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# CAN WAGE BOARDS REVIVE U.S. LABOR?: MARSHALING EVIDENCE FROM PUERTO RICO

CÉSAR F. ROSADO MARZÁN<sup>1</sup>

## ABSTRACT

*Some U.S. law reformers, labor advocates, policymakers, scholars, and politicians have begun to favor laws that promote sectoral bargaining. The aim is to revive collective bargaining and labor unions, which barely represent 6% of the private sector workforce. Sectoral bargaining is a collective bargaining system where employers and unions bargain terms and conditions of employment at the industrial or sector level. It contrasts with employer- or plant-based bargaining promoted by U.S. federal law, specifically the 1935 National Labor Relations Act (NLRA). Evidence shows that workers are more widely represented in collective bargaining and economic inequality is less widespread in countries with sector-based systems of collective bargaining. However, the evidence also shows that sectoral bargaining does not necessarily increase union membership. The opposite might prevail, as it may encourage free riding.*

*Some U.S. advocates of sectoral bargaining highlight the case of New York State, where the government convened sector-based minimum wage boards authorized under its minimum wage legislation to increase wages in the fast-food sector to \$15 an hour. The New York government convened the wage boards because the Fight for \$15, a union-supported group advocating for “\$15 and a union,” had applied pressure. After the government increased wages in the sector, a new group called “Fast Food Justice” formed to represent workers in the sector. However, the group is not a “union,” and neither it, nor the Fight for \$15, bargained with employers about wages. Whether wage boards can revive labor thus remains an open question.*

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*This article marshals historical evidence from Puerto Rico, where wage boards helped U.S.-based labor unions to organize the garment industry in the 1950s, '60s, and '70s. It shows that the International Ladies' Garment Workers' Union (ILGWU), an iconic New York-based union, leveraged significant power over small and poor Puerto Rico to get a seat on the wage committees of its Minimum Wage Board, which had authority to set binding minimum wages. The union also had amicable bargaining relationships with U.S.-based employers in Puerto Rico, giving the union the opportunity to receive neutrality and card check recognition from them in return. In essence, the union sought to extend U.S. non-economic terms to Puerto Rico while negotiating the bulk of the economic terms at the Board level. Through these efforts, the union succeeded in organizing 39% of all garment workers on the island, at a time when Puerto Rican union organizers perceived the sector to be unorganizable.*

*In New York, no tripartite structure sets wages, and employers oppose unions. And while unions have significant political power in New York, it appears to be much less than that wielded by the ILGWU over the 1950s poverty-stricken, colonial Puerto Rico. Therefore, to the extent Puerto Rico can chart a course for contemporary United States, it highlights the importance of political power, tripartite negotiation and wage setting with erga omnes effects, and social norms in the form of amicable, collaborative relationships between employers and unions. Those three conditions are lacking in today's New York fast-food industry and industrial relations. To the extent Puerto Rico charts a course, the future of sectoral bargaining in the United States as a tool to re-build union membership appears extremely uncertain.*

## I. INTRODUCTION: TOWARDS A NEW LABOR LAW?

With U.S. union membership slumping to levels close to a near-irrelevant 6% in the private sector,<sup>2</sup> and after decades of Congressional inaction on the question of federal labor law reform, some labor activists, policymakers, and labor law scholars are exploring alternative pathways to collective bargaining and union renewal.<sup>3</sup> One of the main ideas catching on is that of state-sponsored sectoral bargaining, sometimes called in the North American literature “broader based bargaining” or “social bargaining.”<sup>4</sup> The Service Employees International Union (SEIU), a 2-million member labor organization, conditioned its endorsement of any 2020 Presidential candidate on the candidate’s support of the union’s bold plan for union renewal, called “Unions for All,” which includes sectoral bargaining.<sup>5</sup> Social-democratic presidential hopeful Bernie Sanders included sectoral bargaining in his platform.<sup>6</sup> Harvard Law School’s Clean Slate Program has made it a centerpiece of its ambitious plan for labor law reform.<sup>7</sup> Sectoral bargaining is, therefore, becoming a darling of some labor and left-of-center activists, reformers, scholars, and politicians.

The purported social benefits of sectoral bargaining are significant. It compresses wages,<sup>8</sup> curbing economic inequality—which is currently out

2. Bureau Lab. Stats., *Union Members Summary*, U.S. DEP’T LAB. (Jan. 18, 2019), <https://www.bls.gov/news.release/union2.nr0.htm> [<https://perma.cc/7MLD-9PQK>].

3. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1527-12 (2002).

4. Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 2–100 (2016) (on sectoral and social bargaining); Sara Slinn, *Broader-based and Sectoral Bargaining in Collective Bargaining Law Reform: A Historical View*, 85 LABOUR/LE TRAVAIL 1, 1-29 (forthcoming 2020) (on broader based bargaining); see also David Madland, *How to Promote Sectoral Bargaining in the United States*, CTR. FOR AMER. PROGRESS (July 20, 2019), <https://www.americanprogressaction.org/issues/economy/reports/2019/07/10/174385/promote-sectoral-bargaining-united-states> [<https://perma.cc/68LV-MZYF>]; Kate Andrias & Brishen Rogers, *Rebuilding Worker Voice in Today’s Economy*, ROOSEVELT INST. (Aug. 2018), <https://rooseveltinstitute.org/wp-content/uploads/2018/07/Rebuilding-Worker-Voices-final-2.pdf> [<https://perma.cc/2D5P-ZZWP>].

5. Nicole Berner & Dora Chen, *SEIU Conditions 2020 Presidential Endorsement on Demand for “Unions for All,”* ON LABOR (Aug. 21, 2019), <https://onlabor.org/seiu-conditions-2020-presidential-endorsement-on-demand-for-unions-for-all/> [<https://perma.cc/BZH3-4F9X>].

6. Bernie Sanders Campaign, *The Workplace Democracy Plan*, BERNIE 2020 <https://berniesanders.com/issues/the-workplace-democracy-plan/> [<https://perma.cc/67S7-779K>] (last visited Aug. 22, 2019). The former president of the Communications Workers of America, Larry Cohen, has also made a similar call for sectoral bargaining. Larry Cohen, *The Time Has Come for Sectoral Bargaining*, NEW LAB. F. (June 2018), <https://newlaborforum.cuny.edu/2018/06/22/the-time-has-come-for-sectoral-bargaining/> [<https://perma.cc/S9SX-7AR5>].

7. See Benjamin Sachs & Sharon Block, *Clean Slate for Worker Power: Building a Just Economy and Democracy*, HARV. L. SCH. LAB. & WORKLIFE PROGRAM 37-45 (Jan. 23, 2020), [https://lwp.law.harvard.edu/files/lwp/files/full\\_report\\_clean\\_slate\\_for\\_worker\\_power.pdf](https://lwp.law.harvard.edu/files/lwp/files/full_report_clean_slate_for_worker_power.pdf).

8. Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 532–33 (2011) (showing statistical analyses that link union decline to income inequality).

of control in many countries, especially in the United States.<sup>9</sup> Countries with sectoral bargaining systems also have a narrower gender wage gap.<sup>10</sup>

Professor Kate Andrias, a pioneering legal scholar writing on sectoral bargaining, builds her vision for the U.S. from current experiences.<sup>11</sup> She hallmarks New York State, where the Commissioner of Labor (“Commissioner”)<sup>12</sup> can convene wage boards “to inquire into and report and recommend” on the level of wages in industry and by region.<sup>13</sup> Recently, the governor of New York requested that his Commissioner convene wage boards to recommend wages for the fast-food sector in light of pressures from the “Fight for \$15” movement, a national campaign to increase wage levels to \$15 an hour—more than twice the federal minimum wage.<sup>14</sup>

However, the Fight for \$15 movement not only intended to increase wages in the sector, but also wanted to organize fast-food workers into a labor union capable of representing workers’ interests; at the very least, they wanted to organize the workers in one very large and iconic franchising firm, McDonald’s.<sup>15</sup> While the Fight for \$15 was able to exert enough pressure to get its \$15 an hour law, it is still trying to get that elusive union.<sup>16</sup> Will New York fast-food workers get their union?

Despite some excitement around the prospects of sectoral bargaining through wage boards, there is no clear answer as to whether wage boards can be instituted throughout the United States and, even if so, whether they can reinvigorate labor and serve as an alternative to the 1935 Wagner Act

9. THOMAS PICKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014) (describing the widening gaps in income inequality around the world).

10. Madland, *supra* note 4. On the other hand, critics of sectoral bargaining might argue that it promotes cartels that weed out smaller firms that provide cheaper and more efficient goods and services. See Richard Epstein, *The Cartelization of Commerce*, 22 HARV. J. L. & PUB. POL’Y 209 (1998). Others might also argue that sectoral bargaining is a straight path to servitude, as it coerces entrepreneurs and workers alike into associations that they do not want to join. See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 205, 269 (Ronald Hamowy ed., Univ. of Chicago Press rev. ed. 2011).

11. Andrias, *supra* note 4, at 64–66.

12. New York law refers to the Commissioner of Labor as the “industrial commissioner.” N.Y. LAB. L. § 651 (McKinney 2016).

13. Andrias, *supra* note 4, at 65 (citing N.Y. LAB. L. §§ 653–656). Professor Andrias also hallmarks the 1940s experience in the United States with tripartism under the FLSA, when wage boards recommended wage levels to the Wage and Hour Director of U.S. Department of Labor in a way not too dissimilar from that of New York State. Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616 (2019).

14. Andrias, *supra* note 4, at 8.

15. Tom Juravich, *Fight for \$15: The Limits of Symbolic Power—Juravich Comments on Ashby*, 42 LAB. STUD. J. 394, 395 (2017) (noting the symbolic nature of targeting McDonald’s).

