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Workers' Boards: Sectoral Bargaining and Standard-Setting Mechanisms for the New Gilded Age

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I. INTRODUCTION

Existing labor relations and minimum standards regulatory systems continue to struggle to ensure access to worker voice and acceptable workplace standards. Consequently, attention is increasingly turning to whether sectoral approaches can offer solutions for the contemporary workplace.[1] Sectoral approaches include both sectoral bargaining and sectoral standard-setting models. Sectoral bargaining involves both collective representation of workers and collective bargaining. In contrast, sectoral standard-setting models utilize negotiation or consultation instead of collective bargaining.[2]

Sectoral standard-setting mechanisms (often called, "wage board" or "workers' board" approaches) are gaining significant interest along with growing interest in broader-based and sectoral bargaining. Several sectoral standard-setting models are currently being proposed,[3] major political parties are including such initiatives in their platforms,[4] and sectoral standard-setting legislation has recently passed in several jurisdictions.[5] Therefore, sectoral standard-setting approaches merit a closer look as a potential way forward to ensure adequate standards for workers.

However, sectoral-standard setting models are not new. In the early 20th century, statutory systems of sector-based minimum workplace standard-setting were established in many countries as a response to unacceptable wages and working conditions.[6] Key examples are the British Wages Council system (which developed from the Trade Boards Act, 1909 (TBA)), the 1934 Industrial Standards Act (ISA) established in the Canadian province of Ontario, and the 1938 federal United States Fair Labor Standards Act (FLSA).[7] Although these three statutory systems arose out of broadly similar social and

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[1] CLEAN SLATE FOR WORKER POWER, PRINCIPLES OF SECTORAL BARGAINING: A REFERENCE GUIDE FOR DESIGNING FEDERAL, STATE, AND LOCAL LAWS IN THE U.S. (Harvard Labor and Worklife Program 2021); David Madland, *Re-Union*, in RE-UNION (Cornell Univ. Press 2021); C. MICHAEL MITCHELL & JOHN C. MURRAY, CHANGING WORKPLACES REVIEW: SPECIAL ADVISORS' INTERIM REPORT (Ontario Ministry of Labour 2016); Kate Andrias, *The New Labor Law* 126 YALE L.J. 2 (2016); Kate Andrias, *Union Rights for All: Towards Sectoral Bargaining in the United States*, in THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW: REVIVING AMERICAN LABOR FOR A 21ST CENTURY ECONOMY 56-63 (Richard Bales & Charlotte Garden eds., Cambridge: Cambridge University Press 2020); DAVID MADLAND, RE-UNION: HOW BOLD LABOR REFORMS CAN REPAIR, REVITALIZE, AND REUNITE THE UNITED STATES (ILR Press. 2021) (Madland proposes the term "workers' board"); Cesar F Rosado Marzan, *Quasi Tripartism: The Limits of Co-regulation and Sectoral Bargaining in the United States*, UNIVERSITY OF CHICAGO LAW REVIEW (forthcoming).

[2] Alternative collective representation models can be plotted along a continuum ranging from collective representation without bargaining (standard-setting), to models involving both collective representation and bargaining) (SARA SLINN, COLLECTIVE REPRESENTATION AND BARGAINING FOR SELF-EMPLOYED WORKERS: FINAL REPORT TO EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA, (2021) at 52).

[3] Kate Andrias, *The New Labor Law*, 126 YALE LJ (2016); Madland, *supra* note 1 employs the term "workers' boards"; Sara Slinn and Mark Rowlinson. "Bargaining Sectoral Standards: Towards Canadian Fair Pay Agreement Legislation" Windsor Yearbook of Access to Justice (forthcoming). Available at: http://works.bepress.com/sara_slinn/54/ .

[4] For example, in the United States, many Democratic candidates in the 2019 primary race explicitly endorsed sector or broader-based approaches as did the 2020 Democratic Party Platform (see Madland, *supra* note 1 at 157). In the UK, the Labour Party endorses sectoral collective bargaining for fair pay agreements (The Labour Party, Employment Rights Green Paper - A new deal for working people (The Labour Party, UK 2022) at 5, online: https://labour.org.uk/page/a-new-deal-for-working-people/ (accessed 27 November 2022)).

[5] California, AB 257, the Fast Food Accountability and Standards Recovery Act, 2022; New Zealand, *Fair Pay Agreements Act 2022* (2022/58), Royal Assent 1 November 22, in effect 1 December 2022.

[6] These were not the first instances of sectoral standard-setting legislation: New Zealand and Australia, for instance, had adopted such legislation in the 19th century. However, these earlier examples are not addressed in this article.

[7] Trade Boards Act 1909, 8 Edw. 7 – 9 Edw. 7, c. 22, § 3 (Gr. Brit.) [TBA]; Ontario Industrial Standards Act 1935, S.O. 117, c. 28 (Can. Ont.) [ISA]; Fair Labor Standards Act of 1938, 29 U.S.C.A. §§ 201–219 (1938) [FLSA 1938].

economic concerns, they reflect different applications of tripartism, perspectives on the role of voluntarism and collective representation and bargaining, and approaches to sectoral workplace standard-setting. These systems also share important commonalities: each has roots in combatting sweated labor, characterized by fragmented and scattered workplaces and unacceptable remuneration and conditions of work, where – partly due to the characteristics of the work, workers, and employers in these sectors – voluntary collective bargaining had failed to take root. These circumstances have clear parallels to today's work and economy. Arising in part from these roots, these systems reflect – to some degree – a conception of fairness founded in concern about the effects on workers of unfair employer competition over labor costs.

This article examines these three systems at the point in their histories at which each regime provided the most robust sectoral standard-setting procedure, as informative examples of a spectrum of approaches to tripartite sectoral workplace standard-setting. The conceptions of fairness identified by Seth Harris applied in his study of the origins of the FLSA are applied to analyze the three paradigm systems.[8] Out of this comparison and analysis, a three-step approach to constructing a sectoral workplace standard-setting mechanism is laid out.[9] This does not address every detail of designing a mechanism, nor does it propose a specific model. The goal here is to offer a conceptual starting point, identifying key design decisions and alternatives and mapping out key interrelated considerations.[10]

II. SECTORAL STANDARD-SETTING SYSTEMS

While sectoral bargaining involves both collective representation of workers and collective bargaining, sectoral standard-setting models involve a form of collective representation, not collective bargaining, which is characterized by recognition rights, a duty to bargain in good faith, and, in some cases, a duty of fair representation borne by worker representatives. The use of negotiation or consultation instead of collective bargaining distinguishes sectoral standard-setting from sectoral bargaining models.

This section provides a comparative outline of three historical examples of sectoral standard-setting, or "wage board" models, drawn from Britain, Canada and the United States. These examples reflect the point at which each regime provided the most robust sectoral standard-setting procedure, as informative examples of a spectrum of approaches to tripartite sectoral workplace standard-setting.

A. British Wages Councils

Wages councils were tripartite bodies responsible for establishing sector-wide minimum wages and an array of terms and conditions of work for workers in a specified "field of operation" typically involving a particular trade and geographic area.[11] British Wages Council legislation underwent numerous amendments between its introduction in the early 20th century, its repeal in the mid-1980s, and the abolition of existing councils in the early 1990s.[12] This paper examines the wages council system as it

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[8] Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19 (2000). Harris identified the following six conceptions of fairness: Hierarchic Fairness (or "fairness is the economic hierarchy"), Absolute Fairness (or, "fairness is a living wage"), Bargaining Fairness (or, "fairness is equality of bargaining power"), Competitive Fairness (or, "fairness is fair competition"), Fairness Is an Implied Contract, and Commutative Fairness (or, "fairness is commutative justice").

[9] For the British Wages Council system, this is as it existed under the Wages Councils Act 1979, 27 Eliz. 2 – 28 Eliz. 2, c. 12 (Gr. Brit.) [WCA 1979]; for the ISA, as it existed at the time it was repealed in 2001; and, for the FLSA, as it was first enacted in 1938.

[10] The further question of whether to adopt a sectoral standard-setting approach is beyond the scope of this article.

[11] WCA 1979, *supra* note 9, § 1 and Sched. 2.

[12] Trade Union Reform and Employment Rights Act 1993, 41 Eliz. 2 – 42 Eliz. 2, c. 19, § 50, sch. 9 (abolishing most remaining wages councils); Wages Act 1996, c. 48 (UK) (repealing the WCA).

Note that, in addition to the WCA system, wages councils existed specific to agriculture (Agricultural Wages Act 1948, 12 Geo. 6 – 13 Geo. 6, c. 47, § 17 and the Agricultural Wages (Scotland) Act 1949, 13 Geo. 6 – 14 Geo. 6, c. 30, § 2), and were also ultimately abolished, although not until two decades later (Enterprise and Regulatory Reform Act 2013, 61

existed under the Wages Councils Act 1979, c. 12, (WCA) which represents the point at which wages councils had broadest application and greatest authority over terms and conditions of work.

The WCA had its origins in the 1909 TBA, a product of the anti-sweating movement, which permitted the government's Board of Trade to establish a board in any industry where wages were "exceptionally low compared with that in other employments."[13] The TBA underwent several amendments and a significant reorientation toward regarding trade boards as temporary structures that would develop into and be replaced by joint industrial councils (JIC) and voluntary collective bargaining, once the parties had developed the capacity to do so. As described by one commentator: "One of the objects of Wages Councils legislation has always been to stimulate collective bargaining, to provide a training ground for voluntary procedure, and to this extent to make the statutory procedure superfluous."[14]

The 1945 WCA repealed the TBA, renamed trade boards "wages councils," and introduced several changes to the system. However, the WCA reaffirmed the role of wages councils as, essentially, filling a gap where voluntary collective bargaining had failed to emerge. The WCA also extended this role to include supporting inadequate bargaining machinery.[15] At the height of this system, approximately 3.5 million employees were covered by wages councils. Even at the time that most remaining wages councils were abolished, in 1993, around 2.5 million workers were still covered by this system.[16]

Under the version of the WCA examined in this article, wages councils could be established by order of the Secretary of State (SOS) in three circumstances.[17] First, the SOS could decide to establish a wages council where, in his or her opinion:

> [N]o adequate statutory machinery exists for the effective regulation of the remuneration of the workers described in the order and that, having regard to the remuneration existing among those workers, or any of them, it is expedient that such a council should be established.[18]

Second, the SOS could refer to the Advisory, Conciliation and Arbitration Service (ACAS), the question of whether to establish a wages council, and the SOS could choose to give effect to the ACAS' recommendation where he or she saw "fit" to do so and was of the opinion that:[19]

> [N]o adequate machinery exists for the effective regulation of the remuneration of any workers or the existing machinery is likely to cease to exist or be adequate

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Eliz. 2 – 62 Eliz. 2, c. 24, § 72). Although agricultural wages councils had analogous structures and virtually the same powers as councils established under the WCA, they are not considered here (DOUG PYPER, BUSINESS AND TRANSPORT SECTION, THE NATIONAL MINIMUM WAGE: HISTORICAL BACKGROUND 3 (2014)).

[13] TBA, *supra* note 7, § 1(2).

[14] OTTO KAHN-FREUND ET AL., KAHN-FREUND'S LABOUR AND THE LAW 188 (1983). Wages councils could be transformed into statutory JICs, bipartite bodies with the powers of a wages council, but no independent member. A JIC was intended to transition wages council parties into voluntary bargaining. See Section II.A. for a detailed discussion of JICs.

