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## Politics at Work After Citizens United

Ruben J. Garcia

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# **POLITICS AT WORK AFTER CITIZENS UNITED**

*Ruben J. Garcia\**

*There are seismic changes going on in the political system. The United States Supreme Court has constitutionalized the concentration of political power in the “one percent” in several recent decisions, including Citizens United v. FEC. At the same time, unions are representing a shrinking share of the workforce, and their political power is also being diminished. In order for unions to recalibrate the balance of political power at all, they must collaborate with grassroots community groups, as they have done in several recent campaigns. There are, however, various legal structures that make coordination between unions and nonunion groups difficult, and make nonunion workers prone to retaliation from employers. Thus, new ways of looking at campaign finance must be developed that strengthen the voice of individual workers, and give nonunion workers the freedom to engage in politics. This Article examines recent campaigns to raise the minimum wage as case studies in politics at work post-Citizens United. There have been several successful campaigns to raise the minimum wage at the local level in cities such as Seattle, Los Angeles, and San Francisco. At the same time, the federal minimum wage has been stagnant. In this Article, I propose several ways that changes in the law can facilitate the political power of low-wage workers, and thus incrementally reduce the imbalance of political power between workers and economic elites.*

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\* Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. LL.M., University of Wisconsin Law School; J.D., UCLA School of Law; A.B., Stanford University. I thank Samantha Bilbao, Charles Lee, and Joseph Meissner for their research assistance. Thanks to Professor Nicholas Georgakopoulos for the use of the template.

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## I. INTRODUCTION

On April 15, 2015, fast-food workers throughout the world engaged in a day of action for higher minimum wages and the right to form unions without employer interference.<sup>1</sup> The “Fight for Fifteen” movement seeks a minimum wage of \$15 per hour from employers or through legislation.<sup>2</sup> Meanwhile, the federal minimum wage in the United States is \$7.25 per hour, and it has not been raised since 2009.<sup>3</sup> In real terms, the value of the current minimum wage in the United States is 7.8 percent less than the value of the minimum wage in 1968.<sup>4</sup> Workers might get higher than the federal minimum wage depending on where they live, but many studies allude to the fact that it is very difficult to survive on \$7.25 per hour.<sup>5</sup> The activism of fast-food and other low-wage workers has resulted in a raise in the minimum wage in several cities and states over the last several years.<sup>6</sup>

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1. Peter Baker, *In State of the Union Address, Obama Vows to Act Alone on the Economy*, N.Y. TIMES (Jan. 28, 2014), <http://www.nytimes.com/2014/01/29/us/politics/obama-state-of-the-union.html>; Bryce Covert, *Largest-Ever Strike Hits Fast Food Industry in 230 Cities*, THINKPROGRESS (Apr. 15, 2015, 10:59 AM), <http://thinkprogress.org/economy/2015/04/15/3647217/fast-food-strikes-2015/>; Victor Luckerson, *Fast Food Workers Plan April 15 Strike*, TIME (Mar. 31, 2015), <http://time.com/3765797/fast-food-workers-professors-home-care-strike/>; Dominic Rushe, *Over 100 Arrested Near McDonald's Corporate Headquarters in Protest over Low Pay*, THEGUARDIAN (May 21, 2014, 4:35 PM), <http://www.theguardian.com/business/2014/may/21/mcdonalds-closes-corporate-hq-chicago-protest>.

2. Nelson Lichtenstein, *Two Roads Forward for Labor: The AFL-CIO's New Agenda*, DISSENT, Winter 2014, at 54, 56.

3. 29 U.S.C. § 206 (2012); *Minimum Wage*, U.S. DEP'T LAB., <http://www.dol.gov/dol/topic/wages/minimumwage.htm>.

4. DAVID COOPER, ECON. POLICY INST., RAISING THE FEDERAL MINIMUM WAGE TO \$10.10 WOULD LIFT WAGES FOR MILLIONS AND PROVIDE A MODEST ECONOMIC BOOST 6 (2013), <http://s1.epi.org/files/2014/EPI-1010-minimum-wage.pdf>.

5. See, e.g., David Cooper, *The Minimum Wage Used to Be Enough to Keep Workers Out of Poverty*, ECON. POLICY INST. (Dec. 4, 2013), <http://www.epi.org/publication/minimum-wage-workers-poverty-anymore-raising/>; Drew Desilver, *5 Facts About the Minimum Wage*, PEW RES. CTR. (July 23, 2015), <http://www.pewresearch.org/fact-tank/2015/07/23/5-facts-about-the-minimum-wage/>; Andrew Hanson & Zackary Hawley, *The \$10.10 Minimum Wage Proposal: An Evaluation Across States*, Soc. Sci. Res. Network (May 1, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2431840](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2431840); Jordan Weissman, *McDonald's Can't Figure Out How Its Workers Survive on Minimum Wage*, THE ATLANTIC (July 16, 2013), <http://www.theatlantic.com/business/archive/2013/07/mcdonalds-cant-figure-out-how-its-workers-survive-on-minimum-wage/277845/>.

6. See, e.g., Emily Badger, *Cities Are Passing Higher Minimum Wages*, WASH. POST (June 10, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/06/10/cities-are-passing-higher-minimum-wages-and-leaving-the-suburbs-further-behind/> (citing increases to minimum wages in Seattle and Santa Fe).

The success of movements to raise the minimum wage at both the federal and state levels depends upon the political power of workers in an environment dominated by wealthy interests. The recent campaigns to increase the minimum wage provide examples of the abilities of workers to influence public policies for their own benefit.<sup>7</sup> At the federal level, a change to the minimum wage remains stalled in a morass of partisanship.<sup>8</sup> The U.S. Supreme Court's 2010 decision in *Citizens United v. FEC*<sup>9</sup> further tilted the balance toward the political power of corporations in federal elections and further minimized the voice of shareholders and employees in the workplace.<sup>10</sup> Compounding the inability of workers to match adequately the resources that employers and corporations have at their disposal, the doctrine of at-will employment in effect in forty-nine states allows employers to fire employees for their political beliefs and activities, in the absence of a statute.<sup>11</sup> The decline of organized labor has also affected the political power of low-wage unorganized workers.<sup>12</sup> As a group, then, workers are a diffuse political majority with a difficult time changing the law for better protection. At the same time, however, statutes in many states protect the right of employees to vote, or to run for office.<sup>13</sup> These protections will have to be made more uniform before workers can tilt the political playing field at all in their direction.

The future of these coalitions between unions and unorganized workers is also dependent on an intricate regulatory framework that makes political collaborations difficult between labor unions, which

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7. See RAISE THE MINIMUM WAGE, <http://www.raisetheminimumwage.com/pages/federal-minimum-wage>.

8. Annie Lowrey, *Raising Minimum Wage Would Ease Income Gap But Carries Political Risks*, N.Y. TIMES (Feb. 13, 2013), <http://www.nytimes.com/2013/02/13/us/politics/Obama-pushes-for-increase-in-federal-minimum-wage.html>.

9. 558 U.S. 310 (2010).

10. Nina Totenberg, *When Did Companies Become People? Excavating the Legal Evolution*, NPR (July 28, 2014, 4:57 AM) (citing Stephen Colbert in *The Colbert Report*), <http://www.npr.org/2014/07/28/335288388/when-did-companies-become-people-excavating-the-legal-evolution>.

11. Montana is the only state that has a statute requiring cause for termination. SAMUEL ESTREICHER & GILLIAN LESTER, EMPLOYMENT LAW (CONCEPTS AND INSIGHTS SERIES) 34–35 (2008); see Wrongful Discharge from Employment Act, MONT. CODE ANN. §§ 39-2-901–915 (2014).

12. See U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, UNION MEMBERS—2014, at Table 3 (2015) (finding that 6.6 percent of private-sector employees were represented by a union in 2014, down 0.1 percent from 2013).

13. See, e.g., Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 313–18 (2011).

are organized under section 501(c)(5) of the Internal Revenue Code, and unorganized workers, which would more likely be participating in groups organized under Internal Revenue Code section 501(c)(4).<sup>14</sup> There is a long-standing tension between grassroots, street-level politics, and a need to expend large sums in order to compete effectively on the political playing field away from corporate domination of the political sphere. In this Article, I posit that the many structures already in place—that require union transparency in labor law—make it difficult for unions to participate effectively in the political system, but they also obviate the need for greater scrutiny of union and worker political activities. In short, onerous disclosure requirements place an unequal burden on union and worker groups trying to advocate for increases in the minimum wage in the face of corporate interests arrayed against increases in wages.

The coordination between labor unions and nonunion worker groups has recently spurred controversy and calls for greater scrutiny by some groups.<sup>15</sup> While there are current obstacles to coordination between unions and other worker groups, the purported bar against coordination between candidates and outside groups is easily manipulated and the subject of satire.<sup>16</sup> Meanwhile, the power of individual natural persons continues to diminish, in part due to court decisions following *Citizens United*. In 2014, in *McCutcheon v. FEC*,<sup>17</sup> the United States Supreme Court struck down aggregate limits on contributions to candidates, further privileging concentrated wealth.<sup>18</sup> While *McCutcheon* and *Citizens United* continue the inequality in politics, they may have little effect on the actual political power of unions. Nonetheless, with 93.4 percent of the private-sector workforce not represented by a union,<sup>19</sup> the more pressing question is what strategies are needed to broaden the political participation of nonunion low-wage workers. In this Article,

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14. 26 U.S.C. §§ 501(c)(4)–(5) (2012).

15. Kris Maher, *Nonunion Worker Advocacy Groups Under Scrutiny*, WALL STREET J. (July 24, 2013, 6:26 PM), <http://www.wsj.com/articles/SB10001424127887323971204578626283846775530>.

16. See Totenberg, *supra* note 10.

17. 134 S. Ct. 1434 (2014).

18. *Id.*

19. Melanie Trotman, *U.S. News: Union Membership Stagnates Around 11%*, WALL STREET J., Jan. 24, 2015, at A3 (“Membership in the private sector fell to a rate of 6.6% in 2014, from 6.7% while public sector representation rose slightly to 35.7% from 35.3%.”).

