Using Business Law to Build Labor Power

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This Essay seeks to initiate a conversation amongst scholars who study labor law and social movement lawyering regarding the role of business law in building labor power. Social movement lawyering literature tends to focus on how law shapes social movements. However, the use of business law as a tool for building worker power is under-explored. That is a mistake. This Essay brings insights from Law and Political Economy, social movement, and business law literature into conversation with each other. It then provides four concrete examples of how the labor movement can use business law, specifically bankruptcy and corporate law, as tools for building worker power.

Introduction

Is it possible to use business law to build labor power? Yes, it is. For example, in 2022, Microsoft announced that it had entered into a neutrality agreement with the Communications Workers of America (CWA) that gave over 10,000 workers a pathway to forming a union without interference from company management.[2] CWA arrived at this agreement because it assented to Microsoft's $69 billion dollar acquisition of Activision, a video game developer that vehemently opposed allowing its workers to unionize.[3] Companies engaged in an acquisition have to meet a number of regulatory hurdles, including obtaining pre-merger approval from the Federal Trade

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[2] Press Release, *CWA, Microsoft Announce Labor Neutrality Agreement*, Commc'n Workers of Am. (June 13, 2022), https://cwa-union.org/news/releases/cwa-microsoft-announce-labor-neutrality-agreement [https://perma.cc/EK5M-M36C].

[3] *Id. See also* Sarah Parvini, *What the Microsoft Activision Deal Means for Labor Unions*, L.A. Times (Oct. 13, 2023, at 14:31 PT), https://www.latimes.com/entertainment-arts/business/story/2023-10-13/microsoft-activision-merger-labor-unions [https://perma.cc/VVQ3-7W5C].

Commission (FTC) after conducting a review for antitrust concerns.[4] In this case, the FTC sought to block the merger, and CWA filed an amicus brief in support of Microsoft's purchase.[5] Ultimately, the merger went through and CWA began to organize thousands of workers.[6] CWA won the right to organize in this case because it combined on the ground protests with a sophisticated understanding of business law; specifically, the business acquisition process.[7] CWA's actions demonstrate that the union understood that businesses are institutionally weakest when they are either about to go public or are about to merge due to their need for regulatory approvals from public institutions, and took advantage of that to extract an important victory.

It might seem incongruous to think about unions using business law to build power for workers and to reverse the decline in union density, from 20.1% of the workforce being union to 9.9%, that has occurred due to labor law's ossified framework.[8] Unions often exercise their power through direct action.[9] Scholars who study social movements have carefully studied power

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[4] CT Corp. Staff, *Creating an M&A Due Diligence Checklist*, Wolters Kluwer (Apr. 4, 2024), https://www.wolterskluwer.com/en/expert-insights/creating-an-ma-due-diligence-checklist [https://perma.cc/Z3CC-KJ69]; Fed. Trade Comm'n, *Merger Review*, https://www.ftc.gov/enforcement/merger-review [https://perma.cc/U3YG-HMMX] (last visited Mar. 1, 2026).

[5] Press Release, *CWA Files Amicus Brief in Support of Microsoft-Activision Merger, Citing Positive Impact on Labor Market for Game Workers*, Commc'n Workers of Am. (Sept. 13, 2023), https://cwa-union.org/news/releases/cwa-files-amicus-brief-support-microsoft-activision-merger-citing-positive-impact [https://perma.cc/2FR2-H5K7]. *See also* Jamie Lang, *Communications Workers Of America Backs Microsoft/Activision Blizzard Merger, Says It Will Make Unionizing Easier*, Cartoon Brew (Sept. 14, 2023), https://www.cartoonbrew.com/studios/cwa-microsoft-activision-blizzard-labor-neutrality-agreement-232598.html [https://perma.cc/F9CC-88SS].

[6] Mike Scarcella, *Microsoft Wins Appeal in FTC Challenge to $69 Bln Activision Blizzard Deal*, Reuters (May 7, 2025, at 13:27 EDT), https://www.reuters.com/legal/microsoft-wins-ftc-appeal-challenging-69-bln-activision-blizzard-deal-2025-05-07/ [https://perma.cc/PJY2-EPVA].

[7] *See, e.g.*, Shannon Liao, *Activision Blizzard Staff Walk Out, Protesting Loss of Abortion Rights*, Wash. Post (Jul. 21, 2022), https://www.washingtonpost.com/video-games/2022/07/21/activision-blizzard-roe-walkout/ [https://perma.cc/3T68-UCXE].

[8] Cynthia Estlund first identified that labor law is "ossified" because it has not been subject to renewal through democratic processes. *See* Cynthia Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527, 1530 (2002). Most theories for the renewal of labor law in response to the problem of labor law "ossification" examine it through the lens of democratic renewal and public law tools. *See, e.g.*, Diana S. Reddy, *After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions*, 132 Yale L.J. 1391, 1403-04 (2023) (summarizing scholarship in responding to the ossification thesis and situating renewal efforts through the lens of public policy); Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 Yale L.J. 546, 631-35 (2021) (synthesizing lessons from labor law to supplement political reforms in the interest of building renewed political and labor power). Ted Van Green, *Majorities of Adults See Decline of Union Membership as Bad for the U.S. and Working People*, Pew Rsch. Ctr. (Aug. 27, 2025), https://www.pewresearch.org/short-reads/2025/08/27/majorities-of-adults-see-decline-of-union-membership-as-bad-for-the-us-and-working-people/ [https://perma.cc/B9F5-MZSZ].

[9] Direct action is a form of civil resistance to injustice. Brooke Davies & Daniel Oyolu, *Power, Protest, and Political Change*, Harv. Negot. & Mediation Clinical Program, at 4, https://hnmcp.law.harvard.edu/power-protest-and-political-change/ [https://perma.cc/2YWA-N7MJ] (last visited March 1, 2026) ("More than 250 forms of nonviolent direct action have been identified, including marches, boycotts, picketing, sit-ins, and prayer vigils, to name a few."); *see, e.g.*, Diana S. Reddy, "*There Is No Such Thing as an Illegal Strike": Reconceptualizing the Strike in Law and Political Economy*, 130 Yale L.J. 421, 452-458 (2021).

dynamics on behalf of marginalized communities, and have even explained how transactional law provides an important tool for capturing mobilized power.[10] However, there is less work that has been done exploring business law as a social movement lawyering tool for building worker power.[11] That is a mistake. Unions are in such a weakened state that they cannot afford to discard the use of any lawful tool available to build back power for workers and close the yawning wealth inequality gap that exists in the United States.[12] To do this, unions should reclaim their social movement origins and leverage any tools they can. CWA's filing of a brief during the merger review process required under antitrust law resulted in CWA obtaining concessions. It also provides an example of why movement lawyers interested in building power for marginalized communities should consider incorporating business law into their tool bag.

This Essay brings attention to certain underutilized tools and urges social movement lawyers and scholars to further examine the utility of business law concepts such as corporate governance law and bankruptcy law in building worker power. This Essay contributes to that movement lawyering literature by providing some further practical examples of how movement lawyers could use corporate and bankruptcy law to build up union power by increasing union representation and bargaining power.[13]

Part I of this Essay briefly reviews pertinent literature on movement law, labor law, and business law and brings them into conversation with each

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[10] *See, e.g.*, Alina Ball, *Transactional Community Lawyering*, 94 Temp. L. Rev. 397, 424 (2022) (discussing how community lawyering theory, and its antecedents such as social movement lawyering, have undertheorized the role of transactional lawyering in social movements); Ariana Levinson, *Founding Worker Cooperatives: Social Movement Theory and the Law*, 14 Nev. L.J. 322, 324 (2014) (applying law and sociology to explain the founding of worker owned cooperatives arising out of a social movement).

[11] *See, e.g.*, Scott Cummings, *Movement Lawyering*, 2017 Ill. L. Rev. 1645, 1684 (noting how businesses used litigation to battle unionism); Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 Stan. L. Rev. 821, 880 (2021) (discussing how business elites resist grass roots movement work, but remaining quiet on business law); Alexi Nunn Freeman & Jim Freeman, *It's About Power, Not Policy: Movement Lawyering for Large-Scale Social Change*, 23 Clinical L. Rev. 147, 155 (2016) (same); Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. Pa. J.L. & Soc. Change 25, 31 (2011) (noting that progressive movements have adopted lessons from corporate lawyering, but that the value of mimicry is limited because the struggle to form the corporation is much different from the struggle of marginalized groups); Elizabeth Ford, *Alt-Legal Services: Re-Visioning Lawyers' Role in the Fight for Worker Power*, 46 Berkeley J. Emp. & Lab. L. 1, 7 (2025) (reimagining legal representation within movement lawyering models to build worker power through representation on wage theft and other public rights based litigation).

