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BENJAMIN SACHS INTERVIEWED BY MARTHA MINOW

To address the role of law in the ways that work and employment are sites of opportunity but also inequality in the United States, the *AJLE* editors turned to Professor Benjamin Sachs, Kestnbaum Professor of Labor and Industry at Harvard Law School and Faculty Co-Director of the Labor and Worklife Program at Harvard Law School. With thanks for the help from Madeleine Matsui's research and the OnLabor blog, https://onlabor.org/, founded by Professor Sachs, here is a lightly edited version of the interview conducted by Martha Minow on February 3, 2022.

Martha Minow: The current rate of unionization among workers stands at an all-time low of 10.3%. In your article *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, you propose that social movements and labor law can be used to counter the outsize political power wielded by the wealthy. How can and should labor law proceed: should there be more focus on strengthening unions or on alternative organizations and efforts?

Benjamin Sachs: Let me start by saying that there's an obvious chicken-and-egg problem here, which is true in so many contexts. In my view, we need labor law reform to facilitate the growth of strong organizations of working people, but we need strong organizations of working people in order to lay the political groundwork necessary for labor law reform.

And in a more nuts-and-bolts way, we have a filibuster problem. There was a labor law reform effort during the Obama administration that would have made a huge difference, but it was blocked by filibuster. The Pro Act would make a huge difference; it's being blocked by filibuster.[1] The political issue is profound.

1 The Protect the Right to Organize (PRO) Act would reform workplace organizing rules and provide workers with additional protections in organizing and bargaining. The bill passed the House of Representatives in March 2021 but was stalled due to lack of Senate votes necessary to overcome the filibuster. *See* Akela Lacy & Ryan Grim, *Chuck Schumer Tells Labor Leaders PRO Act Gets a Floor Vote with 50 Co-Sponsors*, The Intercept (Mar. 24, 2021), https://theintercept.com/2021/03/24/pro-act-labor-senate-vote-filibuster/.

https://doi.org/10.1162/ajle_a_00032

But, setting aside the political challenges, our *Clean Slate Report* lays out in 127 pages our answer to your question.[2]

I'd sum it up by saying we need a complete rewriting of the rules that govern the collective organization of workers.

The law aspires to enable working people to build countervailing power, but it fails. And yet that's exactly what we need labor law to do today. We need a law that enables workers to build countervailing power everywhere corporate power affects their lives. That means a law that allows workers to build power at the level of the workplace, it means at the level of the industry and in the corporate boardroom, and it means in American politics also.

Such a law would strengthen existing forms of worker organization, and it would give birth, hopefully, to new forms, from Works Councils at the level of individual firms to more encompassing sectoral unions that would represent all the workers in a sector or an industry. A law that did these things could help us build a more equitable politics and a more equitable economy.

That's no small task, but it's what's needed.

Minow: What opportunities does federalism open for experimentation at the state and local levels to strengthen the labor movement nationally going forward?

Sachs: We might make some progress in some states and cities if we could loosen up the rules of preemption. I've actually done some recent writing on this topic,[3] pointing out a statutory mechanism that the federal agency, the National Labor Relations Board, might use to free states to experiment. I have some optimism about that!

Minow: What about preemption and other elements of current law?

Sachs: Well, as you know, the Supreme Court has constructed a stifling preemption regime.

That regime, at first look, chokes off all avenues for meaningful experimentation by states and cities. But there are some exceptions to the preemption rules that leave states and cities some room, interstitial though it may be, to innovate.

A major exception, which probably deserves not to be called interstitial, is that any workers who are excluded from the federal law are not off-limits to the states. So if you're

2 Overcoming Federal Preemption: How to Spur Innovation at the State and Local Level, Clean Slate for Worker Power, Harvard Law School Labor and Worklife Program (May 2021), https://uploads-ssl.webflow.com/5fa42ded15984eaa002a7ef2/608c62c737ad3c6552162141_Clean%20Slate_Overcoming%20Federal%20Preemption_May%202021.pdf.

3 Benjamin Sachs, *Unpreemption: The NLRB's Untapped Power to Authorize State Experimentation*, OnLabor (Jan. 11, 2022), https://onlabor.org/unpreemption-the-nlrbs-untapped-power-to-authorize-state-experimentation/; Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States,* 124 Harv. L. Rev 1153 (2011); Sharon Block & Benjamin Sachs, *Is It Time to End Labor Preemption?*, OnLabor (Sept. 11, 2017), https://onlabor.org/is-it-time-to-end-labor-preemption/.

excluded from the National Labor Relations Act coverage, states have the authority to act on your behalf.