I argue that the law protecting the ability of millions of workers to engage in political activities must be improved to provide any counterweight to the ever-increasing political power of wealthy interests.

This Article explains the barriers that prevent greater participation by low-wage and nonunion workers in politics, particularly for minimum-wage workers, unless they coordinate with labor unions. *Citizens United* only worsened the political power imbalances that existed. The Article then goes on to explain ways these workers might pool their resources by forming and supporting new organizations that exist across workplaces and on the Internet. This might be done in conjunction with various “alt-labor” organizations that have tried to fill the gaps left by traditional unions in the nonunion workforces. New legal structures can be developed to facilitate political participation by nonunion low-wage workers. Further, changes in the law governing worker collective action will be needed to help nonunion workers participate more fully in politics. Finally, the Article explains how protection for the right to participate politically might be expanded in a post-*Citizens United* world.

The questions of how *Citizens United* will affect the political power of labor unions will take years to fully appreciate. Even though the decision ostensibly provided unions the same free speech rights that corporations have, it is clear that *Citizens United* legally consolidated political power in wealthy corporations. But the extent that the decision will impact the already weakened political power of unorganized workers remains to be seen. Will the decision make it even harder for low- and middle-income workers to pass laws for their own benefit, such as increased minimum wage or antidiscrimination laws? In previous work, I have addressed the diminished political power wielded by workers as a diffuse majority.<sup>20</sup>

The following questions I addressed in previous work also pertain here: How do unorganized workers improve the laws that are supposed to protect them? Should workers focus more on local and state issues than on a nationwide movement to obtain better

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20. See RUBEN J. GARCIA, MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION (2012) (describing how workers are a diffuse political majority which has difficulty improving workplace laws for its own benefit).



protections, such as a higher federal minimum wage? Indeed, that is a strategy that unions have had to use for many years as national policy has been hamstrung by gridlock.

In this Article, I identify the current obstacles that low-wage workers face in exercising citizenship rights inside and outside of the workplace. The need for low-wage workers to spend most of their time working is the first thing that limits their political power—they lack the discretionary time and money to do very much “shoe leather” politics. Further, the law of the workplace in many states is inadequate to enable greater workplace participation. Existing statutes in many states generally only protect political activity that is related to running for office or voting, not giving money to candidates or working on political issue campaigns that are not related to pending initiatives. Further, as will be discussed below, recent changes to the law of politics make it difficult for unions to compete effectively against wealthy interests.

In Part II, I set the scene of growing inequality in the economic system and the political system. Scholars have pointed to ways in which unions can be more politically effective in a post-*Citizens United* world.<sup>21</sup> But for unions and politics to be truly “unbundled,” various changes are needed in the law of politics and unions.<sup>22</sup> Generally, unions can do state level grassroots work in coalition with nonunion, low- and middle-income workers, free from the legal challenges brought against unions by so-called “right-to-work” plaintiffs. In Part III, I explore the ways that nonunion workers participate politically, and some of the barriers to that activity. Part IV describes some ways that greater political participation can be incentivized and encouraged. Part V concludes by looking ahead to the new “alt-labor” groups—nonunion worker associations and worker centers—that might increase the political power of all workers.

In this Article, I argue that advocates must still use localized strategies that utilize political funds to effectively compete with organized corporations. These strategies are consistent with the

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21. See, e.g., Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1 (2011); Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617 (2011).

22. See Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 100 (2013).

resolutions passed at the 2013 AFL-CIO Convention, including a resolution on greater involvement with both union and nonunion community organizations, and greater focus in politics.<sup>23</sup> There are already examples of local organizing such as this throughout the United States.<sup>24</sup> The question will be whether these grassroots movements can parlay their successes at the local level into sustained change for the benefit of workers.

In order for these localized movements to gain more national traction, I argue that states should make it easier for individual workers to participate in politics through authorized deduction statutes, protections from retaliation, and through enhanced political participation statutes. Further, the Federal Election Commission through its rulemaking processes can promulgate regulations to protect workers from retaliation for political activities. Whether such reform proposals become a reality is of course dependent on the ability of mass movements to demand change, something that will admittedly be difficult to do given the existing imbalance of political power between economic elites and non-elites.

## II. THE CONTEXT: GROWING INEQUALITY IN WEALTH AND POLITICAL POWER

### A. *Politics at Work in a Post-Citizens United World*

The wealth gap is more pronounced than it has been since the 1920s.<sup>25</sup> Ever since the Great Recession of 2008, much attention focused on the difference between the 99 percent and the 1 percent. Although the “Occupy” movement of 2010 and 2011 was successful in bringing attention to disparities in wealth, the group was criticized for not sustaining a movement for political change.<sup>26</sup> The increased gap in financial resources has translated into a political disparity. In the 2010 midterm elections, according to a report by the Sunlight Foundation, just 27,000 (or just .009 percent of the 307 million

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23. See Kyle Albert, *Labor Union Political Strategy in an Era of Decline and Revitalization*, 84 SOC. INQUIRY 210, 216 (2014); Lichtenstein, *supra* note 2.

24. See Albert, *supra* note 23, at 216.

25. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 24 (Arthur Goldhammer trans., Harvard Univ. Press 2014).

26. Mattathias Schwartz, *Pre-Occupied*, THE NEW YORKER (Nov. 28, 2011), <http://www.newyorker.com/magazine/2011/11/28/pre-occupied>; see Rick Cohen, *Two Years Since Occupy Wall Street*, NONPROFIT QUARTERLY (Sept. 20, 2013), <https://nonprofitquarterly.org/2013/09/20/two-years-since-occupy-wall-street/>.

people in the United States) made a quarter of all individual political contributions.<sup>27</sup> This disparity means a concentration of political power in the 1 percent of the 1 percent.

The U.S. Department of Labor's Bureau of Labor Statistics (BLS) estimates that "[i]n 2012, 75.3 million workers in the United States age 16 and over were paid at hourly rates, making up 59 percent of all wage and salary workers."<sup>28</sup> Although only 1.6 million of these were paid at the minimum wage, another two million workers were paid *less* than \$7.25 an hour.<sup>29</sup> From there, it becomes difficult to draw lines, but many more workers make just above the federal minimum wage.<sup>30</sup> This data shows that a majority of workers are going to try to maximize hours working and earning money, rather than taking political action to increase the minimum wage.

The Congressional Budget Office estimates that more than 28 million of these 75.3 million hourly workers would get a raise if the minimum wage rose to \$10.10 an hour.<sup>31</sup> Despite the large number of workers who would benefit, however, there is unlikely to be a rise in the federal minimum wage without a major shift in the political stasis that grips Washington, D.C. There are many recent causes of the gridlock, but the roots of this current lopsidedness of the political system are attributable in part to the Supreme Court's 1976 decision in *Buckley v. Valeo*,<sup>32</sup> where the Court held that political contributions are protected by the First Amendment and can only be regulated for a compelling purpose.<sup>33</sup> In *Citizens United*, the Court overruled the limitations that were put into place on unlimited

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27. Peter Overby, *Report: Wealthy 'Elite Donors' Fueling U.S. Politics*, NPR (Dec. 14, 2011, 5:08 PM), <http://www.npr.org/2011/12/14/143730288/top-donors-make-up-one-quarter-of-campaign-donations>.

28. *Labor Force Statistics from the Current Population Survey*, BUREAU OF LAB. STAT. (Feb. 26, 2013), <http://www.bls.gov/cps/minwage2012.htm>.

29. *Id.*

30. See Drew Desilver, *5 Facts About the Minimum Wage*, PEW RES. CTR. (July 23, 2015), <http://www.pewresearch.org/fact-tank/2015/07/23/5-facts-about-the-minimum-wage/>.

31. NABEEL ALSALAM ET AL., CONG. BUDGET OFFICE, *THE EFFECTS OF A MINIMUM-WAGE INCREASE ON EMPLOYMENT AND FAMILY INCOME 2* (2014), [https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/44995-MinimumWage\\_OneColumn.pdf](https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/44995-MinimumWage_OneColumn.pdf); see WHITE HOUSE COUNCIL OF ECON. ADVISERS, *THE ECONOMIC CASE FOR RAISING THE MINIMUM WAGE 4* (2014), [https://www.whitehouse.gov/sites/default/files/docs/final\\_min\\_wage\\_slides\\_-\\_no\\_embargo.pdf](https://www.whitehouse.gov/sites/default/files/docs/final_min_wage_slides_-_no_embargo.pdf) (finding 28 million workers would benefit from an increase to \$10.10 per hour); *Characteristics of Minimum Wage Workers: 2012*, BUREAU OF LAB. STAT., <http://www.bls.gov/cps/minwage2012.htm> (last updated Feb. 26, 2013).

32. 424 U.S. 1 (1976).

33. *Id.* at 58–59.

corporate and union independent expenditures by its decision in *Austin v. Michigan Chamber of Commerce*.<sup>34</sup> As a result, corporations and unions can now make unlimited independent expenditures to political campaigns, as long as they do not coordinate those expenditures with candidates.<sup>35</sup>

Since *Citizens United*, the Court has continually expanded the political rights of the wealthy.<sup>36</sup> On April 2, 2014, in *McCutcheon*, the Court struck down the FEC's aggregate contribution regulations.<sup>37</sup> During oral arguments, several of the justices seemed poised to further weaken statutory safeguards against the increase of concentration of political power in the wealthy.<sup>38</sup> While the *McCutcheon* decision dealt only with the aggregation of contributions, many commentators believe that the doctrinal underpinnings of *McCutcheon* are another step toward complete deregulation of the campaign disclosure system.<sup>39</sup>

This is the legal landscape for wealthy contributors. Not only is the power of their contributions growing, but the ability to avoid disclosure is likely the next part of their legal agenda.<sup>40</sup> They use cases from the civil rights movement like *NAACP v. Alabama*,<sup>41</sup> which were originally about the First Amendment's protection against the intrusion of repressive governments in the South, rather than a way for wealthy donors to shield themselves from public scrutiny.<sup>42</sup> In that case, the state of Alabama sought the membership rolls of the NAACP to repress their civil rights activities.<sup>43</sup> The Court

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34. *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)).

35. *See id.*

36. *See, e.g., Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2829 (2011) (striking down Arizona's system for providing public financing to candidates).