16. Jonathan Rosenblum, *Fight for \$15: Good Wins, But Where Did the Focus on Organizing Go?*, 42 LAB. STUD. J. 387, 388–89 (2017) (underscoring that the Fight for \$15 has yet to organize workers into a union); see also Kalena Thomhave, *Fighting for \$15—and a Union*, AMER. PROSPECT (Oct. 16, 2018), <https://prospect.org/article/fighting-15-and-union> [https://perma.cc/NSE7-2ZWL].

model premised on plant- or employer-based bargaining. Empirical studies have shown that the relationship between sectoral bargaining and union membership is ambiguous.<sup>17</sup> Moreover, to the extent sectoral bargaining favors unionization, those studies have focused on mostly European cases.<sup>18</sup> In Europe, labor market centralization is built through various kinds of extension policies (of collective bargaining agreements), not wage boards.<sup>19</sup>

### A. The Case of Puerto Rico

However, three cases of sectoral bargaining through minimum wage boards lie in Latin America. Chile, Uruguay, and the U.S territory of Puerto Rico<sup>20</sup> have all had experiences with wage boards aiding unionization. None of these cases has ever been brought to bear on the policy debates for

17. See Lyle Scruggs, *The Ghent System and Union Membership in Europe, 1970-1996*, 55 POL. RES. Q. 275, 283 (2002) (labor market centralization and political power are both ambiguously related to union membership); See also OECD, *Chapter 4: Collective Bargaining in a Changing World of Work*, in OECD EMPLOYMENT OUTLOOK 2017, OECD iLIBRARY (2017), [https://www.oecd-ilibrary.org/sites/empl\\_outlook-2017-8-en/index.html?itemId=/content/component/empl\\_outlook-2017-8-en](https://www.oecd-ilibrary.org/sites/empl_outlook-2017-8-en/index.html?itemId=/content/component/empl_outlook-2017-8-en) [https://perma.cc/BH4Q-4WDT]. We should underscore that studies of labor market centralization have also focused on the effects of left political party power on union membership, as political parties can also centralize certain issues of bargaining and that otherwise strengthen unions in parliament, away from the individual shop floor. See Bruce Western, *A Comparative Study of Working-Class Disorganization: Union Decline in Eighteen Advanced Capitalist Countries*, 60 AM. SOC. REV. 179, 187 (1995); César F. Rosado Marzán, *Successful Wage Moderation: Trust, Labor Market Centralization, and Wage Moderation in Puerto Rico's Experience with Export-Led Development* [hereinafter Rosado Marzán, *Successful Wage Moderation*], 9 ELECTRONIC J. COMP. L. 1, 6 (2005) (internal citations omitted) (discussing the Swedish case).

18. See Western, *supra* note 17, at 190–95.

19. On extension policies, see EUR. FOUND. FOR THE IMPROVEMENT OF LIVING & WORKING CONDITIONS, *EXTENSION OF COLLECTIVE BARGAINING AGREEMENTS IN THE EU 1* (2011), [https://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/efl154en.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/efl154en.pdf) [https://perma.cc/62S4-RKB7].

20. For many Puerto Ricans, Puerto Rico is a Latin American country in a colonial relationship with the United States. See JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* 161 (1997) (a former Supreme Court of Puerto Rico Chief Justice explains why Puerto Rico remains a U.S. colony). Despite the colonial relationship, Puerto Rico preserves its Hispanic identity and traditions. See RAMÓN GROSFUGUEL, *COLONIAL SUBJECTS: PUERTO RICANS IN A GLOBAL PERSPECTIVE* 9 (2003) (noting that Puerto Ricans “have a strong sense of identity and cultural nationalism” but it is “not expressed through political nationalism.” However, as a U.S. territory, U.S. laws apply to Puerto Rico. As the U.S. Federal Relations Act with Puerto Rico states, “[t]he statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States.” 48 U.S.C. § 734 (2012). The meaning of what “locally inapplicable” has been the subject of intense litigation and remains an open question. See *Developments in the Law: The International Place of Puerto Rico*, 130 HARV. L. REV. 1656, 1669–70 (2017) (internal citations omitted). Federal labor and employment laws have, thus, been applicable unless otherwise explicitly provided for by the U.S. Congress. See *N.L.R.B. v. Gonzalez Padín Co.*, 161 F.2d 353, 355 (1947) (the NLRA applies to Puerto Rico); see also MILES GALVIN, *THE ORGANIZED LABOR MOVEMENT IN PUERTO RICO* 132–33 (1979) (on FLSA’s applicability to Puerto Rico). The FLSA was not fully applicable until the late 1970s, enabling the island to experiment with other methods of wage setting, including with a wage board. *Infra* Part I.B.

wage boards in the United States. This article thus starts to incorporate these Latin American cases into U.S. policy discussions. It presents secondary and original data on the case of Puerto Rico, where U.S.-based unions used Puerto Rico's wage board, in existence until Congress extended the FLSA to Puerto Rico in the late 1970s, to unionize the garment sector of the island during the 1950s, '60s, and '70s. It also summarizes the Chilean experience in the literature review section below. I will explore the case of Uruguay in future work.

In introducing the case of Puerto Rico into the discussion of wage boards in the United States, the article does not necessarily intend to advise U.S. activists and labor law reformers to try reenacting the island's path, or to copy its 1950s law. The case of Puerto Rico cannot, singly, help chart the path for sectoral bargaining and union growth in the United States or anywhere else. Rather, the aim of this article is theoretical: it tries to conceptually clarify what it would take, based on the Puerto Rican experience, for minimum wage boards to aid unionization.

### *B. Summary of the Evidence*

The case of Puerto Rico, as detailed below, provides mixed evidence on the role wage boards can play to reinvigorate labor unions. It describes how the FLSA,<sup>21</sup>—the federal law providing for, among other things, minimum wages for all of the United States,—did not cover Puerto Rican employers until the late 1970s.<sup>22</sup> Congress exempted Puerto Rico, formerly the “poor house of the Caribbean,” from FLSA coverage to protect the island from onerous labor costs that its enfeebled, mostly agrarian economy allegedly could not afford.<sup>23</sup> In lieu of FLSA wage rates, the island had to set wages through a tripartite Minimum Wage Board (“Board”) administered by the government of Puerto Rico.<sup>24</sup> However, at first Puerto Rico's government did not use the Board assertively because it wanted to preserve its low-wage policy to attract U.S. manufacturing to the island. In the 1950s, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), seeing that unionized garment employers were moving to low-wage Puerto Rico, labeled the island a “haven for runaway industry” and directed its Washington lobbyists to secure the extension of the FLSA to

21. 29 U.S.C. §§ 201–219.

22. GALVIN, *supra* note 20, at 164.

23. *Id.* at 158. On the “poor house of the Caribbean,” see J. K. Galbraith, *Review: Puerto Rico's Economic Future: A Study in Planned Development* by Harvey S. Perloff, 61 *ECON. J.* 635, 635–37 (1951).

24. See GALVIN, *supra* note 20, at 132–36.

Puerto Rico.<sup>25</sup> When the AFL-CIO could not immediately get enough support in Congress for the change, the International Ladies' Garment Workers' Union (ILGWU), an AFL-CIO affiliate that was suffering drops in membership due to unionized garment shop relocations to Puerto Rico, started to directly unionize workers on the Caribbean island. While it waited for Congress to extend the FLSA to Puerto Rico, it also attempted to curb low wages there through collective bargaining.<sup>26</sup> The ILGWU not only sent professional organizers to make direct contact with the workers, but also used the Board and the minimum wage committees to deftly set wages sector-wide.<sup>27</sup> It led a two-pronged, sector- and plant-based strategy to organize workers, paired with assertive political muscle. Investing in organizing resources, bargaining for wages in the industry, and dangling FLSA extension as a sword of Damocles over Puerto Rico, the union was eventually able to unionize 39% of the island's garment workers.<sup>28</sup> Such organizing was remarkable, as only a few years earlier Puerto Rican union organizers had all but given up on organizing garment shops.<sup>29</sup> They perceived the garment industry as unorganizable because, among other things, workers were mostly women with allegedly no class identity or interest in joining unions.<sup>30</sup>

This article argues that Puerto Rico offers some lessons for U.S. sectoral bargaining through wage boards. First, sectoral bargaining *could* potentially help union growth and renewal. The case of Puerto Rico adds to a significant body of literature that has shown such relationships, albeit not consistent, between sectoral bargaining and union membership.<sup>31</sup> But, second, and perhaps most relevant to U.S. discussions on sectoral bargaining through wage boards, the evidence shows that while wage boards might be capable of revitalizing unions, only certain types of wage boards in spe-

25. *Id.* at 151.

26. *Id.*

27. *Id.*

28. César F. Rosado Marzán, *Dependent Unionism* (unpublished dissertation) 62 (2005). In its 1950s heyday, U.S. unions reached density levels of about 33% for male workers. Western & Rosenfeld, *supra* note 8, at 514. Therefore, 39% density in Puerto Rican garment production—arguably non-white and mostly female—was a stellar accomplishment.