[15] Simon Deakin & Francis Green, *One Hundred Years of British Minimum Wage Legislation*, 47 BRIT. J. INDUS. REL. 205, 206 (2009).

[16] Simon Milner, *The Coverage of Collective Pay-Setting Institutions in Britain, 1895–1990*, 33 BRIT. J. INDUS. REL. 69, 78 (1995).

[17] WCA 1979, *supra* note 9, § 1.

[18] *Id.* § 1(2)(a).

[19] ACAS is a government funded, independent, statutory body providing conciliation services and advice and guidance on workplace issues; WCA 1979, *supra* note 9, §§ 1(2)(c), 3.

> for that purpose and a reasonable standard of remuneration among those workers will not be maintained….

The majority of wages councils were established in this manner.[20]

Third, an application could be submitted to the SOS by organizations of employers and workers that had routinely participated in setting wages and conditions of employment in a sector, JIC, or other similar body.[21] These applications had to be made on the grounds that "existing machinery for the settlement of remuneration and conditions of employment for those workers is likely to cease to exist or be adequate for the purpose."[22] The application was subject to review by the ACAS and the SOS could choose to give effect to the ACAS' recommendation to establish a wages council where he or she thought it "fit" do to so.[23]

The WCA covered "workers," broadly defined to include both contracts of and for service, apprenticeship, and "any other contract whereby [the person] undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of [the person]."[24] Homeworkers were explicitly included, regardless of whether they met the above descriptions; however, casual employment and employment for purposes other than that of the employer's business were excluded.[25]

Wages councils were tripartite bodies, composed of equal numbers of worker and employer representatives and up to three independent members. Council members were appointed for five-year terms and the SOS provided funding to pay members such remuneration, traveling and other allowances determined by the SOS and the government.[26] While the SOS determined the number of representatives, employers' associations and unions directly appointed individuals to fill those positions.[27] The SOS decided on the number of independent members and appointed them, including appointing one independent member to act as chair of the wages council.[28] Independent members were apparently typically academics and lawyers, rather than industry experts.[29]

Incorporation of independent members has been described as the "chief distinctive feature" of wages councils and the predecessor trade boards, and a key reason for councils' successful operation.[30] Independents were intended to act as tiebreakers should employer and worker representatives reach deadlock in negotiations.[31] As described below, the voting procedures established by regulation and applied in wages council decision-making reflected and reinforced this role for independent members.

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[20] MINISTRY OF LABOUR, INDUSTRIAL RELATIONS HANDBOOK 155 (London: H.M. Stat. Off. 1961, rev'd. 1964).

[21] WCA 1979, *supra* note 9, §§ 1(2)(b), 2(1)(a), 2(1)(b), 3

[22] *Id.* § 2(1).

[23] WCA 1979, *supra* note 9, § 1(2)(b).

[24] This would likely encompass what, in Canadian labour and employment law, we would classify as "employees", "dependent contractors" and "independent contractors".

[25] WCA 1979, *supra* note 9, § 28.

[26] *Id.* Sched. 2, §§ 8(1), 9.

[27] *Id.* §§ 1(2)-(5). Prior to 1975, representative members were nominated by employer and employee organizations but appointed by the SOS.

[28] *Id.* Sched. 2, §§ 1(1), (6).

[29] KAHN-FREUND ET AL, *supra* note 14.

[30] FREDERIC JOSEPH BAYLISS, BRITISH WAGES COUNCILS 2 (1962).

[31] *Id.* at 1-2.; Kahn-Freund, *supra* note 14, at 185.

The WCA granted wages councils authority to make orders setting remuneration, holidays, and other terms and conditions for all or any of the workers within the council's field of operation, although some restrictions existed relating to holidays.[32] Therefore, unlike other sectoral standard-setting bodies, wages councils did not merely make recommendations to the government and, in this regard, they exercised tremendous autonomy. However, the SOS did have authority to issue an order at any time varying the field of operation of a wages council.[33]

Prior to making an order, a council was required to "make such investigations as it thinks fit," to publish and give notice "for the purpose of informing, so far as practicable, all persons affected" of its proposals, and to consider any written representations regarding proposals.[34] Further publication and notice of any modifications to proposals would be given where the council modified its proposals and "it appears to the councils that, having regard to the nature of any proposed modifications, an opportunity should be given to persons concerned to consider the modifications."[35] Where a council made an order, giving effect to a proposal, notice of the order was to be given to all persons affected by it, "as far as practicable."[36] Wages councils' orders, reportedly, were based on comparisons with bargained outcomes for similar services in other industries, rather than on abstract assessments of minimum standards.[37]

Wages councils made decisions regarding orders by vote, and determined their own procedures, except where the WCA or regulations provided otherwise.[38] Regulations stipulated that each council member had one vote, and provided that if either the chair decided, or more than half of the representative members for employers or workers requested, then a "voting-by-sides" procedure would be followed. Under this procedure, the majority of members' votes on each of the employer and worker "sides" would determine the vote of that side. Independent members would then only vote where the two sides disagreed.[39] Orders were legally enforceable, subject to government inspections and the potential for criminal prosecution.[40] In addition, terms of orders were implied into contracts of employment and, therefore, could also be enforced through civil actions.[41]

Wages councils were not intended to be permanent bodies. Reflecting the long-standing philosophy that wages councils were to be temporary solutions to a lack of collective bargaining, meant to allow the parties to develop the capacity to collectively bargain or to reinforce faltering collective bargaining, the WCA provided for creation of JICs and for abolition of wages councils in certain circumstances.

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[32] WCA 1979, *supra* note 9, §§ 1(1), 14. Some statutory restrictions existed on orders relating to holidays: *id.* §§ 1(2)-(3).

Notably, although earlier legislation provided only for authority to set "wages", over time the statutory scope of wages councils' authority grew as the term "wages" was replaced by "remuneration" and then to include holidays and holiday remuneration and then to include other terms and conditions of employment (Otto Kahn-Freund, *Minimum Wage Legislation in Great Britain*, 97 U. PA. L. REV. 778, 790 (1948).

[33] WCA 1979, *supra* note 9, § 4(2).

[34] *Id.* §§ 14(4)-(6).

[35] *Id.* §§ 14(4)-(6).

[36] *Id.* §14(9).

[37] Deakin & Green, *supra* note 15, at 207.

[38] WCA 1979, *supra* note 9, Sched. 2, § 7.

[39] Wages Councils (Meetings and Procedure) Regulations 1975, SI 1975/2136, § 3 (UK).

[40] WCA 1979, *supra* note 9, § 15, Part IV (§§ 21-24).

[41] Employment Protection Act 1975 c. 71, §§ 109(8)(a), (b) (UK) [EPA 1975].

In the mid-1970s, amendments to the WCA created what has been labeled a "half way house" to collective bargaining: statutory JICs.[42] The SOS could order that a wages council become a JIC, with the same powers as a wages council to make orders regulating terms and conditions of work.[43] Described as "a hybrid creature, sharing some features with a statutory wages council and some with a voluntary negotiating body," JICs were composed of employer and employee representatives, but no independent members.[44] JICs had the authority to issue enforceable orders, as did wages councils. JICs could request assistance from the ACAS, to essentially act as independents would act in a wages council, should the council reach an impasse. However, statutory JICs, themselves, were also intended to be temporary, to be abolished once the parties became capable of voluntary collective bargaining.

A wages council could be abolished in one of two ways. First, the SOS could order that a wages council be abolished, on his or her own motion. The SOS could refer to the ACAS the question of whether the council should be abolished or its field of operation varied, and the ACAS could make investigations.[45] Second, the SOS could order abolition of a wages council where the SOS has received an application from either organizations of workers and organizations of employers, jointly; any organization of workers; or, a JIC, conciliation board, or other similar body of workers or employers, where the applicant "represents a substantial proportion of the workers with respect to whom that wages council operates" and on the grounds "that the existence of a wages council is no longer necessary for the purpose of maintaining a reasonable standard of remuneration for the workers with respect to whom that wages council operates."[46] The SOS was required to refer the abolition or variance of field of operation questions to the ACAS if the SOS did not make such an order.[47]

B. Canadian Industrial Standards Act Conferences

Passed in 1935, the Canadian ISA was the product of myriad influences, including recent federal and provincial government inquiries into competition in particular industries, with attention given to evidence of excessive competition and unacceptable wage and labor standards in those industries,[48] and legislation in other jurisdictions providing for establishment of industrial or trade codes setting minimum standards[49] or juridical extension of collective agreements.[50] The public had been pressuring Canadian governments to adopt fair wages and price codes, as had recently been established by the US National Industrial Recovery Act (NIRA), and some businesses sought curbs on unfair competition.[51] Meanwhile, the labor movement lacked consensus at that time on the issue of statutory minimum wages. Some unions, although supportive of such legislation, were concerned that minimum

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[42] EPA 1975, *supra*, note 41, §§ 90-94 & Sched. 8; KAHN-FREUND ET AL, *supra* note 8, at 188.

[43] WCA 1979, *supra* note 9, §19(1).

[44] KAHN-FREUND ET AL, *supra* note 14, at 188.

[45] WCA 1979, *supra* note 9, §§ 4(1)(b), 6, 7.

[46] *Id.* § 4(1)(a), 5-7.

[47] *Id.* § 4(1)(b), 6-7.

[48] These inquiries were the 1934 Select Special House of Commons Committee on Price Spreads and Mass Buying which led to the Royal Commission on Price Spreads and the 1934 Standing Committee on Labour of the Ontario Legislative Assembly 1934.

[49] Department of Trade and Industry Act S.A. 1934, c. 33 (Can. Alta.); National Industrial Recovery Act, 15 U.S.C. § 703 (1933) [NIRA].

[50] COMMITTEE OF INQUIRY INTO THE INDUSTRIAL STANDARDS ACT ET AL, REPORT OF COMMITTEE OF INQUIRY INTO THE INDUSTRIAL STANDARDS ACT 4-6 (1963). Interestingly, these included the Quebec Collective Labour Agreements Extension Act, Q.C. 1934, c. 56 and the Cotton Manufacturing Industry (Temporary Provisions) Act 1934, 24 Geo. 5-25 Geo. 5, c. 30 (Gr. Brit.), which amended the British TBA. The TBA, itself, is not identified by commentators as one of the ISA's influences.

[51] LAUREL SEFTON MACDOWELL, RENEGADE LAWYER: THE LIFE OF JL COHEN 68 (2002).

standards might, in effect, set a wage ceiling. Other unions regarded such legislation as a threat to their own role.[52]

Shortly after the ISA was introduced, it underwent review and was significantly amended, with a key change being clearly reorienting the legislation from "fair wage" to "minimum standards" regulation.[53] It was again reviewed and substantially amended in the early 1960s to strengthen enforcement, broaden the range of regulated matters, and to alter sectors, among other changes.[54] It was ultimately repealed in 2001 in the context of comprehensive amendments to the province's Employment Standards Act.[55] The following description of the ISA system reflects the legislation as it existed at the time of its repeal.[56]

At its peak, in the mid-1950s, 149 schedules established through conferences were operating pursuant to the ISA across a variety of industries, with a large concentration in construction.[57] Subsequent removal of the construction industry from the scope of the ISA and introduction of minimum standards of work legislation (the Ontario Employment Standards Act)[58] led to less reliance on the ISA.[59] Therefore, by the time the ISA was repealed in 2001, few schedules were in operation and in a limited number of industries.