[12] *See* Inequality.org, *CBO Income Before Taxes and Transfers, 1979-2021*, Tableau Pub. (Nov. 5, 2024), https://public.tableau.com/app/profile/ips.inequality/viz/CBOIncomeBeforeTaxesandTransfers1979-2021/Dashboard1 [https://perma.cc/TGT7-CXRY].

[13] Numerous scholars have demonstrated that unions can and have been using corporate governance tools for building power for workers. *See, e.g.*, David Webber, The Rise of the Working Class Shareholder: Labor's Last Best Weapon 15-41 (2018) (describing how the United Food and Commercial Workers Union engaged in a strike and a shareholder campaign); Matthew T. Bodie, *Labor Interests and Corporate Power*, 99 B.U. L. Rev. 1123, 1136-37 (2019) (observing that unions have significant power to deploy their pensions but have not done so forcefully).

other. Part II exposes how unions have used corporate law to build power. It makes two concrete suggestions that movement lawyers interested in using corporate law to build union power can advise their clients on:

1) Leveraging the interest in treating workers as human capital to legally justify the use of union pension funds to support organizing campaigns, and,
2) Leveraging union pension funds to act as vehicles for getting workers seated onto the board of directors at corporations.

Part III discusses how unions can use bankruptcy tactically. It makes two strategic suggestions–that union counsel should:

1) Deploy a bargaining for the common good framework in bankruptcy as a strategy for bringing workers into corporate decision-making spaces, and
2) File tactical restructuring petitions under Chapter 11 of the Bankruptcy Code to shed tort debts arising out of a union organizing drive or collective bargaining dispute.

These suggestions respond to Fisk and Reddy's call for scholars to study unions as social movements instead of bureaucratic organizations.[14] To be clear, this Essay does not seek to avoid the "smash mouth truth" that unions must continue to rebuild the labor movement through the strife-filled process of organizing on the ground.[15] Instead, it makes a case for movement scholars and movement lawyers to add business law to their movement lawyering toolkit as a complement to on the ground worker mobilization.

I. Grounding Business Law in Theories of Movement Lawyering

This Part brings theoretical work on movement lawyering into conversation with business law theory. The movement lawyering model has four elements. Movement lawyering is accountable "to social movement constituencies in defining and executing legal strategy," skeptical "about the power of law by itself to transform society without concurrent political organizing," committed to changing norms, and "committed to coordinating legal

[14] Catherine L. Fisk & Diana S. Reddy, *Protection by Law, Repression by Law: Bringing Labor Back into the Study of Law and Social Movements*, 70 Emory L.J. 63, 74 (2020) (arguing that it is valuable to study the behavior of unions as a social movement despite bureaucratic tendencies).

[15] Michael C. Duff, *Of Courage, Tumult, and the Smash Mouth Truth: A Union Side Apologia*, 15 Emp. Rts. & Emp. Pol'y. J. 521, 521 n.4, 530 (2012) (arguing that labor conflict must be won by workers in much the same way that American football games are won through brutal physical superiority over their adversary, and noting how employers have lived with that truth in labor-management relations). *See also* Desirée LeClercq, *Labor Strife and Peace*, 15 U.C. Irvine L. Rev. 216, 221 (2024) (arguing that judges undermine labor law's dispute resolution mechanism when they fail to protect the role of strife in labor relations).

and political advocacy in context-specific mobilizations to achieve sustainable social change."[16]

The movement law framework can accommodate the incorporation of business law because it is a trans-substantive lawyering approach. Lawyers and scholars "cogenerate" ideas alongside their movement clients and representatives.[17] On its face, movement law does not discriminate against the deployment of business law.[18] Rather, it requires lawyers to orient themselves to the goals of a social movement and to bring the law to bear on meeting the goals of a mobilized client using integrated advocacy.[19] The key part of this approach to lawyering is that it is agnostic regarding the doctrinal knowledge or lawyering skills brought to bear on a problem facing a social movement. It seeks to knock down the divisions that exist between forms of advocacy and the spaces in which those contestations take place.[20]

The movement lawyering frameworks can accommodate business law as a power-building tool. Corporate governance scholars and scholars of worker-owned cooperatives have done excellent work documenting how corporations have changed behavior in response to social movements from both the political left and the political right.[21] Indeed, corporate law scholars are keenly aware that social movements and corporate governance have a dialectical and synergistic relationship, and some see corporate law as having potential for doing social good or even being useful to social movement actors.[22] That makes sense because corporate governance battles

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[16] Cummings, *supra* note 11, at 1651.

[17] Akbar, *supra* note 11, at 876.

[18] Ball, *supra* note 10, at 433-35.

[19] Cummings, *supra* note 11, at 1691-96.

[20] *Id*. at 1695.

[21] *See, e.g.*, Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 Harv. Bus. L. Rev. 441, 445 (2019) (arguing that despite challenges, corporate law holds significant promise for social change); Tom C.W. Lin, The Capitalist and the Activist: Corporate Social Activism and the New Business of Change 4-5 (2022) (same) (hereinafter The Capitalist and the Activist); Jennifer S. Fan, *Woke Capital Revisited*, 46 Seattle U. L. Rev. 421, 433-35 (2023) (documenting how pressure from stakeholders causes corporations to change their practices); Stephen M. Bainbridge, *Corporate Purpose in a Populist Era*, 98 Neb. L. Rev. 543, 568-73 (2019) (outlining divergent politically conservative views of corporate governance); Brenda Cossman, *#MeToo and the Corporation in Popular Culture*, 43 Seattle U. L. Rev. 607, 637-39 (2023) (analyzing changes in popular culture that fueled changes in corporate governance and decision-making in the wake of the #MeToo movement); Akshaya Kamalnath, *Social Movements, Diversity, and Corporate Short-Termism*, 23 Geo. J. Gender & L. 449, 474-75 (evaluating the impact of social media derived social movements on corporate governance); Levinson, *supra* note 10; Ball, *supra* note 10. *But see* Matthew T. Bodie, *Labor Relations at the Woke Corporation*, 79 N.Y.U. Ann. Surv. Am. L. 171, 173 (2023) (arguing that corporations are experiencing a renaissance in how they view themselves and treat employees who align with values espoused by the American political left, but that "missing from this renaissance in corporate theory, however, are employees' collective representatives: organized labor").

[22] *See, e.g.*, Lin, *supra* note 21, at 116 ("The rise of corporate social activism in contemporary society presents an incredible opportunity that could be mutually beneficial to activists and capitalists."); Lisa Fairfax, *Social Activism Through Shareholder Activism*, 76 Wash. & Lee L. Rev. 1129, 1165 (2019) (calling for shareholders to support corporations in doing good and acting justly).

mirror discussions over the nature of democracy.[23] The literature on corporate governance clearly documents how shareholders use the shareholder proposal process to pursue both economic and political goals.[24] Scholars of both movement law and corporate law are addressing many of the same ills and use much of the same language to describe what they are seeing but doing so without bearing the potential benefits that could arise from engaging with each other.

To begin constructing the bridge between movement law theory and business law theory and moving them toward practical insights requires using two support beams: (1) law and political economy ("LPE") theory and (2) labor law theory. LPE theory and labor law theory serve as the support beams to the work of this Essay because those bodies of literature theorize about how workers are subordinated to powerful economic interests *and* accommodate social movement praxis as a modality for addressing that subordination. The LPE literature is a response to the law and economics framework and what it styles as the "Twentieth-Century Synthesis."[25] This literature accuses business law of focusing on efficiency to mask questions concerning the distribution of wealth and power in both private and public law.[26] LPE literature has helpfully shined a light on these distributional questions in economic and commercial law matters that typically remain within the sphere of private law and the market.[27] Further, this literature includes the study of social movements as a tool for building countervailing power and correcting economic distributional problems that arise as a result of the apolitical economy.[28]

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[23] *See, e.g.*, Katherine Jackson, *Corporate Populism: Musk's Challenge to the Rule of Law and Equity* (July 31, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5205633, at *2-4 (arguing that populism and democratic theory can explain Elon Musk's dominance over companies he is affiliated with); Lisa Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 Ohio St. L.J. 53, 64-78 (2008) (outlining shareholder governance debates that sound in debates over democracy such whom has access to the ballot, term limits for office holders, and whether a vote is won with a simple majority, or super-majority).

[24] *See, e.g.*, Geeyoung Min & Hye Young You, *Active Firms and Active Shareholders: Corporate Political Activity and Shareholder Proposals*, 48 J. Legal Stud. 81, 84 (2019) (finding that "shareholders that are politically active are more likely to submit proposals" and "shareholders that display a larger divergence in political orientation from management submit shareholder proposals much more actively. In particular, Republican-leaning firms. . .receive more shareholder proposals on social issues, especially from public pension funds, religious groups, and shareholders of socially responsible investment (SRI) funds.").