29. Galvin, *supra* note 20, at 157–59.

30. See *infra* text accompanying note 150.

31. See Western *supra* note 17, at 195; Matthew Dimick, *Productive Unionism*, 4 UC IRVINE L. REV. 679, 683 (2014) (systems of sectoral bargaining, not being concerned with plant-level issues or job control show diminished level of employer opposition to unions). However, the OECD reports that other scholars have shown that extension policies might *reduce* incentives to join unions because it might foment free riding. See OECD, *Chapter 3: The Role of Collective Bargaining Systems for Good Labour Market Performance* 35, in OECD EMPLOYMENT OUTLOOK 2018, OECD iLIBRARY (2018) [https://www.oecd-ilibrary.org/sites/empl\\_outlook-2018-7-en](https://www.oecd-ilibrary.org/sites/empl_outlook-2018-7-en/index.html?itemId=/content/component/empl_outlook-2018-7-en) [https://perma.cc/U5KD-68A4].

cific political contexts actually do so. In Puerto Rico, the ILGWU effectively unionized the industry because it could put effective political pressure on the authorities to get a seat at the wage committees and make them function as the law intended. The Board existed through a “hard” law that gave unions the right, once in the wage committees, to bargain with employer and government representatives to set the wages for the industry. Having set the legally binding wages in the sector, unions could then pursue much less contentious issues with management at the plant level, such as bargaining for nominal wage increases and fringe benefits. In other words, the Puerto Rican bargaining structure helped resolve the bulk of the most contentious bargaining issues—wages—leveling the path for plant-based collective bargaining. New York’s law does not provide similar opportunities to the parties, and perhaps the lack of such opportunities explains why unions are still struggling to organize the sector. As this article more fully explains below, New York consults with civil society, including unions and employers, and other members of the public, but does not enfranchise a tripartite (labor, management, and government) body to set wages. Lacking a real bargaining institution where the parties can resolve those thorny matters, contentious bargaining issues are likely to persist in New York, even if the Commissioner consults with a wage board.

Finally, in Puerto Rico, the ILGWU had relationships with the U.S.-based garment employers setting up shops in the island. As this article details, those relationships spanned decades and were amicable. These amicable relationships helped the union receive neutrality and card check recognition<sup>32</sup> from the garment employers, which then facilitated wholesale organizing.

New York unions trying to organize fast food have anything but amicable collective bargaining relationships with the relevant employers. McDonald’s and other fast-food establishments have historically been anti-union. Hence, New York, lacking hard laws that enfranchise tripartite bodies to bargain and set wages, a collective bargaining culture in the fast-food industry amenable to union organizing, and, perhaps most importantly, an organized labor movement with sufficient leverage over politicians to push through important policy goals (such as being enfranchised within a wage board to set sectoral wages) seems to have a significant way to go before

32. Neutrality agreements, coupled with card-check recognition, is when an employer agrees to voluntarily recognize a union as a majority representative of the employees once the union proves it has such majority support: it is legally permitted by the National Labor Relations Act. See James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 821-22 (2005) (describing neutrality agreements and card check).

developing new incentives for unions to flourish through sectoral bargaining, at least when compared with Puerto Rico. All in all, Puerto Rico's success story shows that political power, hard laws, and social norms matter for a system of sectoral bargaining that effectively promotes labor union membership.

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Part I of this article is the Introduction. Part II summarizes the literature describing the links between sectoral bargaining and unionization, including the New York model. Part III describes the Puerto Rican case. Part IV analyzes both cases and, in doing so, highlights important differences. It particularly underscores how a legally enfranchised tripartite board set minimum wages in Puerto Rico, while in New York State the ultimate wage-setting authority is the Commissioner of Labor. Moreover, while in Puerto Rico the U.S. garment union brought with it collective bargaining relationships that it could leverage on the island, New York unions are trying to bargain with a sector (fast food) that has been historically resisted unionization. U.S. unions in Puerto Rico were able to effectively participate in the Board by flexing their political muscle, which they might not have in present-day New York. These normative differences, legal and social, and the political context, seem to explain why the ILGWU was able to organize more than a third of the once seen as un-organizable, Puerto Rican garment workers, while the Fight for \$15 movement has not realized its goal of creating a union. Part V concludes with further issues left open by this article and possibilities for further research.

## II. SECTORAL BARGAINING, WAGE BOARDS, AND UNION RENEWAL

Social scientists have shown that sectoral bargaining can spur union growth because, in such “centralized” bargaining systems, unions are concerned about equalizing conditions across heterogeneous groups of workers.<sup>33</sup> They are less concerned about bargaining plant-level issues, e.g., “job control,” for particular groups of workers. Therefore, in systems of sectoral bargaining, unions do not get into adversarial relationships with plant managers, or at least not to the extent unions and employers typically do in systems of employer-level or plant bargaining.<sup>34</sup> Moreover, once wages are set in the industry and all the employers must pay the same wages, employers are less concerned about how the price of labor may undermine their

33. Dimick, *supra* note 31, at 684–85.

34. *Id.*

competitive advantage vis-à-vis other firms, thus lowering their opposition to unions. Given less employer opposition to unions, labor unions should be able to recruit workers with more ease when they operate in sectoral or centralized bargaining environments.<sup>35</sup>

Sectoral bargaining contrasts with the model of collective bargaining institutionalized by the 1935 Wagner Act,<sup>36</sup> which takes the plant or employer as its starting point.<sup>37</sup> In plant or employer systems of bargaining, employers oppose unions more than in systems of sectoral bargaining, as described above, because the parties are in constant disputes over shop-level issues related to job control.<sup>38</sup> Moreover, employers oppose unionization because it may put them in competitive disadvantage vis-à-vis non-union firms, especially on issues of wages.<sup>39</sup> Additionally, the retail, i.e., plant-by-plant, nature of such organizing makes unions smaller and collective bargaining coverage narrower.<sup>40</sup> Overall, decentralized systems lack robust incentives for collective bargaining. They also lack the institutional tools to compress wages across the board and curb economic inequality.<sup>41</sup>

Most of the better-known systems of sectoral bargaining are located in the European Union.<sup>42</sup> Even though rare in the United States, given the dominant employer or plant-based Wagner model, Professor Andrias has argued that at least an incipient form of sectoral bargaining is developing in New York and elsewhere in the United States, charting a path for a “new labor law.” We now turn to the New York case.

### *A. New York, New Hope?*

In 2016, New York State decided to increase minimum wages in the fast-food industry significantly above the federal minimum wage.<sup>43</sup> The law established that in New York City all large fast-food establishments were to pay their employees at least \$11 an hour by December 31, 2016,

35. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769–70 (1983) (arguing that employer opposition to unions explains union decline).

36. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (1947)).

37. Andrias, *supra* note 4, at 16.

38. Dimick, *supra* note 31, at 683–84.

39. See Andrias, *supra* note 4, at 94.

40. *Id.* at 35 (noting that sectoral bargaining provides for much wider coverage, indeed, so broad that collective bargaining agreements amount to more general employment policy).

41. OECD, *supra* note 31, § 3.3.1 (discussing wage dispersion between countries with plant and sector-based systems of collective bargaining).

42. *Id.*

43. N.Y. LAB. LAW § 652 (McKinney 2016).

\$13 an hour by December 31, 2017, and \$15 an hour by December 31, 2018.<sup>44</sup> It also set wages at \$12.75 for most of the rest of the state, and built in periodic increases until the state-wide minimum wage reaches \$15 an hour by 2021.<sup>45</sup> The minimum wage increase came only after a long struggle spearheaded by the Fight for \$15 movement, a campaign funded and led by the SEIU.<sup>46</sup> A central aim of this campaign was to galvanize non-union, fast-food employees, who mostly earned wages close to the legal minimum, and get them active with the labor movement.<sup>47</sup> These workers have also been historically unrepresented by labor unions and in collective bargaining.<sup>48</sup> At the time of the New York minimum wage hike, wages in the fast-food industry were so low that 46% of the workers were on public assistance programs;<sup>49</sup> this rate is double the percentage of workers in other industries.<sup>50</sup> Almost 90% did not have health care insurance.<sup>51</sup>

The Fight for \$15 aimed not only to get fast-food workers a better wage, but also a “union.”<sup>52</sup> McDonald’s became the focus of this campaign.<sup>53</sup> Not only is McDonald’s an iconic firm, but is also a major franchisor—sometimes even seen as the original franchising company (it is not).<sup>54</sup> The Fight for \$15 also wanted to bind McDonald’s Corporation as a joint

44. *Id.* § 652 (a)(i). Smaller fast-food establishments should also reach \$15 an hour by December 31, 2019. *Id.* § 652 (a)(ii).

45. *Id.* § 652 (b).

46. Andrias, *supra* note 4, at 8.

47. See Michael M. Oswald, *Improvisational Unionism*, 104 CAL. L. REV. 597, 605 (2016) (arguing that groups like the Fight for \$15 aim to galvanize to workers improvisationally to see what kinds of new organizing successes they might be able to do in contemporary times).

48. In New York State, 60% of all workers employed by fast-food chains were enrolled in at least one public assistance program, and 75% earned the legally lowest wage. FAST FOOD WAGE BD., N.Y. DEP’T LAB., REPORT OF THE FAST FOOD WAGE BOARD TO THE NYS COMMISSIONER OF LABOR 1 (2015) [hereinafter N.Y. REPORT].

49. *Id.*

50. *Id.* at 1, 9.

51. *Id.* at 1.

52. Andrias, *supra* note 4, at 8.

53. *Id.* at 58–62; Oswald, *supra* note 47, at 602, 623 (describing the symbolic weight of large brand name stores such as Walmart and McDonald’s); STEVEN GREENHOUSE, BEATEN DOWN, WORKED UP THE PAST, PRESENT, AND FUTURE OF AMERICAN LABOR 246 (2019).

