Chicago-Kent Law Review

Volume 95
Issue 1 *The State of the Law of the New Labor Movement*

Article 45

9-15-2020

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MILKING OUTDATED LAWS: ALT-LABOR AS A LITIGATION CATALYST

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ABSTRACT

Even though alt-labor does not have significant labor market power when compared to labor unions, its impacts are manifold. Alt-labor has given rise to novel state and local legislation improving wages and working conditions for low-wage workers across the country. It has fostered new collaborations with government enforcement agencies to improve the implementation of rights on the books—to "make rights real." It has promoted new bargaining and worker organizing strategies, outside of traditional models. This article highlights another achievement of alt-labor. Alt-labor has served as a catalyst for creative litigation efforts that argue for application of existing workplace protections to non-traditional populations of workers and their organizing efforts. In this way, it has pushed to reinterpret, and thus to revitalize, what many perceive to be outdated labor and employment laws. We focus on initiatives that reimagine the interpretation of these laws in light of new organizing strategies and new global economic realities, all the while staying true to the existing laws on the books. Along with raising questions, and proposing new interpretations of New Deal and civil rights era gains, sometimes alt-labor's litigation efforts are successful and lead to case law "wins." To build its approach, the article draws from literature on litigation as a social movement strategy and provides an in-depth analysis of the ways courageous dairy workers in upstate New York have inspired innovative litigation theories and successes. Alt-labor's achievements as a litigation catalyst are laudable—given the challenge of enacting federal legislation to address income inequality and the decline of labor union power—in the current era.

I. INTRODUCTION

Worker organizations engaging in alternative, non-traditional efforts to improve wages and working conditions are exciting new players on the labor relations scene in the United States. Often referred to as alt-labor due to their new experiments in worker organizing and advocacy, these groups have given rise to a new state of the law surrounding workers' rights. In this article, we aim to reveal a key aspect of the emerging "alt-labor law" framework; alt labor's role as a catalyst for renovating how we apply New Deal and civil rights era labor and employment protections in the 21st century. In other words, we interrogate alt-labor's role as a litigation catalyst—the ways its efforts have led to successful case law "wins" and have raised viable questions about long-standing assumed exclusions from worker protections.

Alt-labor's impacts are manifold and steadily expanding. As other scholars have shown, alt-labor has given rise to novel state and local legislation improving wages and working conditions for low-wage workers. A notable recent example is the Fight for Fifteen movement among fast-food workers which, along with its allies, has successfully raised minimum wage levels in localities across the country. In 2010, before the movement took hold, there were just fourteen states with minimum wages above the federal level. By 2017, that number had doubled, with twenty-nine state minimum wage rates above federal standards.[1] Moreover, cities and states across the country have added protections for the domestic workers that care for children and the elderly in private homes.[2] These workers were excluded from the New Deal era gains that other workers experienced. In recent years these barriers have started to fall in some localities across the county. Indeed, state and local "[b]ill of rights campaigns have become a signature strategic initiative of the domestic worker movement."[3]

Alt-labor has also fostered collaborations with government enforcement agencies to improve the implementation of rights on the books—to

1. *See* Ken Jacobs, *Governing the Market from Below: Setting Labor Standards at the State and Local Levels*, *in* NO ONE SIZE FITS ALL: WORKER ORGANIZATION, POLICY AND MOVEMENT FOR A NEW ECONOMIC AGE 281, 281 tbl. 1 (2018).

2. *See* Linda Burnham & Andrea Cristina Mercado, *Expanding Domestic Worker Rights in the 21st Century: Statewide Campaigns for Domestic Worker Bills of Rights*, *in* NO ONE SIZE FITS ALL: WORKER ORGANIZATION, POLICY AND MOVEMENT FOR A NEW ECONOMIC AGE 297, 297 (2018) ("domestic worker bills of rights have been won in eight states: New York (2010), California (2013), (2015), Hawaii (2013), Massachusetts (2014), Connecticut (2015), Oregon (2015), Illinois (2016), and Nevada (2017)").

3. *Id.*

"make rights real."[4] Janice Fine has done pioneering work on "co-enforcement," showing creative ways that worker centers and other alt-labor groups feed information to state actors that promote a more proactive and strategic form of labor standards enforcement in low-wage industries.[5] Through relationships between alt-labor organizations, government actors become aware of legal violations that would have otherwise gone undetected.

Beyond legislation and labor standard enforcement, alt-labor has additionally pushed beyond traditional organizing tactics and forms of firm-level bargaining. It incorporates "traditional" tactics such as boycotts and pickets. Additionally, however, it has often promoted social movement strategies that involve broader swaths of the community, press attention and other forms of pressure on employers outside of traditional union pressure tactics.[6] It has advocated for collective bargaining with employers at the sectoral level of an industry, rather than traditional collective bargaining efforts at the establishment level.

In this article, we highlight another achievement of alt-labor—-its role in instigating positive, pro-worker, developments through litigation. The litigation it bolsters often exposes the questions, gaps and failures of current interpretations of New Deal and civil rights era legal gains. It thereby serves as a catalyst to reimagine the interpretation of these laws in light of new organizing strategies among marginalized workers and new global economic realities. It has raised key questions and has challenged assumed exclusions from labor and employment law. As new actors have stepped

4. *See generally* Els de Graauw, MAKING IMMIGRANT RIGHTS REAL: NONPROFITS AND THE POLITICS OF INTEGRATION IN SAN FRANCISCO (2016); Charles R. Epp, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE (2010); Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561, 569 (2010). *See also* Michael M. Oswalt and César F. Rosado Marzán, *Organizing the State: The "New Labor Law" Seen From the Bottom-Up*, 39 BERKELEY J. EMP. & LAB. L. 415 (2018).

5. Janice Fine, *Enforcing Labor Standards in Partnership with Civil Society: Can Co-enforcement Succeed Where the State Alone Has Failed?*, 45 POL. & SOC'Y 359 (2017); Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 L. & POL'Y REV. 552 (2010).

6. *See* Marilyn Sneiderman & Joseph A. McCartin, *Bargaining for the Common Good: An Emerging Tool for Rebuilding Worker Power, in* NO ONE SIZE FITS ALL: WORKER ORGANIZATION, POLICY AND MOVEMENT FOR A NEW ECONOMIC AGE 219, 219 (2018) (referring to "bargaining for the common good" as bringing "community allies into the bargaining process"); Erica Smiley, *A Primer on 21st-Century Bargaining*, *in* NO ONE SIZE FITS ALL: WORKER ORGANIZATION, POLICY AND MOVEMENT FOR A NEW ECONOMIC AGE 237, 237 (2018) (referring to efforts to bargain with "the ultimate profiteer" and "community-driven bargaining"); Michael M. Oswalt, *Alt-Bargaining*, 82 L. & CONTEMP. PROBS. 89, 90 (2019) ("Alt-labor is incredibly diverse, but through-lines exist. Its constituent groups are repeatedly marked by three non-standard relationships to law that generate exceptional conceptions of group membership, challenge organizing's presumptive outer-bounds, and prove how even bad organizing doctrine can be harnessed for good.").

forward to make legal claims, they have also successfully pushed judges to reimagine state and federal workplace laws from the ground up. These efforts have led to actual litigation wins in some cases, and have questioned longstanding assumptions in others. These efforts catalyze worker advocates and government actors to re-interpret what many characterize as outdated labor and employment laws. We conceptualize these efforts not as changing existing law, or as contradicting existing doctrine, but rather as bringing about "a natural outgrowth" of existing statutory language and case law precedent.[7]

While here we focus on a success story among upstate New York dairy workers, we do not overlook that new forms of worker organizing can lead to less-worker friendly developments in the law. Non-traditional corporate campaigns have, on occasion, provoked an employer backlash. Some unions instigating such campaigns, for instance, have faced defamation suits.[8] The Fight for Fifteen's efforts to bring to light the power and control of fast-food brands (franchisors) as joint employers has been both a seed for litigation against franchisors and the provocateur of a backlash among powerful interest groups who aim to narrow the scope of joint employer law.[9]

Clearly advancing worker rights is never without risks. In light of these risks, it is critical to take stock of the full range of potential gains made by alt-labor. It is also important to denote what gains can be accomplished with existing state and federal legislation, given the challenge of enacting federal legislation to address income inequality and the decline of labor union power. By involving non-traditional populations of workers, alt-labor inspired litigation efforts expose the questions, gaps, failures as well as the promise of New Deal and civil rights era legal gains. They push the legal system to reimagine the application of these laws in light of new realities. At times, they are successful at achieving new and inclusive applications of existing law. Other times they question assumed exclusions, which shifts the narrative.