The ISA offered a tripartite mechanism for sectoral negotiation and regulation of wages and working conditions through "schedules," which applied to all employers and employees in a "zone" encompassing a particular industry within a specified geographic area.[60] The form of tripartism incorporated in the ISA involved representation for employees, employers, and the government. While the ISA included no mention of trade unions or collective agreements, unions commonly acted as employee representatives under the Act.[61]

If the government accepted the standards negotiated by these bodies, then these become enforceable minimum standards applying to all employers and employees in the sector. For industries subject to interprovincial competition, zones were province-wide in scope.[62] Utilizing a broad definition of "employee," based on a worker being "in receipt of or entitled to wages," the ISA covered non-standard workers and, specifically, included situations where the same person was an employee for one purpose and an employer for another.[63]

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[52] *Id.*

[53] Mark Cox, *The Limits of Reform: Industrial Regulation and Management Rights in Ontario, 1930–7*, 68 CANADIAN HIST. REV. 552, 572–573 (1987).

[54] An Act to amend The Industrial Standards Act, S.S. 1960, c. 23 (Can.).

[55] An Act to amend The Industrial Standards Act 1935, S.O. 1937, c. 32 (Can. Ont.); An Act to amend The Industrial Standards Act 1935, S.O. 1936, c. 29 (Can. Ont.). Repealed effective September 4, 2001: Employment Standards Act, 2000, S.O. 2000, c. 41, §§ 144 (5), 145(Can. Ont.).

[56] Industrial Standards Act, R.S.O. 1990, c. I.6 (Can. Ont.) [ISA 1990].

[57] COMMITTEE OF INQUIRY INTO THE INDUSTRIAL STANDARDS ACT ET AL, *supra* note 50.

[58] Employment Standards Act, R.S.O. 1968, c. 35.

[59] JONATHAN B. EATON, LABOUR LAW REFORM FOR THE NEW WORKPLACE: BILL 40 AND BEYOND 343, 345 (1994) (Master of Laws Thesis, University of Toronto).

[60] ISA 1990, *supra* note 56, §§ 5, 6; Designation of Industries and Zones, O. Reg. 296/01 (Can. Ont.).

[61] COMMITTEE OF INQUIRY INTO THE INDUSTRIAL STANDARDS ACT ET AL, *supra* note 50, at 1.

[62] ISA 1990, *supra* note 56, § 7(1)(e); Interprovincially Competitive Industries, O. Reg. 295/01 (Can. Ont.). Note that ISA 1990 § 23 prohibited schedules from applying to the agriculture and mining industries.

[63] ISA 1990, *supra* note 56, §§ 1, 12.

The standard-setting process was initiated by employers or employees in an industry (not by government or the Minister of Labour) within a particular region of the province, or anywhere in the province, petitioning the Minister to convene a "conference." If the Minister accepted the petition, he or she would authorize an industrial standards officer (ISO) to convene a conference, at which employer and employee representatives would try to negotiate a "schedule" of matters relating minimum workplace standards.[64] The ISO acted as the representative of the Minister and government at these conferences. Schedules could include wages, hours of work, working days, vacation pay, and overtime limits and overtime.[65] The resulting schedules were often based on collective agreements that existed in the relevant industry.[66]

Conference negotiations were not in the nature of compulsory collective bargaining. Instead, they were "wholly permissive."[67] Employer representatives were not compelled to participate or to reach agreement. The ISA did not provide any dispute resolution mechanism, nor did it impose good faith or duty of fair representation obligations on representatives.

Where representatives were able to agree on a proposed schedule, the conference would submit it to the Minister through the ISO who had convened the conference.[68] The state-involvement element of the tripartite character of ISA standard-setting appeared to largely take place outside of and following the conference negotiations and granted the state significant scope to unilaterally shape schedules. The Minister could direct the ISO to investigate labor conditions and practices in the industry, and the ISO could recommend variations to the proposed schedule.[69] The Minister had the authority to approve the proposed schedule if it had been approved by a "proper and sufficient representation of employers and employees" in the conference, "with such variations recommended by the [ISO] as the Minister considers desirable."[70] Schedules that the Minister recommended to the Lieutenant in Council could be enacted as regulations in force "during pleasure" and applied to all employers and employees in the designated industry and zone.[71] Thereafter, the Director of Labour Standards in the Ministry of Labour had the authority to unilaterally amend schedules,[72] although in practice employer and employee representatives had input into such changes.[73]

In addition to establishing an array of minimum standards through enacted schedules, the ISA required employers subject to a schedule to keep records and to make them available for inspection.[74] The ISA also provided protection for employees against retaliation, with reinstatement as a possible remedy. It prohibited termination or threats of termination or discrimination against employees for testifying in ISA proceedings or participating in investigations. Remedies included reinstatement orders, which could include compensation for lost earnings and other employment benefits. These

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[64] ISA 1990, *supra* note 56, §§ 5, 8(1).

[65] *Id.* §§ 8, 9.

[66] EATON, *supra* note 59, at 342.

[67] COMMITTEE OF INQUIRY INTO THE INDUSTRIAL STANDARDS ACT ET AL, *supra* note 50, at 1.

[68] ISA 1990, *supra* note 56, § 8(2).

[69] *Id.* § 10(1).

[70] *Id.* § 10(2).

[71] *Id.* § 10(3).

[72] *Id.* § 7(1)(c).

[73] INTERCEDE, TORONTO ORGANIZATION FOR DOMESTIC WORKERS' RIGHTS, MEETING THE NEEDS OF VULNERABLE WORKERS: PROPOSALS FOR IMPROVED EMPLOYMENT LEGISLATION AND ACCESS TO COLLECTIVE BARGAINING FOR DOMESTIC WORKERS AND INDUSTRIAL HOMEWORKERS (1993).

[74] ISA 1990, *supra* note 56, § 13; Ontario Duties of Employers and Advisory Committees, R.R.O. 1990, Reg. 652, § 2 [DEAC].

orders could be filed by the employee in superior court permitting the employee to pursue contempt proceedings for non-compliance, and these orders were not to be stayed where the employer appealed.[75]

The tripartite conference process could be succeeded by a bipartite committee, an "advisory committee," which would be formally responsible for administering and enforcing enacted schedules. This occurred where the approved schedule designated an advisory committee to assist in administration.[76] In such cases, an advisory committee could be established by the Minister for each zone or group of zones for which a schedule had been approved. Advisory committees were composed of up to five members from employer and employee sides, serving three-year terms; the legislation did not set out the proportion of employer and employee representatives. Required to meet regularly, and at least once every three months, Committee members' expenses were paid by the government.[77]

Where an advisory committee was established, it could hear employer and employee complaints, and could hire inspectors to investigate and enforce violations. These Committees had significant, specific, powers, including the authority to issue permits for overtime work and to set a minimum wage rate that was below the rate set out in the schedule.[78] Decisions of advisory committees could be appealed to the Director of Labour Standards for a final decision.[79] Although not a statutory responsibility of advisory committees, it was the practice for committees to make recommendations to the Minister about revising schedules.[80] Where an advisory committee was not established, the Director of Labour Standards remained responsible for administrative decisions about enacted schedules.[81]

While the ISA lacked any means of compulsion for establishing schedules, it did provide for enforcement of approved schedules. However, enforcement, beyond the steps described above, was not in the hands of advisory committees. Instead, violations of a schedule, orders to pay wages, or the prohibition on retaliation could only be prosecuted as provincial offenses. This required consent to prosecute from the Director of Labour Standards. Violations could result in substantial fines and possibly imprisonment.[82]

The structure of the ISA has been criticized as having several important shortcomings. In terms of composition and participation, the Act did not address the proportion of employer and employee representation at conferences or advisory committees,[83] nor did it include any means for

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[75] ISA 1990, *supra* note 56, §§ 19-21.

[76] *Id.* § 18(1). ONTARIO LAW REFORM COMMISSION & JOHN D. MCCAMUS, REPORT ON AVOIDING DELAY AND MULTIPLE PROCEEDINGS IN THE ADJUDICATION OF WORKPLACE DISPUTES 34 (1995).

[77] *Id.* § 18; DEAC, *supra* note 74, § 16.

[78] ISA 1990, *supra* note 56, §§ 9(2), 18(4).

[79] *Id.* § 18; DEAC, *supra* note 74, §§ 5–10, 13.

[80] INTERCEDE, *supra* note 73, at 33.

[81] ONTARIO LAW REFORM COMMISSION & MCCAMUS, *supra* note 76.

[82] ISA 1990, *supra* note 56, §§ 19-21. Violation of a schedule could result in a maximum fine of $50,000 for employers and $2000 for employees, upon conviction. If an employer defaulted on a fine, this could result in imprisonment for up to six months. An employer convicted of violating minimum wage rates was subject to an order to pay the Director of Labour Standards the amount of unpaid wages as a penalty in addition to any fine. It was at the Director's discretion whether to direct all or part of the penalty amount to be forfeited to the Crown or to the relevant employee. The Director could also file a copy of an order for payment of wages in Superior Court, or Small Claims Court.

[83] INTERCEDE, *supra* note 73, at 33.

compelling or encouraging participation – particularly by employers.[84] The ISA also lacked a mechanism to resolve deadlocks in conference negotiations.[85] Some commentators contend that the ISA gave too much discretion to the Minister over the content of schedules and too much power to change schedules.[86] Finally, long delays in approving and enacting schedules meant that schedules could be out of date by the time they were approved by the Minister.[87]

C. American Fair Labor Standards Act Industry Committees

Enacted by the US federal government in 1938, the FLSA provided for minimum wage rates, overtime pay, and child labor protections, for public and private sector workers.[88] The legislation required that tripartite "industry committees" be established for each industry "engaged in commerce or in the production of goods for commerce," to recommend minimum wages for the relevant industry, within limits established by the Act.[89] Although the FLSA remains in force, industry committees are no longer used. Therefore, this article addresses the FLSA, as it was originally enacted.

The FLSA was not the first minimum wage legislation, nor the first use of "wage boards," in the US. For several decades prior, there had been attempts to achieve state legislation addressing hours of work.[90] Beginning in 1912, and prompted by dire economic and social conditions of many workers and by a series of federal and state government reports on inadequate wages and working standards, several states passed minimum wage laws.[91] Willis Nordlund describes three basic approaches taken by this state-level legislation: a statutory flat minimum wage rate applying to all workers; creation of a commission to recommend minimum wage rates based on consideration of a living wage and business conditions, which covered women and children only, and which was not compulsory; and, most commonly adopted, a version of the second approach, which considered only living wage and which produced compulsory, enforced minimum rates.[92] The Depression provided further motivation for the FLSA, and the short-lived NIRA, the associated National Recovery Administration, and the corporate codes (which included minimum wage standards) established and administered under that system, were influential forerunners to the FLSA.[93]

Given the apparent influence of the NIRA, and the distinction between collective bargaining under the 1935 NIRA and the form of collective standard-setting provided by the NIRA, it appears that the FLSA was also intended to play a role in labor and employment regulation that was distinct from that of collective bargaining regulation.