54. In 2019, McDonald’s was the largest franchisor in the United States. *Franchise 500*, ENTREPRENEUR, <https://www.entrepreneur.com/franchise500> [<https://perma.cc/ZME9-VHNZ>] (last visited on Dec. 18, 2019). In the U.S., franchising operations started in the 19<sup>th</sup> century pubs and railroad station restaurants. In the 20<sup>th</sup> Century, several restaurant chains started before McDonald’s, including Carvel (1934), Kentucky Fried Chicken (1930), Dairy Queen (1940); Dunkin Donuts (1950), and Burger King (1954). McDonald’s franchises started in 1955. Michael H. Seid, *Where It All Began: The Evolution Of Franchising*, FRANCHISE CHAT, [http://www.franchisechat.com/resources/where\\_it\\_all\\_began\\_the\\_evolution\\_of\\_franchising.htm](http://www.franchisechat.com/resources/where_it_all_began_the_evolution_of_franchising.htm) [<https://perma.cc/WP67-9YRH>] (last visited on Dec. 18, 2019). See also ERIC SCHLOSSER, FAST FOOD NATION 94-95 (2009).

employer of all McDonald's employees, especially those working in the franchises.<sup>55</sup>

The Fight for \$15 was to some degree incredibly successful. What perhaps some years earlier had appeared to be a movement with the merely aspirational goal of inspiring activism rather than attaining any specific goal, it in fact attained tangible results.<sup>56</sup> Workers across New York would get \$15 an hour in the industry, at least in the short- to medium-term. And this was not your traditional legislative process where lawmakers in the upper and lower houses of New York's assembly agreed on a compromise bill to increase the minimum wage, then had it signed by the governor. Unlike perhaps all other states, New York State has a minimum wage law that permits the Commissioner of Labor to convene minimum wage boards to determine how much wages should be increased in a particular industry.<sup>57</sup> At the insistence of the Fight for \$15 movement, which carried out strikes and protests for higher wages, Governor Cuomo asked the Commissioner to issue a report on wages in the fast-food industry.<sup>58</sup> The Commissioner, required by law to assess the "life and health of the workers," found that wages in the fast-food industry were inadequate to sustain either. The Commissioner then convened the wage boards to recommend wage levels that could satisfy the law's demands for wages adequate to sustain "life and health."<sup>59</sup>

The committee was composed of three representatives: Byron Brown, mayor of the City of Buffalo, representing the public interest, Michael Fishman, secretary treasurer of the SEIU in Washington, DC, representing labor, and Kevin Ryan, vice chair of the Partnership for New York City and former CEO of Gilt, the online apparel company, representing employers.<sup>60</sup> Many groups provided testimony to the wage board, including the activists with the Fight for \$15.<sup>61</sup> On May 6, 2016, the governor of New York signed the order.<sup>62</sup>

55. Andrias, *supra* note 4, at 58.

56. Oswalt, *supra* note 47, at 655.

57. N.Y. LAB. LAW § 653 (McKinney 2000) (Commissioner shall appoint a wage committee if he concludes that workers in a particular occupation are not receiving wages sufficient to maintain themselves and their health). *See also id.* at § 659.1 (Commissioner of Labor can reconvene minimum wage committees after 6 months wages had come into effect to reevaluate minimum wages and modify them, if necessary).

58. Andrias, *supra* note 4, at 64.

59. *Id.* at 64–65.

60. N.Y. REPORT, *supra* note 48, at 21.

61. *Id.* at 4–6.

62. Andrias, *supra* note 4, at 64 (internal citations omitted).

But while many sectors of civil society participated in the process to determine wages in the fast-food industry, labor and management did not negotiate and decide a wage hike that directly concerned them both.<sup>63</sup> Unlike traditional tripartite arrangements where management and labor, in conjunction with the state, agree on and set the terms of employment, including wages,<sup>64</sup> the New York system is one where the Commissioner has the final say on wages.<sup>65</sup> The tripartite wage boards can only provide a report and a recommendation.<sup>66</sup> While some employer and labor groups,<sup>67</sup> including the Fight for \$15, made their voices heard in front of the tripartite board, the Commissioner, not the wage board, issued the final order.<sup>68</sup>

In an interview, a Fight for \$15 leader argued that the process towards a \$15-dollar minimum wage in fast food was “collective bargaining.” As Professor Andrias recounts: “In a rare media interview published on August 30, 2015, the Fight for \$15 campaign director Scott Courtney reflected: ‘I would call what happened [in New York] collective bargaining, and I would call that a union,’ even though there was no ‘bargaining’ with employers.”<sup>69</sup> According to *New York Times* reporter Steven Greenhouse, Courtney described the Fight for \$15’s experience with the wage boards as “like collective bargaining on steroids.”<sup>70</sup> But spin should not be confused with reality. There was no collective bargaining *agreement* of any sort. There was no union negotiating terms with management, nor management with the union. And at the most general levels of comparative

63. *Id.* at 66–67.

64. For example, and as explained by Professor Anne Trebilcock, “In the tripartite context of the [International Labor Organization], the term ‘Member States’ encompasses the representatives of Employers and Workers, who alongside those of government take the decisions about which items will be considered for possible standard-setting.” Anne Trebilcock, *Putting the Record Straight About International Labor Standard Setting*, 31 COMP. LAB. L. POL’Y J. 553, 554 (2010).

65. The Wage Board only “inquires and reports.” N.Y. LAB. LAW § 653 (McKinney 2000). It can conduct public hearings, report, and make recommendations to the Commissioner. *Id.* §§ 655 (3)–(5). On the other hand, the Commissioner has the authority to order minimum wages and regulations. *Id.* § 657. Hence, the Commissioner sets the wages.

66. *Id.* § 655(5).

67. The employer groups who provided testimony to the New York fast-food wage board were: the Business Council for New York State, the Competitive Enterprise Institute, Dunkin Donuts, Employment Policies Institute, Fiscal Policy Institute, International Franchise Association, Manhattan Institute for Policy Research, National Federation of Independent Businesses, National Restaurant Association, New York State Association of Convenient Stores, New York State Restaurant Association. N.Y. REPORT, *supra* note 48, at 5–6.

68. Andrias, *supra* note 4, at 65.

69. *Id.* at 66.

70. GREENHOUSE, *supra* note 53, at 246.

industrial relations, unions are, at a minimum, organizations that negotiate workers' pay with employers.<sup>71</sup>

So, what happened in New York? The governor signed the Commissioner of Labor's order after some labor and employer groups, as well as other groups, had their say before a tripartite committee that could only make recommendations to the Commissioner. In fact, employers resisted attempts to raise wages and to organize workers, and still do.<sup>72</sup> McDonald's expressly stated that it would not meet with the Fight for \$15 or the SEIU because they do "not represent any employee in a McDonald's restaurant."<sup>73</sup> In this fashion, the New York minimum wage-setting system remains in the hands of the government's executive branch, and not of a tripartite wage board. The relevant parties also never resolved their differences. Labor just happened to have its champion, the governor of New York State, who imposed the sum of \$15 an hour on the fast-food industry.

After New York increased minimum wages, the SEIU created a new not-for-profit organization, Fast Food Justice.<sup>74</sup> It is a voluntary association of fast-food workers who advocate for themselves and their interests.<sup>75</sup> New York City has passed a new law, commonly referred to as the "Deductions Law," that helps fund the new organization by giving fast food employees the right to demand that their employers send dues directly from their paychecks to non-union, not-for-profit groups like Fast Food Justice.<sup>76</sup>

71. See Michael Wallerstein & Bruce Western, *Unions in Decline? What has Changed and Why*, 2000 ANN. REV. POL. SCI. 355, 356 (2000). For a critique of the Fight for \$15, see Nelson Lichtenstein, *Two Roads Forward for Labor: The AFL-CIO's New Agenda*, DISSENT (Winter 2014), <http://www.dissentmagazine.org/article/two-roads-forward-for-labor-the-afl-cios-new-agenda>, [<https://perma.cc/HH6C-NW4H>]

72. In the case of New York, some employer representatives did participate and provided testimony to the wage committees, even supporting some increases. However only the Vermont-based, openly liberal company, Ben & Jerry's Ice Cream, supported a wage hike to \$15 an hour. The New York Commissioner of Labor and the Governor thus extended minimum wages to up to \$15 an hour without explicit employer consent.

73. GREENHOUSE, *supra* note 53, at 248.

74. FAST FOOD JUSTICE, <https://www.fastfoodjustice.org> [<https://perma.cc/M5QS-24UC>] (last visited on Dec. 18, 2019). See also Max Zahn, *The Future of the Low-Wage Worker Movement May Depend on a Little-Known New York Law*, IN THESE TIMES (Aug. 15, 2017), <https://inthesetimes.com/working/entry/20429/low-wage-worker-unions-fight-for-15-New-York-workers-rights-fast-food> [<https://perma.cc/3T67-4EXW>].

75. FAST FOOD JUSTICE, *supra* note 74.

76. N.Y.C. ADMIN. CODE §§ 20-1301–1310 (2017). This law was part of a package of laws enacted by New York City on 2017, commonly referred to as the "Fair Workweek" laws. While these laws dealt mostly with scheduling rules, they included new rules giving employees of fast food employers the right to have part of their paychecks sent directly to non-for-profit organizations of the fast-food industry. Eli Z. Freedberg et al., *New York City Enacts Laws Limiting Employers' Flexibility To Staff Employees*, LITTLER NEWS & ANALYSIS INSIGHT (June 2, 2017), <https://www.littler.com/publication-press/publication/new-york-city-enacts-laws-limiting-employers-flexibility-staff> [<https://perma.cc/LQ8U-VHHE>].