[25] Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 Yale L.J. 1784, 1790 (2020).

[26] *Id*. at 1791.

[27] *Id.* at 1790.

[28] *See, e.g.*, *Symposia: LPE and Social Movements*, LPE Project https://lpeproject.org/symposia/lpe-and-social-movements/ [https://perma.cc/9ZJQ-5X92] (last visited Mar. 1, 2026); *see also* Alvin Velazquez, *Labor Organizing in an Age of Legal Chaos*, LPE Blog (Apr. 14, 2025), https://lpeproject.org/blog/labor-organizing-in-a-time-of-legal-chaos/ [https://perma.cc/6285-BB7G].

Labor law theory provides the second support beam for bridging movement law insights with business law theory and moving toward actionable insights. There are three reasons why labor law bridges the chasm between social movement lawyering techniques and business law insights. First, labor activists have already used corporate law as a tool for building worker power.[29] Second, labor law theory is grounded in exploring how workers mobilize into unions to challenge distributions of wealth created by corporations empowered by a shareholder primacy model of law to exploit them. Third, the past, present, and future of labor unions is grounded in wrestling with the tension of being a social movement *and* bureaucratic organization.[30] Labor unions have accumulated some resources and have a financial model that renders them a self-sustaining social movement organization.[31]

These features put labor unions in a unique position to deploy corporate law as a tool and to innovate on strategies for achieving the goals of the labor movement. Of course, there have been some scholars who have objected to labor using their capital, or from embracing business law in fear that doing so will take away the focus of unions from worker mobilization.[32] That argument has merit, but it is one of caution.[33] Movement lawyers must be sensitive to these competing considerations and advise their clients with the understanding that building worker power to ameliorate the pernicious effects of inequality is the goal that must guide union lawyers, not the development of clever legal theories.

The next Part of this Essay will discuss how lawyers for the labor movement can deploy corporate law to build worker power. The Essay focuses there first because that literature is much more developed. After that, Part III will examine how bankruptcy law can serve as a tool for building labor power.

II. Deploying Corporate Law as a Tool of Labor Movement Lawyering

Movement lawyers and scholars should continue to examine and consider deploying corporate law as a movement tool for the construction of worker power. The labor movement has recently used tools available through corporate law alongside on-the-ground organizing to force companies to collectively bargain. CWA's fight to organize Activision was simply

[29] *See* Webber, *supra* note 13, at 256-57.

[30] *See* Fisk & Reddy, *supra* note 14, at 73-74.

[31] Matthew Ginsburg, *Nothing New Under the Sun: "The New Labor Law" Must Still Grapple With the Traditional Challenges of Firm-Based Organizing and Building Self-Sustainable Worker Organizations*, 126 Yale L.J. F. 488, 496-98 (2017) (explaining how unions use dues to be self-sustaining and how other proposals to reform labor law pose real challenges to building a self-sustaining organization).

[32] *See* Webber & Velazquez, *infra* note 65, at 260-62.

[33] *See id.*

one example. Worker organizing at Starbucks provides another. In that case, baristas at a Starbucks in Buffalo, NY first organized into a union as early as 2021.[34] That first act of organizing led to a nationwide effort on the part of Starbucks baristas to organize despite significant opposition from the company at the time.[35] Bargaining stalled. The Strategic Organizing Center, underwritten by the Service Employees International Union (SEIU), sponsored a slate of three candidates to run for seats on Starbucks's Board of Directors to address problems in labor relations. The coffee giant agreed to engage in collective bargaining for over 12,000 baristas nationwide, and, in exchange, the Strategic Organizing Center dropped its bid.[36] Negotiations amidst a strike are ongoing as of the time of this writing as bargaining is at a standstill.[37] The Starbucks case demonstrates how innovative engagement in corporate governance coming alongside workers organizing on the ground has the potential for building union power.

The Starbucks example also serves to illustrate the labor movement's tension-filled relationship with corporate law. On the one hand, the labor movement has experienced how capitalists use corporate law to justify the mistreatment of workers in the pursuit of profit. In fact, it is fair to say that the labor movement arose in response to workers feeling oppressed by the demands of the corporate form and first banded together to challenge it.[38] The majority view amongst scholars is that corporations are still governed by Milton Friedman's famous statement that the social purpose of corporations is to increase their profits.[39] Friedman's statement simply crystallized the

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[34] Alina Selyukh, *Starbucks Workers Form Their 1st Union in the U.S. in a Big Win for Labor*, NPR (Dec. 9, 2021 at 15:28 ET), https://www.npr.org/2021/12/09/1062150045/starbucks-first-union-buffalo-new-york [https://perma.cc/N4A2-XWA5].

[35] Andrea Hsu, *Starbucks Workers Have Unionized at Record Speed; Many Fear Retaliation Now*, NPR (Oct. 2, 2022 at 05:00 ET), https://www.npr.org/2022/10/02/1124680518/starbucks-union-busting-howard-schultz-nlrb [https://perma.cc/U8QU-XEM9].

[36] James Adams, *Starbucks Resolves Boardroom Conflict with Labor Unions*, CEO Times (Mar. 5, 2024), https://ceotimesmag.com/news/starbucks-resolves-boardroom-conflict-with-labor-unions/ [https://perma.cc/U8QU-XEM9].

[37] Ananya Gairola, *Bernie Sanders Slams Starbucks Again, Says CEO Earns $96 Million In Four Months While 12,000 Union Workers Still Wait For Contract*, Benzinga (Nov. 29, 2025 at 01:27 ET), https://www.benzinga.com/news/restaurants/25/11/49124840/bernie-sanders-slams-starbucks-again-says-ceo-earns-96-million-in-four-months-while-12000-union-workers-still-wait-for-contract [https://perma.cc/EQ5B-J3VV].

[38] Philip Dray, There is Power In a Union: The Epic Story of Labor in America 68-69 (2011) (telling the story of one of America's first strikes in Lynn, MA).

[39] Milton Friedman, *A Friedman Doctrine–The Social Responsibility of Business Is to Increase Its Profits*, N.Y. Times (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/D6LF-YBUZ]. Some scholars have taken the view that corporations should look to maximize "triple bottom line" value-social, environmental, and monetary. *See, e.g.*, Christopher D. Hampson, *Bankruptcy & Benefit Corporation*, 96 Am. Bankr. L.J. 93, 101-03 (2022) (describing the debate between scholars who align with Milton Friedman's vision of corporate purpose and believe a board of directors should focus their efforts solely on shareholder wealth maximization, and those who advocate a broader set of interests in line with team theories of production propounded by Lynn Stout and Margaret Blair).

truth of what generations of workers demanding better worker placed conditions, wages, and job opportunities had experienced into a pithy sentence—profits come before them. On the other hand, the Strategic Organizing Center used a tool that hedge funds use in hostile takeovers—running an insurgent slate of board candidates against company management's wishes, as a tool to build worker power and support collective bargaining.[40]

Even though corporations use shareholder wealth maximization theory to justify paying workers low wages, labor unions engage with corporate law to build power for workers. They do so in two ways. First, labor engages in corporate social responsibility campaigns.[41] Charlotte Garden describes how those campaigns aim to shine attention on the legally questionable practices that employers engage in.[42] Those campaigns bring attention to employers' business models and their compliance with labor, employment, and commercial law.[43] Unions typically want workers to vote on union representation with minimal employer interference as a way of concluding these campaigns. Some of these campaigns have successfully organized new members. Others ended with employers bringing Racketeer Influenced and Corrupt Organizations (RICO) Act claims against the unions as a tool for chilling union organizing and worker speech.[44]

The other way in which unions engage with corporate law is using what David Webber calls "labor's capital" to effectuate change.[45] In his book, Webber examines how the Safeway supermarket chain triggered a five-month strike by 59,000 unionized workers when it cut their wages and benefits.[46] He tells the story of how traditional labor action failed. However, with the assistance of the California Public Employees' Retirement System (CalPERS), workers organized a shareholder revolt. They ran a successful campaign to unseat three members of Safeway's Board of Directors and head off those wage concessions.[47] The shareholder's ire arose because then-Safeway CEO Steven Burd purchased a number of regional grocery

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[40] Ortenca Aliaj and Patrick Temple-West, *How Unions Are Fighting a Boardroom Battle at Starbucks*, Fin. Times (Jun. 24, 2024), https://www.ft.com/content/08c00024-3dc7-4d48-9dcd-670f93016973 [https://perma.cc/ZN67-B4GC].

[41] Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 Fordham L. Rev. 2617, 2621-23 (2011).