7. *See* Edward Rubin & Malcolm Feeley, *Creating Legal* Doctrine, 69 S. CAL. L. REV. 1989, 2027 (1996).

8. *See* Kati L. Griffith, *The NLRA Defamation Defense: Doomed Dinosaur or Diamond in the Rough?*, 59 AM. U.L. REV. 1, 5 (2009) ("In fact, it is widely believed that employers are increasingly bringing defamation lawsuits as employees and their organizations turn to less traditional modes of collective activity through means such as union corporate campaigns and new forms of worker organizations.").

9. *See* Kati L. Griffith, *An Empirical Study of Fast-Food Franchising Contracts: Towards a New "Intermediary" Theory of Joint Employment*, 94 WASH. L. REV. 171, 174 (2019) (describing recent legislative efforts to narrow joint employer law).

In the next part (Part II), we draw from scholarly debates about the role of litigation as a social change strategy to build our litigation as a catalyst approach.[10] Part III fleshes out the catalyst concept with an in-depth analysis of the litigation successes and questions that sprung out of alt-labor organizing in the upstate New York dairy industry. Courageous organizing among New York's dairy workers has resulted in a successful effort to push for doctrinal renovation and has exposed legal gaps.[11] These latter efforts have questioned historic exclusions and have thus laid the groundwork for a future challenge. These under-celebrated efforts push decision-makers to reinterpret existing law to better accommodate the new realities of workers in industries like the dairy industry which global economic shifts have recently transformed.

II. THE LITIGATION CATALYST APPROACH

The existing debates about the role of litigation in social change suggest the importance of looking at lawyers and litigation as just one strategy within broader advocacy and organizing efforts. These debates focus primarily on how litigation feeds or impedes social movement efforts to shift power relations, but less on how they contribute to changes in the development of the law itself. Our alt-labor as a litigation catalyst approach both acknowledges the need to view litigation in its wider context and highlights the value of considering litigation's impact on the development of case law that renovates interpretations of existing laws to include groups long thought (erroneously) to be excluded from worker protections.[12]

10. *See, e.g.*, Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1731 (2017) (there are "fundamental disagreements about theories of social change - and the role of elite politics, professional expertise, and litigation within them."); Ayako Hatano, *Can Strategic Human Rights Litigation Complement Social Movements? A Case Study of the Movement Against Racism and Hate Speech in Japan*, 14 U. PA. ASIAN L. REV. 228, 236-37 (2019) ("Among law and society scholars, there has been a contentious debate about the promise and limits of litigation as a strategy for social change.").

11. *See* Margaret Gray & Olivia Heffernan, *Buying Local Won't Help Exploited Farmworkers*, JACOBIN (Nov. 16, 2019), https://www.jacobinmag.com/2019/11/farmworkers-organizing-marks-farm-agriculture-labor [https://perma.cc/9TR3-TRYQ] (describing the obstacles and successes faced by dairy workers and the organizers that work with them).

12. There is much to be gained from increased connection between legal and social movement scholars. *See, e.g.*, Scott Cummings, *The Social Movement Turn in Law*, L. & SOC. INQUIRY 360 (2018) (acknowledging legal scholarship's growing recognition of social movement scholarship); Edward L. Rubin, *Passing through the door: Social movement literature and legal scholarship*, 150 U. PENN. L. REV. 1, 2-3 (2001) ("The social movement literature, although it pays some attention to law, makes little use of legal scholarship. In turn, and of more direct concern for present purposes, legal scholars seem largely oblivious to the extensive social science literature on social movements . . . legal scholars have much to gain from broadening their perspective and making contact with the social movements literature. They would be able to improve their descriptions of the legal system, and would perceive additional distinctions that would enhance their prescriptions as well.").

Some scholars have been critical of litigation as a source of positive change for disadvantaged groups.[13] They note that litigation tends to privilege individual interests over collective interests.[14] They observe that the court system is slow and tightly constricts how parties can frame their claims for change. They point out that a court win can change the law on the books, but it does not necessarily translate into actual change in practice.[15] Others advance the view that litigation can provoke a negative "backlash" to the movement that actually undermines a social movement's long-term goals. These backlash scholars often point to the rise of the political right in response to high-profile Supreme Court decisions such as *Roe v. Wade* and *Brown v. Board of Education*.[16] Catherine Albiston's oft-cited article, which ominously refers to litigation strategies as the "the dark side," paints a picture of litigation as a demobilizing force that puts too much power in the hands of lawyers rather than movement leaders.[17]

These heavy-hitting critiques notwithstanding, another group of scholars has persuasively argued that litigation that occurs in conjunction with a broader movement for change may not suffer from the same deficiencies noted above (or at least may suffer them to a reduced degree). Litigation wins that occur in the context of organizing and wider advocacy efforts can energize collective efforts. They can produce legal re-interpretations which combat the assumed strictures on how claims must be made. Thus, rather than constricting claims, they can broaden the scope of claimsmaking by challenging assumed restrictions or exclusions. Movements on the ground can also help make rights real and can work in coalition with others to address any backlashes that litigation wins may spur.

In this vein, Manoj Dias-Abey aptly reminds us that litigation's weaknesses as a strategy "depend on context," such as whether the litigation efforts "are accompanied by movements on the ground."[18] Similarly, Scott Cummings' concept of "social movement lawyering" brings to light how

13. *See, e.g.*, DEBRA MINKOFF, ORGANIZING FOR EQUALITY: THE EVOLUTION OF WOMEN'S AND RACIAL-ETHNIC ORGANIZATIONS IN AMERICA (1995); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE (1991).

14. *See* Manoj Dias-Abey, *Justice on Our Fields: Can "Alt-Labor" Organizations Improve Migrant Farm Workers' Conditions?*, 53 HARV. C.R.–C.L. L. REV. 167, 179 (2018) ("Courts may be ill-equipped to receive and resolve issues involving collective interests because they are structured to privilege individual freedom and private ownership of property.").

15. *See id.* ("Furthermore, courts can only make declarations about rights, they cannot implement them.").

16. Cummings, *supra* note 12, at 362 (discussing scholars who critique the "massive backlash against seminal court decisions").

17. *See generally*, Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61 (2011).

18. *See* Dias-Abey, *supra* note 14, at 179.

vital it is for movement activists to engage lawyers as secondary actors while "deploying law in politically sophisticated ways designed to maximize the potential for deep and sustained democratic change."[19] Daniel Galvin's work on the "changing politics of workers' rights" reinforces this point by revealing alt-labor's multi-layered efforts that combine legislative advocacy, direct actions and litigation strategies.[20] In sum, we should view litigation as just one part of "advocacy across different domains (courts, legislatures, media), spanning different levels (federal, state, local), and deploying different tactics (litigation, legislative advocacy, public education)."[21] That is precisely what we plan to do in the subsequent part when we consider litigation efforts that sprung out of multidimensional organizing and advocacy efforts among dairy workers and their allies in upstate New York.

Litigation can help movements even when it does not initially lead to a case law win.[22] Indeed, Douglas NeJaime's work points to how social movement leaders can "seize" and "leverage" the constraints of the legal system "for social movement purposes in the wake of litigation loss."[23] The claims made in litigation can help disadvantaged groups gain public support through enhanced media exposure and public awareness.[24] The arguments advanced in litigation sometimes help the public see an issue more positively, as some have argued in the same-sex marriage litigation context.[25] Litigation can help a movement figure out how best to frame and

19. Cummings, *supra* note 10.

20. Daniel J. Galvin, *From Labor Law to Employment Law: The Changing Politics of Workers' Rights*, 33 STUD. AMER. POL. DEV. 50 (2019).

21. Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1242 (2010).

22. *See* Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 295 (2015) ("Legal mobilization can create leverage for marginalized groups bargaining in the shadow of the law . . . litigation losses can construct movement identity and mobilize participants.").

23. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 946 (2011).

24. *See* Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 295 (2015) ("[L]itigation can bring benefits to social movements such as mainstream media attention, financial resources, and legitimacy. These benefits can empower marginalized individuals to press for social change."); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 68-74 (1994).

25. Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 MARQ. L. REV. 263, 266-67 (2010) ("[D]ecisions and change-oriented litigation may sometimes produce social change indirectly, by redefining a social practice like same-sex marriage and thereby influencing citizens' attitudes. This model is one of 'constitutional framing,' whereby movements, countermovements, and officials in constitutional debates compete and collaborate in changing or reinforcing the meaning of social practices."); Cummings & NeJaime, *supra* note 21; *see also* Ellen A. Andersen, *The Gay Divorcée: The Case of the Missing Argument*, *in* QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW (2009); ELLEN A. ANDERSEN, OUT OF THE CLOSETS & INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION (2006).

reframe the movement's long term agenda.[26] Jules Lobel's notion of "courts as forums of protest" characterizes courts "as arenas where political and social movements agitate for, and communicate, their legal and political agenda."[27]

Thus, as we consider the case of upstate New York dairy workers, we pay close attention to alt-labor's efforts as they relate to court wins and as they relate to the development of legal claims that have yet to gain traction in the courts. We look for ways that alt-labor, as part of broader organizing and advocacy efforts,[28] pushes judges and government agencies to reimagine state and federal workplace laws from the ground up.[29] The next Part will elaborate upon a historic litigation win and the sowing of seeds for future litigation challenges. Both examples reveal alt-labor's key role as a litigation catalyst. They show how alt-labor is *milking* existing laws by effectively advocating for inclusion and challenging perceived exclusions from these laws as erroneous interpretations of the law.

III. NEW YORK'S DAIRY WORKERS AS A LITIGATION CATALYST: FROM LEGAL EXCLUSION TO INCLUSION

Organizing among upstate New York's dairy workers, a form of alt-labor organizing, laid the foundation for key developments in the law, and for legal innovation through litigation. We highlight how New York's dairy workers have challenged long-endured exclusions from organizing rights and from housing protections that some workers receive automatically when they live and work on their employer's property. While we home in

26. Yoav Dotan, *The Boundaries of Social Transformation Through Litigation: Women's and LGBT Rights in Israel, 1970-2010*, 48 ISR. L. REV. 3, 3 (2015) ("Litigation may also help social movements to reconstitute and shape their claims and the organizing principles for their actions, thus serving as a process of 'framing' and 'reframing' the conceptual tools and perspectives of such movements."); Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s',* 111 AM. J. SOC. 1718, 1720 (2006). But this agenda setting function can steer movement's away from more transformative goals. *See* Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667, 1676-77 (2014).

27. Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 479 (2004).

28. *See* Charles R. Epp, THE RIGHTS REVOLUTION, 1-6 (1998) (challenging scholars of the "rights revolution" between 1961-1975 to consider the broader social movement organizing context, along with legal developments).

29. For scholarship that calls for looking at these issues from the ground up, see FROM THE GRASSROOTS TO THE SUPREME COURT: BROWN V. BOARD OF EDUCATION 1 (Peter F. Lau ed. 2004) (discussing the importance of considering change from both a top-down and bottom-up grassroots perspective when considering *Brown v. Board of Education* and civil rights era gains) and Clayborne Carson, *Book Review: The Origins of the Civil Rights Movement: Black communities Organizing for Change. by Aldon D. Morris*, 3 CONST. COMMENT. 616, 619 (1986) (critiquing the book's author as "determined to attribute the initiation of movements to individuals affiliated with the major civil rights organizations rather than to emphasize the role of emergent, local protest groups").

on the ways that organizing innovates case law development and lays the foundation for future challenges, it is essential to note again that litigation is not the only area of advocacy and change.[30] Organizing efforts among New York's dairy workers, and the broader Justice for Farmworkers Campaign, have also engaged in direct actions against employers and have pushed for heightened co-enforcement efforts (such as more Occupational Safety and Health Administration inspections).[31] They have advocated for legislative advancements (a farmworker rights bill passed in New York in 2019) that led to the right to overtime pay, workers' compensation, disability insurance and the right to a day of rest, among other gains.[32]

In New York State, the story of dairy workers' rights is a story of exclusion. Despite legal advancements for non-agricultural laborers during the New Deal period of the 1930s, New York's agricultural workers, including those that work on dairies, were excluded from worker rights at both the federal and state levels until New York's Farm Laborers Fair Labor Practices Act went into effect January 1, 2020.[33] As agricultural workers, dairy workers are excluded from an array of federal protections that other non-agricultural employees benefit from. Just one example among many, they are excluded from overtime premiums under the FLSA when they work hours that exceed forty in a particular workweek.[34] In 1938, when the law was enacted, Congress originally excluded them from FLSA minimum wage protections as well.[35] The minimum wage exclusion for agricultural workers was abandoned in the civil rights era of the 1960s, but federal exclusion from overtime premiums remains for this population.[36] New York's recent law fills the gap partially through the provision of a right to overtime pay after 60 hours of work in a workweek. As the below will elaborate upon, recent organizing efforts challenge presumed exclusions from organizing rights, housing protections, and other safeguards.

30. *See* discussion of multidimensional advocacy strategies *supra* Part II.

31. Diana Louise Carter, *Farm Workers Seek Better Conditions*, DEMOCRAT & CHRON. (May 3, 2014, 8:08 PM), https://www.democratandchronicle.com/story/money/business/2014/05/03/jose-caas-farm-worker-conditions/8665339/ [https://perma.cc/JGB8-ZWWQ].

32. *Senate Passes the Farm Laborers Fair Labor Practices Act,* NY STATE SENATE (June 19, 2019), https://www.nysenate.gov/newsroom/press-releases/senate-passes-farm-laborers-fair-labor-practices-act [https://perma.cc/JJ63-Q6UK].

33. Alexis Guild & Iris Figueroa, *The Neighbors Who Feed Us: Farmworkers and Government Policy—Challenges and Solutions*, 13 HARV. L. & POL'Y REV. 157, 159 (2018) ("A key factor in the creation and maintenance of agricultural exceptionalism has been the economic strength of agribusiness interests and their ability to exert a significant influence on public policy.").

34. 29 U.S.C. § 213(b)(12) (2019).

35. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 13, 52 Stat. 1060, 1067 (1938).

36. Fair Labor Standards Amendments of 1966, Pub. L. 89-601, § 203(a), 80 Stat. 833, 833-34 (1966).

A. Challenging Exclusions from Organizing Rights

Organizing among upstate New York dairy workers contributed to a successful legal challenge that led to inclusion of dairy workers in state-level organizing rights. Dairy workers, as agricultural laborers, are excluded from the National Labor Relations Act (NLRA), and thus do not have federal protections related to engaging in collective action with their fellow workers.[37] In other words, unlike NLRA "employees," dairy workers can be fired for talking to their co-workers about issues related to wages and working conditions. Employers can retaliate against agricultural workers for this behavior and employers have no duty to bargain with unions, even when a union has the support of a majority of the workers. Scholars have uncovered that race was likely to have motivated New Deal exclusions which targeted the agricultural sector. Southern Democrats conditioned their support of these bills (the FLSA and the NLRA) on the exclusion of farmworkers and domestic workers (two industries dominated by African American workers at the time).[38]

New York State has a similar history of agricultural exclusion from protections of workers' associational activity. Some states, most notably California, filled the federal gap in farmworker organizing protections.[39] In 1975, California passed the historic Agricultural Labor Relations Act (CALRA), with the express intent of rectifying the NLRA's failure to protect farmworkers. Its intent is "to encourage and protect the right of [California's] agricultural employees to full freedom of association."[40] Critics contend, however, that powerful California growers and their allies in California government have made it difficult for CALRA to achieve its stated purposes.[41]

37. 29 U.S.C. § 152(3) (2012).

38. Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1337 (1987) ("This Article presents proof of the discriminatory purpose behind the exclusion of farm workers from the maximum hours and overtime provisions of the FLSA."); Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95 (2011) (arguing that the farmworker and domestic worker exclusions had racist origins).

39. *See* Kati L. Griffith, *The Power of a Presumption: California as a Laboratory for Unauthorized Immigrant Workers' Rights*, 50 U.C. DAVIS L. REV. 1279, 1315 (2017) ("The NLRA's exclusion and legislative history strongly suggests that Congress affirmatively left the regulation of agricultural relations in the hands of the states.").

40. CAL. LAB. CODE § 1140.2 (Deering 2016).

41. For criticisms see William B. Gould IV, *Some Reflections on Contemporary Issues in California Farm Labor*, 50 U.C. DAVIS L. REV. 1243, 1250-54, (2017); Miriam Pawel, *The Sad Lesson from California*, N.Y. TIMES (July 16, 2019), https://www.nytimes.com/2019/07/16/opinion/labor-laws-california-new-york-lesson.html [https://perma.cc/XZ3B-33KC] (referring to the Board that administers California's agricultural labor relations law as "moribund" and to farmworker wages and working conditions as "arguably no better than decades ago").

In contrast to gap-filling states like California, New York mimicked the federal government's exclusion of agricultural workers for over eight decades. Two years after the U.S. Congress passed the NLRA in 1935, New York passed its own Labor Relations Act in 1937 (subsequently referred to as the New York State Employment Relations Act, or "SERA").[42] It provided employees "a statutory right to organize and collectively bargain." Nonetheless, similar to the NLRA, it explicitly excluded "any individuals employed as farm laborers" from its definition of "employees" who would benefit from this state intervention.[43] As a result, dairy workers in New York State were affirmatively excluded from state protections of collective bargaining and against employer retaliation for organizing activities.

The story of exclusion shifted to a story of inclusion in 2019 when alt-labor's litigation efforts contributed to ending New York's exclusion of farm laborers from state collective action protections. The Worker Center of Central New York and the Worker Justice Center of New York led many of these organizing efforts.[44] Organizers did farm-to-farm organizing and, at times, teamed up with community, university, legal and labor allies to expand their advocacy efforts across the state.[45] These initiatives included talking to workers and organizing rallies and wider meetings.[46] One of the workers who participated in these organizing efforts, Crispin Hernandez, was fired after talking to workers about problematic working conditions on the dairy farm where he worked.[47]

Firing an employee for talking to co-workers about working conditions was legal under both the NLRA and SERA's language excluding farm laborers. Hernandez, the Worker Center of Central New York and the

42. NY LAB. LAW § 703 (Consol. 2019).

43. NY LAB. LAW § 701(3)(a) (Consol. 2019).

44. Whitney Randolph, *Immigrant Farmworkers Rally Slated*, WATERTOWN DAILY TIMES (Apr. 29, 2015), https://www.nny360.com/news/immigrant-farmworkers-rally-slated/article_ 43eae5c4-0b6b-534f-8af7-3c34a59cd4e9.html [https://perma.cc/5LPM-JNE9]; Jake Clapp, *East and West Coast Farmworkers Unite for Labor Rights,* ROCHESTER CITY NEWSPAPER (Mar. 14, 2018), https://www.rochestercitynewspaper.com/rochester/east-west-coast-farmworkers-unite-for-labor-rights/Content?oid=5766159 [https://perma.cc/ZY2P-7CWD] (referring to Alianza Agricola's work on behalf of farmworkers).

45. *See, e.g.*, Carter, *supra* note 31.

46. Randolph, *supra* note 44; Clara McMichael, *Farmworkers Struggle to Unionize in New York. Crispin Hernandez May Change That*, DOCUMENTED (August 17, 2018, 10:16 AM), https://documentedny.com/2018/08/17/farmworkers-struggle-to-unionize-in-new-york-crispin-hernandez-may-change-that/ [https://perma.cc/FUC8-Z6M5]; Carter, *supra* note 31; Chris Bolt*, Dairy Day at the State Fair, Some Sweet Cream, Some Sour Milk*, WAER 88.3 (Aug. 26, 2013), https://www.waer.org/post/dairy-day-state-fair-some-sweet-cream-some-sour-milk [https://perma.cc/ZU5S-DJBF].

47. Margaret Gray & Olivia Heffernan*, supra* note 11; *Lawsuit Challenges Shameful Exclusion of Farmworkers from Right to Organize*, N.Y. C.L. UNION (May 10, 2016), https://www.nyclu.org/en/press-releases/lawsuit-challenges-shameful-exclusion-farmworkers-right-organize [https://perma.cc/DW8L-98YR].

Worker Justice Center of New York sued New York State and Governor Cuomo. Represented by the New York Civil Liberties Union, the plaintiffs claimed, however, that New York's exclusion was unconstitutional under the New York Constitution.[48] Enacted a year after SERA, New York's Constitution includes broad protections of freedom of association for New York's workers. Article I, §17, states that "[e]mployees shall have the right to organize and to bargain collectively through representatives of their own choosing." New York's Constitution did not define "employees" and did not reference SERA, or its exclusion for agricultural laborers.

The New York trial court originally concluded that New York's Constitution, written only a year after SERA, impliedly intended to incorporate SERA's exclusion of farmworkers from organizing protections.[49] The New York appellate division court disagreed with the trial court and overturned its decision. It relied on the New York Constitution's broad language to conclude that its protections extend to farm laborers' associational activity.[50] The plain language of the state constitution did not exclude farmworkers. As a result, the appellate court deemed SERA's exclusion unconstitutional under New York's Constitution. Alt-labor's litigation efforts, galvanized initially by grassroots organizing, expanded New York legal protections of worker organizing. They resulted in doctrinal innovation—a case law win.

Soon after the appellate court decision, New York took legislative action and reaffirmed the principle that agricultural workers should not be excluded from organizing protections. The new law was the culmination of a two decades long struggle of farmworker advocates to push for farmworker rights legislation. As of January 1, 2020, SERA no longer has an exclusion for agricultural laborers. New York law now includes agricultural workers, including dairy workers, in its protections for employee collective action.[51] This new law, the Farmworker Fair Labor Practices Act, provides protections for farmworkers, such as collective bargaining protections, a day of rest, and overtime premiums, among others. The Worker

48. Hernandez v. New York, 173 A.D.3d 105, 108 (N.Y. App. Div. 2019).

49. The New York Farm Bureau stepped in to defend SERA's exclusion after both Governor Cuomo and Attorney General Schneiderman declined to defend the exclusion, stating that they felt that SERA's exclusion conflicted with New York's constitution. Hernandez v. State of New York, NY3d (2018), Decision No. 2143-16.

50. *Hernandez*, 173 A.D.3d at 112.

51. Farm Laborers Fair Labor Practices Act, NY S. 6578 (2019), https://legislation.nysenate.gov/pdf/bills/2019/S6578 [https://perma.cc/2CEJ-49NS]; Diego Mendoza-Moyers, *Hearings Scheduled for Debate on Farmworkers Fair Labor Practices Act,* TIMES UNION (March 30, 2019, 3:12 PM) https://www.timesunion.com/news/article/Hearings-scheduled-for-debate-on-Farmworkers-Fair-13728804.php [https://perma.cc/8AAM-S3QW].

Center of Central New York, the Worker Justice Center of New York, and their coalition of allies not only sparked legal innovations, they also bolstered efforts by legislators to include agricultural workers in legislative protections for workers. For these reasons, alt-labor's litigation innovations should be seen as key aspects of the emerging alt-labor law.