At least 500 workers must pledge to send money to the group before employers are obligated to send the funds to the group.<sup>77</sup> Fast Food Justice seeks to maintain worker voice in future minimum wage studies and hearings, and perhaps in other forums.<sup>78</sup> It also seeks to advocate for workers' immigration, housing, and transportation concerns.<sup>79</sup> Currently, it is supporting a campaign for just cause termination for fast-food workers.<sup>80</sup> The *Times's* Greenhouse reports that the group counts 2,000 dues-paying members.<sup>81</sup> Its goal, however, is to get at least 10,000 of the 65,000 fast food workers and to build a \$1.8 million treasure chest to run its campaigns.<sup>82</sup>

But despite real gains, both by increasing wages for many workers and building a new organization, Fast Food Justice is certainly still trying to find a foothold within New York's labor institutions.<sup>83</sup> As we will see below, especially when compared to Puerto Rico in the 1950s–1970s, the absence of employer, union, and state collective bargaining and wage-setting authority shows the still inchoate nature of tripartism and sectoral bargaining in New York. True, the Commissioner must hear a tripartite committee that, in turn, has heard labor and employer groups, and the Deductions Law gives special funding rights to quasi-labor groups like Fast Food Justice. These legal norms may inch New York closer to sectoral bargaining and union renewal. But Fast Food Justice is still a fledgling group with no clear bargaining role or membership. The future of this organization as a labor market institution, a *union*, is unknowable.<sup>84</sup>

### B. Other Wage Board Cases in the Literature

Most models of sectoral bargaining known and discussed in the literature are in Europe.<sup>85</sup> None of those models of sectoral bargaining include

77. N.Y.C. ADMIN. CODE § 20-1303(3).

78. FAST FOOD JUSTICE, *supra* note 74.

79. GREENHOUSE, *supra* note 53, at 249.

80. Patrick McGechan, *After Winning a \$15 Minimum Wage, Fast Food Workers Now Battle Unfair Firings*, N.Y. TIMES (Feb. 19, 2019), <https://www.nytimes.com/2019/02/12/nyregion/fast-food-worker-firings.html> [<https://perma.cc/PU3Q-7DW6>].

81. GREENHOUSE, *supra* note 53, at 249.

82. *Id.*

83. See Kalena Thomhave, *Fighting for \$15—and a Union*, AMER. PROSPECT (Oct. 16, 2018), <https://prospect.org/article/fighting-15-and-union> [<https://perma.cc/YQ9W-PHXZ>] (detailing how workers still lack a bargaining agent in fast food).

84. See RICHARD B. FREEMAN AND JAMES L. MEDOFF, *WHAT UNIONS DO?* (1984) (describing roles of U.S. unions as institutions).

85. See Western, *supra* note 17, at 181 (describing an eighteen-country study focused on thirteen European countries, the United States, Canada, Japan, Australia, and New Zealand).

tripartite minimum wage boards. Some wage boards have been studied, but those cases seem to mostly lie in Latin America and in the U.S. Commonwealth of Puerto Rico.

One important study, now over 40 years old, is Professor Lance Compa's study of Chile's tripartite wage commissions, bolstered by the socialist government of the short-lived Unidad Popular (UP) coalition (1970–73).<sup>86</sup> In that study, Professor Compa described how the Eduardo Frei Montalva government (1964-1970), of the centrist Christian Democrats, recreated tripartite wage commissions, bodies where unions, employers, and government set wages for Chilean industry, after false starts in other eras.<sup>87</sup> But despite inscribing the law into the law books, the Frei government never convened the commissions because, according to the historical record, his advisors alleged that the times were “inopportune” for them.<sup>88</sup>

The UP government, however, was different. It wanted to use these commissions to support the government's overall economic plan for a socialist economy, where certain industries, such as textiles, could expand and grow while workers, exerting socialist solidarity, would moderate wage claims to generate a surplus that could then be redistributed throughout the population.<sup>89</sup> Another goal of the commissions was to generate incentives for workers to join unions and increase the overall power and influence of workers and organized labor in the Chilean political economy, necessary for a successful political environment for socialism. Indeed, Professor Compa mentions that unions and strike militancy grew significantly in Chile after the wage committees became active. Union activity grew because, first, the UP government, unlike its predecessors, relaxed unionization rules to ease their formation.<sup>90</sup> It also stopped using police and other instruments of formal state repression against unions and striking workers.<sup>91</sup> Second, the executive decree issued by the President to enforce the wage commission's law enfranchised the government to declare which unions and employers could bargain by sector.<sup>92</sup> Inevitably, the govern-

86. Lance Compa, *Labor Law and the Legal Way: Collective Bargaining in the Chilean Textile Industry Under the Unidad Popular* 32 (Yale Law Sch. Program in Law and Modernization, Working Paper No. 23, 1973), <http://digitalcommons.ilr.cornell.edu/workingpapers/98/> [<https://perma.cc/PAE4-7KWZ>] (internal citations omitted).

87. *Id.* at 33. Certain kinds of wage commissions, called *tarifados*, existed in Chile since the 1930s. See KARINA NARBONA, OBSERVATORIO SOCIAL, ANTECEDENTES DEL MODELO DE RELACIONES LABORALES CHILENO 6-9 (2nd ed. 2015); Law No. 6020 art. 11, Febrero 5, 1937, DIARIO OFICIAL [D.O.] (Chile).

88. Compa, *supra* note 86, at 32.

89. *Id.* at 40

90. *Id.* at 38–39.

91. *Id.* at 38–39.

92. *Id.* at 33.

ment favored pro-government—socialist and communist—unions, which tipped the scales politically against employers and other groups outside the ruling coalition of the UP.<sup>93</sup> Pro-government unions, emboldened, struck for an array of issues, including wage hikes.<sup>94</sup> While that militancy conflicted with the government's overall plan for wage moderation, it resulted directly from its political goal to support organized labor.<sup>95</sup>

Later, however, with the economy in disarray, and the Cold War at its height, a right-wing coup by the Chilean military toppled the UP government in 1973. It destroyed the tripartite committees, broke most unions, eviscerated democracy in the country, and brutally violated basic human rights.<sup>96</sup> Hence, while the wage commissions might have given a temporary boost to unions in Chile, their life was tied to the government, which came to an abrupt end with the 1973 coup.

A second case of wage commissions, much more positive, is Uruguay.<sup>97</sup> Uruguay has had a system of industry-wide wage commissions, called *Consejos Tripartitos de Salarios*, or Tripartite Wage Councils, since about the early-to-mid 1940s, when the country enacted Law No. 10.4499 of 1943.<sup>98</sup> As in Chile, the Uruguayan executive convened these councils.<sup>99</sup> Without an executive willing and capable of convening them—and these executives have mostly been left-of-center—the wage councils would not operate. In 2009, however, a new law gave the parties the right to request that the government convene the wage councils.<sup>100</sup> But despite the government's historical role in convening the wage councils (until 2009), different from Chile's UP tripartite wage committees, Uruguayan bargaining agents have had the reputation of acting autonomously; there has been no official government sanction or control of the parties, thereby providing a more genuine tripartite institution where all interests are independently represented.<sup>101</sup>

In Uruguay's tripartite wage councils, parties bargain over wages sectorally and set them by agreement. Parties typically bargain over other terms and conditions of employment for each industrial sector and draw

93. *Id.* at 37.

94. *Id.*

95. *Id.* at 41–42.

96. See Peter Winn, *The Pinochet Era*. In *THE CHILEAN MIRACLE: WORKERS AND NEOLIBERALISM IN THE PINOCHET ERA, 1973–2002* 14 (Peter Winn ed., 2004).

97. See Sergio Gamonal Contreras & Pablo Arellano Ortiz, *Negociación colectiva, autonomía y abstención legislativa*, 124 *REVISTA IUS ET PRAXIS* 173, 176 (2018).

98. *Id.* at 177.

99. *Id.* at 179.

100. Law 18.566, art. 9 (2009) (Uruguay).

101. Gamonal & Arellano, *supra* note 97, at 177–78.

collective bargaining agreements to such ends.<sup>102</sup> Uruguay's wage councils are said to have strengthened unions there.<sup>103</sup> In future work I will explore the Uruguayan case in more detail.

A third case where wage boards have aided unionization is the Commonwealth of Puerto Rico of the 1950s–70s. With the exception of my prior work,<sup>104</sup> this case has been studied in little detail. Using secondary and original data that I collected, below I show how Puerto Rico's Board helped U.S. unions organize the centrally important garment sector of the island.

### III. PUERTO RICO

Before it was incorporated into the U.S. overseas empire at the conclusion of the 1898 Spanish-American War, Puerto Rico was a Spanish colony. Thus, it has had a mixed labor and legal history that spans Latin American and U.S. Anglo-American traditions.<sup>105</sup> Included in that hybrid history is an experiment with sector-based wage committees and a tripartite Board to set minimum wages.<sup>106</sup> The experiment lasted about three decades, from the 1950s to the end of the 1970s, when Congress finally extended the FLSA to the island.<sup>107</sup> As explained in my earlier work, those committees helped U.S. labor unions co-determine minimum wages in Puerto Rico's important garment industry and to unionize almost 40% of its workers, after local Puerto Rican organizers had apparently abandoned the prospect.<sup>108</sup> This section summarizes that history. First, it shows that political power matters for unions to use the law effectively and get a seat at the table where decisions are made. In 1950s Puerto Rico, the AFL-CIO and its important affiliate, the ILGWU, got seats in the government's minimum

102. *Id.*

103. *Id.* at 178.