This includes agricultural workers, domestic workers, undocumented immigrant workers, and under current law probably gig workers. So there's room there, but—and this is my as-yet untested theory—there's this little-known provision of the federal statute, section 14(c), which says that if the Board decides that labor disputes in a particular industry are unlikely to affect interstate commerce then the Board has authority to cede jurisdiction to the states over that industry in that state.[4] The section has been interpreted to mean essentially that there's a small-business exception to the National Labor Relations Act. But it can be read differently, and it can be read in a way that if a state offers to, or does in fact, regulate the industry in a way that minimizes the chance that labor disputes in the industry will affect interstate commerce, the Board could cede jurisdiction to a state.

On this view, the statute thus contemplates a federal-state partnership between the Board and a state that's willing to protect organizing and bargaining rights. For example, if the state of California says, we're willing to take on regulating the labor relations in, say, the fast-food industry, we're going to give workers these following rights, we're going to implement the following rules, and we think that that will eliminate or limit the prospect for labor disputes. If the Board agrees, the statute gives the Board the discretion to authorize California to go and do it.

Minow: In the meantime, the COVID-19 pandemic has both exposed and exacerbated the gaps in privileges and protections between vulnerable essential and service-sector workers and better-off workers who were able to work from home and adapt to dangerous conditions. A survey of essential workers during the pandemic showed that union members had safer workplace practices and conditions than nonunion members. Is there an opportunity now for the labor movement and union organizing to draw attention to the benefits of union organizing and membership, as well as the tendency of strong unions to reduce inequality?

Sachs: I love that question. There's a lot about the pandemic that ought to spur, and in fact has spurred, worker organizing.

On the downside, it shows just how bad things have gotten for so many workers and how, on the one hand, they're being rightly told that they're essential and that they're heroes, and on the other hand, they're showing up and being required to work in deadly work environments. The upside is that the tightening labor market and conditions have increased worker activism and worker militancy in many sectors across the country, leading to the upsurge in organizing, at Starbucks and at Amazon, for example, including the

4 Section 14(c), 29 U.S.C. § 164(c), was enacted as part of the 1959 amendments to the National Labor Relations Act. *See* Sachs, *Unpreemption*, *supra* note 3.

recent historic union victory at the Amazon warehouse on Staten Island. But it shouldn't be so hard to organize a union. And that's labor law's fault.

Minow: So what can we learn from the recent union victories at Amazon and Starbucks?

Sachs: I think what the campaigns have in common is incredible bravery of a group of workers who have put up with too much for too long. And the other thing that they have in common is massive corporations' willingness to deploy every resource, legal and illegal, at their disposal to stop workers from forming a union.

The victories are of historic significance because these are, in the contemporary economy, bellwether industries much as auto companies were bellwether industries in the 1930s when union victories ushered in a new era in United States political economy. But again, it shouldn't be so hard to win a union-organizing campaign. Workers shouldn't have to put everything on the line to get a union. And the fact that it is so hard is a failure of labor law.

Minow: How important is the strike tool for those who are allowed to use it?

Sachs: Gosh, it is labor's most important tool. It is often, and in many instances desirable that it is, held in reserve.

But it is labor's most important tool. Without access to this tool, the labor movement is going to be weakened. And again, we have a story about law. Workers do enjoy a statutory right to strike, but thanks to a Supreme Court doctrine that's now decades old, employers have a right to "permanently replace" striking workers. This is kind of a sad joke among labor law practitioners and scholars: the law says you cannot be fired for striking; you can just be permanently replaced. In other words, the right to strike has been eviscerated in profound ways.

In many contexts now we are seeing an upsurge in strike activity, and you know, there were massive strike waves before there was the Wagner Act.

Minow: That tight market in some labor markets may be helpful. It's risky, obviously. The teachers in Chicago were effective in threatening around COVID-related practices.

What do you view as the most urgent reforms that are needed to adequately support and protect growing numbers of gig workers? Is the California reform helpful, and if so, how? What's promising for gig workers?

Sachs: It is a complicated question. My view is that gig workers—like Uber drivers, like DoorDash delivery drivers—are appropriately classified as employees under existing law.

Workers and industries ought to be able to have flexible employment relationships, but the definition of "employee" is capacious enough that you could have an Uber-like work system with workers treated as employees. Uber drivers, like everybody else, ought to have the right to form a union.