37. *McCutcheon v. FEC*, 1134 S. Ct. 1434, 1462 (2014).

38. *See* Transcript of Oral Argument, *McCutcheon*, 1134 S. Ct. 1434 (No. 12-536); Michael D. Gilbert & Benjamin F. Aiken, *Corruption and Disclosure*, 14 ELECTION L.J. 148 (2015).

39. *See* Liz Kennedy, *Dollars and Sense*, DEMOS (Apr. 30, 2014), <http://www.demos.org/publication/dollars-and-sense-how-undisclosed-money-and-post-mccutcheon-campaign-finance-will-affect>.

40. Justices seemed to invite a challenge to disclosure laws at the oral argument in *McCutcheon*. *See* *McCutcheon v. Federal Election Commission*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/mccutcheon-v-federal-election-commission/> (last visited Aug. 17, 2015).

41. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

42. *Id.* at 462 (ruling that the state of Alabama's actions were "a substantial restraint upon the exercise by petitioner's members of their right to freedom of association").

43. *Id.* at 453.

held that the First Amendment to the U.S. Constitution protected the association's right to keep its members anonymous.<sup>44</sup> The decision is currently being used to protect wealthy donors from disclosure. This decision can be interpreted as a way to protect smaller donors from government and employer disclosure. Another way of looking at the holding is that it is about *membership* lists, and not *donor* lists. It seems unlikely, however, that today's courts would make that distinction if it would mean *less* privacy for wealthy donors. Further, as will be explained below, there might be some benefits for low- and middle-income workers to participating in these private entities. Thus, low-wage workers should be shielded from disclosure the same way that large donors are by these precedents.

On the other hand, unions are subject to a heavy web of federal statutory regulation, while seeing years of declining membership. The high-water mark for union density in the private-sector workplace was 35 percent in 1954.<sup>45</sup> That number has declined to 6.6 percent of the private sector.<sup>46</sup> In 1959, Congress passed the Labor-Management Reporting and Disclosure Act (LMRDA), which required unions to file detailed reports, known as LM-10s, with the Department of Labor.<sup>47</sup> These forms not only require unions to disclose their finances and staffing, but also how much they are contributing to political campaigns in both money and staff time. Although there is a value to transparency and disclosure, unions are perhaps overexposed when compared to corporations, who do not have a duty to report their political activities to their shareholders or the Securities and Exchange Commission.<sup>48</sup> This imbalance makes it more likely that the collaborations between nonunion workers and unions will be disclosed.

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44. *Id.* at 464–66.

45. GERALD MAYER, CONG. RESEARCH SERV., UNION MEMBERSHIP TRENDS IN THE UNITED STATES 23 (2004), [digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1176&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1176&context=key_workplace).

46. See U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, *supra* note 12, at 1; Trottman, *supra* note 19.

47. Labor Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.).

48. For an article exploring the constitutional ramifications of the differences between unions and corporations, see Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 860–61 (2012).

During the twentieth century, unions had been the primary means for low-wage workers to participate in the political process.<sup>49</sup> With the waning number of private-sector unions, the voice of low-wage workers will be diminished. Thus, low-wage nonunion workers need to find new ways to be politically active outside unions, and to be active without fear of retaliation, in order to improve the condition of their work.

*B. The Growing Wealth Divide and the Resulting Political Inequality*

Despite the ability of unions to mobilize resources and people, data shows that unions, and particularly low-wage workers without resources, are at a financial disadvantage in the political realm.<sup>50</sup> A recent study found that policies favoring economic elites are more likely to pass, while policies that favor poor and working people are more likely to be stunted.<sup>51</sup> The study suggests that policies favoring low-wage workers will face significant opposition from economic elites at the national level.<sup>52</sup> There is also debate about whether unions actually outspend corporations in political campaigns, with some arguing that the value of union hours spent on campaigns outweighs the amount of direct contributions to candidates.<sup>53</sup> But this metric fails to take into account the large amount of *indirect* expenditures from wealthy donors. Further, because of the ability of wealthy donors to make indirect contributions anonymously, it is

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49. Marion G. Crain & Ken Matheny, *Unionism, Law, and the Collective Struggle for Economic Justice*, in *WORKING AND LIVING IN THE SHADOW OF ECONOMIC FRAGILITY* 101, 104–07 (Marion G. Crain & Michael Sherraden eds., 2014); Michael Wasser & J. Ryan Lamare, *Unions as Conduits of Democratic Voice for Non-Elites: Worker Politicization from the Shop Floor to the Halls of Congress*, 14 *NEV. L.J.* 396, 398–401 (2014).

50. When the large number of indirect expenditures is taken into account, unions are outspent by business groups on average approximately fifteen to one. See *Business-Labor-Ideology Split in PAC & Individual Donations to Candidates, Parties, Super PACs and Outside Spending Groups*, [OPENSECRETS.ORG](http://www.opensecrets.org), <http://www.opensecrets.org/overview/blio.php> (last visited Aug. 22, 2015).

51. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups and Average Citizens*, *PERSP. ON POL.*, Sept. 2014, at 564, 576.

52. *Id.*

53. See Laura Clawson, *If You Count Bratwurst, Unions Really Do Spend a Lot on Politics*, *DAILY KOS* (July 10, 2012, 11:20 AM), <http://www.dailykos.com/story/2012/7/10/1108281-If-you-count-issues-advocacy-and-bratwurst-unions-spend-more-on-politics-than-previously-thought>; Tom McGinty & Brody Mullins, *Political Spending by Unions Far Exceeds Direct Donations*, *WALL STREET J.* (July 10, 2012, 9:49 AM), <http://www.wsj.com/articles/SB10001424052702304782404577488584031850026>.

difficult to compare union and corporate independent expenditures. Many observers think that *Citizens United* has skewed politics.<sup>54</sup>

The aftermath of *Citizens United* and *McCutcheon* presents a choice for the labor movement: to continue competing in the arms race of money at the national level, or to create new structures to localize politics and improve the lives of unionized and nonunion workers. In the 2012 election cycle, all unions contributed more than \$153 million to federal candidates, from congressional candidates to the presidential race.<sup>55</sup> Yet, at the same time, many local unions have waged successful campaigns for enhanced worker protection.<sup>56</sup>

In order to deal with the growing political divide, one scholar argues that unions should be “unbundled” from politics.<sup>57</sup> In a recent essay in the *Yale Law Journal*, Benjamin Sachs argued that unions should begin to divorce themselves from electoral politics.<sup>58</sup> While there are benefits to such an approach, a question remains whether the resulting organizations would not be as strong as traditional unions with their political operations. In fact, separating collective bargaining from political advocacy has been the goal of the national right-to-work movement for many years.<sup>59</sup> While there might be administrative benefits to separating unions and politics, these “unbundled” unions are not likely to have the same political power on a national scale as traditional unions.<sup>60</sup> Thus, there must be new modes of political participation that extend political power to

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54. See Editorial, *The Big Money Behind State Laws*, N.Y. TIMES, Feb. 13, 2012, at A22; Richard L. Hasen, *The Numbers Don't Lie: If You Aren't Sure Citizens United Gave Rise to the Super PACs, Just Follow the Money*, SLATE, [http://www.slate.com/articles/news\\_and\\_politics/politics/2012/03/the\\_supreme\\_court\\_s\\_citizens\\_united\\_decision\\_has\\_led\\_to\\_an\\_explosion\\_of\\_campaign\\_spending.html](http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending.html) (last updated Mar. 12, 2012). But see Kent Greenfield, *Let Us Now Praise Corporate Persons*, WASH. MONTHLY (Jan. 1, 2015), [http://www.washingtonmonthly.com/magazine/januaryfebruary\\_2015/features/let\\_us\\_now\\_praise\\_corporate\\_pe053466.php](http://www.washingtonmonthly.com/magazine/januaryfebruary_2015/features/let_us_now_praise_corporate_pe053466.php) (arguing that corporate personhood is not the cause of dysfunction in politics).

55. Lee Fang, *Chart: Koch Spends More Than Double Top Ten Unions Combined*, REPUBLIC REP. (Mar. 7, 2014, 12:16 PM), <http://www.republicreport.org/2014/unions-koch/>.

56. There have been examples of this in UNITE HERE locals in Las Vegas and New Haven, Connecticut. Paul Bass, *New Hope for New Haven, Connecticut*, THE NATION (Jan. 25, 2012), <http://www.thenation.com/article/165867/new-hope-for-new-haven-connecticut>; Jake Blumgart, *A Union-Remade City*, IN THESE TIMES (Sept. 18, 2013), [http://inthesetimes.com/article/15604/a\\_union\\_remade\\_city](http://inthesetimes.com/article/15604/a_union_remade_city).

57. See Sachs, *supra* note 22, at 148.

58. *Id.*

59. *Id.* at 183.

60. *Id.*

nonunion employees, particularly low-wage workers, in order for the greater political change to benefit unions and all workers.

There are, however, new Internal Revenue Service (IRS) regulations that might make it harder for these local organizations to function, and might unconstitutionally burden their speech and associational rights.<sup>61</sup> These regulations are largely intended to prevent coordination between the two parties. It quite likely will be harder for low-wage workers to participate politically. I will address these regulations later in this Article.

### *C. The Importance of Political Participation for Nonunion Workers*

There are several reasons why nonunion workers, particularly low-wage nonunion workers, should be engaged politically at work. First, political activity with fellow workers might lead to greater workplace organizing, thus helping to prevent further erosion of unionization in the private sector. Second, as Cynthia Estlund has argued, the workplace is a source of civic participation and social bonds with other individuals.<sup>62</sup> Finally, greater political participation may enhance the social capital of workers throughout the economy, thus leading to greater mobility of many workers. In short, greater political participation by nonunion workers might have many of the effects that greater participation by unions had in the twentieth century, in an era when unions are not as prevalent as they once were. The ideal, of course, would still be to have unions whenever possible, for workers to organize both at the workplace and in the civic arena. Further, there are several initiatives that low-wage workers might want to participate in to improve their working conditions, such as increases to the minimum wage.