104. See Rosado Marzán, *Successful Wage Moderation*, *supra* note 17; Rosado Marzán, *supra* note 28.

105. Ennio M. Colón García et al., *A Mixed Legal System*, 32 REV. JURÍDICA U. INTER. P.R. 227, 229 (1998) (explaining that Puerto Rico has a hybrid legal system that incorporates civil law and common law traditions); JORGE FARINACCI FERNÓS, *LA CONSTITUCIÓN OBRERA DE PUERTO RICO* (Huracán ed., 2015) (describing how the influential Puerto Rican *Partido Socialista* of the first half of the 20<sup>th</sup> Century was instrumental in crafting a Puerto Rico constitution with an array of labor rights, as well as statutory laws, that protect Puerto Rico's workers to this date, beyond what U.S. federal laws, and most state laws, do); Jorge Farinacci Fernós, *The Search for a Wrongful Dismissal Statute: A Look at Puerto Rico's Act No. 80 As a Potential Starting Point*, 17 EMP. RTS. & EMP. POL'Y J. 125, 128 (2013) (arguing that Puerto Rico's dismissal protections go beyond what most American legal commentators comprehend because they have failed to study the relevant jurisprudence).

106. Rosado Marzán, *Successful Wage Moderation*, *supra* note 17, at 44–47.

107. GALVIN, *supra* note 20, at 164.

108. Rosado Marzán, *supra* note 28, at 62–65.

wage committees after they threatened to pursue relentless efforts in Washington to extend the FLSA to Puerto Rico, which would have frustrated Puerto Rico's policy of wage moderation for economic development. U.S. unions elbowed their way into Puerto Rico's halls of power by threatening to exert their own political muscle in the United States.

Second, the Puerto Rican Board and its minimum wage committees where the U.S.-based unions participated were true tripartite organizations where state, employer, and union representatives had authority to set wages through a process of sectoral bargaining. The parties settled at that sectoral level the guts of the economic terms governing workers in the vital garment industry of Puerto Rico, leveling the way for plant-based organizing and collective bargaining in the industry.

Third, the ILGWU mobilized its informal networks, namely its preexisting, collaborative relationships with employers in the U.S. mainland, to persuade employers to agree to card check and neutrality agreements, and bargain for nominal wage increases and marginal benefits. In other words, the union persuaded employers to extend its U.S. master contracts to Puerto Rico once the bulk of the economic issues had been resolved at the Board. Hence, the ILGWU's political power, its mobilization of binding law (through its participation in the wage committees), and social networks (pre-existing relationships with employers in the U.S.) paid off. At the end, it significantly unionized 39% of what had previously been considered a precarious, feminized sector resistant to unionization.

### *A. Political Power*

The Puerto Rican experiment with sectoral bargaining and a wage board likely started when the U.S. Congress excluded Puerto Rico from the FLSA of 1938, on the presumption that U.S. wage levels would hurt the agrarian and poverty-stricken island.<sup>109</sup> In lieu of the FLSA, Congress expected that Puerto Rico would use its Board to set minimum wages. It was originally created in 1941 to set industry-specific minimum wages and stabilize prices during World War II.<sup>110</sup>

The Board, however, lay mostly dormant in the immediate post-World War II period because official government policy mandated wage modera-

109. GALVIN, *supra* note 20, at 132–33.

110. *Id.* at 132–33. World War II compelled the U.S. government to coordinate industrial policy with organized employer and worker groups, all for the war effort, generating a sort of short-lived corporatism. See Nelson Lichtenstein, *From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era*, in *RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980*, 122, 122–23 (Steve Fraser & Gary Gerstle eds., 1989).

tion.<sup>111</sup> In 1947, Puerto Ricans elected their first governor, Luis Muñoz Marín, who came with a mandate to transform the “poor house of the Caribbean” into a more prosperous place. Heralding a populist message, Muñoz Marín and his Popular Democratic Party (“PDP”) won supermajorities in four consecutive elections.<sup>112</sup> In 1964, the PDP won a fifth consecutive election under Roberto Sánchez Vilella, Muñoz Marín’s successor.<sup>113</sup> The PDP ran a corporatist-type state where labor leaders were coopted or repressed if they did not follow the lead of the PDP.<sup>114</sup> In essence, Muñoz Marín copied the state corporatist styles of many of his Latin American counterparts.<sup>115</sup> He disciplined labor to follow the government’s plan for wage moderation—which the government argued was the key to attracting U.S. industry to the island.<sup>116</sup> An American chronicler of the Puerto Rican labor movement, Miles Galvin, thus noted that by the 1950s, “it was clear . . . that organized labor, with most of its leadership either neutralized or compromised, has been seriously weakened.”<sup>117</sup>

However, as U.S. factories, mostly in the garment industry, relocated to Puerto Rico in the 1950s, one thing complicated matters: the 1955 merger of the AFL and the CIO. In its inaugural conference, the AFL-CIO denounced Puerto Rico as a “haven for runaway industry,” and began an aggressive campaign to fully extend the FLSA to the island.<sup>118</sup> The AFL-CIO was ultimately unsuccessful in getting Congress to extend the FLSA to the island, but the political tug of war between U.S. unions and the Puerto Rican government did result in an eventual truce where important U.S. unions, including, most prominently, the ILGWU, began to collaborate with the Puerto Rican government.<sup>119</sup> Miles Galvin mentioned that the Puerto Rico government gave that union, and other AFL-CIO affiliates, a “free hand” to organize in Puerto Rico, as long as the unions supported the government’s program in Washington, DC.<sup>120</sup> Thereafter, and at the unions’ insistence, the Puerto Rican legislature passed Law 96 of 1956,<sup>121</sup>

111. GALVIN, *supra* note 20, at 146–48.

112. GALVIN, *supra* note 20, at 120 (noting the election of Roberto Sanchez Vilella, of the Popular Democratic Party, in 1964, and the triumph of the New Progressive Party in 1968).

113. *Id.*

114. *Id.* at 152–55.

115. Philippe Schmitter, *Still the Century of Corporatism?*, 36 REV. POL. 85, 86 (1974) (defining state corporatism and its presence in Latin America).

116. GALVIN, *supra* note 20, at 147–48.

117. *Id.* at 155.

118. *Id.* at 157.

119. See Rosado Marzán, *supra* note 28, at 77–78 (citing letter from David Dubinsky to Luis Muñoz Marín describing how they did not always see “eye-to-eye” but shared the same goals).

120. GALVIN, *supra* note 20, at 159.

121. Minimum Wage Act of Puerto Rico, 1956 P.R. LAWS 622.

which declared that the new wage policy was to equalize wages with the U.S. mainland through collective bargaining.<sup>122</sup> The ILGWU's president, David Dubinsky, achieved an important position of influence in Puerto Rico, and his union participated in the island's wage committees, heralding a new era for labor law, collective bargaining, labor politics, and even U.S.-Puerto Rico relations.<sup>123</sup>

### B. Binding Law

The Board had authority to "issue regulations and to exercise all other powers necessary to accomplish the purposes" of Law 96.<sup>124</sup> It had a duty to study conditions in industry.<sup>125</sup> It had robust investigative powers and could issue subpoenas to study said conditions.<sup>126</sup> It could also administer oaths and collect testimony for its investigations.<sup>127</sup> Before issuing a mandatory decree, it had to summon industry committees with an equal number of employer, employee, and public interest (government) representatives who would recommend draft decrees.<sup>128</sup> The Board had to provide the wage committees with the necessary experts ("lawyers, economists, stenographers, translators, clerks and other personnel") to perform their ministerial duties.<sup>129</sup> Like Board members, wage committee members could "administer oaths, summon witnesses and issue subpoenas."<sup>130</sup>

After a wage committee handed a draft decree to the Board, the Board had to call for public hearings to discuss the draft decree.<sup>131</sup> The law mandated that the public have an opportunity to express itself at these hearings. After the hearings, the Board could either accept or reject the draft decree.<sup>132</sup> If accepted, the draft decree had the force of law and became a "mandatory decree" establishing the minimum wages in that industry. If rejected, the draft decree could only be tabled; the Board could reconvene the same or a different committee to reconsider the draft decree and provide the Board with a new one.<sup>133</sup>

122. *Id.* §§ 1(b), (e), at 624-25.

123. Galvin, *supra* note 20, at 157-61.

124. Minimum Wage Act of Puerto Rico § 2(f), at 628.

125. *Id.* § 3(a), at 628.

126. *Id.* § 4(a), at 628.

127. *Id.* § 4(b), at 628.

128. *Id.* § 10(a), at 660.

129. *Id.* § 10(d), at 662.

130. *Id.* § 10(f), at 662.

131. *Id.* §§ 11(a)-(b), at 662-64.

132. *Id.* § 13(b), at 664-66.

133. *Id.*

The Supreme Court of Puerto Rico had the authority to review a mandatory decree.<sup>134</sup> However, the grounds for review were limited; the Supreme Court had to afford a high level of deference to the Board. It could annul or remand a decree, but only if parties challenging the decree proved that a minimum wage committee had acted “without authority or ultravires [sic],” or “because the Board acted without authority or ultravires [sic],” or “because the decree was procured through fraud.”<sup>135</sup>

Hence, the cases before the Puerto Rico Supreme Court challenging the validity of a mandatory decree hinged, in many situations, on the data used to produce a draft decree, and the reasonableness of the mandatory decree in light of such numbers. For example, in *Sierra v. Puerto Rico Cereal Extracts*, the Puerto Rico Supreme Court held that a mandatory decree was proper, largely in part due to the statistical evidence provided by the committee detailing production costs and competition considerations of the industry.<sup>136</sup> It noted that:

During the year 1952, the four enterprises under study had revenues of \$17,055,577, the total sum of sales being \$11,311,962. The gross benefit was \$5,743,615. Of such gross benefit, there was a deduction of general costs of sale and administration that totaled \$3,052,522, leaving a remainder benefit for operations of \$2,691,093. This benefit of operation equaled 15.8 per cent of the sales and 37.8 per cent over capital and accumulated remainder . . . .