But, as my other comments will indicate, I'm not a huge fan of the existing labor law. Even if we succeeded in classifying gig workers as employees, that wouldn't be enough to solve the problems that you're alluding to. The gig sector is one where I think [the] sectoral bargaining approach [might be successful]. Maybe even a tripartite sectoral

organizing approach is worth trying. The idea would be instead of organizing firm by firm or bargaining unit by bargaining unit, you would have a union or a group of unions that represent all workers in the gig space. The union or unions would then sit down with the employers in the gig space and maybe also with a state government, and bargain standards and rules for the sector.

One of the great virtues of collective bargaining, including sectoral collective bargaining, is that it is flexible, and it is responsive to the needs of a given industry. I'd be optimistic that if you had that kind of structure in a state like California, you could come up with rules that worked for the industry but also protected the workers.

Minow: Really interesting. In the meantime, the definitions of "employee" may have become somewhat outdated with work-from-home since the pandemic. And more and more people have digital-related jobs.

Sachs: So, you know, work always changes. Work is always changing and evolving, and the law needs to respect that and respond to that. But the fact that someone is working from home should not determine their employment rights; if their terms and conditions of work are set by a firm, then we want to count them as an employee of that firm.

I am very worried that the remote work will be our new subcontracting, franchising, and independent contracting. It's what David Weil describes as the "fissured workplace," subdividing work and undermining the protections of labor law.[5] We have to be on guard about that possibility.

Minow: Also the digital revolution: what do you think about the role of AI in the workplace? It's been much criticized for amplifying bias in hiring and employment, though the *Wall Street Journal* has a story today about how it can reduce bias.[6] In the meantime, digital platforms like LinkedIn and other devices bypass employment laws such as those against racial bias—employers can see a photo before they even decide to interview a candidate. What is promising and what's worrying about these new technologies when we think about inequality?

Sachs: I don't consider myself an expert on AI, though increasingly I think I need to become one. We have had a marvelous series on the blog written by a Harvard Law student, Hannah Hilligoss.[7] What she taught me and convinced me and what seems right to me is that algorithmic hiring methods do not eliminate bias and can inject new forms of

5 David Weil, The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It (2017).

6 Nish Parikh, *Understanding Bias in AI-Enabled Hiring*, Forbes (Oct. 14, 2021), https://www.forbes.com/sites/forbeshumanresourcescouncil/2021/10/14/understanding-bias-in-ai-enabled-hiring/?sh=2520f6927b96; Richard Vanderford, *AI Could Cut Hiring Biases as Companies Make Push to Find Workers, Proponents Say*, Wall St. J. (Feb. 2, 2022), https://www.wsj.com/articles/ai-could-cut-hiring-biases-as-companies-make-push-to-find-workers-proponents-say-11643797804.

7 Hannah Hilligoss, *What's the Deal with Algorithmic Discrimination?*, OnLabor (Mar. 10, 2021), https://onlabor.org/whats-the-deal-with-algorithmic-discrimination/.

bias and compound existing forms of bias. Just like we need better mechanisms for rooting out bias in human hiring, we need to do that for the algorithmic processes too.

Minow: Here's a question I have after watching, actually, a relatively successful effort by a union. Something good recently—the diversity within the relevant group included sharp conflicts over what to bargain for, and it is really hard to navigate, so when some people are working twelve-hour shifts and other people don't have that situation but instead have worries about objecting to an employment practice without facing retaliation. What are the lessons that can be learned from all these years of union work? We know histories of racism and sexism, and other differences within the employee groups. People allegedly in the same industry really had very different interests, and who speaks for whom?

Sachs: That's a very thorny and important question. One way it's dealt with, or how unions attempt to deal with it, is by forming smaller bargaining units that have different contracts for different kinds of workers. The upside of separating bargaining like that is that you can be more responsive to the needs and interests of a smaller group of people. The downside is, as you disaggregate bargaining units, you disaggregate power. And so you can be more focused but less effective.

Another approach is to have one bargaining unit, one union, so to speak, and negotiate for different job categories. Inevitably, if there's one table and one contract, the temptation or the risk is that the interests of one group are traded off against the interests of the other. There's a certain inevitability to that, but it needs to be addressed and mitigated.

Some trade-offs we can't allow. And what segments of the union movement did allow for too long was prioritizing the interests of white workers over the interests of workers of color and prioritizing the interests of male workers over the interests of women workers. The union movement has better addressed these issues in recent years but still has work to do in order to resolve them more fully.

When the question is, how do we deal with the somewhat conflicting interests of new hires versus folks who have been around for a much longer period of time, the principles of solidarity are critical.

Minow: What about people who are under pressure from their supervisors to lie in order to make it seem like the contract and the law is complied with, when it is not?

Sachs: This is one powerful example, of many such examples, of what happens as a result of the power differentials in the workplace, which are far too vast.