B. Challenging Exclusions from Housing Protections

Dairy alt-labor efforts in New York have also laid the foundation for a successful legal challenge to dairy worker exclusions from housing protections. They highlighted the problematic exclusion of dairy workers from the lone federal statute intended to protect workers in the agricultural sector.[52] This statute, the federal Migrant and Seasonal Agricultural Worker Protection Act (AWPA) of 1983, provides a variety of protections to temporary or seasonal migrant workers related to their housing conditions, wages, work-related transportation, and the "working arrangement" they are promised when recruited for the job.[53]

Dairy workers are often assumed not to be "migrant" agricultural workers under the AWPA because dairying is a year-long enterprise and thus dairy workers are not seen as engaged in work of a "seasonal or other temporary nature."[54] The few courts who have considered whether the AWPA excludes dairy workers are divided on the issue,[55] but employers widely assume their year-long workers are not AWPA migrants. While we focus here on the federal exclusion, these rationales also may serve to argue

52. *See* Teresa Hendricks-Pitsch, *Slighting the Hands that Feed Us: How Labor Laws Leave Farmworkers in Left Field*, 95 MICH. BAR J. 26, 29 (2016) (assuming that AWPA does not apply to dairy workers and arguing that it "ideally" should).

53. *See generally* 29 U.S.C. §§ 1801-1872 (2012); *see also* Kati L. Griffith, *Globalizing U.S. Employment Statutes Through Foreign Law Influence: Mexico's Foreign Employer Provision and Recruited Mexican Workers,* 29 COMP. LAB. L. & POL'Y J. 383, 393 (2008).

54. The AWPA defines a "migrant agricultural worker" as "an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence." 29 U.S.C. § 1802(8)(A) (2012).

55. Lopez v. Lassen Dairy, Inc., No. CV-F-08-121 LJO GSA, 2010 U.S. Dist. LEXIS 80308, at *2 (E.D. Cal. Aug. 10, 2010) ("Because the undisputed facts establish that plaintiffs' employment at Meritage Dairy was neither 'seasonal' nor 'temporary in nature,' this Court GRANTS defendants' summary adjudication motion as to plaintiffs' AWPA cause of action."); Hernandez v. Tadala's Nursery, Inc., No. 12-61062-CIV-SELTZER, 2013 U.S. Dist. LEXIS 191227, at *14 (S.D. Fla. Oct. 21, 2013) (citing *Lopez* favorably and stating that it "involved dairy with year-round operation, with no slack season, with milk production relatively constant throughout the year, and with employment that was permanent and continuous, not limited to a discrete time frame or dependent on the duration of a job task"); Benitez v. Wilbur, No. CV F 08-1122 LJO GSA, 2009 U.S. Dist. LEXIS 15018, at *10 (E.D. Cal. Feb. 26, 2009) (dismissing motion to dismiss and allowing dairy worker plaintiffs AWPA claim to move forward); Alvarado v. Nederend, No. 1:08-CV-01099-OWW-SMS, 2009 U.S. Dist. LEXIS 18007, at *13 (E.D. Cal. Feb. 26, 2009) (same).

that New York's dairy workers are "migrant workers" protected by New York's new permit and inspection requirements for labor camp housing.[56]

Dairy workers and advocates laid the foundation for strong legal and policy arguments that dairy workers are indeed "migrants" who live and work on employer property and require governmental oversight of such things as their housing conditions. They did so with a participatory action research project that culminated in *MILKED: Immigrant Dairy Workers in New York State*, a report released in June 2017.[57] *MILKED* paved the way for arguing that dairy workers are "migrants" in two ways. First, it made a link between deplorable housing conditions and exclusions from housing protections. Second, it challenged the assumptions undergirding the interpretation of dairy workers as non-migrants. After describing how alt-labor generated these arguments, we go a step further and consider the viability of legal rationales for challenging AWPA's exclusion of dairy workers with regards to housing protections.

1. Alt-Labor Report Challenges Dairy Exclusion from Housing Protections

New York dairy organizers, academics and workers collaborated in devising a two-pronged participant action research project. The first prong, a worker survey, exposed the housing conditions of most dairy workers, along with other problems workers face. In doing so, it linked housing injustices to exclusions from housing protections. Previous academic studies had documented the dilapidated and unhealthy housing conditions that dairy workers endure in other states.[58] The only prior research on New York's dairy workers, however, had relied on surveys of employers, not workers. Even though the dispersion of workers across many far-flung dairy farms made collecting a random sample of dairy workers unfeasible, this survey of workers would be the first systematic effort to document the

56. *See Farm Laborers Fair Labor Practices Act*, N.Y. DEP'T LAB. (last visited Jan. 31, 2020), https://www.labor.ny.gov/immigrants/farm-laborer-fair-labor-practices-act.shtm [https://perma.cc/C25W-YKKG] ("Employers are required to contact the NYS Department of Health (or local County Health Department) and apply for a permit to operate a farm or processing labor camp which will be occupied by one or more *migrant* workers.") (emphasis added).

57. Carly Fox, Rebecca Fuentes, Fabiola Ortiz Valdez, Gretchen Purser & Kathleen Sexsmith, *MILKED: Immigrant Dairy Farmworkers in New York State*, WORKERS' CTR. N.Y. & WORKER JUSTICE CTR. N.Y. (2017), http://files.iwj2017.gethifi.com/resources/milked-immigrant-dairy-farmworkers-in-new-york-state/milked_053017.pdf.

58. *See* JULIE C. KELLER, MILKING IN THE SHADOWS: MIGRANTS AND MOBILITY IN AMERICA'S DAIRYLAND 83-84, 86-88, 162 (2019) (housing conditions in Wisconsin's dairy industry); TERESA M. MARES, LIFE ON THE OTHER BORDER: FARMWORKERS AND FOOD JUSTICE IN VERMONT 30-31, 125 (2019) (housing conditions in Vermont's dairy industry).

working and living conditions of dairy workers in New York.[59] It would be a survey by and for workers. Dairy organizers and academics facilitated a process whereby dairy workers themselves conceived of and carried out a survey of their fellow workers. They obtained nearly ninety respondents.[60]

The survey of, and by, dairy workers reported in *MILKED*, revealed wide-spread substandard housing conditions for dairy workers, such as overcrowding and safety and health issues, along with rampant wage theft.[61] One worker quoted in the report describes his housing conditions as "very bad" and riddled with "cockroaches and bugs."[62] Fifty-eight percent of the eighty-eight upstate NY dairy workers surveyed for the report said their houses were infested with insects, forty-eight percent reported safety issues due to the absence of locks on their housing, and thirty-two percent described holes in the floors or walls of their housing.[63] In short, the report finds that housing standards often fall below basic standards of hygiene and safety.[64]

The worker survey also enabled *MILKED* authors to establish a likely link between poor housing conditions and legal exclusions from housing protections.[65] Even though *MILKED* authors describe AWPA's housing protections as "inadequate," they appreciate that these protections "at least assign state or federal governmental responsibility for inspecting farm-worker housing."[66] The worker survey revealed, however, that dairy workers do not feel they have recourse when their housing does not meet basic standards of hygiene and safety.[67] A full 97% of the *MILKED* report's respondents lived in employer-provided housing that was never inspected by governmental officials. While county housing inspectors would ostensibly have jurisdiction to inspect their housing, dairy worker respondents said they never saw any government official inspect their housing. *MILKED* elaborates, then, how the perceived AWPA exclusion for the dairy industry has likely enabled dairy farmers to expand their use of migrant labor without the burden of federal oversight on the housing they provide to workers

59. *See* MARES, *supra* note 58, at 62-67 (published results of a similar survey on dairy workers in Vermont which was also not based on a random sample).

60. Fox et al., *supra* note 57.

61. *Id.* at 11-12; *see also* MARGARET GRAY, LABOR AND THE LOCAVORE: THE MAKING OF A COMPREHENSIVE FOOD ETHIC (2013) (revealing the hidden labor injustices underlying New York's agricultural production).

62. Fox et al., *supra* note 57, at 2.

63. *Id.* at 54-55.

64. *Id.*

65. *Id.* at 54.

66. *Id.*

67. *Id.* at 54-55.

(unlike AWPA covered employers and employers of H-2A agricultural guest workers). As mentioned, New York's Farm Laborers Fair Labor Practices Act, does not alter the status quo.