[42] *Id.* at 2622.

[43] *Id.*

[44] *Id.* at 2623-25.

[45] Webber, *supra* note 13, at xi-xii (describing labor's capital as worker pension funds that are invested for their benefit). In 2003, Safeway existed as a Delaware corporation. Safeway Inc., Annual Report (Form 10-K) (Jan. 3, 2004). Delaware law ties the power to vote on key corporate decisions at annual shareholder meetings as a foundational right of being a shareholder. 8 DE Code § 211 (2025); 8 DE Code § 212(a) (2025) and *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988) ("The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.")

[46] Webber, *supra* note 13, at 2, 20.

[47] *Id.* at 6-7.

chains. In doing so, he overextended the company's credit card. To pay the bill, he turned to cutting workers' wages while still paying himself as a worker strike became imminent.[48] The problem with Burd's maneuver is that the strike caused a major drop in Safeway's share price.[49] In response, institutional shareholders, who serve as the custodian for the retirements of hundreds of thousands of workers, used the voting power of their shares and ran the corporate election campaign to unseat David Burd as CEO and Chairperson of the Board.[50]

Webber makes a powerful observation about why investment managers wanted to come alongside labor not due to political alignment, but rather economic alignment.[51] As he states, "[p]rivate investment managers like Blackstone and even KKR, whose politics and business practices might ordinarily place them in opposition to labor interests, may find themselves backing labor interests because they want to manage the trillions of dollars held in public pension funds—labor's capital. The political implications of this are underappreciated and underexploited by labor."[52]

There are plenty of relatively recent examples of labor successfully using its capital as well. Union pension funds and their allies have filed shareholder resolutions that put into action some of the insights that LPE literature made concerning how money and power is distributed. For example, SEIU-affiliated pension funds succeeded in convincing BlackRock to conduct a racial-equity audit to review how its actions affected marginalized communities.[53] Former attorney general Eric Holder issued a comprehensive report that made many key findings and suggested areas for BlackRock to improve that the company committed to improving.[54] His report led to a wellspring of other companies choosing to undertake similar assessments.[55] That pension fund, along with other union-affiliated and public pension funds, convinced shareholders at both Apple and Starbucks to conduct third-party assessments of compliance with their own stated commitments to respecting a worker's right to form a union under International Labor Organization (ILO) standards.[56] Apple hired Jenner and Block to conduct an assessment.

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[48] *Id.* at 2-4.

[49] *Id.* at 3.

[50] *Id.* at 23.

[51] *Id.* at 7.

[52] Webber, *supra* note 13, at 7-8.

[53] *See* Alvin Velazquez, *Making Racial Equity Audits Effective*, 99 Chi.-Kent L. Rev. 123, 124-25 (2024).

[54] *Id.* at 150.

[55] *See* Casey Sullivan & Danielle Walker, *Inside the growing Big Law business of racial equity audits, where big companies hire outsiders to investigate their impact on civil rights*, Business Insider (Dec. 20, 2021), https://www.businessinsider.com/citi-blackrock-racial-equity-audits-covington-2021-12.

[56] N.Y.C. Comptroller, Investor Review of Jenner & Block's Workers' Rights Assessment Report (Prepared for Apple, Inc.) (2024), https://comptroller.nyc.gov/wp-content/uploads/2024/02/Investor-Review-of-Apple-Workers-Rights-Assessment-Report.

The New York City Comptroller's Office criticized the report for lacking rigor and failing to interview workers.[57]

There are other uses for which labor can use its capital—but doing so requires combining movement lawyering tools with a deep understanding of corporate law and the Earned Retirement Income Security Act (ERISA) for deploying those tools effectively. These successes have required labor to convince pension funds that their interventions are value-producing for investors and workers, *and* in the best interests of the corporation as a producer of profits to distribute to shareholders. The concept of fiduciary duty forces labor to walk this tightrope. Specifically, ERISA governs the investment decisions of private sector retirement funds. It requires that pension plan trustees make investment decisions for the "exclusive purpose" of providing beneficiaries with retirement benefits and for defraying reasonable costs.[58] ERISA does not apply to public pension plans,[59] but most of them adopt ERISA. At times, investment managers apply these principles and invest worker retirement funds in a way that harms the very workers whose funds are invested with them.[60] ERISA's safeguards effectively codify the Friedman doctrine and its application to workers' capital. Despite these doctrinal limitations, unions have been able to succeed in using worker capital to push for changes in corporate boardrooms using the tools of corporate governance.[61] The fact that this convinced the managers of capital to support its causes provides a roadmap for moving forward with this work.

The next phase for movement lawyers interested in using labor's capital to build worker power resides in mobilizing the interest in human capital management ("HCM") as a tool for using labor power. HCM provides a justification under ERISA for unions to file shareholder proposals benefitting labor interests. Specifically, HCM scholars view employees not as an expense item, but rather as a form of capital that brings value to a business. Since 2010, there has been an intellectual movement amongst corporate governance scholars exploring how HCM creates firm value. As George Georgiev observes, HCM has two elements. First, HCM "views workers as

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pdf; Paul Venery, *ESG Resolution Roundup: Worker Rights Proposal Secures Majority Support at Starbucks*, Responsible Investor (Mar. 31, 2023), https://www.responsible-investor.com/esg-resolution-round-up-workers-rights-proposal-secures-majority-support-at-starbucks/ [https://perma.cc/C5XH-SEQ2].

[57] *See* N.Y.C. Comptroller, Investor Review of Jenner & Block's Workers' Rights Assessment Report (Prepared for Apple, Inc.) (2024), https://comptroller.nyc.gov/wp-content/uploads/2024/02/Investor-Review-of-Apple-Workers-Rights-Assessment-Report.pdf

[58] 29 U.S.C. § 1104(a)(1)(A)(i)-(ii).

[59] *Id.* § 1003(b)(1).

[60] For a more extensive treatment of the way that ERISA's fiduciary duty rule and shareholder primacy in corporate law results in labor's capital being invested in projects that harm their interests, *see* David H. Webber, *The Use and Abuse of Labor's Capital*, 89 N.Y.U. L. Rev. 2106, 2161-67 (2014).

[61] *See* Webber, *supra* note 13, at 115-36 (explaining how unions filed resolutions successfully challenging corporate power by separating the role of board chair from chief executive officer).

productive assets, serving a similar, though of course qualitatively different, function as capital assets, such as machines." Second, HCM views workers through their ability to deliver long-term value.[62] The idea that companies should discuss their human capital as an investment, rather than solely an expense, has gained purchase with the Securities and Exchange Commission (SEC).[63] While certainly viewing humans as part of a capital structure orients executives to think more carefully about firing workers, even that literature is divided between those who explicitly accept collective bargaining as having a role in managing human capital and those who remain silent on the matter.[64]

Labor should not abandon the power of its capital.[65] The anti-ESG backlash does not mean that labor movement scholars and lawyers should abandon the deployment of corporate law or corporate governance.[66] Rather, that backlash means that organized labor needs to reassess how and where to deploy corporate law to build worker power in consultation with their mobilized clients. Corporate law is like labor law in that both doctrinal frameworks are shaped by law *and* social movements.[67] Charting a path for winning corporate governance reforms benefits from bringing movement lawyering mindsets into conversation with corporate law literature.

For social movements to truly influence corporate governance requires examining governance as another arena shaped by law and social movements. Understood that way, movement lawyers can start to map the power

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[62] George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 Tul. L. Rev. 639, 644 (2021); *see also* George S. Georgiev, *Human Capital Disclosure & Corporate Governance: The New Evidence*, 46 Cardozo L. Rev. 485, 494 (2024) (also defining human capital management) [hereinafter HCM Disclosure].

[63] *See* Recommendation of the Investor Advisory Committee, Human Capital Management Disclosure (Mar. 28, 2019), https://www.sec.gov/spotlight/investor-advisory-committee-2012/human-capital-disclosure-recommendation.pdf; Recommendation of the SEC Investor Advisory Committee's Investor-as-Owner Subcommittee Regarding Human Capital Management Disclosure (Sept. 21, 2023), https://www.sec.gov/files/spotlight/iac/20230921-recommendation-regarding-hcm.pdf; Modernization of Regulation S-K, 85 Fed. Reg. 63726 (Nov. 9, 2020).

[64] *Compare* Tom C.W. Lin, The Capitalist and the Activist (declining to address the role of collective bargaining and unions as movement partners with corporations) *with* Bodie, *supra* note 21, at 172-74 (discussing the role of collective bargaining in labor management).

[65] David Webber & Alvin Velazquez, *Interview with David Webber: Reflections on the Past, Present, and Future of Labor's Capital*, 99 Chi.-Kent L. Rev. 251, 260-61 (2025).