There are, however, collective action problems inherent in low-wage workers' ability to participate in politics. Low-wage workers may be united in their wishes for higher wages, but there may be other legislative goals that are more difficult to coalesce around—such as expanding the authority of health and safety agencies to inspect workplaces, or to narrow the exemptions to

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61. See Frances R. Hill, *Citizens United and Social Welfare Organizations: The Tangled Relationships Among Guidance, Compliance, and Enforcement*, 43 STETSON L. REV. 539 (2014).

62. CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 37 (2003).



overtime pay. These are more complicated issues than a raise in the minimum wage, and thus there will be difficulties coalescing around more specific legislative goals. The different circumstances of low-wage workers mean that they might have widely varying abilities to participate in the political process. For this reason, there needs to be greater coordination between nonunion workers and unions, both public and private.

*D. Harris v. Quinn: The Supreme Court Politically Marginalizes State Home Care Workers.*

The ability of public-sector unions to engage in political collaborations with nonunion workers has been made more difficult in several recent Supreme Court cases, most recently in *Harris v. Quinn*.<sup>63</sup> On June 30, 2014, the U.S. Supreme Court further tilted the balance away from workers trying to improve their working conditions through unionization and the political process. In *Harris*, the Court, in a five-four ruling, struck down Illinois legislation that gave home-care workers in Illinois the right to bargain collectively as employees of the state.<sup>64</sup> The Court held that the legislated requirement that all those represented by the union pay any dues to that union was a violation of the First Amendment as long as the employees were “partial public employees.”<sup>65</sup> The ramifications of the decision affect a small percentage of the total number of public employees, but they are largely low-wage women of color.<sup>66</sup>

This decision shows that low-wage workers will have a harder time organizing politically through unions and must find new processes in which to participate. When the employer is the state, the need for political action is even more pronounced.<sup>67</sup> However, the decision essentially makes the entire country “right-to-work” for home care workers. And in many “right-to-work” states, workers and unions are politically neutralized.

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63. 134 S. Ct. 2618 (2014).

64. *Id.* at 2620, 2644.

65. *Id.* at 2622.

66. See Ruben J. Garcia, *Harris v. Quinn: The Supreme Court Further Marginalizes Public Employees*, HAMILTON AND GRIFFIN ON RTS. BLOG (July 1, 2014), <http://Hamilton-griffin.com/harris-v-quinn-the-supreme-court-further-marginalizes-public-employees/> (describing the impact of the decision on women and people of color who are low-wage workers).

67. See Ruben J. Garcia, *Citizenship at Work: How the Supreme Court Politically Marginalized Public Employees*, 14 NEV. L.J. 377, 379–86 (2014).

*E. A Primer on Union Campaign Finance*

With the political abilities of public-sector unions particularly diminished in newly converted right-to-work states such as Wisconsin and Michigan, it will be more difficult for unions to mount campaigns that benefit the entire workforce, both union and nonunion.<sup>68</sup> Unions are often criticized for using members' dues to "support Democrats."<sup>69</sup> In fact, as the *Citizens United* decision itself reaffirms, unions are prohibited by federal law from using their general funds to support or oppose candidates.<sup>70</sup> Unions must create a separate segregated fund (SSF) to financially support any candidates for state or federal offices, and union members must voluntarily choose to contribute to the SSF.<sup>71</sup> Unions can engage in get-out-the-vote activities to encourage political participation without advocating for one candidate or another.<sup>72</sup> In some states, unions have finely honed their turnout operations to be able to affect elections in certain states.<sup>73</sup> In both the private and public sectors, employees have the right to have the portion of their union dues that goes to these nonrepresentational activities, per the Supreme Court's rulings in *Hudson*<sup>74</sup> and *Beck*.<sup>75</sup>

The National Right to Work Foundation has continually litigated unions' ability to use member dues for get-out-the-vote campaigns not related to the support or opposition of candidates for office.<sup>76</sup> In

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68. See Monica Davey, *Unions Suffer Latest Defeat in Midwest with Signing of Wisconsin Measure*, N.Y. TIMES (Mar. 9, 2015), <http://www.nytimes.com/2015/03/10/us/gov-scott-walker-of-wisconsin-signs-right-to-work-bill.html>; Paul Egan, *Supreme Court Upholds Right-To-Work for State Workers*, DETROIT FREE PRESS (July 29, 2015, 5:59 PM), <http://www.freep.com/story/news/politics/2015/07/29/supreme-court-ruling-right-work-law-state-employees/30839363/>.

69. Newt Gingrich, *Union Employees Have a Right Not to Fund Political Ads*, THE DAILY CALLER (Oct. 29, 2014, 5:40 PM), <http://dailycaller.com/2014/10/29/union-employees-have-a-right-not-to-fund-political-ads/>; see also Richard Berman, *Union Dues Shouldn't Serve as Pipeline to Democrats*, L.V. REV.-J. (Sept. 30, 2014, 8:50 AM), <http://www.reviewjournal.com/opinion/union-dues-shouldn-t-serve-pipeline-democrats> ("Labor unions are among the biggest spenders in national elections, employ the same 'social welfare' group tactics they decry and use forced dues money in addition to political funds to push a left-wing agenda a significant bloc of their membership doesn't support.").

70. *Citizens United v. FEC*, 558 U.S. 310, 318–19 (2010).

71. See 52 U.S.C. § 30118 (2012).

72. See David Madland & Nick Bunker, *Unions Make Democracy Work for the Middle Class*, CTR. FOR AM. PROGRESS ACTION FUND (Jan. 2012), [https://www.americanprogressaction.org/wp-content/uploads/issues/2012/01/pdf/unions\\_middle\\_class.pdf](https://www.americanprogressaction.org/wp-content/uploads/issues/2012/01/pdf/unions_middle_class.pdf).

73. See *id.*

74. *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986).

75. *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 763 (1988).

76. See *Hudson*, 475 U.S. at 292; see *Beck*, 487 U.S. at 763.

so-called “right-to-work” states, where the payment of dues is optional in any event, the remedy for any dues payer who does not agree with the union’s get-out-the-vote efforts is to not pay dues at all.<sup>77</sup>

In non-right-to-work states, where those who are covered by a union contract are required to pay dues even if they are not members of the union, employees are entitled to a rebate of any portion of their dues that is not “germane” to collective bargaining.<sup>78</sup> Although the Supreme Court has never ruled that political activity geared toward raising the minimum wage is not germane to collective bargaining, it seems quite likely that is not chargeable to nonmembers, even though increases to minimum wages across the economy may have benefits to unionized employees in bargaining. Analogously, the courts have found the benefits of various activities, such as the cost of organizing competing stores in the grocery market, to be too attenuated to bargaining to be chargeable to nonmembers.<sup>79</sup>

And then there is the possibility, after *Harris*, discussed above, that the Court might further exacerbate the free rider problem in non-right-to-work states.<sup>80</sup>

### III. OBSTACLES TO PARTICIPATION FOR LOW-WAGE NONUNION WORKERS

Workers participated in great numbers in recent national elections.<sup>81</sup> In the 2008 and 2012 elections, turnout was very high across the board, and organized labor played a large role in that turnout.<sup>82</sup> Even so, there are several obstacles to greater participation

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77. James Sherk, *Right-to-Work Laws Don't Lower Private-Sector Pay*, ISSUE BRIEF, Sept. 1, 2015, at 1, 5, [http://thf\\_media.s3.amazonaws.com/2015/pdf/IB4457.pdf](http://thf_media.s3.amazonaws.com/2015/pdf/IB4457.pdf) (“Twenty-five states have adopted [right-to-work] laws that make union dues voluntary.”).

78. *California Saw & Knife Works*, 320 N.L.R.B. 224, 233 (1995) (“[W]hen or before a union seeks to obligate an employee to pay fees and dues under a union-security clause, the union should inform the employee that he has the right to be or remain a nonmember and that nonmembers have the right . . . to object to paying for union activities not germane to the union’s duties as bargaining agent and to obtain a reduction in fees for such activities . . .”).

79. *See United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760 (9th Cir. 2002).

80. *Harris v. Quinn*, 134 S. Ct. 2618, 2631–33 (2014).

81. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 (131st ed. 2011).

82. THOM FILE & SARAH CRISSEY, U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2008, at 5 (2012), <https://www.census.gov/prod/2010pubs/p20-562.pdf>; Table 6. *Reported Voting and Registration, by Sex, Employment Status, Class of*

in politics for low- and middle-income workers. In this section, I discuss obstacles to participation.

### A. Organizational Difficulties

There are great obstacles to participation for low-wage and middle-income workers. First, the goal of many of these workers is simply to survive. Especially in these tough economic times, workers are unable to, on their own, devote the necessary resources to electoral politics.<sup>83</sup> The union model, however, has worked well in part because union officials have had the time and financial resources to organize get-out-the-vote campaigns and voter mobilization.<sup>84</sup> The increased hours of low-wage workers make it increasingly difficult to engage in politics.<sup>85</sup>

The diffuse definition of “low-wage workers” also makes legislative action difficult.<sup>86</sup> Other interest groups can band together around minority status, union affiliation, or immigration status, but low-wage nonunion workers are a diffuse interest group with an inexact definition.

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*Worker, and Disability Status: November 2012*, U.S. CENSUS BUREAU, <https://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/Table06.xls> (last visited Sept. 19, 2015).

83. See Julie MacLeavy, *Workfare and Resistance in the U.S.: The Quietude and Ineffectiveness of Progressive Welfare Politics Post-1996*, 181 GEOGRAPHICAL J. 259, 261 (2014).

84. See Harold Meyerson, *Get Out the Union Vote*, THE AM. PROSPECT (Nov. 9, 2012), <http://prospect.org/article/get-out-union-vote>.

85. *Id.* Recognizing that many workers need time off from work to actively participate in politics, the United Auto Workers’ contracts provide Election Day as a paid holiday. Jordan Weissman, *Why Do U.S. Auto Workers Get Election Day Off? Thank Their Union*, THE ATLANTIC (Nov. 6, 2012), <http://www.theatlantic.com/business/archive/2012/11/why-do-us-auto-workers-get-election-day-off-thank-their-union/264651/>.