By March 1939, the Chief Economist for the Wage and Hour Division of the US Department of Labor estimated that 11.25 million employees were covered by the FLSA, representing about one-

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[84] JUDY FUDGE, ERIC TUCKER & LEAH VOSKO, THE LEGAL CONCEPT OF EMPLOYMENT: MARGINALIZING WORKERS 272 (2002).

[85] INTERCEDE, *supra* note 73, at 33.

[86] EATON, s*upra* note 53, at 346; INTERCEDE, *supra* note 73, at 33.

[87] *Id.*

[88] FLSA 1938, *supra* note 7, §18 (where a state enacted minimum standards legislation providing greater protection than the FLSA, the state law governed).

[89] *Id.* § 5(a).

[90] Luke Norris, *The Workers' Constitution*, 87 FORDHAM L. REV. 1459 (2018).

[91] Willis J. Nordlund, *A Brief History of the Fair Labor Standards Act*, 39 LAB. L.J. 715, 716 (1988).

[92] *Id.* at 718.

[93] *Id;* NIRA, *supra* note 49.

third of the nation's wage-earners and salaried employees.[94] Almost a decade later, in 1948, the FLSA's wage floor protected almost 22 million workers.[95]

The FLSA's definitions of "employee," "employer," and "employ" are broad, and distinctly broader than similar definitions in contemporary minimum standards legislation in many jurisdictions and common law definitions of these terms.[96] These definitions turn on the definition of "employer," which explicitly contemplated including both direct and indirect relationships, with "employ" defined as "includes to suffer or permit to work." "Employee" was simply defined as "include[ing] any individual employed by an employer." Based on a review of the FLSA's legislative history of the FLSA, Kati Griffith contends that these broad definitions were intentional.[97] She argues that legislators understood and foresaw the dangers of narrow definitions that might permit or encourage businesses to "splinter" or "fissure" their operations to avoid the statute. Moreover, legislators anticipated changing business structures and relationships over time. In Griffith's view:

> [T]he message that the legislative history communicates is that the FLSA's regulatory power should reach all businesses responsible, directly or indirectly, for baseline wage standards, regardless of the forms those businesses take, or of the self-serving formalities they impose.[98]

The FLSA provided a Presidentially-appointed Administrator to direct the newly created Wage and Hour Division in the US Department of Labor.[99] Then, as "soon as practicable" thereafter, the Administrator was to appoint an Industry Committee "for each industry engaged in commerce or in the production of goods for commerce."[100] Industry Committees were tripartite – composed of equal numbers of "disinterested persons representing the public," employers, and employees in the industry. However, the number of representatives was not specified. In appointing Committee members, the Administrator was directed to give due regard to the geographic regions in which the industry was carried on.[101] One of the public representatives was designated as chair by the Administrator. Committee members were reimbursed for expenses and a given *per diem* payment. Unlike analogous bodies under the British Wages Council or Canadian ISA systems, Industry Committees were intended to be national in scope.

The Administrator was required to provide Committees with "adequate" legal and office support.[102] Commentators noted that Industry Committees were often large and that this large size was an impediment, yet significant concerns existed about the true representativeness of different unions, non-unionized workers, organized and unorganized employers, public members, and different

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[94] Carroll R. Daugherty, *The Economic Coverage of the Fair Labor Standards Act: A Statistical Study,* 6 LAW & CONTEMP. PROBS. 406, 409, 412 (1939).

[95] Dorothea Tuney, *Ten Years Operations under Fair Labor Standards Act*, 67 M.L.R. 271, 271 (1948).

[96] FLSA 1938, *supra* note 5, § 3 provides: "(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. (e) 'Employee' includes any individual employed by an employer…(g) 'Employ' includes to suffer or permit to work."

[97] Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old is New Again*, 104 CORNELL L. REV. 101, 134-135 (2019).

[98] *Id.* at 133-134.

[99] FLSA 1938, *supra* note 7, § 4.

[100] *Id.* § 5(a).

[101] *Id.* § 5(b).

[102] *Id.* § 5(c).

geographic industrial regions, on these Committees.[103] Appointing employee representatives reflecting the relevance of different trade unions as well as providing for sufficient representation for unorganized workers were recognized as challenges early on. The Administrator sought to appoint unionist Committee members proportionate to the relative strength of the relevant union.[104] However, one commentator noted that "Any failure to achieve proportional representation has been of little significance since representatives of different unions have always agreed on the wage determinations which should be adopted."[105] At least in the early period, the Administrator concluded that union officials were appropriate representatives of unorganized workers on Committees.[106]

On convening an Industry Committee, the Administrator would refer to it the question of minimum wage rates, and Committee recommendations would inform resulting Wage Orders.[107] Recommendations could be made for the industry as a whole or for reasonable "classifications" provided that this would not give a competitive advantage to any group in the industry, and classifications on the basis of age or sex were prohibited.[108]

Committees investigated conditions in the industry, and this could include summoning and hearing witnesses and other evidence and requesting information from the Administrator. The Administrator was required to provide Committees with available data and witnesses the Administrator deemed material.[109] Based on these investigations, the Committee would make a recommendation to the Administrator about the "highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry."[110]

A quorum was two-thirds of the members of an Industry Committee, and decisions were taken by a vote of "not less than a majority of all its members."[111] It appears that lack of consensus among Committee members was not a significant problem, with reports that in more than half the cases, recommendations were unanimously supported by Committee members.[112] There is no indication that

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[103] Elroy D. Golding, *The Industry Committee Provisions of the Fair Labor Standards Act*, 50 YALE L.J. 1141, 1157-1160 (1941); Z. Clark Dickinson, *The Organization and Functioning of Industry Committees under the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 356, 362-367 (1939).

[104] Golding, *supra* note 100, at 1157.

[105] *Id.*

[106] *Id.*

[107] FLSA 1938, *supra* note 7, § 8.

[108] *Id.* § 8(c). Committees were to recommend the highest minimum wage rate, for each classification, which the committee determined would not substantially curtail employment in that classification. The FLSA also specified several mandatory considerations for both Committees and the Administrator in deciding whether and how many classifications to make in any industry. These considerations were:

"(1) competitive conditions as affected by transportation, living and production costs;

(2) the wages established for work or like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry." *Id.* § 8(c).

[109] *Id.* § 5(d).

[110] *Id.* § 8(b).

[111] *Id.* § 5(c).

[112] Nordlund, *supra* note 91, at 723.

public interest members were intended to perform the tie-breaking role of independent members of British Wages Councils.

Committee recommendations were contained in reports filed with the Administrator who would then give notice to interested parties who had an opportunity to be heard on the recommendations. Thereafter, the Administrator would accept the recommendations if he or she found that the recommendations were in accordance with the law and hearing evidence, and would fulfill the purposes of the legislation. Otherwise the Administrator must disapprove the recommendations.[113] If the Administrator did not approve a Committee's recommendation, the Administrator was required to refer the matter back to the Committee, "or to another industry committee (which he or she may appoint for the purpose), for further consideration and recommendation."[114]

Wage Orders took effect after publication in the Federal Register,[115] and were to expire seven years after the effective date of § 6 of the FLSA, and no order was to be issued thereafter or after expiry for an industry "unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry."[116] Wage Orders could be challenged by "any person aggrieved" by the order, by way of judicial review, although the scope for review was limited by the statute.[117]

Wage Orders were enforceable in the courts, with substantial fines available and, in the case of subsequent offenses, the potential for both fines and imprisonment for not more than six months. Employers would also be liable to affected employees for both the amount of the unpaid minimum wages and an additional equal amount as liquidated damages, as well as a reasonable attorney fee and costs of the action.[118]

This section has outlined three contrasting examples of sectoral standard-setting and their historical origins, as examples of a spectrum of approaches to tripartite sectoral workplace standard-setting. The following section examines and compares particular elements of these three models, to inform constructing a contemporary standard-setting system.

III. COMPARING ELEMENTS OF SECTORAL STANDARD-SETTING APPROACHES

This section examines key constituent elements of the three models surveyed. These include: breadth of sector coverage of types of workers and work relationships, scope of standards addressed, tripartite composition and the role of government, presence and form of dispute resolution, enforcement and investigation tools, and whether the model provided a mechanism to facilitate evolution from consultation and negotiation into independent collective bargaining (see Table 1, below).

This comparison may assist in considering whether these early models are instructive in terms of how a modern sectoral standard-setting mechanism might be configured to address today's workplaces.

[Table 1 about here]

[113] FLSA 1938, *supra* note 7, § 8(d).'

[114] *Id.* § 8(d).

[115] *Id.* § 8(f).

[116] *Id.* § 8(e).

[117] *Id.* § 10.

[118] *Id.* § 16.

A. Sector and Coverage

It is notable that each of the three models incorporated broader conceptions of the forms of work relationships that were to be covered than those included in modern common law and statutory labor and employment legislation in North America. Not only did each cover contractors in addition to more traditional employees, but each incorporated broad understandings of the concept of "employer." The FLSA was particularly forward-looking in its effort to capture future developments in business organization and to foil business' efforts to avoid regulation through creative structuring of organizations. The FLSA was intended to address the fissured and chain or pyramid structures that now pose such a challenge to modern workplace regulation.[119]

B. Range of Workplace Standards

An important consideration is the scope of workplace standards to be addressed by a sectoral standard-setting body. British Wages Councils (responsible for remuneration, terms and conditions of work and with specific limitations only on holidays and holiday remuneration) and the ISA conferences (wages and conditions of work) had broad spheres of influence, in contrast with the FLSA Wage Boards, which were limited to addressing minimum wages. An additional limitation on FLSA Wage Board discretion was the statutory requirement that minimum wage recommendations be assessed against anticipated effects on employment.[120] No such mandatory considerations applied under the other systems.

C. Tripartism and Composition of Standard-Setting Body

Composition of the standard-setting body, including the form of tripartism, was an important distinguishing feature of each model. For both British Wages Councils and Canadian Industry Conferences, the number of representatives and the overall size of the standard-setting body was not a concern. Only with the FLSA wage boards, which commonly included 20 or more members, was excessive size a concern. A challenge identified for all of the models was adequate representation of non-unionized employees. In each case, it appears that unions typically acted as worker representatives.[121]

A related issue was the form of tripartism incorporated into the model. Each of the three systems examined in this article adopted a tripartite structure.[122] However, they represent different approaches to this concept. All included representatives of employers and employees, and unions generally acted as employee representatives. However, the systems incorporate different approaches to the third party: British Wages Councils utilized independent members, Canadian Industry Conferences included an ISO as representative of the Minister and the state, and the FLSA incorporated "public" representatives.

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[119] On this point, see Griffith, *supra* note 97; and for a detailed examination of these phenomena see DAVID WEIL, THE FISSURED WORKPLACE, 2014.

[120] FLSA 1938, *supra* note 7, § 8(a).

[121] See Daphne Taras, *Reconciling Differences Differently: Employee Voice in Public Policymaking and Workplace Governance*, 28 COMP. LAB. L. & POL'Y J. 167 (2006) (regarding the dilemma of voice for unorganized workers).

[122] Notably, Kate Andrias has recently examined the FLSA as evidence of a history of tripartite approaches to standard-setting in the US and has called for a return to tripartite approaches to employment regulation (*An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616 (2019)). The ISA model additionally incorporated a bipartite advisory committee that could be struck for the purposes of administering and enforcing standards – not standard-setting.