[66] In fact, corporate governance scholars are reconceptualizing what the future of ESG in the corporate boardroom may look like, rather than give up on the project entirely. *See, e.g.*, Lisa Fairfax, *ESG's Death Defying Future: Predicting the Future of ESG Through the Lens of Current ESG Disclosure*, 26 U. Pa. J. Bus. L. 1019, 1051-57 (2024) (outlining consequences for businesses as a result of the anti-ESG turn and arguing that even though the label may be in danger, its premise has a future).

[67] William E. Forbath, Law and the Shaping of the American Labor Movement 1, 6-7 (1991) (outlining how the labor movement's commitment to voluntarism was shaped by hostile judicial rulings which repressed certain types of labor organizing); Min & You, *supra* note 24, at 84 (noting that political movements have affected corporate governance; Fan, *Woke Capital: The Role of Corporations in Social Movements, supra* note 21, at 487-88 (outlining how social movements led to the ascendency of ESG in the boardroom).

dynamics between different players. Movement lawyers who work in the corporate governance arena will need to understand that there is value in losing in that arena, and that changes in corporate governance trends require building over years, not months, to bear fruit for allies of social movements. For example, several resolutions receive less than majority votes but may get a strong minority vote.[68] That vote result could make a board take notice and respond despite not securing a majority, or could lead to an instance in which a dissident shareholder resolution finally receives the support of the majority of shareholders. In that way, corporate governance movements mirror other social movements.[69] Those dynamics mirror the timeline horizon in other social movements and should inform the pursuit of the legal changes that union and movement lawyer allies can pursue in corporate law to build power for workers. However, as NeJaime later notes, the idea of winning through losing only works when the focus is not juriscentric.[70]

There are two ways that labor can deploy corporate law to win power for workers. Lawyers for social movements must see corporate governance battles as being shaped by both corporate movements and law in a synergistic relationship. First, and somewhat boringly, unions can and should continue to leverage labor's capital and corporate governance interest in the HCM movement to obtain gains for workers. Expanding HCM creates a lane for union pension funds to engage shareholders using a framework that is rooted in shareholder primacy and aligned with ERISA's understanding of fiduciary duty but allows those funds to explicitly advocate for their members. While some HCM literature avoids talking about collective bargaining, older literature examines how unions bring significant long-term value for firms in the form of reduced turnover costs and provides some additional economic justification for adopting collective bargaining within frames of corporate governance.[71] This movement has gained steam. For example, the SEC's Investment Advisory Committee (IAC) has already approved two recommendations calling for the SEC to take regulatory action to regulate HCM

[68] *See* Webber & Velazquez, *supra* note 65, at 253-54 (explaining how support for shareholder resolutions introduced through labor's capital gained little support at first before earning majority votes); Geeyoung Min, *Shareholder Direct Democracy*, 74 Emory L.J. 381, 423-26 (2025) (differentiating the interests of vote conscious shareholders who seek to advance a mission and trade-conscious shareholders who opt out of governance mechanisms).

[69] Douglas NeJaime, *Winning Through Losing*, 96 Iowa L. Rev. 941, 945 (2011).

[70] Douglas NeJaime, *Before Losing*, 134 Yale L.J. F. 63, 65-66 (2025).

[71] *See, e.g.*, Christos Doucouliagos & Patrice Laroche, *What Do Unions Do to Productivity: A Meta-Analysis*, 42 Indus. Rels: J. Econ. & Soc'y 650, 682 (2003) (concluding that unions add to firm value in the United States); Richard B. Freeman, *What Unions Do? The 2004 M-Brance Stringtwister Edition* 19-24, 29 (Nat'l Bureau of Econ. Rsch., Working Paper No. 11410, 2004) (finding that unions provide a modest but positive effect to productivity, and reduce firm turnover); Shep Hyken, *What Costco Knows That Most Others Don't*, Forbes (Feb. 23, 2025), https://www.forbes.com/sites/shephyken/2025/02/23/what-costco-knows-that-most-others-dont/ [https://perma.cc/4FFY-PXHZ] (noting that turnover at Costco, which is heavily unionized, is at 8% compared to 60% for the rest of the retail industry).

disclosures.[72] It also approved a recommendation calling on the SEC to issue regulatory guidance governing company disclosure of AI usage, including the amount of money companies spend on such initiatives, and return on investments.[73] The SEC responded in 2020 with rulemaking requiring some HCM disclosures.[74] Suffice to say the fact that HCM has entered into corporate governance parlance demonstrates that there is some appetite for aligning the interests of unions as worker advocates and unions as custodians of worker capital under ERISA's fiduciary framework. In other words, the HCM movement provides the opportunity for labor to knock down the tension that has existed as a result of ERISA's fiduciary duty doctrine requiring that union pension funds invest worker capital in a manner inimical to the interests of workers.[75]

The second way that movement lawyers can leverage corporate law is to push for corporate reforms that decenter shareholder primacy in favor of stakeholder primacy. One such example of how to do so is the German model of codetermination—a concept that gives workers the right to occupy up to half of the seats on a corporate board and participate in the management of the company they work for.[76] Matthew Bodie, Grant Hayden, and Brett McConnell have done much work describing the flaws in the current American system of corporate governance focusing on shareholder primacy.[77] They have advocated for the implementation of a German-style codetermination model in the United States.[78]

Europe is not the only place to look toward as a fountain of ideas for pro-worker conceptions of corporate governance. The global south also deserves attention from scholars in North America and movement activists. For example, Mariana Pargendler and Olívia Pasqualeto demonstrate how

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[72] *See* Recommendation of the Investor Advisory Committee, *supra* note 63.

[73] *See* Recommendation of the SEC Investor Advisory Committee's Disclosure Subcommittee Regarding the Disclosure of Artificial Intelligence's Impact on Operations (Dec. 4, 2025).

[74] *See* Recommendation of the Investor Advisory Committee, *supra* note 63.

[75] *See generally* Webber, *supra* note 60.

[76] Brett H. McConnell & Matthew T. Bodie, *From Mandates to Governance: Restructuring the Employment From Mandates to Governance: Restructuring the Employment Relationship*, 81 U. Md. L. Rev. 887, 930 (2022).

[77] *Id.* at 890-91; *see also* Grant M. Hayden & Matthew T. Bodie, Reconstructing the Corporation: From Shareholder Primacy to Shared Governance 69, 87 (2021) (demonstrating that arguments of shareholder primacy based in the homogeneity of shareholder interests fail as a justifying theory of firm governance).

[78] *Id.* at 187-88. The position that scholars such as Hayden, Bodie, and McConnell put forward provides much greater voice to workers than employee-owned stock plans (ESOPs) by decentering shareholder primacy and giving workers a seat on the board of directors. The typical ESOP is managed in a manner that gives very little voice in governance to workers and treats them as another brand of passive shareholders. Private equity-backed efforts may provide workers with a share of profits but still undermine control to workers over corporate affairs. Nikishka Iyengar, *The Employee-Ownership Mirage: Private Equity's Latest PR Strategy*, OnLabor (Dec. 15, 2025), https://onlabor.org/the-employee-ownership-mirage-private-equitys-latest-pr-strategy/[https://perma.cc/W2VC-ZE4Z]; *see also* Webber, *supra* note 60, at 117 (stating that private equity has been a "disaster" for labor and workers).

Brazil began holding parent companies responsible for the labor violations committed by subsidiary entities as early as 1937.[79] That is a marked departure from American corporate law holding that parent companies are not responsible for the actions of their subsidiaries.[80] If the U.S incorporated lessons from the Global South into its jurisprudence, they could help reframe debates under U.S. labor law concerning whether a parent organization has an obligation to bargain in good faith as a joint employer.

More importantly for a U.S. audience, the proposals set forth by the scholars discussed above fit within the current ERISA law framework. While a state can legislate the changes they call for, it is not necessary for that to happen. There are multiple ways for such a change to come into effect that social movements, and movement lawyering, can influence. For example, even though unions cannot strike to compel agreement from an employer on a permissive subject of bargaining,[81] unions can work with mobilized investors to run a shareholder campaign seeking to elect a union-ratified slate of directors to make managerial decisions, a move that the SEIU did which concluded with an agreement to negotiate over terms and conditions of employment with Starbucks.[82] Similarly, requiring that parent companies monitor the labor affairs of their subsidiaries may be a useful tool for monitoring human capital and taking steps to mitigate the risk that arises from mistreating a work force. The next section turns to how movement lawyers should look at using bankruptcy law tactically.

III. Tactical Restructurings as a Tool of Labor Movement Lawyering

From the outside, bankruptcy law appears technical and arcane. There is some truth to that, but bankruptcy law practice is political and relational.