Dairy advocates and workers directed collaborating academics in a second prong of research which lays the foundation for a challenge to the assumption that dairy workers are not "migrants" under the law. They directed academics to research the industry's labor force and structure with the hope that a sharper picture of the industry would enable them to make more informed strategic choices in organizing priorities and corporate campaigns. In addition to informing the movement's strategic priorities the report unsettles the assumption that "because year-round dairy farmworkers are not considered 'migrant and seasonal,' they are excluded from [AWPA] provisions for housing standards and inspection of migrant labor camps."[68] *MILKED* marshals evidence about the nature of the dairy workforce and global economic shifts that challenge the assumption of just who contemporary dairy workers are.

The *MILKED* report presents research which is critical for making the case that New York's dairy workers are precisely the kind of "migrants" working and living on employer property that AWPA intended to protect from exploitation. It presents evidence that there has been a shift from local to immigrant workers since Congress passed AWPA in 1983. In 1983, the assumption was that the vast majority of migrant laborers were brought in to pick seasonal vegetables and fruit, and thus had temporary stays in employer housing that needed federal oversight and protections. Dairy work, because of its year-long cycle, was assumed to largely rely on family workers and workers drawn from local communities.[69] This is no longer the case, in New York and in the dairy industry nationally.

The *MILKED* report demonstrates that, unlike in 1983, immigrants now play a more central role in the labor forces of year-long agricultural enterprises, like dairy.[70] For decades, it notes, dairy farms in New York State employed mostly local residents or family members of the farm's owners to conduct the bulk of dairy farm work. However, this changed in the early 1990s.[71] It reveals that immigrants, mostly from Mexico and Gua-

68. *Id.* at 54.

69. *See* Dias-Abey, *supra* note 14, at 170 (referring to the vegetable and fruit sectors and stating "that powerful economic transformations . . . are affecting agricultural employers and applying downward pressure on the working conditions of farmworkers").

70. Fox et al., *supra* note 57, at 20.

71. *See* Thomas R. Maloney, Libby Eiholzer, & Brooke Ryan, *Survey of Hispanic Dairy Workers in New York State 2016*, CORNELL UNIV. DEP'T APPLIED ECON. & MGMT. 4 (2016), http://publications.dyson.cornell.edu/outreach/extensionpdf/2016/Cornell-Dyson-eb1612.pdf [https://perma.cc/UYX4-P523]; Thomas R. Maloney & Nelson L. Bills, *Survey of Hispanic Dairy*

temala, constitute the "hidden population" behind New York's dairy industry today.[72] In a recent survey of New York's dairy farms by Cornell's School of Applied Economics and Management, immigrants far outnumbered citizens in the workforce.[73]

In short, the New York dairy industry's labor force today looks much more like the labor force in vegetable and fruit agricultural sectors, which AWPA intended to protect. Indeed, as of 2015, the majority of dairy workers in the U.S. were immigrants and nearly 80% of all dairy farms employed immigrant workers.[74] Immigrants are deemed so fundamental to the dairy industry nationally, that industry advocates warn of industry collapse, and a 90% increase in milk prices, if the industry were to lose immigrant workers.[75] Put simply, dairy has a largely migrant workforce due to global economic shifts.

The *MILKED* report also introduces the public and policymakers to some of the tectonic shifts in the dairy industry globally which further demand re-imagining dairy workers as "migrants." It positions the shift by New York's dairy farmers hiring practices in relationship to the industry's global restructuring. It casts the shift as related to an industry-wide transformation in the labor process; one which seeks to maximize milk production out of every cow with round the clock milking.[76] It casts New York's dairy farms as following the national trend of consolidating into fewer and larger farms.[77] Indeed, according to the United States General Accounting Office, by 2001, "there [were] fewer, but larger, players . . . at each level of the marketing chain, including dairy farms, cooperatives, wholesale milk processors, and retail grocery stores."[78] And, it positions New York's leading dairy producers as among those integrating and globalizing the indus-

Workers in New York State 2009, CORNELL UNIV. DEP'T APPLIED ECON. & MGMT. 26 (2011), http://publications.dyson.cornell.edu/research/researchpdf/rb/2011/Cornell-Dyson-rb1101.pdf [https://perma.cc/W4LA-VLZ2].

72. Fox et al., *supra* note 57, at 6-7.

73. Maloney, Eiholzer, & Ryan, *supra* note 71, at 4.

74. Flynn Adcock, David Anderson, & Parr Rosson, *The Economic Impacts of Immigrant Labor on U.S. Dairy Farms*, CTR. N. AM. STUD. 2 (2015), http://cnas.tamu.edu/Immigrant%20Labor%20Impacts%20on%20Dairy%20Final.pdf [https://perma.cc/L2BA-R6B2] (based on a survey distributed to 5000 farms in December 2014).

75. *Id.*

76. Fox et al., *supra* note 57, at 19-20.

77. *Id.* at 20-21.

78. *See* GEN. ACCOUNTING OFFICE, DAIRY INDUSTRY: INFORMATION ON MILK PRICES AND CHANGING MARKET STRUCTURE 96 (2001); Darcey Rakestraw, *Rising Concentration in Milk Processing, Dairy Industry Undermine New York's Rural Economies*, FOOD & WATER WATCH (Nov. 2, 2012), https://www.foodandwaterwatch.org/news/rising-concentration-milk-processing-dairy-industry-undermines-new-yorks-rural-economies [https://perma.cc/HB8V-EGA9].

try.[79] In doing so, it builds the case for the dairy industry as one which has completely transformed its labor practices in line with a global transformation of the industry. It positions New York's dairy industry as following the national trend of dairy turning to immigrant workers as a strategy to manage the myriad of pressures arising from new competitive global market conditions for the industry.[80]

In sum, this alt-labor report, along with its advocacy across the state, brought attention to a potential link between exclusions of dairy workers from housing protections and their deplorable housing conditions. It also raises questions about the assumptions informing the exclusions of dairy workers as non-migrants by calling attention to the broader transformations shaping New York's dairy industry. This is the case with respect to housing protections, as well as AWPA's safety rules, wage requirements, and other protections. Given other priorities of the movement, it is unclear when and if it will pursue a litigation strategy that argues for dairy worker inclusion as "migrant workers." However, this New York-based alt-labor initiative may very well lay the groundwork for future legal challenges to AWPA as well as state characterizations of dairy workers as non-migrants. In order to explore the plausibility of this litigation catalyst we examine whether AWPA's legislative history and case law would support inclusion of dairy workers. Next, we show why it does.

2. AWPA's Legislative History and Case Law Support Alt-labor's Challenge

AWPA's legislative history supports alt-labor's proposition that Congress intended to protect immigrant dairy workers who live on employer property as "migrants," even if they participate in a year-round agricultural enterprise. Our review of the report,[81] debates,[82] and hearings[83] in the

79. *Id.* at 20-22.

80. KELLER, *supra* note 58, at 16-19 (detailing "the labor shift" in Wisconsin's dairy industry); MARES, *supra* note 58, at 13-19 (describing a similar shift in Vermont's dairy industry); GRAY, *supra* note 61, at 80 (describing an earlier shift from black to Latino workers in New York agriculture more broadly).

81. H.R. REP. NO. 97-885 (1982).

82. 128 CONG. REC. H7899 (daily ed. Sept. 29, 1982); 128 CONG. REC. S15561 (daily ed. Dec. 19, 1982); 128 CONG. REC. H10456 (daily ed. Dec. 20, 1982).

83. *Oversight Hearings on the Farm Labor Contractor Registration Act: Hearings Before the Subcomm. on Agric. Labor of the Comm. on Educ. and Labor H.R.*, 94th Cong. (1975) [hereinafter *FLCRA Oversight Hearings*]; *Farm Labor Contractor Registration Act Amendments of 1976: Hearings on H.R. 14254 Before the Subcomm. on Agric. Labor of the Comm. on Educ. and Labor H.R.*, 94th Cong. (1976) [hereinafter *FLCRA 1976 Amendments Hearings*]; *Farm Labor Contractor Registration Act: Hearings on H.R. 8232, H.R. 8233, H.R. 8234, H.R. 8249, H.R. 8894, H.R. 10053, H.R. 10631, H.R. 10810, and H.R. 10922 Before the Subcomm. on Econ. Opportunity of the Comm. on Educ. and Labor H.R.*, 95th Cong. (1978) [hereinafter *FLCRA February 1978 Hearings*]; *Farm Labor Contractor*

months leading up to AWPA's passage in 1983 support this view. Congress expressed concern about "squalid housing" conditions in employer-provided housing[84] and expressed an intent for the Act to protect outsiders who have a more permanent place of residence abroad rather than local workforces.