86. Compare Steven Greenhouse, *Study Finds Violations of Wage Law in New York and California*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/business/study-finds-violations-of-wage-law-in-new-york-and-california.html> (defining low-wage workers as those earning less than 1.5 times the minimum wage, meaning nearly \$12 per hour in California), with *Low-Wage Work in California: 2014 Chartbook*, U. CAL. BERKELEY LAB. CTR., <http://laborcenter.berkeley.edu/lowwageca/> (last visited Sept. 19, 2015) (defining low-wage workers in California as those earning less than \$13.63 per hour), and *What Is Low Wage Work?*, WORKING FOR DIGNITY, <https://workingfordignity.ucsc.edu/what-is-low-wage-work/> (last visited Sept. 7, 2015) (defining low-wage workers in Santa Cruz County, California as those earning less than \$14.81 per hour).

### B. Strategic Choices Between Candidates and Issues

One of the main questions for the leadership of social movements is how to separate candidates and issues.<sup>87</sup> In some ways, the choice is a false one, because grassroots movements support both candidates and issues. The focus of many organized labor groups for many years has been to elect candidates.<sup>88</sup> Often they focus on issues, such as raising the minimum wage and seeking better health benefits.<sup>89</sup> At the same time, ballot initiatives, such as the one that increased Nevada's minimum wage in 2006, can put labor rights into state constitutions, but might make it difficult to adapt to changed conditions or political gamesmanship.<sup>90</sup> In the end, the question of whether to emphasize candidates or issues is not as central as expanding the base of participation of low-wage workers.

### C. The Choice Between Federal and State Advocacy

The recent success at raising the minimum wage in a number of states and cities suggests that the best prospects for change exist at the state and local levels. Indeed, in cities such as Los Angeles, the minimum wage has been raised to as much as \$15 per hour for some workers.<sup>91</sup> Moreover, in the 2014 election cycle, several states and cities raised their minimum wage, including Nebraska and Arkansas—two states generally not considered favorable to greater

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87. Jack A. Goldstone, *More Social Movements or Fewer? Beyond Political Opportunity Structures to Relational Fields*, 33 THEORY & SOC'Y (SPECIAL ISSUE) 333, 338–39 (2004).

88. See, e.g., Alex Seitz-Wald, *Bernie Sanders and Hillary Clinton Vie for Labor Unions' Favor*, MSNBC (July 30, 2015, 11:17 PM), <http://www.msnbc.com/msnbc/bernie-sanders-hillary-clinton-vie-labor-unions-favor> (“Labor unions have long been [Presidential Candidate Bernie] Sanders’ biggest donors and allies.”).

89. See Lisa Lerer, *Meeting Unions, Clinton Offers Support for \$12 Minimum Wage*, AP (July 30, 2015, 4:17 PM), <http://bigstory.ap.org/article/ace3333d254f4ae88d5de9ba50d1886c/meeting-unions-clinton-offers-support-12-minimum-wage>; Avik Roy, *Labor Unions: Obamacare Will ‘Shatter’ Our Health Benefits, Cause ‘Nightmare Scenarios’*, FORBES (July 15, 2013, 7:12 AM), <http://www.forbes.com/sites/theapothecary/2013/07/15/labor-leaders-obamacare-will-shatter-their-health-benefits-cause-nightmare-scenarios/>.

90. Nevada's minimum wage is \$7.25 per hour for workers who receive health benefits and \$8.25 if workers do not receive health benefits. Sean Whaley, *Nevada Urged to Fix Minimum Wage Loopholes*, L.V. REV.-J. (July 18, 2014, 10:31 AM), <http://www.reviewjournal.com/business/nevada-urged-fix-minimum-wage-loopholes>. The government agency that enforces the law allegedly has allowed employers to pay the lower wage even when the benefits offered are unaffordable to the employee. Several large restaurant chains have been sued. *Id.*

91. See Badger, *supra* note 6.

worker protections.<sup>92</sup> These victories show that, even in conservative political environments, gains can be made on issues such as the minimum wage. But minimum wage might be the one issue that has broad political support. Other issues, such as discrimination or protection of union organizing, are either much more controversial or are generally the province of federal law.<sup>93</sup> Even with gains in the minimum wage in some states, there are still places where work that is not covered by the FLSA can be legally paid below the minimum wage, such as Louisiana.<sup>94</sup> Thus, while state innovations have been very important, a federal solution is still needed in many places.

#### *D. The Political Goals of Low-Wage Workers*

The fast-food and Walmart strikes of the last few years show a renewed interest in activism among lower and middle-income workers.<sup>95</sup> These workers are demanding an increase to the minimum wage and the right to organize a union without interference.<sup>96</sup> Although both of these goals can be accomplished through demands of the employer, the movements can also achieve an increase in the minimum wage at the local level, as many have done in cities such as San Francisco, San Diego, and Santa Fe.<sup>97</sup> Recently, voters in Seattle, Washington, approved the highest minimum wage in the nation; the voters were supported by the significant efforts of a

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92. Dave Jamieson, *Minimum Wage Raise Passes in Four GOP States*, HUFFINGTON POST (Nov. 4, 2014, 9:16 PM), [http://www.huffingtonpost.com/2014/11/04/minimum-wage-raise-passes\\_n\\_6095458.html](http://www.huffingtonpost.com/2014/11/04/minimum-wage-raise-passes_n_6095458.html).

93. See *Discrimination in the Workplace*, HR HERO, <http://topics.hrhero.com/discrimination-in-the-workplace/> (last visited Sept. 16, 2015); *Employer/Union Rights and Obligations*, U.S. NAT'L LAB. REL. BOARD, <https://www.nlr.gov/rights-we-protect/employerunion-rights-and-obligations> (last visited Sept. 16, 2015).

94. U.S. DEP'T OF LABOR, HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT (2014); *Minimum Wage Laws in the States—January 1, 2015*, U.S. DEP'T LAB., <http://www.dol.gov/whd/minwage/america.htm> (last visited Sept. 7, 2015).

95. See, e.g., KIRO Radio Staff, *Seattle Fast Food Workers Strike for More Money, Right to Organize*, MYNORTHWEST (May 30, 2013, 8:20 AM), <http://mynorthwest.com/926/2285115/Seattle-fast-food-workers-strike-for-more-money-right-to-organize> (“The movement, called ‘Good Jobs Seattle’ calls for higher wages for fast food workers.”); Howard Koplowitz, *Fast Food Strike September 2014: Workers Seek \$15 Minimum Wage, Right to Unionize*, INT'L BUS. TIMES (Sept. 4, 2014, 7:53 AM), <http://www.ibtimes.com/fast-food-strike-september-2014-workers-seek-15-minimum-wage-right-unionize-1678354> (“Thursday’s protests are part of a two-year campaign to raise awareness of the plight of the fast-food worker.”).

96. See KIRO Radio Staff, *supra* note 95.

97. See Badger, *supra* note 6.

strong central labor council.<sup>98</sup> The Los Angeles City Council approved a minimum-wage increase to \$15.37 per hour for hotel workers in a specified tourist zone.<sup>99</sup> There are numerous other examples—some 3.1 million workers got a raise due to minimum-wage increases on January 1, 2015.<sup>100</sup> This shows that workers will continue to use a multistate strategy to increase the minimum wage, but there will continue to be gaps in coverage until there are changes to the federal minimum wage.<sup>101</sup>

### *E. The Political Money Arms Race*

The amount of money being poured into politics is unprecedented. The candidates at the top of the tickets in the 2012 elections spent more money than ever before.<sup>102</sup> The question is not whether there will be enough money for workers to match the amount of spending by large donors such as Las Vegas casino mogul Sheldon Adelson and the Koch Brothers. Rather, the question is whether small donations by many workers can narrow the gap and still have some effect on the lives of ordinary workers.

Although the Supreme Court's decision in *Citizens United* has become a symbol of all that is wrong with American politics, the specific holding of *Citizens United* dealt only with unlimited independent expenditures by corporations.<sup>103</sup> The fact is that there have been and will continue to be many ways that companies and rich individuals can participate in politics. Whether it is Swift Boat Veterans for Truth, or other groups organized under section 527 of the Internal Revenue Code, there are many ways for these groups to

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98. Emily Jane Fox, *Washington City Votes to Raise Minimum Wage to \$15*, CNN (Nov. 7, 2013, 11:39 AM), <http://money.cnn.com/2013/11/06/news/economy/minimum-wage-seatac-new-jersey/>.

99. David McAfee, *Hotel Industry Groups Sue Los Angeles to Block \$15.37 Minimum Wage Law*, BLOOMBERG BNA (Dec. 18, 2014), <http://www.bna.com/hotel-industry-groups-n17179921124/>.

100. Niraj Chokshi, *Twenty States Raised Their Minimum Wage Today*, WASH. POST (Jan. 1, 2015), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/12/26/twenty-states-will-raise-their-minimum-wage-on-jan-1/>.

101. On the political economy of the labor movement in the twenty-first century, see JAKE ROSENFELD, *WHAT UNIONS NO LONGER DO* (2014). On the political economy of minimum wage movements, see DAVID NEUMARK & WILLIAM WASCHER, *MINIMUM WAGES* 253 (2008).

102. BLAIR BOWIE & ADAM LIOZ, *BILLION-DOLLAR DEMOCRACY, THE UNPRECEDENTED ROLE OF MONEY IN THE 2012 ELECTIONS* 1 (2013); see *2012 Presidential Race*, OPENSECRETS.ORG, <https://www.opensecrets.org/pres12/> (last visited Aug. 27, 2015).

103. *Citizens United v. FEC*, 558 U.S. 310 (2010).

dominate political spending other than the unlimited independent expenditures of corporate money blessed by the *Citizens United* ruling. *Citizens United* was, nonetheless, the proverbial green light that encouraged ever more creative attempts for the wealthy to fund their political goals. At the same time, there are asymmetrical opportunities for the poor and the rich to participate in politics.