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[79] Mariana Pargendler & Olivia Pasqualeto, *Overcoming Corporate Separateness: The Early Origins of Group Liability for Workers and Beyond* 2 (European Corp. Governance Inst. Working Paper No. 895, 2026).

[80] *Id.* at 23-24 ("While distinct and more expansive than the traditional veil piercing standards (by, for instance, not requiring fraud or injustice), U.S. doctrine in this area generally remains more demanding and less protective of workers than Brazil's legal approach.").

[81] *See generally* Clean Slate for Worker Power, *Mandatory Subjects of Bargaining: Four Options for Shifting the Paradigm* (2021), https://clje.law.harvard.edu/app/uploads/2022/12/Clean-Slate-Mandatory-Subjects-of-Bargaining.pdf.

[82] Sharon Block & Benjamin I. Sachs, Clean Slate for Worker Power: Building a Just Economy and Democracy 5-6 (2020), https://clje.law.harvard.edu/app/uploads/2020/01/Clean-Slate-for-Worker-Power.pdf [https://perma.cc/YV5N-DCQB] (calling for workers to be on a company Board of Directors); *see also* Ortenca Aliaj and Patrick Temple-West, *How Unions Are Fighting a Boardroom Battle at Starbucks*, Fin. Times (Jan. 24, 2024) (discussing how the SEIU ran a slate of candidates for Starbucks' Board of Directors), https://www.ft.com/content/08c00024-3dc7-4d48-9dcd-670f93016973 [https://perma.cc/ZN67-B4GC]; James Farrell, *Labor Group Drops Campaign For Starbucks Board Of Directors As Company Makes Progress With Union*, Forbes (Mar. 5, 2024), https://www.forbes.com/sites/jamesfarrell/2024/03/05/labor-group-drops-campaign-for-starbucks-board-of-directors-as-company-makes-progress-with-union/ [https://perma.cc/56YN-YXWJ].

Creditors form committees and coalitions.[83] They lobby and seek support from both within and outside of the bankruptcy court process to maximize their recoveries and use wedge tactics in a hostile way to maximize their recovery.[84] Unions have done that as well. For example, unions used their power and influence within the Obama administration to arrive at successful restructuring outcomes, including the preservation of hundreds of thousands of the jobs of members of the United Auto Workers, during the bankruptcies of the Detroit based automakers.[85] Organized labor's use of its power within a bureaucratic, policy environment provided some benefits to workers, but those wins were a residual from having built power, not the result of a newly organized social movement.

Bankruptcy law deserves the attention of social movement scholars and labor lawyers alike because it provides another theater in which workers can build power. On the surface, that may sound insane to any reader who supports the labor movement because corporations have used bankruptcy to rip up collective bargaining agreements with impunity.[86] Bankruptcy law provides a special procedure for a debtor to continue performing on a contract after bankruptcy. That is called assuming the contract. Alternatively, bankruptcy law allows for a debtor to choose to rip up an executory contract.[87] Under the Countryman standard, a contract is executory if the obligations of both parties are so underperformed that the failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other.[88] An unexpired collective bargaining agreement is an example of an executory contract because both the employer must

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[83] *See* Daniel J. Bussel, *Coalition Building Through Bankruptcy Creditors' Committees*, 43 UCLA L. Rev. 1547, 1610-11 (1996) (advocating for unsecured creditor committees to be formed in a manner that enhances the building of coalition); *see also* Diane Lourdes Dick, *Alliance Politics in Corporate Debt Restructurings*, 39 Emory Bankr. Dev. J. 285, 292 (2023) (emphasizing need to study coalition politics and tactics amongst creditors).

[84] Lourdes Dick, *supra* note 83, at 289-90.

[85] *See* Jared A. Ellias & George Triantis, *Government Activism in Bankruptcy*, 37 Emory Bankr. Dev. J. 509, 515, 527-28 (2021).

[86] 11 U.S.C. § 1113 (providing procedure for debtors to reject collective bargaining agreements); *see also* Andrew B. Dawson, *Collective Bargaining Agreements in Corporate Reorganizations,* 84 Am. Bankr. L.J. 103, 104 (2010) ("Based on data from every large publicly traded company bankruptcy between 2001 and 2007, the present study reveals that the outcome of § 1113 motions was the same regardless of the legal standard applied: the court granted the debtor's motion to reject its CBA.").

[87] 11 U.S.C. § 365(a).

[88] *See* In re Svenhard's Swedish Bakery, 653 B.R. 471, 477 (B.A.P. 9th Cir. 2023). The Countryman standard derives from a highly influential law review article authored by former National Labor Law Attorney and Harvard Law Professor Vern Countryman. *See* Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L. Rev. 439, 460 (1973). For an examination of Countryman and his legacy in the progressive bankruptcy scholar tradition, *see* David A. Skeel, Jr., *Vern Countryman and the Path of the Progressive (and Populist) Bankruptcy Scholarship*, 113 Harv. L. Rev. 1075, 1076 (noting the reach of the Countryman standard amongst bankruptcy scholars as well as how Countryman defended Communist sympathizers in the 1950's).

continue employing, and the union must continue refraining from striking during the full life of the agreement.

In the 1980s, companies began to use Section 365 of the Bankruptcy Code ("Code") to reject collective bargaining agreements. The Supreme Court held in *NLRB v. Bildisco* that companies could set aside a collective bargaining agreement if the debtor shows (1) that the agreement burdens the estate and (2) that on balance the equities balance in favor of rejection of the collective bargaining agreement.[89] Congress reacted quite quickly to the Court's decision in *Bildisco* and amended the Code to make it more difficult for courts to approve the rejection of the collective bargaining agreement.[90] That is not what happened.

There is a good reason why the typical narrative is that the imposition of concessions on workers is necessary and therefore an appropriate use of bankruptcy law by indebted corporations.[91] Namely, courts have happily granted almost all employer motions to destroy collective bargaining agreements.[92] As a result of these court cases, Andrew Dawson rightly frames unions and workers as concessionary agents who must give back the power that they have built in the name of paying back higher priority creditors and rehabilitating the debtor.[93] The fact that unions have almost always lost any attempt to protect their collective bargaining agreement creates a kind of pessimism around an employer seeking bankruptcy. While labor suffers a high cost in bankruptcy, so do other workers and tort victims. As Marcovich Gross demonstrates, corporations have used bankruptcy to shed sexual harassment claims after the "MeToo" movement.[94] A lawyer for the labor movement could reasonably argue that bankruptcy is where social movements and worker power go to die. It is time to change that.

Social movement lawyering theory, in conjunction with LPE theory, has much work to do reconceptualizing how social movements can influence questions about the distribution of wealth and power in bankruptcy law.[95] The study of public sector bankruptcy provides an especially rich

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[89] NLRB v. Bildisco & Bildisco, 465 U.S. 513, 525-27 (1984).

[90] *See* 11 U.S.C. §1113(a), (c). The Code also contains some minimal protections for individual employees. For example, Code provisions § 507(a)(4)-(5) allow workers who have not received their wages for up to 180 days before the filing of a bankruptcy to have a fourth priority claim, but only up to $15,150. The Code also allows workers whose employers have failed to pay into a health plan to have a fifth priority claim over other parties that are owed money.

[91] Anne M. Burr, *The Unproposed Solution to Chapter 11 Reform: Assessing Management Responsibility for Business Failure*, 25 Cal. W. Int'l L.J. 113, 114-15 (1994) (describing how solvent airlines filed for bankruptcy to shed collective bargaining agreements).

[92] Dawson, *supra* note 86, at 115.

[93] Andrew B. Dawson, *Labor Activism in Bankruptcy*, 89 Am. Bankr. L.J. 97, 98-99 (2015).

[94] Adi Marcovich Gross, *Morally Bankrupt: Bankruptcy Law, Corporate Responsibility, and Sexual Misconduct*, 97 Am. Bankr. L.J. 480, 499-507 (2023) (describing methods which corporations use to manage liability for sexual harassment in bankruptcy).