D. Autonomy

A significant difference among the three models is found in the degree of autonomy they exercised. British Wages Councils had statutory authority to issue legally enforceable orders. In contrast, both the Canadian Industry Conferences and the FLSA Wage Boards were making recommendations to the government and the government had significant authority to reject or modify the recommendations. The FLSA included several additional features that likely had the effect of limiting wage boards' autonomy: the government could cancel and replace a wage board at any point, wage board minimum wage rates were subject to judicial review that could be initiated by a member of the public, and any resulting wage order was of statutorily limited duration. All three systems provided for a form of public or industrial community transparency, in the form of requiring public hearings, notice, or input into proposed orders or recommendations. In the case of the FLSA, the input into recommendations included a heavy emphasis on calling evidence and witnesses to inform the boards' recommendation.

One challenge for tripartite sectoral standard-setting bodies is ensuring participation of employers and their representatives. While lack of employer participation was a long-standing problem with the ISA conferences, it does not appear that it was a difficulty encountered by British Wages Councils.[123] The difference likely lies in the inherent incentive to participate that existed in wages councils. As wages councils had authority to directly issue legally binding orders, if employers did not participate, they faced the prospect of becoming subject to orders that they had not participated in developing.

In contrast, the ISA system provided employers with little incentive to participate constructively. As discussed below, the ISA system offered no mechanism for resolving an impasse if a conference was unable to come to agreement. Further, even if employer and employee representatives came to agreement, the Minister could delay, reject, or unilaterally modify the agreed-upon standards. Unlike under the wages council system, there was little prospect under the ISA that if employers did not participate that they would become subject to sectoral standards.

E. Dispute Resolution

Where members of the standard-setting body could not come to agreement, the British Wages Council system provided for the option of voting-by-sides, and contemplated that independent members would act as tiebreakers. Reportedly, rarely did this have to be resorted to.[124] The relative autonomy and authority of wages councils demanded some means of breaking deadlocks. This is in contrast to the other systems, which lacked dispute resolution mechanisms.

F. Enforcement

Enforcement and associated inspections are key elements of any scheme of workplace regulation, and any configuration depends on sufficient resources to be effective. The broadest provision for enforcement was provided by the British Wages council system. Government inspections were supplemented by options for either civil or criminal enforcement. Notably, the civil, contract law, enforcement route arose from the incorporation of works council orders into individual contracts of employment.

The ISA system relied on inspections, which were historically underfunded.[125] Moreover, enforcement was by means of a provincial offense proceeding, which was a costly, cumbersome process that the individual worker was responsible for pursuing.

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[123] INTERCEDE, *supra* note 73.

[124] KAHN-FREUND ET AL., *supra* note 14.

[125] See INTERCEDE, *supra* note 73; COMMITTEE OF INQUIRY INTO THE INDUSTRIAL STANDARDS ACT, REPORT OF COMMITTEE OF INQUIRY INTO THE INDUSTRIAL STANDARDS ACT (1963) (Can. Ont.).

G. Promote Voluntary Collective Bargaining

Chris Howell has described the role of wages councils as "a hybrid form between statutory wage regulation and voluntary bargaining" and an example of state encouragement of industry bargaining institutions instead of directly determining outcomes.[126] Howell located JICs in the British system between wages councils and traditional collective bargaining in a "hierarchy" of bargaining systems, with voluntary collective bargaining at the top and wages councils at the bottom.[127] Wages councils and JICs were conceived of as transitional bodies: a means for launching parties into independent, collective standard-setting, whether that be in the form of voluntary collective bargaining or non-bargaining collective negotiations, and to supplement the collective bargaining system.

In contrast, the Canadian ISA system was not intended to supplement a collective bargaining system but to operate separately and in parallel, with no explicit role for unions or collective bargaining. Although it did provide for development of conferences into advisory committees, this was not regarded as either a means of developing independent negotiations or collective bargaining capacity for employer and employee representatives.

Meanwhile, the FLSA explicitly addresses unions and, while it intended wage boards to be temporary bodies, this was of a different character than either the wages council or the ISA systems. The FLSA did not include any mechanism for staged development toward independent standard-setting by employers and employees, and was clearly not intended to foster workplace parties' independence or to transform into collective bargaining.

Looking ahead, there is value in considering whether elements of these different approaches may be drawn upon to construct a "wage board for the 21st century". The following two Parts examine how this might be achieved.

IV. CONSTITUTING A SECTORAL STANDARD-SETTING MECHANISM FOR THE CONTEMPORARY WORKPLACE

The preceding outline and comparison of three examples of sectoral standard-setting mechanisms prompt several interrelated considerations relevant to contemplating adopting a sectoral standard-setting model for contemporary workplaces. This section first addresses the theoretical location, second the structural location of a mechanism, and finally, examines additional contextual considerations which may influence design choices.

A. Theoretical Location: Fairness

A fundamental consideration is the theoretical location or orientation of the model. Specifically, which of the many existing conceptions of fairness will inform the design of the model**.** For this, we turn to the distinct, competing, conceptions of fairness animating different stages of development, passage and subsequent legal interpretation and amendment of the FLSA and its predecessors identified by Seth Harris in his comprehensive examination of the legislative and social history of this legislation.[128] Although grounded in a particular legislative history, Harris' alternative conceptions of fairness are not limited to the FLSA context. They are helpful to contemporary policymakers because, as we consider the potential for sectoral standard-setting mechanisms to address contemporary workplace concerns, clearly identifying its goals – including fairness goals – has significant implications for the structure of the mechanism that is chosen.

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[126] CHRIS HOWELL, TRADE UNIONS AND THE STATE: THE CONSTRUCTION OF INDUSTRIAL RELATIONS INSTITUTIONS IN BRITAIN, 1890-2000, 88-89 (2005).

[127] *Id. a*t 89.

[128] Harris, supra note 7. Harris identified the following six conceptions of fairness: Hierarchic Fairness (or "fairness is the economic hierarchy"), Absolute Fairness (or, "fairness is a living wage"), Bargaining Fairness (or, "fairness is equality of bargaining power"), Competitive Fairness (or, "fairness is fair competition"), Fairness Is an Implied Contract, and Commutative Fairness (or, "fairness is commutative justice").

This section first addresses the six conceptions of fairness identified by Harris. This includes a judicially constructed conception (Hierarchic Fairness), and conceptions developed in the social and political arenas (Absolute, Bargaining, and Competitive Fairness) which, therefore, are most likely to be helpful to considering how to construct new standard-setting mechanisms. Finally two conceptions that were products of later judicial decisions are considered (Communtativ Fairness and Fairness is an Implied Contract).[129] In addition to briefly outlining each of these notions of fairness, this section identifies those elements of standard-setting mechanisms that are consequences of different conceptions of fairness and the implications of each conception for designing a contemporary sectoral standard-setting model (see Part V and Table 2).

1. Hierarchic Fairness

Reflecting the *laissez-faire*, free-market approach to working standards that prevailed prior to government intervention, the Hierarchic Fairness perspective construes fairness as protecting the *status quo* to the extent that it is socially possible to do so.[130] It regards inequality in labor market bargaining power and outcomes, including low wages, as acceptable and even necessary for social progress.[131] Therefore, Hierarchic Fairness supports individual bargaining with limited government intervention in its process or outcome. A product of judicial decisions in the *Lochner* era, this was an important backdrop to the development of sectoral standard-setting mechanisms in the US.[132] Similarly, each of the standard-setting mechanisms examined in this article can be regarded as a response to socially unacceptable outcomes of regimes characterized by Hierarchic Fairness. Hierarchic Fairness may also aptly describe the circumstances facing many workers today who fall outside of protective workplace regimes.

2. Absolute Fairness

Absolute Fairness identifies inferior worker bargaining power as the source of inadequate wages, and a living wage for workers as the goal.[133] Absolute Fairness prescribes a substantive outcome (e.g. imposing a minimum wage for every worker, without exception or differentiation) by replacing individual or collective bargaining with regulation setting, for example, a requirement that all workers be paid a minimum living wage.[134] Embraced by the living wage movement in the US in the early 20th century, this approach was influenced by both socio-economic reformers and Catholic theologians and has some resonance with contemporary living wage and "Fight for $15" movements.[135] While, as Harris notes, Absolute Fairness established an ethical touchstone for fair wages debates, its "absolutist" nature was a practical impediment to incorporating it into legislation.[136] This approach is, for instance, does not account for regional cost of living differences and may require significant ancillary social welfare policies to be effective.

3. Bargaining Fairness

Like Absolute Fairness, Bargaining Fairness focuses on fairness to employees, diagnoses workers' inferior bargaining power as the root of inadequate wages, but prescribes a different cure. In contrast

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[129] *Id.* at 23-24.

[130] *Id.* at 23, 76.

[131] *Id.* at 69-70.

[132] *Lochner v. New* York, 198 U.S. 45 (1905); Harris, *supra* note 8 at 23.

[133] Harris, *supra* note 128 at 69, 163.

[134] *Id.* at 21, 69.

[135] *Id.* at 22.

[136] *Id.* at 46. While "absolute fairness" influenced some state minimum wage legislation, but no federal legislation, Harris notes that none of these programs achieved "absolute fairness" in their implementation, and this perspective was never incorporated into US federal minimum wage legislation. (*Id.* at 46).

with Absolute Fairness which replaces bargaining with direct regulation, Bargaining Fairness targets bargaining power. It prescribes a procedural solution: installing a "public bargaining" mechanism to relocate minimum wage determination from the labor political markets to a public administrative forum and to insulate negotiations from interest group influences, thereby providing greater equality of bargaining power to workers that will, hopefully, produce the desired outcome of a living wage.[137]

Key elements of a Bargaining Fairness system include a minimum standards determination body composed of employer and worker representatives and one or more government or "public" representatives and data-based recommendations or decisions about minimum standards, including evidence-based variation or differentials in standards. Scope of coverage is broad, without individual exceptions from coverage, and any broader exceptions are evidence-based.[138] Challenges of a system based on this fairness approach are that it relies significantly on government goodwill including ensuring employer participation, and that does not fundamentally recalibrate bargaining power, instead relying on the public bargaining procedure to improve worker bargaining.

4. Competitive Fairness

In contrast with other conceptions, Competitive Fairness identifies unfair producer/employer competition on the basis of labor costs to gain price advantages in product markets, as the key source of inadequate wages and focuses on fairness among producer/employers rather than fairness to employees.[139] Consequently, the solution to substandard wages is to impose sector-wide regulation to reduce the scope for employers to engage in unfair labor cost competition, with the expectation that competition would shift from cost reduction to productivity.[140] This approach emphasizes the need for uniformity of labor standards across all employers to remove labor costs from competition, without differentials. Therefore, it entails broad worker coverage, including independent contractors, with limited scope for explicit, statutory exclusions.[141]

Although Competitive Fairness focuses on unfair competition among employers – not on inequality of bargaining power – the solution it prescribes (sector-wide labor cost regulations, subject to very limited, explicit exceptions) also engages a form of public bargaining and would also help protect workers from the consequences of unequal bargaining power.[142]

A fundamental challenge for systems based on Competitive Fairness is whether relevant market boundaries match the possible boundaries for sectoral regulation. For instance, if sectoral regulation is limited to a sub-national region it will struggle to be effective in a national market.