*F. Decline of Private-Sector Unions; Attacks on  
Public-Sector Unions*

Union density is 6.6 percent in the private-sector work force.<sup>104</sup> Although unions have continued to maintain a presence in national politics, their effectiveness at the local level—particularly in Southern and rural states—is not as strong as their outcomes on the coasts.<sup>105</sup> There are some notable exceptions, such as the Culinary Union in Las Vegas, but most unions in right-to-work states are not able to mount the political operations necessary to change state and local policy, because they have smaller numbers.<sup>106</sup>

Because public-sector unions currently comprise about 35 percent of the workforce of federal, state, and local governments, these unions have become both a primary target of those opposed to expanded worker rights and the subject of legislation designed to limit their right to bargain.<sup>107</sup> The United States Supreme Court has made it more difficult for public-sector unions to participate politically in cases such as *Knox v. Service Employees International Union Local 1000*.<sup>108</sup> There, the Court held that the Service Employees International Union (SEIU) was required to give a special notice to nonmembers for a special assessment to engage in politics, even though the employees would eventually get a rebate of any funds that they did not want spent on political causes.<sup>109</sup> More

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104. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, *supra* note 12, at Table 3.

105. NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR (rev. ed. 2013).

106. In the 2015 Bureau of Labor Statistics Report of State Unionization rates, the bottom ten states in terms of unionized workers are all “right-to-work” states. See U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, *supra* note 12.

107. *Id.* at 1.

108. 132 S. Ct. 2277 (2012).

109. *Id.* at 2293.



importantly, the Court raised constitutional concerns about the operation of agency fee statutes for future cases.<sup>110</sup>

Nevertheless, unions that are made up of a large number of public-sector unions have engaged in many campaigns in the private sector. Notably, the SEIU has given support to the fast-food workers campaigns in the private sector.<sup>111</sup> This has resulted in some criticism of the union for fomenting the strikes, but there have also been legislative victories in places such as Seattle and SeaTac.<sup>112</sup> The question will be whether unions such as the SEIU will be able to continue to support minimum-wage campaigns if legislation in certain states makes it harder for the SEIU to get members.<sup>113</sup> Attempts to weaken public-sector unions, then, likely will have an impact on campaigns in some states for a higher minimum wage in fast food and other service industries.

### G. *The Law of Concerted Activity*

Federal law also inadequately protects political activity by workers, even when in concert with unions. The National Labor Relations Act (NLRA), at section 7, protects workers who engage in protected concerted activity for the betterment of their wages, hours, and working conditions.<sup>114</sup> Courts have construed the purpose of this statute narrowly, though many activities might have a salutary effect on working conditions.<sup>115</sup> In the only Supreme Court decision to address the issue, *Eastex, Inc. v. NLRB*,<sup>116</sup> the Court held that employees who tried to encourage opposition to “right-to-work”

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110. *See id.*

111. Josh Eidelson, *The SEIU's Odd Recipe for Unionizing Fast Food*, BLOOMBERG BUSINESSWEEK (July 2, 2015, 12:20 PM), <http://www.bloomberg.com/news/articles/2015-07-02/for-fast-food-labor-unions-seiu-has-odd-recipe>.

112. Ben Bergman, *Unions Have Pushed the \$15 Minimum Wage, But Few Members Will Benefit*, NPR (Feb. 10, 2015, 4:33 PM), <http://www.npr.org/2015/02/10/384980527/unions-have-pushed-the-15-minimum-wage-but-few-members-will-benefit>.

113. *See, e.g.*, A.B. 182, 78th Nev. State Assemb., Reg. Sess. (Nev. 2015) (proposing to end union dues deduction by government entities and also to limit bargaining association by supervisors).

114. 29 U.S.C. § 157 (2012).

115. Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 926 (1992); Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 791 (1989).

116. 437 U.S. 556 (1978).

legislation in their state could only be protected from discipline if their speech was connected to their association with the union.<sup>117</sup>

The current debate about immigration reform and the workers who participated in the large immigration marches possibly facing retaliation highlights the inadequate protection of the NLRA. The General Counsel of the National Labor Relations Board, in two different advice memoranda to agency lawyers, has interpreted the law as not protecting workers who are retaliated against because of their participation in the actions.<sup>118</sup> There are certainly reasons to think that this view of the statute does not mean that there are some political activities that could be more closely connected to workplace conditions, such as the minimum wage. On the other hand, the Board and the courts may ask for a closer nexus to the workers' *workplace* conditions. The Supreme Court's decision in *Eastex* supports this reasoning, finding some political activity by unionized workers to be sufficiently connected to the workplace.<sup>119</sup>

It is very unlikely that section 7 of the NLRA will be interpreted to include a broad right to engage in political reform, even one that is connected to workplace issues, such as minimum wage or immigration reform.<sup>120</sup> Thus, workers will likely have to look to other sources of protection for their political activities. Nevertheless, as the activism of the fast-food strikers shows, the workers can be protected if their protest for higher wages is directed at their employer, even if their activism has wider national and legislative implications.

#### *H. The Overlap Between Noncitizen Status and Low-Wage, Nonunion Work*

Minimum-wage increases are often put on ballots as initiatives, and they generally win; such increases generally receive significant popular support.<sup>121</sup> However, as there is a high concentration of

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117. *Id.* at 567–68.

118. Memorandum GC 08-10 from Ronald Meisburg, Gen. Counsel, NLRB (June 22, 2008), <http://apps.nlr.gov/link/document.aspx/09031d4580145ee5>.

119. *Eastex*, 437 U.S. at 570.

120. Alan Hyde, *Economic Labor Law v. Political Labor Relations*, 60 TEX. L. REV. 1, 7 (1981).

121. Michael Auslen, *New Poll: Americans Support Higher Minimum Wage*, MIAMI HERALD: NAKED POL. (Feb. 19, 2015, 12:22 PM), <http://miamiherald.typepad.com/nakedpolitics/2015/02/new-poll-americans-support-higher-minimum-wage.html>; see, e.g., *\$15 Laws & Current Campaigns*, RAISE THE MINIMUM WAGE (Aug. 26, 2015), <http://raisetheminimumwage.org/pages>

immigrants in occupations where many workers earn the minimum wage, this means that many low-wage workers will not have the ability to vote and often engage in other, non-voting activity such as participation in labor unions to which they belong. With the decline of unions in the last half-century, there are fewer opportunities to be involved with unions politically. Thus, some of the political power that low-wage workers might otherwise have to pass state and local initiatives is muted by their lack of voting power. Many hope that immigration reform will mean the legalization of millions of people who can get on a path to citizenship and participation, but that is a long way off politically under the current gridlock in Washington D.C.

#### IV. HOW DO LOW-WAGE NONUNION WORKERS PARTICIPATE POLITICALLY TODAY?

Even with all the obstacles to political organizing for low-wage workers, as stated above, there have been many increases in the minimum wage in local and state initiatives.<sup>122</sup> This raises the possibility of a large-scale workers' rights movement around the minimum wage that might successfully achieve improvements in the law governing their working conditions, on matters ranging from sick leave to antidiscrimination. There are examples of this in a number of states and cities. California has been at the forefront of paid family leave and paid sick leave in ways that have benefitted workers from all income groups.<sup>123</sup> These successes suggest that gains are possible in other states and localities. The following factors, however, suggest difficulties that movements might face.

##### *A. The Political Power Paradox*

Since over 90 percent of the private-sector workforce is not represented by a union, there should be better ways of organizing nonunion workers politically, besides those who do not need a union

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/15-Laws-Current-Campaigns; *Local Minimum Wage Laws and Current Campaigns*, RAISE THE MINIMUM WAGE (Aug. 26, 2015), <http://www.raisetheminimumwage.com/pages/local-minimum-wage>; *Recent State Minimum Wage Laws and Current Campaigns*, RAISE THE MINIMUM WAGE (Aug. 26, 2015), <http://www.raisetheminimumwage.com/pages/state-minimum-wage>.

122. *Recent State Minimum Wage Laws and Current Campaigns*, *supra* note 121.

123. Jennifer Thompson, *Family and Medical Leave for the 21st Century?: A First Glance at California's Paid Family Leave Legislation*, 12 U. MIAMI BUS. L. REV. 77, 78 (2004).

because of the wealth and power that they already have.<sup>124</sup> Thus, although low- and middle-income workers make up a large majority of American voters, change has been very slow at the federal level.

As I have discussed in other work, workers make up a large diffuse majority that is difficult to mobilize for large-scale change.<sup>125</sup> That is the role of the AFL-CIO, a federation of 57 individual unions and 12 million workers; Change to Win, which consists of the large union SEIU; the Teamsters; and the United Farm Workers (UFW).<sup>126</sup> The SEIU PAC, for example, gave the largest amount of labor organization support in advocating for the defeat of Republican presidential candidate Mitt Romney.<sup>127</sup> Nevertheless, there are a variety of local-issue campaigns in which workers could be involved.

### *B. Voting for and Supporting Candidates*

As discussed above, most workers who are not in unions tend to participate politically only through voting, or perhaps through working on an electoral campaign. This represents a very thin level of civic participation. Nevertheless, most states have some protection for the right to vote. In most states, however, one's stated political preference—such as “I support Mitt Romney” stated to the employer before the election—can be a basis for termination in a jurisdiction that does not have a statute banning an employer from “directing the employee's political activities.” Even in these jurisdictions, as described below, there are limits to the protection that those statutes offer.

Further, while many statutes require time off during the workday to vote,<sup>128</sup> there is little other time available for workers to vote on Election Day. The collective bargaining agreement between the United Auto Workers and the Detroit auto industry allows workers a

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124. See U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, *supra* note 12.

125. See Garcia, *supra* note 67, at 383.

126. *About Us*, CHANGE TO WIN, <http://www.changetowin.org/about> (last visited Nov. 30, 2015).

127. *Independent Expenditures, Communication Costs and Coordinated Expenses as of April 11, 2013*, OPENSECRETS.ORG (Apr. 11, 2013), <http://www.opensecrets.org/pacs/indexpend.php?cycle=2012&cmte=C00004036>; *Service Employees International Union*, FACTCHECK.ORG (June 17, 2014), <http://www.factcheck.org/2014/02/service-employees-international-union-seiu-3/>.

128. See *State by State Time Off to Vote Laws*, FINDLAW, <http://www.findlaw.com/voting-rights-law.html> (last visited Apr. 16, 2016).

holiday on certain election days.<sup>129</sup> This is anomalous even in workplaces with union contracts, and so there will be limited opportunities to participate politically without losing a day of work or taking personal time.