[95] Mariana Pargendler, *Heterodox Corporate Laws in the Global South*, LPE Blog (Dec. 7, 2023), https://lpeproject.org/blog/heterodox-corporate-laws-in-the-global-south/ [https://perma.cc/4P8U-687G] (describing how bankruptcy law in the Global South protects workers in a way that does not occur in the Global North).

area for the application of social movement insights because they are so political in nature. For example, Clayton Gillette has called for "[d]ictatorships for democracies" in the form of emergency managers with broad power to curb strategic behavior by unions.[96] That scholarly work inspired the State of Michigan to impose an emergency manager to run the affairs of Detroit over the objections of its elected officials.[97] That work also led to Congress flexing colonial power over Puerto Rico and imposing a financial oversight board with power to make financial decisions over the will of Puerto Rico's elected officials.[98] In Detroit, retirees and union workers mobilized themselves to prevent cuts to their retirements and having their CBAs adjusted. They failed in doing so. However in Puerto Rico, workers and retirees arrived at a different outcome. What happened? Puerto Rico's story is one of worker resilience and movement lawyering combined with effective, sustained mobilization by workers and retirees.[99] Many have critiqued Congress's enactment of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) as an exercise in colonialism. I join that critique—but that power imbalance does not mean that there is cause to abandon engagement. Instead, it requires innovation. In *Lucha Si, Entrega No: How Retirees Used an "Awkward Power Sharing Arrangement to Upend a Plan of Adjustment,* I explained:

> "Congress's passage of PROMESA spurred protests concerning colonialism. Yet somehow those discussions concerning the Junta's exercise of power did not translate into any discussion regarding 48 U.S.C. § 2174(b)(3) and its inter-relationship with 11 U.S.C. § 943(b)(4)."

No one discussed the opportunities for "mutual sabotage" that the court later identified.[100]

Luckily, there were unions, activists, and social movement lawyers who capitalized on that awkward power sharing arrangement through a synergetic combination of movement lawyering and activism. Puerto Ricans were initially at risk of having their pensions cut by 25%.[101] The retirees later refused to accept a pension cut of 8.5% for anyone who made over $1,500 in pension benefits per month that was negotiated by a court appointed retiree

[96] Clayton P. Gillette, *Dictatorships for Democracy: Takeovers of Financially Failed Cities*, 114 Col. L. Rev. 1373, 1433 (2014) (arguing that control boards blunt the influence of interest groups that exploit the common pool of a local budget).

[97] Mich. Comp. Laws §§ 141.1541-141.1575 (2012). *See also* Press Release, Clayton Gillette and Students Guide Detroit Through Key Questions in its Bankruptcy, NYU Law (May 22, 2014), https://www.law.nyu.edu/news/motor-city-remake [https://perma.cc/987C-CWCU].

[98] 48 U.S.C. § 2121.

[99] Alvin Velazquez, *Lucha Si, Entrega No: How an "Awkward Power Sharing Arrangement" Enabled Retirees to Upend a Plan of Adjustment*, 97 Am. Bankr. L.J. 836, 887-95 (2023).

[100] Velazquez, *supra* note 99, at 871.

[101] *Id*. at 881.

committee.[102] Instead, they realized that the oversight board's power over them was not absolute and utilized PROMESA's "awkward power sharing arrangement" to mobilize around a demand for zero pension cuts. The pressure they created led to a grand bargain—zero pension cuts in exchange for the legislature authorizing Puerto Rico to issue restructured bonds and complete the bankruptcy process.[103] Unions and retirees arrived at that result because they put years of strategic work into preparing. That work included unions preparing before a bankruptcy filing by educating their members on the process, framing bargaining demands in ways that would benefit the union and the public such as calling for the audit of the debt to ensure that a government issued debt legally,[104] and participating on official creditor committees, they were able to achieve an unusual outcome.[105] Additionally, unions framed some of their demands as being not only good for their members, but for all of Puerto Rico.[106] For example, certain unions called for Puerto Rico to challenge the legality of its debt to force financial creditors to settle for less money than they otherwise would have.[107]

There is even more work to do when thinking about the intersection of social movement lawyering, LPE theory, and *private* sector corporate bankruptcies governed by Chapter 11 of the Code. Admittedly, the best that this Essay can do is point to the need to do more work in this area as there are no prior examples to easily point towards. The scholarly literature is starting to build fertile soil for rethinking how social movement lawyering and bankruptcy law intersects. In corporate governance, there is an evergreen debate between whether a board of directors should make decisions with only shareholders in mind, or other stakeholders such as vendors and workers. In bankruptcy, the evergreen debate is between the proceduralists and the traditionalists.[108] The proceduralists are scholars who think that the primary role of bankruptcy is to implement the bargain that creditors would

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[102] *Id.*

[103] *Id.* at 900-03 (explaining how retirees used a power-sharing arrangement in the Code and political protests to protect their pensions from being cut).

[104] *See, e.g.*, Press Release, *SEIU's Henry: Puerto Rico's Working Families Deserve a Voice in the Restructuring of the $70 Billion Debt*, Servs. Emps. Int'l Union (Apr. 19, 2017), https://www.seiu.org/2017/04/seius-henry-puerto-ricos-working-families-deserve-a-voice-in-the-restructuring-of-the-70-billion-debt/ [https://perma.cc/Y3KZ-QZSN].

[105] *See, e.g.*, Alvin Velazquez, *Bargaining for the Common Good in Bankruptcy*, 50 Labor St. J. 314, 316 (2025).

[106] *Id.* at 327. Under bankruptcy law, the U.S. Trustee must select the seven largest unsecured creditors to form an official committee. 11 U.S.C. § 1102(b)(1). Unsecured creditors are those who do not have claims secured by collateral. *See* James Chen, *Unsecured Creditor Defined, Types, vs. Secured Creditor*, Investopedia (Dec. 31, 2022), https://www.investopedia.com/terms/u/unsecuredcreditor.asp [https://perma.cc/D8WZ-Z7M7]. In many cases, unions are amongst the largest unsecured creditors as their members are workers whose claims to continued employment are not secured by a security interest on the employer's property.

[107] *Id.* at 323.

[108] *See* Douglas Baird, *Bankruptcy's Uncontested Axioms*, 108 Yale L.J. 573, 599 (1998) (characterizing the debate as one of morals and not of facts).

have received outside of the bankruptcy process inside of it.[109] That means that the goal of bankruptcy is to pay out creditors according to an established set of priorities encapsulated in the absolute priority rule requiring that higher ordered creditors, such as those whose claims are secured by the debtors property (think home mortgages), get paid in full before lower priority creditors.[110] The traditionalists are those who think about bankruptcy in terms of substantive fairness and balance the interests of all creditors and stakeholders according to policy determined norms.[111] In recent years, scholars have begun questioning whether corporate bankruptcy is too pro-debtor or now prefers "fake people" over "real people."[112] Bankruptcy scholars acknowledge that movements like #MeToo have brought these questions into clear relief for bankruptcy or otherwise have written in the shadow of major social movements.[113]

What can union and movement lawyers seeking to build worker power use from this literature that they can put into practice now?

First, unions facing an employer who has filed for bankruptcy can use their position as a creditor in a bankruptcy (often amongst the largest) to represent the interest of unrepresented employees and use that wall-to-wall power to seek a seat on the Board of Directors in a reorganized firm as Andrew Dawson urges.[114] Dawson's work uses many of the same themes that the HCM literature and Hayden and Bodie's work on codetermination use to advance an argument for decentering shareholder primacy and imagining workers having a managerial role.[115] In fact, one reason that Dawson's suggestion is attainable is that in bankruptcy law, shareholders do not enjoy primacy, their creditors do. For example, under the absolute priority rule, shareholders are paid last (and almost always not at all).[116] Instead, bankrupt debtors must manage the firm on behalf of creditors, of which unions and workers are one.

Second, movement lawyers can advise their labor unions to consider more aggressive organizing tactics, and to consider filing for bankruptcy in a tactical manner to discharge tort debts that arise out of those decisions. In the provocatively titled *Chapter 11's Descent into Lawlessness*, Lynn

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[109] *Id.* at 579-80.

[110] *See generally* 11 U.S.C. §§ 507, 1129(b)(2).

[111] *Id.*

[112] Melissa B. Jacoby, *Fake and Real People in Bankruptcy*, 39 Emory Bankr. Dev. J. 497, 521 (2023) (observing the disconnect of how corporations are treated in bankruptcy versus individual debtors).

[113] *See, e.g.*, Marcovich Gross, *supra* note 94; Nicole Langston, *Discharge Discrimination*, 111 Cal. L. Rev. 1131, 1137-39 (2023) (observing how victims of police brutality and civil rights violators can discharge their liabilities).

[114] *See* Dawson, *supra* note 93, at 100-01. The employees that unions represent in a bankruptcy typically possess priority claims under 11 U.S.C. § 507(a)(4)-(5) but are unsecured and therefore in a weaker position than creditors whose claims are secured by an employer's property.

[115] *Id.* at 109-10 (imagining labor as co-bargainer with a debtor's senior creditors). *See also* Hayden & Bodie, *supra* note 77, at 87.

[116] 11 U.S.C. § 1129(b)(2).