5. Judicial Conceptions of Fairness: Commutative and Implied Contract

The FLSA, as it was enacted, reflected Competitive Fairness. However, subsequent judicial interpretation of the FLSA departed from Competitive Fairness, instead reflecting what Harris labels "Commutative Fairness" and, later, "Fairness is an Implied Contract." Commutative Fairness, a short-lived approach conceived by the US Supreme Court, regarded minimum wage law to be constitutionally acceptable only where wages were equivalent to the value of the workers' output.[143]

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[137] *Id.* at 21, 61, 69, 116.

[138] *Id.* at 162.

[139] *Id.* at 22, 119.

[140] *Id.* at 22, 143-144.

[141] *Id.* at 158.

[142] *Id.* at 161, 165.

[143] Harris, *supra* note 8. According to Harris, Commutative Fairness emerged in a single US Supreme Court decision on a District of Columbia minimum wage statute, without subsequently being adopted by later decisions or incorporated into legislation (*Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

Therefore, wage inequality would be addressed by seeking fair value of work for wages paid by basing wages on assessment of individual worker productivity.

Finally, the contemporary judicial interpretation of the FLSA reflects the understanding that Fairness is an Implied Contract. Like Competitive and Commutative Fairness, this perspective is primarily concerned with fairness to employers, and provides that statutory protection only extends to workers who are dependent on their employers.[144] This approach rejects the premise that workers, generally, lack sufficient bargaining power, to secure adequate standards. Consequently, it requires proof of lack of bargaining power based on individual workers' circumstances, requiring a fair wage only where workers have demonstrated total loyalty, dedicating their full labor to the employer.[145] This is operationalized by applying a "dependence" test, removing many workers from the scope of the FLSA protection by narrowing the statute's scope of application to include only those workers meeting the common law definition of "employee," thereby excluding dependent and independent contractors. The results of this qualifying dependence test, Harris contends, reflect "an individual employer's appetite for litigation and its hunger for an advantage over its competitors", thereby encouraging and rewarding litigious employers.[146]

6. Fairness Reflected in the Models

The Bargaining and Competitive Fairness perspectives have most clearly shaped the sectoral standard-setting mechanisms examined here – although to varying degrees –with unfair competition concerns a motivation in each case.

The FLSA, at least as it was enacted and as outlined above, most clearly embodies Competitive Fairness, which ultimately prevailed after a protracted struggle over whether Bargaining or Competitive Fairness would be the animating perspective for the legislation.[147] President Roosevelt, who drove adoption of the FLSA, clearly identified price-cutting in the labor market as the cause of inadequate wages and declining consumer purchasing power and sought to counter these with minimum standards. This is reflected in the FLSA's nation-wide limits on low wages and working hours, with limited explicit exceptions, as a means of limiting the use of labor cost-cutting for competitive advantage, remedying underconsumption and ensuring fair competition in product markets. Subsequent judicial interpretations significantly altered the course of the legislation by formulating and applying new conceptions of fairness: briefly Commutative Fairness and, enduringly, Fairness Is an Implied Contract.[148]

The other two models examined in this article, British Wages Councils and the Canadian ISA, can each be regarded as reflecting a hybrid of Bargaining and Competitive Fairness perspectives. Elements of Bargaining Fairness appear in both, including recognition of inadequate worker

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[144] Harris, *supra* note 8, Part VI. The "social contract", here, refers to the "social contract" established by the Social Security Act which provided for old age, disability and unemployment benefits for employees funded by taxing employers. (See *Id.* at 23, 150-151).

[145] *Id.* at 157. Harris notes that it is not necessarily all employers who benefit from this approach, although "litigious employers" would certainly benefit (*Id.* at 164-165).

[146] *Id.* at 162.

[147] *Id.* at 22. Harris details the shifts between Bargaining and Competitive Fairness at various stage of development of the legislation as it made its way through US Congress (*id.* at 61). The contest between these conceptions included the labor movement's resistance to public bargaining, preferring private collective bargaining as the solution to workers' lack of bargaining power. Harris contends that this attitude was partly due to labor's deep skepticism that government could act neutrally in this role (*id.* at 22) and labor's concern that publicly bargained minimum wages would become maximum wages, that unions might end up competing with the wage board on core bargaining issues of wages and hours of work, and that it might hamper union organizing. Therefore, while the labor movement generally supported the legislation, it attempted to limit its scope to sectors lacking collective bargaining (*id.* at 117).

[148] *Id.* at 119-120.

bargaining power as a source of inadequate standards, and removal of negotiations from the labor market and political arenas to a tripartite administrative forum.

The Wages Council system also embodied other key elements of Bargaining Fairness: a focus on addressing unequal bargaining power reflected in the criteria for establishing wages councils, and the clear intention that wages councils were meant to be a form of temporary support for employers and workers as they progressed to independent, voluntary collective bargaining facilitated by the JIC mechanism incorporated into the legislation. At the same time, the British Wages Councils system reflects Competitive Fairness concerns in its genesis and broad scope of application, without exceptions determined on an individual basis.[149]

The ISA system, though primarily reflecting Bargaining Fairness, was also partly a product of concerns about curbing unfair competition and was consciously reoriented from a "fair wage" to a "minimum standards" approach as a result of significant amendments to the legislation early in its life.[150] In these respects, including its wide scope of application, lack of recognition of unions and lack of a mechanism for parties to graduate to independent bargaining, it reflects a Competitive Fairness perspective.

B. Structural Location

The second important consideration is the structural location of the mechanism. That is, where it will be conceptually located within the overall system of workplace regulation; whether the system will adopt a horizontal, regional or vertical approach; and, its relationship to ancillary welfare policies.

1. Location Relative to Other Workplace Regimes

The question of where to locate a sectoral standard-setting mechanism within the overall system of workplace regulation includes considering whether the mechanism will operate in parallel with, or be incorporated into, existing legislation; and, whether standard-setting will be a permanent mechanism or a temporary support to assist employers, workers, and their organizations to gain capacity to shift to more independent forms of standard-setting such as voluntary negotiations or collective bargaining.

a. Parallel or Incorporated Systems

A sectoral standard-setting mechanism could be incorporated into an existing workplace statutory system. However, this is likely to be a complex undertaking, particularly if the mechanism will cover workers, such as independent contractors or dependent contractors, not included in the existing legislation.[151] Therefore, it may be more feasible to construct the new standard-setting mechanism as a separate statutory regime, to operate in parallel with existing minimum standards and collective bargaining systems.[152]

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[149] See discussion and references at section A. British Wages Councils.

[150] See discussion and references at section B. *Canadian Industrial Standards Act Conferences*.

[151] See, for e.g. the detailed and complex proposal submitted by one union to the 2015-16 Ontario Changing Workplaces Review of labour and employment legislation (Unifor, "Building Balance, Fairness, and Opportunity in Ontario's Labour Market" (Toronto: Unifor, 2015), 104–130) and the Special Advisors' recommendation for sectoral committees in that Review (C. Michael Mitchell and John C. Murray, *The Changing Workplaces Review: An Agenda for Workplace Rights – Final Report* (Toronto: Ministry of Labour, 2017 at 354)).

[152] This could also be effectuated by incorporating the new mechanism as a separate part or division of existing legislation, allowing it to operate essentially in parallel with the rest of the statute. The construction sector provisions of the Ontario *Labour Relations Act*, 1995, SO 1995, c 1, Sch A, ss. 126-168, are an example of this two-regimes in one statute approach.

Recent sectoral bargaining proposals emphasize the importance of pairing sectoral initiatives with workplace-level reforms such as works councils, workplace monitors, or worksite bargaining.[153] Paired reform could similarly be contemplated for sectoral standard-setting mechanisms.

b. Graduation to Independent Collective Bargaining

Turning to the option of a temporary mechanism, as explained earlier, some models examined here include elements designed to promote and support development of more independent forms of negotiation or collective bargaining out of the sectoral standard-setting system. Specifically, the JIC structure in the British Wages Council system and, to a lesser degree, the advisory committee in the Canadian ISA system, were intended to play such a role. These models were not necessarily temporary but had the option to become self-obsolete, in particular cases. In contrast, the American FLSA did not include apparatus intended to transition parties and negotiations to more independent or voluntary forms.[154]

Therefore, an option for locating a sectoral standard-setting system includes designing it as a system that could also lead to parties progressing to either non-statutory independent negotiation or to statutory collective bargaining. In such cases, it will be important to ensure that parties are capable of undertaking such a transition. This has implications for structural features, most importantly the nature of the representatives, scope of application, and scope of standards included in the system.

First, it is important to ensure that the representatives are functionally capable of representing constituent employers or workers in voluntary negotiation or statutory bargaining. For statutory collective bargaining, it would also be crucial to consider whether the prospective bargaining parties, particularly the employee representative, would satisfy the statutory requirements for a collective bargaining representative, including any exclusions, or prohibitions such as prohibitions on employer-dominated employee representatives.[155]

Second, regarding scope of application, collective bargaining legislation commonly limits access to "employees," excluding independent contractors.[156] In the same way that it may impede incorporating a new sectoral standard-setting mechanism into existing legislation, a mismatch between the scope of application of the standard-setting mechanism and the collective bargaining system may hamper or prevent transition to statutory collective bargaining.[157]

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[153] CLEAN SLATE, *supra* note 1 at 7, 8; Andrias, *supra* note 1 at 59-60; Madland, *supra* note 1 at 16.

[154] Workplace regulation involving successive, "staged" (Keith D. Ewing, *Trade Union Recognition: A Framework for Discussion*, 19 INDUS. L.J. 209 (1990); KEITH D. EWING & JOHN HENDY, RECONSTRUCTION AFTER THE CRISIS: A MANIFESTO FOR COLLECTIVE BARGAINING (2013)), "graduated (Mark Thompson, *Wagnerism in Canada: Compared to What?* Proc. of the XXXIst Conf. – CANADIAN INDUS. REL. ASS'N, 59-71 (1995); David J. Doorey, *Graduated Freedom of Association: Worker Voice Beyond the Wagner Model*, 38 QUEEN'S L.J. 511 (2012-2013)), or "gradated" (JEAN BERNIER, GUYLAINE VALLEE, & CAROL JOBIN, LES BESOINS DE PROTECTION SOCIALE DES PERSONNES EN SITUATION DE TRAVAIL NON TRADITIONNELLE (2003)) approaches to collective representation and bargaining, as it has variously been labeled, has appeared in the literature for many years. Some approaches explicitly link staged or gradated access to representation and bargaining at the workplace to sectoral-level representation, negotiation, and bargaining. Note that Ewing and Hendy's proposal, for instance, appears to be rooted in the British Wages Councils model.

[155] See for examples of employer domination prohibitions: NLRA, § 8(a)(2), *Canada Labour Code,* R.S.C. 1985, c. L-2, s. 94(1).

[156] Note that, unlike the NLRA, Canadian collective bargaining legislation recognizes and includes a "dependent contractor" category, with the effect that the excluded "independent contractor" category is smaller than that under the NLRA. See § 1(1) OLRA (definitions of "employee", "dependent contractor").

[157] Though beyond the scope of this article, potential conflict of voluntary negotiation with competition or anti-trust regulation may also be a consideration. For a comprehensive treatment of the intersection of competition law and collective bargaining see SANJUKTA PAUL, SHAE MCCRYSTAL, AND EWAN MCGAUGHEY (EDS.), THE CAMBRIDGE HANDBOOK OF LABOR IN COMPETITION LAW (2022).