At the end of the day, you address that by addressing the power differential. Again, that's what labor law is supposed to be about.

Minow: One of the tools to help is transparency—making workplace interactions more visible—but this also could lead to more constraints on workers as they are monitored or otherwise face surveillance. What do you think about that?

Sachs: Transparency is important, but even transparency fails if there's not a relatively equal distribution of power. So I would return to the question of how you empower workers to demand their own rights in the workplace.

Minow: Given features of our current situation, what are your predictions or your assessments: opinion-poll support for the workers suggest support for labor,[8] and President Biden is perhaps the most pro-labor president in a long time. And the tight job market should help increase leverage for workers. What policy options are possible now? What would you most like to see progress on?

Sachs: This in some sense the million-dollar question today. The tight job market will help workers, but workers need a way to institutionalize their power to institutionalize their voice.

A tight job market empowers individual workers in certain ways that are real, and I'm grateful for those. But in order to effect systemic change, we need to equip workers with some kind of institutional mechanism to channel that power. That's what unions are. Institutions now don't have to be unions like those we've had for the last fifty years, but there must be some form of collective organization of workers. To get that you need law; I mean, that's what labor law is.

I was disappointed the PRO Act failed, and I don't think there's really much of a chance of that passing given the filibuster. There's some hope that some of the enhanced penalties that were in the PRO Act will make it through the reconciliation process. And, again, in my view, what we really need is a fundamental reform along the lines we proposed in Clean Slate.[9]

In the meantime, we do have the most progressive general counsel of the National Labor Relations Board ever. Jennifer Abruzzo has been phenomenal. She is trying to rewrite the way that the prosecutorial arm of the agency operates; she is using every possible mechanism she can within the constraints of this broken law to advance the interests of working people. She deserves enormous credit. President Biden deserves credit for appointing her. If there's one person in the federal government who is really the strongest advocate for unions and working people in my political memory, it's Jennifer Abruzzo. She should get credit for what she's doing.

Minow: I have so many more questions. I can't resist one about globalization and the downward pressure on all kinds of jobs—pay, conditions—because of globalization. It affects white-collar jobs, all kinds of jobs.

Sachs: It feels like an age-old question at this point. I don't have a pat answer to the really important question. There are industries that are more or less insulated from global

8 Public opinion of unions has also reached a historic fifty-year high. A recent Gallup poll showed that sixty-eight percent of Americans approve of unions. *See* Megan Brenan, *Approval of Labor Unions at Highest Point Since 1965*, Gallup (Sept. 2, 2021), https://news.gallup.com/poll/354455/approval-labor-unions-highest-point-1965.aspx.

9 Sharon Block & Ben Sachs, Clean Slate for Worker Power: Building a Just Economy and Democracy, https://www.cleanslateworkerpower.org/.

economic pressure, though. If you want to hire an Uber driver in San Francisco, your Uber driver has to be in San Francisco.

At the end of the day, if the labor market is bigger than a domestic jurisdiction, which it undoubtedly is, then unionization efforts and labor legislation or employment standards legislation need to be global also.

Minow: And I guess my last one concerns occupational health and safety. The Supreme Court has told us that the transmission of COVID in the workplace is not enough to justify workplace protections.

Sachs: I hope this doesn't seem like a non sequitur, but your question reminds me of a student's reaction to Clean Slate's proposal for sectoral bargaining. She said, "But won't the Supreme Court reject such an effort as a non-delegation problem beyond the scope of administrative authority because it is beyond what Congress has specified?" Of course it's important to think through those doctrinal questions very carefully. It's true that if you're going to design progressive legislation, it ought to be designed in the manner that's least likely to be invalidated by the Supreme Court. At the same time, the justices have so many tools, now, that they're willing to deploy: the First Amendment, the Takings Clause, non-delegation, you name it—so any progressive legislation is just at risk.

We need a new kind of answer to your question. It may be what do we do about the Supreme Court; it may be thinking more and more about popular mobilization. It's a long-winded way of saying it's not just OSHA, it's nearly every area of law. With powerful tools in their hands—like the First Amendment, like the Takings Clause, like non-delegation—the Supreme Court can strike down nearly all progressive legislation. We need a response that's as broad as the challenge.

Minow: Then there's money in politics, and John Coates's research says that half the First Amendment cases benefit corporations and trade groups.[10]

Is there anything else I should have asked you? Thanks for electrifying students and pointing them to meaningful careers.

Sachs: Let's talk another time about what the coming generation can do.

10 John C. Coates, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 Const. Comment. 223 (2015), https://scholarship.law.umn.edu/concomm/546/.