LoPucki criticized bankruptcies of large corporations that are concluded in one day, and tied this development to bankruptcy courts' reluctance to push back on debtors.[117] In a vein, Diane Lourdes Dick observes that corporations engage in pre-bankruptcy petitions and tactical maneuvers to maximize bankruptcy outcomes.[118] While this is unfortunate, union lawyers advising their clients through a movement lawyering frame consider what lessons can be taken from these failures in bankruptcy law and consider how they can help labor clients while advocating for reforms to the system. In my article *Bankrupting Labor Power,* I explain that corporations have used bankruptcy law to discharge tort judgments owed to survivors of sexual abuse or who have otherwise been harmed, even when they are not technically insolvent.[119] Bankruptcy law encourages entrepreneurs to take risks. It provides a sort of safety net for them should a business fail. It is time for unions to adopt a similar mindset in which they think about taking entrepreneurial risks and understand bankruptcy as a backstop.[120]

The tactical use of bankruptcy can open up conversations concerning whether to engage in tactics that put the union at some risk of having a court hold them responsible as a tortfeasor. Right now, the Supreme Court's decision in *Glacier Northwest* holding that the Teamsters were liable for strike-related damages may cause unions to refrain from going on strike in certain circumstances for fear of being held liable for damages arising out of a strike.[121] As a result, movement lawyers may end up counseling their clients in a risk-averse manner that would chill their activities. Instead, with some tactical counseling, unions could maximize the benefits that bankruptcy can provide in the case that a hostile court finds that the union has committed a tort.[122] That approach may also provide union leadership with some space to consider employing corporate social responsibility campaigns and using bankruptcy as a tool for dealing with the RICO claims that employers may use to quell such activity.[123]

This is not to say that bankruptcy law will wash away all tort liabilities.[124] However, it can act as a sort of social insurance for unions as

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[117] Lynn LoPucki, *Chapter 11's Descent into Lawlessness*, 96 Am. Bankr. L.J. 247, 307 (2022).

[118] Diane Lourdes Dick, *Tactical Restructurings*, 93 Fordham L. Rev. 1, 5 (2024) (explaining that corporations engage in tactical pre-bankruptcy planning to obtain a favorable outcome).

[119] Alvin Velazquez, *Bankrupting Labor Power*, 78 Stan. L. Rev. 1023, 1044-45 (2026).

[120] *Id.* at 1033.

[121] *See* Glacier Northwest Inc. v. Teamsters, 598 U.S. 771, 777-79, 784-85 (2023). *See also* Velazquez, *supra* note 119, at 1066-67.

[122] *See, e.g.*, Ateş Serifsoy, *Something Concrete: How Labor Advocates Can Best Respond to the Ambiguity of Glacier Northwest*, 48 Seattle U. L. Rev. 1385, 1416 (2025) (urging labor to not chill expressive activity in response to the Court's decision in that case).

[123] Velazquez, *supra* note 119, at 1062.

[124] Readers of this Essay may wonder if unions could employ the "Texas Two-Step" as a mechanism for escaping liability. Texas law allows corporations to undergo a divisive merger in which the entity doing the merger can allocate assets and liabilities among the newly formed entities. In the Texas Two-Step, the parent allocates the assets to one company, and then the

it did for at least one Teamsters local.[125] Movement lawyers would do well to study bankruptcy doctrine and engage in a process in which they provide their clients with a clearer understanding of the risks that come with being found liable for a tort, and how bankruptcy shapes those incentives.

This Part argued that labor lawyers should consider whether bankruptcy law could give unions a tactical advantage. It is understandable for union lawyers to have an aversion to bankruptcy. Companies have used bankruptcy to reject collective bargaining agreements with relative impunity, and city governments have sought either to reject collective bargaining agreements or cut pension benefits that workers have earned to pay back creditors. However, movement lawyers should not cede bankruptcy expertise to lawyers representing interests adverse to them and abandon the cause. This Part made two points for union lawyers to take away regarding the practice of bankruptcy law. First, they ought to look at the Puerto Rico bankruptcy as an example that unions can protect the interests of workers through effective organizing and leveraging of the Code. Second, they ought to use bankruptcy tactically to manage a union's tort risks and to encourage unions to innovate or take greater risks in the building of worker power.

CONCLUSION

I would like to end this Essay on a personal note and with an exhortation. Over my 15 years as an in-house attorney and recent entrant into

liabilities to another. The company burdened with liabilities then files for bankruptcy protection. Unions may not employ the Texas Two-Step because that tactic involves a corporate governance move that unions are not specifically authorized to do themselves. *See* Tex. Bus. Orgs. Code Ann. § 1.002(55)(A) (West 2021) (excluding unions as entities under the Code as unions are unincorporated associations). Additionally, bankruptcy courts have dismissed multiple bankruptcy petitions filed by Johnson & Johnson subsidiaries managing talc litigation claims as being filed in bad faith. The underlying litigation continues. This means that courts may end up finding a union's attempt to use the Texas Two-Step as being in bad faith, as well as possibly not authorized under federal law. *See* Clara Jiang, *Breaking Down the Texas Two-Step: Johnson & Johnson's Fight Against Mass Tort Liability*, Colum. Bus. L. Rev. (Feb. 4, 2025), https://journals.library.columbia.edu/index.php/CBLR/announcement/view/759 [https://perma.cc/37PP-JB3R]; Dietrich Knauth, *US Judge Tosses Lawsuit Accusing J&J of Fraud Over Talc Bankruptcy Strategy*, Reuters (Jan. 29, 2026 at 18:32 ET), https://www.reuters.com/sustainability/boards-policy-regulation/us-judge-tosses-lawsuit-accusing-jj-fraud-over-talc-bankruptcy-strategy-2026-01-29/ [https://perma.cc/JAD7-WY86]. The Texas Two-Step has received significant scholarly attention. *See, e.g.*, Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 Mich. L. Rev. Online 38, 40, 49 (2023) (noting that the Texas Two-Step "fits the mold of a bad faith bankruptcy filing"); Ralph Brubaker, *Assessing the Legitimacy of the Texas "Two-Step" in Mass Tort Bankruptcy*, 42 Bankr. L. Letter, 8-9, 16-17 (noting that "bankruptcy systematically disadvantages mass-tort claimants" and turns bankruptcies into a place to resolve mass tort liabilities).

[125] *See* In Re General Teamsters, Warehousemen and Helpers Union Local 890, 225 B.R. 719, 728-33 (Bankr. N.D. Ca. 1998) *aff'd*, In Re General Teamsters, Warehousemen and Helpers Union Local 890, 265 F.3d 869, 877 (9th Cir. 2001).

the legal academy, I have had hundreds of conversations with students who wanted to become union or public interest lawyers, but at the same time recoiled when I asked them to engage in thinking about how to reconceptualize corporate or bankruptcy law as a tool for building worker power. Many of these students had a disdain for traditional business law and the way they perceived its use in perpetuating inequality and systemic harms. That is what motivated their interests in social movement lawyering. In many ways, they could not see the connection between social movement lawyering and business law initially. I hope that this Essay encourages public interest-minded law students, social movement lawyers, and labor activists to study business law, and deploy business law as a tool for building union membership by giving them examples of how to do that. I am also writing this to encourage academics to come alongside the movements they study in a synergistic manner. If workers are going to effectively battle capital, then knowing the law that shapes corporate decision making is a strategic necessity for labor to effectively engage with capital.[126]

This Essay made the argument that union lawyers should leverage both corporate law and bankruptcy law to build labor power. It made the case for why union lawyers specifically, but progressive lawyers generally, should study and incorporate these areas of law into their movement lawyering toolkit. The Essay provided four things that union lawyers can explore right now with their clients. They are:

1) Leverage labor's capital alongside shareholder interest in human capital management to organize workers;
2) Continue decentering shareholder primacy in favor of codetermination models of corporate governance that give seats on the board of corporate directors to workers;
3) Deploy a bargaining for the common good framework in bankruptcy as a strategy for bringing workers into corporate decision-making spaces; and
4) File tactical restructuring petitions under Chapter 11 of the Bankruptcy Code to shed tort debts arising out of a union organizing drive or collective bargaining disputes.

The labor movement faces a difficult time. As a result, movement lawyers should look at private law as a vehicle to build power and minimize potential losses when public institutions appear to be in an unsteady state. While an objector could call me foolish, I continue to hold onto a certain faith in the labor movement, and its lawyers, to innovate. In the Bible, Saint

[126] *See* Vegelahn v. Guntner, 167 Mass. 92, 108 (1896) (Holmes, J., dissenting) ("Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.").

Paul states "[n]ow faith is the substance of things hoped for, the evidence of things not seen."[127] Even though the labor movement continues to experience a downward trend, I continue to have faith that workers, through unions supported by lawyers deploying a movement lawyering toolkit, can incorporate business law into their toolkit to build worker power and a stronger labor movement.

[127] *Hebrews* 11:1 (New King James Translation).