In other words, dairy workers who live in "squalid housing," and are living away from their permanent places of residence, are precisely the types of workers legislators expressed concern about. During debates on the legislation, Representative Miller of California, for example, talked about how "exploitation, poor housing, and abuse all too often go hand in hand" in agriculture and that the bill would try to "insure a better quality of life."[85] Representatives expressed concern about "housing safety" in part because workers are not living in their permanent places of residence and instead are housed on the property of their employers.[86]

The legislative history communicates that the goal of AWPA's definition of migrant was to exclude local workers from AWPA's reach. Oftentimes legislators used high school students working on farms as the quintessential example of a group of workers who were not the "migrants" that Congress intended to protect with the AWPA.[87] High school student workers are not "migrants," legislators reasoned, because "they live in the area where they are working" and "they go home to their permanent residence every night and in no way can the salary from this job be considered as their primary means of support."[88]

Wives who commonly do side jobs for farms were also often invoked during the hearings as the quintessential local, rather than migratory, worker. An industry association shared an anecdote of "a lady who drives to a packing shed" from her home "after she has fed her family." This was a

Registration Act: Hearing Before the Subcomm. on Econ. Opportunity of the Comm. on Educ. and Labor H.R., 95th Cong. (1978) [hereinafter *FLCRA October 1978 Hearings*]; *Hearing on H.R. 7102 Before the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor H.R.*, 97th Cong. (1982).

84. *See, e.g.,* 128 CONG. REC. 24,091 (1982) ("Newspapers and the news magazines still periodically report on continuing exploitation of migrant workers, on squalid housing, and on unscrupulous crew bosses.").

85. 128 CONG. REC. 23,499 (1982).

86. 128 CONG. REC. 26,009 (1982) (statement of Rep. Erlenborn); *see also FLCRA Oversight Hearings supra*, note 83, at 327 (statement of Leon Gordon) ("It was the migrant worker which Congress sought to protect. It was the migrant worker who was induced to travel to places of employment on the basis of false information or false promises.").

87. *FLCRA February 1978 Hearings*, *supra* note 83, at 36 (statement of Rep. Smith) ("several thousand high school students are hired for a portion of the summer to go out in the fields to detassel seed corn, think out test plots or rouge sorghum. These people can in no way be considered 'migrant workers.'").

88. *Id.*

good example of someone who is not a migrant worker subject to the protections of the AWPA. The employer association asserted that considering "local, seasonal agricultural workers" to be "migrants" would be "stretching the intent of the Act."[89]

In other words, the legislative history shows concern that the definition of "migrants" protected by the AWPA should reach "workers who actually are subjected to abuses" that the AWPA "is designed to correct" rather than local workers who have more bargaining power.[90] As a representative from a growers' association commented at a hearing on the legislation, when you live on employer property far from home, "you really do not have the freedom to negotiate, to work or not to work, that you would have living at your own home."[91]

Existing AWPA case law is not extensive but it does support this interpretation as well. While courts are not uniform on the issue, some courts have allowed dairy worker cases to move forward because a slower "slack season" is alleged.[92] Other courts in the non-dairy context have called for expansive coverage of some year round industries because of high turnover rates, or because it would serve the broader humanitarian goals of the AWPA.[93] In the lone appeals court ruling on the issue, the Eleventh Circuit concluded that fern workers were "migrants" who were engaged in work "of a seasonal or other temporary nature," even though "ferns are harvested throughout the year," and even though the workers often worked "year-round."[94] The court drew from legislative history, administrative interpretation, and precedent to conclude that the word "migrant" is a legal "term of

89. *FLCRA Oversight Hearings*, *supra* note 83, at 82 (letter to William D. Ford, Chairman, Subcomm. on Agric. Labor); *id.* at 109 (statement of John Kautz, a grower in San Joaquin County) ("my neighbors' sons or daughters, or the women who are residents of San Joaquin County who might work on my tomato harvesters during the season, would qualify as 'migrant.' I feel sure that you would agree with me this indeed is a very broad interpretation of the law . . . .").

90. *FLCRA 1976 Amendments Hearings*, *supra* note 83, at 72 (1976) (statement of Roderick K. Shaw, Jr., Counsel, Citrus Industrial Council of Lakeland, Fla.); *see also FLCRA February 1978 Hearings*, *supra* note 83, at 261 (letter from R. J. Peterson, Lobbyist) ("we feel there is a clear difference between local and migratory seasonal workers, mainly because the migrant does not return home after the day's work has been completed.").

91. *FLCRA Oversight Hearings*, *supra* note 83, at 78 (statement of Scott Toothaker, attorney representing Texas Citrus & Vegetable Growers and Shippers) (differentiating between Mexican workers who cross back into Mexico as non-migrants and Mexicans who travel further north of the border as "migrants" and stating that the former group "[i]s not a captive, but when you have been transported to a housing facility several thousand miles away, you really don't have the freedom to negotiate, to work or not to work, that you have when you are living in your own home.").

92. *See* Alvarado v. Nederend, No. 1:08-CV-01099-OWW-SMS, 2009 U.S. Dist. LEXIS 18007, at *10-11 (E.D. Cal. Feb. 26, 2009) (denying a motion to dismiss because plaintiffs alleged "that milk production 'slacks during summer months.'").

93. Castillo v. Case Farms of Ohio, Inc., 96 F. Supp. 2d 578, 614 (W. D. Tex. 1999).

94. Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d 1500, 1505 (11th Cir. 1993).

art" and protects migrants who "are vulnerable to exploitation . . . not just when they migrate from job to job."[95]

It is unclear whether the seeds for an AWPA legal challenge will ultimately turn into doctrinal innovation. Nonetheless, as we have outlined above, they have set the stage for a challenge to AWPA's perceived exclusion of dairy workers from its reach. They have catalyzed questions about the legitimacy of assumed exclusions from AWPA.

IV. LITIGATION AND THE FUTURE OF ALT-LABOR LAW

While litigation is just one tool in alt-labor's evolving toolkit, it plays an important role in the development of an "alt-labor law" that is more inclusive of historically marginalized worker populations. We have chronicled how alt-labor inspired litigation has broken down historic exclusions from New York's protections of worker organizing efforts. We have shown how, even though there is not yet a litigation win, alt-labor has set the stage for a robust challenge to assumed exclusions of dairy workers from housing protections for other agricultural workers. As scholars continue to define the contours of alt-labor law we should continue to delve into alt-labor's role as a litigation catalyst.

We focus mainly here on upstate New York dairy workers' efforts to flesh out our alt-labor as a litigation catalyst construct, but there are other examples as well. In the alt-labor context, litigation wins on behalf of exotic dancers provide another example of alt-labor's role as a litigation catalyst.[96] In the past few years, groups of exotic dancers have been turning to "old-school union tactics" to push for fair wages and fair treatment at work.[97] Their organizing, and the broader litigation efforts surrounding it, have exposed independent contractor misclassification in the exotic dancer industry and have challenged the status quo.[98] Even though some exotic

95. *Id.* at 1507.

96. Valeriya Safronova, *Strippers are Doing It for Themselves*, N.Y. TIMES (July 24, 2019), https://www.nytimes.com/2019/07/24/style/strip-clubs.html [https://perma.cc/S6SM-TCMF]; Margot Roosevelt, *Are You an Employee or a Contractor? Carpenters, Strippers and Dog Walkers Now Face That Question*, L.A. TIMES (Feb 23, 2019, 5:00 AM), https://www.latimes.com/business/la-fi-dynamex-contractors-20190223-story.html [https://perma.cc/ZU5A-3XPY].

97. Sascha Cohen, *Strippers Are Turning to Old-School Union Tactics to Fight for Fair Wages*, HUFFINGTON POST (June 14, 2019), https://www.huffpost.com/entry/strippers-union-fair-wages_n_5cf97c7ae4b06af8b505a2f2 [https://perma.cc/5F2A-YV63].