After summarizing the extensive statistical study in its Determination of Facts, the Board concluded that, “Due to the previous considerations we believe that the economic situation of the beer industry in Puerto Rico contains a wide enough margin to increase the salaries that it pays to its employees.”

. . . .

. . . [T]he Board in every moment considered and had in mind the four companies that produced alcoholic beer and non-alcoholic beer, generally considered as malt. Such four enterprises constituted the beer industry in Puerto Rico. The conclusions of fact reached by the Board, acting on its powers, are conclusive in absence of fraud.<sup>137</sup>

The Court was deferential to Board and the numbers its minimum wage committees produced.

134. *Id.*

135. *Id.* § 29(b).

136. 83 P.R. 267, 271 (1961).

137. *Id.* at 271–72 (citations omitted).

### C. Social Norms

U.S.-based unions, threatening to throw a wrench into Puerto Rico's wage moderation policy, reignited the Board and its mandatory decrees. They revived labor as an autonomous actor in Puerto Rico, at least in the garment sector. They also revived the Board's tripartite structure, which had been quashed by Munoz Marín's incorporation of labor leaders into the PDP government and the state machinery. As they revived the Board, they also created conditions to organize workers in Puerto Rico and to bargain collectively with employers. How? Miles Galvin showed that, having set wages with employers at the Board, U.S. unions negotiated nominal wage gains above the stated minimum levels and fringe benefits through collective bargaining.<sup>138</sup> Here, preexisting, amicable relationships between U.S. employers and U.S. unions became fundamental. Binding law—and political power—was therefore not the end of the story. Unions' relationships with employers also helped. Having resolved most important economic matters, wages, at the Board and having been bargaining parties for decades prior to entering Puerto Rico, U.S.-based employers did not oppose the union's organizing efforts. Some, if not most of them, seem to have granted the ILGWU neutrality and card check recognition when the union asked for it.

We can see how the ILGWU received a neutrality and card check recognition in the fact statement of a 1960s NLRB case where local (Puerto Rican) union leaders accused the ILGWU of being a "company union."<sup>139</sup> In that case, testimony showed the close proximity between the ILGWU and U.S.-based garment shops. One U.S. garment shop manager told his workers the following when the ILGWU was organizing the shop:

I think you and me, the workers in Coamo, and the Company have gotten along well for many years. There is mutual respect and friendship. . . . [O]ver a year ago, we merged with a public corporation, Bobbie Brooks, the best and largest company in the apparel field. . . .

There are a number of benefits to use from the merger—steadier employment and greater availability of capital for new equipment. There are also certain obligations. One of these is the requirement that we sign a contract with the International Ladies' Garment Workers' Union if you want the union. Our parent company, Bobbie Brooks, has had contractu-

138. GALVIN, *supra* note 20, at 151. For example, in a union drive, the ILGWU promised workers the union would seek from management concessions for: "an additional holiday, additional vacation benefits, and a better welfare program. He further declared that the ILGWU would not sign a contract in Puerto Rico unless it provided for a wage increase of at least 5 cents per hour." Coamo Knitting Mills, Inc. and Federación Puertorriqueña de Sindicatos Democráticos, 150 N.L.R.B. 579, 586 (1964).

139. *Coamo Knitting Mills*, 150 N.L.R.B. at 595.

al dealings with this union for twenty-three years. . . . Seriously, the ILGWU has shown itself to be a responsible and intelligent Union, and we anticipate no problems if we deal with them.

During the next few days, representatives of Union will be in Coamo to solicit your membership. Although you are under no compulsion, we urge you to join. The Company will negotiate a contract with the union, which we believe will be mutually beneficial.<sup>140</sup>

Accustomed as we are to the anti-union stance of most employers since at least the 1980s, the employer's speech here presents a stark contrast.<sup>141</sup> The reason appears to lie, at least in important part, on the union's preexisting relationships with those managers.

Evidence that these pre-existing relationships mattered can be found in certain unfair labor practice cases filed by Puerto Rican unions against the ILGWU and the American garment shops. For example, in the case already cited, *Coamo Knitting Mills*, the pro-union attitude of garment employers appeared to be reserved for the ILGWU. As the case above attests, the employer favored the ILGWU, so much that a local Puerto Rican union called the Federación Puertorriqueña de Sindicatos Democráticos ("Federación") claimed that the ILGWU was a company union, in violation of Section 8(a)(2) of the NLRA.<sup>142</sup> According to the Federación, it was organizing employees at Coamo Knitting Mills, a 170-employee plant in the south of Puerto Rico owned by an Ohio corporation by the name of Colebrook Mills, itself a subsidiary of Bobbie Brooks.<sup>143</sup> As it was doing so, the head of the ILGWU in Puerto Rico, Jerry Schoen, arrived at the plant to give the aforementioned speech to the workers and collect union cards.<sup>144</sup> That open method of organizing, with employer neutrality and card check recognition, contrasted with the almost clandestine method of the Puerto Rican union, evidencing a lack of a collaborative relationship between the Puerto Rican union and the American employer, and the opposite for the ILGWU. Sec-

140. *Id.* at 596.

141. See Weiler, *supra* note 35, at 1776–78 (arguing that employer opposition and weak penalties against them contributed to U.S. union decline). Even European companies that typically abide with international labor standards regarding freedom of association typically oppose unionization campaigns, adopting the American way. See Lance Compa & Fred Feinstein, *Enforcing European Corporate Commitments to Freedom of Association by Legal and Industrial Action in the United States: Enforcement by Industrial Action*, 33 COMP. LAB. L. & POL'Y J. 635, 644 (2013) (detailing captive audience speeches, denial of access to union organizers, and coalescing with Chamber of Commerce employers against employee attempts to unionize).

142. *Coamo Knitting Mills*, 150 N.L.R.B. at 583.

143. *Id.* at 584.

144. *Id.* at 585–86.

ondary literature has detailed the collaborative relationships between the ILGWU and employers in Puerto Rico.<sup>145</sup>

Evidence of what the ILGWU bargained for and what was contained in the collective bargaining agreements further shows why U.S. garment shops favored the ILGWU and not other unions. The ILGWU would, in essence, request that the employer make concessions on just a few items, such as marginal wage increases (slightly above those set by the Board, sometimes five cents), holiday pay, vacation benefits, and a welfare program.<sup>146</sup> The rest of the contract incorporated the terms of the Bobbie Brooks contracts that the union had already bargained for in the continental United States; the unions and the employers in essence extended the non-economic terms of their U.S. master contracts to Puerto Rico.<sup>147</sup> These extensions of master agreements were even sometimes done in haste to preempt union elections called by non-ILGWU unions.<sup>148</sup> As the evidence in the Coamo Knitting Mills case recounted:

On the next day, July 18, two representatives of the Federación appeared outside the Company's plant, addressed the employees through a loud-speaker, and distributed literature on behalf of the Federación. Wolf [the company manager] obtained one of these leaflets. He then telephoned Schoen [the ILGWU Regional Director], told him what had happened, and read the leaflet's contents to him. In the same telephone conversation, Wolf and Schoen arranged to meet in San Juan the following day. Accordingly, on July 19 and again on July 20 Wolf and Schoen, accompanied by Sanchez [the Puerto Rican union officer of the ILGWU], met and negotiated the terms of a collective-bargaining contract. On the latter date the understanding was reduced to writing and signed. It provides, *inter alia*, for recognition of the ILGWU as the exclusive bargaining agent of all the Company's employees, with exclusions not here material; "a Union shop and the monthly checkoff of Union dues in accord with articles II and III of the Puerto Rican ILGWU Standard Independent Agreement"; five paid holidays; certain "vacation pay"; a wage increase of 5 cents per hour for all workers "without prejudicing the Union's po-

145. See GERVASIO GARCÍA & ANGEL QUINTERO RIVERA, *DESAFÍO Y SOLIDARIDAD: BREVE HISTORIA DEL MOVIMIENTO OBRERO PUERTORRIQUEÑO* 137 (1986). Left-wing union activists in the United States had already been denouncing the ILGWU as a union that negotiated sweetheart deals with employers. See Michael Myerson, *The ILGWU: A Union that Fights for Lower Wages* 51 (1968), <https://www.marxists.org/subject/jewish/myerson-ilgwu.pdf> [<https://perma.cc/BZV7-YJWZ>] (arguing that the policy of the ILGWU had been, for decades, to demand meager wage increases to protect jobs).

146. *Coamo Knitting Mills*, 150 N.L.R.B. at 586.

147. For example, in *Coamo Knitting Mills*, the evidence showed that since 1959 Bobbie Brooks and the ILGWU had "a single overall agreement to cover all Bobbie Brooks plants in the United States whether owned by Bobbie Brooks or any of its subsidiaries or affiliates." *Id.* at 591. However, the parties had an oral agreement that the economic terms of the master contracts would not apply immediately to any particular plant acquired by Bobbie Brooks, requiring specific contracts for such economic terms for each new plant. *Id.* at 592.

148. *Id.* at 587.

sition that additional increases are called for”; it lists certain “unresolved” questions; states that certain other specified matters were not discussed “because presumably covered by the Bobbie Brooks agreement”; and provides that it shall be effective from July 15, 1963, to December 31, 1964. Upon the execution of the agreement, Wolf notified Galinanez [the plant’s manager] to raise the wages of all employees 5 cents per hour, retroactive to July 15. Galinanez accordingly raised hourly rates 5 cents and refigured piece rates so as to provide an equivalent increase. The new piece rates were posted on the plant bulletin board the following Monday, July 22. The notices included the fact that the new rates had been made effective as of July 15 (internal citations omitted).<sup>149</sup>

Hence, the ILGWU brought with it its existing relationships, including master contracts, that built employers’ trust in that union specifically, and likely not others, which facilitated union organizing in the end. Likely aided by the Board, where most of the wage issues were resolved, the ILGWU could thus blend sectoral and plant-level strategies to organize the garment sector.