Third, the scope of topics included in the sectoral standard-setting negotiations may also be relevant to whether to design a sectoral standard-setting mechanism as a staged approach to other forms of negotiation or bargaining. Both voluntary negotiation and collective bargaining contemplate the parties addressing a wide array of matters. If the standard-setting system permits only a narrow range of matters to be negotiated, this may hinder representatives' ability to graduate to full negotiation or collective bargaining and may heighten the difficulty of achieving a first negotiated or bargained collective agreement.

2. Horizontal or Vertical Approach

A further structural consideration is whether to adopt a "horizontal" (national or market-wide) or "vertical" (such as single-industry or possibly pilot-project) approach.[158] Horizontal approaches are associated with standard-setting at higher levels (national or regional) while vertical approaches may also involve standards at lower, local levels. While the former, horizontal, approach may have the benefit of encompassing relevant markets, the latter may be more manageable to implement, and vertical approaches may serve as useful pilot projects.[159]

The recently revived living wage movement, producing "Fight for $15" movements in many countries including the US, Canada and the UK, may offer some insight into challenges surrounding choosing a direction of approach. Similar to living wage movements of the early 20th century, contemporary campaigns seek a living wage in the form of an across the board $15 an hour minimum wage. Originating at the municipal level, these campaigns have subsequently "scaled up" to regional or national initiatives. Researchers caution that this brings significant structural challenges.[160] Successfully implementing "a nationally uniform wage floor in what is ultimately a regional economic world" must address regional cost of living differences stemming from the same forces producing the inadequate conditions challenged by the movement and must coordinate this initiative across political "scales".[161] Similar difficulties would be faced by sectoral standard-setting mechanisms adopting a horizontal approach with standards at national or regional levels.

In addition, decisions about direction of approach may be restricted by constitutional allocation of responsibility for labor and employment matters. In the United States the preemption issue may limit the scope for national, horizontal sectors.[162] Meanwhile in Canada labor and employment law is predominantly under provincial jurisdiction, while only certain industries fall under federal jurisdiction.[163] Therefore, truly horizontal approaches would be limited to federally regulated sectors.

Finally, choice of theoretical location may affect decisions about direction of approach since the choice of motivating conception of fairness is relevant to the importance of competition and, therefore, scope of relevant labor and product markets. For example, a horizontal or regional approach may be consonant with competitive fairness, depending on the boundaries of these markets.[164]

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[158] CLEAN SLATE, *supra* note 1, addressed this in the context of sectoral collective bargaining and labelled these approaches "vertical", "horizontal" and "state". Here the term "regional" is preferred to "state" to facilitate more universal application of this concept.

[159] *Id.* at 8.

[160] Jason Spicer et al., *National Living-Wage Movements in a Regional World: The Fight for $ in the United States*, IN REIMAGINING THE GOVERNANCE OF WORK AND EMPLOYMENT 41 (Dionne Pohler ed., 2020).

[161] *Id.* at 42.

[162] See for a discussion of NLRA pre-emption Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States,* 124 HARV. L. R. 1153 (2011).

[163] GEORGE ADAMS, CANADIAN LABOUR LAW (2nd ed.), § 3:2 (loose-leaf).

[164] See Part IV. *A. Theoretical Location: Fairness*, *supra*, for discussion of theoretical location.

3. Location relative to Other Social Policies

A final consideration is to locate sectoral standard-setting in relation to other social welfare policies. Turning again to the "Fight for $15" example for insight, researchers contend that the twin challenges of regional differences and multiple political forums mean that successful implementation of these efforts to improve workers' standard of living requires ancillary policies targeting the particular sources of regional cost of living differences.[165] In different regions, reflecting local drivers of unaffordability, these policies could range from those increasing access to affordable housing, to supplementary social welfare initiatives and policies developing more local employment in regions where, for instance, childcare and healthcare are primary sources of unaffordability.[166] However, the practical feasibility of different policy options may depend on the different levels of government, legislation and politics implicated.[167] Therefore, where standard-setting fits in the overall policy mix and its likely interaction with other existing and potential social welfare polices, as well as whether to approach standard-setting as one part of a multi-pronged integrated strategy or stand-alone initiative are important considerations.

C. Contextual Considerations

Several somewhat intersecting phenomena color the current moment and may influence new approaches to workplace regulation. These include identification of persistent and growing inequality as a fundamental challenge of our time;[168] growing acceptance of international labor standards, particularly the International Labour Organization's freedom of association principles, into domestic labor standards;[169] and, emergence of business and workplace practices of large technology and platform enterprises such as Google and Uber as among the most significant challenges for workplace regulation, standards, and worker rights and power. The dominance of these new entities has given rise to competition concerns and discussion of antitrust regulation, including for the purposes of worker protection.[170] More generally, several scholars have emphasized the importance of sufficient worker political power, supportive social norms, and the political orientation of the governing party, to the effectiveness of introducing wage boards.[171]

Possible structural implications of these contextual features relevant to designing sectoral standard-setting may include greater interest in ensuring more equal worker bargaining power, concern about unfair competition, and a focus on process which may lead to renewed interest in public bargaining

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[165] Spicer et al., *supra* note 160 at 41, 42, 61, 62.

[166] *Id.* at 61, 62.

[167] *Id.* at 62.

[168] ILO, INEQUALITIES AND THE WORLD OF WORK: REPORT IV OF THE INTERNATIONAL LABOUR CONFERENCE 109TH SESSION (2021).

[169] Yifeng Chen, *Proliferation of Transnational Labour Standards: The Role of the ILO*, *in* INTERNATIONAL LABOUR ORGANIZATION AND GLOBAL SOCIAL GOVERNANCE (Tarja Halonen & Ulla Liukkunen eds., 2021); Congressional Research Service, R46842, *Worker Rights Provisions and U.S. Trade Policy* (2021) https://crsreports.congress.gov/product/pdf/R/R46842/1.

[170] See e.g. SANJUKTA PAUL ET AL., *LABOR IN COMPETITION* (2022); AMY KLOBUCHAR, *ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE* (2021); S.2710 - 117th Congress (2021-2022): Open App Markets Act, S.2710, 117th Cong. (2022), http://www.congress.gov/; S.2992 - 117th Congress (2021-2022): American Innovation and Choice Online Act, S.2992, 117th Cong. (2022), http://www.congress.gov/.

[171] César F Rosado Marzán, *Can Wage Boards Revive US Labor?: Marshaling Evidence from Puerto Rico*, 95 CHI.-KENT L. REV. (2020); Ana Laura Ermida & Cesar F Rosado Marzan, *Wage Boards and Labor Revitalization: US Aspirations and Uruguayan Realities*, 32 DUKE J. COMP. & INT'L L. (2021); Ken Jacobs, et al., *State and local policies and sectoral labor standards: From individual rights to collective power*, 74 ILR REVIEW (2021) at 1135.

approaches and preference for adopting bargaining or competitive fairness approaches or a hybrid of the two.

V. DESIGNING A CONTEMPORARY SECTORAL STANDARD-SETTING SYSTEM

Drawing on the above analyses, this final section proposes a three-step approach to informing design of a sectoral standard-setting system: (1) selecting the theoretical location for the mechanism; (2) identifying the structural elements that flow from the theoretical location; and (3) deciding the structural (bargaining and policy) location for the mechanism (See Table 2).

A. Step 1: Theoretical Location - Fairness Conception

The first step is to identify the theoretical location (that is the conception of fairness) for the sectoral standard-setting mechanism. Absolute, Bargaining and Competitive Fairness, or a hybrid of these approaches are the most likely theoretical starting points for a contemporary sectoral standard-setting model. Therefore, while this article canvassed an array of conceptions of fairness,[172] this section addresses only this subset of conceptions.

Central to discerning the theoretical location is identifying the source of the problem of inadequate terms and conditions of work: lack of worker bargaining power or unfair competition based on labor cost competition? The former explanation reflects Absolute or Bargaining Fairness, the latter, Competitive Fairness. An additional consideration is whether the concern is primarily for worker or employer welfare? Again, the first relates to Absolute or Bargaining Fairness; the second, Competitive Fairness.

Different conceptions of fairness are also associated with different legislative goals. Absolute Fairness focuses on achieving a set living wage; the goal of Bargaining Fairness is to facilitate bargaining of a living wage; while the object of Competitive Fairness is to remove labor costs from competition to protect employer/producers from unfair competition.

Finally, contextual considerations may also be relevant to selecting the fairness conception. For instance, growing policy and public concern over inequality, antitrust, and recognition and promotion of freedom of association and collective bargaining are more consonant with Bargaining and Competition, or a hybrid of these two conceptions, compared to Absolute Fairness.

In contrast, the relative straightforwardness of statutorily imposed standards, and revived public support for "Fight for $15" movements may weigh in favour of preferring an Absolute Fairness approach, although such mechanisms are necessarily limited in scope.

[Table 2 about here]

B. Step 2: Structural Elements

Different conceptions of fairness have different structural implications for sectoral standard-setting mechanisms. To a significant extent, underlying conceptions of fairness guide the choice of some structural features, including: whether it is a substantive or procedural mechanism, coverage and exceptions, scope of matters included, and nature of any differentials in protection. Other important structural elements, such as tripartite form, role of the state, dispute resolution, and enforcement do not necessarily flow from the mechanism's theoretical location.

1. Mechanism

Absolute Fairness approaches are associated with substantive standard setting mechanisms: replacing negotiation with statutorily mandated standards, such as a prescribed "living wage". As such,

[172] See IV.A. Theoretical Location: Fairness.

the approach bypasses inadequate bargaining power and bargaining and, therefore, unions have no explicit role in these models. In contrast, Bargaining and Competitive Fairness approaches incorporate procedural mechanisms seeking to equalize bargaining power, and may also relocate bargaining to an administrative forum, thus providing for "public" instead of private bargaining. In addition, Competitive Fairness approaches focus on providing sector-wide regulation of labor costs to remove this from product market competition.

2. Coverage and Exclusions

The scope of worker coverage and the nature of exceptions to coverage also follow from each fairness conception. Absolute fairness, reflecting its absolutist and prescriptive approach, is associated with worker coverage which excludes independent contractors, and which has few or no exceptions.

While Bargaining Fairness may or may not cover independent contractors, the unfair competition rationale would require that a true Competitive Fairness approach include independent contractors. Bargaining Fairness would not provide for individual exceptions to coverage, while Competitive Fairness coverage would be subject to limited, explicit, statutory exclusions. Coverage under the latter two fairness conceptions may be so broad as to include an individual who is both a worker and employer, or direct and indirect employment.[173]

3. Matters included

The scope of matters included in standard-setting is strongly influenced by the animating conception of fairness. In the case of Absolute Fairness there are practical limitations to the number and type of matters that can be regulated by such a system: only those matters that can be specified for all covered workers in the sector, such as remuneration or basic limits on hours of work, can be regulated. Bargaining and Competitive Fairness systems are not subject to such limitations. However, due to the Competitive Fairness focus on labor costs, these mechanisms tend to ensure coverage of matters relating to cost of labour.