### *C. The Obstacles to Workers Running for Office*

Low-wage workers may also choose to run for office to participate politically. Many states provide protection for being a candidate. Typical of these is section 613 of the Nevada Revised Statutes, which provides that an employer shall not direct the political activities of his employees in running for office.<sup>130</sup> This is an important provision to get more working people in elected positions, but the percentage of professionals (mostly lawyers) in legislatures remains very high. Most are career politicians who are serving in the legislature as a way station to another office or appointment. They are not often from the ranks of working people.

Even in states with part-time legislatures, the ability of working people to have a leave of absence that would allow them to perform their legislative duties is limited. In Nevada, for example, the legislature meets every two years from February to June while legislators from all over the state live in Carson City.<sup>131</sup> They must have jobs with the flexibility to allow for an extended leave of absence. Even then, most Nevada legislators are lawyers on leave of absence from their law firms, or are business owners.<sup>132</sup>

Running for and holding elected office is a large investment of time and money. Increasingly, both at the local and national levels, elected officials are part of an elite group. Thus, statutes that were intended to protect working people from retaliation for running for office are not as useful as they once might have been when there were more citizen-legislators.

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129. *UAW History*, UAW, <http://uaw.org/solidarity-magazine/uaw-history/> (last visited Jan. 31, 2016).

130. NEV. REV. STAT. § 613.040 (2015).

131. *The Nevada State Assembly*, NEV. LEGISLATURE, <http://asm.leg.state.nv.us/Assembly/About-The-Assembly.aspx> (last visited Jan. 31, 2016).

132. Tom Gorman, *Part-Time Legislature Serves Most Nevadans Just Fine*, L.A. TIMES (Feb. 5, 2001), <http://articles.latimes.com/2001/feb/05/news/mn-21401>.

*D. Voter Initiatives as Opportunities for Action*

Some state statutes also specifically protect workers' rights to support ballot initiatives from employment consequences.<sup>133</sup> Often, these initiatives must be on a state ballot. Even then, there have been examples of these laws being inadequately protective if the employer argues that its legitimate interests are adversely affected by the employee's activities. In *Nelson v. McClatchy Newspapers*,<sup>134</sup> for example, the Washington Supreme Court interpreted a Washington state statute that was supposed to allow for employees to support or oppose "a candidate, ballot proposition, political party, or political committee."<sup>135</sup> Sandra Nelson was an employee of *The News Tribune* in Tacoma, Washington, who became active in supporting expanded antidiscrimination protections for gays and lesbians.<sup>136</sup> After her employer expressed concern about how her activities would impact her credibility as a reporter on the education beat, she was demoted from her reporting job to a lower-visibility swing-shift copy editor position.<sup>137</sup> She sued her employer on the ground that it had discriminated against her in violation of Washington state law.<sup>138</sup> Although the court agreed that the statute's terms applied to Nelson's case, the freedom of the press in the Washington and U.S. Constitutions made it inappropriate for the court to find the newspaper liable.<sup>139</sup>

The *Nelson* case, while unique because of the distinctive relationship role that the press has as an employer, also shows that barriers can exist depending on who the employer is and the particular language of the statute involved. For example, some campaigns may not be protected until a ballot initiative is formally filed. Thus, these statutes should be broadened to cover general political issues, and not just the subjects of ballot initiatives.

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133. See, e.g., WASH. REV. CODE § 42.17A.495(2) (2015) ("No employer or labor organization may discriminate against an officer or employee in the terms or conditions of employment for (a) the failure to contribute to, (b) the failure in any way to support or oppose, or (c) in any way supporting or opposing a candidate, ballot proposition, political party, or political committee.").

134. 936 P.2d 1123 (Wash. 1997).

135. *Id.* at 1126 (quoting WASH. REV. CODE § 42.17A.495 (2012) (originally enacted as WASH. REV. CODE § 42.17.680 (1993))).

136. *Id.* at 1124–25.

137. *Id.* at 1125.

138. *Id.* at 1126.

139. *Id.* at 1128, 1133.

The other factor that makes initiatives more unequal is that there are generally no limits on how much money can be spent on ballot initiatives. Indeed, the Supreme Court has said that paid signature gatherers have a First Amendment right to collect signatures for ballot initiatives without disclosing who is paying them.<sup>140</sup>

These imbalances will be very relevant in several upcoming ballot initiatives involving the minimum wage. In the city of San Diego, although the City Council recently passed an increase in the minimum wage, there will be a voter referendum on the law,<sup>141</sup> in which business interests are likely to pour money into the campaign against increasing the city's minimum wage. Thus, even when local bodies are responsive to worker needs, powerful interests can reverse gains for workers. This occurred in another California city when the Santa Monica City Council passed a minimum-wage increase for workers in the "Coastal Zone," the area where most of the tourists visit because it is closest to the Pacific Ocean.<sup>142</sup> Although the City Council passed the ordinance, business interests put the law back on the ballot, and voters repealed it a year later.<sup>143</sup>

These examples show that even at the local level, increased protections for workers are very much contested. For workers to hold on to gains that are made, they must be able to compete effectively in the political system, which inevitably means being able to compete in the money race.

### *E. Donating Money to Candidates*

Ever since the Supreme Court in *Valeo* made donating money to candidates a First Amendment protected activity, government regulation of political fundraising must meet a demanding

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140. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 195 (1999).

141. Claire Trageser, *San Diego Minimum Wage Increase to Go on June 2016 Ballot*, KPBS (Oct. 20, 2014), <http://www.kpbs.org/news/2014/oct/20/city-council-decide-whats-next-san-diego-minimum-w/>.

142. Oscar Johnson, *Santa Monica Widens Living Wage Ordinance*, L.A. TIMES, June 13, 2001, California, Part 2, Metro Desk, at 4.

143. Martha Groves, *Backers of Failed 'Living Wage' Vow to Press On*, L.A. TIMES, Nov. 7, 2002, California, Part 2, Metro Desk, at 10 ("The campaign against the measure was funded largely by the city's luxury hotels."); see also Kathleen M. Erskine & Judy Marblestone, *The Movement Takes the Lead: The Role of Lawyers in the Struggle for a Living Wage in Santa Monica, California*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 249 (Austin Sarat & Stuart A. Scheingold eds., 2006) (describing the legal challenges of the Santa Monica living wage campaign).

standard.<sup>144</sup> When an employer limits fundraising, however, there is no state action, and thus no First Amendment problem. It is only in states like Louisiana, which protects the act of making donations to candidates, or Connecticut, which protects against private retaliation all “rights guaranteed by the [F]irst [A]mendment to the United States Constitution,” that employees have legal recourse.<sup>145</sup> These statutes also generally protect making contributions to electoral candidates, thus obviating the need for worker organizations to get more involved in issue campaigns.<sup>146</sup>

But in the absence of statutes that comprehensively protect low-wage workers from retaliation for donating money to political campaigns, the political inequalities that currently exist are likely to grow. That is why federal law should protect the acts of contributing to federal campaigns and voting in federal elections.

#### *F. A Frayed Patchwork of Protections*

As described above, a fifty-state strategy for worker protection will inevitably leave gaps in coverage depending on where the worker lives.<sup>147</sup> Furthermore, even in states where there is a law, there might be various exemptions in the statute that make the law inapplicable to many workers. This would include everything from a minimum jurisdictional threshold for antidiscrimination statutes—fifteen or more employees in many states—to exemptions for overtime pay. Or, as is the case in states such as Louisiana, there is no minimum wage on work not covered by the FLSA.<sup>148</sup> Thus, there is a frayed patchwork of protections for politics at work. Short of a uniform federal law for protecting political participation, which seems unlikely, the question must then become what can be done to broaden political participation of low- and middle-income workers amid this checkerboard of state protections.

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144. See Joel M. Gora, *Free Speech, Fair Elections, and Campaign Finance Laws: Can They Co-Exist?*, 56 HOW. L.J. 763, 784–85 (2013).

145. CONN. GEN. STAT. § 31-51q (2015); see also S.C. CODE ANN. § 16-17-560 (2014) (“It is unlawful for a person to . . . discharge a citizen from employment or occupation . . . because of political opinions or the exercise of political rights and privileges guaranteed to every citizen by the Constitution and laws of the United States or by the Constitution and laws of this State.”).

146. See Volokh, *supra* note 13 (discussing state statutory protection of employee political activity, including campaign contributions).

147. See NEUMARK & WASCHER, *supra* note 101, at 253 and accompanying text.

148. See U.S. DEP’T OF LABOR, HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT (2014), *supra* note 94 and accompanying text.



## V. WAYS TO INCREASE POLITICAL PARTICIPATION OF NONUNION WORKERS

As described above, there are a number of obstacles to greater political participation of workers.<sup>149</sup> Increased unionization would be one of the most effective ways to increase political participation, but without many changes at the federal level, which seem unlikely to occur in the near future, other strategies must be explored. Further, models are needed to address the default behaviors that people have in not participating. And, as discussed above, there must be enough privacy to prevent retaliation. In this section, I describe four areas that, with further exploration, might lead to greater political voice for low-wage nonunion workers. These are: (1) broadening state authorized deduction statutes; (2) the use of entities created under section 501(c)(4) of the Internal Revenue Code in which workers can participate; (3) greater cooperation between existing unions and nonunion organizations, without increased scrutiny or disclosure; and (4) a federal statute that explicitly protects the right to engage in political activities related to elections regulated by the Federal Election Commission.

### A. State Authorized Deduction Statutes

State law governs which deductions an employer may take from an employee's paycheck. The typical statute allows for deductions of union dues, health contributions, and retirement plans.<sup>150</sup> Where there is a union with a separate voluntary political action fund, the employer may deduct those funds as well.<sup>151</sup>

If statutes were broadened to simply include "any organization of the employee's choice," there would be more opportunities to contribute to organizations set up for grassroots non-electoral activity at the local level to expand their activities to raise funds for initiatives for greater workplace protections. Of course, if the employer were aware of these donations, the anonymity of the

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149. See *supra* Part III.

150. For a list of state wage deduction laws, see *Wage Deduction Laws*, SOC'Y FOR HUM. RESOURCE MGMT., <https://www.shrm.org/LegalIssues/StateandLocalResources/StateandLocalStatutesand-Regulations/Documents/deductionlaw.pdf> (last visited Sept. 12, 2015).