U.S. union strategies worked. As we can learn from the Coamo Kitting Mills case, Puerto Rican unions had to organize clandestinely and in sharp opposition to management. Moreover, other Puerto Rican organizers had just about given up on the sector. Prior to the ILGWU’s entry, a Puerto Rican union organizer funded by U.S. unions complained that “family traditions, Latin temperaments, moral standards, and interference with the freedom that a woman organizer must have in her private life” made it impossible for him to organize the sector.<sup>150</sup> In other words, the organizer blamed *machismo* for his incapacity to organize garment workers, most of whom were female. And yet, the ILGWU, a “*gringa*” union from New York, was successful in breaking through the alleged cultural and gender barriers when it decided to organize the sector directly. By the end of 1959, four years after the ILGWU decided to directly organize workers in Puerto Rico, the ILGWU was able to organize more than 7,000 workers, or about 22% of the 20,000 garment workers on the island at the time.<sup>151</sup> By 1973, the number of workers who had joined the ILGWU surpassed the 13,000 mark, or 39% of all garment workers in Puerto Rico.<sup>152</sup> These were tremendous successes in light of the prevailing view in the early 1950s that the sector could not be organized.

149. *Id.* at 587.

150. Rosado Marzán, *supra* note 28, at 61 (citing Letter from Miguel Garriga, Regional Director, Federación del Trabajo de Puerto Rico to David Dubinsky, President, ILGWU (Feb. 9, 1954) (on file with Kheel Center Archives Box 258)).

151. *Id.* at 62.

152. *Id.*

## IV. ANALYSIS

We can generate some hypotheses to help explain why U.S. unions were able to significantly organize the garment sector in Puerto Rico through sectoral bargaining, while the Fight for \$15 and Fast Food Justice still face challenges doing something similar in the New York fast food sector today. First, U.S. unions in Puerto Rico leveraged significant power against the government of Puerto Rico. They posed a significant threat to the island's low wage policy and federal exemption of the FLSA. While unions have significant influence in New York, they do not appear to wield the type of potentially disruptive power that the U.S. unions had over the poverty struck territory of Puerto Rico in the 1950s. Political power matters.

Second, U.S. unions in Puerto Rico used their power to wield representation rights under the law and co-set legally binding wages in the garment industry. In New York, unions provide mere opinions to the tripartite committees, which in turn only recommend wages to the Commissioner. The Puerto Rican model, where the Board set the wages, seems to have helped unions organize at the shop level, as it resolved most economic, shop-level disputes sectorally, diminishing employer opposition to union presence in the shop floor.

New York does not have a similar board. True, in New York State the Commissioner seeks advice from a tripartite board before ordering minimum wages adequate to sustain the "life and health" of workers, which is more than what happens in today's purely parliamentary minimum wage systems in most of the United States. However, a system in which wage boards give advice is leagues away from one where the unions, employers, and government leaders actually agree on wages. In the New York model, parties might still be dissatisfied with the level of minimum wages set by the Commissioner. Employers may not trust that unions will cease making demands on employers at the plant level even after the Commissioner has raised wages. In the end, adversarial relationships likely remain after the Commissioner's actions, doing little to set the stage for collective bargaining.

Puerto Rico offers a different story: Once wages were set by the parties through the wage committees and the Board's mandatory decrees, employers appeared willing to tolerate unions, or at least the ILGWU. Preexisting relationships with employers also seem to have helped neutralize employer opposition at the plant level. Employers knew what non-economic terms in the contracts they would be subject to—the ones in the

other contracts between the ILGWU and the garment shops in the United States—and that the union would very likely not press them more on wages, at least not significantly. The dual combination of wage board negotiations and preexisting collective bargaining relationships thus opened the way for neutrality and card check recognition for the ILGWU, which then spurred unionization.

The evidence also shows that employers did not welcome Puerto Rican local unions while they welcomed the ILGWU. But would employers have given neutrality and card check recognition to the ILGWU without its having dealt previously with wages at the Board? While it is impossible to answer that question given that we do not have an alternative universe to investigate, it is hard to envision the ILGWU being welcomed by U.S.-based employers without its first not having resolved the contentious wage issues at the Board. After all, the ILGWU was on the record as wanting to extend the FLSA to the island and curb “runaway industry,” a position that U.S. employers would have obviously resisted. On the other hand, what if the ILGWU never went on the record opposing runaway industry? Could it have agreed with employers on wages outside the structure of the Board? Perhaps, but doing so would have undermined its contracts in the United States. Mainland union members would have been displeased with their union if it was bargaining for lower wages in Puerto Rico, to their detriment. The Board gave an “out” to the ILGWU, since it could deflect some blame to the government of Puerto Rico for not agreeing on higher wages (as the union many times complained about). This is all to say that the evidence points to relevant effects of the Board on union organization in Puerto Rico’s garment industry, but it was certainly not the only important reason. Hence, while the evidence presented here makes it difficult to estimate with precision the independent effects of sectoral bargaining and the pre-existing relationships on overall unionization of the garment factories, the evidence strongly suggests that both conditions, sectoral bargaining and preexisting relationships, provided for union organizing in Puerto Rico’s garment shops.

Persistent employer opposition has proven to be a real obstacle in New York and elsewhere in the United States. “It takes two to tango,” as the saying goes, and U.S. employers don’t really want to dance.<sup>153</sup> Hence, New York sectoral bargaining is embryonic—if even that. It is impossible to

153. The case of Puerto does not help us to definitely discern if those pre-existing relationships were essential. It could have been the case that the relationships and trust built merely through the Board could have been enough for unions to organize the sector. Other case studies could help us answer this question. See *infra* Part II.B.

determine if it will develop into something where unions, as collective bargaining agents, will grow. Union insistence on using the present system to set minimum wages might just preserve the status quo, where no collective agents are enfranchised to formally bargain and set wages and, through the process, resolve important disputes that engender employer opposition to unions. In the extremely unlikely event that New York enfranchises collective bargaining agents to set wages, will employers want to willingly participate in that system? It is certainly not obvious that they will. In all, it's hard to say if the "new labor law" will take any particular shape in the United States. To the extent Puerto Rico charts any path towards union renewal through a wage board, it appears that positive outcomes, negative ones, or nothing at all, at least in terms of union membership, might ultimately prevail in the United States given the lack of union political leverage over the government, a binding system of tripartite wage-setting, and collaborative relationships between unions and employers.

#### V. CONCLUSION: SUCCESS IN PUERTO RICO, BUT NOT NECESSARILY ELSEWHERE

This article has compared New York's minimum wage law with Puerto Rico's 1950s experience. It has shown that, while both laws provide for labor, management, and government input to set wages, Puerto Rico's was much more traditionally tripartite; the three parties had to negotiate to set binding mandatory decrees, while in New York ultimate authority still lies with the state executive. Moreover, in New York, management need not participate in the wage boards and, in fact, in the latest campaign with fast food, the major companies did not co-set the wages. The Puerto Rico case thus shows the importance of a law that enfranchises the parties to bargain at a sectoral level.<sup>154</sup> It also shows the importance of union political power:

154. Professor Kate Andrias has suggested, however, that some employer lobbies and conservatives might argue that a true system of sectoral bargaining might face preemption challenges under the NLRA, since only NLRA-sanctioned processes legitimize bargaining on behalf of employees and employers in the United States. Andrias, *supra* note 4, at 91. Rules that alter the NLRA-sanctioned process, including any rules that alter the role that the NLRA lets the market play to structure collective bargaining has been said to be preempted by the NLRA. *Id.* While preemption analysis is beyond the limits of this paper, it appears that the challenge would be ultimately unsuccessful since wage boards are tripartite; they include the state as a necessary party that then extends the tripartite agreement to the rest of the sector. Sectoral bargaining through wage boards are not private agreements between a labor and management, which then get imposed by the state. Wages are co-negotiated with the state, which has authority to regulate minimum wages. In this sense, it is not the type of collective bargaining that the NLRA is concerned about regulating.

We should add that to the knowledge of this author, the Puerto Rican system was never successfully challenged on either preemption or delegation grounds. Professor Andrias has also noted that the wage

the AFL-CIO and the ILGWU could throw a wrench into Puerto Rico's low-wage policy justifying federal exemption from the FLSA, compelling the government of Puerto Rico to give a space for the ILGWU to participate in the island's wage committees. And, finally, social relationships and norms established after many years with U.S. employers also enabled the union to obtain neutrality and card check recognition. All of these elements seem to lack in the New York and the U.S. case. It is difficult to ascertain if wage boards can truly invigorate U.S. labor, or at least its union membership numbers.

So, under what conditions can wage boards help revitalize unions in the United States? To the extent the Puerto Rican case charts a path, it suggests that political power, binding law, and social norms matter. And if we were to follow the Puerto Rican path, New York (and the U.S.) have a very uphill path to trek. How to build political power, reform the law, and build collaborative relationships between unions and management is beyond the limits of this article, but these are the hard issues that U.S. legal reformers and activists will likely need to confront.

board system might also face delegation challenges, but these challenges seem also hard to prevail. *Id.* As professor Andrias states, "the statutes set forth a clear legislative policy position and then vest more specific decision-making authority in an expert body, without excessively delegating to private parties." Andrias, *supra* note 4, at 89.