4. Differentials

A true Absolute Fairness system would not provide for any differentials or variation in the prescribed standards: all those covered would be entitled or subject to the same standard. Similarly, a Competitive Fairness approach would not provide for deviations: ideally, to combat unfair labor cost competition, standards would be uniform across the labor/product market or covered sector. In contrast, deviations under Bargaining Fairness would be based on evidence of differentials, such as differences in cost of living.

5. Other structural elements

Other key structural elements not necessarily directed by the choice of fairness conception include: the tripartite form, role of the state, dispute resolution and enforcement. Tripartite form and state role are not relevant to Absolute Fairness systems which do not involve any form of negotiation or bargaining, have no formal role for worker or employer representatives, and are based on state mandated standards. For other systems, key considerations include the number and source of worker and employer representatives, whether tripartism involves "public" representatives, and whether the workplace and non-workplace representatives participate in the same manner. In terms of the standards that result, the state role may be minimal, as in the case of UK Wage Councils which issued orders directly without state involvement, or the state may play a significant role, such as having authority to approve, reject, or unilaterally modify standards recommended by the tripartite body.

Means for resolving impasses or disputes in the standard-setting process may be helpful for Bargaining and Competitive Fairness-based systems. As with UK Wages Councils, this problem could be addressed through voting procedures or, perhaps less usefully, through dissolving and

[173] E.g., See discussion of the FLSA and ISA models *supra* at II.B. and C.

reconstituting a new board, as provided for under the FLSA. Alternatively, the role of the state could be defined to include the power to determine matters at impasse.

Enforcement in Absolute Fairness systems, characterized by explicit mandated standards, would likely either utilize existing minimum standards, or newly established, administrative machinery of a labor tribunal or government department. However, as illustrated by the historical examples examined here, a range of options exists for locating enforcement authority and means of enforcement of resulting standards for systems based on other fairness conceptions.

Enforcement could be through administrative, civil or criminal actions, and, like UK Wages Councils or under the Canadian ISA system, the standard-setting body itself could be granted a role in enforcement, such as by issuing orders or being responsible for compliance inspections. In such cases, the standard-setting body requires adequate financial and other resources and authority to be effective.

C. Step 3: Structural Location

The third step involves decisions about where to locate the sectoral standard-setting mechanism in relation to other workplace regulation regimes, whether to structure it "horizontally" or "vertically", and its relationship to other social policies relevant to workers.

1. Relationship to other Work Regimes

Standard-setting mechanisms could be established as stand-alone systems, regardless of the underlying fairness conception. Absolute Fairness mechanisms would be most feasibly incorporated into existing minimum standards legislation, in contrast to Competitive or Bargaining fairness systems, which might be incorporated into either existing minimum standards or collective bargaining systems. In each case, the standard-setting mechanism could be included as a separate section or division of the legislation, to reduce or avoid the complexities of fully integrating existing and new systems.

In addition, an option for Bargaining or Competitive Fairness systems is to incorporate a "graduation mechanism", permitting or facilitating development from standard-setting to free collective bargaining. This may be more feasible if the system is incorporated into the existing collective bargaining legislation, although it may not be necessary.

2. Horizontal / Vertical

A "horizontal" (that is, national or market-wide) approach to Absolute Fairness mechanisms would be difficult – at least as that conception is strictly defined – given the unqualified nature of the standard, as it would be difficult to determine a single standard capable of such broad application. It would be more feasible for Bargaining and Competitive fairness systems and, would be an important component of the latter system's goal of regulating competition. A "vertical" (that is, single industry, occupation, or pilot project) approach, in general, may be simpler to apply, particularly for Absolute and Bargaining Fairness systems. However, a vertical approach may undermine the core goal of Competitive Fairness, which is to control competition across the labor or product market, because a single industry or occupation is unlikely to cover the full labor or product market.

3. Relationship to Other Social Policies

As addressed earlier, the narrow scope of matters included in Absolute Fairness systems suggest that improvements in conditions require that these approaches, in particular, operate in conjunction with an array of other social policies. A key challenge of Absolute Fairness models is that regional cost of living differences undermine improving standards of living. Therefore, as noted above, such models likely require ancillary policies if, overall, the standard of living for workers is to improve. While desirable, integration with other social programs may not be as acute a need for broader standard-setting mechanisms based on different fairness conceptions.

D. Hybrid Option

This section has addressed constructing standard-setting mechanisms based on one of three alternative conceptions of fairness. However, in principle, it is possible to design a hybrid model and, in particular, a hybrid reflecting both Bargaining and Competitive Fairness principles.[174] At Step One, such a hybrid model would be concerned with both employee and producer/employer fairness, and therefore, at Step Two, it would include elements drawn from these two conceptions: public bargaining, at a national or at least product-market level, with uniform rates set for each industry or trade, broad scope of worker coverage, and limited, likely explicit statutory exceptions. The structural element that would be most difficult to reconcile in this hybrid would be how to structure differentials, as here the two conceptions fundamentally diverge.[175] At the final Step, the hybrid model could be stand-alone or incorporated into existing minimum standards or collective bargaining legislation. In the latter case the model could include a graduation mechanism, and would be better suited to a horizontal application to cover at least the relevant labor /product market.

VI. CONCLUSION

Many 21st century workplaces demonstrate significant parallels with those of early 20th century, with severely depressed compensation relative to living costs, poor working conditions, and isolated and dispersed workers with little prospect of access to collective bargaining or meaningful workplace voice. This has prompted some commentators to label this the new "gilded age".[176] This article looks back to the sectoral standard-setting strategy that became widespread during that period and considers how this approach may be retooled for contemporary workplaces.

In this article, the following three-step approach to designing a contemporary sectoral standard-setting mechanism is proposed (and see Table 2):

Step 1 Questions: Theoretical Location

- What is the cause of inadequate workplace terms and conditions: lack of bargaining power or unfair competition?
- Is the policy concern primarily for worker or employer/producer welfare?
- What is the policy goal? (e.g. living wage, equalized bargaining power, counter unfair competition)
- What contextual concerns apply? (e.g., freedom of association, antitrust and inequality concerns).

Step 2 Questions: Structural Elements

- What structural elements are necessary consequences of the choice of fairness conception?
    - Substantive or procedural mechanism?
    - Coverage and exceptions
    - Matters included
    - Differentials

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[174] For example, Harris characterizes the *National Industrial Recovery Act,* 15 U.S.C. § 703, predecessor to the FLSA, as a hybrid of these two fairness conceptions (*supra* note 8 at 105-7, 120).

[175] A key difference between Bargaining and Competitive fairness lies in how the two conceptions approach entitlement differentials: the former accepts evidence-based cost of living differentials. The latter does not support differentials, favouring uniform, sector-wide standards (See Table 2).

[176] See e.g., William Herbert, *Janus v AFSCME, Council 31: Judges Will Haunt You in the Second Gilded Age*, RELS INDS / IND REL 162 (2019); Ruth Milkman, *Back to the Future? US Labor in the New Gilded Age*, 51 BRITISH JOURNAL OF INDUSTRIAL RELATIONS 645 (2013).

- Other structural elements not tied to fairness choice? (e.g., tripartite form, state role, dispute resolution and enforcement).

Step 3 Questions: **Structural Location**

- What is the relationship to other work regimes?
- Will the mechanism be structured horizontally or vertically?
- What is the relationship to other social policies and programs?

This three-step proposal for formulating a contemporary sectoral standard-setting mechanism contributes to the ongoing dialogue about the potential for sectoral models, such as wage boards or "workers' boards", to ensure access to voice and acceptable working standards for workers, by offering a clear framework for formulating a sectoral approach. This proposal is theoretically and practically grounded in developed conceptions of fairness and historical experience with sectoral standard setting mechanisms, drawn from multiple jurisdictions. There remain theoretical and practical issues to be considered beyond those addressed in this article; however, this proposal offers an initial framework for addressing this workplace challenge.

Table 1: Comparison of Sectoral Standard-Setting Models: Wages Councils, ISA Conferences, and FLSA Wage Boards

	Sector	Coverage	Matters Included	Tripartite Form	State Role	Dispute Resolution Mechanism	Enforcement	Promote Collective Bargaining
British Wages Councils	"Field of operation" (trade within a geographic area)	Worker	Remuneration and other terms and conditions	Equal numbers worker and employer representative, up to 3 independent members	Wages councils issued orders directly	Independent members; voting-by-sides procedure	Wages councils; criminal and civil actions	JIC could replace wage council, then voluntary collective bargaining
Canadian ISA Conferences	"Zone" (industry within a geographic area); province-wide zones specified for industries subject to inter-provincial competition	Employee (defined as "in receipt of or entitled to wages"); individual could be both employer and employee	Wages, hours of work, working days, vacation pay and overtime limits and overtime	Employee, Employer. government representatives	Proposed schedules submitted to Minister who had unilateral authority to accept or modify	None	Advisory committee; civil actions (provincial offenses)	None
FLSA Industrial Councils /Wage Boards	National industry	Employee (broadly defined, including direct and indirect employment)	Minimum wages, hours of work	Equal numbers of representatives of employees, employers, and public members	Administrator approve or refer back industrial council (wage board) recommendations	None; board could be dissolved and replaced by new board	Civil courts	None

Table 2: Conceptions of Fairness and Minimum Standard-Setting

	STEP 1: IDENTIFYING THE FAIRNESS CONCEPTION				
CONCEPTION					
Absolute	Unequal labor market bargaining power	Workers	Living wage		
Bargaining	Unequal labor market bargaining power	Workers	Facilitate bargaining of a living wage		
Competitive	Unfair labor cost competition in product markets	Employer/Producer	Remove labor costs from competition in produce market to protect employer/producers from unfair competition		
	STEP 2: **STRUCTURAL ELEMENTS DETERMINED BY FAIRNESS CONCEPTION**				
	Mechanism	**Scope of Worker Coverage**	**Exceptions**	**Scope of Matters Included**	**Differentials**
	Substantive: replace negotiation with mandated standards	Narrow, excluding independent contractors	None	Limited	None
Bargaining	Procedural: statutory procedure to equalize bargaining power, relocated to administrative forum ("public bargaining")	Broad, may include independent contractors	No individual exceptions	Potentially broad	Based on evidence of cost-of-living differences
Competitive	Procedural: Sector-wide regulation of labor costs, with limited, express exceptions	Broad, including independent contractors	Limited, explicit, statutory exclusions	Potentially broad; focus on labor costs	No differentials; ideally uniform, sectoral standards
	STRUCTURAL ELEMENTS NOT DEPENDENT ON FAIRNESS CONCEPTION				
	Tripartite form, role of the state, dispute resolution, enforcement.				

	STEP 3: STRUCTURAL LOCATION			
FAIRNESS CONCEPTION	**Relationship to Other Work Regimes**	**Graduation Mechanism**	**Horizontal (national or market-wide) / Vertical (industry, occupation or pilot)**	**Relationship to Other Social Policies**
Absolute	Stand-alone or incorporate into minimum standards legislation.	Not likely feasible.	Vertical	May be necessary
Bargaining	Stand-alone or incorporate into minimum standards or collective bargaining legislation.	Possible, especially if incorporated into existing collective bargaining legislation.	Horizontal or Vertical	Less necessary
Competitive	Stand-alone or incorporate into minimum standards or collective bargaining legislation.	Possible, especially if incorporated into existing collective bargaining legislation.	Horizontal or Vertical. Vertical may undermine goal of targeting unfair competition.	Less necessary