151. See, e.g., MD. CODE ANN., ELEC. LAW § 13-242 (West 2015) ("If an employer withholds from employees by payroll deduction the employees' dues to an employee membership entity . . . the employee also may make contributions by payroll deduction to one or more affiliated political action committees selected by the employee . . .").

organization might need to be regulated to prevent any retaliation, or the employer could be prohibited from retaliating against employees from participating in a voluntary deduction for politics.

*B. Existing Opportunities in 501(c)(4) Organizations*

There has been a fair amount of controversy over the difficulty that some conservative-leaning organizations have had in trying to obtain tax-exempt status.<sup>152</sup> Assuming for the moment that there are problems with the IRS process of approval, and assuming further that any problems will be resolved eventually, the usual rules of approval for 501(c)(4) organizations that exist as social welfare organizations and not as lobbying or electoral arms should be straightforward.<sup>153</sup> This might lead then to greater voter education on issues of revenue, spending, and other matters that will come up in forthcoming elections, but are not necessarily tied to particular elections. This should lay the groundwork for the need for citizenship outreach that might become very important should immigration reform become law.

The Culinary Workers Union in Las Vegas has also engaged in a kind of political work that is neither about supporting candidates nor issues, but instead about increasing democratic participation through citizenship processes in immigrant communities.<sup>154</sup> According to the Union, the Citizen Project has helped more than 8,000 people through the U.S. citizenship process since 2001.<sup>155</sup> This kind of activity will become all the more important when there is immigration reform.

*C. Coalitions with Existing Alt-Labor Groups*

There have been more discussions within the labor movement and its allies on how to expand ties with existing “alt-labor”

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152. See Alex Altman, *The Real IRS Scandal*, TIME (May 14, 2013), <http://swampland.time.com/2013/05/14/the-real-irs-scandal/>; Sam Stein, *IRS Investigator: Tea Party Groups Were Scrutinized More Than Progressive Organizations*, HUFFINGTON POST (June 27, 2013, 11:52 AM), [http://www.huffingtonpost.com/2013/06/27/irs-2012-election\\_n\\_3510455.html](http://www.huffingtonpost.com/2013/06/27/irs-2012-election_n_3510455.html).

153. See Frances R. Hill, *Citizens United and Social Welfare Organizations: The Tangled Relationships Among Guidance, Compliance and Enforcement*, 43 STETSON L. REV. 539 (2014).

154. See *Citizenship Project*, CULINARY WORKERS UNION LOCAL 226, <http://www.culinaryunion226.org/affiliates/citizenship> (last visited Sept. 12, 2015).

155. *Id.*

groups.<sup>156</sup> These groups are generally nontraditional unions because they do not bargain in the same way as unions, and they represent many of the workers who are not covered by traditional unions, such as farmworkers (the Coalition of Immokalee Workers), freelancers (the Pacific Media Workers Guild), and private-sector domestic workers (the National Domestic Workers Alliance).<sup>157</sup> These ties are important to strengthen, but they also run the risk of too much coordination, which can lead to both operational and legal issues. But union political and technical staff setting up entities would be an important step to get the organizations up and running.

*D. Changes to the Law to Enhance the Voice of Politically-Marginal Workers*

As described above, the protection of political activities for low-wage workers, and indeed all workers, is partial and contingent on where the workers live.<sup>158</sup> This patchwork of protection raises the need for federal protection for voting and supporting candidates. A federal civil rights statute prohibits threats, intimidation, or coercion causing any person to “vote for, or not to vote for” a candidate in a federal election.<sup>159</sup> No cases appear to apply the statute to private employers, but the statute has been used in a case involving a public school teacher whose contract was not renewed allegedly in retaliation for his vote in a federal election.<sup>160</sup> Although the court in that Fifth Circuit case, *United States v. Board of Education*, affirmed the lower court’s refusal to issue an injunction, it is possible that a court could find the economic coercion of the threat of losing one’s job for the act of voting to be the kind of intimidation that Congress intended the statute to prohibit.<sup>161</sup> In some states, a plaintiff might be able to base a tort claim for wrongful termination on an employer’s

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156. See Pamela Wolf, *AFL-CIO Adopts Resolution to Expand “Alt-Labor” Efforts, Target the South*, EMP. L. DAILY, <http://www.employmentlawdaily.com/index.php/news/afl-cio-adopts-resolution-to-expand-alt-labor-efforts-target-the-south/> (last visited Sept. 12, 2015).

157. See COALITION OF IMMOKALEE WORKERS, <http://ciw-online.org/> (last visited Sept. 12, 2015); NAT’L DOMESTIC WORKERS ALLIANCE, <http://www.domesticworkers.org/> (last visited Sept. 12, 2015); PAC. MEDIA WORKERS GUILD, <http://mediaworkers.org/> (last visited Sept. 12, 2015).

158. See NEURMARK & WASCHER, *supra* note 101, at 253 and accompanying text.

159. 52 U.S.C. § 10101 (2015) (originally enacted as 42 U.S.C. § 1971).

160. *United States v. Bd. of Educ.*, 332 F.2d 40, 42–43 (5th Cir. 1964).

161. *Id.*; see also Volokh, *supra* note 13, at 308–34 (describing similar statutes enacted at the state level to protect employee voting preferences from employer retaliation).

violation of a federal statute, but in others, the tort is limited to claims arising from violations of state law.<sup>162</sup> Others do not recognize the tort of wrongful termination at all.<sup>163</sup>

The unpredictability of legal protection suggests that explicit legislation protecting the right to vote from employment retaliation is necessary. Federal law could be amended to make it clear that workers should not be subject to retaliation by supporting or opposing candidates. Certainly, the Department of Justice can bring lawsuits to better define the limits of the law, but that could take years and might lead to a narrower construction of the law. The possibility of amendment is extremely slim, however. Further, the federal voting protection law does not provide a private right of action; even in states where an employee can base a wrongful termination claim on an employer's violation of federal law, there are few cases.<sup>164</sup>

Most minimum-wage employees do not give enough money in any disclosure cycle to cause the notice of regulators or employers, but there are other activities which, when aggregated, might lead to disclosure. The type of disclosure that is being called for by critics of worker organizations would place an unequal burden on the workers, and should be rejected.

## VI. CONCLUSION: A LOOK TOWARD THE FUTURE

At its Quadrennial Convention in September 2013, the AFL-CIO approved a resolution that called for expanded labor-community partnerships.<sup>165</sup> As speakers from the podium said

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162. Compare *Smuck v. Nat'l Mgmt. Corp.*, 540 N.W.2d 669, 672 (Iowa Ct. App. 1995) (holding that "federal law can serve as an appropriate source for state public policy" in wrongful termination cases), and *Luethans v. Wash. Univ.*, 838 S.W.2d 117, 118 (Mo. Ct. App. 1992) (finding that reporting employer's violation of federal Animal Welfare Act is sufficient basis for a wrongful termination claim), with *Lawrence Chrysler Plymouth Corp. v. Brooks*, 465 S.E.2d 806, 809 (Va. 1996) (holding that plaintiff did not have a claim for wrongful termination, where he could not identify a specific Virginia statute establishing a public policy that his former employer violated). For an in-depth discussion of federal law as a basis for wrongful termination claims, see Nancy Modesitt, *Wrongful Discharge: The Use of Federal Law as a Source of Public Policy*, 8 U. PA. J. LAB. & EMP. L. 623 (2006).

163. Montana's statutory wrongful termination law preempts the common-law tort of wrongful termination. MONT. CODE ANN. § 39-2-913 (2015).

164. See Trystan Phifer O'Leary, Note, *Silencing the Whistleblower: The Gap Between Federal and State Retaliatory Discharge Laws*, 85 IOWA L. REV. 663, 664 (1999).

165. AFL-CIO, *Resolution 16: Building Enduring Labor-Community Partnerships*, in AFL-CIO CONVENTION 2013 ADOPTED RESOLUTIONS AND CONSTITUTIONAL AMENDMENTS 40 (2013), <http://www.aflcio.org/content/download/96131/2631981/Res16.pdf>. I was proud to work

many times, the hard work of the convention is not in passing resolutions, but in implementing change.<sup>166</sup> The Convention was notable to many observers in that it recognized the value of reaching out to nonunion workers to build a broad-based social movement to improve the conditions of all working people in the United States and throughout the world.<sup>167</sup>

This Article endeavors to begin the conversation of what legal and policy reforms are needed for the large number of workers who have no union, and yet can be connected to a movement that would improve their conditions of work. The amounts of money that would be involved to fund these activities pale in comparison to those that are poured in by those who wish to stop any workplace regulation.<sup>168</sup> These initiatives would, I argue, nonetheless foster cultures of participation that could make tangible changes at the local level—including living wages and domestic rights—that would dramatically improve the conditions of work and begin broader based social movements. This is a product of a post-*Citizens United* era when: (1) political participation is no longer seen largely as the act of voting, or running for office; and (2) unions are no longer able to be the exclusive vehicle for the lobbying on work-law protections they were when they were a bigger share of the economy. Now, there are many opportunities for these new associations that are not unions but can have a greater voice if they pool their resources.

Given all the obstacles faced by low-wage workers in what Oliver Wendell Holmes called “the free struggle for life,”<sup>169</sup> the fact that they have been able to spotlight many of the issues facing them and their fellow low-wage workers has been remarkable and brave. But their ability to undo the trends toward greater economic and political inequality is dependent in part on a number of legal and political variables that I have described above. Fundamental national change to improve working conditions for the vast majority of

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on this resolution and advocate for its adoption on the Convention floor. For more information about the Convention, see *Convention Info*, AFL-CIO, <http://www.aflcio.org/About/Exec-Council/Conventions/2013/Convention-Info> (last visited Sept. 13, 2015).

166. See Michael Zweig, *Working for Global Justice in the New Labor Movement*, 17 J. LAB. SOC'Y 261, 261 (2014).

167. *Id.*

168. See *id.* at 274.

169. *Vegeahn v. Guntner*, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting).

low-wage nonunion workers may not occur until several years from now.

