spotlights the important issue of retirement security for precarious, often part-time, multi-job workers who are a frequent focus of alt-labor organizing. Professor Secunda begins with a foundational point: these workers are, and must be, considered common law employees under ERISA. That conclusion is critical, because the statute provides for multiple employer pension (“MEP”) plans, including an “open” version that allows unaffiliated employers to pool resources for retirement benefits. Combined with a professional service organization to administer it, so-called “Open MEPs” might bring companies and industries under a shared benefits umbrella, while also limiting their fiduciary liability. Professor Secunda suggests that the necessary legal frameworks and incentives for the proposal are possible, ultimately offering access and meaningful participation in employer-provided tax-deferred retirement planning in the alt-labor universe.

Professor Kati L. Griffith closed the day with a piece co-authored by Professor Leslie C. Gates that underscores one of alt-labor’s undertheorized achievements: its role as a “catalyst” for the reinterpretation and renewal of labor and employment doctrines already on the books. Through the lens of recent organizing by upstate New York dairy workers, Professors Griffith and Gates show how alt-labor groups use litigation not simply as a pressure, substitute, or added tactic in broader campaigns but as a precedent-setting vehicle that can expand workplace protections in concrete ways. In New York that meant contributing to the end of the state’s exclusion of farm laborers from state collective action protections, creating momentum—and inspiration—for a similar effort at the federal level.

Throughout, Professors Laura Weinrib, Daniel J. Galvin, and Kenneth G. Dau-Schmidt served as panel discussants. Their incisive commentary, suggestions, and questions made clear that while the symposium might have been the first devoted exclusively to the evolving world of alternative labor law, it will not be the last.