98. The number of lawsuits is skyrocketing. Bloomberg law reports that exotic dancers have filed over 400 wage-and-hour lawsuits between 2005 and September 2019. Perhaps even more striking, the first three quarters of 2019 saw an average of one new exotic dancer lawsuit every four days. Patricio Chile, *Exotic Dancers Push for Employee Status*, BNA DAILY LAB. REP. (Oct 21, 2019, 5:55 AM), https://www.bloomberglaw.com/product/blaw/document/XC45QF8K000000 ("[A] Bloomberg Law

dancers call for maintenance of their status as "independent contractors,"[99] many dancers have filed Fair Labor Standards Act (FLSA) cases against exotic dancing clubs that call for their classification as "employees."[100] The latter group's efforts have led to developments in wage-and-hour laws that enhance workplace protections for a group of workers that often receives less than minimum wage for the hours they labor.[101]

These legal challenges have led to litigation wins, a near uniform court response to the question. Case law overwhelmingly affirms that the FLSA's minimum wage and overtime protections extend to most exotic dancers as "employees" of the clubs where they dance.[102] The three courts of appeals that considered the question under the FLSA agreed that dancers are employees.[103] While some of these FLSA cases are brought by one plaintiff, many of these wage-and-hour claims turn into larger collective actions against clubs. They are not all the direct result of alt-labor organizing, but they are certainly part of the picture of exotic dancer organizing efforts nationally. Some cases are forced into arbitration, others settle, but they have undoubtedly provided exotic dancers with "millions of dollars in damages and lost wages" from strip clubs.[104] In sum, alt-labor's organizing efforts, and related litigation, have challenged narrow readings of who is an "employee," and broad interpretations of who is an "independent contractor" under existing law.

analysis found 406 lawsuits filed since 2005 by dancers alleging the clubs misclassified them as contractors.").

99. *See, e.g.*, Stormy Daniels, *Stormy Daniels: Strippers Need to be Treated as Freelancers, Not Employees*, L.A. TIMES (Feb 05, 2019, 1:55 PM), https://www.latimes.com/opinion/op-ed/la-oe-stormy-daniels-strippers-dynamex-california-20190205-story.html [https://perma.cc/5ARG-AQ8E].

100. Larry Buhl, *Strippers Clash Over Employment Status in Dueling L.A. Protests*, CAL. REP. (Apr. 3, 2019) https://www.kqed.org/news/11737567/strippers-clash-over-employment-status-in-dueling [https://perma.cc/6XPT-PC78].

101. Erin Mulvaney & Andrew Wallender, *Strippers Winning Employee Status Challenges Gig Economy's Norms*, BNA DAILY LAB. REP. (Oct. 21, 2019, 5:04 AM), https://news.bloomberglaw.com/daily-labor-report/strippers-winning-employee-status-challenges-gig-economys-norms [https://perma.cc/LJ9Y-QL8V].

102. *See, e.g.*, Mason v. Fantasy, LLC, No. 13-cv-02020-RM-KLM, 2015 U.S. Dist. LEXIS 97640, at *34 (D. Colo. 2015) (summary judgment granted on behalf of plaintiff exotic dancers); Whitworth v. French Quarter Partners, LLC, No. 6:13-CV-6003, 2014 U.S. Dist. LEXIS 190419, at *20 (W.D. Ark. 2014) (successful trial outcome for plaintiff exotic dancers).

103. Verma v. 3001 Castor, Inc., 937 F.3d 221, 224 (3d Cir. 2019); McFeeley v. Jackson St. Entm't, LLC, 825 F.3d 235, 239 (4th Cir. 2016); Reich v. Circle C. Invs., 998 F.2d 324, 326 (5th Cir. 1993).

104. Samuel Braslow, *L.A.'s Exotic Dancers Are Launching a Labor Movement*, L.A. MAG. (Mar. 4, 2019) https://www.lamag.com/citythinkblog/soldiers-of-pole-stripper-union/ [https://perma.cc/JB4B-B268]; *Judge orders millions in back wages to 28,000 exotic dancers*, CBS NEWS (June 20, 2017, 2:53 PM), https://www.cbsnews.com/news/judge-orders-millions-in-back-wages-to-28000-exotic-dancers/ [https://perma.cc/R6ZH-Q62D] (referring to a $6.5 million dollar settlement in an exotic dancer wage dispute).

Efforts among Northwestern college football players affirm our position that alt-labor's role as a litigation catalyst can be meaningful even when legal efforts do not immediately lead to case law wins. In 2013 and 2014 Northwestern grant-in-aid football players organized and contended that they are "employees" under that National Labor Relations Act (NLRA).[105] They viewed their work on behalf of the university as a performance of labor that merited collective action rights under the NLRA.[106] Among other things, they wanted to negotiate with the university over long-term health effects of their work as football players for the university.[107] The regional National Labor Relations Board (NLRB) was favorable to their claim, and viewed them as "employees" under the NLRA.[108] When the case reached the 5-member board in D.C., the NLRB sidestepped the issue entirely and dismissed the claim by voluntarily failing to exercise jurisdiction over the question.[109] These efforts, however, fed the broader conversation about how to value student labor, such as the labor of teaching assistants in universities. While their initial bid for inclusion was not successful,[110] they suggest the promise of a new kind of alt-labor law.[111] New groups of workers, in sectors not seen as union strongholds, are organizing and pushing to gain full rights and protections as employees under state and federal labor and employment laws.[112]

105. Anne Marie Lofaso, *Groomed for Exploitation! How Applying the Statutory Definition of Employee to Cover Division 1A College Football Players Disrupts the Student-Athlete Myth*, 119 W. VA. L. REV. 968, 977 (2017).

106. Ben Straus, *In a First, Northwestern Players Seek Unionization*, N.Y. TIMES (Jan. 29, 2014), https://www.nytimes.com/2014/01/29/sports/ncaafootball/northwestern-players-take-steps-to-form-a-union.html [https://perma.cc/96XC-2N37].

107. *See generally* Lofaso, *supra* note 105.

108. Northwestern Univ., 2014-15 NLRB Dec. (CCH) P15781, 2014 NLRB LEXIS 221, at *2 (Mar. 26, 2014) ("I find that players receiving scholarships from the Employer are 'employees' under Section 2(3) of the Act.").

109. Northwestern Univ., 362 N.L.R.B. 1350, 1352 (2015) ("[B]ecause of the nature of sports leagues . . . and the composition and structure of FBS football . . . it would not promote stability in labor relations to assert jurisdiction in this case.").

110. For a discussion about the legality of the NLRB's denial of jurisdiction, see Roberto L. Corrada, *College Athletes in Revenue-Generating Sports as Employees: A Look into the Alt-Labor Future*, 95 CHI.-KENT L. REV. (forthcoming May 2020).

111. *See* Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes' Rights Movement*, 38 CARDOZO L. REV. 1627, 1642 (2017).

112. *See* Leon Neyfakh, *Not Your Grandpa's Labor Union*, BOS. GLOBE (Apr. 6, 2014, 12:00 AM), https://www.bostonglobe.com/ideas/2014/04/05/how-labor-advocacy-changing/QKULX uazXGHMW7EBBe6IKJ/story.html [https://perma.cc/6YWG-6RN9] (referencing organizing among adjunct professor, video game programmers, college football players, and others).

CONCLUSION

In this Article, we highlight alt-labor as a litigation catalyst. It has served as a catalyst for reinterpreting, and for revitalizing, what many perceive to be outdated labor and employment laws. By organizing non-traditional populations of workers, it often exposes the questions, gaps, and failures of New Deal and civil rights era legal gains. It thereby reimagines the interpretation of these laws in light of new organizing strategies and new global economic realities, while staying true to the existing language and underlying policy goals of these laws. The Article fleshed out our approach with an in-depth analysis of the legal gaps that courageous dairy worker organizing has exposed in New York. The alt-labor as a litigation catalyst approach illustrates how alt-labor can work within existing law to advocate for legal interpretations that challenge unjust exclusions and accommodate the realities of workers in industries like dairy that have been subject to recent global economic shifts.